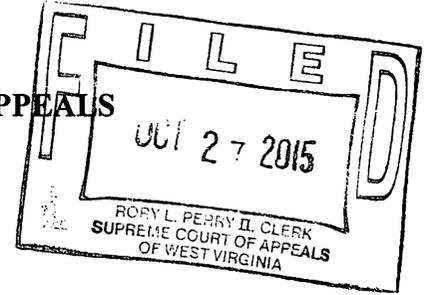


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 15-0711



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

v.

**THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF MOTOR VEHICLES,
Petitioner, Defendant below.**

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED BY FINDING THAT PETITIONER WAS NOT ENTITLED TO QUALIFIED IMMUNITY.
1. The Circuit Court Erred By Failing To Rely Upon *W. Va. Code* §17B-2-7a (2003) That Made Referral To The Medical Board Discretionary.
 2. The Circuit Court Erred By Relying Upon *W. Va. Code R.* §91-5-3.3.c. (2006) In Contravention Of *W. Va. Code* §17B-2-7a (2003).
 3. The Circuit Court Erred By Failing To Rely Upon *W. Va. Code R.* §§91-5-3.3.a. and 91-5-3.3.b. (2006) Making Referral To The Medical Board Discretionary Consistent With *W. Va. Code* §17B-2-7a (2003).
- B. THE CIRCUIT COURT ERRED BY FAILING TO RELY ON PETITIONER'S ARTICULATED POLICY ON EPILEPSY AND DRIVING.
- C. THE CIRCUIT COURT ERRED BY FAILING TO APPLY THE MAXIM *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS*.

II. STATEMENT OF CASE

On January 19, 2013, Doris Fay Peyton and Wilma Ann King were involved in a car accident that resulted in Ms. King's death. (App. 201-202). Respondent David King, as Administrator of the Estate of Ms. King, filed a lawsuit against Ms. Peyton alleging negligence. (App. 7-13). Later, Respondent King amended his Complaint naming Petitioner West Virginia Department of Transportation, Division of Motor Vehicles (hereinafter "DMV") as a defendant. (App. 7-13). Respondent King alleged that the DMV was responsible for Ms. King's death because in 2009, it did not refer Ms. Peyton's medical file to the DMV's Medical Advisory Board (hereinafter "Board") for review because of her diagnosis of epilepsy. (App. 180).

Petitioner DMV filed a *Motion for Summary Judgment* based on qualified immunity afforded to state agencies while performing discretionary duties. (App. 32-45). In denying the *Motion* and in contravention of *W. Va. Code* § 17B-2-7a (2003) and *W. Va. Code R.* §91-5-3.3.a.

(2003), the trial court found that referral to the Board for individual review was nondiscretionary. (App. 641-644).

In February 2007, Petitioner DMV received information questioning whether it was safe for Ms. Peyton to drive because of her diagnosis of epilepsy. (App. 46, 48-132). Because the DMV was concerned about the safety of Ms. Peyton and the public in general, it required her to submit a medical form from her neurologist, Ijaz Ahmad M.D., evaluating her ability to drive safely. (App. 46). When the form was not submitted in a timely manner, the DMV suspended Ms. Peyton's driving privileges in March 2007. In February 2009, her license was reinstated after a medical report from Dr. Ahmad was submitted finding that it was safe for her to drive. (App. 47).

In January 2008, almost one year after her driving privileges were suspended, Ms. Peyton informed Dr. Ahmad that she wanted to drive again. (App. 80). Dr. Ahmad requested that her driving skills be evaluated at St. Mary's Medical Center. (*Id.*) In April 2008, St. Mary's concluded that Ms. Peyton had the skills to drive, but recommended treatment for her cataracts and a behind-the-wheel assessment. (App. 133). In October 2008, Dr. Ahmad completed the medical report that had been previously requested by the DMV. (App. 135-141). He noted that Ms. Peyton's epilepsy and blackout spells had been under control for approximately 19 months, but recommended that she pass a driving test administered by the DMV because she had not driven in years. (App. 135-141). Otherwise, he believed that it was safe for her to drive. (App. 136). According to the findings in Dr. Ahmad's 2008 report and his later reports and office notes, Ms. Peyton had been seizure free for almost six years before the 2013 accident. (App. 51-77, 295-299, 466-470). Dr. Ahmad noted that Ms. Peyton had done "extremely well." (App. 51).

