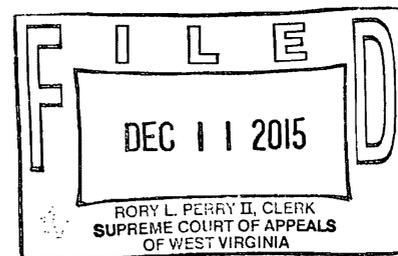


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON**

Docket No. 15-0711



**DAVID KING, AS ADMINISTRATOR OF THE
ESTATE OF WILMA ANN KING, DECEASED**

Respondent; plaintiff below,

vs.

**THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF MOTOR VEHICLES,**

Petitioner; defendant below.

RESPONDENT'S BRIEF

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I.

STATEMENT OF THE CASE

A. Introduction.

This action arises out of a motor vehicle accident in which David King's mother, Wilma Ann King ("Mrs. King"), was fatally injured (Appendix Record ["App.,"] 201-02). Doris Fay Peyton ("Ms. Peyton"), was the driver of the vehicle that collided with Mrs. King's vehicle. Mr. King seeks damages from The West Virginia Department of Transportation, Division of Motor Vehicles ("DMV") for the death of his mother, Mrs. King (App. 7-13). Mr. King alleges that DMV negligently allowed Ms. Peyton to have a drivers' license even though she had an extensive history of seizures, cognitive deficits and blackouts.

DMV moved for summary judgment against Mr. King ("the Motion")(App. 32-45), on grounds of qualified immunity. The court below denied the Motion (App. 641-44). DMV then sought an immediate appeal on the following grounds:

"A circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Syl. Pt. 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009).

Syl. pt. 1, *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011). This appeal then followed.

B. *Ms. Peyton and the Accident.*

At the time of the accident, Mrs. King was riding in an automobile being driven by her daughter, Vicky Stickler (“Ms. Stickler”), on U.S. Route 60 in Barboursville, Cabell County, West Virginia (Amended Complaint ¶ 6)(App. 8). Ms. Peyton was driving south on Merritts Creek Road. Ms. Peyton then drove straight into the intersection of Merritts Creek Road with Route 60 against a red light. In so doing, Ms. Peyton struck Ms. Strickler’s vehicle (Amended Complaint ¶ 7)(App. 8-9). The traffic accident crash report described the condition of Ms. Peyton as “unknown medical.” Mrs. King suffered serious injuries, pain and suffering as a result of the accident (Amended Complaint ¶ 9)(App. 9). In fact, Mrs. King later died of her injuries (Amended Complaint ¶ 18)(App. 11).

C. *Ms. Peyton, the DMV and Mrs. King.*

Ms. Peyton has had a history of multiple seizure incidents yearly since 1989 (Amended Complaint ¶ 29)(App. 13). Indeed, she has had a history of generalized seizures since 1972, when she was eighteen and partial complex seizures with loss of control of her environment since 1979, when she was 25. Since June 1998, Ijaz Ahmad, M.D. has been treating Ms. Peyton for her seizure disorder (Amended Complaint ¶ 28)(App. 13). Dr. Ahmad’s medical records document frequent seizures and loss of contact with environment.

In 2005, Ms. Peyton had no valid drivers license but sought to have her driving privileges restored even though she had not driven for years. DMV asked her for a medical report from a medical doctor. Ms. Peyton failed to supply the report; hence on

March 19, 2007, her driving privileges were suspended for medical reasons for a two year period (Amended Complaint ¶ 30) (App. 13).

In April 2008, Dr. Ahmad referred Ms. Peyton to St. Mary's Medical Center for a driving assessment. The report noted that Ms. Peyton "did have some cognitive deficits in the area of language and memory." In the end the report recommended a "not to resume driving" prescription (Amended Complaint ¶ 31)(App. 13), (St. Mary's Medical Center) (App. 435).

In October 2008, Dr. Ahmad submitted a report indicating that Ms. Peyton had epileptic blackout spells that caused her to lose awareness. He also checked the DMV report form "yes" and "no" that Ms. Peyton had blackout spells unrelated to epilepsy or diabetes. Dr. Ahmad did not state that it was safe for Ms. Peyton to drive. He failed to answer the question of whether it was safe for Ms. Peyton to drive (DMV Form) (App. 241). On January 6, 2009 Ms. Peyton took a DMV driving test. She failed. Her performance was listed as "poor" and the report included the following comments:

Reacts slowly; not sure [of] when to go; questions herself.
If she was on the road by herself, I believe she would be a
hazard to herself and others.

