

No. 13-0037

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

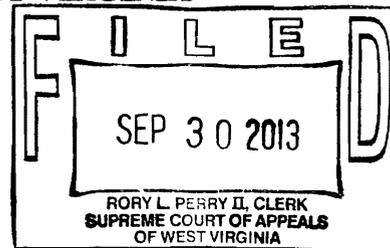
Petitioner,

v.

Case No. 13-0037

A.B.,

Respondent.



CORRECTED RESPONDENT'S AMENDED BRIEF

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STATEMENT OF THE CASE

I. Procedural History

Respondent concurs with the Procedural History set out in Petitioner's Brief, save for the request of relief sought. Respondent requests that this Honorable Court affirm the lower court's ruling in regard to the Respondent's negligence claims against Petitioner WVRJA.

II. Statement of the Facts¹

Respondent A.B. (Respondent or A.B.) was incarcerated in Southern Regional Jail (SRJ), a WVRJA-run jail located in Raleigh County, West Virginia, between September, 2009, and April, 2010. Respondent was a convicted felon awaiting her transfer to a West Virginia Division of Corrections facility during her tenure at SRJ. During this period of incarceration at SRJ, Respondent was repeatedly sexually harassed, physically abused, sexually abused and raped by Correctional Officer D.H. Specifically, Respondent alleges that D.H. forced her to perform oral and vaginal sex on no less than seventeen (17) occasions. It should be noted that Respondent worked as a seamstress at SRJ and D.H. was her direct supervisor.

For the most part, SRJ is set up like many WVRJA institutions throughout the State of West Virginia. The highest ranking official is the Administrator. Next in command is the Chief Correctional Officer. Following the Chief Correctional Officers are varying degrees of correction officers. During the time in which Respondent was repeatedly raped by D.H., D.H. held the rank of Correctional Officer II. During his employ at SRJ, D. H. was being paid to rehabilitate and protect Respondent in a safe and secure environment, subject to the WVRJA's "Mission Statement." The WVRJA's Mission Statement reads as follows:

The Mission of the West Virginia Regional Jail and Correctional Facility Authority is to ensure the safety of the public, staff and inmates by maintaining a safe, secure and humane

¹ Any and all documents addressed below are exhibits to *Plaintiff's Response to The West Virginia Regional Jail and Correctional Facility Authority's Motion for Summary Judgment*. Should this Honorable Court desire additional copies of the exhibits, Respondent will be more than happy to provide.

system of regional jails, and to provide incarcerated persons with the opportunities for self-improvement and rehabilitation by participating in educational programs.

D.H. was the property clerk at SRJ and worked Monday through Friday, 8:00 AM until 4:30 PM. As stated above, during any and all of the sexual assaults/rapes, D. H. was Respondent's direct supervisor. Respondent was a seamstress at SRJ and usually performed her duties in an interview room which was in close proximity to D. H.'s personal office. Due to this position, D. H. was able to isolate Respondent and perpetrate the acts of sexual assault/rape. The majority of these assaults/rapes occurred in D.H.'s office to which few other WVRJA/SRJ employees ever visited.

The specifics surrounding the assaults/rapes are quite disturbing and shocking. In order for this Honorable Court to fully understand and comprehend these disgusting acts, please refer to *Plaintiff's Response to WVRJA's First Set of Discovery Requests, Response No. 7*, which is part of the record in this Appeal. Nevertheless, Respondent will summarize below.

The sexual harassment and sexual misconduct began in late October, 2009. While Respondent was in a SRJ interview room, D.H. asked her if she had "ever thought of doing a favor for a favor." Respondent responded that she had thought about it, but that "was not what I am into." Approximately two (2) days later, the first assault occurred. While in D.H.'s office Respondent was moving clothing from a shelf above her head. D. H. approached her from behind and placed his hands on her breasts. Again, Respondent informed D.H. that she was "not into that" [*i.e.*, interested in forming some form of sexual relationship with a correctional officer]. D.H. responded to Respondent that "you can't tell me that someone with your charges doesn't like to [have sexual intercourse]." D.H. then requested Respondent expose her breasts. Respondent responded "and if I say no?" D.H. informed her that he could "always pay your [Respondent's] little boyfriend a visit." Respondent's boyfriend at the time was incarcerated at

SRJ. Being intimidated by D.H.'s threats towards both her and her boyfriend, Respondent exposed her breasts at D.H.'s order.

On or about October 23, 2009, while in D.H.'s office, D. H. inquired if Respondent "kept her [vagina] shaved" and then requested Respondent show him her vagina. Feeling threatened both physically and what punishment D.H. could exact, Respondent exposed her vagina. D.H. then proceeded to insert his fingers in Respondent's vagina and placed her hand on his erect penis. After approximately five (5) minutes, Respondent was ordered to pull her pants up and, when his erection subsided, D.H. brought her back to her unit.

On or about October 26, 2009, D.H. forced Respondent to administer oral sex in the video arraignment room at SRJ. On or about November 5, 2009, D.H. vaginally raped Respondent in the video arraignment room. When Respondent asked if the rape was being recorded, D.H. informed her that "no, he just wanted her to make her feel like a porn star." It should be noted that the cameras in the video arraignment room do not record and are solely closed circuit. Further, unless there are images on the left screen, no one can watch the events occurring in the video arraignment room. During any and all instances of sexual assault/rape, the left screen was blank.

Additional sexual assaults/rapes were perpetrated by D.H. on or about the following dates:

November 16, 2009. Oral rape in D.H.'s office.

November 20, 2009. Vaginal rape in D.H.'s office.

November 24, 2009. D.H. administered oral sex to Respondent in the uniform closed inside the video arraignment room.

December 4, 2009. Vaginal rape in the video arraignment room.

December 10, 2009. Oral rape in the file room located behind the second door on the right in the hallway towards the education section.

January 6, 2010. Vaginal rape in D.H.'s office.

January 11, 2010. D.H. gave Respondent a pair of pants with the seam of the crotch removed. When Respondent inquired if she were to fix the pants, D.H. said "no, I want you to put them on with no underwear underneath." Respondent did as ordered and D.H. administered oral sex to her on his office desk.

February 10, 2010. Oral rape in D.H.'s office.

February 23, 2010. D.H. ordered Respondent to masterbate for him.

March 2, 2010. Vaginal rape in the video arraignment room.

March 18, 2010. Oral rape in D.H.'s office.

April 8, 2010. Vaginal rape in D.H.'s office.

April 12, 2010. Oral rape in D.H.'s office.

In addition to the above, Respondent was also subject to several other occasions wherein D.H. forcibly kissed her, rubbed his erect penis against her and ordered her to engage in sexually explicit talk. Any and all sexual misconduct by D.H. was accompanied by threats and other forms of intimidation. Respondent would be remiss if she did not relay that she was also physically intimidated by D.H. as he is approximately six (6) feet, one inch tall and over two-hundred (200) pounds, whereas Respondent is approximately four (4) feet, ten (10) inches tall and one-hundred twenty (120) pounds.

It should be noted that after many of the rapes, D.H. gave Respondent cigarettes and other "gifts" in exchange for the sexual abuse. Respondent can only surmise that D.H. was able to provide such items as he was the property clerk at SRJ. D.H. was one of the few correctional officers who had access to the property room. Further, undisputed testimony has proved that

inmates' personal effects are kept in black lockers with locks on the handles. Further, D.H. has testified that Respondent did not have access to either the keys to the lockers or the property kept in lockers. (*Please see* Deposition transcript of D.H., p. 55). Additionally, SRJ correctional officer Brian Ewing has testified to the same. (*Please see* Deposition transcript of Ewing, p. 18). Basically, the only way Respondent could have procured items from the property room was either directly from D.H. or D.H. allowing her access to such items.

The most compelling evidence concerning D.H. giving Respondent items from the property room is the issue surrounding the property of SRJ inmate Amanda Conley, an individual whom Respondent has never met. During Respondent's March, 2011 deposition, she specifically detailed the contents of Conley's personal effects that were either given to her by D.H. or that D.H. allowed her access to the same. Included in the property bag were the following items – a Coach purse, Aussie shampoo and conditioner, make-up, a wallet with Conley's personal information and documents such as Social Security card and driver's license, pictures and, most importantly, a cellular telephone. Plaintiff testified that there was only one telephone number saved on the cellular phone – "Master TurtleDove."