In January 2009, Ms. Peyton took a driving test. (App. 144) She passed the written part of the test, but failed the driving portion and, as was her right, she took the test again in February 2009 and passed. (App. 150). Ms. Peyton's cataracts were treated in October 2009, and she was approved to drive with regard to her vision. (App. 134). Because she had passed her driving test, corrected her eyesight, and had been seizure free for over one year according to Dr. Ahmad's October 31, 2008 report, Ms. Peyton's license was reinstated pursuant to the DMV's policy as outlined in a Memorandum written by the DMV's Director of Driver Services that states in pertinent part:

The Division of Motor Vehicles relies on Title 91, Code of State Rules, Series 5, in reviewing applications for driver licensing from individuals who are subject to mental, emotional or physical illness.

In regard to seizure disorders, there are no specific Regulations on which to rely. However, the Division of Motor Vehicles *and/or* the Driver's License Advisory Board [Medical Advisory Board] will review each individual's medical history to determine whether or not that person should be licensed. *In cases where no seizure activity has been reported within the past year, application will be approved if no other significant health problems exist.*

If a seizure activity has occurred, the Division of Motor Vehicles will review the individual's medical history to ascertain the frequency and severity of such seizures. In general, *an applicant must remain seizure free for twelve months before being approved for driving.* This is in accordance with recommendations from past and current medical Review Board Members [Medical Advisory Board].

(Emphasis added) (App. 151).

The Medical Advisory Board (hereinafter "Board") consists of five licensed physicians and surgeons appointed by the governor and compensated at the same rate as legislators for interim duties. *W. Va. Code* §17B-2-7a (2003). The Board is required to perform the following duties:

- 1) Advise the DMV Commissioner as to the general medical criteria relevant to the licensing of persons to operate motor vehicles;

2) *Upon request* of the DMV Commissioner, advise the Commissioner of the mental or physical fitness of an applicant or holder of a license to operate a motor vehicle; and

3) *Upon request* of the Commissioner, to furnish medical information and advice.

(*Id.*) (Emphasis added).

Dr. Ahmad's October 31, 2008, medical report requested a follow up report in one year. (App. 136). It was provided in October 2009, again finding that Ms. Peyton could safely operate a vehicle with her last seizure about three years ago. (App. 282-286). Dr. Ahmad left the decision of additional periodic reviews to the DMV who required another report by October 2010. (App. 283, 292). It was provided with the same findings. (App. 295-299).

The DMV filed a *Motion for Summary Judgment* based upon qualified immunity for state officials arguing that the duty to refer Ms. Peyton's medical file to the Board for individual review was discretionary. (App. 33-45). In its *Order*, the circuit court recited two instances of negligence alleged by King. The first alleged instance occurred on February 17, 2009, when DMV approved Ms. Peyton's driver's license without a follow-up medical report. The second alleged instance likewise occurred on February 17, 2009, when DMV did not refer Ms. Peyton's medical history to the Board. (App. 641-642). The circuit court made no finding of negligence with regard to the first alleged instance of negligence concerning a follow-up report. With regard to the second issue the circuit court found that "the act of referring a licensee's medical record to the Division's Advisory Board was a nondiscretionary duty" and, as a result, the DMV was not entitled to qualified immunity. (*Id.*) Without explanation, the circuit court omitted any mention of *W. Va. Code* § 17B-2-7a (2003) and *W. Va. Code R.* §91-5-3.3.a. (2003), both making referral by the DMV to the Board discretionary. (App. 641-644). The DMV requests appellate review of the circuit court's decision based on the findings in *West Virginia*

Regional Jails and Correctional Facilities v. A.B., 234 W. Va. 492, 766 S.E.2d 751 (2014) holding that a circuit court's denial of a motion for summary judgment predicated on qualified immunity is an interlocutory ruling subject to immediate appeal.

