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.

PETITIONER'S REPLY BRIEF

Counsel for Petitioner

Jan L. Fox, Esq. (WVSB #1259)
Mark C. Dean, Esq. (WVSB #12017)
STEPTOE & JOHNSON PLLC
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

Counsel for Respondent

W. Jesse Forbes, Esq. (WVSB #9956)
Jennifer N. Taylor, Esq. (WVSB #4612)
FORBES LAW OFFICE, PLLC
1118 Kanawha Boulevard East
Charleston, West Virginia 25301
(304) 342-1887
(304) 343-7450 facsimile
wjforbes@lawwv.com
jennifer@jtaylor-law.com

L. Dante DiTrapano, Esq. (WVSB #6778)
CALWELL LUCE DITRAPANO PLLC
500 Randolph Street
Charleston, West Virginia 25302
(304) 343-4323
(304) 344-3684 facso,o;e
dditrapano@cldlaw.com

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I. ASSIGNMENT OF ERROR

Petitioner reincorporates the Assignment of Error set forth in Petitioner's Brief.

II. STATEMENT OF THE CASE

Petitioner reincorporates the Statement of Facts and Procedural History set forth in Petitioner's Brief. The circuit court's ruling depriving the West Virginia Department of Health and Human Resources ("DHHR") of qualified immunity on Respondent's claims of negligence and negligent hiring/supervision was in error as a matter of law. All of Respondent'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 – *i.e.*, supervising and training. Although she makes a last-ditch attempt to do so in her Response Brief, she has failed to identify any violation of clearly established laws ***by DHHR*** (as opposed to others she has named in her lawsuit) and/or failed to describe conduct ***by DHHR*** (as opposed to others named in her lawsuit) which was fraudulent, malicious, or oppressive.

III. SUMMARY OF ARGUMENT

Petitioner DHHR reincorporates the Summary of Argument set forth in Petitioner's Brief. In specific reply to Respondent's arguments made in her brief, Respondent is simply wrong as a matter of law that 1) DHHR is not entitled to qualified immunity because it is a state agency rather than an individual; and 2) that a determination that DHHR is entitled to qualified immunity is "premature" and Respondent should be allowed to develop more facts before DHHR may assert it. The remainder of Respondent's Brief is an exercise in obfuscation. The pertinent question on this appeal is whether any actions ***by DHHR*** (not Dustin Kinser) violated any clearly established law or acted fraudulently, maliciously, or oppressively ***with regard to Respondent***.

Respondent has no explanation for this beyond generalities, which is patently insufficient to meet the heightened pleading standard required to abrogate DHHR's clear qualified immunity.

The circuit court erred in denying DHHR's Motion to Dismiss Respondent's negligence claims against DHHR. DHHR is entitled to qualified immunity. *W. Va. Police, Dept. of Military Affairs and Public Safety v. J.H.*, 856 S.E.2d 679, 699 (W. Va. 2021); *W. Va. Dept. of Educ. v. McGraw*, 800 S.E.2d 230 (W. Va. 2017); *W.Va. Bd. of Educ. v. Marple*, 783 S.E.2d 75 (W. Va. 2015); *W.Va. Reg'l Jail Auth. v. A.B.*, 766 S.E.2d 751 (W. Va. 2014).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner reasserts that oral argument is warranted by Rule 19 as this appeal involves error in the circuit court's application of well-settled law. Petitioner recognizes that the Court may resolve the matter through a Rule 21 Memorandum Decision

V. DISCUSSION

A. STATE AGENCIES ARE ENTITLED TO ASSERT QUALIFIED IMMUNITY

Respondent's fundamental misunderstanding of the doctrine of qualified immunity is illustrated by her baffling assertion that "Petitioner is a State agency, and not an individual, and therefore it cannot, as a matter of law, assert qualified immunity." [Resp. Br. at 15]. Respondent could not be more wrong. Indeed, this Court roundly rejected Respondent's exact argument in *W. Va. Bd. of Educ. v. Croaff*, No. 16-0532, 2017 WL 2172009 (W. Va. May 17, 2017) (memorandum decision) when it held that "the circuit court clearly erred in concluding that qualified immunity is unavailable to state agencies. It is well-settled that West Virginia law provides for a state agency's protection through qualified immunity." *Croaff* at *4; *see also Hess v. W. Va. Div. of Corr.*, 705 S.E.2d 125, 129 (W. Va. 2010) ("Likewise, the doctrine of qualified immunity is equally applicable to actions brought only against state agencies, such as the

