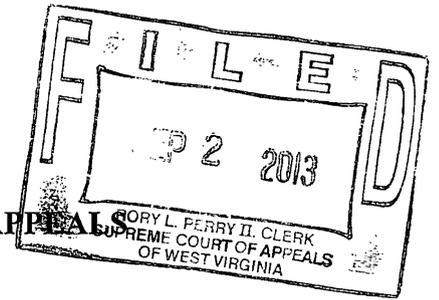


No.:13-0037



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITY AUTHORITY,
an agency of the State of West Virginia,**

Defendant Below, Petitioner,

v.

**Upon Appeal
West Virginia Supreme Court of Appeals
(Case No.: 10-C-2131)**

A.B.

Plaintiff Below, Respondent.

CORRECTED PETITIONER'S BRIEF

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III. ASSIGNMENTS OF ERROR

1. The trial court erred in its ruling on the availability of the defense of qualified immunity to the West Virginia Regional Jail and Correctional Facility Authority (“Petitioner”) in this matter. Because A.B.’s (“Respondent”) claims sound solely in negligence based on purported improper discretionary decision-making, Petitioner is entitled to qualified immunity and summary judgment is appropriate on that basis alone.

2. The trial court applied the incorrect standard in its vicarious liability analysis and improperly denied Petitioner’s Motion for Summary Judgment.

IV. STATEMENT OF THE CASE

The trial court committed reversible error when it entered its “Order Granting In Part and Denying In Part the WVRJCFA’s Motion for Summary Judgment”, denying immunities afforded state agencies and applying the incorrect standard regarding vicarious liability. Petitioner’s Motion for Summary Judgment was filed on January 31, 2012, and argued on May 23, 2012. Petitioner seeks appellate review of the trial court’s decision pursuant to *Ortiz v. Jordan*, 131 S.Ct. 884 (2011) and *Robinson v. Pack*, 223 W.Va. 828, 679, S.E.2d 660 (2009), which mandates that an appeal of the trial court’s decision to deny dismissal pursuant to qualified immunity must be sought prior to a final decision rendered on the merits.

Respondent was convicted of Sexual Assault in the Third Degree in 2006, as a result of having sexual intercourse with her then boyfriend’s 14 year old son. Appendix at 32. She was then ordered to serve an indeterminate sentence of 1 to 5 years on each of the two offenses for which she pleaded; those sentences were to run consecutively. App. at 32. She was granted parole in August 2008. App. at 32. In 2009, she was found guilty of violating the terms and conditions of her parole

due to numerous instances of drug use and possession of drug paraphernalia. App at 32. She was then ordered to be re-confined until otherwise released.

Respondent was booked into the Southern Regional Jail (“SRJ”) on September 11, 2009 and remained there until April 13, 2010, when she was transferred to Lakin Correctional Center after a short stay at the Western Regional Jail (“WRJ”). Correctional Officer D.H. (“D.H.”) is an employee of Petitioner working at the SRJ. Respondent has accused D.H. of sexual harassment, rape, sexual assault and sexual abuse on several occasions. Specifically, Respondent alleges she was vaginally and orally raped seventeen (17) times between October, 2009 and April, 2010. App. at 33-36.

D.H. denied any and all sexual contact with Respondent. App. at 95. Further, D.H. testified that he knew it was a crime for a correctional officer to have sexual contact with an inmate and received yearly training on the same. App. at 323. D.H. was familiar with the Prison Rape Elimination Act and received yearly training regarding the Act as well as Petitioner’s Code of Conduct. App. at 323.

The crux of Respondent’s evidence that the alleged acts occurred was the allegation she was given access to another inmate’s, Amanda Conley, personal belongings including a cellular phone in exchange for the alleged sexual encounters. App. at 189-90. Respondent claimed she and Danielle Thornton, a plaintiff in a similar suit, were able to call individuals outside of the SRJ on the cellular phone. App. at 189-90. Amanda Conley provided to Respondent’s counsel an Affidavit stating her cellular phone was missing when she left SRJ. App. at 208. However, property logs indicate that Amanda Conley was transferred to WRJ on March 12, 2010, where her property was inventoried, including a cellular phone. App. at 161-66. Amanda Conley was transferred back to SRJ on March 18, 2010 for a court hearing but took no property with her. App. at 161-66. On March 22, 2010 she

was taken to Mercer County and then returned to WRJ. App at 161-66. Then on March 26, 2010 she was taken back to SRJ; however, her personal property was stored at WRJ. App. at 161-66.

Most of the facts in this matter relate to the liability of D.H., and is immaterial to Respondent's claims against Petitioner. Respondent did not report any alleged abuse until the filing of the instant civil action, but relies upon another inmate's reporting of the alleged abuse against Respondent. Tammy Pennington, an inmate and plaintiff in a similar case, informed Sgt. Michael Francis and CO Brian Ewing that Respondent and D.H. were having a sexual relationship. App. at 412-15. This occurred while Ms. Pennington was being transported to South Central Regional Jail. App. at 386. Ms. Pennington had also been recently physically assaulted by Respondent and two other inmates. App. at 412-15. Sgt. Francis and CO Ewing filed Incident Reports concerning the same on November 24, 2009. App. at 412-15. A meeting was held by Lt. Bunting, Sgt. Francis and CO Ewing regarding their Incident Reports. App. at 390. D.H. was also present in this meeting. App. at 390. According to CO Ewing, D.H. was asked if there was any truth the allegations, to which he replied with "More of a snicker, you know, like, you know I can't believe that." Sgt. Francis added "I knew when I heard it was your name, it wasn't you." App. at 338, 392-93 In fact, on November 2, 2009 D.H. filed an Incident Report regarding the inappropriate conduct of Respondent. App at 108. In that report, D.H. indicated that Respondent had approached him and asked if he would trade a favor for a favor; specifically, if he would bring her cigarettes in exchange "for anything" that he would ask of her. App at 108. D.H. admonished Respondent, informing her that such actions were inappropriate and if she wished to continue with this conduct she could return to her cell. Thereafter, Respondent began to apologize. App. at 108.

Petitioner filed its "Motion for Summary Judgment" on January 21, 2012. Petitioner based its motion upon the defense of qualified immunity and that it could not be held liable for the alleged

illegal acts of its employee, whose alleged acts were outside the scope of his employment. Respondent filed a Response on February 23, 2012. Respondent's Response contended that Petitioner did not enjoy qualified immunity because D.H. allegedly violated a statute, *W.Va. Code* § 61-8B-10 or the Prison Rape Elimination Act; therefore, Petitioner also violated the statute. Respondent continued, citing that an administrative function must be involved, but failed to develop how the actions by Petitioner were not administrative. App. at 187-214. Instead, Respondent alleged a myriad of nonsensical assertions that are not supported by the record. App. at 201-03. Respondent attempts to hide behind a Potemkin village of illusory allegations and innuendo. Finally, Respondent asserted that vicarious liability is a question of fact for a jury to decide. App. at 195-97. Respondent relied upon an opinion from the Eastern District of Virginia, which applied the Virginia standard for vicarious liability. App. at 195-97. On March 7, 2012 Petitioner filed a Reply to Respondent's Response indicating its apparent inadequacies.