In August, 2011, counsel for Respondent was finally able to locate Ms. Conley. Ms. Conley verified that her property was missing upon her discharge from SRJ in June or July, 2010. Ms. Conley also verified that the personal items missing were exactly those as described by Respondent in her March, 2011, deposition testimony. Ms. Conley also confirmed that the only name saved on her cell phone was "Master TurtleDove." Finally, Ms. Conley confirmed that she had no direct relationship with Respondent. (*Please see* Affidavit of Amanda Darlene Conley, Exhibit 4 of Plaintiff's Response to WVRJA's Motion for Summary Judgment).

While in possession of Ms. Conley's cell phone, Respondent testified she called her cousin, Eve O'Dell. Ms. O'Dell has executed an Affidavit stating that Respondent called her

from a cell phone while Respondent was incarcerated at SRJ. (*Please see* Affidavit of Eve O'Dell, Exhibit 5 of Plaintiff's Response to WVRJA's Motion for Summary Judgment). Former SRJ inmate Danielle Thornton has sworn in an Affidavit that Respondent confided to her about D.H. raping her and that Respondent allowed Thornton to use the cell phone to make personal calls. Ms. Thornton called her mother and mother-in-law wherein she spoke with her husband. (*Please see* Affidavit of Danielle Thornton, Exhibit 6 of Plaintiff's Response to WVRJA's Motion for Summary Judgment). Ms. Thornton's husband, Sam Mathena, has also executed an Affidavit wherein he swears that he received a non-collect call from Ms. Thornton and that she informed him that the call was made from a cell phone given to her cellmate, Respondent, from a correctional officer. (*Please see* Affidavit of Sam Mathena, Exhibit 7 of Plaintiff's Response to WVRJA's Motion for Summary Judgment).

Simply put, taking into consideration the sworn Affidavits of the above witnesses, the Plaintiff's deposition testimony and all of the facts surrounding access to property, it is abundantly clear that D.H. provided Respondent with Conley's personal items as some form of payment for sexual services or to ensure she does not inform his superiors. The most telling aspect of this issue is the fact that Respondent and Conley have never met – before, during or after their respective incarceration at SRJ. The fact that Respondent described everything in Conley's property bag – including the only saved number – over five months before Ms. Conley executed her Affidavit -- clearly validates Respondent's claims against D.H.

While the above-referenced sexual misconduct of D.H. is egregious enough, many of the sexual assaults/rapes experienced by Respondent could have been prevented shortly after they began. On or about November 23, 2009, SRJ inmate Tammy Pennington was being transferred to South Central Regional Jail after an altercation with three (3) inmates, including Respondent. During the transport, Ms. Pennington was questioned by SRJ employees Sgt. Michael Francis

and CO II Brian Ewing about the sexual relationship between D.H. and Respondent. This conversation is referenced in the Incident Reports of both men. (*Please see* Incident Reports, Exhibits 8 and 9 of Plaintiff's Response to WVRJA's Motion for Summary Judgment). Ms. Pennington executed an Affidavit wherein she averred that D.H. was having sexual intercourse with Respondent and that it was obvious to "everyone who was incarcerated or worked at SRJ." (*Please see* Affidavit of Tammy Pennington, Exhibit 10 of Plaintiff's Response to WVRJA's Motion for Summary Judgment). Pennington further gave deposition testimony reflecting the same contention and that she was never questioned after that transport.

Sgt. Francis's Incident Report was addressed to Lt. Larry Bunting, the Chief Correctional Officer and second in command at SRJ. According to Ewing, a meeting was held between him, Bunting and Francis in late November, 2009, to discuss Pennington's allegations concerning D.H. During this meeting, which Ewing testified lasted a mere five (5) to eight (8) minutes, D.H. eventually showed up. (*Please see* Exhibit 3, p. 57 of Plaintiff's Response to WVRJA's Motion for Summary Judgment). According to Ewing, Bunting asked D.H. whether he had a sexual relationship with Respondent. D.H. responded only with a "snicker." (Exhibit 3, pp. 58, 61). That was the extent of Petitioner WVRJA's investigation of the allegations that one of its correctional officers, D.H., was sexually abusing/raping an inmate, Respondent, an inmate under his direct supervision on the grounds of SRJ.

Ewing further testified that after the meeting with Bunting, Francis and, eventually, D.H., he was never again questioned about Pennington's allegations by any WVRJA employee either at SRJ or at Headquarters in Charleston, West Virginia. (Exhibit 3, pp. 59-63). Basically, Petitioner WVRJA swept these serious allegations under the rug and ignored the same. When asked "in your opinion, do you think you should have been further questioned about the

information regarding Tammy Pennington?,” Ewing replied, “Yeah. I think that it should have been looked into, I mean yes.” (Exhibit 3, pp. 58, 61).

D.H. testified that he knew of no further investigation and that he never saw the above-referenced Incident Reports until his August 18, 2011 deposition. (*Please see* Deposition transcript of Hammonds, p. 125). Other than the brief meeting addressed above, D.H. testified that no person in the employ of Petitioner WVRJA at either SRJ or from the headquarters in Charleston, West Virginia, questioned him any further about these serious allegations. Most importantly, the victim, Respondent, was never once questioned by any WVRJA/SRJ agent concerning the abuses/rapes she suffered at the hands of D.H. To that end, it is easy to surmise that Respondent WVRJA cares more about its reputation than the inmates which it is paid to protect.

By virtue of the fact that the serious allegations of sexual misconduct regarding D.H. towards Respondent were never thoroughly investigated, or investigated at all, when it came to the attention of Petitioner WVRJA, D.H. was able to continue working as a correctional officer at SRJ without additional supervision and/or scrutiny, continued to be the direct supervisor of Respondent and was able to commit no less than ten (10) additional instances of rape/sexual assault of Respondent. Basically, had WVRJA followed its own procedures and policies and conducted a thorough investigation, or simply questioned Respondent, the abuses suffered by Respondent would have likely ceased.

By way of further background, several similarly situated Plaintiffs and WVRJA personal have testified during their respective depositions that correctional officers and/or employees of the WVRJA did, in fact, control every aspect of an inmate’s life. This position is undisputed and unquestioned. This includes, but is not limited to, correctional officers taking away privileges, putting inmates in segregation and subjecting inmates to other forms of punishment.

As such, during every phase of her incarceration at SRJ, Respondent was under the control of the WVRJA. More importantly, during every phase of her SRJ incarceration Respondent believed that D.H., as a WVRJA correctional officer and her direct supervisor, could and would carry out any and all punishments he saw fit should Respondent not consent to his disgusting sexual advances. Basically, being an incapacitated inmate unable to consent to any form of sexual misconduct perpetrated by a WVRJA employee, Respondent knew and understood that she had to adhere to D.H. disgusting and demented requests for sex or she could face punishment in excess of the sentence she was already serving.

Additionally, Respondent would be remiss in stating that she experienced any sort or sexual gratification from the seventeen (17) occasions wherein she was forced to administer oral and vaginal sex upon D.H. It is clear that any and all rapes were solely for the sexual benefit of D.H., not the Respondent.

As this Honorable Court is aware, there are several dozen lawsuits pending against the WVRJA as well as WVRJA agents/employees surrounding sexual harassment, sexual assault, rape and other related allegations. In fact, there are no less than twenty (20) lawsuits surrounding similar allegations against SRJ agents/employees. Simply put, sexual misconduct by correctional officers at WVRJA facilities has become a common, rampant and systematic problem throughout West Virginia.

A very telling aspect regarding WVRJA, how it is run and its apathy towards inmates are the statements made by its Executive Director, Joe DeLong, before the West Virginia Legislature's Regional Jail Oversight Committee in November, 2012. In describing the "buddy system" that is prevalent throughout the ten (10) regional jails in his command, Mr. DeLong stated that there is a pattern of "see nothing, hear nothing, record nothing" amongst WVRJA correctional officers. Mr. DeLong also testified that in one case of suspected inmate brutality a

correctional officer agreed to covering up other officers' misconduct by stating "we were told if we all stick together and stick to the same story, they can't do anything to us." Such is the culture at the ten (10) jails operated by the WVRJA, including Southern Regional Jail.