Appellant in the instant case."). Indeed, this Court routinely applies the doctrine of qualified immunity to State agencies which do not fall under the West Virginia Governmental Tort Claims and Insurance Reform Act. *See, e.g., W. Va. State Police v. Hughes*, 796 S.E.2d 193, 201 (W. Va. 2017) ("The State Police is entitled to qualified immunity to protect the discretionary actions of its employees."); *W. Va. Reg'l Jail & Corr. Fac. Auth. v. A.B.*, 766 S.E.2d 751, 757 (W. Va. 2014) (""[W]e again find that the WVRJCFA is entitled to [qualified] immunity under the circumstances here present. . . ."); *Clark v. Dunn*, 465 S.E.2d 374, 381 (W. Va. 1995) ("[W]e conclude that the doctrine of qualified or official immunity bars a claim of mere negligence against the Department of Natural Resources, a State agency. . . .").

Respondent's confusion appears sourced from the federal constitutional tort actions she cites, which she argues that West Virginia should blindly "follow" in this area. [Resp. Br. at 15]. What Respondent overlooks is that the circumstances under which federal courts have held qualified immunity inapplicable in constitutional torts under 42 U.S.C. § 1983 do not mirror this Court's application of the doctrine to negligence claims. One of the several reasons why federal law and state law part ways on this issue is evident in Respondent's at best incomplete assertion that "in federal constitutional tort actions, qualified immunity is **only** applicable to an individual defendant and not the employer, agency, or state." [*Id.*]. This is because there has never been any need to as much as ***discuss*** qualified immunity for an "employer, agency, or state" in such cases, since there can be no liability at all against the "employer, agency, or state" in § 1983 claims. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989). Respondent is at best hyper-technically correct in her assertion that the body of § 1983 case law does not afford qualified immunity to state defendants, but only because there ***is*** no § 1983 law on qualified immunity where the defendant is a state.

By the same token, neither does federal law ***deprive*** state defendants of qualified immunity in negligence cases. As with *Will*, there would be little reason for any such doctrine to have developed, given that negligence is not cognizable under § 1983 and there is little other "federal negligence" law, especially that might apply against non-consenting states. *See* U.S. CONST. AM. XI.

But this is all beside the point. Respondent's assertion is that ***only*** individuals are entitled to qualified immunity, ***not*** State agencies. [Resp. Br. at 15]. This Court has rejected that argument both implicitly (*see, inter alia, Hughes, A.B.,* and *Clark supra*) and explicitly (*see Croaff* and *Hess, supra*), rendering Respondent unquestionably wrong.

B. PETITIONER'S ASSERTION OF QUALIFIED IMMUNITY IS NOT PREMATURE.

Respondent next argues that DHHR's assertion of qualified immunity is "premature," and that DHHR "will have another shot at avoiding the trial of this matter once discovery is completed and this case proceeds to the summary judgment stage."[1] [Resp. at 33-34]. Once again, Respondent misunderstands the doctrine of qualified immunity. As this Court has noted, "[t]he 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" at all. *Hutchison v. City of Huntington*, 479 S.E.2d 649, 658 (W. Va. 1996). For this reason, the United States Supreme Court has instructed that questions of qualified immunity must be determined at the "earliest possible stage of litigation," *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam), and that "until this

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[1] Respondent implies that the fact that *A.B*, *Crouch*, and *J.H.* were all appeals from a Rule 56 summary judgment order supports her proposition that Petitioner's appeal herein from a Rule 12(b) motion is "premature" because she wishes to further develop her ***facts***. [Resp. Br. at 16]. As this Court has noted, "qualified immunity is a ***question of law*** that may be generally asserted (1) on a pretrial motion to dismiss under Rule 12(b)(6) for failure to state a claim; (2) as an affirmative defense in the request for judgment on the pleadings pursuant to Rule 12(c); (3) on a summary judgment motion pursuant to Rule 56(d); or (4) at trial." *W. Va. Bd. of Educ. v. Marple*, 783 S.E.2d 75, 89 (W. Va. 2015) (emphasis added) (citation omitted). Quite simply, the procedural posture of *other* cases is of no moment in *this* one.

