IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0389

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Defendant Below,

Petitioner

vs.

A.R. Plaintiff Below,

Respondent.

PETITIONERS' BRIEF

Jan L. Fox, Esq. (WVSB #1259)
Mark C. Dean, Esq. (WVSB #12017)
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8000
Facsimile (304) 353-8180
Jan.Fox@Steptoe-Johnson.com
Mark.Dean@Steptoe-Johnson.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. ASSIGNMENT OF ERROR

The Circuit Court erred by denying those portions of the West Virginia Department of Health and Human Resources' ("DHRR's") Motion to Strike and for Partial Dismissal seeking dismissal of the causes of action alleging mere negligence and negligent hiring/supervision because DHHR is entitled to qualified immunity as a governmental agency for the discretionary actions it undertook. All of Respondent A.R.'s allegations against DHHR in her negligence causes of action arise from DHHR's exercise of its discretionary governmental functions and duties in making employment decisions, fail to identify any violation of clearly established laws about which DHHR should reasonably know, and fail to describe conduct fraudulent, malicious, or oppressive. *See, e.g. W.Va. Reg'l Jail Auth. v. A.B.*, 234 W.Va. 492, 514, 766 S.E.2d 751, 756 (2014) (recognizing that "employee retention . . . easily falls within the category of 'discretionary' government functions' for qualified immunity purposes"); *W.Va. State Police, et al. v. J.H.*, 244 W.Va. 720, 856 S.E.2d 679; *W.Va. Bd. of Educ. v. Marple*, 236 W.Va. 654, 783 S.E.2d 75 (2015).

II. STATEMENT OF THE CASE

West Virginia Courts have expressed no reluctance in dismissing a civil action based upon the doctrine of qualified immunity. *See, e.g, Goodwin v. Shepherd Univ. Police*, 2018 WL 6980894 (Circuit Court of Jefferson County, West Virginia Feb. 28, 2018) (granting motion for judgment on the pleadings which Court said was analogous to motion to dismiss); *Goodwin v. City of Shepherdstown/Shepherdstown Police Dept.*, 2017 WL 10717311 (Circuit Court of Jefferson County, West Virginia Sep. 8, 2017); *Crites v. Eastern West Virginia Comm. and Tech. College*, 2016 WL 9240526 (Circuit Court of Hardy County, West Virginia Jan. 4, 2016); *Shaffer v. City of South Charleston*, 2014 WL 11153658 (Circuit Court of Kanawha County, West Virginia Aug. 15, 2014); *Taylor v. Hill*, 2013 WL 12474809 (Circuit Court of Kanawha County, West Virginia May 14, 2013); *Radcliff v. Gannon*, 2013 WL 10252591 (Circuit Court of Cabell County,

West Virginia March 29, 2013) (statutory immunity per Governmental Tort Claims and Insurance Reform Act); *Gray v. Berezniak*, 2008 WL 5520097 (Circuit Court of Kanawha County, West Virginia Jan. 31, 2008); *West Virginia Bd. of Educ. v. Croaff*, 2017 WL 2172009 (W.Va. May 17, 2017) (unpublished). Despite an abundance of precedent, however, the Circuit Court below erroneously found that "for Defendants' 'qualified immunity' defense to bar [negligence claims], it would first need to be clearly established that the actions (or inactions) of Defendants were discretionary in nature and not in violation of clearly established statutory or constitutional laws that a reasonable person would know, or were not otherwise fraudulent malicious or oppressive."[1] Without question, the Amended Complaint delineates a terrible series of events, but just because something terrible happens does not mean the entity to which the claimant points the finger is responsible. Moreover, as this Court has stated, " '[t]he purpose of such official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make officials unduly timid in carrying out their official duties.' As we have discussed in the context of police investigations, '[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Likewise, had Ms. Garcia removed Raynna from the home without sufficient evidence to do so, she and DHHR were equally exposed to litigation." *Crouch v. Gillispie*, 240 W.Va. 229, 809 S.E.2d 699, 706-7 (2018). (footnotes omitted). As the Fourth Circuit Court of Appeals eloquently stated in *White v. Chambliss*, 112 F.3d 731, 739 (4th Cir. 1997), "[w]e are reminded again that the defense of qualified immunity is often asserted in the most difficult of cases. Yet it is precisely for the hard case that the immunity exists. The

[1] Order Denying The West Virginia Department of Health and Human Resou[r]ces[']' Motion to Strike and For Partial Dismissal of Plaintiff's Amended Complaint at ¶¶ 35, 39 (citations omitted). [Appendix Record 324-326].

availability of immunity cannot be judged solely by tragedies that later occur or by mistakes that later come to light."