The WVRJA malfeasance does not begin and end with correctional officers. Former Eastern Regional Jail Administrator, Lewis Barlow, has filed a lawsuit against the WVRJA in the Circuit Court of Berkeley County, West Virginia, (Civil Action No.: 13-C-68) alleging that he was wrongfully terminated for reporting suspected state and federal crimes revolving around sexual misconduct and excessive force by correctional officers at his jail. Simply put, it seems as though the systematic problem of sexual misconduct by WVRJA correctional officers and staff begins in headquarters in Charleston, West Virginia, and continues to the lowest ranking employee.

ARGUMENT

I. Standard of Review

Respondent partially accepts the Standard of Review as set forth in WVDOC's Petitioner's Brief. In regard to the Summary Judgment standard, specifically relevant are the standards of law held in cases cited by Petitioner WVRJA. In the West Virginia Supreme Court of Appeals' decision in Williams v. Precision Coil, Inc., this Honorable Court held that when there is a genuine issue of material fact, the court views the evidence in the light most favorable to the nonmoving party. 194 W.Va. 52, 459 S.E.2d 329 (1995). The Court further held in Painter v. Peavy that summary judgment is appropriate only when the nonmoving party cannot "satisfy the burden of proof by offering more than a mere 'scintilla of evidence,'" and "produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." 192 W.Va. 189, 451 S.E.2d 755 (1994). Simply put, if the nonmoving party can produce evidence that a reasonable jury could return a verdict in its favor, summary judgment should be denied. As

clearly stated above and below, Respondent has met any and all burdens concerning this standard.

In regard to qualified immunity, it is clear that the WVRJA is not asking for this Honorable Court to find that the WVRJA is entitled to qualified immunity, but rather the WVRJA is asking this Honorable Court to apply absolute immunity as any and all actions of the WVRJA could be considered administrative functions. Simply put, there is a dispute “as to the facts that underlie the immunity determination. . . .” City of St. Albans v. Botkins, 228 W.Va. 393, 719 S.E.2d 863 (2011).

II. LEGAL ANALYSIS

A. Respondent’s Federal and West Virginia Constitutional Claims.

As stated in her opening paragraph in her Complaint as well as in Count I, Respondent asserts various Federal and West Virginia Constitution violations at the hands of both D.H. and Petitioner WVRJA. Respondent seeks monetary relief from the WVRJA to the extent such damages are covered by an applicable policy of insurance. Unlike 42 U.S.C. § 1983 actions where the theory of the *respondeat superior* doctrine does not apply, no corresponding authority prohibits vicarious liability claims against the WVRJA. It is conceded, however, that no attorney fees can be recovered by Plaintiff in connection with her claims under the West Virginia Constitution in regard to Respondent WVRJA.

However, D.H. posed a threat of serious harm to women housed at SRJ and the WVRJA knew or should have known about his propensity to engage in sexual exploitation prior to the incidents forming the basis for this civil action. Further, as stated above, Petitioner WVRJA knew that allegations against D.H. concerning Respondent arose in November, 2009, and it failed to investigate the same. The WVRJA’s inaction led to an additional ten (10) or eleven (11) instances of sexual assault/rape.

Respondent seeks damages and asserts claims against the WVRJA arising from violations of her constitutional rights as a citizen of West Virginia under the West Virginia Constitution grounded in Article III, Sections 1, 2, 5, 6 and 10.

1. In violation of her right to be secure in her person and to her bodily integrity;
2. In violation of her right to due process and to her liberty interests; and
3. In violation of her right to be free from cruel and unusual punishment.

In her pleadings, Respondent asserts violations of her rights, privileges and immunities protected by the Constitution of the State of West Virginia.

In Hutchinson v. City of Huntington, 198 W. Va. 139, 479 S.E.2d 649 (1996), the West Virginia Supreme Court addressed a citizen's rights protected within Article 3 § 10 of the West Virginia Constitution. In Hutchinson, this Honorable Court stated "[t]o suggest otherwise, would make our constitutional guarantees of due process an empty illusion." Support is also found in Syllabus Point 3, Tiernan v. Charleston Area Medical Center, Inc., 203 W. Va. 135, 506 S.E.2d 578 (1998)

In Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979), application of provisions of the West Virginia Constitution and comparable provisions of the United States Constitution were examined. This Honorable Court held that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Adkins v. Leverette, 161 W. Va. 14, 239 S.E.2d 496 (1977).

The Court's attention is further directed to three Circuit Court orders regarding this issue. In Eggleton v. Clendenin, et al., Civil Action No. 05-C-710 (2006), the Honorable Paul Zakaib addressed a litigant's rights, protections and immunities under the West Virginia Constitution in the context of a civil suit seeking monetary damages. Judge James C. Stucky made a similar ruling in Houchins v. City of South Charleston, et al., Civil Action No. 03-C-1307 (2004) and in McGhee v. City of South Charleston, et al., Civil Action No. 01-C-3437 (2004).

B. Negligent Retention and Other State Law Claims.

The West Virginia Supreme Court of Appeals has recognized that negligent retention as a stand-alone tort cause of action. State ex rel. West Virginia State Police v. Taylor, 204 W. Va. 554 n. 7, 499 S.E.2d 283 (1997). Construing facts set forth above in a light most favorably to Respondent, a reasonable person may conclude that D.H. posed a threat to the female inmates housed at SRJ, that the WVRJA knew or should have known of his sexual exploitation of Respondent as it occurred approximately seventeen (17) times. However, the WVRJA negligently retained, negligently failed to intervene and negligently failed to properly supervise D.H. Stated differently, D.H.'s sexual misconduct was foreseeable by the SRJ staff and a question of foreseeability is to be determined by the trier of fact. This is further compounded by the fact that former SRJ inmate Tammy Pennington was questioned about D.H.'s sexual misconduct towards Respondent. As stated above, little, if any, inquiry or investigation occurred. Due to D.H. believing that he would not be punished, he raped the Respondent an additional ten (10) occasions after the November, 2009 meeting between D.H., Ewing, Francis and Bunting.

Such is also the case with respect to Respondent's other fact-driven, state law claims of negligent failure to supervise D.H. while he was sexually exploiting and raping Respondent, tort of sexual harassment, negligent failure to intervene on Respondent's behalf. Further, Judge Webster held that Respondent's claim of intentional infliction of emotional distress survived summary judgment.

Further, this Honorable Court has held "where a supervisor of an employer has, within the scope of employment, caused, contributed to, or acquiesced in the intentional reckless infliction of emotional distress upon an employee, that such conduct is attributed to the employer, and the employer is liable for the damages that result. Syl. Pt. 6 Travis v. Alcon Laboratories, Inc., 202 W. Va. 369, (1998).

Recently, the United States Supreme Court addressed the scope of employment issue in Milbrook v. United States, No. 11-10362, 569 U.S. _____, (2013), decided March 27, 2013. This matter revolved around sexual abuses perpetrated by a correctional officer towards and

inmate in regard to the Federal Tort Claims Act (FTCA). Not unlike the facts of this case, Kim Milbrook was a prisoner in the custody of the Federal Bureau of Prisons wherein correctional officers sexually assaulted and verbally threatened him. In reversing the Third Circuit's holding that granted the United States government summary judgment in regard to immunity from tort suits, the United States Supreme Court held as follows:

The law enforcement proviso extends to law enforcement officers' acts or omissions that arise within the scope of their employment, regardless of whether to officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.

While the Milbrook matter concerned the FTCA, its language and reasoning should be applied to this and similar matters concerning scope of employment in regard to correctional officers and their employers.

C. The WVDOC had a legal duty to protect Respondent from sexual abuse while she was incarcerated at Southern Regional Jail.

It is axiomatic that the WVRJA owed a legal duty to protect Respondent from sexual abuse while she was incarcerated at Southern Regional Jail. The WVRJA's regulations and state law prohibit a correctional officer from having any sexual contact with an incarcerated person, such as Respondent. (*See* W.Va. Code § 61-8-10).

Objectively, sexual abuse of an inmate by a prison official violates contemporary standards of decency. Schwenk v. Hartford, 204 F.3d at 1197 (9th Cir. 2000) (“[a] sexual assault on an inmate by a guard ...regardless of the gender of the guard or of the prisoner...is deeply ‘offensive to human dignity.’”).