threshold immunity question is resolved, discovery should not be allowed." *Stiegert v. Gilley*, 500 U.S. 226, 231 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Respondent may only overcome this immunity under a "heightened pleading" standard. *W. Va. Reg'l Jail & Corr. Fac. Auth. v. Estate of Grove*, 852 S.E.2d 773, 781 (W. Va. 2020). As described more fully in DHHR's opening Brief and further below, Respondent has not done so and the Circuit Court below was in error in finding that she had. Granting DHHR protection of the qualified immunity to which it is entitled is in no way "premature;" quite the opposite. DHHR should not be forced to submit to discovery and inquiry into negligence claims from which it is immune.

C. THE PERTINENT QUESTION IN THIS APPEAL IS DHHR'S CONDUCT – NOT DUSTIN KINSER'S

"Th[e] critical first step [of a qualified immunity analysis] may be . . . effectively accomplished by identifying the official or employee whose acts or omissions give rise to the cause of action. This individual identification may more easily permit a proper examination of that particular official or employee's duties and responsibilities and any statutes, regulations, or other 'clearly established' laws which are applicable to his or her duties." *A.B., supra* at 766 Without a doubt, Respondent's Amended Complaint, if true, delineates a series of terrible events. She repeats these in her Brief. [Resp. Br. at 3-4]. However, all of this alleged "undeniably wicked," [*Id.* at 37], conduct – including allegedly convincing Petitioner to abscond from home, taking her to a hotel, providing her drugs, and committing sexual assault – was committed by ***Dustin Kinser***[2] (a separate named Defendant in the Circuit Court action below). As this Court is

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[2] Respondent attempts to complete her bait-and-switch of placing *Kinser's* alleged conduct as a cloak upon *DHHR* in two ways. Initially, she claims that Kinser allegedly engaged in this conduct while "acting in his capacity as a CPS caseworker." [Resp. Br. at 4]. These actions – which if true, would be ***criminal*** – cannot be imputed to DHHR as a matter of law. *See, W. Va. Reg'l Jail & Corr. Fac. Auth. v. A.B.*, 766 S.E.2d 751, 769-772 (W. Va. 2014) (" Respondent has failed to adduce any evidence bringing

well aware, however, ***Kinser's*** allegedly felonious conduct cannot serve as a basis for abrogating ***DHHR's*** qualified immunity here, as the analyses are separate and distinct:

> ***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

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these alleged criminal acts [sexual assault of an inmate] within the ambit of D.H.'s employment beyond merely suggesting that his job gave him the opportunity to commit them . . . . However, the mere proximity and opportunity that his job provided to commit such acts do not, alone, bring them within the scope of his employment. . . . [W]e find that D.H.'s alleged acts fall manifestly outside the scope of his authority and duties as a correctional officer. When taken as true for the purposes of summary judgment, there can be no question that these acts, as alleged, are in no way an 'ordinary and natural incident' of the duties with which he was charged by the WVRJCFA and in no way furthered the purposes of the WVRJCFA.")

Respondent next attempts to circumvent this truism by claiming, essentially, that DHHR "should have" drug tested or investigated Kinser, which "might have" prevented Respondent from being exposed to him. Such a hindsight "should have known" assertion (which sounds in negligence, exactly the kind of allegation barred by qualified immunity) eviscerates the objective requirement that a reasonable official *should know at the time* that their conduct violated *the plaintiff's* (here, Respondent's) rights. *Maston v. Wagner*, 781 S.E.2d 936, 949 (W. Va. 2015); *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014) (*rev'd on other grounds* 577 U.S. 7) ("Claims of qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently.").

