

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

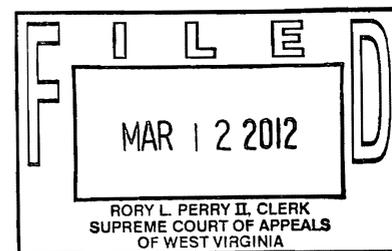
THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,
THE WEST VIRGINIA OFFICE OF
BEHAVIORAL HEALTH SERVICES, THE
WEST VIRGINIA BUREAU FOR MEDICAL
SERVICES, and THE WEST VIRGINIA
OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,

Defendant Below, Petitioners,

v.

GREGORY PAYNE, Individually and as
Executor of the Estate of CRAIG ALLEN
PAYNE, and BETTY JO PAYNE, Individually

Plaintiffs Below, Respondents.



Upon Appeal

Case No.: 11-1701

PETITIONERS' BRIEF

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Licensure and Certification*

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III. ASSIGNMENTS OF ERROR

1. The trial court erred in its ruling on the availability of the defense of qualified immunity to DHHR in this matter. Because the Plaintiffs' claims sound solely in negligence based on purported improper discretionary decision-making, these Defendants are entitled to qualified immunity and summary judgment is appropriate on that basis alone.

2. The trial court applied the incorrect standard in its qualified immunity analysis and improperly denied Defendant's Motion for Summary Judgment.

IV. STATEMENT OF THE CASE

Procedural History and Statement of Fact:

This appeal is being sought because the trial court committed reversible error when it entered its Order Denying the Defendants' Motion for Summary Judgment, based on immunities afforded state agencies and its employees. See Appendix at 1-10. Petitioners' Motion for Summary Judgment was filed on March 17, 2009, and argued on February 17, 2010. See Appendix at 113 and 201. The Petitioners seek appellate review of the trial court's decision pursuant to *Ortiz v. Jordan*, 131 S.Ct. 884 (2011), which mandates that an appeal of the trial court's decision to deny dismissal pursuant to qualified immunity must be sought prior to a final decision rendered on the merits.

This matter arises out of the wrongful death of, Craig Allen Payne, 22, who suffered from severe cerebral palsy. See Appendix at 14. As a result of his medical condition, his parents utilized the day services provided by, D.E.A.F. Education and Advocacy Focus, Inc.(hereinafter, "D.E.A.F."). See Appendix at 11-14. D.E.A.F., was a nonprofit organization which ran a facility for mentally retarded and developmentally disabled adults in Nitro, West Virginia.

In February 2007, while at D.E.A.F.'s day shelter, Craig Payne choked to death on a hot dog that was fed to him by an employee of D.E.A.F. See Appendix at 15-16. The plaintiffs/respondents

alleged that D.E.A.F. improperly trained its staff and/or its staff applied improper protocols in this situation, thereby causing the death.¹ The DHHR by and through the Office of Health Facility Licensure And Certification (hereinafter, OHFLAC) revoked D.E.A.F.'s behavioral health license by Order dated March 28, 2007, as a result of a February 22, 2007 investigation into the incident. See Appendix at 96-97.

On July 7, 2007, the plaintiffs/respondents filed their Complaint in the Circuit Court of Kanawha County, West Virginia, asserting that the DHHR was negligent in their supervision of its Medicaid Waiver program and the private entities which the State of West Virginia contracted with to provide these community based services. See Appendix at 11-103.

In an attempt to bolster their lawsuit, the respondents cited a report issued by the West Virginia Advocates (hereinafter, "WVA") in their Complaint. See Appendix at 98-103. According to the report issued by WVA the DHHR was negligent in their supervision of D.E.A.F. However, the report issued by WVA is comprised of baseless allegations and speculation. On July 9, 2009, the deposition of WVA investigatory Tovli Simiryon was taken. See Appendix at 213-218. During the deposition it was learned that WVA never investigated DHHR in relation to this matter. Specifically, Ms. Simiryon testified, "I didn't investigate the DHHR in my capacity" and "I didn't investigate whether the Department committed any negligence." See Appendix at 213-214. Further, it was learned from Ms. Simiryon that WVA was not investigating the action of DHHR, yet somehow managed to conclude DHHR was deficient in their oversight of D.E.A.F. See Appendix at 114.

Behavioral health centers, such as D.E.A.F., are licensed and regulated by the State of West Virginia through the DHHR. W.Va. C.S.R. § 64-11-4 *et seq.* requires DHHR to perform surveys of behavioral health facilities like D.E.A.F.'s West Sattes' site once every two years. There has been

¹ Importantly, defendants D.E.A.F. and Braley and Thompson have settled the claims against them, in the amount of \$850,000.00, leaving only the DHHR defendants.

no evidence produced to suggest that DHHR failed or refused to comply with its legislative mandates. Throughout the course of discovery, Respondents have not shown that there was a well established law which the DHHR Petitioners should have known about or knew about which they either negligently breached or deliberately ignored resulting in the death of the decedent. Instead, the Respondents have merely alleged that the DHHR negligently decided to issue a license to D.E.A.F. in spite of its history of safety violations. See Appendix at 20-24 and 48-49. Since W.Va. C.S.R. § 64-11-4 *et seq.* gives DHHR the authority to decide if a license should be issued after performing a licensure survey, they did not violate any clearly established law. Further, nowhere in any of the Respondents pleadings do they cite to any rule, regulation, statute, or case law that articulates how DHHR is to arrive at their decision. Accordingly, the Petitioners assert that they are entitled to defense of qualified immunity.