In this matter Respondent, A.R., was at the time of the events alleged in the Complaint a minor, and had previously been in the care, custody, and control of DHHR. [Am. Compl. at ¶ 1, Appendix Record 186]. Dustin Kinser was a CPS worker trainee who A.R. reportedly told of her home conditions. Kinser allegedly formed a relationship with A.R. and took her from her home in Lincoln County, West Virginia. *Id.* at ¶¶ 8, 10, Appendix Record 187-188. A.R. avers that Kinser took her to the Knight's Inn in Kanawha City, West Virginia, supplied her with alcohol, and sexually abused and assaulted her. *Id.* at ¶ 12, Appendix Record 188. Kinser also allegedly took A.R. with him on site visits, one time identifying her as a CPS intern. *Id.* at ¶ 16, Appendix Record 189. Plaintiff avers that Kinser never reported the home conditions described by her, and never opened a formal CPS case. *Id.* at ¶ 11, Appendix Record 188.

A.R. brought suit against DHHR and CPS in the Circuit Court of Kanawha County, West Virginia (Civil Action No. 20-C-571) alleging violations of the Child Welfare Act[2], violations of the West Virginia Human Rights Act[3], intentional infliction of emotional distress[4], extreme and outrageous conduct, violations of the West Virginia Human Trafficking statute[5], violations of the West Virginia State Constitution[6], negligence, negligent hiring/supervision, and vicarious

[2] DHHR takes the position that there is no implied, private cause of action for the alleged violation of the Child Welfare Act.

[3] DHHR asserts that A.R. is not a protected person under the West Virginia Human Rights Act and has not outlined any act allegedly unlawful under that Act.

[4] Voluntarily dismissed by A.R. [Appendix Record at 313].

[5] DHHR maintains that there is no implied, private cause of action for the alleged violation of the West Virginia Human Trafficking Statute.

[6] DHHR asserted the lack of monetary damages as recovery for various state Constitutional claims.

liability[7]. [Appendix Record 6-19]. Suit was dismissed because "[i]t [was] undisputed that [A.R.] failed to provide notice to the State Defendants pursuant to the procedures outlined in *W.Va. Code* § 55-17-3(a)(1)" and the Circuit Court "lack[ed] jurisdiction to hear this matter as to the State Defendants". [Appendix Record at 44].

Less than a month after the dismissal order was entered, A.R. filed a second suit against DHHR in the Circuit Court of Kanawha County, West Virginia. [Appendix Record 46]. The second suit, not naming CPS, alleged violations of the Child Welfare Act, violations of the West Virginia Human Rights Act, infliction of emotional distress, extreme and outrageous conduct, violations of the West Virginia Human Trafficking Statute, violations of the West Virginia State Constitution, negligence, negligent hiring/supervision, and vicarious liability. [Appendix Record 50-57]. A.R. then sought to transfer her second suit and consolidate it with the original action. [Appendix Record at 85-89]. Transfer and consolidation was granted. *See* Appendix Record 96. However, "prior to proceeding with the hearing on" DHHR's "*Motion to Strike and for Partial Dismissal*", A.R.'s counsel sought leave "to file an amended complaint due to issues raised in the recent decision" of this Court in *W.Va. State Police, Dept. of Military Affairs and Public Safety v. J.H.* and such leave was granted. [Appendix Record 182-183]. The Amended Complaint at issue herein was filed thereafter. [Appendix Record 3].

As against DHHR[8], A.R.'s Amended Complaint alleged violations of the Child Welfare Act, infliction of emotional distress, extreme and outrageous conduct, violations of the West Virginia Human Trafficking Statute, negligence, negligent hiring/supervision, and vicarious liability. [Appendix Record 186-197]. DHHR moved to strike, and partially dismiss, A.R.'s suit,

---

[7] DHHR maintains that there is no standalone claim for vicarious liability.

[8] CPS is not named in A.R.'s Amended Complaint. [Appendix Record 186].

asserting in particular qualified immunity as to all negligence claims. *See* Appendix Record 232, 234.

