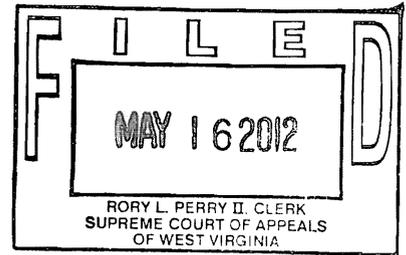


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.

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.

PETITIONERS' REPLY BRIEF

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Bureau for Medical Services, and the
West Virginia Office of Health Facility
Licensure and Certification*

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Now comes the Petitioners', the West Virginia Department of Health and Human Resources (hereinafter, "Petitioners"), by and through its counsel, M. Andrew Brison, Joshua R. Martin, and the law firm of Allen, Kopet, and Associates, and respectfully submit their Reply to the Respondents' Brief in response to Petitioner's appellate brief and assignments of error.

I. Introduction

As has been the case throughout this litigation, both the respondents and the trial court have confused the various affirmative defenses available to a governmental agency. In particular, the respondents and the trial court have been unable to distinguish between the affirmative defenses of Qualified Immunity and the Public Duty Doctrine.

Indeed, the Respondents spent the majority of their time in their Introduction to their Respondents' Brief discussing the public duty doctrine. However, the Petitioners' Appeal in this case is not based upon the public duty doctrine, but rather upon qualified immunity, which this Court has held numerous times, provides complete immunity from suit. Since, the Petitioners' only appeal the trial court's improper application of (or the failure to apply) the qualified immunity standard, the Petitioners' assert that the issue of the Public Duty Doctrine is not ripe for this appeal or is otherwise moot. Nevertheless, the Respondents have raised this specter, and made several unfounded statements regarding the purported duty owed by the Petitioners to the decedent in this matter, which it feels obligated to address.

II. Public Duty Doctrine Addressed

The Respondents' spend most of their time asserting that their claim should proceed to trial because the decedent in this matter had established a special relationship with the Petitioners, due to the decedent's participation in the MR/DD Waiver Program, and that the special relationship that was formed defeats the Petitioners' immunity under the public duty doctrine. The Respondents further allege that since the decedent sought services provided by D.E.A.F., a MR/DD Waiver provider, that the Petitioners' owed the decedent a special duty. The Respondent's assert that the Petitioners' breached the special duty owed to the decedent by making a discretionary decision to issue D.E.A.F. a behavioral healthcare license, once D.E.A.F. had entered into a Memorandum of Understanding to correct certain deficiencies in its operations. Moreover, the Respondents' make the unsubstantiated and unfounded assertion that the Petitioners had "a mandatory duty to warn" the clients of D.E.A.F. "and/or a duty to close said facility prior to the death of Respondents' son." See Respondent's Brief at 2.

Respondents further imply that the duty owed to the decedent was not one owed to the general public, but one that was owed “to a specific, defined group of individuals with certain severe disabilities, and to Craig Payne, the decedent, himself.” See Respondent’s Brief at 2. Again, the Petitioners assert that they are not appealing the trial court’s decision regarding the public duty doctrine, and the Respondents’ argument that there was some sort of special duty owed to the decedent as a member of a class of people is not relevant to this matter. However, Petitioner’s assert that the Respondents mischaracterize the law on special relationship, as the case law in this state clearly indicates to whom the relationship must be between. “[T]he duty imposed upon a governmental entity is one owed to the general public, and unless the injured party can demonstrate that some special relationship existed between the injured person and the allegedly negligent entity, the claim is barred.” *J.H. v. West Virginia Div. of Rehabilitation Services*, 680 S.E. 2d 392, 224 W.Va. 147 (2009). Special relationship to the state can only be established and breached if the state owes a duty to the “particular person seeking recovery.” *Tucker v. West Virginia Dept. of Corrections*, 530 S.E. 2d 448, 207 W.Va. 187 (1999). The Respondent’s admit in their Response that they are claiming that the alleged “special duty” was owed to a “group of individuals.” See Respondent’s Brief at 2. There is no evidence in the record that the decedent, in this case, was owed any more or less than a duty owed to other MR/DD Waiver Program participants. Accordingly, the Respondent’s are unable to establish or prove that a special duty existed between the Petitioner and the decedent.

Finally, Respondents inaccurately assert that Petitioners somehow controlled D.E.A.F. It is undeniable that D.E.A.F. was a privately owned and operated behavioral healthcare facility. Petitioners did not conduct the day to day operations of the facility. The Petitioners did not have any responsibility to either the decedent or the Respondents above that required by W.Va.