(Amended Complaint ¶ 33)(App. 14). Ms. Peyton's driving privileges were thus suspended by DMV on January 13, 2009 (Amended Complaint ¶ 34)(App. 14).¹

On February 11, 2009, Ms. Peyton again took the driving test but this time she passed it. DMV sent a letter to Ms. Peyton requesting a complete medical report form,

¹ As DMV acknowledges, Ms. Peyton had a "petit mall seizure" while in a doctor's office in June 2009 (Motion p. 4 n.3)(App. 36).

to be submitted by October 2009. A Dr. Tae Lee filled out and submitted the requested form on or about October 7, 2009; it indicated that Ms. Peyton could drive but recommended periodic medical evaluations (Amended Complaint ¶ 34)(App. 14).

On that basis DMV, per Director David Bolyard, approved Ms. Peyton's driver license on October 29, 2009 but with instructions to her to submit an updated complete medical report form by October 2010, or one year later. DMV did not, however, submit Ms. Peyton's file to the Medical Advisory Board for further review pursuant to W.Va. Code §§ 17B-2-3, 7a, and the relevant rules and regulations promulgated thereunder (Amended Complaint ¶ 36)(App. 14).

Dr. Ahmad subsequently submitted a medical report dated June 25, 2010; it recommended that Ms. Peyton receive a medical evaluation in one year for driving. Dr. Ahmad did state in that report that Ms. Peyton could safely operate a motor vehicle but that a "final decision was [was] up to the [DMV]" (Amended Complaint ¶ 37)(App. 14-15). On October 5, 2010 DMV medically approved the issuance of a license to Ms. Peyton. The agency failed to request a follow-up medical report in one year notwithstanding Dr. Ahmad's recommendation for periodic monitoring (Amended Complaint ¶ 38)(App. 15).² In addition, DMV failed to submit Ms. Peyton's medical file to the Medical Advisory Board for further review (Amended Complaint ¶ 39)(App. 15).

Ms. Peyton admitted to being involved in a motor vehicle accident on March 30, 2012 as the result of a seizure while she was driving (Amended Complaint ¶ 40). What is more, Ms. Peyton admitted to being involved in another motor vehicle accident on

² Dr. Ahmad characterized Ms. Peyton's blackout spells as "uncontrolled" in that October 2010 medical report. (DMV Form)(App. 299).

May 30, 2012, again as the result of a seizure while she was driving (Amended Complaint ¶ 41)(App. 15). Additionally, Ms. Peyton's medical records from St. Mary's Hospital reflect an abnormal EEG after her single car accident of 5/30/2012. An abnormal EEG is consistent with seizure activity in the brain.

II.

SUMMARY OF ARGUMENT

Both DMV and Mr. King agree on the issue at stake in this proceeding. As DMV stated in quoting Mr. King's characterization of that issue:

"[T]his dispute turns on the issue of whether, after Ms. Peyton's license was suspended on March 14, 2007 and a reinstated driver's license issued on February 17, 2009, DMV was required by law to refer her medical file to the Medical Advisory Board for its review before her license could be reinstated."

(Petitioner's Brief p. 8, quoting App. 180). The circuit court resolved the issue as follows:

"In this case the Division's regulations in effect at the time Ms. Peyton's license was reinstated in February 2009 W. Va. Code R. §91-5-3 (2006), *required* the Division to refer her medical file to the Medical Advisory Board for its review and recommendation before her license could be reinstated. *This was not done.*"

(Petitioner's Brief p. 8, quoting App. 642-43)(first emphasis by the court; second emphasis supplied). The circuit court drew the following conclusion :

[T]he act of referring a licensee's medical records to the Division's Advisory Board was a nondiscretionary duty and therefore ...the Division is not entitled to qualified immunity in this case.

(App. 643).

This case is a relatively simple one, therefore. The issue is whether DMV was required by law to refer Ms. Peyton's license to the Medical Review Board. The law in effect at that time mandatorily required such a referral. The obligation was nondiscretionary. The referral was not made; hence, DMV is not entitled to qualified immunity. The Order below should therefore be approved in this proceeding.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent requests that the Court schedule an oral argument in this case. He believes that oral argument will aid the Court in the deliberative and decisional process.

IV.