Specifically, DHHR argued that the case law from this Court "as recently as 2021, says that this is something that the courts should address at the very front of litigation, because a defendant such as the Department of Health and Human Resources should not be subjected to litigation if qualified immunity applies." [Appendix Record 339]. Noting that A.R. "alleges the negligent violation of CPS policies, procedures and protocols", DHHR maintained that in 2018 this Court "rejected a similar assertion stating that, 'although the Social Service Manual may have been incorporated by reference by the state regulation in 1986, the CPS Guidelines in effect at the operative time may have been revised in 2009 and revised in 2010, have not been adopted or approved by the Legislature. Moreover, the CPS Guidelines are interim rules and even so, they're not uniformly applied across the state, they are applicable only in pilot counties. Under those circumstances, we have difficulty elevating those interim guidelines to clearly established statutory or constitutional law." [Appendix Record at 339-340]. DHHR also challenged A.R.'s negligent hiring and supervision allegations in accordance with this Court's decision in *Dept. of Military Affairs v. J.H. Id.* at 340. Nevertheless, despite DHHR's assertion of the longstanding doctrine of qualified immunity, its request to strike and for partial dismissal was denied. *See* Appendix Record 313-328. This appeal ensued.

III. SUMMARY OF ARGUMENT

The crux of this case involves the Circuit Court's decision to deny qualified immunity as to the negligence claims against DHHR early in the litigation. Indeed, failing to do so eviscerates the very purpose of qualified immunity – an immunity from suit. As this Court has repeatedly stated:

> '[t]he very heart of the [qualified] immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.' *Id.* at 148, 479 S.E.2d at 658. We also have recognized that
> a ruling on qualified immunity should be made early in the proceedings so that the expense of trial is avoided where the defense is dispositive. First and foremost, qualified immunity is an entitlement not to stand trial, not merely a defense from liability. See *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) ('The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.').
>
> *Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015). Therefore, because we consistently have acknowledged that qualified immunity is not just a defense, but rather 'an entitlement not to stand trial,' *id.*, rulings on qualified immunity claims should be made as early in the proceedings as possible. The uniqueness of qualified immunity and its provision of total immunity from suit rather than just a defense is an important reason for the aforementioned heightened pleading.

West Virginia Regional *Jail and Correctional Facility Authority v. Estate of Grove*, 244 W.Va. 273, 852 S.E.2d 773, 782 (2020) (citations omitted). In this regard, this Court recently held:

> Because an objective of qualified immunity is to save specific individuals and agencies from suit and, when appropriate, from pre-trial discovery and litigation, deferring a ruling on qualified immunity acts as an effective denial of such protections. Accordingly, we now hold that where a complaint fails to adequately plead specific facts that (1) allow the court to draw the reasonable inference that the defendant is liable for the harm alleged, and (2) defeat a qualified immunity defense, then a circuit court's order deferring its ruling on a motion to dismiss based upon an assertion of qualified immunity is an interlocutory ruling that is subject to immediate appeal under the collateral order doctrine.

West Virginia State Police, Dept. of Military Affairs and Public Safety v. J.H., 244W. Va. 720, 856 S.E.2d 679, 689-90 (2021) (quoting *A.B.* at 514, 766 S.E.2d at 773).

Herein, A.R. alleges the "negligent" violation of CPS policies, procedures and protocols. In *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699, 705 (2018), this Court rejected a similar assertion stating "[a]lthough the Social Service Manual may have been incorporated by reference

by that state regulation in 1986, the CPS Guidelines in effect at the operative time had been revised in 2009, were revised again in 2010, and have not been adopted or approved by the Legislature. Moreover, the CPS Guidelines are interim rules and even so are not uniformly applied across the state—they are applicable only in pilot counties. Under these circumstances, we have difficulty elevating those interim guidelines to a clearly established statutory or constitutional law; the issue is compounded by Mr. Gillispie's failure to demonstrate that clearly established CPS Guidelines were violated, that Ms. Garcia would have known she was violating a clearly established right or that the specific alleged failures were even remotely causally related to Raynna's death." Indeed, *Crouch* is a good example of how this Court has often approved disposal of claims against DHHR (CPS/APS) based on qualified immunity. *See Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018); *R.L.D. v. West Virginia Dept. of Health & Human Resources,* 2018 WL 6040310 (W. Va. Nov. 19, 2018) (unpublished); *Markham v. West Virginia Dept. of Health & Human Resources*, 2020 WL 2735435 (W. Va. May 26, 2020) (unpublished).