The DHHR filed its “Motion for Summary Judgment” on March 17, 2009. DHHR based its motion upon the defenses of qualified immunity and the public duty doctrine. See Appendix at 113. Counsel for Plaintiff/Respondents filed a response brief to DHHR’s Motion for Summary Judgment on April 15, 2009. Appendix at 188. The Respondents’ response brief contended the defense of qualified immunity is not available to the Petitioners because the negligence arises out of a, “failure to uphold the very laws and regulations that they are charged with sustaining”, and because DHHR employees acted outside the scope of their employment by ignoring a obviously dangerous situation by not informing the Plaintiffs/Respondents of D.E.A.F.’s previous deficiencies. However they fail to cite to any statute or rules which requires them to do so. See Appendix at 188-200. According to the “Notice of Hearing” served on September 22, 2009, the matter was set to be heard on February 17, 2010, before Judge Burger. However, before that time, on January 13, 2010, the DHHR filed its

Response to Plaintiff's response brief, to which the Plaintiffs filed a response brief on February 12, 2010.

While the DHHR's motion was pending, Judge Burger was appointed Federal District Court Judge, for the Southern District of West Virginia. Governor Joe Manchin, III then appointed Carrie Webster to serve out the remainder of Judge Burger's term. On February 17, 2010, a hearing took place on DHHR's Motion for Summary Judgment, before the Honorable Judge Webster. No ruling was made at the time. See Appendix at 355.

In an effort to persuade the trial court (and noting that no ruling had been rendered), DHHR filed its, Supplemental Motion for Summary Judgment on February 18, 2011. In its supplemental motion the DHHR asserted that this Court's recent rulings in *Jarvis v. West Virginia State Police*, 711 S.E.2d 542 (W.Va. 2010), and *Hess v. West Virginia Div. of Corrections*, 227 W.Va. 15, 705 S.E.2d 125, (W.Va. 2010) (dealing with the issues of qualified immunity and the public duty doctrine) were compelling and required that its Motion for Summary Judgment be granted. See Appendix at 267-340. The trial court would not set oral arguments on the DHHR's supplemental motion.

By letter dated April 1, 2011, counsel for DHHR was informed by counsel for the Plaintiffs/Respondents that Judge Webster had decided to deny the DHHR's Motions for Summary Judgment and that an Order would be forthcoming, however, no finding of fact, conclusion of law or reasons for the denial were communicated to Petitioners.

Subsequently, on April 13, 2011, the parties attended a status conference with Judge Webster's law clerk. The clerk informed the parties that they were to submit via e-mail a proposed order denying DHHR Motion for Summary Judgment. On, April 14, 2011, counsel for the Plaintiffs/Respondents e-mailed and mailed their proposed order to the trial court, and on April 28,

2011, counsel for DHHR submitted its proposed order via e-mail. The trial court had the proposed orders for nearly six (6) months, before the Petitioners filed their Writ of Mandamus with this Court on October 13, 2011. As a result of Petitioners' Writ of Mandamus the trial court issued its Order Denying Defendants' Motion for Summary Judgment on November 10, 2011, finding that qualified immunity and the public duty doctrine do no shield DHHR from suit in this matter. The trial court's Order was based upon its finding that there are material issues of fact in dispute which would allow a reasonable jury to find for the Plaintiff, however, the Order fails to identify any evidence which supports the trial court's decision. The trial court's Order was issued prior to this Court's Order to Show Cause dated November 22, 2011. On December 8, 2011, Defendants/Petitioners filed their Notice of Appeal with this honorable Court, which then entered a scheduling order for this Appeal on December 20, 2011.

III. SUMMARY OF ARGUMENT

Petitioners are entitled to qualified immunity. Qualified immunity is available to state agencies in suits involving legislative, judicial, or executive policy-making. "Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A government official or employee is not so unhappy that he/she must choose between being charged with dereliction of duty if he/she exercises or performs a discretionary function, and being mulcted in damages if he/she does. (citations omitted)" Syl. 2, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). Further, this Court recently upheld its previous rulings that:

In the absence of an insurance contract waiving the defense, the doctrine of qualified immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Torts Claim and Insurance Reform Act, ... and against an

officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.

Jarvis v. West Virginia State Police, 711 S.E.2d 542, 227 W.Va. 472 (2010), *Clark*, 465 S.E.2d 374, 195 W.Va. 272 (1995), *Parkulo v. West Virginia Bd. Of Probation and Parole*, 483 S.E.2d 507, 199 W.Va. 161 (1996). Therefore, based upon the facts of this case, it is clear and undisputed that DHHR should have been immune from this suit, as the Plaintiffs/Respondents have failed to provide any evidence which proves the existence of any insurance contract which waives the defense of qualified immunity or that this case is nothing more than a mere negligence action.