III. SUMMARY OF ARGUMENT

Petitioner is entitled to qualified immunity available to state agencies in negligence suits involving discretionary decisions. In determining the availability of qualified immunity the first step is to identify the nature of the acts or omissions giving rise to the suit. *West Virginia Regional Jails and Correctional Facilities v. A.B.*, 234 W.Va. 492,766 S.E.2d 751 (2014). In response to the *Motion for Summary Judgment*, Respondent King alleged that the failure of the DMV to refer Ms. Peyton's medical file to the Board in 2009 was the sole proximate cause of the 2013 fatal accident. (App. 180).

The second step is to determine whether the alleged negligent act or omission involved a discretionary or nondiscretionary duty. (*Id.*) Respondent King argued that the DMV had a nondiscretionary duty to refer every medical file to the Board for individual review pursuant to the legislative rule *W. Va. Code R. §91-5-3.3.c.* (2006). (App. 180-186). The circuit court agreed and denied DMV's *Motion for Summary Judgment*. (App. 641-644). Respondent's interpretation of the ambiguous language in legislative rule *W. Va. Code R. §91-5-3.3.c.*(2006) contravenes the clear statutory language in *W. Va. Code §17B-2-7a* (2003). When administrative law and statutory law contradict, the statute prevails. For this reason alone, the circuit court's order cannot be upheld.

Furthermore, other legislative rules promulgated pursuant to *W. Va. Code §17B-2-1 et seq.* are not ambiguous and are consistent with the statutory law in *W. Va. Code §17B-2-7a* (2003). *W. Va. Code R. §91-5-3.3.a.* (2006) *permits, but does not require*, the DMV to submit

medical files to the Board for individual review. (Emphasis added). *W. Va. Code R. 91-5-3.3.b.* (2006), *permits, but does not require*, a licensee to submit his or her medical files to the Board for individual review. (Emphasis added). Finally, the sections and subsections in *W. Va. Code R. §91-5-1, et seq.* (2006) listing and describing the actual procedures and requirements for review fail to even mention the Board.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the *West Virginia Rules of Appellate Procedure*, Petitioner DMV asserts that the parties have not waived oral argument; the appeal is not frivolous; and oral argument will aid the Court in making the correct decision. Pursuant to Rule 19, this case is suitable for oral argument because it involves an error in the application of settled law and involves a narrow issue of law.

V. STANDARD OF REVIEW

In the case *sub judice* the circuit court denied Petitioner DMV's *Motion for Summary Judgment* that was predicated on qualified immunity entitling Petitioner to a *de novo* review by this Court. *W. Va. Rules of Civil Procedure*, Rule 56; Syl. Pt. 1, *Findley v. State Farm Mutual Auto Insurance Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002); and *A.B.* at 759 citing *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). "A circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Syl. Pt. 2, *A.B.* The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "[T]he 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, the ultimate question of statutory or qualified immunity are ripe for summary disposition. Syl. Pt. 1, *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

VI. ARGUMENT

A. **THE CIRCUIT COURT ERRED BY FINDING THAT PETITIONER WAS NOT ENTITLED TO QUALIFIED IMMUNITY.**

Governmental officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Syl. Pt. 5, *A.B.* “Immunities 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 subjected to the burden of trial at all.” *Hutchinson* at 658. The purpose of qualified immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation and promote effective government. *State of West Virginia v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591, 599 (1992). The policy consideration underlying qualified immunity is that “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* at 658. To prove that a clearly established right has been infringed upon there must be “a particularized showing” that a reasonable official would understand that what he or she did violated a clearly established law or that “in light of preexisting law the unlawfulness of the action was apparent.” *A.B.* at 776. 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). Public officials are shielded from liability in grey areas. *City of St. Albans v. Bodkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011).