C.S.R. § 93-11-1 *et seq.*, which required performing or conducting surveys or inspections of behavioral healthcare providers, such as D.E.A.F.

III. Reply to Respondents' Response to Petitioners' Assignments of Error

Respondents' characterization of Petitioners' assignments of error bend and contort logic and reason in order to fashion the facts in this matter to suit their needs. First and foremost, Respondents did in fact revoke D.E.A.F.'s behavioral healthcare license. Any representation to the contrary made by the Respondents in their brief is false and misleading. See Appendix at 9-10 and 23-24.

The Respondent's Brief seems to imply that despite being cited by the Petitioners, D.E.A.F. was allowed to operate as usual, which is not true. The Petitioner did revoke D.E.A.F.'s behavioral healthcare license after the survey, which found serious violations of W.Va. C.S.R. § 93-11-1 *et seq.* Therefore, Petitioner's did in fact do as they were mandated to do under applicable state law. Interestingly, the Respondents fail to point out that the D.E.A.F. facility that was shut down as a result of the citation, was not the same facility (geographically or services provided) that is the subject of this litigation.

What Respondents turn a blind eye to, and what this matter really boils down to, is after Petitioners revoked D.E.A.F.'s behavioral healthcare license, D.E.A.F. sought an administrative appeal. During the appeals process, an agreement was reached in which D.E.A.F. was mandated to undertake certain steps in order to comply with state law, and correct its deficiencies. It then became the Petitioner's sole discretionary decision to determine whether or not D.E.A.F. had materially and substantially complied with state law and the Memorandum of Understanding.

This type of decision making is the exact type of governmental decision making qualified immunity is designed to protect. Further, the Respondents can not fairly or accurately state that the Petitioner have violated any provision of W.Va. C.S.R. § 93-11-1 *et seq.*

The Respondents have twisted the facts in this matter when they assert that:

petitioners had a non-discretionary mandatory duty to close said DEAF facility, as the same posed a substantial and serious risk to the life, health and safety of the clients at said facility, such as Respondents' son, and the petitioners grossly violated said duty in allowing the substandard care at DEAF to continue by failing to revoke said facility's license when petitioners knew or should have known that these serious and substantial deficiencies in the quality of the care provided had not been corrected as petitioners had undertake additional affirmative monitoring of said facility as present below."

See Respondent's Brief at 3-4. The Petitioners did in fact revoke D.E.A.F's behavioral healthcare license well before the events that are the subject of this matter transpired. As the Respondent's own Supplemental Appendix clearly shows, in March of 2006 the Office of Health Facility Licensure and Certification (hereinafter "OHFLAC") issued an order revoking D.E.A.F.'s behavioral healthcare license for violations of W.Va. C.S.R. 93-11-1 *et seq.* See, Supp. Appn'x at 23-24. However, the Respondent's have consistently failed to mention throughout the course of litigation, that the deficiencies found by OHFLAC of D.E.A.F. were not just for the West Satte's operation, but for its inpatient facility in Southern West Virginia as well. See, Supp. App'x at 25-61) Therefore, the report in which the Respondents have consistently relied upon in their arguments to the trial court is not wholly relevant to this matter. This fact is made clear by the requirement in the Memorandum of Understanding entered into by D.E.A.F. and the Petitioners. See, Supp. Appn'x at 20. In that Memorandum of Understanding D.E.A.F. agreed to shut down its residential facility, and agreed to terminate its chief executive. *Id.*

The Respondents consistently assert in their Respondent's Brief that the Petitioners agreed to undertake additional monitoring responsibilities and that the Petitioners failed to

undertake these responsibilities. See Respondent's Brief at 3-4. Unfortunately for the Respondents, they have failed to produce one piece of evidence which supports their contention. Merely stating that the Petitioners failed to do something does not prove it to be so, and fails woefully short of the scintilla of evidence required to defeat summary judgment.

The Memorandum of Understanding in paragraph 7 does state that the Petitioners will monitor the D.E.A.F.'s summary progress reports, and perform a site inspection by April 28, 2006. Again, the Respondents have not produced any evidence that this was not done. Further, the Respondents have consistently asserted or inferred that the Petitioner is responsible for monitoring facilities such as D.E.A.F. on a day-to-day basis, however, there is no mention in W.Va. C.S.R. § 93-11-1 *et seq.* that requires the Petitioners to undertake such monitoring. Rather, facilities such as D.E.A.F.'s West Sate are to be inspected by the Petitioners once every two years, or upon receiving a complaint regarding the facility. W.Va. C.S.R. § 93-11-4.3.c and 4.4.b.

