**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

Spring 2023 Term

**FILED**
**June 15, 2023**
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EDYTHE NASH GAISER, CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

No. 22-ICA-58

JASON RYAN MOORHEAD,
Plaintiff Below, Petitioner,

v.

WEST VIRGINIA ARMY NATIONAL GUARD,
and WEST VIRGINIA MOUNTAINEER CHALLENGE ACADEMY,
Defendants Below, Respondents.

Appeal from the Circuit Court of Preston County
Honorable Steven L. Shaffer, Judge
No. 18-C-71

AFFIRMED

Submitted: April 26, 2023
Filed: June 15, 2023

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JUDGE LORENSEN delivered the Opinion of the Court.

LORENSEN, JUDGE:

The Petitioner, Jason Ryan Moorhead, appeals the final order of the Circuit Court of Preston County entered July 28, 2022, granting Respondents, West Virginia Army National Guard and the West Virginia Mountaineer Challenge Academy ("MCA") summary judgment. Mr. Moorhead filed suit on July 16, 2018, against MCA, alleging that he was injured at MCA's Camp Dawson barracks while exiting his top bunk because MCA failed to enforce its own bunk-exiting policy. Mr. Moorhead was subsequently discharged from the MCA program at the end of the acclimation period for insufficient participation.

After considering the parties' briefs, oral arguments, the appendix record, and the applicable law, we find that the circuit court committed no error and affirm the court's July 28, 2022, order.

## I. Facts and Procedural Background

MCA is a voluntary 22-week, quasi-military training and mentorship residential program for high-school-age students who are at risk of not succeeding in the traditional school environment. MCA is operated by the West Virginia Army National Guard.

Mr. Moorhead was sixteen years old when he applied to participate in MCA. His application indicates that he was leaving traditional school because he "will not go to school and is way behind in credits." He left Man High School located in Logan County,

West Virginia while attempting the 10th grade. His 9th grade cumulative GPA was 0.600, ranking 104th out of 117 students. In addition to struggling academically, he also had a documented history of behavioral and attendance issues.

Mr. Moorhead submitted his application for admission to MCA on April 5, 2015. As a part of the application process, Mr. Moorhead's mother signed a power of attorney and voluntary appointment of guardian form. After a review of Mr. Moorhead's educational records, letters from his treatment providers, and an interview, he was accepted to attend the "acclimation period" of the MCA for the second MCA Class of 2015.[1] He attended orientation at MCA with his mother on July 12, 2015. During the opening day of MCA, cadet candidates were introduced to the MCA campus, program, rules, and were given a safety briefing by the Commandant of Cadets. Cadet candidates were also instructed on the approved method of dismounting their top bunks when they were taken to the barracks in which they would be residing before they spent their first night at MCA. This method consisted of candidates sitting upright, turning so that they were face down on the bed, and then sliding down off the bunk on their stomachs.

Each morning at MCA, the cadet candidates are awakened by the playing of Reveille. Cadet candidates then dismount their bunks and stand at attention in preparation

[1] The acclimation period is a two-week period during which candidates for consideration as cadets are introduced to MCA life and evaluated for suitability as cadets.

for the day. On the morning of July 17, 2015, Mr. Moorhead awoke and dismounted his bunk bed in an unapproved manner. Upon landing, he felt a pinch in his right knee but did not inform anyone that he felt that he had been injured.

The next day, Mr. Moorhead informed one of the cadre[2] that he had injured his knee. Mr. Moorhead was then taken to see an on-site nurse employed by Preston Memorial Hospital[3] and was given a pair of crutches. On July 20, 2015, Mr. Moorhead was again taken to sick call and evaluated by Preston Memorial nurse practitioner Brian Steffke. Mr. Steffke treated Mr. Moorhead and placed him on lower body restricted duty, prohibiting him from engaging in physical training or organized activities until he could be re-evaluated in three days. On July 22, 2015, Mr. Moorhead was re-evaluated by Preston Memorial physician Jennifer Pumphrey, M.D. After her evaluation, Dr. Pumphrey determined that Mr. Moorhead had non-specific complaints of knee pain. She instructed him to walk correctly to avoid injury and returned him to full duty. Mr. Moorhead resumed participation in the program.

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[2] While the term "cadre" is not specifically defined by the parties, it appears that cadre refers to the group of supervising officers trained to instruct and guide cadets and candidate cadets during their time at MCA.