Sexual abuse serves no penal purpose and the West Virginia Legislature has recognized that employees of The West Virginia Regional Jail and Correctional Facility Authority should refrain from engaging in sexual intercourse or sexual intrusion with inmates by making such conduct a felony. *W. Va. Code* § 61-8B-1(7).

In the context of prisoner abuse, West Virginia Supreme Court of Appeals has held that a person brutalized by State agents while in jail or prison may be entitled to bring a civil action in tort. Harrah v. Leverette, 271 S.E.2d 322 (W. Va. 1980).

In DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989), Justice Rehnquist acknowledged a long-recognized special relationship-affirmative duty with respect to a State agency obliged to protect a prisoner in situations in which the State takes a person into custody, imprisons him, and keeps him there against his will. “The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has on his freedom to act on his own behalf.” Id. at 1005.

Other courts have examined “state-created danger” cases which have held that if a State places a person in a position of danger and then fails to protect her “it is as much an active tortfeasor as if it had thrown her into a ‘snake pit.’” Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982); Bank of Illinois v. Over, 65 F.3d 76 (7th Cir. 1995).

D. Respondent WVRJA’s failure to implement annual psychological examinations of D.H. clearly violates a mandate from this Honorable Court and further bolsters Respondent’s claims of negligent training, negligent supervision and negligent retention.

On the issue of psychological examinations in regard to supervision and retention, this Honorable Court held in State of W.Va. v. Werner, 242 S.E.2d 907 (W.Va. 1978), as follows:

[A]fter-the-fact dismissal of psychologically unsuited staff persons who brutalize inmates is an inadequate way to cull unfit staff members. Reliance upon this method guarantees that a youngster will be harmed. The result is that the children are guinea pigs that test for brutal or sadistic staff members whose penchants surface with they hurt someone. We recommend pre-hiring and periodic psychological testing or other screening techniques of the keepers to identify those who may be unable to restrain violent impulses.

Two years later, in Harrah, et al., v. Leverette, 271 S.E.2d 322 (W.Va.1980), the West Virginia Supreme Court of Appeals took the issue of psychological testing a step further, stating

that correctional officers who are “psychologically unsuited for employment as guards shall not be or continue to be employed.” Leverette involved allegations of brutality by prison guards. The Court specifically referenced its language in K.W. v. Warner, supra, noting its disappointment in the lack of psychological testing of correctional officers. In order to remove all doubt, this Honorable Court announced the following judicial rule:

Our admonition has not helped, if it has been heeded. We now order psychological testing of all correctional officers before they are employed, and at least annually throughout their employment.” (Emphasis added).

While the above-referenced cases concern the West Virginia Division of Corrections, at the time of the rulings, the WVRJA was not in existence. To that end, it is safe to assume that this Honorable Court would have applied the same standard had WVRJA existed 1980.

It is undisputed that D.H. was not ordered to perform or undertake any annual psychological testing and/or examinations throughout his employ with the WVRJA. It is further undisputed that such testing and/or examinations were a condition of his various promotions during his tenure with the WVRJA.

While WVRJA may counter with the argument that psychological testing is irrelevant to its Appeal, it is misguided, at best. In regard to the qualified immunity argument concerning negligent retention and negligent training, the WVRJA’s apathy towards its inmates in failing to order such testing is blatantly obvious and goes to the heart of not only Respondent’s claim, but several dozen other similar claims.

As further addressed below, WVRJA claims that any and all WVRJA functions are administrative and discretionary. This includes proper training, proper supervision, improper/negligent retention and similar functions. Petitioner WVRJA’s failure to psychologically evaluate its employees on at least an annual basis, further proves that the WVRJA’s stance is illogical as the aforementioned evaluations are considered training and

supervision or, at the very least, related to the WVRJA's "Mission Statement" in protecting its inmates.

Additionally, as stated above, Petitioner WVRJA learned of D.H.'s sexual assaults/rapes of Respondent in November, 2009 and failed to conduct a meaningful investigation. It is undisputed that WVRJA failed to administer any psychological examinations even in light of such serious and criminal accusations. Such failure to administer an examination to determine if D.H. was violent and/or a sexual predator clearly validates Respondent's position and, most importantly, is not subject to a qualified immunity defense.

As stated repeatedly throughout this Brief, "[i]nmates incarcerated in West Virginia state prisons have a right to rehabilitation established by *W. Va. Code* § 62-13-1 and 62-13-4 (Cum.Supp. 1980), and enforceable through the substantive due process mandate of article 3, section 10 of the West Virginia Constitution." Syl. pt. 2, Cooper v. Gwinn, *W. Va.*, 298 S.E. 2d 781 (1981).

This Honorable Court has held "[w]e find after-the-fact dismissal of psychologically unsuited staff persons who brutalize inmates in an inadequate way to cull unfit staff members. Reliance upon this method guarantees that a youngster will be harmed. The result is that the children are guinea pigs that test for brutal or sadistic staff members whose penchants surface when they hurt someone. We recommend pre-hiring and periodic psychological testing or other screening techniques of the keepers to identify those who may be unable to restrain violent impulses." State of W. Va. v. Werner, et al., 242 S.E. 2d 907 (W.Va. 1978).

Whether or not this utter lack of compliance by the WVRJA of not only this Honorable Court's directive but also its own "Mission Statement" was a proximate cause of the sexual exploitation visited upon Respondent is a question to be determined by the trier-of-fact and not properly decided via Appeal or through summary judgment.

E. D.H. acted within the scope of his employment and his conduct was foreseeable.

On a related note, due to D.H. past inappropriate behavior towards Respondent on the grounds of SRJ, his actions were foreseeable. Further, D.H. was acting within the scope of his employment as he was a correctional officer on the grounds during the seventeen (17) incidents of sexual assault/rape of Respondent. As this Honorable Court has previously held, “[b]ecause the *respondeat superior* doctrine combines in its support both principles of natural justice and public policy, it should be liberally applied in favor of those who invoke it.” Zirkle, et al. v. Winkler, et al., 214 W. Va. 19; 585 S.E.2d 19; 2003 W. Va. LEXIS 58.

This Court further held that in West Virginia, “[g]enerally, an employer is held responsible for all of the acts of its agents or employees that are committed within the course and scope of their employment.” Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419, 431 (1998). “Generally the course and scope of employment includes any conduct by an officer, agent, or employee in the furtherance of the employer’s business.” Id. Additionally, the court has “generally accepted the proposition that an employer may be held liable for the conduct of an employee, even if the specific conduct is unauthorized or contrary to express orders, so long as the employee is acting within his general authority and for the benefit of the employer.” Id. Finally, “[a] master may not limit his liability to such of the conduct of his servant as is discreet and within the bounds of propriety, and avoid liability as to such conduct as is indiscreet and improper. Where a master sends forth an agent he is responsible for the acts of his agent within the apparent scope of his authority, though the agent oversteps the strict line of his duty.” Id.

In Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp. 2d 544 (E.D. Va., 2007), a Virginia Regional Jail Authority correctional officer had allegedly forced a female inmate to perform oral sex on him. The assault occurred in the inmate’s assigned cell shortly after she had exited the bathing area. Ms. Heckenlaible filed a civil complaint against the officer and the Jail Authority. Heckenlaible asserted a claim against the Jail Authority seeking to impose vicarious liability on the governmental entity.

The Virginia RJA sought summary judgment contending that the guard’s actions were outside the scope of his employment. The court denied the VRJA’s motion and concluded that

the question of whether or not the officer was acting within the scope of his employment was a jury question. Applying facts in their most favorable light to Plaintiff, the Court held that a jury could find the officer was engaged in the exercise job duties when the wrongful act occurred. The Court concluded that a jury could determine the officer was engaged in services (supervising the female inmate), a duty of his employment, and therefore the wrongful act had occurred in the course of the RJA's business.