On May 23, 2012 a hearing on Petitioner's Motion for Summary Judgment took place before Judge Carrie Webster. During the hearing, counsel for Respondent was repeatedly asked what statute or constitutional right Petitioner violated. App. at 484-86, 490. Counsel for Respondent was unable to provide the trial court with an answer. App. at 484-86. Regarding vicarious liability, counsel for Respondent was asked why the trial court should adopt the standard from Virginia when a federal court in West Virginia held the opposite. App. at 500-01. Counsel for Respondent argued that Judge Goodwin was entitled to his opinion and that everyone has one, but his opinion was not binding on the lower court. App. at 503.

On December 3, 2012, the trial court entered an "Order Granting in Part and Denying In Part the WVRJCFA's Motion for Summary Judgment." App. at 215-229. The Order reflected the parties' stipulations to: 1) the dismissal of the John Doe Defendants; 2) the dismissal of Respondent's claims

for violation of the West Virginia Constitution; 3) the dismissal of Respondent's claims for violation of the West Virginia Tort Claims and Insurance Reform Act; 4) the dismissal of Respondent's claims for invasion or privacy; 5) the dismissal of Respondent's claim for negligent hiring; 6) the dismissal of Respondent's claims against Petitioner for violation of 42 U.S.C. § 1983; and 7) the dismissal of Respondent's claims for future and special damages. App. at 216, 17. The remaining claims against Petitioner are: 1) negligent training; 2) negligent supervision; 3) negligent retention; 4) failure to intervene and 5) vicarious liability. App. at 218. On January 2, 2013 Petitioner filed its Notice of Appeal with this honorable Court, which entered a Scheduling Order on January 18, 2013.

V. SUMMARY OF ARGUMENT

Petitioner's Motion for Summary Judgment should have been granted as Petitioner is entitled to qualified immunity and cannot be held liable for the alleged criminal acts of its employee.

Qualified immunity is available to state agencies in suits involving negligence in discretionary decisions.

Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A government official or employee is not so unhappy that he/she must choose between being charged with dereliction of duty if he/she exercises or performs a discretionary function, and being mulcted in damages if he/she does. (citations omitted)

Syl. Pt. 2, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). Further, this Court recently upheld its previous rulings that:

In the absence of an insurance contract waiving the defense, the doctrine of qualified immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Torts Claim and Insurance Reform Act, ... and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.

Syl. Pt. 7, *Jarvis v. West Virginia State Police*, 227 W.Va. 472, 711 S.E.2d 542 (2010); *Clark*, 195 W.Va. 272, 465 S.E.2d 374; *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). Based upon the facts of this case, it is clear and undisputed that Petitioner should have been immune from this suit. Respondent has failed to provide any evidence which proves the existence of any insurance contract which waives the defense of qualified immunity or that this case is nothing more than a mere negligence action.

Petitioner contends that the trial court committed reversible error by not extending qualified immunity to it in this matter. Respondent's Complaint contains theories of negligence which are not substantiated by the facts of this case and fall short of defeating Petitioner's qualified immunity. In order for qualified immunity not to apply in this matter, Respondent would have to show that Petitioner violated some well established constitutional or statutory right of Respondent which it should have known of or did know of and deliberately violated. The record in this matter shows that no clearly established constitutional or statutory right was pled or violated in this matter, and this fact is highlighted by the trial court's inability to cite to such in its order denying summary judgment. App. at 215-29. Further, the record in this matter shows that Petitioner properly trained D.H., that Respondent never reported any abuse and D.H. denied all allegations of sexual misconduct.

Respondent advocated and the trial court adopted the opinion of a decision from the Eastern District of Virginia which applied the Virginia standard for vicarious liability. App. at 222. The trial court found, by applying Virginia law, that West Virginia law allows an employer to be liable for the sexual assault of a third party by an employee. Sexual contact between a correctional officer and an inmate is illegal in West Virginia; in fact, it is a felony. Respondent conceded that D.H. was instructed and trained to refrain from the alleged conduct, but still found the alleged illegal acts were

within the scope of his employment. App. at 220. Although courts in West Virginia have found that sexual misconduct by a correctional officer with an inmate is outside the scope of their employment, and the West Virginia Legislature found it so far outside their scope of employment they criminalized it, the trial court relied on Virginia case law to deny Petitioner's Motion for Summary Judgment.

VI. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a), of the West Virginia Rules of Appellate Procedure, this matter should be scheduled for a Rule 19 hearing. Petitioner assert that the parties to this Appeal have not waived oral argument, the Appeal is not frivolous, the issues have not been authoritatively decided, and Petitioner assert that oral argument will aid the Court in making the correct decision. A Rule 19 hearing is appropriate in this matter because the issues presented to the Court involve assignments of error in the application of settled law; error by the trial court in ruling in a manner contrary to the weight of the evidence; and involves narrow issues of law; qualified immunity and vicarious liability. Therefore, a Rule 19 hearing is appropriate.

VII. ARGUMENT

The trial court committed reversible error when it denied Petitioner's Motion for Summary Judgment. The trial court's decision improperly applied qualified immunity, relied on Virginia law when West Virginia law is well settled regarding vicarious liability, and is contrary to the weight of the evidence presented to it. Therefore, Petitioner requests that this Honorable Court reverse the trial court's decision to deny its Motion for Summary Judgment.

A. Standard Of Review

Petitioner asserts that it is entitled to *de novo* review. "The *de novo* standard of review also applies to a circuit court's ruling on a motion for summary judgment." *MacDonald v. City Hosp.*,

Inc., 715 S.E.2d 405 (2011); Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). The Supreme Court of Appeals reviews *de novo* “a circuit court’s entry of summary judgment under Rule 56 of the *West Virginia Rules of Civil Procedure*, and applies the same standard that the circuit courts employ in examining summary judgment motions.” *Nicolas Loan & Mortg., Inc., v. W.Va. Coal Co-Op, Inc.*, 209 W.Va. 296, 547 S.E.2d 234 (2001); Syl. Pt. 1, *Painter*, 192 W.Va. 189, 451 S.E.2d 755. “Although review of the record from summary judgment proceeding is *de novo*, Supreme Court of Appeals will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion...” *Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). “The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pt. 3, *Painter*, 192 W.Va. 189, 451 S.E.2d 755.

