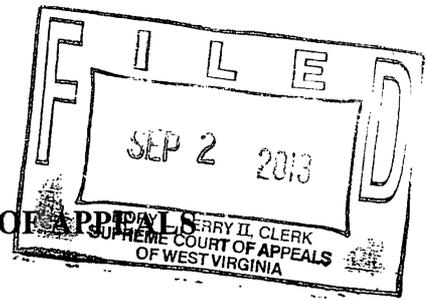


No.:13-0037



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.**

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**CORRECTED PETITIONER'S REPLY BRIEF**

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**I. TABLE OF CONTENTS**

I. TABLE OF CONTENTS ..... i

II. TABLE OF AUTHORITIEIS ..... ii-iii

III. STATEMENT OF THE CASE ..... 1

IV. ARGUMENT ..... 2-9

    A. Respondent’s Claims Under The West Virginia Constitution Were Dismissed  
    By Stipulation ..... 2-3 .

    B. Petitioner Is Entitled to Qualified Immunity ..... 3-8

    C. Petitioner Is Not Liable For The Alleged Criminal Acts Of Its Employees..... 8-9

V. CONCLUSION..... 9-10

## II. TABLE OF AUTHORITIES

### Cases:

<i>Ball v. Baker</i> , Civil Action No.: 5:2010-cv-00955 .....	6
<i>Bowers v. DeVito</i> , 686 F.2d 616, 619 (7th Cir. 1982) .....	4
<i>Clark v. Dunn</i> , 195 W.Va. 272, 465 S.E.2d 374 (1995).....	5,6
<i>Danielle Thornton v. David Stoner, et al.</i> , Civil Action No. 10-C-2142.....	6
<i>Hager, et al., v. Robinson, et al.</i> , Civil Action No.: 2:03-0094 (S.D.W.Va. Feb. 1, 2005).6	
<i>Harrah v. Leverette</i> , 165 W.Va. 665, 271 S.E.2d 322 (1980).....	3
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982).....	3
<i>Hess v. West Virginia Div. of Corrections</i> , 227 W.Va. 15, 705 S.E.2d 125 (2010).....	5
<i>J.H. v. West Virginia Div. of Rehabilitation Services</i> , 224 W.Va. 147, 680 S.E.2d 392 (2009).....	5
<i>Mary M. v. City of Los Angeles</i> , 814 P.2d 1341 (Cal. 1991).....	9
<i>Millbrook v. United States</i> , 569 U.S. ___ (2013). .....	8,9
<i>Prichett v. Alford</i> , 973 F.2d 307, 312 (4th Cir. 1992) .....	4
<i>Randall v. Fairmont City Police Department</i> , 186 W.Va. 336, 412 S.E.2d 737 (1991).....	5
<i>Reynolds v. Hale</i> , 855 F. Supp. 147, 149 (S.D. W.Va. 1994) .....	4
<i>State of W.Va. v. Werner</i> , 242 S.E.2d 907 (W.Va. 1978).....	3
<i>Tarantino v. Baker</i> , 825 F.2d 772, 775 (4th Cir. 1987).....	4
<i>The WV DHHR, et al., v. Payne, et al.</i> , --- S.E.2d ---- WL 2919950 ( W.Va. June 12, 2013).....	6,7,8
<i>Will v. Michigan Dep't of State Police</i> , 491 U.S. 58, 71 (1989).....	4
<i>Wolfe v. The City of Wheeling</i> , 182 W.Va. 253, 387 S.E.2d 307 (W.Va. 1989) .....	5

Statutes and Other Authorities:

42 U.S.C. § 1983 ..... 4

W.Va. Code § 61-8B-10 ..... 9

W.Va. Code § 29-12-5 ..... 5,6,7,

West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.* ..... 9

### **III. Statement of Facts**

Respondent goes to great length in her “Statement of Facts” describing the alleged conduct of D.H. *Respondent’s Amended Response Brief* at 1-10. One may suppose that Respondent wishes to rely on shock value as a substitute for the lack of legal authorities or evidence that would not entitle the WVRJCFA to judgment as a matter of law. Throughout Respondent’s incoherent diatribe she never cites to the Appendix to support any of the disjointed assertions she claims to be undisputed facts. For example, Respondent states, as if it is fact, that D.H. was her direct supervisor when she worked as a seamstress. *Id.* at 1. However, as discussed in *Petitioner’s Brief*, D.H. was not her direct supervisor, as the shift supervisor assigned jobs and shifts. Appendix (“App.”) at 331. Respondent makes no attempt to distinguish Petitioner’s facts, which were supported by citations to the Appendix; instead Respondent makes the exact same inaccurate factual claims that are wholly unsupported by the record. *Respondent’s Response Brief supra*. Respondent even mischaracterizes the testimony of Tammy Pennington. Respondent claims that Ms. Pennington’s Affidavit is proof that the alleged conduct happened. Outside Ms. Pennington’s credibility issues, she never testified that she saw Respondent and D.H. engage in sexual misconduct nor did she ever testify D.H. informed her of such. Ms. Pennington made comments to two correctional officers after Respondent and other inmates physically assaulted her. App. at 412-15. More importantly, if one were to search the entire record they would never find where Respondent complained of or informed any person working for the WVRJCFA that she was the victim of any abuse.

In the interest of brevity, Petitioner stands by its correctly cited Statement of Facts contained in *Petitioner's Brief*. Respondent is insincere in citing the statements made by Joe DeLong. Although not part of the record, Mr. DeLong's "quote" from a newspaper article is neither evidence or even trustworthy; any politician or elected official can attest that the media cares more about headlines than about getting the story right. Respondent then cites a lawsuit filed by a disgruntled former employee who was terminated due to his own misconduct. None of the speculation and unsupported facts cited by Respondent present an issue which addresses the WVRJCFA's discretionary decisions which Respondent complains of.

#### IV. Argument

Respondent has provided no evidence or case law to usurp Petitioner's entitlement to qualified immunity. Respondent provides allegations regarding the alleged conduct of D.H. Respondent has not distinguished nor addressed the well reasoned arguments contained on *Petitioner's Brief*. As such, the trial court order denying Petitioner's Motion for Summary Judgment should be reversed.

##### A. Respondent's Claims Under The West Virginia Constitution Were Dismissed By Stipulation.

Respondent has chosen to lead with a rather peculiar argument; namely, that the WVRJCFA violated certain sections of the West Virginia Constitution. However, those claims were dismissed against Petitioner by stipulation of *all the parties*. App. at 217, ¶ 2 (emphasis added). Respondent has not asserted any cross assignments of error nor argued that the trial court erred regarding her West Virginia Constitutional claims. This should be no surprise as Respondent stipulated to their dismissal. *Id.* The trial court dismissed

the claim by stipulation of all parties; accordingly, Respondent's argument has no basis in law and should be disregarded.

**B. Petitioner Is Entitled to Qualified Immunity**

As fully explained in *Petitioner's Brief*, Petitioner is entitled to qualified immunity. Respondent appears to have mixed a qualified immunity analysis with vicarious liability. See *Respondent's Amended Response Brief* at 13-4. Nevertheless, Respondent has not addressed the fact that she has not presented any clearly established statute or law which the Petitioner allegedly violated. As our second President John Adams once said, "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." Despite Respondent's attempts at shock and awe throughout her brief she fails to allege that Petitioner violated any statute or right.

Respondent claims that the failure to subject D.H. to annual psychological testing is evidence of negligent retention and, strangely, negligent training. *Respondent's Amended Response Brief* at 15-7. Respondent cites *State of W.Va. v. Werner*, 242 S.E.2d 907 (W.Va. 1978) and *Harrah, et al., v. Leverette*, 271 S.E.2d 322 (W.Va. 1980), to support her position. Respondent admits that those decisions concerned the West Virginia Division of Corrections and then Respondent "assumes" such holding would apply to Petitioner as well. *Respondent's Amended Response Brief* at 16. As has been stated at length, it is well settled that "government officials performing discretionary functions generally are shielded from liability on civil damages insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738

(1982); and *Prichett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). Although Respondent “assumes” the same standard would apply to Petitioner, courts have regularly held that “if there is a ‘legitimate question’ as to whether an official’s conduct constitutes a constitutional violation, the official is entitled to qualified immunity.” *Reynolds v. Hale*, 855 F. Supp. 147, 149 (S.D. W.Va. 1994) (quoting *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987). Meaning if there is a question of whether those holdings apply to Petitioner or not, then Petitioner is entitled to immunity. Further, the West Virginia Legislature gave authority to Petitioner to create Policy and Procedures. Petitioner Policy and Procedure number 3004 address psychological testing and requires an applicant to pass an examination before employment and “shall be required during the course of employment to submit to reevaluation, if justifiable need exists.” Accordingly, as the Petitioner has adopted policy and procedures regarding psychological testing and was not in existence during the pendency of the above cited cases, it is entitled to qualified immunity.