Likewise, with regard to A.R.'s negligent training and supervision claim, this Court recently reiterated "[i]t is well-established that 'the broad categories of training, supervision, and employee retention ... easily fall within the category of 'discretionary' governmental functions.'" *West Virginia State Police, Dept. of Military Affairs and Public Safety v. J.H.*, 244W. Va. 720, 856 S.E.2d 679, 699 (2021) (quoting *A.B.* at 514, 766 S.E.2d at 773). This Court thereafter stated "[w]ith respect to the negligent training and supervision claim, J.H. failed to identify in either his complaint or amended complaint any clearly established constitutional or statutory law or right that was violated. Furthermore, J.H. failed to plead that the WVSP acted maliciously, fraudulently, or oppressively in training or supervising the Trooper Defendants. Accordingly, the circuit court erred in failing to determine that the WVSP was entitled to qualified immunity as to J.H.'s

negligent training and supervision claim. *Id.* (citation omitted). Virtually identically herein, with respect to the negligent training and supervision claim, A.R. failed to identify any clearly established law allegedly violated, or that DHHR acted maliciously, fraudulently, or oppressively in training or supervising Kinser. See Appendix Record at 195. Thus, the Circuit Court erred in failing to afford DHHR qualified immunity and dismissing A.R.'s negligence allegations.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

DHHR does not dispute that this Court has authoritatively decided the subject of qualified immunity, but submits that the decisional process may be significantly aided by oral argument. DHHR further submits that, although immunity issues are of import, at issue is the application of existing law such that the matter is appropriate for Rule 19 oral argument. Additionally, DHHR recognizes that this Court may resolve this matter through Rule 21 Memorandum decision.

V. ARGUMENT

A. THE STANDARD OF REVIEW

"This Court has held that '[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.'" *Boone v. Activate Healthcare, LLC*, 245 W.Va. 476, 859 S.E.2d 419, 422 (2021) (citing Syl. Pt. 1, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995))). Stated otherwise, " '[w]hen a party ... assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*.' Syl. pt. 4, in part, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998)." *West Virginia Reg'l Jail and Correctional Facility Auth. v. Grove*, 244 W.Va. 273, 852 S.E.2d 773, 780 (2020). "The term '*de novo*' means 'Anew; afresh; a second time.' 'We have often used the term '*de novo*' in connection with the term 'plenary.'... Perhaps more instructive for our present purposes is the definition of the term 'plenary,' which

means '[f]ull, entire, complete, absolute, perfect, unqualified.'' 'We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court.'" *Gastar Exploration, Inc. v. Rine*, 239 W.Va. 792, 806 S.E.2d 448, 454 (2017) (footnotes omitted).

Additionally, " '[i]n Syllabus point 1 of *West Virginia Board of Education v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015), [this Court] held: 'A circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.'" *Grove, supra.* In that regard:

> It is well-established that '[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.' Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). Moreover, '[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.' Syl. Pt. 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009). This review, however, is guided by the following principle regarding immunity:
> ***[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.***
> Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

West Virginia Regional Jail and Correctional Facility Authority v. A.B., 234 W.Va. 492, 766 S.E.2d 751, 760 (2014) (emphasis added). As this Court has recognized, "[t]he Court observed in *Robinson* that allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing them with 'the right not to be subject to the burden of trial.' *Id.* at 833, 679 S.E.2d at 665 (citation omitted)." *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863, 867 (2011).

B. DHHR IS ENTITLED TO QUALIFIED IMMUNITY FROM ALLEGATIONS OF NEGLIGENCE, INCLUDING ALLEGATIONS OF NEGLIGENT HIRING OR SUPERVISION, AND THE CIRCUIT COURT'S REFUSAL TO DISMISS SAID CLAIMS WAS IN ERROR.