In this matter the trial court has denied Petitioner’s Motion for Summary Judgment. The case law cited entitles Petitioner to *de novo* review of the arguments and evidence presented to the trial court in this matter. Petitioner asserts that the evidence in this matter shows that the trial court committed reversible error by denying its Motion for Summary Judgment.

B. Interlocutory Appeals

Petitioner’s appeal is properly before this Court. Typically, interlocutory orders are not immediately appealable. *Jarvis*, 227 W.Va. 472, 711 S.E.2d 542. However, appeals involving qualified immunity are a recognized exception to the final order rule. “A circuit court’s denial of summary judgment that is predicated on qualified immunity is interlocutory ruling which is subject to immediate appeal under the ‘collateral order’ doctrine.” *Id.*, *Robinson*, 223 W.Va. 828, 679, S.E.2d 660. This Court has recognized that orders denying, substantial claims of qualified immunity

should be decided before trial and these pretrial decisions are immediately appealable under the collateral order doctrine. *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). This is particularly true when assessing the disposition of cases involving immunities. Indeed, “[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.” *Id.* (emphasis added). Furthermore, this Court has stated that claims of immunity should be summarily decided before trial. *Id.*

Petitioner is entitled to immediate review of the trial court’s Order denying their Motion for Summary Judgment. As in *Hutchinson*, if the State is required to go to trial before being allowed to appeal the trial court’s decision, then the purpose of immunity has been defeated. Immunities exist to prevent government entities from having to go through the burden of trial. This Court’s recent decision in *Jarvis and Hess v. West Virginia Div. of Corrections*, 227 W.Va. 15, 705 S.E.2d 125 (2010), shows that government employees and agencies have the right to ask for immediate review of trial court rulings denying their motions for summary judgment based on qualified immunity. Here, like in the cases cited above, Petitioner is asking this Court to review its Motion for Summary Judgment, which is founded upon the affirmative defense of qualified immunity. Therefore, this Court should allow Petitioner to immediately appeal the trial court’s decision to deny their Motion for Summary Judgment.

C. Summary Judgment Standard

Petitioner is entitled to have its motion for summary judgment granted because Respondent has failed to show any genuine issue as to any material fact, and therefore Petitioner is entitled to judgment as a matter of law. Pursuant to *W.Va. R.Civ.P. Rule 56(c)*, a party is entitled to summary judgment when, “the pleading, deposition, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” This Honorable Court has stressed the important role that Rule 56 plays in litigation. *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

In addition, even though the burden to show no genuine issue of material fact is placed upon the party seeking summary judgment, the nonmoving party must present evidence of a genuine issue of material fact. Summary judgment is only appropriate when the non-moving parties has had, “adequate time for discovery.” *Conley v. Stollings*, 223 W.Va. 762, 679 S.E.2d 594 (2009); *Petros v. Kellas*, 146 W. Va. 619, 122 S.E.2d 177 (1961). A material fact cannot be “conjectural or problematic,” and the non-moving party must produce more than a “scintilla” of evidence. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986).

The mere contention by the party resisting summary judgment that issues are disputable is not sufficient to overcome summary judgment. *Brady v. Reiner*, 157 W. Va. 10, 198 S.E.2d 812 (1973), overruled on other grounds, *Board of Church Extension v. Eads*, 159 W. Va. 943, 230 S.E.2d 911 (1976). Instead, “the party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence, and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Painter*, 192 W. Va. 189, 451 S.E.2d 755. “Summary judgment is appropriate where the record taken as a whole could not lead to a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” *Id.*, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 97 L.Ed. 265 (1986). Therefore, while the facts of the matter are viewed in the light most favorable to the nonmoving party, it is still their responsibility to, “offer some concrete evidence from which a reasonable ...[finder of fact] could

return a verdict in ...[its] favor or other significant probative evidence tending to support the complaint.” *Painter*, 192 W.Va. 189, 451 S.E.2d 755; *Liberty Lobby*, 477 U.S. at 256, 106 S.Ct. at 2514, 91 L.Ed.2d at 217, quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569, 593 (1968); *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987).

This is particularly true when assessing the disposition of cases involving immunities. These issues of immunity are ultimately issues for the Court to determine. “Ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court; therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie immunity determination, ultimate questions of statutory or qualified immunity are ripe for summary disposition.” Syl. Pt. 1, *Hutchison*, 198 W.Va. 139, 479 S.E.2d 649. This Honorable Court has stated in past, “that in civil actions where immunities are implicated, the trial court must insist on a heightened pleading by the plaintiffs. *Id.*”

Once a defendant asserts the affirmative defense of qualified immunity, it is the plaintiff, not the defendant that carries the burden of convincing the court that the law was clearly established, and violated by the defendant. *Bryant v. Muth*, 994 F.2d 1082, 1086 (4th Cir.), Cert denied, 510 U.S. 996, 114 S.Ct. 559, 126 L.Ed.2d 459 (1993).

D. The Trial Court Erred In Refusing To Grant Petitioner’s Motion For Summary Judgment Predicated Upon The Doctrine Of Qualified Immunity.

Petitioner is entitled to qualified immunity in this matter. The causes of action asserted against Petitioner are simple negligence claims based on purported improper discretionary decisions made by Petitioner’s employees, therefore Petitioner is entitled to qualified immunity and summary judgment is appropriate on this basis alone.

In the absence of an insurance contract waiving the defense, the doctrine of qualified immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Torts Claim and Insurance Reform Act, ... and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.

Syl. Pt. 7, *Jarvis*, 711 S.E.2d 542, 227 W.Va. 472; *Clark*, 195 W.Va. 272, 465 S.E.2d 374; *Parkulo*, 483 S.E.2d 507, 199 W.Va. 161. “Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Syl. Pt. 2, *Clark*, 195 W.Va. 272, 465 S.E.2d 374. Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Therefore:

The thrust of any attempt to establish liability against a public official is the violation of some duty attendant to the official's office and a resulting harm to the plaintiff, which analysis essentially adopts the common law tort concept that liability results from the violation of a duty owed which was a proximate cause of the plaintiff's injury; the one difference in qualified immunity cases is that the official's act must be shown to have violated clearly established law of which a reasonable person would have known.

Hess, 227 W.Va. 15 at 18, 705 S.E.2d 125 at 128. “Once a qualified immunity defense has been advanced, it is the plaintiff's burden to show that a defendant is not entitled to qualified immunity.” *Poteet ex rel Poteet v. Polk County*, Tenn. 2007 WL 1138461, citing *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir.2000). “The policy considerations driving such a rule are straightforward: public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society.” *Hutchinson*, 198 W.Va. 139 at 148, 479 S.E.2d 649 at 658.