Respondent continues to rely on *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982), but ignores the remedy that is proscribed. *Respondent’s Amended Response Brief* at 15. As cited in *Petitioner’s Brief* the remedy for a person who has been harmed by a violation of a clearly established right or statute by a government official is a 42 U.S.C. § 1983 claim. *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982). The United States Supreme Court ruled, in *Will v. Michigan Dep’t of State Police*, that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” 491 U.S. 58, 71 (1989). Under this analysis the WVRJCFA is not a “person” who can be held liable under § 1983; therefore, barring a claim against Petitioner.

Respondent asserts that “Petitioner has apparently taken the position that an analysis of the “public duty” doctrine and the “special relationship” exception are not applicable in this case,” Respondent continues claiming Petitioner has “conceded” that a “special relationship” existed between Petitioner and Respondent. *Respondent’s Amended Response Brief* at 23. However, Petitioner addressed the deficiencies in the very arguments which Respondent claims were ignored or conceded. *See Petitioner’s Brief* at 22-5. Suffice it to say, that Respondent relies on the same authorities as the trial court and makes no attempt to address the fact that Petitioner is not a political-subdivision, but a State agency. As such, it is immune from negligence suits brought under *W.Va. Code* § 29-12-5, *et seq. Clark v. Dunn*, 195 W.Va. 272, 275, 465 S.E.2d 374, 377 (1995). Respondent cites several opinions from this Court as examples of claims in negligence that held that qualified immunity was inapplicable. *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. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 157, 680 S.E.2d 392, 402 (2009). Respondent then claims that Petitioner’s reliance upon *Hess v. West Virginia Div. of Corrections*, 227 W.Va. 15, 705 S.E.2d 125 (2010), is misguided. Respondent argues that the facts in *Hess* are completely different than the facts currently before this Court. *Respondent’s Amended Response Brief* at 27. However, the cases for which Respondent relies upon have completely different facts than the current case as well. The distinctions between the above cited authorities and the current controversy were addressed at length in *Petitioner’s Brief* and Respondent has offered no new arguments or authority in opposition.

Respondent spends considerable time discussing several opinions authored by the Honorable Judge Copenhaver, particularly several cases involving the Logan County Commission in addition to *Ball v. Baker*, Civil Action No.: 5:2010-cv-00955. *Respondent's Amended Response Brief* at 30, 36. Yet, Respondent fails to address the fact that Petitioner is not a political-subdivision subject to liability for negligence claims under *W.Va. Code* § 29-12-5, *et seq.* and the Logan County Commission is. *Clark* 195 W.Va. 272 at 275, 465 S.E.2d 374 at 377. Further, Respondent cites *Hager, et al., v. Robinson, et al.*, Civil Action No.: 2:03-0094 (S.D.W.Va. Feb. 1, 2005), as holding that Judge Copenhaver did not believe qualified immunity was available to Petitioner. However, nowhere in the Memorandum Order is a discussion regarding qualified immunity had. Respondent continues to cite several Orders issued in cases from the Circuit Court of Kanawha County; yet, many of the very Orders were appealed, only to be voluntarily dismissed by Respondent's counsel. The most egregious portion of *Respondent's Amended Response Brief* is found on page 36 discussing a hearing in the *Danielle Thornton v. David Stoner, et al.*, Civil Action No. 10-C-2142. Respondent mischaracterizes the exchange that took place with Judge Bailey. Moreover, Respondent provides no citation or copy of any transcript evidencing this exchange making this depiction all the more repugnant to counsel for Petitioner. Throughout the entirety of *Respondent's Amended Response Brief* there is no citation provided to support the wild accusations which populate it. Furthermore, Respondent cites to no evidence supporting claims for negligent training, negligent retention, or negligent supervision.