Defendants/Petitioners contend that the trial court committed reversible error by not extending qualified immunity to them in this matter. Plaintiffs/Respondents' Complaint contains theories of negligence which are not substantiated by the facts of this case and fall short of defeating Defendants/Petitioners' qualified immunity. In order for qualified immunity not to apply in this matter, the Plaintiff Respondents would have to show that Defendants/Petitioners violated some well established constitutional or statutory right of the decedent which it should have known of or did know of and deliberately violated. The record in this matter clearly shows that no clearly established constitutional or statutory right was violated in this matter, and this fact is highlighted by the trial court's inability to cite to such in its decision. Further, the record in this matter clearly shows that DHHR performed all required surveys of D.E.A.F. and took appropriate action when violations were detected.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a), of the West Virginia Rules of Appellate Procedure, this matter should be scheduled for a Rule 19 hearing. Petitioners assert that the parties to this Appeal have not waived oral argument, the Appeal is not frivolous, the issues have not been authoritatively decided, and

Defendants/Petitioners assert that oral argument will aid the Court in making the correct decision. A Rule 19 hearing is appropriate in this matter because the issues presented to the Court involve assignments of error in the application of settled law; error by the trial court in ruling in a manner contrary to the weight of the evidence; and involves a narrow issue of law; qualified immunity. Therefore, the Petitioners believe that a Rule 19 hearing is appropriate.

V. ARGUMENT

Defendants/Petitioners assert that the trial court committed reversible error when it denied their Motion for Summary Judgment. The trial court's decision improperly applies qualified immunity, applies the wrong standard in its qualified immunity analysis, and is contrary to the weight of the evidence presented to it. Therefore, Defendants/Petitioners request that this Honorable Court reverse the trial court's decision to deny their Motion for Summary Judgment.

A. Standard of Review

Defendants/Petitioners assert that they are entitled to *de novo* review. "The *de novo* standard of review also applies to a circuit court's ruling on a motion for summary judgment." *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (2011). Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). The Supreme Court of Appeals reviews *de novo* "a circuit court's entry of summary judgment under Rule 56 of the *West Virginia Rules of Civil Procedure*, and applies the same standard that the circuit courts employ in examining summary judgment motions." *Nicolas Loan & Mortg., Inc., v. W.Va. Coal Co-Op, Inc.*, 209 W.Va. 296, 547 S.E.2d 234; Syl. Pt. 1, *Painter*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "Although review of the record from summary judgment proceeding is *de novo*, Supreme Court of Appeals will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion..." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). "The circuit

court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. Syl. pt. 3, *Painter*, 192 W.Va. 189, 451 S.E.2d 755.

In this matter the trial court has denied Defendants/Petitioners' Motion for Summary Judgment. The case law cited entitles Defendants/Petitioners to *de novo* review of the arguments and evidence presented to the trial court in this matter. Defendants/Petitioners assert that the evidence in this matter shows that the trial court committed reversible error by not granting their Motion for Summary Judgment.

B. Interlocutory Appeals

Defendants/Petitioners' appeal is properly before this Court. Typically, interlocutory orders are not immediately appealable." *Jarvis v. West Virginia State Police*, 227 W.Va. 472, 711 S.E.2d 542 (2010). However, appeals involving qualified immunity are a recognized exception to the final order rule. "A circuit court's denial of summary judgment that is predicated on qualified immunity is interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." *Id.*, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009). This Court has recognized that orders denying, substantial claims of qualified immunity should be decided before trial and these pretrial decisions are immediately appealable under the collateral order doctrine." *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). This is particularly true when assessing the disposition of cases involving immunities. Indeed, "[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all." *Id.* (emphasis added). Furthermore, this Honorable Court has stated that claims of immunity should be summarily decided before trial. *Id.*

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

C. Summary Judgment Standard

DHHR is entitled to have its motion for summary judgment granted because the Plaintiffs/Respondents have failed to show any genuine issue as to any material fact, and therefore DHHR is entitled to judgment as a matter of law. Pursuant to W.Va. R.Civ.P. Rule 56(c) a party is entitled to summary judgment when, "the pleading, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Honorable Court has stressed the important role that Rule 56 plays in litigation. See *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

In addition, even though the burden to show no genuine issue of material fact is placed upon the party seeking summary judgment, the nonmoving party must present evidence of a genuine issue of material fact. Summary judgment is only appropriate when the non-moving parties has had,

“adequate time for discovery.” *Conley v. Stollings*, 679 S.E.2d 594, 223 W.Va. 762 (2009). *Petros v. Kellas*, 146 W. Va. 619, 122 S.E.2d 177 (1961). A material fact cannot be “conjectural or problematic,” and the non-moving party must produce more than a “scintilla” of evidence. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986).