The facts of this case are similar to those in Heckenlaible. Respondent was under the direct and personal direction of D.H. at SRJ during all the times she was sexually assaulted/raped. D.H. became aroused and initiated the sexual contact after leering at Respondent and making overtly sexual remarks. At the time of the sexual exploitation, D.H. was clothed in his uniform and was using the access and authority granted to him by his employer. Similar to the assailant in Heckenlaible, D.H. was supervising inmates, including Respondent, and used his authority to gain immediate physical proximity and isolation from other staff. D.H. used his position as a corrections officer and attendant authority to commit these wrongful acts. As this is a question of fact, a reasonable jury could conclude that when the wrongful acts occurred, D.H. was engaged in the supervision of female inmates, including Respondent. Further, a reasonable jury could find D.H. used pretext of supervision, which is a function of their employment and these wrongful acts occurred in the ordinary course of the WVRJA's official business. In each incident of rape, D.H. was actively engaged in the performance of his official duties and procured his female victim with pretense. Special circumstances related to the employment of each facilitated an intentional tort.

Respondent could not escape the outrageous conduct (sexual assault/rape) committed by D.H. because she was an inmate who was under the control of D.H. and the WVRJA since she was incarcerated at the time. However, in Alcon, plaintiff could have avoided the supervisor's outrageous behavior since he could leave and stop working for Alcon at any time.

Each time D.H. sexually assaulted and/or raped Respondent, he was:

- A. Wearing his uniform,
- B. Carrying his badge,

- C. Was on the payroll of the WVRJA,
- D. Was assigned to supervise inmates,
- E. Was acting within the scope of his employment; and,
- F. Was carrying out the business of his employer, WVRJA.

The WVRJA should have taken appropriate measures to prevent D.H.'s foreseeable sexual conduct by installing video surveillance in every part of the prison with the exception of toilets and showers. Further, conduct exhibited by D.H. could be significantly reduced by requiring female inmates be solely supervised by female correctional staff.

The California Supreme Court held in Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991), that when an **on duty** police officer who misuses his authority by raping a woman he detained, his public employer can be held vicariously liable. This does not imply that, as a matter of law, the public employer is vicariously liable when an on duty police officer commits sexual assault, but rather it is a question of fact for the jury to decide.

The court reasoned that “society has granted police officers great power and control over criminal suspects. Officers may detain such persons at gunpoint, place them in handcuffs, remove them from their residences, order them into police cars and, in some circumstances, may even use deadly force. The law permits police officers to ensure their own safety by frisking persons they have detained, thereby subjecting detainees to a form of nonconsensual touching ordinarily deemed highly offensive in our society. In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. The precise circumstances of the assault need not be anticipated, so long as the risk is one that is reasonably foreseeable.” Id. at 1349-1350.

The court in City of Los Angeles distinguishes Gambling v. Cornish, (N.D. Ill. 1977) 426 F. Supp. 1153, since “they involved sexual assaults by police officers **who were not on duty** when they committed the sexual assaults.” Id.

The court further found a “question of fact for the jury,” “[b]ased on these facts, the jury could reasonably conclude that Sergeant Schroyer was acting within the course of his employment when he sexually assaulted the plaintiff.” Id. at 1352. The court concluded that

“[o]ur society has entrusted police officers with enforcing the law and ensuring the safety of the lives and property of its members. In carrying out these important responsibilities, the police act with the authority of the state. When police officers on duty misuse that formidable power to commit sexual assaults, the public employer must be held accountable for their actions. ‘It is, after all, the state which puts the officer in the position to employ force and which benefits from its use.’ ” *Id.*

The Los Angeles Police Department and San Francisco Police Department require police officers on duty who transport a person of the opposite sex document vehicle odometer mileage and time of day before and after each trip. This policy demonstrates the foreseeability of potential sexual misconduct by an officer and is intended to serve as a deterrent. Likewise, the legislature has acknowledged the foreseeability that prison staff will sexually exploit offenders by the enactment of *W. Va. Code* § 61-8B-10.

Further evidence of the foreseeability of sexual misconduct of correctional staff and confirming the “special relationship” between Respondent and the WVRJA is found in the agency’s self-proclaimed policy of zero tolerance toward any type of sexual contact. The foreseeability of staff sexual misconduct/sexual assault in a prison setting is such as to warrant this Court’s concluding the conduct of D.H. acted “in the scope” during these events.

“Scope of employment” was addressed by Chief Judge Joseph Goodwin with respect to sexual misconduct by a counselor at The Anthony Correctional Center, a youthful offenders prison operated by the West Virginia Division of Corrections. *Yoakum v. AIG Domestic Claims Services, Inc.*, 2:08-CV-01268, S.D. W. Va., Document No. 32. Judge Goodwin held that Counselor Yoakum was acting outside of the scope of his employment when he maintained a sexual relationship with an inmate. Respondent asserts that a counselor’s authority over a female inmate is dramatically different than that of a correctional officer. This distinction is sufficiently significant so as to legally distinguish the *Yoakum* decision and render the Virginia Court’s *Heckenlaible* reasoning more applicable to Respondent’s circumstances.

As mentioned above, the United States Supreme Court also recently agreed with

Respondent's position concerning scope of employment in regard to the FTCA in the Milbrook v. U.S. decision.

Further, as addressed below, the Honorable Irene Berger, United States District Court Judge, Southern District, West Virginia, recently held that if "a jury were to so conclude and then find that [defendant] Sheppard acted within the scope of his employment, which neither party disputes, the [defendant] Greenbrier County Commission may be held liable for those acts of negligence." *Ball v. Baker*, September 18, 2012 Memorandum Order, Civil Action No.:5:2010-cv-00955. Like in this matter, the plaintiff in *Ball* was sexually abused/raped by a law enforcement officer. Simply put, issues concerning scope of employment are for the trier of fact.

F. Petitioner WVRJA is not entitled to Summary Judgment on Respondent's claims under the doctrine of Qualified Immunity.

The WVRJA has argued that Respondent's claims for negligent retention, training and supervision of D.H. should be dismissed pursuant to the doctrine of qualified immunity. Qualified immunity provides protection for government officials performing "discretionary functions" as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *See also Hess v. W.Va. Div. of Corr.*, 705 S.E.2d 105 (W.Va. 2010).

In Parkulo v. West Virginia Board of Probation and Parole, 483 S.E.2d 507 (W.Va. 1996), the Court announced the general rule that the qualified immunity, or lack thereof, of the State/State agency is usually "coterminous" with the qualified immunity, or lack thereof, of a government official whose acts or omissions give rise to a West Virginia Section 29-12-5 action.

Respondent asserts that the alleged sexual misconduct by D.H. most definitely violates "clearly established statutory or constitutional rights of which a reasonable person would have

known.” Harlow, Hess, *supra*. For this reason, D.H. does not enjoy qualified immunity in the case.

Since the issue of the WVRJA’s qualified immunity is “coterminous” with that of D.H., Respondent further asserts that the WVRJA lacks qualified immunity for the negligence claims raised by Respondent and thereby requests the Court to DENY the WVRJA’s Petition for Appeal on that ground. *See Parkulo, supra*.

The WVRJA has apparently taken the position that an analysis of the “public duty” doctrine and the “special relationship” exception are not applicable in this case, as the WVRJA has conceded that a “special relationship” indeed existed between the Respondent and the WVRJA, which gave rise to a legal duty to protect Respondent from sexual abuse at the hands of WVRJA employees. *See Benson v. Kutsch*, 380 S.E.2d 36 (W.Va. 1989). Instead, the WVRJA has asserted that the Respondent’s negligence claims against the WVRJA for negligent retention, training and supervision involve administrative functions, thereby invoking qualified immunity.

United States District Court Judge Robert C. Chambers examined the “special relationship” doctrine when he addressed the “State Created Danger Doctrine” in Sloane v. Kanawha County Sheriff’s Department, et al., 342 F. Supp. 2d 545 (2004), in the context of a Motion to Dismiss. “Under the state-created danger doctrine, state actors may held to be liable for a violation of an individual’s liberty interest in bodily integrity, even though the actual physical injury of which a plaintiff complains was the direct result of violence perpetrated by private actors.”

It is further submitted that the WVRJA mission statement also created a “special relationship” between Respondent and the WVRJA by virtue of the agency having undertaken duties to Respondent as are set forth in its Mission Statement:

The Mission of the West Virginia Regional Jail and Correctional Facility Authority is to ensure the safety of the public, staff and inmates by maintaining a

safe, secure and humane system of regional jails, and to provide incarcerated persons with the opportunities for self-improvement and rehabilitation by participating in educational programs.