ARGUMENT

A. *Standard Of Review*

The standards for sustaining a motion for summary judgment like the one at hand are well-settled under West Virginia law. As a recent decision stated:

Summary judgment is mandated when the record demonstrates that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *See Powderidge Unit Owners Ass'n v. Highland Props. Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

As this Court explained in syllabus points one and two of *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995),

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be

tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

194 W.Va. at 56, 459 S.E.2d at 333.

Boggess v. City of Charleston, ___ W.Va. ___, 765 S.E.2d 255, 260 (2014)(circuit court entry of summary judgment affirmed). *See also Dickens v. Sahley Realty Co., Inc.*, 230 W.Va. 150, 756 S.E.2d 484, 489 (2014)(same)(circuit court entry of summary judgment affirmed).

The standard for reviewing a grant of summary judgment is well-settled in this Court:

. "A circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Syl. pt. 1, *Stephens v. Rakes*, 2015 W.Va. Lexis 809 (W.Va., filed June 16, 2015)(circuit court orders affirmed). Here, all the prerequisites for the entry of summary judgment as set out in *Stephens*, *Boggess* and like decisions are satisfied. The Court should therefore affirm the Order as entered below.

B. Negligence in West Virginia.

Mr. King alleges that DMV was negligent in its decisional handling of Ms. Peyton's right to operate a motor vehicle in this state. For that reason, a definition of the doctrine of negligence in this State is useful:

In West Virginia, negligence is "always determined by assessing whether the actor exercised 'reasonable care' under the facts and circumstance of the case, with reasonable care being that level of care a person of ordinary prudence would take in like circumstances." *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197, 205 (W.Va. 2004). "A long standing premise of the law of [West Virginia] is that negligence is the violation of the duty of care under the given circumstances. It is not absolute, but is always relative to some circumstances of time, place, manner, or person." *Setser v. Browning*, 214 W. Va. 504, 590 S.E.2d 697, 701 (W.Va. 2003).

Audry v. Miller, 2015 U.S. Dist. Lexis 28033 at *14 to *15 (N.D.W.Va., filed January 21, 2015) (applying West Virginia law).

C. Qualified Immunity in West Virginia.

The Supreme Court of Appeals recently restated the law of qualified immunity, as follows:

To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W.*

Va. Bd. of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996).

Syl. Pt. 10, *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, ___ W.Va. ___, 766 S.E.2d 751 (2014). *See also West Virginia Division of Corrections v. Jividen*, 2015 W.Va. Lexis 268 at *5 to *6 (Mem. Op., filed April 10, 2015)(same).

In addition to that definition, the court in *A.B.* added the additional provisos:

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive . . .

Syl. Pt. 11, *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, *supra*. *See also R.Q. v. West Virginia Division of Corrections*, 2015 W.Va. Lexis 517 at *9 to *10 (Mem. Op., filed April 10, 2015). *See generally, Smith v. County of Los Angeles*, 2015 U.S. Lexis 65473 at *5 (C.D. Cal, filed May 19, 2015)(recent statement of rules from perspective of United States Supreme Court authority).

D. DMV Cannot Claim Qualified Immunity Because it Failed to Perform a Mandatory Act.

1. Introduction.

DMV seeks to avoid liability in this case on the ground that it “is entitled to qualified immunity available to state agencies in negligence suits involving discretionary decisions” (DMV Brief p. 5). The rules that flow from that principle are well-settled. If the

acts of omissions fall within the category of discretionary duties, DMV is entitled to qualified immunity follows. If on the other hand the acts or omissions fall within the category of nondiscretionary or mandatory duties, DMV is not entitled to qualified immunity. See *West Virginia Division of Corrections v. Jividen*, 2015 W.Va. Lexis 268 at *5 to *8 (Mem. Op., filed April 10, 2015); *R.Q. v. West Virginia Division of Corrections*, *supra*, 2015 W.Va. Lexis 517 at *9 to *10.

The test for finding a nondiscretionary or mandatory duty was usefully described by a local federal court, as follows:

[T]he Court must consider the nature of the conduct and determine whether it involves "an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). Government conduct does not involve an element of judgment or choice and is not discretionary if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive." *Id.* at 322 (internal citations and quotations omitted).

Miller v. SFF Hazelton, 2015 U.S. Dist. Lexis 28033 at *13 to *14 (N.D.W.Va., filed January 21, 2015).