"[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." *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995) *quoting City of Fairmont v. Hawkins*, 172 W. Va. 240, 304 S.E2d 824 (1983). *See also Jarvis v. West Virginia State Police*, 227 W.Va. 472, 711 S.E.2d 542 (2010) *citing Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995) ("In the absence of an insurance contract waiving the defense[9], 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

---

[9] This Court has expressly held that the State's insurance policy procured through the Board of Risk and Insurance Management does not waive immunity defenses:

> Therefore, we hold that the state insurance policy exception to sovereign immunity, created by West Virginia Code § 29–12–5(a)(4) [2006] and recognized in Syllabus Point 2 of *Pittsburgh Elevator Co. v. W.Va. Bd. of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983), applies only to immunity under the West Virginia Constitution and does not extend to qualified immunity. To waive the qualified immunity of a state agency or its official, the insurance policy must do so expressly, in accordance with Syllabus Point 5 of *Parkulo v. W.Va. Bd. of Probation & Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).
>
> . . .
>
> Under the facts of this case, the Board and Mr. Linger are not precluded from claiming qualified immunity because the insurance policy's terms do not expressly waive the defense. In fact, the Certificate of Liability Insurance contained in the record expressly states: "It is a condition precedent of coverage under the policies that the additional insured does not waive any statutory or common law immunity conferred upon it."

West Virginia Bd. Of Educ. v. Marple, 236 W.Va. 654, 783 S.E.2d 75 (2015).

or her employment, with respect to the discretionary judgments, decisions, and actions of the officer."). The DHHR is clearly a state agency. *See West Virginia Dept. of Health and Human Resources v. Sebelius*, 172 F.Supp.3d 904 (S.D. W.Va. 2016).

"Justice Cleckley, writing for the Court in *Hutchison*, suggested a two-part test that determines, first, whether the government officer violated a plaintiff's statutory or constitutional right, and if so, then second, whether that right was clearly established in light of the specific context of the case at the time of the events in question. As Justice Cleckley stated, 'When broken down, it can be said that we follow a two-part test: (1) does the alleged conduct set out a constitutional or statutory violation, and (2) were the constitutional standards clearly established at the time in question?' *Id.*, 198 W.Va. at 149, 479 S.E.2d at 659 (footnotes omitted)." *Maston v. Wagner*, 236 W.Va. 488, 781 S.E.2d 936, 949 (2015). As this Court has instructed, " ''[p]leading simple negligence, without a violation of a clearly established right, is insufficient to overcome qualified immunity.'" *B.R. v. West Virginia Dept. of Health and Human Resources*, 2018 WL 2192480 *2 (W.Va. May 14, 2018) (unpublished). The "pivotal question" is whether *DHHR* violated a clearly established right. As the Court stated in *J.H., supra*:

> ***The pivotal question is whether J.H. alleged that the WVSP, in training and supervising the Trooper Defendants, violated a clearly established right or law and/or otherwise acted maliciously, fraudulently, or oppressively.*** *See, e.g., R.Q. v. W. Va. Div. of Corr.*, No. 13-1223, 2015 WL 1741635, at *5 (W. Va. Apr. 10, 2015) (memorandum decision) ('***There does not appear to be a question in the instant case that D.F. allegedly violated petitioner's clearly established rights, but it is not his conduct that is the focus of this aspect of the appeal. Instead, the question is whether there is an assertion that the DOC, in the course of its supervision and retention of D.F., violated a clearly established right.*** Petitioner failed to allege what the DOC did or failed to do that it would have reasonably understood was unlawful with regard to its supervision, retention, and training of D.F. Petitioner did not identify a single policy, procedure, rule, regulation, or statute that the DOC violated.').

J.H., supra at 699 (some emphasis added). Thus, in this case, the issue to be analyzed with regard to qualified immunity is not ***Kinser's*** conduct, but ***DHHR's.*** Notably, "[t]o prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated." *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649, n. 11 (1996).

A.R. brings general negligence allegations against DHHR; however, with regard to a "clearly established right", alleges only:

> Defendants' failures to follow their own policies, procedures, and protocols, and their violation of the policies, procedures and protocols statutorily mandated under the Child Welfare Act, Chapter 49 of the W.Va. Code constituted gross dereliction of duty, and gross negligence, which proximately resulted in severe and substantial harm to A.R. for which she is entitled to recover damages.

[Amended Complaint at ¶ 56, Appendix Record 194]. Dispositive of A.R.'s assertions, this Court has already examined whether violation of DHHR's internal policies and procedures rise to the level of being violations of a clearly established right, concluding that:

> [w]e are wary of allowing a party to overcome qualified immunity by cherry-picking a violation of any internal guideline irrespective of whether the alleged violation bears any causal relation to the ultimate injury. Therefore, in the absence of allegations tying the alleged violations to [the] death, we are unable to view this case as more than an abstract assertion that DHHR could have investigated more thoroughly.