The mere contention by the party resisting summary judgment that issues are disputable is not sufficient to overcome summary judgment. *Brady v. Reiner*, 157 W. Va. 10, 198 S.E.2d 812 (1973), overruled on other grounds, *Board of Church Extension v. Eads*, 159 W. Va. 943, 230 S.E.2d 911 (1976). Instead, “the party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence, and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Painter*, 192 W. Va. 189, 451 S.E.2d 755 (1994). **“Summary judgment is appropriate where the record taken as a whole could not lead to a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.”** *Id.*, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 97 L.Ed. 265 (1986)(emphasis added). Therefore, while the facts of the matter are viewed in the light most favorable to the nonmoving party, it is still their responsibility to, “offer some concrete evidence from which a reasonable ...[finder of fact] could return a verdict in ...[its] favor or other significant probative evidence tending to support the complaint.” *Painter*, 192 W.Va. 189, 451 S.E.2d 755 (1994). *Liberty Lobby*, 477 U.S. at 256, 106 S.Ct. at 2514, 91 L.Ed.2d at 217, quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569, 593 (1968); *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987).

This is particularly true when assessing the disposition of cases involving immunities. Indeed, “[i]mmunities under West Virginia law are more than a defense to a suit in that they grant

governmental bodies and public officials the right not to be subject to the burden of trial at all.”

Hutchison, 198 W.Va. 139, 479 S.E.2d 649 (1996)(emphasis added). These issues of immunity are ultimately issues for the Court to determine. “Ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court; therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie immunity determination, ultimate questions of statutory or qualified immunity are ripe for summary disposition.” *Id.* This Honorable Court has stated in past, “that in civil actions where immunities are implicated, the trial court must insist on a heightened pleading by the plaintiffs. *Id.*

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

D. Court erred in refusing to grant the DHHR’s Motion for Summary Judgment predicated upon the doctrine of qualified immunity.

Defendants/Petitioners are entitled to qualified immunity in this matter. The causes of action involved in this matter are simple negligence claims based on purported improper discretionary decisions made by DHHR employees, therefore Defendants/Petitioners are entitled to qualified immunity and summary judgment is appropriate on this basis alone.

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

Jarvis v. West Virginia State Police, 711 S.E.2d 542, 227 W.Va. 472 (2010), *Clark*, 465 S.E.2d 374, 195 W.Va. 272 (1995), *Parkulo*, 483 S.E.2d 507, 199 W.Va. 161 (1996). “Government officials

performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Syl. 2, *Clark*, 195 W.Va. 272, 465 S.E.2d 374 (1995). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Therefore:

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

Hess v. West Virginia Div. of Corrections, 227 W.Va. 15, 18, 705 S.E.2d 125, 128 (2010). “Once a qualified immunity defense has been advanced, it is the plaintiff's burden to show that a defendant is not entitled to qualified immunity.” *Poteet ex rel Poteet v. Polk County*, Tenn. 2007 WL 1138461, citing *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir.2000). “The policy consideration driving such a rule are straightforward: public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society.” *Hutchinson v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996).

From the above cited cases it is clear that DHHR is entitled to qualified immunity as the Plaintiffs/Respondents' Complaint is only comprised of a laundry list of negligence actions. The Plaintiffs/Respondents can not show that the decisions made by DHHR employees to allow D.E.A.F. to continue to operate violated a clearly established right of the decedent. Further, the Plaintiffs/Respondents can not make a showing that the decision made by DHHR employees to issue a behavioral healthcare license to D.E.A.F. was not a discretionary decision made within the scope and in the course of their employment.

1. The Plaintiffs/Respondents Have Not Made Any Showing That A Clearly Established Constitutional Or Statutory Right Has Been Violated

The Plaintiffs/Respondents have not produced sufficient evidence which shows that a clearly established constitutional or statutory right has been violated in this matter. This Court has acknowledged that West Virginia law should conform with federal law in addressing this area, so that there is a uniform approach to immunity laws. *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). Once a defendant asserts the affirmative defense of qualified immunity, it is the plaintiff, not the defendant that carries the burden of convincing the court that the law was clearly established, and violated by the defendant. *Muth*, 994 F.2d 1082, 1086 (4th Cir.), Cert denied, 510 U.S. 996, 114 S.Ct. 559, 126 L.Ed.2d 459 (1993). More specifically, the plaintiff must move forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred. *Id.* Plaintiffs' burden cannot be met by identifying in the abstract a clearly established right and then alleging that the defendant violated that right. *Wiley v. Doony*, 14 F.3d 993,995 (4th Cir. 1994). The plaintiff must make a more particularized showing – the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

The Fourth Circuit has held that a right is clearly established when the issue has been addressed by the Supreme Court, the appropriate court of appeals, or the highest court of a state. *Wilson v. Lane*, 141 F.3d 111, 114 (4th Cir. 1998). Negligence is not clearly established law, and therefore not a cause of action which will defeat a qualified immunity defense. *Jarvis v. West Virginia State Police*, 227 W.Va. 472, 482, 711 S.E.2d 542, 552 (2010). Qualified immunity is a shield from liability in grey areas, but it is not for violation of bright lines. *City of Saint Albans v. Botkins*, --- S.E.2d ----, (2011), 2011 WL 5902236.