Once a defendant asserts the affirmative defense of qualified immunity, it is the plaintiff, not defendant, who 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, 1114 S.Ct. 559, 126 L.Ed.2d 459 (1993). The contours of the right must be sufficiently clear that a reasonable official would understand that what he or she was doing violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

In King's Response to the *Motion for Summary Judgment* he cited one disputed issue:

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

(App. 180).

The circuit court noted:

Plaintiff alleges that the Division was negligent when on February 17, 2009, it medically approved Ms. Peyton's driver's license by failing to require a follow-up medical report and by failing to refer her medical history to the Division's Medical Advisory Board.

(App. 641-642).

The circuit court found that:

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

(App. 642-643).

It was Plaintiff King, not Defendant DMV, who carried the burden to show that existing law required Ms. Peyton's medical file to be reviewed by the Medical Advisory Board before her license could be reinstated. Pursuant to the statutory and administrative law, there was no duty, requirement, or right to have Ms. Peyton's medical file reviewed by the Board. Because the only alleged act of negligence involved a discretionary duty, no "clearly established right was infringed upon" much less "a particularized showing."

Petitioner's 2008 policy with regard to epilepsy and driving was articulated in a Memorandum from David H. Bolyard, Director of Driver Services for the DMV:

In regard to seizure disorders, there are no specific [seizure disorder] Regulations on which to rely. However, the Division of Motor Vehicles *and/or* the Driver's License Advisory Board will review each individual applicant's medical history to determine whether or not that person should be licensed. *In cases where no seizure activity has been reported within the past year, applications will be approved if no other significant health problems exist.*

(App at 151) (Emphasis added).

When Petitioner DMV received information in 2007, that it might not be safe to allow Ms. Peyton to drive, it sent a letter to Ms. Peyton enclosing a medical form to be completed by her treating neurologist, Dr. Ahmad. Because the medical form was not submitted until October 2008, Ms. Peyton's license was suspended in March 2007. Dr. Ahmad documented in his October 2008, report that Ms. Peyton had been seizure free for 19 months and that it was safe for her to drive, but needed to pass a driving skills test.

In January 2009, Ms. Peyton took the requested test and passed the written portion, but did not pass the driving portion. One month later in February 2008, Ms. Peyton passed the driving portion of the test. Upon receiving the October 2008, report showing that Ms. Peyton had been seizure free for 19 months and it was safe for her to drive; verification that Ms. Peyton passed her driving test; and verification that her vision had been corrected; the DMV lifted the

suspension of her license in February 2009, in compliance with policy. Dr. Ahmad requested a follow up report in one year that was provided finding again that Ms. Peyton needed no restrictions for driving and could safely operate a vehicle, with her last seizure about three years ago. Another follow-up report was requested and provided in 2010 finding the same.

Although the only issue in this appeal is whether the Division is entitled to qualified immunity, not whether the Petitioner DMV was negligent, Respondent has offered no insight as to how the alleged duty to refer Ms. Peyton's medical file to the Board in February 2009 could have proximately caused the fatal accident in 2013. All of Dr. Ahmad's office notes and reports show that from 2007 until her accident in 2013, Ms. Peyton was seizure free, had done "extremely well" and was safe to drive.

1. The Circuit Court Erred By Failing To Rely Upon *W. Va. Code* §17B-2-7a (2003) That Made Referral By The Commissioner To The Medical Board For Individual Review Discretionary.