Crouch v. Gillispie, 240 W. Va. 229, 237, 809 S.E.2d 699, 708 (2018). Indeed, this is not like the case of *W. Va. Div'n of Corr. v. P.R.*, 2019 WL 6247748 at *7 (W.Va. Nov. 22, 2019) (memorandum opinion), wherein it was stated "[w]hen Policy Directive 332.02 is removed from the analysis, P.R. is left with her general claims against the defendants of negligent staffing and negligent supervision of staff and inmates on the day of the alleged assault. However, her general negligence claims do not defeat the broad scope of qualified immunity. Our law is clear that the doctrine of qualified immunity bars claims of mere negligence. *See e.g., Clark*, 195 W.Va. at 274,

465 S.E.2d at 376, syl. pt. 6. Simply making 'the skeletal assertion that if ... [a correctional officer] were properly trained and supervised, the rape would not have occurred' is nothing more than an 'illusory and languid contention ... [not] sufficient to overcome the State's immunity[.]' *A.B.*, 234 W.Va. at 516 n.33, 766 S.E.2d at 775, n.33.") (footnote omitted)."

Also fatally flawed is A.R.'s negligent training and supervision claim. As this Court recently reiterated "[i]t is well-established that 'the broad categories of training, supervision, and employee retention ... easily fall within the category of 'discretionary' governmental functions.'" *West Virginia State Police, Dept. of Military Affairs and Public Safety v. J.H.*, 244W. Va. 720, 856 S.E.2d 679, 699 (2021) (quoting *A.B.* at 514, 766 S.E.2d at 773). Importantly, in *J.H.*, this Court further stated "[w]ith respect to the negligent training and supervision claim, J.H. failed to identify in either his complaint or amended complaint any clearly established constitutional or statutory law or right that was violated. Furthermore, J.H. failed to plead that the WVSP acted maliciously, fraudulently, or oppressively in training or supervising the Trooper Defendants. Accordingly, the circuit court erred in failing to determine that the WVSP was entitled to qualified immunity as to J.H.'s negligent training and supervision claim. *Id.* (citation omitted). Virtually identically herein, with respect to the negligent training and supervision claim, A.R. failed to identify any clearly established law allegedly violated, or that DHHR acted maliciously, fraudulently, or oppressively in training or supervising Kinser. *See* Amended Complaint at ¶ 62, Appendix Record 195 ("Defendants negligently failed to conduct meaningful background checks, drug screening, and investigations when hiring and retaining their employees, agents and staff and, in fact, created a work force that was dangerous to the minor children, including Plaintiff which whom they are charged to protect.").

It is anticipated that A.R. will mirror the Circuit Court in wrongfully asserting that qualified immunity premature; however, such position defies the very nature and purpose of the doctrine. In *J.H., supra*, this Court stated "an objective of qualified immunity is to save specific individuals and agencies from suit and, when appropriate, from pre-trial discovery and litigation". *J.H.* at 730-1 (footnote omitted). Indeed, " 'a ruling on qualified immunity should be made early in the proceedings so that the expense of trial is avoided where the defense is dispositive. First and foremost, qualified immunity is an entitlement not to stand trial, not merely a defense from liability.' *Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015)." *West Virginia Dept. of Health and Human Resources v. V.P.*, 241 W.Va. 478, 825 S.E.2d 806, 812 (2019). As commentators have noted:

> [Qualified immunity] is designed to allow government officials to ***avoid the expense and disruption of litigation***, and is not merely a defense to liability. When a complaint fails to allege a violation of a clearly established law or discovery fails to uncover evidence sufficient to create a genuine issue whether the defendant committed such a violation, the qualified immunity defense provides the defendant with immunity from the burdens of trial as well as a defense to liability, and ***is effectively lost if the case is erroneously permitted to go to trial.***