The applicable law regarding the supervision of behavioral healthcare centers can be found in W.Va. C.S.R. 64-11-4 *et seq.* W.Va. C.S.R. 64-11-4 *et seq.* authorizes DHHR employees to make the decisions on whether a behavioral healthcare license should be issued. W.Va. C.S.R. § 64-11-4.1.f.4 states in part, “A provisional license shall be issued when a Center seeks a renewal license, and a Center is not in substantial compliance with this rule, but does not pose a significant risk to the rights, health and safety of a consumer.” W.Va. C.S.R. § 64-11-4.1.F.2 states, “Following an application review, and any onsite inspection **and plans of correction**, the Secretary **shall**, if there is substantial compliance with this rule issue a license in one (1) of three (3) categories:” (Emphasis added). “It is well established that the word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” Syllabus Point 6, *Foster Foundation v. Gainer*, --S.E. 2d ----, 2011 WL 867343; *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982). The decision to accept the plan of correction is completely up to the discretion of DHHR. “The Secretary shall approve, modify or reject the proposed plan of correction in writing.” W.Va. C.S.R. § 64-11-4.6.b. Furthermore, it is DHHR’s discretionary decision whether the changes have been made. “**The Secretary may determine** if the corrections have been made.” (Emphasis added). *Id.* at 4.6.f.

In *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992), Chase filed a third-party complaint against the Governor, the Secretary of State, and the Auditor of the State for losses sustained by the Consolidated Fund. The three public officials were members of the State Board of Investment, which was responsible for management of the Fund. The trial court dismissed Chase’s suit based upon the defense of qualified immunity and Chase appealed. In its analysis of the case the Court looked extensively as to what constituted a clearly established law. Ultimately, the Court concluded that when there are “long standing” laws which the public official should have reasonably

known about, and that public official acts in violations of these laws then qualified immunity is not available to the public official. Ultimately, the Court found, “the Board had the authority to approve and make investments. Chase does not cite any statute that forbids the option contract.” *Id.* Therefore, the Court concluded the facts did not show a violation of clearly established law. *Id.*

In *Goines v. James*, 189 W.Va. 634, 433 S.E.2d 572 (1993), this Court clarified the standard for determining what is a clearly established law. In *Goines*, a police officer arrested the appellant in the home of another person after the police officer witnessed the appellant being disorderly outside. The police officer contends that he got permission from the home owner before going inside to arrest the appellant. After entering the house an altercation occurred in which the appellant was injured by a uniformed police officer. In its analysis of whether the defense of qualified immunity prevented the suit, the Court addressed the issue of what is a clearly established law. Ultimately, the Court found a clearly established law is one where the “statute existed or this Court or the United States Supreme Court had held the officers were violating the Appellants’ Fourth Amendment right by conducting a warrantless search of the Appellants’ residence to effect an arrest of a misdemeanor whom the officers pursued into the residence in hot pursuit, then qualified immunity should fail.” *Id.* at 634, 757. Therefore, since no such statutory law existed nor had such a decision been rendered by the Court the police officer was entitled to the defense of qualified immunity.

This matter is similar to that of *Chase* in that in both matters public officials clearly had the authority to make certain discretionary decisions. In the present case, like in *Chase*, the DHHR employees who decided to issue a behavior healthcare license to D.E.A.F did not violate a clearly established law. In fact, just like in *Chase*, DHHR employees were specifically given the power to make the decision being challenged by the Plaintiffs/Respondents. This matter is similar to *Goines* in that the Plaintiffs/Respondents have failed to identify a statute or court ruling which makes DHHR

liable for deciding to issue a behavioral healthcare license to a provider, after performing its required licensure survey. Further, in spite of their best efforts, the Plaintiffs/Respondents have yet to cite a statute, rule, or regulation which DHHR violated in its oversight of D.E.A.F., rather the opposite is true.

In their “Plaintiff Response and Objection to Defendant’s Motion for Summary Judgment” the Plaintiff/Respondents assert that alleged negligence arises out of DHHR’s, “failure to uphold the very laws and regulation that they are charged with sustaining.” See Appendix at 197. However, upon inspection of the applicable rules it becomes clear DHHR employees followed the procedure set forth in the law, but arrived at a decision which the Plaintiffs/Respondents take exception. Further, the Plaintiffs/Respondents allege, “contrary to the duties and employment requirements of the DHHR, the DHHR defendants’ action herein were manifestly outside the scope of their employment” by not informing the Plaintiffs/Respondents that D.E.A.F. had previous deficiencies, however, the Plaintiffs/Respondents fail to cite any rule or regulation which requires them to make such disclosure. See Appendix at 197-198. The rules and regulations which are cited by the Plaintiffs/Respondents clearly show that the Defendants/Petitioners were entitled to make the decisions upon the best information available to them at the time.