W. Va. Code § 17B-2-7a (2003) describes the Medical Advisory Board's duties in pertinent part as "[t]he board shall, *upon request*, advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for . . . a license to operate a motor vehicle." (Emphasis added). The discretionary language used by the legislature gives the Commissioner discretion over which medical files will be sent to the Medical Review Board. It does *not require* an individual review by the Medical Board of every medical file that the DMV receives. Absent the words "upon request" the statute would read that "[t]he board shall advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for, or the holder of, a license to operate a motor vehicle." The phrase "upon request" is not meaningless. A fundamental rule of statutory construction requires that every part of a statute be presumed to have effect and meaning. *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920, 928

(W.Va. 2007) citing Syl. Pt. 4, *Bank of Weston v. Thomas*, 75 W. Va. 321, 83 S.E. 985 (1914); *Raven Coal Corporation v. Asher*, 153 Va. 332, 149 S.E.2d 537, 545 (1949). When the phrase “upon request” is given effect, the statute limits review to those instances where the Commissioner requests medical review. Likewise, the last sentence of the statute reads, “[t]he board shall furnish the commissioner with all such medical standards, statistics, data, professional information and advice as he *may request*.” (Emphasis added). Again, the Board is not required to review or offer advice to Petitioner DMV on every medical case. Therefore, the circuit court committed error by not relying on *W. Va. Code* §17B-2-7a (2003) in finding that the duty to refer a medical file to the Board was discretionary.

2. The Circuit Court Erred By Relying Upon *W. Va. Code R. §91-5-3.3.c.* (2006) In Contravention Of *W. Va. Code* §17B-2-7a (2003).

In spite of the discretionary language in *W. Va. Code* §17B-2-7a (2003), Respondent King argued and the circuit court agreed that the DMV had a mandatory duty to refer each medical file to the Board for individual review. In support, Respondent and the circuit court cited the legislative rule in *W. Va. Code R. §91-5-3.3.c.* (2006). *W. Va. Code R. §91-5-3.3.c.* (2006) states that “[t]he Commissioner, after reviewing the Medical Report or Vision Examination Report and the recommendation of the Driver’s License Advisory Board may determine a person’s competency drive.” (App. 540, 180-181). Respondent argued that the placement of the word “and” created a nondiscretionary duty to refer every medical file to the Board for individual review in spite of the controlling statutory language in *W. Va. Code* §17B-2-7a (2003) that made referral to the Board discretionary. (App. 180-181, 643).

In interpreting an agency’s legislative rule and the construction of a statute that it administers, if the intention of the legislature is clear, that is the end of the matter, and the rule can only be upheld if it conforms to the legislature’s intent. Syl. Pts. 3 and 4, *Appalachian*

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

The language in *W. Va. Code* §17B-2-7a (2003) is clear and makes referral to the Board for individual review discretionary reading that “[t]he board shall, *upon request*, advise the commissioner of motor vehicles as to the mental or physical fitness of an applicant for . . . a license to operate a motor vehicle.” (Emphasis added). In the event that the legislative rule in *W. Va. Code R.* §91-5-3.3.c. (2006) makes referral to the Board mandatory, it contravenes *W. Va. Code* §17B-2-7a (2003) and cannot be upheld. Therefore, the circuit court committed error by finding that the referral of a medical file to the Board was nondiscretionary.

3. The Circuit Court Erred By Failing To Rely on *W. Va. Code R.* §§91-5-3.3.a. And 91-5-3.3.b. (2006) Making Referral To The Medical Board Discretionary Consistent With *W. Va. Code* §17B-2-7a (2003).

On the other hand, other rules in *W. Va. Code R.* §91-5-1 *et seq.* (2006) promulgated pursuant to *W. Va. Code* §17B-2-1 *et seq.* namely §§91-5-3.3.a. (2006) and 91-5-3.3.b. (2006), are *consistent* with *W. Va. Code* §17B-2-7a (2003) and are controlling. *W. Va. Code R.* §91-5-3.3.a. (2006) *permits, but does not require*, Petitioner DMV to submit medical files to the Board for individual review. (Emphasis added).

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

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

3) Vision Examination Report Form completed by an optometrist or ophthalmologist of the licensee's choice who is licensed in the United States.

(Emphasis added) (App. 539-540).