From the above cited cases it is clear that Petitioner is entitled to qualified immunity as Respondent's Complaint is only comprised of a laundry list of negligence actions. App. 5-14.

Respondent can not show that the decisions made by Petitioner violated a clearly established right of Respondent. Further, Respondent can not make a showing that any decision made by Petitioner was not a discretionary decision made within the scope and in the course of their employment; or that said decision was done fraudulently, maliciously or was otherwise oppressive.

i. **Respondent Has Not Made Any Showing That A Clearly Established Constitutional Or Statutory Right Has Been Violated**

Respondent has not produced sufficient evidence which shows that a clearly established constitutional or statutory right has been violated in this matter. This Court has acknowledged that West Virginia law should conform with federal law in addressing this area, so that there is a uniform approach to immunity laws. *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). Once a defendant asserts the affirmative defense of qualified immunity, it is the plaintiff, not the defendant that carries the burden of convincing the court that the law was clearly established, and violated by the defendant. *Muth*, 994 F.2d 1082, 1086 (4th Cir.), Cert denied, 510 U.S. 996, 114 S.Ct. 559, 126 L.Ed.2d 459. More specifically, the plaintiff must move forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred. *Id.* "Plaintiffs' burden cannot be met by identifying in the abstract a clearly established right and then alleging that the defendant violated that right." *Wiley v. Doony*, 14 F.3d 993, 995 (4th Cir. 1994). "The plaintiff must make a more particularized showing – the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violated that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

The Fourth Circuit has held that a right is clearly established when the issue has been addressed by the Supreme Court, the appropriate court of appeals, or the highest court of a state. *Wilson v. Lane*, 141 F.3d 111, 114 (4th Cir. 1998). Negligence is not clearly established law, and

therefore not a cause of action which will defeat a qualified immunity defense. *Jarvis*, 227 W.Va. 472 at 482, 711 S.E.2d 542 at 552. Qualified immunity is a shield from liability in grey areas, but it is not for violation of bright lines. *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011).

In *Chase*, 188 W.Va. 356, 424 S.E.2d 591, Chase filed a third-party complaint against the Governor, the Secretary of State, and the Auditor of the State for losses sustained by the Consolidated Fund. The three public officials were members of the State Board of Investment, which was responsible for management of the Fund. The trial court dismissed Chase's suit based upon the defense of qualified immunity and Chase appealed. In its analysis of the case, this Court looked extensively as to what constituted a clearly established law. Ultimately, the Court concluded that when there are "long standing" laws which the public official should have reasonably known about, and that public official acts in violations of these laws then qualified immunity is not available to the public official. Ultimately, the Court found, "the Board had the authority to approve and make investments. Chase does not cite any statute that forbids the option contract." *Id.* at 366, 424 S.E.2d at 601. Therefore, the Court concluded the facts did not show a violation of clearly established law. *Id.* In reaching this conclusion this Court found that "it is virtually impossible to make a clear distinction between a public official's discretionary and ministerial acts." *Id.* at 636, 64, 424 S.E.2d at 598, 99. This Court adopted the simpler test of whether the conduct violated a clearly established law. *Id.*

In *Clark*, 195 W.Va. 272, 465 S.E.2d 374, a hunter sued a conservation officer and the Department of Natural Resources ("DNR") alleging the officer negligently caused the discharge of another hunter's gun, injuring the hunter. This Court initially noted that the DNR is not a political subdivision. *Id.* at 275, 465 S.E.2d at 377. This Court concluded that when an employee is engaged

in the performance of discretionary judgments and actions within the course of his duties, the employee should not be faced with the choice of “either inaction and dereliction of duty or “being mulcted in damages” for doing his duty. *Id.* at 278, 465 S.E.2d at 380. The DNR was found to be entitled to qualified immunity. *Id.*

Respondent argued and the trial court adopted the proposition that D.H.’s alleged conduct violated *W.Va. Code* § 61-8B-10, a clearly established statute, barring him from the defense of qualified immunity.¹ App. at 225. Further, the trial court held the “general rule that qualified, or lack thereof, of the State is usually “coterminous” with the qualified immunity, or lack thereof, of a government official. . .” App. at 225. In support of this proposition the trial court cited *Parkulo*, 199 W.Va. 161, 483 S.E.2d 507, however, said “general rule” is not cited in its entirety. App. at 224-25. This Court held in *J.H. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 157, 680 S.E.2d 392, 402 (2009), that, “[t]he immunity of the state is coterminous with the official whose acts gave rise to the case. However, on occasion, ***the State will be entitled to immunity when the official is not entitled to the same immunity.***” *Id.* (emphasis added). The existence of the State's immunity must be determined on a case-by-case basis. *Id.*

This matter is similar to that of *Clark* in that in both matters the plaintiffs failed to allege a violation of a clearly established statute or right. In the present case, Respondent argues that since D.H. allegedly violated *W.Va. Code* § 61-8B-10, Petitioner did as well. This analysis is incorrect for two reasons: first, this Court in *J.H.* specifically held that the State can be entitled to immunity when the official is not; and secondly, Petitioner, a State agency, cannot violate *W.Va. Code* § 61-8B-10. While Respondent specifically denies a claim against Petitioner under 42 U.S.C. § 1983, it appears that is what she is asserting; although, she stipulated to dismissal of this claim. The

¹ To be clear, D.H. has not asserted the defense of qualified immunity; nor does Petitioner advocate that he is shielded by qualified immunity.

United States Supreme Court ruled, in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” Under this analysis Petitioner is not a “person” who can be held liable under § 1983. Further, in spite of their best efforts, Respondent and the trial court have yet to cite a statute or right which Petitioner violated. App. at 215-29. During the hearing on Petitioner’s Motion for Summary Judgment counsel for Respondent struggled to name a statute that was violated, finally alleging Petitioner violated the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15602(1), which was not in affect at the time, or violated *W.Va. Code* § 61-8B-10. App. at 493-4.

When viewing Respondent’s remaining claims against Petitioner one notices a theme, mainly the inclusion of the word “negligence”. Respondent claims consist of *negligent* training, *negligent* supervision, *negligent* retention, and a failure to intervene. App. at 218. As cited above, qualified immunity bars a claim of mere negligence against a State agency. Syl. Pt. 1, *Hess*, 227 W.Va. 15, 705 S.E.2d 125. Moreover, it is well established, as evidenced by the authorities above, that when the complaining party fails to show that the State agency violated a clearly established law which that agency should have known about then that agency is entitled to the defense of qualified immunity. Accordingly, Petitioner is entitled to qualified immunity.

ii. **Petitioner’s Employees Made A Discretionary Decision Regarding The Training, Retention, And Supervision Of D.O., As Well As Investigation Administration**

Petitioner’s employees who determined the training correctional officers receive, the retention of employees, the determination of supervision, and method of investigation made discretionary decisions in the administration of fundamental government policy. A discretionary decision is where a public official “is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, *he is not liable for*

negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.” *Clark*, 195 W.Va. at 280, 465 S.E.2d at 378; quoting *City of Fairmont v. Hawkins*, 172 W.Va. 240, 304 S.E.2d 824, 829 n.7 (1983). “There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.” *J.H.*, 224 W.Va. at 156, 680 S.E.2d at 401. However, when a public official’s duties are “positive and ministerial only and involve no discretion on his part, he is liable to any one injured by his nonperformance or his negligent performance thereof....” *City of Fairmont*, 240 W.Va. 240, 304 S.E.2d 824 (1983).