Moreover, the Plaintiffs/Respondents base their entire theory of the case on a report issued by the West Virginia Advocates (hereinafter, “WVA”). Defendants/Petitioners assert that the report issued by WVA is baseless, and the deposition testimony of the WVA investigator responsible for the facts in the report prove it. Tovli Simryon, stated during her deposition, “I didn’t investigate the DHHR in my capacity” and that she, “didn’t investigate whether the Department committed any negligence.” Further, she stated that she did not find in her investigation that DHHR failed to perform any of its required licensure surveys regarding D.E.A.F. shows that West Virginia

Advocates (hereinafter, “WVA”) See Appendix at 213-214. In spite of the fact that WVA never investigated DHHR in regards to this incident, the Plaintiffs/Respondents still try to use the report to show that DHHR violated clearly established laws. Unfortunately for the Plaintiffs/Respondents, simply saying something is true does not meet the burden of proof required to survive summary judgment. The Plaintiffs/Respondents were required to submit to the trial more than a mere scintilla of proof, a burden which they have fallen woefully short.

W.Va. C.S.R. § 64-11-4 *et seq.* authorizes DHHR employees to make the decision whether or not to issue a behavioral healthcare license, just as the law allowed the Governor, Secretary of State and State Auditor make the decision to enter into the financial deal at the heart of *Chase*. Plaintiffs/Respondents try to point to W.Va. C.S.R. § 64-11-4.1.f.4 as the rule that DHHR violated. As stated above, W.Va. C.S.R. § 64-11-4.1.f.4 states in part, “A provisional license shall be issued when a Center seeks a renewal license, and a Center is not in substantial compliance with this rule, but does not pose a significant risk to the rights, health and safety of a consumer.” However, in their Response Plaintiffs/Respondents completely ignore W.Va. C.S.R. § 64-11-4.1.F.2., which states, “Following an application review, and any onsite inspection and plans of correction, the Secretary **shall**, if there is substantial compliance with this rule issue a license in one (1) of three (3) categories:” (Emphasis added). Therefore, the decision to issue any form of a behavioral healthcare license is to be made after DHHR has received the provider’s plan of correction.

Pursuant to the rule, if DHHR finds after receiving the plan of correction the provider is in substantial compliance with the applicable rules it is required to issue the license. The only fair and logical reading of the rule is that it is DHHR’s decision to accept the plan of correction as evidenced by W.Va. C.S.R. § 64-11-4.6.b, “The Secretary shall approve, modify or reject the proposed plan of correction in writing.” Furthermore it was entirely up to the discretion of DHHR whether the

changes had been made. “**The Secretary may determine** if the corrections have been made.” (Emphasis added). *Id.* at 4.6.f. However, once DHHR made the determination that the plan of correction was sufficient, by plain language of the rule, they had to issue the license. The mere fact that the Plaintiffs/Respondents would have made a different decision or that DHHR’s decision was negligent does not matter, however, what does matter is the fact that the Rule gives all relevant decision making authority to DHHR, and in this case, DHHR determined that D.E.A.F. was in compliance after their plan of correction was accepted.

Therefore, the Defendants/Petitioners should be afforded the defense of qualified immunity. The law cited above clearly shows that when the complaining party fails to show that the public official violated a clearly established law which that official should have known about then that official is entitled to the defense of qualified immunity. Further, the facts of this matter show that the public officials involved in this matter did not violate a clearly established law, but rather executed the law to the best of their ability, hence the Defendants/Petitioners are entitled to the defense of qualified immunity.

2. DHHR Employees Made A Discretionary Decision To Allow D.E.A.F. To Continue To Operate

The DHHR employees who determined that D.E.A.F. should be issued a license to operate their behavioral healthcare centers made a discretionary decision in the administration of fundamental government policy. A discretionary decision is where a public official “is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, *he is not liable for negligence or other error* in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.” *Clark*, 195

W.Va. 272, 280, 465 S.E.2d 374, 378 (1995); quoting *City of Fairmont*, 172 W.Va. 240, 304 S.E.2d 824, 829 n.7 (1983). “There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.” *J.H. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 156, 680 S.E.2d 392, 401 (2009). However, when a public official’s duties are “positive and ministerial only and involve no discretion on his part, he is liable to any one injured by his nonperformance or his negligent performance thereof...” *City of Fairmont*, 240 W.Va. 240, 304 S.E.2d 824 (1983)..

In *J.H. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 158. 680 S.E.2d 392, 403 (2009), the plaintiff was admitted to the Division of Rehabilitation Services’ (hereinafter, “Division”) West Virginia Rehabilitation Center in Institute, Kanawha County, West Virginia. While he was there the plaintiff was molested by another client, Jeff Bell, at the Rehabilitation Center. Mr. Bell was alleged to have been under investigation at the time of the alleged molestation for attempting to molest another client. The plaintiff alleged that Mr. Bell had private access to his room at the time of the molestation. The Division moved to dismiss the plaintiff complaint based upon qualified immunity. According to the Division, the plaintiff had only alleged negligence theories of liability in his complaint, and that the defense of qualified immunity provided a defense to simple negligence claims. However, this Court found that because the Division did not assert that it was exercising, “any type of legislative, judicial, or administrative function involving the determination of a fundamental governmental policy...” the defense of qualified immunity was not available to it. *J.H. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 158. 680 S.E.2d 392, 403 (2009).