Simply put, Petitioner WVRJA's own statements and creed clearly validate Respondent's position that a special relationship between she and the entity charged with her safety and well-being.

Respondent would be remiss in simply walking away from the "special relationship" line of West Virginia Supreme Court of Appeal cases because this Honorable Court found not only that a "special relationship" existed in a variety of factual patterns, but also impliedly that administrative functions were not involved in those cases as well.

Throughout the discovery phase of this lawsuit, Respondent has presented evidence which creates a genuine issue material fact as to whether the WVRJA owed her a special duty. The WVRJA's promises, by and through its duty and its own "Mission Statement," as well as its affirmative duty to intervene on Respondent's behalf, prior knowledge of D.H.'s sexual misconduct towards Respondent require that the question of a special duty owed Respondent be resolved by the trier of fact. Further, Respondent has presented evidence that creates a genuine issue of material fact that Respondent justifiably relied on the aforementioned duty undertaken by the WVRJA. Therefore, summary judgment on these grounds was not warranted. Sawyer v. Asbury, et al., 2010-CV-1256, 2012 U.S. Dist. LEXIS 69428, Memorandum and Order, April 12, 2012.

The four requirements for the application of the "special relationship" exception to *W. Va. Code* § 12-12-5 cases are as follows:

- (1) An assumption by the state 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 state governmental entity's agents that inaction could lead to harm;

(3) some form of direct contact between the state governmental entity's agents and the injured party; and

(4) that party's justifiable reliance on the state governmental entity's affirmative undertaking.

Syllabus Point 12, Parkulo, supra. "In cases arising under *W. Va. Code* § 29-12-5, the question of whether a special duty arises to protect an individual from a State governmental entity's negligence is ordinarily a question of fact for the trier of the facts." Syllabus Point 11, Parkulo. Respondent's factual allegations against the WVRJA and her justifiable reliance on the WVRJA's affirmative duty to act in good faith to see to her safety satisfy these 4 requirements sufficiently to deny the WVRJA's Motion for Summary Judgment as well as this pending Appeal.

Further, in Wolfe v. The City of Wheeling, 387 S.E.2d 307 (W.Va. 1989), a homeowner filed suit after his home burnt to the ground because the City of Wheeling Fire Department refused to respond to his numerous calls for assistance. It turned out that the homeowner actually resided outside of city limits, but Wheeling had billed him and the homeowner had paid a fire service fee for several years before this fire destroyed his home. The circuit court denied the homeowner's motion for summary judgment in regard to his breach of contract and negligence claims against the City. It did not determine that failure to respond to the repeated calls for assistance was an "administrative function."

In Randall v. Fairmont City Police Department, 412 S.E.2d 737 (W.Va. 1991) a murder victim's estate filed suit against the Fairmont Police Department after the decedent drove to the police department, as she was being stalked by a homicidal maniac, blasted her horn for assistance, and was subsequently slain without police assistance. The circuit court granted the Fairmont Police Department's motion to dismiss based upon a finding that there was no "special relationship" between the victim and the Fairmont Police Department, and, therefore, no legal

duty owed. However, the Court reversed the circuit court's ruling on the ground that a factual question existed as to whether the victim's repeated calls for police protection before her murder created a "special relationship." Again, the Court did not find this to be an administrative function.

One of the most recent cases in which the Court discussed the application of qualified immunity of a state agency in a negligence action is J.H. v. West Virginia Division of Rehabilitation Services, 680 S.E.2d 392 (W.Va. 2009). In that case, a resident at a DHHR rehabilitation center alleged that he was molested by another resident. The plaintiff asserted that the assailant was under investigation for molesting another resident, but was nevertheless allowed private access to his bedroom. The resident alleged that the DHHR was negligent in properly supervising the assailant and in providing security for him and the other center residents. The circuit court granted the DHHR's motion to dismiss, based upon a finding that a "special relationship" between the victim and the DHHR did not exist. On appeal, the Court reversed the circuit court, and instead determined that "[i]t was for a jury to determine, under appropriate instruction of law, whether a special duty arose to protect the resident from the DHHR's alleged negligence." Again, this Honorable Court did not determine that an "administrative function" was involved.

Petitioner/Defendants in this and similar lawsuits usually rely on Hess v. West Virginia Division of Corrections, 705 S.E.2d 125 (W.Va. 2010), in support of their qualified immunity argument. The facts in Hess are completely different from those in the present case. In Hess, an inmate sued for slipping and falling in the shower. The record before the court was inadequate to make a factual determination as to whether "an administrative function involving the **determination** of fundamental governmental policy" was involved. (Emphasis added).

In this case, we are not talking about the “determination” of a “fundamental governmental policy” for a slip and fall in the shower. Instead, we are talking about systematic and wholesale rape of a female prison population, over a prolonged period of time at SRJ over which WVRJA has dominion. Specifically, we are talking about the manner in which the WVRJA administers its policies to prevent this from occurring, pitiful and lackluster as it was, and, quite frankly, still is. Respondent’s case on this point is based solely on circumstantial evidence as D.H. has not, and likely will not, admit to raping the Respondent. An admission would bring certain termination, prosecution and likely incarceration. Further, several WVRJA officials have testified that its current and past policies to prevent prison rape would work if the WVRJA adhered to it and enforced said policies.

Instead of facing the problem head on with zeal and effectiveness, the WVRJA is covering up its mess. Regrettably, the WVRJA has turned a blind eye to the very real probability that its male employees, including its inmates’ direct supervisors such as D.H., are raping and sexually assaulting WVRJA inmates, *en masse*, with few, if any, consequences. The Honorable Joseph R. Goodwin, Chief Judge of Southern District, denied Summary Judgment and entered a Memorandum and Order in *Woods v. Town of Danville*, 2:09-cv-366 (S.D. W.Va.) (May 14, 2010). The Court opined in page 16 “[t]he duty with respect to hiring and retention increases as the risk to third persons associated with a particular job increase.” The Court quoted this Honorable Court’s ruling in McCormick v. W.Va. Department of Public Safety, 503 S.E.2d 502 (1998). Judge Goodwin’s Order denied a qualified immunity defense on the following tort claims each of which were asserted by the Plaintiff in that matter:

- A. Negligent Supervision;
- B. Negligent Hiring; and
- C. Negligent Retention

Petitioner WVRJA mistakenly relies on the Supreme Court’s opinion in Clark v. Dunn, 195 W.Va. 272, 465 S.E.2d 374 (1995), which is distinguishable. In that case, DNR Officer

Dunn had, as a matter of law, made a discretionary judgment while engaging men he believed were poaching when a firearm accidentally discharged. Logan County Circuit Court Judge Roger Perry's decision, upon which the Petitioner WVDOC relies, is irrelevant to these circumstances, as it arose from an alleged wrongful termination.

In summary, Respondent requests that this Honorable Court reject the WVRJA's qualified immunity argument on the ground that implementing, hiring, training, retaining and supervising its employees, including its highest ranking employees, to prevent wholesale rape and sexual abuse of a female jail population is not an "administrative function involving the **determination** of fundamental governmental policy." Moreover, summary judgment on the issue of negligent training, retention and supervision was not appropriate in this case because Respondent has raised numerous questions of fact which bear on this issue, including, but not limited to, the following: (1) Respondent was an inmate at a WVRJA facility, and her safety and care were the responsibility of the WVRJA and its staff; (2) D.H. was a correctional officer of SRJ and Respondent's direct supervisor when he sexually assaulted/raped Respondent on no less than seventeen (17) occasions, in violation of said legal duty to protect Respondent from such misconduct; (3) the WVRJA had a system in place to prevent its correctional officers from sexually assaulting inmates, but did not properly implement and enforce said policies to prevent inmates, such as Respondent, from being sexually abused; (4) the WVRJA failed to properly train, supervise and negligently retained D.H., which ultimately resulted in multiple sexual assaults against Respondent and at least one additional inmate; (5) D.H. had direct access to Respondent and he exercised his authority to isolate and sexually abuse Respondent on seventeen (17) occasions; (6) the WVRJA was aware of its heightened statutory and regulatory duty to protect Respondent, an incarcerated person; (7) the WVRJA was aware of the very real probability that its male correctional officers would, if given any reasonable opportunity,

sexually abuse incarcerated persons, as evidenced by numerous other lawsuits, and human nature to take advantage when in complete control; (8) the WVRJA did not implement mandatory annual psychological testing of its employees, per the West Virginia Supreme Court of Appeals mandate in the Leverette case, which is a 1980 case; (9) the WVRJA failed to investigate D.H.'s actions towards Respondent when it became aware of the same in November, 2009. This inaction led to an additional ten (10) or eleven (11) sexual assaults/rapes; and (10) the WVRJA knew or should have known that its failure to properly train, supervise, evaluate and improperly retain its employees, including D.H., could very likely lead to sexual assaults against inmates, including Respondent.