IV. Statement of the Case

Petitioners assert that the Respondents' Statement of the Case is filled once again with questionable presentation of facts, and include completely irrelevant arguments regarding the public duty doctrine. Further, it should be noted that the Respondents admit that a vast amount of the evidence that it has submitted in support of its claim was created by the Petitioners, which assertively establishes that the Petitioners have conducted all necessary and required surveys' of D.E.A.F. as required by W.Va. C.S.R. § 93-11-1 *et seq.* and has not violated a clearly established right or law.

The entire Respondent's Brief continuously confuses the responsibilities of D.E.A.F. and the Petitioners. The Respondents cite a laundry list of exhibits which it contends highlights

Petitioners' failure to enforce the applicable state law. See Respondent's Brief at 6. However, what Respondents evidence really does show is that D.E.A.F. did not comply with the applicable state law before the Petitioners revoked D.E.A.F.'s behavioral healthcare license in March 2006, and that after it was found to be in compliance with the applicable law and Memorandum of Understanding, D.E.A.F. once again allowed its care to become substandard. No evidence has been produced by the Respondents to show that the Petitioners did a survey of D.E.A.F.'s West Sate's locations and found deficiencies just before the decedent's death and allowed D.E.A.F. to continue to operate or failed to conduct a required survey. It is uncontroverted that the Respondents have not produced any evidence which links Petitioners to the decedent's death; such that would defeat the application of qualified immunity.

Throughout their brief, the Respondents continuously promote the false notion that the Petitioners did not perform their required duties. Nothing is further from the truth. As the Respondents were quite happy to point out in the response brief, most of their evidence comes in the form of the required licensure surveys of D.E.A.F.'s facilities performed by the Petitioners. Further, the Respondents continuously, repeatedly, and disingenuously try to perpetuate the folktale that Petitioners did not revoke D.E.A.F.'s behavioral healthcare license in 2006. Petitioners' own Supplement Appendix clearly evinces that Petitioners did in fact revoke D.E.A.F.'s behavioral healthcare license, but was subsequently issued a provisional license once they agreed to correct the serious deficiencies in its operations, pursuant to the Memorandum of Understanding struck during the administrative appeal of the revocation. See Supp Appn'x at 20-21.

Respondents argue that the Petitioners had a duty to warn the decedent of D.E.A.F.'s prior deficiencies, but that duty is not found anywhere in laws governing this matter, nor was

there any agreement in which Petitioners agreed to warn anyone about D.E.A.F.'s compliance issues. The letter that the Respondents refer to in their brief is from DHHR to D.E.A.F. informing D.E.A.F. that they must inform their clients of the imminent closure of D.E.A.F. See Supp. Appn'x at 9-10. The Respondents continued insinuation that this was in some way a responsibility of Petitioners is misleading and untrue.

The Respondents in their brief try to gloss over the fact that the West Virginia Advocates' (hereinafter, "WVA") investigation and subsequent report into the death of the decedent is irrelevant to this matter. Respondents try to argue that the weight to be given the WVA's report should be left up to a jury, but ignores the fact that the determination of relevance is a legal question to be determined by the court. It is uncontroverted that the WVA investigator, Tovli Simiryon, admitted during depositions that WVA did not investigate Petitioners role in death of the decedent, but rather was concerned only with the actions of D.E.A.F. See Appn'x at 212-218 and 277-278. Further, the WVA investigator was unable to explain how WVA reached their conclusion that Petitioners were in some way at fault in this matter. If any portion of the WVA's insertion into this case is relevant, it is their inability to articulate how the Petitioners were culpable in this incident and the fact that WVA was unable to cite to a single statute, ordinance or rule that was violated by the Petitioners.

As stated above, the Respondents, throughout their response brief, confuse qualified immunity and the public doctrine duty. In their brief the Respondents state, "the petitioners actions in continuing to license DEAF should be considered by the trier of fact as to whether said action were a breach of the petitioners' special duties owed to Respondents' son." Qualified immunity is a separate and distinct doctrine from the Public Duty Doctrine. The special relationship exception relates to the public duty doctrine and not qualified immunity. Once a

special relationship is established between an individual and the state, then that special relationship defeats the immunity afforded the state by the public duty doctrine. Here, the Petitioners have not raised the public duty doctrine as one of its grounds for appeal, but rather have asserted only that the Petitioners are immune from this suit based upon qualified immunity. However, Petitioners assert that no special relationship exists between the decedent and the Petitioners in this matter, but even if such a relationship did exist, that relationship has little to no relevance to this appeal.

V. Argument

A. Summary Judgment for Qualified Immunity

Respondents have failed to provide less than a scintilla evidence which supports their position in this matter, and therefore summary judgment was appropriate in this matter and should be granted de novo.