In *Hess v. West Virginia Div. of Corrections*, 227 W.Va. 15, 705 S.E.2d 125 (2010), this Court was asked to decide whether the trial court erred when it dismissed the West Virginia Division

of Corrections' (hereinafter "WVDOC") motion to dismiss based upon qualified immunity. According to the facts in *Hess*, an inmate slipped and fell in the shower area at Stevens Correctional Center in McDowell County, West Virginia. The plaintiff asserted that the WVDOC failed to have adequate number of staff at the facility, failed to ensure adequate means of safety for prisoners, and failed to take steps needed to correct unsafe conditions. Ultimately, this Court ruled that it was not clear whether not taking steps to remedy unsafe conditions at the jail resulted from a "discretionary administrative policy-making act or omission." Furthermore, this Court stated it is was unclear as to whether the allegations made by the plaintiff, "involved the exercise of an administrative function involving the determination of fundamental government policy which is the guidepost set forth by the Court in *Parkulo*..." that the trial court did not error in allowing more factual development of the case.

In *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995), the appellant asked the court to over turn the trial courts decision dismissing his complaint based upon the defense of qualified immunity. In *Clark*, the appellant and his friends were stopped by conservation office Dunn, on suspicion of illegal doe hunting. When Officer Dunn attempted to disarm one of the appellant's friends the gun discharged and the bullet struck the appellant in the left leg. The appellant brought a negligence action against Officer Dunn and the Department of Natural Resources. In its decision affirming the trial court's ruling the Court found that, "Officer Dunn was engaged in the performance of discretionary judgments and action within the course of his authorized law enforcement duties. In performing those discretionary duties, Officer Dunn should not be faced with the choice of either inaction and dereliction of duty or 'being mulcted in damages' for doing his duty." *Id.* Ultimately, the Court ruled that it was adopting the principle noted in *City of Fairmont*,

172 W.Va. 240, 304 S.E.2d 824, 829 (1983), where “performance of such discretionary duties” is clarified as:

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

Id. at 380, 278.

The case presently before this Court is similar substantively to *Clark*. Both cases involve public officials charged with the performance of certain duties, which placed the public official in a no win situation. In *Clark*, there was no dispute that the enforcement of hunting laws was within the scope of the conservation officer’s employment, and that the decision to disarm the appellant’s friend was a discretionary one performed within the course of his law enforcement duties. Further, had the officer in *Clark* not stopped the appellant for the suspected illegal activity he could have faced disciplinary measures for not following through with his duties. In the present case, there is no question that DHHR employees are responsible for the enforcement of W.Va. C.S.R. 64-11-4 *et seq.* Likewise, there is no doubt that the legislature gave the DHHR the decision making authority over behavioral healthcare licensure. Therefore, just like in *Clark*, when DHHR employee make a decision regarding behavioral healthcare licensure, after the requisite investigation, that employee and DHHR are immune from suit regarding their decision. Further, just like in *Clark*, had DHHR failed to issue a behavioral healthcare license to D.E.A.F. after receiving the Memorandum of Understanding which DHHR believed put D.E.A.F. within substantial compliance with the rules, then DHHR would have been faced with a civil suit from D.E.A.F. alleging DHHR had failed to follow W.Va. C.S.R. § 64-11-4 *et seq.* by not issuing a behavioral healthcare license to it when

DHHR believed that D.E.A.F.'s plan of correction (in this matter Memorandum of Understanding) put it within substantial compliance of the rule.

This matter is different from the facts in *J.H.* in that the Defendants/Petitioners have continuously asserted that the decision to issue a license to D.E.A.F. was a discretionary decision by a public official exercising administrative/executive functions involving the determination of fundamental government policy. Unlike in *Hess*, in this matter there is no doubt that the decision to issue a behavioral healthcare license was left up to discretion of DHHR employees. Further, unlike in *Hess*, here W.Va. C.S.R. § 64-11-4 *et seq.* details the process of issuing a behavioral healthcare license. As in *Clark*, There is no doubt that DHHR is the state agency which was authorized by the legislature to watch over behavioral healthcare center such as D.E.A.F.'s West Settle's facility. DHHR in its sole discretion made an administrative decision involving the fundamental government policy of whether a regulated mental healthcare facility could continue to operate. Furthermore, unlike in *J.H.* and *Hess* the decedent in this matter was not housed or being treated in a state ran facility, rather, in this case, the facility was owned and operated by a private provider. Therefore, unlike in *J.H.* and *Hess* the Defendants/Petitioners have made a showing that the complained of government action involves a discretionary decision involving a fundamental government policy. Interestingly, as discussed above, once DHHR accepted D.E.A.F.'s plan of correction they were required to issue a behavioral healthcare license to them. Had DHHR not issued the behavioral healthcare license they would have been liable to D.E.A.F. for not performing a ministerial function (issuing the license once the plan of correction was accepted).