Further, noticeably absent in WVRJA's Petitioner's Brief were the plethora of other similar cases wherein both Kanawha County Circuit Court Judges as well as The Honorable John T. Copenhaver, Jr., United States District Court Judge and The Honorable Irene Berger, United States District Court Judge, ruled against the very arguments which the WVRJA made in its Motion for Summary Judgment as well as in its Appeal Brief in this matter.²

United States District Court Judge John T. Copenhaver, Jr., addressed the qualified immunity issue in cases in which the acts of an entity and an individual were far less egregious than the facts surrounding this case. In the three (3) cases before Judge Copenhaver, a legal entity defendant moved for summary judgment citing qualified immunity as a defense. These three companion cases are styled *Jeananne Gilco v. Logan County Commission, Logan County Home Confinement Department, John Reed and John Does I-V*, Civil Action No.: 2:11-0032; *Rebecca Whitt v. Logan County Commission, Logan County Home Confinement Department, John Reed and John Does I-V*, Civil Action No.: 2:11-0033; *April Chafin v. Logan County*

² Respondent has included copies of the foregoing Orders and other documents as exhibits to her Response to WVRJA's Motion for Summary Judgment.

Commission, Logan County Home Confinement Department, John Reed and John Does I-V,
Civil Action No.: 2:11-0034.

In these three (3) cases, the plaintiffs were on home confinement by and through the Logan County Commission (LCC) and the Logan County Home Confinement Department (LCHC). These three females all had interactions with a LCHC officer, John Reed. All three plaintiffs claim that Defendant John Reed ordered each of them to perform some form of sexual act or acts in order from having the terms and conditions of their respective home confinement violated. These sexual acts occurred at various places including a vehicle in a parking garage, John Reed's office and at one of the plaintiff's homes.

At the conclusion of the discovery process, Defendants LCC and LCHC moved for summary judgment on various legal theories. Among them was qualified immunity in regard to negligent hiring, training and supervision. While Judge Copenhaver granted summary judgment in regard to negligent hiring and supervision, he denied those defendants' claims that qualified immunity protects them from negligently training John Reed.

When addressing the facts in those cases, it is obvious why Judge Copenhaver granted the dismissal of the negligent hiring and supervision claims of the plaintiffs. Unlike the scenario in this matter, in those cases there was not a history of Reed mistreating his home confinement inmates. Further, Reed and the plaintiffs had far more autonomy than inmates at a WVDOC facility by virtue of not being in a maximum-security facility twenty-four hours per day, seven days per week. Relatedly, Reed had far less power over the three plaintiffs in those cases than D.H. had over Respondent in this matter. Also, Reed was not to be supervised as keenly as D.H. was at SRJ – his duties included driving around Logan County checking on home confinement inmates. Finally, unlike Reed, D.H. had undisputed absolute control over Respondent during her incarceration at SRJ and, in fact, was Respondent's direct supervisor. A clear distinction

between the two fact scenarios explains Judge Copenhaver's ruling on negligent hiring and supervision.

Nevertheless and as stated above, Judge Copenhaver denied defendants LCC and LCHC's motion for summary judgment in regard to negligent training under the doctrine of qualified immunity. Simply put, he did not agree that qualified immunity was a vehicle in which those defendants could implement to escape liability to the plaintiffs.

In three (3) cases whose fact patterns are similar to the facts in this matter, Judge Copenhaver did deny a defendant's motion for summary judgment in regard to negligent retention and supervision and held that the defendant was not entitled to qualified immunity. In *Chasity Hager, Delilah Toney and Tonya Sloan v. Brent Robinson and the West Virginia Regional Jail and Correctional Facility Authority*, Civil Action No.: 2:03-0094, by and through his February 1, 2005 Memorandum Order, Judge Copenhaver agreed with the plaintiffs' contention that qualified immunity does not exist in "jail rape" cases.

As stated above, the facts in the *Hager, et al. v. Brent Robinson, WVRJA, et al.*, matter are very similar to those in this matter. Like D.H. at SRJ, Brent Robinson was a correctional officer at South Western Regional Jail in Holden, West Virginia. While he had a history of being somewhat violent towards inmates, his actions – in both number and severity -- paled in comparison to those of D.H. Robinson was neither terminated nor subject to enhanced supervision after several inmates complained of his tendencies prior to the plaintiffs' allegations. In relation to this appeal, D.H. was also neither investigated, terminated nor subject to enhanced supervision after it was reported that he was sexually assaulting/raping Respondent. Because of the lack of enhanced supervision and negligent retention, Robinson was able to sexually abuse and/or rape the three plaintiffs. Again, Judge Copenhaver did not believe that qualified immunity was proper and denied defendant WVRJA's motion for summary judgment.

Judge Copenhaver is not the only trial court judge to disagree with various defendants concerning qualified immunity. Several Kanawha County Circuit Court judges have denied summary judgment for the same reasons held by Judge Copenhaver. In fact, as addressed below, this Honorable Court has held the same.

In *Ashley Campbell v. Billy Jack and The West Virginia Division of Corrections*, Civil Action No.: 09-C-1739, The Honorable Louis Bloom not only relied on Judge Copenhaver's *Hager* ruling, but also mentioned the ruling during the Hearing on WVDOC's Motion for Summary Judgment. By way of background, plaintiff Campbell was incarcerated at WVDOC-run Anthony Correctional Center when she was sexually abused/assaulted by defendant Billy Jack, a WVDOC correctional officer. Defendant Jack had a history of abuses towards inmates. However, like Robinson in the *Hager, et al.*, matters, his abuses – in both number and severity – were innocuous compared to those of D.H. in this matter.

In the *Campbell* case, Judge Bloom stated “[l]et’s talk about the immunity first, qualified immunity. I find, similarly to the reasons asserted by Judge Copenhaver [in reference to the *Hager* Memorandum Order], that it does not apply in this case. I think there is likely to be sufficient evidence of prior knowledge to do that, . . . To that end, Judge Bloom’s ruling is the same as Judge Copenhaver – Defendant WVDOC is **not** entitled to qualified immunity.

Several other Kanawha County Circuit Court judges have also followed and/or relied on Judge Copenhaver's *Hager* ruling. In *Bailey/Cline v. WVDOC, Yoakum*, Civil Action No.: 07-C-1877, Judge Stucky held that “[t]he defense of qualified immunity simply does not apply to the allegations in the instant Complaint.” Judge Stucky further elaborated on the reasons why defendant WVDOC was not entitled to qualified immunity in that Order. His reasoning shadows that of Judge Copenhaver and, quite frankly, was based on the same arguments Respondent

makes in this matter. To that end, Judge Stucky denied WVDOC's Motion to Dismiss in regard to qualified immunity.

In *McKown v. Masters*, WVDOC, Civil Action No.: 08-C-1337, plaintiff Ryan McKown alleges she was vaginally raped by defendant Masters on one occasion while incarcerated at ACC. As stated above, Masters had a history of abusing inmates. However, again, the WVDOC turned a blind eye to his egregious behavior. Plaintiff McKown alleged that the negligence of WVDOC led to her being raped by defendant Masters.

In his February 23, 2012 Order, Judge Stucky held that defendant WVDOC was not entitled to qualified immunity in regard to plaintiff's claims of negligent training, retention and supervision. Amongst other findings, Judge Stucky held that "the Court does not accept the WVDOC's contention that mere "administrative functions" are involved in this case. The Court instead believes that the WVDOC has asserted a qualified immunity defense when it is really asking the Court to apply **absolute immunity**, as it is difficult to imagine a factual scenario in which immunity would not attach, as long as the WVDOC could lament budget cuts, staffing concerns, etc., as it has done in this case."