DMV asserts that it is Mr. King's burden to establish the petitioner's duty to have Ms. Peyton's medical file reviewed by the Medical Advisory Board (DMV Brief p. 9). Of course, Mr. King did just that. In fact, it is the relevant statutory and regulatory scheme that accomplished that task for him. DMV attempts to avoid that result by sketching the course of dealing between Ms. Peyton and the agency (DMV Brief pp. 9-10). There is nothing in that course of dealing, however, that could possibly excuse DMV's failure to

fulfill its mandatory, nondiscretionary duties to Ms. Peyton in particular and in general to people driving motor vehicles or riding in them as passengers in West Virginia.

2. W.Va. Code § 17B-2-7a does not make referral to the Medical Board discretionary.

DMV first argues that W.Va. Code § 17B-2-7a renders referral by DMV to the Medical Board for individual review a discretionary matter for the agency (DMV Brief pp. 10-11). The relevant part of the statute provides as follows:

The board shall advise the commissioner of motor vehicles as to vision standards and all other medical criteria of whatever kind or nature relevant to the licensing of persons to operate motor vehicles under the provisions of this chapter. The board shall, *upon request*, advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for, or the holder of, a license to operate a motor vehicle. The board shall furnish the commissioner with all such medical standards, statistics, data, professional information and advice as he may reasonably request.

(Emphasis supplied). This reading by DMV amounts to looking down the wrong end of the telescope by focusing on what the *Medical Review Board* was bound to do rather than what *DMV* was required to do.

DMV invites the Court to read the pertinent sentence to entail that “[t]he board shall advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for, or the holder of, a license to operate a motor vehicle” (DMV Brief p. 10). This reading is both strained and improbable, however. With the statutory language written the way DMV suggests, the Medical Review Board would be required to pass upon the mental or physical fitness of *every* applicant for a driver’s license in West

Virginia. Such a requirement would be unnecessary, unworkable and impossible to implement.

DMV argues that the phrase “upon request” cannot be disregarded because “[a] fundamental rule of statutory construction requires that every part of a statute is presumed to have effect and meaning” (DMV Brief p. 10)(numerous citations omitted). DMV then examines the phrase, arguing that “[w]hen the phrase ‘upon request’ is given effect, the statute limits review to those instances when the Commissioner requests medical review” (DMV Brief p. 11). Mr. King could not agree more; however, that leaves unanswered the form that “request” must take. Clearly, a request is made when the Commissioner refers a particular file to the Medical Review Board for medical review. Even if one credits DMV’s argument, however, that does no more than beg the question of when such a referral must be made. That is the key issue in this case, after all. It is a question to which DMV responds with a circular reply that leaves the primary question unanswered.

The remaining issue is thus the one with which we began, namely, what was the nature of DMV’s duty to refer Ms. Peyton’s records to the Medical Review Board? Under the statutory and regulatory scheme in force when Ms. Peyton received her license in 2009, the duty to refer was plainly mandatory and nondiscretionary. Under such circumstances, DMV is not entitled to qualified immunity.

Notwithstanding, DMV continues to argue that W.Va. Code § 17B-2-7a renders the submission of data to the Review Board a discretionary rather than a mandatory act (DMV Brief p. 12). As we have seen above, the statutory language actually leaves open the question of whether such a submission is discretionary or mandatory. DMV’s

attempt to avoid the question by begging it cannot succeed. Instead, as the discussion below will demonstrate, the answer is to be found in W.Va. Code R. § 91-5-3.3.c, which was promulgated to flesh out the provisions of W.Va. Code § 17B-2-7a.

3. The Circuit Court properly relied upon W. Va. Code R. § 91-5-3.3.c. to find that the duty to refer was mandatory and non discretionary.

As noted above, this dispute turns on the issue of whether, after Ms. Peyton's license was suspended on March 14, 2007 and a reinstated driver's license issued on February 17, 2009, DMV was required by law to refer her medical file to the Medical Advisory Board for its review *before* her license could be reinstated. The regulation in force at the time of these events, Reg. § 91-5-3.3c (2006) mandated that "[t]he Commissioner, *after* reviewing the Medical Report or Vision Examination Report *and* the recommendation of the Driver's License Advisory Board" (emphases supplied), may determine if a person is competent to drive. The requirement that a review of that report is required before a license can be reinstated logically requires a submission of the medical evidence to the Advisory Board. Otherwise, although the Commission is required to receive the Advisory Board recommendation before issuing a license to Ms. Peyton, there would be no recommendation from the Advisory Board to review. Thus, on February 17, 2009, the date of reinstatement, DMV was required to have (a) received a medical report on Ms. Peyton; (b) submitted that report to the Driver's License Advisory Board for review; and (c) received a recommendation from the Board based on its findings.