To this end, DHHR is stunned that Respondent continues to cite to the improper "sham affidavit" attached to her Amended Complaint, which well-established law prohibits the use of. That affidavit was submitted in ***response*** to DHHR's second round of briefing in this case regarding qualified immunity – only after Respondent's complaint allegations had come under attack. *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 422 (4th Cir. 2014) ('This Court has previously referred to bogus affidavits submitted in opposition to summary judgment for the purpose of creating disputes of material fact as 'sham' affidavits.'"). More critically, that sham affidavit is in no way derived from personal knowledge and contains nothing but hearsay from unnamed sources and vague, nonspecific speculation. [*See* Appx. AR113-114] ("My understanding . . ."; "My understanding . . . ."; "I believe. . . . ."; "It was common knowledge. . . ."; "People in the office . . . knew . . . ."; "there was general office gossip"; "there was a great deal of conversation"; "it was said"; "Everyone in the office really thought . . ."; ". . . other workers talked to their supervisors"; "There was talk . . ."; "Other people in the office were worried. . . ."; "Some people were worried. . . .").

> 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). As this Court has succinctly distilled it:

> The issue presented by A.B.'s direct claim against the WVRJCFA is what did ***the WVRJCFA*** fail to do that it was specifically required to do under a clearly established law or right? What respondent's scant evidence failed to establish was that WVRJCFA, itself — ***rather than D.H.*** — acted in a manner which violated a clearly established right of which a reasonable official would have known.

A.B., supra at 775 (emphasis in original). Quite simply, Respondent cannot attempt to circumvent *DHHR*'s qualified immunity by relying on *Kinser*'s alleged conduct. Respondent must point to specific acts ***by DHHR***, separate and apart from Kinser's, which violated one of her clearly established rights. In several bites at the apple – multiple complaints, multiple motions to dismiss, and a 34-page Respondent's Brief in this Court – she has failed to do so.

D. THERE ARE NO FACTS TO SUPPORT RESPONDENT'S CONTENTION THAT DHHR (RATHER THAN KINSER) VIOLATED ANY "CLEARLY ESTABLISHED" LAW TOWARD RESPONDENT OR ACTED FRAUDULENTLY, MALICIOUSLY, OR OPPRESSIVELY

"To 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*, 479 S.E.2d 649, n. 11 (W. Va. 1996). To do this, Justice Cleckley set forth a straightforward test: "'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.* at 659. The Court further elaborated on this test:

> The threshold inquiry is, assuming that the plaintiff's assertions of facts are true, whether any allegedly violated right was clearly established. To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a "particularized showing" that a "reasonable official would understand that what he is doing violated that right" or that "in the light of preexisting law the unlawfulness" of the action was "apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Indeed, some courts hold that an "official may not be charged with knowledge that his or her conduct was

> unlawful unless it has been previously identified as such." *Warner v. Graham,* 845 F.2d 179, 182 (8th Cir.1988). But, for a right to be clearly established, it is not necessary that the very actions in question previously have been held unlawful. *Anderson v. Creighton,* 483 U.S. at 640, 107 S.Ct. at 3039.

Id. at n. 11. In short, Respondent must allege more than the abstract. She must allege more than that DHHR "could have done more" to stop someone *else*'s conduct. She must describe with a "particularized showing" how *DHHR* affirmatively acted in violation of her rights, separate and apart from Kinser. *A.B., supra* at 766 ("This critical first step . . . may be effectively accomplished by identifying the official or employee whose acts or omissions give rise to the cause of action. This individual identification may more easily permit a proper examination of that particular official or employee's duties and responsibilities and any statutes, regulations, or other "clearly established" laws which are applicable to his or her duties."). Across the 34 pages of her Brief, Respondent conspicuously skips this most critical question in this qualified immunity analysis – ***what*** conduct ***by DHHR*** (rather than Kinser) violated ***her*** rights?

1. Respondent Has Not Established that Any Acts by DHHR Were Constitutional or Statutory Violations.

Respondent appears to believe that her recitation of a laundry list of statutes of questionable applicability is enough to abrogate DHHR's qualified immunity. [Resp. Br. at 29] ("[T]he Respondent's Amended Complaint not only pled simple negligence, but it also specifically satisfied 'the pleading requirement necessary to defeat the defense of qualified immunity because it identified numerous specific statutes that were allegedly violated."). This is, of course, nonsense. If qualified immunity jurisprudence were so reductive that all a prospective plaintiff need do is recite statutes without the required "particularized" factual showing of *how* they were violated *by the defendant claiming the immunity*, then the doctrine would be meaningless. *See Hutchison, supra* at 659 ("Government officials performing

discretionary functions are shielded from liability for civil damages insofar as ***their conduct*** does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") (emphasis added); *A.B., supra* at 766 ("This critical first step . . . may be effectively accomplished by identifying the official or employee whose acts or omissions give rise to the cause of action. This individual identification may more easily permit a proper examination of that particular official or employee's duties and responsibilities and any statutes, regulations, or other "clearly established" laws which are applicable to his or her duties.").