In *Hess*, 227 W.Va. 15, 705 S.E.2d 125, this Court was asked to decide whether the trial court erred when it denied the West Virginia Division of Corrections’ (“WVDOC”) motion to dismiss based upon qualified immunity. According to the facts in *Hess*, an inmate slipped and fell in the shower area at Stevens Correctional Center in McDowell County, West Virginia. The plaintiff asserted that the WVDOC failed to have adequate number of staff at the facility, failed to ensure adequate means of safety for prisoners, and failed to take steps needed to correct unsafe conditions. Ultimately, this Court ruled that it was not clear whether not taking steps to remedy unsafe conditions at the jail resulted from a “discretionary administrative policy-making act or omission.” Furthermore, this Court stated it is was unclear as to whether the allegations made by the plaintiff, “involved the exercise of an administrative function involving the determination of fundamental government policy which is the guidepost set forth by the Court in *Parkulo*...” that the trial court did not commit error in allowing more factual development of the case. *Id.* at 20, 705 S.E.2d 130. Also, in *J.H.*, 224 W.Va. 147, 680 S.E.2d 392, this Court held that a defendant must assert that is was exercising, “any type of legislative, judicial, or administrative function involving the determination of a fundamental governmental policy...” *Id.* at 158, 680 S.E.2d at 403. Here, Petitioner has asserted just that. Petitioner’s complained of conduct involved discretionary administrative decisions.

As discussed above, in *Clark*, the appellant and his friends were stopped by conservation officer Dunn, on suspicion of illegal doe hunting. When Officer Dunn attempted to disarm one of the appellant's friends the gun discharged and the bullet struck the appellant in the left leg. The appellant brought a negligence action against Officer Dunn and the DNR. In its decision affirming the trial court's ruling the Court found that, "Officer Dunn was engaged in the performance of discretionary judgments and action within the course of his authorized law enforcement duties. In performing those discretionary duties, Officer Dunn should not be faced with the choice of either inaction and dereliction of duty or 'being mulcted in damages' for doing his duty." 195 W.Va. at 278, 465 S.E.2d at 380. Ultimately, the Court ruled that it was adopting the principle noted in *City of Fairmont*, where "performance of such discretionary duties" is clarified as:

[I]f a public officer ... is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, **he is not liable for negligence or other error** in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Clark, 195 W.Va. at 278, 465 S.E.2d at 380 (emphasis added).

The case presently before this Court is somewhat different than prior cases that were before the Court. Still, when applying precedent, this matter is similar substantively to *Clark*. Both cases involve public officials charged with the performance of certain duties. In *Clark*, there was no dispute that the enforcement of hunting laws was within the scope of the conservation officer's employment, and that the decision to disarm the appellant's friend was a discretionary one performed within the course of his law enforcement duties. Further, had the officer in *Clark* not stopped the appellant for the suspected illegal activity he could have faced disciplinary measures for not following through with his duties. Here, Petitioner's employees' decisions regarding training, supervision, retention and investigation are all discretionary administrative functions.

Respondent and the trial court relied upon several cases that are inapplicable here in denying Petitioner's Motion for Summary Judgment. App. at 225-27. See *Wolfe v. The City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989); *Randall v. Fairmont City Police Department*, 186 W.Va. 336, 412 S.E.2d 737 (1991); and *J.H.*, 224 W.Va. 147, 680 S.E.2d 392. The distinctions between this matter and *J.H.* were examined above. *Wolfe* and *Randall* were decided before *Chase*, *Parkulo*, and *Clark*. As this Court noted in *Chase*, "the law with regard to public official immunity is meager." 188 W.Va. at 358, 424 S.E.2d at 593. *Chase* and its progeny have clarified the issue regarding qualified immunity. The most important distinction between the present case and *Wolfe* and *Randall* is the application of the West Virginia Governmental Tort Claims and Insurance Reform Act, *W.Va. Code* § 29-12A-1, *et seq.* The West Virginia Governmental Tort Claims and Insurance Reform Act applies to political subdivisions and creates causes of action against them, in lieu of immunity. However, Petitioner does not fall within its purview as a State agency. *Clark*, 195 W.Va. at 275, 465 S.E.2d at 377.

In both *Wolfe* and *Randall* no serious discussion was made regarding "administrative functions". In fact, in *Wolfe* the phrase "administrative function" is not used. Both cases involve municipalities, not State agencies, and apply *W.Va. Code* § 29-12A-1, *et seq.* as a basis of liability. Further, the claims in both did not relate to "administrative functions" and this Court mainly addressed the "special duty" exception to the public duty doctrine, which will be examined in more detail below. The trial court erroneously relied upon opinions addressing immunities available to political subdivisions under *W.Va. Code* § 29-12A-1, *et seq.*, which are inapplicable in this case. App. at 225-27.

In this matter, Petitioner's employees are responsible for addressing training requirements, retention policies, supervisory roles and investigative mechanisms. Correctional officer training is a

discretionary administrative policy-making decision, and thus is shielded by qualified immunity. Respondent is claiming that Petitioner's management negligently trained D.H. Even though D. H. testified that he received yearly training and knew the prohibition of sexual contact between correctional officers and staff. App. at 323. Regardless, the decisions of how and when to train correctional officers, involves the allocation of resources and the development of policy in carrying out Petitioner's objectives. No allegation has been made in this case that the current policy with respect to officer training violates any clearly established law that a jail administrator should be aware of. Unless Respondent can demonstrate that these policy decisions, and the policies that result from them, violated a clearly established law, the decisions regarding when and how much training to provide to officers is covered by the doctrine of qualified immunity and these decision cannot be the basis for a claim of negligence against Petitioner.

Respondent further asserts that Petitioner negligently retained D.H. as an employee. As discussed above, discretionary administrative decisions of government officials are entitled to qualified immunity, insofar as these decisions do not constitute knowing violations of clearly established law. Discretionary decisions with respect to staffing a facility, retention of staff, and allocating resources to conduct investigations into alleged wrongdoing are all discretionary, administrative policy-making decisions that are subject to qualified immunity.