Judge Stucky further held that "the WVDOC cannot shield itself from liability for what appears to be a pattern of not protecting its female population from sexual misconduct at the hands of its employees who have absolute control over the inmates by virtue of an inherently unequal power dynamic. The high number of lawsuits, the similarity of allegations, the volume of WVDOC employees involved, and the apparent lack of investigation and apathy by the WVDOC presents a factual basis and a legal basis for plaintiff's negligence claims."

Like Respondent has addressed above, Judge Stucky further relied on J.H. v. West Virginia Division of Rehabilitation Services, 680 S.E.2d 392 (W.Va. 2009), when addressing the "special relationship" between a victim and a legal entity as well as the "administrative function"

issue in regard to duties performed by the legal entity as well as duties owed to individuals in that legal entity's charge.

The Honorable Jennifer Bailey has also agreed with plaintiffs in regard to the issue of qualified immunity. In *Patricia Kipp v. Darrell Krinke, WVDOC, et al.*, Civil Action No.: 09-C-2121, the plaintiff was incarcerated at ACC. She alleges she was sexually harassed and sexually assaulted by defendant Krinke. Like the cases mentioned above, defendant Krinke's actions were far less egregious and far less frequent than those of D.H. in this matter.

Defendant WVDOC moved for summary judgment on plaintiff Kipp's negligence claims claiming that "the doctrine of qualified immunity shields the WVDOC from liability for these negligence claims because the conduct which gives rise to the claims of negligence involves discretionary administrative decisions made by WVDOC management that did not violated clearly established law.

In denying WVDOC's motion for summary judgment, Judge Bailey held that "a genuine question of fact exists as to the Plaintiff's theories of negligent training, supervision, and retention" and that whether the WVDOC's actions concerning "discretionary administrative decisions" were an issue for the trier of fact. Further, Judge Bailey held that "the WVDOC appears to ask the Court to apply **absolute immunity** as it is difficult to imagine a factual scenario in which immunity would not attach. The Court concludes that the WVDOC cannot shield itself from liability for what appears to be a pattern of not protecting the female inmate population from sexual misconduct at the hands of its employees who have absolute control of those inmates by virtue of an inherently unequal power dynamic."

In *Beverly Carson v. Masters, WVDOC*, Civil Action No.: 08-C-1334, Judge Bailey again ruled in favor of the plaintiff in regard to her negligence claims/qualified immunity. Ms. Carson was incarcerated at ACC when she was allegedly orally raped on 40 to 50 occasions by

defendant Masters. In fact, defendant Masters admitted to one oral rape after confronted with a t-shirt with his semen on it. He pled guilty to a felony pursuant to West Virginia Code Section 61-8B-10 and is a registered sex offender.

During the August 8, 2011 Hearing on its motion for summary judgment, WVDOC moved to dismiss plaintiff's negligence claims pursuant to the doctrine of qualified immunity. Judge Bailey held that "I am going to deny the motions on the training, the retention and supervision. I think they are questions of fact in these negligence claims for the jury in this case and these sets of circumstances."

As this Honorable Court is well aware, a defendant is permitted to bring to this Honorable Court's attention the issue of having qualified immunity at any phase of litigation. In *Danielle Miller v. C.O. Taylor, The West Virginia Regional Jail Authority, et al.*, Civil Action No.: 11-C-1132, defendant Taylor, a correctional officer at WVRJA-run Potomac Highlands Regional Jail, allegedly ordered plaintiff Miller and another inmate to engage in sexual relations while he masturbated. As evident by the allegations of the *Miller* matter, D.H.'s acts towards Respondent in this matter were far more disgusting than those in the *Miller* case.

Defendant West Virginia Regional Jail Authority (WVRJA) filed a Motion to Dismiss on two grounds – vicarious liability and qualified immunity. After reviewing the Motion to Dismiss as well as plaintiff Miller's Response to the Motion to Dismiss, Judge Tod Kaufman denied WVRJA's Motion in total.

There are additional lawsuits wherein the plaintiffs were sexually harassed, sexually abused, sexually assaulted and/or raped by correctional officers in the employ of the WVRJA. Both the plaintiffs had negligent hiring, negligent training, negligent supervision and negligent retention claims against the WVRJA. Further, both individual correctional officers, like D.H. in

this matter, had a history of sexually abusing and/or raping female inmates at Southern Regional Jail.

Likewise, the WVRJA filed a Motion to Dismiss claiming it enjoys qualified immunity in the matter of *Danielle Thornton v. David Stoner, WVRJA, et al.*, Civil Action No.: 10-C-2142. Judge Jennifer Bailey questioned WVRJA's counsel when the WVRJA could be liable to plaintiff Thornton, if at all. Counsel for WVRJA stated that it could be held liable if a WVRJA correctional officer came into plaintiff's cell and beat her with a flashlight. When Judge Bailey asked of WVRJA's counsel what the difference would be if instead of a beating received from a flashlight, the correctional officer forced plaintiff to administer oral sex, WVRJA's counsel could not distinguish. Judge Bailey ultimately denied the WVRJA's Motion to Dismiss and held that plaintiff Thornton's negligence claims against WVRJA are a factual issue for the jury.

Further, in regard to immunity pursuant to West Virginia Code § 29-12A-1, et seq., The West Virginia Governmental Tort Claims and Insurance Reform Act, the Honorable Irene Berger, United States District Court Judge, Southern District, West Virginia, recently denied summary judgment concerning the same immunity argument Petitioner WVRJA is making in its appeal. *Ball v. Baker*, Civil Action No.:5:2010-cv-00955. In her September 18, 2012 Memorandum Order, Judge Berger held that "immunity is only appropriate 'when the plaintiff has not demonstrated any genuine issues of material fact which must be resolved to determine whether the defendant's actions were reasonable under clearly established law.'" *Id.*, relying on *Kelly v. City of Williamson*, 655 S.E.2d 528, 534 (W.Va. 2007). Judge Berger further held that if "a jury were to so conclude and then find that [defendant] Sheppard acted within the scope of his employment, which neither party disputes, the [defendant] Greenbrier County Commission may be held liable for those acts of negligence." Simply put, issues concerning scope of employment are for the trier of fact. Finally, Judge Berger held that "a jury could find, under the

facts of this case, that [defendant] Sheppard's actions in performing a background check on [defendant] Baker, and not ensuring that Baker and others had access to training, policy and procedures, were 'in bad faith, or in a wanton or reckless manner.' Such a finding would eradicate any immunity afforded to [defendant] Sheppard by Section 29-12A-5(b).

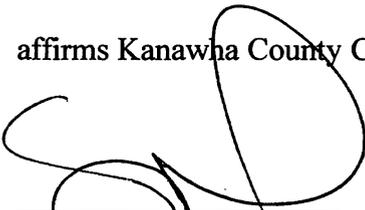
Respondent argues that failing to investigate D.H.'s actions towards her after learning of the same in November, 2009, was in bad faith or, at least, in a wanton or reckless manner. Such inaction enabled D.H. to perpetrate an additional ten to eleven counts of sexual assault/rape. To that end, no immunity is afforded to Petitioner WVRJA.

CONCLUSION

When reviewing the facts of this matter with an analysis of various case law, testimony and discovery responses of the parties, documents provided by both parties and other exhibits supplied by the parties as well as the rulings delineated above, it is quite clear that Petitioner WVRJA's Appeal should be **DENIED**, in total. Petitioner WVRJA is not entitled to qualified immunity as it is seeking absolute immunity from any and all actions or inactions of it and its agents/employees.

WHEREFORE, the Respondent, A.B., prays that this Honorable Court DENY the Petitioner West Virginia Regional Jail and Correctional Facility Authority's Appeal, in total, and affirms Kanawha County Circuit Court Judge Carrie Webster's ruling.

A.B.
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No. 13-0037

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

Case No. 13-0037

A.B.,

Respondent.

CERTIFICATE OF SERVICE

I certify that I have caused to be placed in first class mail, postage prepaid, a copy of **CORRECTED RESPONDENT'S AMENDED BRIEF** in this matter to counsel of record listed below on this the 30th day of September, 2013:

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