Recently, this Court issued an opinion regarding qualified immunity, *The WV DHHR, et al., v. Payne, et al.*, --- S.E.2d ---- WL 2919950 ( W.Va. June 12, 2013), and

once again reiterated “[I]n the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29–12A–1, *et seq.*, 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. 6. This Court identified that the claimant’s allegations were “grounded exclusively in negligence” and the actions must have violated “clearly established laws of which a reasonable official would have known.” *Id.* at 14, 5. This Court explained “[T]he DHHR “may” conduct unannounced inspections in response to a complaint, but is not required to do so. W. Va. C.S.R. § 64-11-4.4.b.” *Id.* at 17. Such is the same with Petitioner regarding psychological testing, as it may conduct annual examinations if justified. *Infra.*

The great similarity of *Payne* to this matter is the holding, “despite repeated reference to the DHHR defendants’ “failure to uphold the very laws and regulations that they are charged with sustaining,” at no time do respondents identify a specific law, statute, or regulation which the DHHR defendants violated.” *Id.* at 19, 20. Further this Court held:

Respondents seem to argue simply that if the DHHR defendants were doing their job properly, this incident would not have occurred. . . Although this overly simplistic analysis may be appealing in light of these tragic events, qualified immunity insulates the State and its agencies from liability based on vague or principled notions of government regulation.

*Id.* at 21, 2. This argument is the mirror image of the argument Respondent advances. Respondent provides no evidence and advances a strict liability standard be imposed upon a State agency when performing discretionary functions. Respondent attempts to

hang her hat on Ms. Pennington. However, Ms. Pennington never informed Petitioner that Respondent was being forcibly raped, as Ms. Pennington never witnessed any misconduct on the part of D.H. App. 412-15 D.H. had previously filed a report indicating Respondent's attempts to compromise him, which is consistent with her history as a sexual predator. App. at 108. Basically, Respondent's argument that the alleged conduct occurred should suffice without providing any evidence that Petitioner violated a clearly established law. *The WV DHHR, et al., v. Payne, et al.*, --- S.E.2d ---- WL 2919950 ( W.Va. June 12, 2013).

Based on the arguments above, Respondent has provided no evidence that would not entitle Petitioner to the defense of qualified immunity. Respondent has put forth no evidence that Petitioner violated a clearly established law, in which she carries the burden of showing. Therefore, the trial court erred when it denied Petitioner's Motion for Summary Judgment.

**C. Petitioner Is Not Liable For The Alleged Criminal Acts Of Its Employees**

Petitioner can not be held liable for the alleged criminal acts of its employees as it provides no benefit for Petitioner and D.H. was specifically told to refrain from said activity. App. at 323. Further, Respondent advances and the trial court adopted a different standard than the controlling standard in this jurisdiction.

Respondent is quick to cite *Millbrook v. United States*, 569 U.S. \_\_\_ (2013), when providing an analysis of scope of employment. Respondent is correct that the majority of the opinion addressed the language contained in the Federal Tort Claims Act, which waives sovereign immunity in certain circumstances, and is inapplicable in this matter. Yet, Respondent fails to take the next step in the analysis, that the State of West Virginia

has created a similar statute, W. Va. Code § 29–12A–1, *et seq.* As detailed above, W. Va. Code § 29–12A–1, *et seq.*, applies only to political-subdivisions regarding negligence claims. As such, *Millbrook* provides no guidance on the issue pending before this Court.

Next, Respondent continues to rely on the Virginia standard for vicarious liability to support her claim under *respondeat superior*. Respondent then cites *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991), to support her position but does not detail if the standard is the same as the one adopted here or if it is similar to the standard found in Virginia. Instead, Respondent asserts the holding supports the contention that the enactment of W.Va. Code § 61-8B-10 supports a claim for vicarious liability. In fact, W.Va. Code § 61-8B-10 does the opposite. The passing of that legislation provides the strongest evidence that State of West Virginia considers sexual contact between correctional staff and inmates so far outside the scope of employment that it should be illegal.

Respondent only provides authorities that are either inapplicable here or are from other jurisdictions. Respondent attempts to brush aside the authorities found in this jurisdiction with those of others. This distinction was addressed in depth in *Petitioner's Brief* and Petitioner will not take the Court's time rehashing the well supported arguments contained therein. Accordingly, the trial erred when it denied Petitioner's Motion for Summary Judgment regarding vicarious liability.

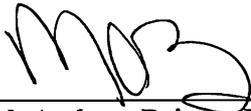
## **V. Conclusion**

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**

**By Counsel**



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Upon Appeal  
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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  
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