The law regarding summary judgment in qualified immunity cases is well settled in West Virginia. 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.” 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). 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 v. Peavy*, 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); *Anderson v. 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 v. City of Huntington*, 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. 1993), Cert denied, 510 U.S. 996, 114 S.Ct. 559, 126 L.Ed.2d 459 (1993). “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(E.D. Tenn. April 16, 2007) citing *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000).

In this matter, the Respondents have failed to prove that the Petitioners violated a “clearly established” law. Further, the Respondents have not provided any evidence which shows the Petitioners have acted in a fraudulent, malicious, or oppressive manner towards the rights of the decedent in this matter, as they repeatedly assert in their response brief. What the Respondents have done, at the trial court level and in their response brief, is express their belief that Petitioners should not have decided to issue a behavioral healthcare license to D.E.A.F., in a situation where the governing rules allowed them to make such a decision. In other words, the Respondents argue that the Petitioners should not have used their discretionary judgment the way they did, but the way the Respondents would have in hind sight. Since the Respondents have not provided any evidence that shows that the Petitioners violated any “clearly established” law, and have failed to show that Petitioners acted in a fraudulent, malicious or oppressive way towards the rights of the decedent, summary judgment is appropriate, should have been granted, and granted now. Failure by the Respondents to prove the existence of a disputed material fact for either issue is fatal to their claim. Moreover, it is the Respondents that have failed to meet their burden required as articulated by the *Muth* court. *Id.*

B. The Petitioners Followed Applicable Law on Revocation

Petitioners assert, and the record reflects that they have followed the applicable law governing behavioral healthcare licensure and revocation and assert that the Respondents in this matter have misapplied or misinterpreted the law governing this matter. W. Va. C.S.R. § 64-11-4 *et seq.* governs the inspection of facilities and the issuance of licenses, however, nowhere in the rule does it state that the Petitioners must close down a facility. W.Va. C.S.R. § 64-11-4.1.f.4 states in pertinent 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*, 228 W.Va. 99, 717 S.E.2d 883 (2011); *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 satisfactorily made and/or corrected. “**The Secretary may determine** if the corrections have been made.” (Emphasis added). *Id.* at 4.6.f. Moreover, “any person aggrieved by an order or other action by the Secretary based on this rule...may request in writing a hearing by the Secretary in accordance with the Division of Health rule, ‘Rules of Procedure of Contested Case Hearings and Declaratory Rulings,’ 64CSR1...” W.Va. C.S.R. § 64-11-11.

In this matter, OHFLAC conducted a survey of D.E.A.F in March 2006. During that survey, OHFLAC uncovered several serious violations W.Va. C.S.R. § 64-11-1 *et seq.* As a result of the survey, Petitioners revoked D.E.A.F.'s behavioral healthcare license, and rejected D.E.A.F. proposed plan of correction. See Supp. Appn'x at 9-10. D.E.A.F. then requested a hearing, as allowed by the applicable rules. During this process, D.E.A.F. assented to terms and conditions set forth by Petitioners, which would allow D.E.A.F. to be granted a provisional license. Those conditions are contained in a Memorandum of Understanding. See Appn'x at 20-21. Conforming to the terms conditions set forth therein, would put D.E.A.F back into compliance with W.Va. C.S.R. § 64-11-1 *et seq.* The decision to accept the Memorandum of Understanding and the decision that D.E.A.F. had sufficiently complied with the terms of the Memorandum of Understanding was that of the Petitioner per W.Va. C.S.R. § 64-11-4 *et seq.* Whether the Petitioners decision was a bad one or a negligent one is completely irrelevant, as it was clearly a discretionary decision which the laws of this State allowed the Petitioners to make.

Therefore, as the law clearly states, *there is no mandate to close a facility* under the applicable law, and Respondents' assertion to the contrary is clearly erroneous and not supported by law. The rules set forth the procedure for issuing licenses, and grants the Petitioners the authority to accept or reject a facility's plan of correction once they have been found to be out of compliance with the law. The law further provides an aggrieved party an opportunity to request a hearing and challenge any adverse decision. The Respondents' allegation that the Petitioners agreed, "to make weekly inspections of the DEAF facility to ensure the plan of correction was being followed, and the petitioners failed to do so" is completely false. See Respondent's Brief at 31. The Memorandum of Understanding only states that the Petitioners would monitor the weekly summary reports that D.E.A.F. was to submit to OHFLAC. The Memorandum of

Understanding does not state that Petitioner were to perform weekly reviews of D.E.A.F.'s facilities. See Supp. Appn'x at 20-21. Further, the Respondents have failed to produce one piece of evidence that substantiates their claim that Petitioners failed to perform any function specified in the Memorandum of Understanding.