E. The trial court applied an incorrect standard in its qualified immunity analysis and improperly denied Defendant's Motion for Summary Judgment

The trial court applied the incorrect standard in its qualified immunity analysis by failing to address the threshold issue of whether a clearly established law was violated by DHHR. The Court's failure to address the threshold issue first improperly allowed the Respondent's suit to survive summary judgment. "The threshold inquiry is, assuming that the plaintiff's assertions of facts are true, whether any allegedly violated right was clearly established." *Hutchison*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (W.Va.1996) citing *Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). "When a defendant asserts qualified immunity, a court first must ascertain whether the facts alleged, taken in a light most favorable to the plaintiff, show that the defendant's conduct violated a constitutional right; if so, it then must determine whether the right was clearly established." *Poteet ex rel Poteet*, Tenn. 2007 WL 1138461, citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "Once a qualified immunity defense has been advanced, it is the plaintiff's burden to show that a defendant is not entitled to qualified immunity." *Id.* citing *Gardenhire*, 205 F.3d 303, 311 (6th Cir.2000).

The application of the two step analysis of qualified immunity is articulated in *City of Saint Albans v. Botkins*, 719 S.E.2d 863 (2011). In that matter this Court was asked to decide whether the trial court had applied the incorrect standard in deciding a motion for summary judgment based upon qualified immunity. In *Botkins*, six (6) young men got into a verbal altercation, which escalated to the point where they were face to face with what appeared to be weapons in their hands. Two police officers arrived on the scene and ordered everyone to lay face down on the ground. One of the six young men did not comply with the officers' order, and therefore one of the officers struck him on the head with the butt of his gun to get him to comply. As a result of the officers' actions the young man filed suit against the two officers and the City of Saint Albans. The officers and the city moved for summary judgment based on the theory of qualified immunity, however the trial court denied

their motion stating “Is there qualified immunity? Well, then I have to decide whether or not I believe that the act was a wrongful act, and I don't know.... I believe that reasonable minds could come to different conclusions about each and every issue that you have raised in this case.” In this Court’s analysis of the facts it found that “it is far from clear what facts the lower court relied upon to determine that the officer's conduct violated a constitutional right. Nor has our review of the record revealed any disputed predicated facts regarding this factor.” *Id.* at 871. Further, this Court found, “the facts and circumstances in the record support finding qualified immunity from suit, either because no constitutional violation is established by the facts alleged or because a reasonable officer confronting the same situation—without notice to the contrary—would have considered the action lawful. Consequently, the order of the lower court is reversed.” *Id.* at 872.

Based upon the record below, it is clear that the facts in this matter closely resemble those in *Botkins*. As in *Botkins*, in this matter the trial court has denied a motion for summary judgment based upon qualified immunity. In both cases the trial court denied the motions without addressing the threshold question of whether a law was violated. In *Botkins*, the trial court was not sure that the actions of the officers were wrongful. Here, the trial court similarly found that there existed, “disputed material facts, . . . which could allow the trier of fact to determine that the decisions made by the defendants in connection with and relating to plaintiffs’ claims were not discretionary.” Order Denying Defendants’ Motion for Summary Judgment, pg. 6, paragraph 6. Therefore, in both matter the trial courts denied the motions for summary judgment based upon uncertainty of the actions of the public officials, without first determining that a right of the plaintiff was violated as required by the state’s qualified immunity analysis. Without question, this is an incorrect standard applied in a qualified immunity analysis. Because there is no evidence that a clearly established right or statute

has been violated, as in *Botkins*, this Court must apply the correct standard and analysis and reverse the judgment of the Circuit Court.

VI. Conclusion

WHEREFORE the Appellant asserts that they have shown that they are entitled to qualified immunity in this matter. The facts of this case clearly show that DHHR official did not violate any constitutional or statutory right of the decedent, and that the decision to issue a license to D.E.A.F. was a discretionary one which it was statutorily authorized to make. Further, the Appellant asserts that it has shown that the trial court applied the wrong standard in its qualified immunity analysis. Therefore, Defendants/Petitioners request that this honorable Court reverse the trial court order denying its motion for summary judgment or for any other such relief as this honorable Court deems appropriate.

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
THE WEST VIRGINIA OFFICE OF
BEHAVIORAL HEALTH SERVICES,
THE WEST VIRGINIA BUREAU FOR
MEDICAL SERVICES, AND THE WEST
VIRGINIA OFFICE OF HEALTH
FACILITY LICENSURE AND
CERTIFICATION**

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Licensure and Certification*

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,
THE WEST VIRGINIA OFFICE OF
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WEST VIRGINIA BUREAU FOR MEDICAL
SERVICES, and THE WEST VIRGINIA
OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,,
Defendants Below, Petitioners,

v.

Upon Appeal
Case No.: 11-1701

GREGORY PAYNE, Individually and as
Executor of the Estate of CRAIG ALLEN
PAYNE, and BETTY JO PAYNE, Individually
Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I, Joshua R. Martin, counsel for the Defendants, West Virginia Department of Health and Human Resources, The West Virginia Office of Behavioral Health Services, The West Virginia Bureau for Medical Services, and the West Virginia Office of Health Facility Licensure and Certification dos hereby certify that I have served a true and accurate copy of the foregoing *Petitioner's Brief* upon the following counsel of record by depositing the same in the United States mail, with postage prepaid, on the 12th day of March, 2012, addressed as follows:

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