Employees of Petitioner are civil servants subject to the protections of civil service laws. Officials within Petitioner making personnel decisions must adhere to these civil service protections. Respondent is asserting that the individual(s) making personnel decisions should have made a different decision, i.e. to terminate D.H. However, errors in judgment in the making of discretionary decisions are not subject to negligence claims, because the doctrine of qualified immunity shields government officials from making these difficult decisions. It is insufficient for

Respondent to allege that Petitioner should have reached a different conclusion with respect to D.H.'s employment. Instead, Respondent must demonstrate that the decision to retain D.H. as an employee violated clearly established law of which a reasonable official should have known. Plaintiff has not articulated how the decision to retain D.H. as an employee, in and of itself, based upon the available information, violated any clearly established law.

With respect to Respondent's claim of negligent supervision, as discussed above, discretionary administrative decisions of government officials are entitled to qualified immunity, insofar as these decisions do not constitute knowing violations of clearly established rights. Decisions with respect to allocating resources for supervision of corrections staff are discretionary, administrative policy-making decision regarding how to carry out Petitioner's objectives. Respondent has not show, with respect to policies regarding supervision of staff, that it constitutes a knowing violation of any constitutional right or any other law.

This matter is different from the facts in *JH* in that Petitioner has continuously asserted that the decisions to train, retain, supervise and intervene were discretionary decisions by a public official exercising administrative/executive functions involving the determination of fundamental government policy. Unlike in *Hess*, here, the decisions regarding training, retention and supervision was left up to discretion of Petitioner's employees. In fact, Respondent even complains of the "the very manner in which the WVRJA has administered its own policies. . ." App. at 200. As in *Clark*, there is no doubt that Petitioner is a state agency. Petitioner in its sole discretion made an administrative decision involving the fundamental government policy regarding training, retention, supervision and intervention. D.H. filed an Incident Report indicating Respondent's attempt to compromise him as an officer on November 2, 2009. App. at 108. On November 24, 2009 Sgt, Francis and CO Ewing filed incidents regarding the allegations set forth by Tammy Pennington after

being assaulted by Respondent. App. 412-15. Ms. Pennington did not state she had observed any misconduct only that she had heard of it. App. 412-15. Lt. Bunting had previously received D.H. Report, reviewed the Reports filed by Francis and Ewing and questioned D.H., Lt. Bunting plausibly decided not to pursue the matter further, as he was previously apprised of the situation. As Ewing stated, “inmates get mad at corrections officers and then make baseless allegations.” App. at 219. In fact, Respondent never complained of any misconduct while incarcerated. Therefore, unlike in *J.H.* and *Hess* Petitioner has made a showing that the complained of government action involves a discretionary decision involving a fundamental government policy and Petitioner is entitled to qualified immunity.

iii. The Trial Court Erred By Finding A Special Duty Existed Between Petitioner And Respondent

The trial court in its order under “Vicarious Liability” discussed that a “special duty” existed between Petitioner and Respondent, and ultimately found one did. App. at 223-224. While discussed under the “Vicarious Liability” section, it is more appropriately addressed in regards to qualified immunity. The trial court concluded, *sua sponte*, that Petitioner owed Respondent a “special” duty. App. at 223. In fact, it appears that the trial court relied upon this “special” relationship when it denied Petitioner’s Motion for Summary Judgment. App. at 223. However, no “special” duty existed and the trial court did not undertake the proper test to establish a “special relationship” between the parties.

Originally, the State was immune against all actions brought against it. *See* W.Va. Const. art. VI, § 35. Then the Legislature passed *W.Va. Code* § 29-12-5, which allowed suits to proceed so long as the suit sought no recovery from state funds. Syl. Pt. 2, *Pittsburgh Elevator v. W.Va. Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983). Still, one could not bring suit against the State for mere negligence. Generally speaking, the public duty doctrine and its “special relationship”

exception apply to *W.Va. Code* § 29-12-5 actions against the State and its instrumentalities. Syl. Pt. 10, *Parkulo*, 199 W.Va. 161, 483 S.E.2d 507. The public duty doctrine stands for the proposition that some governmental acts create a duty owed to the public as a whole and not a particular person who may be harmed by said acts. *Id.* at 172, 483 S.E.2d at 518. This Court in *Wolfe* developed a four-point test for the existence of a “special relationship”: 1) [A]n assumptions by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; 2) knowledge on the part of the local government’s agents that inaction could lead to harm; 3) some form of direct contact between the State’s agents and the injured party; and 4) that party’s reliance on the States’ affirmative undertaking. Syl. Pt. 2, 182 W.Va. 253, 387 S.E.2d 307. This Court stated that the doctrine and its exception applied to suits involving “non-discretionary” functions of city government. *Id.* at Syl. Pt. 3.

Here, the trial court found that sexual assault on an inmate by correctional staff violates contemporary standards of decency, which is an easy point to agree upon. App. at 224. The trial court then relied upon several federal cases and *Harrah v. Leverette*, 165 W.Va. 665, 271 S.E.2d 322 (1980), to support denying Petitioner qualified immunity. App. at 224. However, neither the trial court nor Respondent addresses the remedy said federal courts proscribe. One only needs to look to the authorities Respondent and the trial court relied upon, *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982), to find the appropriate remedy for alleged abuse, 42 U.S.C. § 1983 claims. As this Court did in *Chase*, it is helpful to look to federal opinions regarding immunity. 188 W.Va. at 359, 424 S.E.2d at 594.

Qualified immunity has been found to apply in circumstances similar to those alleged by Respondent in federal court. Specifically, Judge Robert C. Chambers has held that qualified immunity bars claims of negligence by an inmate against the Administrator of the WRJ, the

WVRJCFA and several correctional officers, including a supervisory officer, arising out of an incident where the defendants allegedly "negligently, carelessly and recklessly failed to exercise reasonable care in . . . protect[ing]" the plaintiff and in "the supervision, training, and control of the Defendant Officers." *Lavender v. West Virginia Regional Jail and Correctional Facility Authority, et al.*, 2008 U.S. Dist. LEXIS 8162, *4 (S.D. W.Va. 2008). Judge Chambers held that, under West Virginia Law, the defendants were "clearly" entitled to qualified immunity from claims sounding in negligence. *Id.* at #27.