Petitioners assert that they are the State's most knowledgeable agency on the subject matter and the agency best suited to make the determination as to when a facility should be granted a provisional license. Qualified immunity is designed to protect the state and its agents from suit in situations just like this one, where, in spite of its best efforts, the agency's decision, in hind sight, results in a loss such as this. "The policy considerations driving such a rule are straightforward: public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society." *Hutchison*, 479 S.E.2d 649, 198 W.Va. 139 (1996).

C. The Respondents Fail to Show a Clearly Established Right was Violated

The Respondents have failed to show in their brief that a clearly established law was violated. In fact, in this matter, the opposite is true, as Petitioners were authorized to make the decision of whether D.E.A.F. had corrected their serious deficiencies. As stated in Petitioners' brief, a 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). In the Sixth Circuit, the law on qualified immunity states that a law will not be held “clearly established” unless the Supreme Court of the Sixth Circuit has previously ruled upon it. *Id.* Citing *Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997). 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*, 228 W.Va. 393, 719 S.E.2d 863 (2011).

As previously stated in Petitioners brief, in *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992), a third-party complaint was filed against the Governor, the Secretary of State, and the Auditor of the State for loses sustained by the Consolidated Investment Fund. The three public officials were members of the State Board of Investment, which were responsible for management of the Fund. The trial court dismissed the suit based upon the defense of qualified immunity and the decision was 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. However, in *Chase*, just like in this matter, “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.

Petitioners maintain that 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 as in *Chase*, DHHR employees were specifically given the power to make the decision being challenged by the Respondents. This matter is similar to *Goines* in that the 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 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. The Respondents have tried to twist the law regarding this matter in order to make it appear that a clearly established law has been violated. The Respondents point to the fact that W.Va. C.S.R. § 64-11-1 et seq. was adopted in 2000, as proof that the law was well established, but this is not the standard of determining whether the law on an issue is “clearly established”. The Respondents have not pointed to one court decision on this issue, state or federal, which settles this matter. Therefore, the Respondents are trying to maneuver around the applicable standard in order to survive summary judgment, which this Honorable Court should not allow.

D. 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 wrong standard to its qualified immunity analysis. The Respondents try to argue in their response brief that the trial court used the correct qualified immunity analysis, and try to assert that *Botkins v. St. Albans*, 228 W.Va. 393, 719 S.E.2d 863 (W.Va. 2011), is not controlling in this matter. Respondents are correct that the decision in *Botkins* was issued after the trial court ruling in this matter. However, the Respondents missed the boat with regards to the use of *Botkins* in Petitioners’ brief. *Botkins* was used simply to show how this Court has recently applied the previously established qualified immunity analysis in a similar situation. The controlling law with regards to qualified immunity analysis was established in *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). In *Hutchison*, this Honorable Court stated, “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, 479 S.E.2d 649 (1996). Further, other jurisdictions have stated, “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(E.D. Tenn. April 16, 2007), 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).

Therefore, regardless of whether the facts in *Botkins* are exactly the same as this matter, the controlling analysis is still requires the trial court to first determine whether a “clearly established” law was violated, before the trial court can move on to any other issue. Here, the trial court 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.” See Appn’x at 6. Therefore, the trial courts denied the motion 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” law or statute has been violated, as established by the Fourth Circuit previously, this Court must apply the correct standard and analysis and reverse the judgment of the trial court, as it did in *Botkins*.

IV. Conclusion

WHEREFORE the Petitioners assert that they have shown that the Respondents have failed to show that the Petitioners violated a law or statute when they exercised their discretionary decision to issue D.E.A.F. a provisional behavioral healthcare license after both sides entered into a Memorandum of Understanding. Further, the Petitioners have shown that the

Respondents have not produced any evidence that a “clearly established” law or statute was violated by Petitioners in a fraudulent, malicious, or oppressive way. Therefore, the Petitioners request that this Honorable Court overturn the trial court’s November 10, 2011 order, and grant the Petitioners’ motion for summary judgment, and grant Petitioners any and all other such relief as this 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
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WEST VIRGINIA BUREAU FOR MEDICAL
SERVICES, and THE WEST VIRGINIA
OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,

Defendant 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, M. Andrew Brison and 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 do hereby certify that I have served a true and accurate copy of the foregoing *Petitioners' Reply Brief* upon the following by depositing the same in the United States mail, with postage prepaid, on the 16th day of May, 2012, addressed as follows:

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