[3] MCA contracted with Preston Memorial Hospital to provide on-site medical evaluations and care for its cadets. This arrangement is disclosed to parents prior to admission.

Mr. Moorhead's Acclimation Reports, all of which appear to have been written after Mr. Moorhead injured his knee on July 17, 2015, indicate that Mr. Moorhead showed little insight when counseled, was reluctant to participate, made excuses, and was unwilling to perform in the program despite being able. On July 22, 2015, at the close of the acclimation period, the decision was made to discharge Mr. Moorhead from MCA. After his discharge, Mr. Moorhead was able to graduate with his high school diploma in 2017.

Mr. Moorhead commenced this litigation on July 16, 2018. Below, Mr. Moorhead argued that Respondents were liable because they were required, pursuant to the West Virginia Constitution and/or the doctrine of *in loco parentis*, to provide him with a safe and secure learning environment and that MCA failed to enforce its mandatory protocol regulating how candidates were to exit from the top bunk.

On December 1, 2021, Respondents filed a motion for summary judgment on the basis that MCA is entitled to qualified immunity. In its order of July 28, 2022, the circuit court granted summary judgment. It is from this order that Mr. Moorhead appeals.

## II. Standard of Review

We review a circuit court's entry of summary judgment *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). We therefore apply the same standard as the circuit court, which is that "[a] motion for summary judgment should

be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

## III. Discussion

Mr. Moorhead raises six assignments of error on appeal: (1) MCA is not entitled to qualified immunity; (2) the manner in which candidates are required to exit their bunks is a ministerial duty; (3) MCA is subject to the thorough and efficient education system of free schools required by Article XII, Section 1 of the West Virginia Constitution; (4) Mr. Moorhead's constitutional right to an education was violated; (5) MCA is subject to the doctrine of *in loco parentis*; and (6) there is a genuine issue of material fact concerning whether MCA's actions were fraudulent, malicious, and/or oppressive. For brevity, we combine our discussion of some of these assignments of error.

### A. Qualified Immunity

MCA asserts that the circuit court grant of summary judgment is correct based on application of the qualified immunity doctrine. The Supreme Court of Appeals of West Virginia has held:

> "'In the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 *et seq.*, 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.' Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995)." Syllabus point 7, *West Virginia Regional Jail & Correctional Facility Authority v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).

Syl. Pt. 6, *West Virginia State Police v. J.H.*, 244 W. Va. 720, 735, 856 S.E.2d 679, 695 (2021).

The West Virginia Army National Guard, and through it, the West Virginia Mountaineer Challenge Academy, is an agency of the State of West Virginia and not a political subdivision. Accordingly, MCA is not within the purview of the West Virginia Governmental Tort Claims and Insurance Act.[4] Moreover, there is no evidence of an insurance contract waiving the defense of qualified immunity.

To overcome a qualified immunity defense, a plaintiff must show that the governmental acts or omissions that fall in the category of discretionary are "in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise, fraudulent, malicious, or oppressive." Syl. Pt. 11, *W. Va. Reg'l Jail Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). "To determine whether the State, agency, and/or its employees are entitled to immunity, [the court] must first identify the nature of the

[4] This fact is not disputed by the parties.

governmental acts or omissions which give rise to the suit . . .” *Id.* at Syl. Pt. 10. For those state officials whose functions are discretionary in nature, qualified immunity “is broad and protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Crouch v. Gillispie*, 240 W. Va. 229, 234, 809 S.E.2d 699, 704 (2018) (citation omitted). “Further, ‘[a] public officer is entitled to qualified immunity for discretionary acts, even if committed negligently.’” *Id.* (quoting *Mason v. Wagner*, 236 W. Va. 488, 500, 781 S.E.2d 936, 948 (2015)). Once a determination is made regarding whether the acts of the state actor are discretionary, then the analysis turns to whether the discretionary acts or inactions violated a “clearly established law.” *W. Va. Dep’t of Health & Human Res. v. Payne*, 231 W.Va. 563, 573, 746 S.E.2d 554, 564 (2013).