Respondent and the trial court's reliance on the public duty doctrine and its "special relationship" exception is nothing more than a misunderstanding of the relationship between qualified immunity and the public duty doctrine. The public duty doctrine has not been asserted here, as it only addresses non-discretionary governmental functions. Even if it did apply, Respondent does not meet the four part test to qualify for a "special relationship" as she never informed Petitioner of the alleged abuse nor did she take action in reliance upon Petitioner's undertaking of action. As stated at length above, the trial court used the improper standard for determining whether Petitioner was entitled to qualified immunity. Respondent has failed to allege that Petitioner has violated a clearly established statute or constitutional right. App. at 5-14. Respondent only claims that Petitioner was negligent in its exercising of discretionary administrative decision making. App. at 5-14. The law is clear, Respondent has a vehicle to pursue a remedy for her alleged wrongs, 42 U.S.C. § 1983. While § 1983 does not provide for claims against Petitioner, it does allow Respondent to pursue her claims against the actual alleged tortfeasor, D.H. Given that Respondent has failed to allege a violation of a clearly established statute or right and Respondent has only alleged mere negligence regarding administrative decisions, Petitioner is entitled to qualified immunity.

E. The Trial Court Incorrectly Denied Petitioner's Motion For Summary Judgment Regarding Vicarious Liability By Applying The Incorrect Standard

The trial court erred when it applied Virginia law in its analysis for denying Petitioner's Motion for Summary Judgment. Petitioner cannot be held liable for the alleged criminal acts of its employees that are outside the scope of their employment. West Virginia law regarding vicarious liability is fairly settled. The trial court's application of Virginia law, when West Virginia precedent was available, was reversible error. App. at 222. Accordingly, Petitioner is entitled to summary judgment as D.H.'s alleged conduct was outside the scope of his employment.

This Court set out the *respondeat superior* analysis as follows:

[I]n cases involving the question of the liability of the principal for the tortious acts of his agent, there are two questions: First, whether the alleged agent was, in fact, an agent at the time of the commission of the tort, and secondly, **whether the tort was committed within the scope of employment.**

Barath v. Performance Trucking Co., Inc., 188 W.Va. 367, 370, 424 S.E.2d 602, 605 (1992) (emphasis added and additional citations omitted). In *Travis v. Alcon Laboratories*, 202 W.Va. 369, 380, 504 S.E.2d 419, 431 (1998), this Court stated that "[g]enerally, the course and scope of employment includes any conduct by an officer, agent or employee in the furtherance of the employer's business." With regard to conduct such as that complained of herein, commentators have stated the obvious: "*sexual assaults . . . are generally not due to the employee's desire to benefit, serve, or further the employer's interest and are not committed in furtherance of the employer's business.*" 27 Am.Jur.2d Employment Relationship § 464 (1996) (footnote omitted).

Consistent with this principle the Supreme Court of Appeals of West Virginia has long recognized that:

A master cannot be held liable for a servant's assault on a third person unless the assault was committed, either by direction of the master, or in performance by servant of duties within scope of his employment, or in course of and connected with such employment.

Porter v. South Penn Oil Co., et al, 125 W.Va. 361, 24 S.E.2d 330, Syl. pt. (1943) (an employer may be liable for an assault committed by an employee acting in the performance of duties within the scope of the employment); *Meadows v. Corinne Coal & Land Co.*, 115 W.Va. 522, 177 S.E. 281 (1934) (employer was liable for malicious prosecution initiated against plaintiff by employee acting within the scope of his employment and in furtherance of the employer's business). Indeed, a majority of courts to have addressed this issue have determined that sexual misconduct is clearly outside the "scope of employment." E.g., *Gambling v. Cornish*, 426 F.Supp. 1153 (N.D. Ill. 1977) (sexual assault by police officer outside scope of employment; no vicarious liability by employer); *Worcester Insurance Co. v. Fells Acres Day School, Inc.*, 408 Mass. 393, 558 N.E.2d 958 (1990) (no vicarious liability by private employer for acts of sexual abuse)²

Respondent and the trial court reliance on *Zirkle v. Winkler*, 214 W.Va. 19, 585 S.E.2d 19 (2003) and *Courtless v. Jolliffe*, 203 W.Va. 258, 507 S.E.2d 136 (1998), is misplaced. App. at 222. The *Zirkle* and *Courtless* Courts reiterated the general principles of respondeat superior, wherein a "master" can be held liable for the negligent acts of its "servant." An important distinction is the fact that, at least in the *Zirkle* case, it was undisputed that the accident at issue occurred while the servant was acting within the scope of his employment.

Moreover, in *Courtless* this Court noted:

In *Griffith v. George Transfer & Rigging, Inc.* 157 W.Va. 316, 201 S.E.2d 281 (1973), we explained:

The universally recognized rule is that an employer is liable to a third person of any injury to his person or property which results proximately from tortious conduct of an employee acting within the scope of his employment. The negligent or tortious act may be

² See also *Randi F. v. High Ridge YMCA*, 170 Ill.App.3d 962, 120 Ill.Dec. 784, 524 N.E.2d 966 (1988) (sexual assault of child by day-care teacher is deviation from scope of employment); *Bates v. Doria*, 150 Ill.App.3d 1025, 104 Ill.Dec. 191, 502 N.E.2d 454 (1986) (sexual assault outside scope of authority; no vicarious liability); *Webb v. Jewel Cos.*, 137 Ill.App.3d 1004, 92 Ill.Dec. 598, 485 N.E.2d 409 (1985) (sexual molestation outside scope of employment; no vicarious liability).

imputed to the employer *if the act of the employee was done in accordance with the expressed or implied authority of the employer.*

157 W.Va. at 324-25, 201 S.E.2d at 287. In *Griffith*, we discussed this Court's judgment in *Cochran v. Michaels*, 110 W.Va. 127, 157 S.E. 173 (1931), and noted the following language from Mechem on Agency, Second Edition, 1879:

[A] servant is acting within the course of his employment when it is engaged in doing, for his mater, *either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural, direct and logical result of it. If in doing such an act, the servant acts negligently, that is negligence within the course of the employment.*

Courtless, 203 W.Va. 258, 507 S.E.2d 136 (1998) (emphasis added).

In support of the position that sexual assault is within the scope of D.H. employment with Petitioner, Respondent cites *Heckenlaible v. Virginia Peninsula Regional Jail Authority*, 491 F.Supp.2d 544 (E.D. Va. 2007), and the trial court adopted its holding. App. at 222. In that Eastern District of Virginia case, it was alleged that a correctional officer was assigned the task of supervising the plaintiff while she showered and entered her cell where the assault took place on the pretext of a cell search. The court noted that “Steele’s duties as a correctional officer required him to observe inmates in the shower. . . [S]teele’s impulse to have sexual contact with Heckenlaible may well have risen, at least in part, from the fact that he was required to view Heckenlaible while she was unclothed in the shower. *Id.* at 551.