The use of the word “and” in the Regulation is important in that it links the two collections of data that must be in hand before a license can be issued. Certainly the word “and” cannot be disregarded for, as DMV had earlier reminded us, “[a] fundamental rule of statutory construction requires that every part of a statute is presumed to have effect and meaning” (DMV Brief p. 10)(numerous citations omitted).

Effective on September 18, 2009, or after Ms. Peyton’s license had been reinstated, the Rule was changed slightly but significantly and was codified in Reg. § 91-3-3.c to provide that that “[t]he Commissioner, after reviewing the Medical Report or Vision Examination Report and the recommendation of the Driver’s License Advisory Board *if applicable*” (emphasis supplied), may find an applicant either competent or incompetent with possible conditions to operate a motor vehicle on West Virginia roads.

This change flows from Reg. § 91-3-3.a, which provided that DMV “*may* upon written notice of five days require the licensee to present in the form prescribed by the Commissioner to the Driver’s License Advisory Board a [relevant form related to the applicant’s medical condition]”(emphasis supplied). Under this new system, DMV could require a medical review or it not, as it determined to be proper. That is the reason for the addition of the phrase “if applicable.” The Advisory Board’s recommendation need be considered only if DMV requested one from the Advisory Board in the first place. In fact a later amended version of the Regulation similarly rendered a submission of medical records to the Medical Advisory Board a discretionary duty. See Reg. §§ 91.3.3.a, 3.3.c (2013); Reg. §§ 91. 3.3.a., 3.3.c (2009).

Under the prior Regulation that governed Ms. Peyton’s license reinstatement in February 2009, however, a review under Reg. § 91-5-3 by the Medical Advisory Board

was not discretionary but rather mandatory. Yet it is undisputed that no such review took place before Ms. Peyton received her license. No review took place because DMV never referred Ms. Peyton's medical records to the Medical Advisory Board as it was required under law to do. It follows inexorably that DMV failed to undertake and satisfy a mandated, nondiscretionary duty. DMV could not have been entitled to qualified immunity under such a scenario. *See R.Q. v. West Virginia Division of Corrections, supra*, 2015 W.Va. Lexis 517 at *12 to *13.

DMV naturally tries to spin the 2006 regulation and its successors to demonstrate that the clearly stated, nondiscretionary duty to refer medical records to the Medical Advisory Board under the 2006 Regulations does not actually exist at all. This attempt is unavailing.

DMV argues that W.Va. Code § 17B-2-7a and W.Va. Code R. § 91-5-3.3.c are contradictory. Because, as DMV asserts, the regulation does not conform to the legislative intent as evidenced in the statute, the regulation should be disregarded (DMV Brief p. 11). As the agency states:

The rule must faithfully reflect the intention of the statute. Syl. Pt. 5, *Appalachian Power Co. [v. State Tax Department of West Virginia]*, 195 W.Va. 573, 466 S.E.2d 424 (1995)]. Thus when a statute is clear like W.Va. Code § 17B-2-7a (2003), no deference to a contradictory rule such as W.Va. Code R. § 91-5-3.3c (2006) is proper.

(DMV Brief p. 12).

DMV once again misreads the statute. W.Va. Code § 17B-2-7a governs the Driver's Licensing Advisory Board, its structure and duties. It creates a mandatory duty on the Board to respond to inquiries by the Commissioner "upon request.". But the

statute nowhere speaks to the issue of when the Commissioner must make such requests. This is a point DMV fails to acknowledge. The petitioner states that “[i]n the event that the legislative rule in W.Va. Code R. § 91-5-3.3.c (2006) makes referral to the Board mandatory, it contravenes W.Va. Code § 17B-2-7a (2003) and cannot be upheld” (DMV Brief p. 12). Under the regulation in existence when Ms. Peyton received her driver’s license, W.Va. Code R. § 91-5-3.3.c did indeed make referral to the Board mandatory. But because the regulation governs the Board, not the DMV, it can have no effect upon the statutory duties laid out therein. DMV is trying unsuccessfully to mix the apples of the regulation with the oranges of the statute to find a contradiction that does not in fact exist. The only conclusion to be drawn is that DMV’s duty to refer medical files to the Board is nondiscretionary and thus mandatory.