W. Va. Code R. §91-5-3.3.b. (2006) permits, but does not require, the licensee to submit information to the Board for review.

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

(App. 540) (Emphasis added).

B. THE CIRCUIT COURT ERRED BY FAILING TO RELY UPON PETITIONER'S ARTICULATED POLICY ON EPILEPSY AND DRIVING.

DMV's relevant policy on driving and epilepsy reads that review of an individual's medical history can be performed by the DMV *and/or* the Medical Advisory Board to determine whether or not that person should be licensed making referral to the Board discretionary. The policy is consistent with the statute in *W. Va. Code §17B-2-7a (2003)* and the legislative rule in *W. Va. Code R. §91-5-3.3.a. (2006)*. An agency's articulated policy interpreting a statute will stand unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424, 433, 440 (1995). "[C]onstruction of [a] statute by the person charged with the duty of executing the same is accorded great weight." *Id.* at 438. It is only when an agency's interpretation is unduly restricted and in direct conflict with the intent of the legislature is the interpretation erroneous. Syl. Pt. 5, *Hodge v. Ginsberg*, 172 W.Va. 17, 303 S.E.2d 245 (1983). Interpretation of statutes by bodies

charged with their administration are given great weight unless clearly erroneous. *Id.* at 439; Syl. Pt. 4, *Security National Bank & Trust Co. v. First West Virginia Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981); Syl. Pt. 7, *Evans v. Hutchinson*, 158 W.Va. 359, 214 S.E.2d 453 (1975). Not being arbitrary, capricious or manifestly contrary to *W. Va. Code* §17B-2-7a (2003) or *W. Va. Code R.* §91-5-3.3.a. (2006), the policy must be given great weight and upheld making referral to the Board discretionary.

C. THE CIRCUIT COURT ERRED WHEN IT FAILED TO APPLY THE MAXIM EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

The maxim *expressio unius est exclusio alterius* means that the express mention of one thing implies the intentional exclusion of another. Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). Relevant sections of *W. Va. Code R.* §91-5-1, *et seq.* (2006) fail to even mention the Board when describing the actual procedures and requirements for review:

- 1) *W. Va. Code R.* §91-5-3.1. lists the requirements for medical review without listing a mandatory duty for individual review by the Board (App. 538-539);
- 2) *W. Va. Code R.* §91-5-3.2.a., b., c., d., and e. list the actions to be taken after receipt of medical information without naming a mandatory duty for review by the Board (App. 539);
- 3) *W. Va. Code R.* §91-5-3.2.d. lists the actions that the Commissioner can take pursuant to an individual review without containing a mandatory Board review (App. 539); and
- 4) *W. Va. Code R.* §91-5-3.4. mandates referral of medical files to the Board only if the Commissioner *requests* it, not in every all case. (App. 540-541).

VII. CONCLUSION

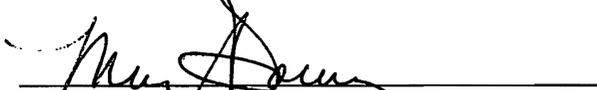
Wherefore, for all the above reasons the circuit court's *Order* dismissing Petitioner's *Motion for Summary Judgment* should be reversed and summary judgment should be granted based on qualified immunity.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION
OF MOTOR VEHICLES

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 15-0711

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

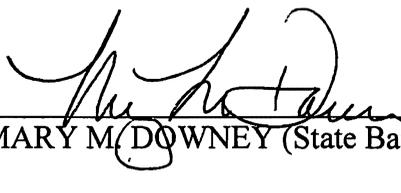
v.

**THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF MOTOR VEHICLES,
Petitioner, Defendant below.**

CERTIFICATE OF SERVICE

I, Mary M. Downey, Esq., Counsel for Petitioner, Defendant below, hereby certify that a copy of the foregoing *Petitioner's Brief* was sent via US Mail postage prepaid on this the 27th day of October, 2015 to:

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