***1. Discretionary v. Non-discretionary Acts***

It has been well established that a broadly characterized governmental action or function can fall under the “umbrella” of a discretionary function. *W. Va. Reg’l Jail Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 514, 766 S.E.2d 751, 773 (2014). For example, training, supervision, and employee retention have been found to “easily” fall under this umbrella. *Id.*

Mr. Moorhead argues that the circuit court erred when it found that the negligent training or supervision of the cadre was a discretionary act because he alleged that the cadre did not have discretion in enforcing the bunk policy, not that

the cadre were negligently trained.[5] However, Mr. Moorhead's argument is misplaced. Although his claim may not be centered around the supervision and training of the cadre, the determination is relevant because the finding of discretionary acts is a required step in the qualified immunity analysis. *See id.* at Syl. Pt. 10. There is no dispute that the cadre are present when the cadets exit their bunks and that both the cadre and the cadets are trained on the bunk-exiting policy. There is also no allegation that the cadre failed to promptly seek treatment for Mr. Moorhead when he complained of injury. Therefore, we find that MCA's act, or omission to act, with respect to the cadre failing to correct the way candidate cadets exit the top bunk squarely falls within the "supervision" category of discretionary actions.

***2. Clearly Established Law or Constitutional Right***

Next, we move to whether MCA has violated a clearly established law or constitutional right. "[O]nce the 'judgments, decisions, and actions' of a governmental official are determined to be discretionary, the analysis does not end. Rather, even if the complained-of actions fall within the discretionary functions of

[5] Mr. Moorhead argues that this Court should distinguish "ministerial" and "discretionary" acts. In *Payne*, the Supreme Court of Appeals of West Virginia found that the "distinction is highly arbitrary and difficult to apply." *Payne*, 231 W. Va. 565, n. 26, 746 S.E.2d 574 (citation omitted). Our highest Court chose to "resurrect" the principle under the limited facts in *Payne*. *Id.* However, we find that the distinction is not helpful nor necessary under the particular facts in this case and decline to apply it.

an agency or an official's duty, they are not immune if the discretionary actions violate 'clearly established laws of which a reasonable official would have known[.]'" *Payne*, 231 W.Va. at 572, 746 S.E.2d at 563 (citing Syl. Pt. 3, *Clark*, 195 W.Va. 272, 465 S.E.2d 374).

Mr. Moorhead argues that MCA violated his right to an education under Article 12, Section 1 of the West Virginia Constitution. Again, we disagree.

The West Virginia Constitution requires that "[t]he legislature shall provide, by general law, for a thorough and efficient system of free schools." W. Va. Const. art. XII, § 1. Further, students have a right to a safe and secure school environment. *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 527–28, 490 S.E.2d 340, 346–47 (1997) (quoting Syl. Pt. 4, *Phillip M. ex rel. J.P.M. v. Greenbrier Cnty. Bd. of Educ.*, 199 W. Va. 400, 484 S.E.2d 909 (1996)).

The legislature has made it clear that the programs offered by Mountaineer Challenge Academy sit separate and apart from West Virginia's public school system and are not subject to the same constitutional protections as its public school counterpart. MCA is classified as a "special alternative education program" and is operated by the Adjutant General, not the state board of education. *See* W.

Va. Code § 18-2-6(f)–(g) (2019).[6] Further, MCA was specifically created "for students who are at risk of not succeeding in the traditional school structure." *Id.* § 18-2-6(g). A student participating in the MCA is considered fully enrolled in the public school of the student's home county for the purposes of funding and calculating attendance and graduation rates. *See* W. Va. Code § 18-2-6(g)(3)(D). For any other purpose, a student participating in the MCA is considered withdrawn from the public school system. *Id.* MCA cadets do not graduate or obtain high school diplomas from the MCA. Rather, a cadet must complete the High School Equivalency Exam, which is offered and administered by a separate entity. Only if the cadet passes that exam will the cadet receive a diploma from his or her respective home high school.

We find that MCA does not exist within the public school system. For this reason, Mr. Moorhead cannot rely on W. Va. Const. art. XII, § 1 to establish a violation of a constitutional right by the acts or omissions of MCA, and therefore, Mr. Moorhead's argument fails to overcome MCA's qualified immunity.

Mr. Moorhead further argues that his statutory right under West Virginia Code § 18A-5-1(a) (2008) to be supervised by his teachers has been violated. Our Supreme

[6] Although this code section was amended in 2019, the portions relied on for this case remained unchanged from the prior 2013 version.