DMV’s argument reveals a failure to understand the underpinnings of administrative law in the first place. As the Court is well aware, the purpose of regulations is not simply to parrot the statute under which it is promulgated. If that were so, there would be no need for regulations at all. To the contrary, regulations are intended to fill in the gaps left by more general statutory provisions. They serve to implement what is sketched out in the statutory language. That is exactly what happened here. As a result, the supposed contradiction cited by DMV does not exist. DMV’s argument thus reflects a fundamental misunderstanding of the relationship between statutes and regulations.

4. W.Va. Code R. §§ 91-5-3.3.a., b. does not render referral to the Medical Board by DMV a discretionary act.

DMV then argues that at the very least W.Va. Code R. §§ 91-5-3.3.a., b “are *consistent* with W.Va. Code § 17B-2-7a (2003) and are controlling” (DMV Brief p. 12)(emphasis in the original). Mr. King does not necessarily disagree with that statement but fails to see what that fact, even if true, would have to do with the issue at hand. On the other hand, Mr. King definitely disagrees with the conclusion DMV draws from its assertion that “W.Va. Code R. § 91-5-3.3.a. (2006) *permits, but does not require*, Petitioner DMV to submit medical files to the Board for individual review (emphasis added)” (DMV Brief p. 12).

These two regulations provide as follows:

The Division may ... require the licensee to present ... to the Driver’s License Advisory Board a:

- 1) Medical Report Form completed by a physician of the licensee’s choice who is licensed in the United States;
- 2) Medical Report Form completed by a board certified physician in the appropriate medical specialty for the condition under consideration; or
- 3) Vision Examination Report Form completed by an optometrist or ophthalmologist of the licensee’s choice who is licensed in the United States.

W.Va. Code R. § 91-5-3.3.a. (2006). W.Va. Code R. § 91-5-3.3.b. (2006) in turn provides as follows:

The licensee may, in addition to the medical and vision report forms, submit any other record or documentation concerning his or her competency to drive for consideration of the Driver License Advisory Board and the Commissioner.

These two regulations govern the obligations and rights of a licensee like Ms. Peyton, not the overall licensing duties of DMV. A licensee like Ms. Peyton may indeed be required to present data to the Advisory Board; she is also able to present additional data of her choosing to the Board. The regulations speak to the licensees, not to DMV, and are limited to that extent. As the Court will recall, W.Va. Code R. § 91-5-3 (2006) mandated that “[t]he Commissioner, *after* reviewing the Medical Report or Vision Examination Report *and* the recommendation of the Driver’s License Advisory Board” could only then make a decision on licensure.” Certainly, that mandated procedure cannot be undone by the mere fact that the licensee herself may be under obligations and entitled to rights peculiar to her.

In addition, although W.Va. Code R. § 91-5-3.3.b. (2006) is discretionary as to whether the licensee will submit those additional data, W.Va. Code R. § 91-5-3.3.a. (2006) authorizes DMV to place a mandatory, nondiscretionary duty upon the licensee to submit data. The fact that licensee is under a mandatory, nondiscretionary duty to submit data to the Board hardly translates into a finding that DMV’s parallel duties under its governing regulations are discretionary and thus supportive of qualified immunity.

E. DMV’s Articulated Policy Argument is Unavailing.

DMV tries to convince the Court that its “relevant policy on driving and epilepsy *reads* that review of an individual’s medical history can be performed by the DMV and/or the Medical Advisory Board to determine whether or not that person should be licensed making referral to the Board discretionary” (DMV Brief p. 13)(emphasis supplied). This argument has many flaws, all of them fatal.

First, Mr. King has absolutely no idea what the policy does say because its language is not quoted nor is a citation given to the location in the record or elsewhere of that policy. Certainly, an unsupported assertion as to what an absent writing might say cannot be the basis for a decision in this case.