a. The Child Welfare Act

Respondent asks this Court to deny DHHR qualified immunity due to alleged violations of "Chapter 49 of the *W.Va. Code*," specifically that DHHR "had a duty to assure that she received safe, proper and appropriate treatment. *W. Va. Code* § 49-1-105." [Resp. Br. at 4, 18, 20, 31]. While she now broadly asserts an entire statutory chapter, in her Amended Complaint, Respondent vaguely asserts "gross dereliction of their mandatory statutory duties under said statutes and abandonment of their mandatory statutory duties under the Child Welfare Act. . . ." [Appx. AR190]. Respondent never identifies with any specificity what this alleged "dereliction" and "abandonment" by DHHR (rather than Kinser) ***actually was***. Chapter 49 of the Code is entitled "Child Welfare;" Article 1, Section 105 is entitled "Purpose." In short, Respondent fails to identify any specific statutory provision allegedly violated and, moreover, cannot identify any specific violation related to purportedly negligent hiring, training, and supervision.

Indeed, Respondent's argument that because she was "under the care and custody of the Department" and it therefore "owed [her] a special duty to take reasonable measures to ensure her safety and well-being," [Resp. Br. at 12, 20], toward her under *W. Va. Code* § 49-1-105 sufficient to abrogate qualified immunity has already been rejected by this Court. A similar

argument was advanced by the plaintiff in *A.B., supra*, and summarily disposed of by this Court, correctly noting that the "special duty" doctrine is not entwined with immunity and is merely an exception to the public duty defense[3] – a defense which, like DHHR here, was not asserted in *A.B.* Therefore, it was inapplicable and, moreover, "[t]]o the extent, however, that respondent is attempting to use the "special duty" concept to evade the scope of immunity by suggesting that she is owed a heightened duty of care by virtue of her placement in a correctional facility, we find it unnecessary to carve out an exception for prison inmates and create a special rule of liability for them. . . . As noted before, respondent has established no violation of any clearly established law, asserted no civil rights claim pursuant to Section 1983 except as against D. H., and expressly dismissed her West Virginia constitutional claims as against the WVRJCFA." *A.B., supra,* at n. 35. Here, much like in *A.B.*, Respondent has pointed to no specific violation of the Child Welfare Act ***by DHHR*** (rather than Kinser) and her invocation of the Act claiming violation of a "special duty" under it does not abrogate DHHR's qualified immunity.

b. The West Virginia Human Rights Act

Respondent next asserts violation of the West Virginia Human Rights Act ("WVHRA"). However, her Brief merely names the WVHRA in string citations; it in no way describes any poor treatment by DHHR (or anyone else) on account of a protected class. [Resp. Br. at 8, 18, 31]. In fact, Plaintiff's Amended Complaint ***does not allege violation of the WVHRA by DHHR at all*** – only Defendants Kinser and Capitol Hotels. [AR191-192]. Clearly, Plaintiff has not (and cannot) made a particularized showing that DHHR violated the WVHRA sufficient to abrogate its qualified immunity.

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[3] Indeed, this Court issued a new syllabus point, stating that "[t]he 'special relationship' or 'special duty' doctrine is an exception to the liability defense known as the public duty doctrine; it is neither an immunity concept nor a stand-alone basis of liability." Syl. Pt. 14, *A.B., supra.*

c. The West Virginia Human Trafficking Act

Much like her citations to the WVHRA, Respondent's citations to the Human Trafficking Act appear only in string citations, without any attempted explanation of DHHR's (rather than Kinser's) alleged violation of the Act. [Resp. Br. at 8, 18, 31]. The Act, *W. Va. Code* § 61-14-1, *et seq.* is a ***criminal*** statute which prohibits "knowingly recruiting, transporting, transferring, harboring, receiving, providing, obtaining, isolating, maintaining or enticing an individual to engage in debt bondage, forced labor or sexual servitude." *W. Va. Code* § 61-14-1(6). However, Respondent points to no agent of DHHR – other than Kinser – who allegedly convinced her to abscond from her home; transported her to a hotel; supplied her with drugs; and sexually abused her. As noted above, however, DHHR is not vicariously liable for the alleged criminal acts of its employees and Respondent cannot "cloak" DHHR with Kinser's alleged criminal acts to abrogate DHHR's qualified immunity.