Court of Appeals of West Virginia recently affirmed teachers' statutory duty to supervise students while they are at school. *Goodwin v. Bd. of Educ.*, 242 W. Va. 322, 331, 835 S.E.2d 566, 575 (2019). Further, the Court has acknowledged that West Virginia Code § 18A-5-1(a) (2008)[7] embodies the *in loco parentis* doctrine in which a parent "delegates part of his parental authority while the child is in their custody." *Id.* (citation omitted). In finding that MCA is not a considered a public school, we decline to find that the doctrine of *in loco parentis*, as described in *Goodwin*, is applicable here.[8]

In the alternative, Mr. Moorhead argues that the health care power of attorney form that Mr. Moorhead's mother signed prior to his entry into MCA required that MCA be held responsible for his overall care while in attendance. "In general, a power of attorney is an instrument granting someone authority to act as agent or attorney-in-fact for the grantor." *AMFM LLC v. Shanklin*, 241 W. Va. 56, 61, 818 S.E.2d 882, 887 (2018) (internal quotations and citation omitted). When Mr. Moorhead initially reported his injury on July 18, 2015, he was taken to the on-call nurse. He continued to complain of pain in his right knee and was taken to be evaluated two more times in a four-day period. The medical staff

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[7] "The teacher shall stand in the place of the parent(s), guardian(s) or custodian(s) in exercising authority over the school and has control of all students enrolled in the school from the time they reach the school until they have returned to their respective homes . . . ." W. Va. Code § 18A-5-1(a) (2008).

[8] We recognize that the *in loco parentis* doctrine in West Virginia is generally applied in scenarios outside of the school environment, mostly in family law matters. *See In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d (2005); *see also* W. Va. Code § 49-6-2(a). However, Mr. Moorhead restricted his discussion to education, and we will do the same.

examining Mr. Moorhead did not diagnose him with any injuries that would prevent him from participating in the activities and advised that he was physically able to continue with the program.[9]

The power of attorney that Mr. Moorhead's mother signed authorized MCA "to do all acts necessary or desirable for maintaining the health of my child, Jason Ryan Moorhead." We agree with the circuit court's finding that MCA fulfilled this duty by promptly taking Mr. Moorhead to three medical professionals to be evaluated for his injury. Although MCA is required to help cadets and candidate cadets seek care, MCA is unable to control the actions and advice of medical professionals. Therefore, the circuit court did not err in the summary judgment finding that MCA did not breach any duty under the power of attorney owed to Mr. Moorhead.

### B. Fraudulent, Malicious, or Oppressive Actions as an Exception to Qualified Immunity

After finding that no established statutory or constitutional right has been violated, the only way to overcome the presumption of qualified immunity is to establish that MCA's acts were fraudulent, malicious, or oppressive. *Ayersman v. Wratchford*, 246 W. Va. 644, 656, 874 S.E.2d 756, 768 (2022). Our Supreme Court of Appeals has held:

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[9] Brain Torre, M.D., an expert hired by Mr. Moorhead, testified that Mr. Moorhead's initial evaluation at MCA did not reveal any orthopedic problems. However, it was later learned that Mr. Moorhead had a pre-existing stress fracture that was exacerbated when he improperly exited his bunk. Mr. Moorhead later underwent surgery for his injuries.

> A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29–12A–1, *et seq.* [the West Virginia Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. *There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.*

Syl. pt. 3, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995) (emphasis added).

Mr. Moorhead argues that there are factual disputes as to whether MCA acted in a fraudulent, malicious, or an otherwise oppressive way[10] when it required Mr. Moorhead to continue to participate in the physical activities required by candidate cadets and that the issue should be remanded for a jury determination.

MCA relied on the medical advice of Preston Memorial treatment providers and had no reason to believe that Mr. Moorhead was physically unable to participate in MCA activities. Mr. Moorhead did not present any evidence that MCA disregarded the treatment recommendations from the several different providers that evaluated Mr. Moorhead, nor did he present any evidence that MCA refused or delayed having him evaluated at all. Therefore, the circuit court did not err when it did not send this issue to a jury.

[10] Mr. Moorhead fails to specify with particularity which category (fraud, malice, or oppression) he believes MCA's actions implicate.

## IV. Conclusion

Based on the foregoing, we affirm the Circuit Court of Preston County's July 28, 2022, order granting MCA's motion for summary judgment.

Affirmed.