Respondent and the trial court conveniently omitted that this is a minority opinion in the very jurisdiction where it is persuasive. In *Blair v. Defender Servs., Inc.*, 386 F.3d 623, 627 (4th Cir. 2004), the Fourth Circuit applied Virginia law in considering whether an employer who provided custodial services to a university is liable under the theory of *respondeat superior* for a physical assault that occurred on campus. The court noted when viewing the facts in the light most favorable to the plaintiff the assault “had nothing to do with [the employee’s] performance of janitorial

services.” *Id.* at 627. The court reasoned that “the simple fact that an employee is at a particular location at a specific time as a result of his employment is not sufficient to impose *respondeat superior* liability on the employer.” *Id.*

Similarly, in the Eastern District of Virginia, a court held although the sexual harassment occurred in the workplace, it did not occur while the supervisor was engaged in his workplace duties or functions. *Jones v. Tyson Foods, Inc.*, 378 F.Supp.2d 705, 713, 14 (E.D. Va. 2004). In that case, a supervisor allegedly summoned the employee to his office, closed the door, asked her on a date, asked to kiss her, and also touched her. *Id.* at 714. The court held that the plaintiff could not hold the employer liable under the theory of *respondeat superior*. *Id.*

The trial court dismisses a more compelling and authoritative opinion in this jurisdiction, *Yoakum v. AIG Domestic Claims Services, Inc.*, Civil Action No. 2:08-cv-01268 (S.D. W.Va. June 4, 2009), wherein the court held that a sexual relationship with an inmate is not within a correctional officer’s job description and outside the scope of his employment. There, a correctional officer was having a sexual relationship with an inmate. The court held that Mr. Yoakum’s actions were in his own self interest rather than his employer’s and his actions did not fall within his scope of duties. See, e.g., *W.Q. v. National Union*, No. 2:04-cv-0370 (S.D. W.Va. March 31, 2006) (holding in an order granting defendant’s motion for summary judgment that sexual relations with a patient was not within the scope of a case manager at a mental health services center). Judge Goodwin in *Yoakum* reasoned, “it is impossible to imagine that the DOC authorized Mr. Yoakum’s actions or that his conduct was incident to his job or that he was furthering the DOC’s interests.” *Yoakum v. AIG*, at 6. Similarly, in the United States District Court for the Southern District of West Virginia, Judge Copenhaver held in *Rakes v. Rush*, 2009 U.S. Dist. LEXIS 67728 (August 4, 2009), that as a matter of law the Division of Corrections (“DOC”) could not be held liable under the theory of *respondeat*

superior for the intentional acts of its employees such as sexual misconduct, even a high level employee such as the associate warden, when the acts are done in furtherance of selfish motives rather than in the interests of the DOC.

Disregarding the overwhelming precedent applying West Virginia law, the trial court relied upon *Heckenlaible* when it denied Petitioner's Motion for Summary Judgment. App. at 222. However, the *Heckenlaible* case is inapplicable and should be disregarded. First, the Virginia case is not authoritative, particularly in light of the breadth of West Virginia law on this issue. Second, the State of Virginia's definition of "scope of employment" is much broader than in West Virginia: in *Heckenlaible*, the court stated that "an act is within the scope of the employment if (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, and did not arise wholly from some external, independent, and personal motive on the part of the employee to do the act upon his own account." 491 F.Supp.2d at 549.

The above definition relied upon by the trial court for "scope of employment" is not the standard in West Virginia. As indicated above, the standard in West Virginia is much simpler: was the alleged conduct in furtherance of Petitioner's business? With regard to conduct such as that complained of herein, commentators have stated the obvious: "sexual assaults . . . are generally not due to the employee's desire to benefit, serve, or further the employer's interest and are not committed in furtherance of the employer's business." 27 AmJur.2d Employment Relationship § 464 (1996) (footnote omitted). Moreover, in the context of § 1983 claims, the United States Supreme Court has held "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 694 (1978).

Here, the trial court relied upon the facts that D.H. worked at SRJ and wore his uniform when the alleged acts occurred. App. at 222. Although, “the simple fact that an employee is at a particular location at a specific time as a result of his employment is not sufficient to impose *respondeat superior* liability on the employer.” *Blair*, 386 F.3d 623, 627. Further, Respondent and the trial court admit that D.H. was not trained or instructed to engage in sex acts with Respondent; in fact, he was instructed to do the opposite. App. at 220. Respondent and the trial court compare this situation to that of a job, where Respondent was working and D.H. was her direct supervisor; however, that characterization is incorrect. App. at 222. Respondent was not an employee but a jail-trustee, there was no employee-employer relationship. Respondent worked as a seamstress and performed other duties at the behest of the shift supervisor. App. at 331. D.H. who did not serve as a shift supervisor, merely ensured she had the materials available to complete the task she was assigned. These facts are not enough to impose vicarious liability. *Blair*, 386 F.3d 623, 627. Respondent has admitted D.H. was not directed to engage in such behavior; therefore, Respondent must show that the alleged conduct was for the benefit of Petitioner. This is a burden she cannot meet.

The alleged acts by D.H. toward Respondent, if proven, are criminal, thus directly adverse to the interests of Petitioner. The Legislature found that sexual contact between a correctional officer and an inmate is so outside their scope of employment they criminalized it. *See W.Va. Code* § 61-8B-10. Respondent has failed to even allege that Petitioner enjoyed some benefit as a result of the alleged conduct. App. at 5-14. Accordingly, when applying West Virginia law, Respondent must show that D.H. conduct was done at the direction of Petitioner or for Petitioner’s benefit. Respondent has not and cannot make said showing. The fact that D.H. wore a uniform to work at the SRJ is insufficient to establish vicarious liability. As such, the trial court

erred when it applied the wrong standard and when it denied Petitioner's Motion for Summary Judgment.

VIII. CONCLUSION

WHEREFORE Petitioner asserts that it has shown that it is entitled to qualified immunity in this matter. The facts of this case show that Petitioner did not violate any constitutional or statutory right of Respondent, and that the decisions regarding training, supervision, retention and investigation were discretionary administrative decisions. Further, Petitioner asserts that it has shown that the trial court applied the wrong standard in its vicarious liability analysis. Therefore, Petitioner request that this honorable Court reverse the trial court order denying its motion for summary judgment or for any other such relief as this honorable Court deems appropriate.

**WEST VIRGINIA REGIONAL JAIL
AND CORRECTIONAL FACILITY
AUTHORITY**

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No.:13-0037

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITY AUTHORITY,
an agency of the State of West Virginia,

Defendant Below, Petitioner,

v.

Upon Appeal
West Virginia Supreme Court of Appeals
(Case No.: 10-C-2131)

A.B.,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, M. Andrew Brison, do hereby certify that I served the following a true copy of the
Corrected Petitioner's Brief and Corrected Appenix via First Class United States mail,
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