Second, even if this “relevant policy” does exist somewhere in some form, that fact alone does not establish that this is the policy that was in place when Ms. Peyton received her driver’s license. DMV presents a long and learned black-letter law discussion of the deference to be given to an agency’s interpretation of its own governing statutes (DMV Brief pp. 13-14). Absent the text of that policy along with evidence of what the relevant policy was at the relevant time for this renders this discussion one of academic interest only. Even DMV’s own authority provides that an articulated policy of the kind being championed by the agency cannot stand if it is “arbitrary, capricious, or manifestly *contrary to the statute*” (DMV Brief p. 13)(emphasis supplied), which in this case it clearly is. DMV has given the Court no tools with which to test those requirements; hence, its articulated policy argument necessarily fails.

F. DMV’s Expressio Unis Est Exclusio Alterius Argument is Unavailing.

DMV notes the canon of construction providing that *expressio unis est exclusio alterius*, namely, “that the express mention of one thing implies the intentional exclusion of another” (DMV Brief p. 14). It then enumerates four portions of W.Va. Code R. § 95-5-1 *et seq.* (2006) which, according to DMV, “fail to even mention the Board when describing the actual procedures and requirements for review” (DMV Brief p. 14). It is unclear exactly what this argument is intended to establish. Any claim by DMV that no

nondiscretionary duty can exist under the Regulation unless it is also present in every iteration of the Regulation is unavailing.

As we have seen, the version of W.Va. Code R. § 91-5-3.3.c in force when Ms. Peyton received her license did make referral a mandatory, nondiscretionary duty. That portions of W.Va. Code R. § 95-5-1 *et seq.* did not include a mention of the Board seems unimportant. In other words, the “one thing,” mandatory referral, was “express[ly] mention[ed]” in W.Va. Code R. § 91-5-3.3.c. It is thus unclear what is supposed to be excluded here. By the same token, the cited portions of W.Va. Code R. § 95-5-1 *et seq.* did not contain language that could have constituted “an intentional exclusion of another;” instead, they were simply silent on the point. It is not clear that “the express [omission] of one thing implies the intentional exclusion of another;” that is not how *expressio unis est exclusio alterius* operates.

It is not clear in any event that the argument as stated (DMV Brief p. 14), is the complete argument that was intended. It lacks any conclusion but seems to ask the reader to draw his own conclusions. The conclusion Mr. King draws is that this *expressio unis est exclusio alterius* argument is of no help to DMV’s argument.

In short, had the law been followed and Ms. Peyton’s medical file properly reviewed by the Medical Advisory Board, it is highly likely that Ms. Peyton would not, in view of her very poor driving record in conjunction with her severe medical issues, have been on the road at all so as to crash into the motor vehicle in which Mrs. King was riding. DMV failed to send Ms. Peyton’s file to be reviewed by the Medical Advisory Board in order to institute some form of medical oversight and ask the tough questions that needed to be inquired into regarding the licensing of a poorly controlled epileptic

individual who has a cognitive dysfunction in addition to frequent seizures and blackouts. Because DMV failed to undertake a mandatory, nondiscretionary duty in that regard, it is not entitled to qualified immunity.

VI.

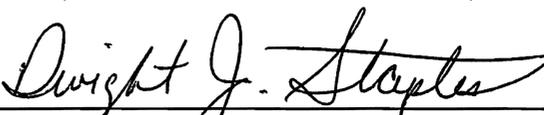
CONCLUSION

For the reasons set out above, plaintiff David King as Administrator of the Estate of Wilma Ann King respectfully asks the Court to affirm the Order below denying Defendant West Virginia Department of Transportation, Division of Motor Vehicles' Motion for Summary Judgment. Mr. King respectfully asks the Court as well to grant him all additional or cumulative relief to which it finds him entitled.

Respectfully submitted,

DAVID KING, AS ADMINISTRATOR OF THE
ESTATE OF WILMA ANN KING, DECEASED
By counsel

HENDERSON, HENDERSON & STAPLES, L.C.

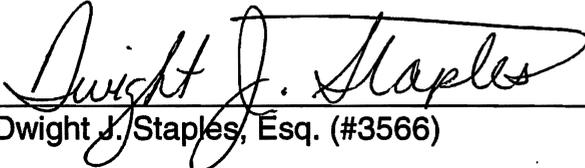
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CERTIFICATE OF SERVICE

I, Dwight J. Staples, Esq. counsel for Respondent, David King, As Administrator Of The Estate Of Wilma Ann King, Deceased, hereby certify that I served a copy of the foregoing "**RESPONDENT'S REPLY BRIEF**" by depositing a true and correct copy thereof in the United States mail, postage prepaid on this 11th day of December, 2015, upon the following counsel of record:

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