63C Am. Jur. 2d *Public Officers and Employees* § 305 (footnotes omitted) (emphasis added). Accordingly, this Court has regularly determined dismissal appropriate on the basis of qualified immunity. *See, e.g., West Virginia Bd. of Educ. v. Marple*, 236 W.Va. 654, 783 S.E.2d 75 (2015); *West Virginia State Police, Dept. of Military Affairs and Public Safety v. J.H.*, 244 W.Va. 720, 856 S.E.2d 679 (2021); *B.R. v. West Virginia Dept. of Health and Human Resources*, 2018 WL 2192480 (W.Va. May 14, 2018) (unpublished); *West Virginia Bd. of Educ. v. Croaff*, 2017 WL 2172009 (W.Va. May 17, 2017) (unpublished); *West Virginia Dept. of Educ. v. McGraw*, 239 W.Va. 192, 800 S.E.2d 230 (2017); *West Virginia Dept. of Health and Human Resources v. V.P.*,

241 W.Va. 478, 825 S.E.2d 806 (2019); *Jarvis v. West Virginia State Police*, 227 W.Va. 472, 711 S.E.2d 542 (2010); *Mercer Co. Bd. of Educ. v. Ruskauff*, 2019 WL 5692295 (W.Va. Nov. 4, 2019) (unpublished); *Yoak v. Marshall Univ. Bd. of Gov's*, 223 W.Va. 55, 672 S.E.2d 191 (2008).

In the instant case, the Circuit Court denied DHHR the benefit of qualified immunity by denying its Motion to Dismiss A.R.'s negligence claims. Lest the purpose of the doctrine be defeated, the Circuit Court's decision must be reversed.

VI. CONCLUSION

This Court has long-recognized the policy and purpose of immunities from suit:

> 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 subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.*** *See Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) (The Court distinguished summary judgment rulings on claims by individuals to qualified immunity as immunities from suit). In this vein, unless expressly limited by statute, the sweep of these immunities is necessarily broad. They protect 'all but the plainly incompetent or those who knowingly violate the law.' *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986). 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.*** *See Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995); *Goines v. James*, 189 W.Va. 634, 433 S.E.2d 572 (1993); *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987). ***Such fear will stymie the work of state government, and will 'dampen the ardor of all but the most resolute, or the most irresponsible, [public officials] in the unflinching discharge of their duties.'*** *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir.1949)); see also *Parkulo v. West Virginia Board of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 [1996 WL 663338] (No. 23366, 11/15/96) ('The public interest is that the official conduct of the officer is not to be impaired by constant concern about personal liability'). The doctrine of qualified and statutory immunity was created to '***avoid excessive disruption***

> ***of government and permit the resolution of many insubstantial claims on summary judgment.'*** *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

Hutchison v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649, 658 (1996) (emphasis added). The Circuit Court's decision denies DHHR the protections the doctrine of qualified immunity supports, and thereby exposes DHHR, a governmental entity, to the very fears and disruption immunities seek to thwart.

Moreover, in refusing dismissal, the Circuit Court ignored long-standing precedent and instruction from this Court. *See, e.g., West Virginia State Police, Dept. of Military Affairs and Public Safety v. J.H.*, 244W. Va. 720, 856 S.E.2d 679, 699 (2021) (quoting *A.B.* at 514, 766 S.E.2d at 773) (""[i]t is well-established that 'the broad categories of training, supervision, and employee retention ... easily fall within the category of 'discretionary' governmental functions'"). Accordingly, DHHR respectfully requests the decision of the trial court be reversed.

WHEREFORE Petitioner, the West Virginia Department of Health and Human Resources, respectfully requests this Court reverse the trial court's Order failing to dismiss the negligence claims against it in this case, and remand the case for the purpose of awarding Petitioner judgment of dismissal as to those claims.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

By Counsel,

Jan L. Fox (WVSB #1259)
Mark C. Dean (WVSB #12017)
Chase Tower, Seventeenth Floor
707 Virginia Street, East
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000
(304) 933-8704 facsimile
Jan.Fox@Steptoe-Johnson.com
Mark.Dean@Steptoe-Johnson.com

STEPTOE & JOHNSON PLLC
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2022, I served the foregoing **"Petitioners' Brief"** by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

L. Dante diTrapano, Esq.
Benjamin D. Adams, Esq.
Calwell Luce diTrapano, PLLC
Law and Arts Center West
500 Randolph Street
Charleston, West Virginia 25302
(304) 343-4323
(304) 344-3684 facsimile

William C. Forbes, Esq.
W. Jesse Forbes, Esq.
Forbes Law Offices, PLLC
1118 Kanawha Boulevard East
Charleston, West Virginia 25301
(304) 343-4050
(304) 343-7450 facsimile
Counsel for Respondent/Plaintiff Below