d. Child Protective Services Policy

Respondent next points to DHHR's Child Protective Services Policy (2018) as a source of policy allegedly violated by DHHR. She repeatedly points out that DHHR had ***knowledge*** of the Policy because all employees are required to be familiar with the Policy, [Resp. Br. at 7, 11, 31], but in what has become a recurring theme, entirely declines to explain ***how*** DHHR violated that policy and ***how*** it led to her alleged injury. Indeed, this Court has already examined whether alleged violation of a predecessor to this very Policy rises 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, 809 S.E.2d 699, 708 (W. Va. 2018) (emphasis added).[4] Much like *Crouch*, Plaintiff's allegations ***about DHHR's conduct*** (rather than Kinser's) do not recount specific violations of clearly established portions of the Policy ***by DHHR,*** but are nothing more than abstract speculation – that DHHR "knew about" the Policy and therefore "could have done more" to prevent Kinser's alleged conduct. This is precisely the argument disposed of by this Court in *W. Va. Div'n of Corr. v. P.R.*, 2019 WL 6247748 at *7 (W.Va. Nov. 22, 2019) (memorandum opinion) ("When 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).

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[4] Respondent makes much hay that *Crouch* is distinguishable because the applicable CPS Policy at the time was an interim policy. [Resp. Br. at 20] This is a distinction without a difference; this Court's holding in *Crouch* revolved around whether the alleged violation of the Policy bore a causal relation to the injury suffered. *Crouch, supra* at 708. Here, as in *Crouch*, there is no such connection.

Respondent also misunderstands or misrepresents this Court's statement in footnote 1 of *Crouch*, attempting to pin the Court's differentiation on the fact that the CPS Policy at issue was interim rather than permanent. [Resp. Br. at 20]. In reality, the Court's differentiation was ***substantive*** – "We differentiate the CPS Guidelines relating specifically to safety assessments from the broader CPS policy that governs CPS activities generally." *Crouch, supra* at n.1. Whether in interim (as in *Crouch*) or permanent (as here) form, the category in which the respective policies fall is substantively the same – because they ***are*** essentially the same. *Compare Interim Child Protective Services Policy for WV Safety Assessment and Management System Pilot Counties* (rev. Nov. 30 2009) at https://www.wvdhhr.org/bcf/sams/documents/samsphilosophyintakeffapolicy113009.pdf *with Child Protective Services Policy* (rev. Feb. 2019) at https://dhhr.wv.gov/bcf/policy/Documents/CPS_Policy.pdf

e. Drug and Alcohol-Free Workplace Policy

Respondent next turns to the Drug and Alcohol-Free Workplace Policy authored by the West Virginia Division of Personnel, asserting (without quotation or citation whatsoever) that it[5] imposed a ***mandatory*** duty on DHHR to drug test Kinser and/or otherwise investigate his alleged drug use. [Resp. Br. at 10]. Upon review, the Policy does no such thing:

> When reasonable suspicion exists that an employee or vendor/independent contractor has reported to work under the influence of alcohol or an illegal drug, the individual ***may*** be subject to assessment, which ***may*** include a drug or alcohol test.

Policy DOP-P2, *Drug- and Alcohol-Free Workplace Policy* at pp. 4, § III.D (last revised Dec. 18, 2020), https://personnel.wv.gov/SiteCollectionDocuments/Policies/DrugFree.pdf (emphasis added). In the analogous realm of statutory construction, "[t]he use of the permissive 'may' ordinarily creates the presumption that a statute is discretionary and not mandatory." *Laughlin v. U.S.*, 124 Fed. Cl. 374, 383 (Fed. Cl. 2015). Without any mandatory duty under the Policy, Respondent's claims that she *might not* have been subjected to Kinser's conduct had he been drug tested are "illusory and languid," *A.B., supra* at N. 33, insufficient to form a basis to abrogate DHHR's qualified immunity even in absence of any specific facts tying such an alleged violation to her injury. *Crouch, supra* at 708.

f. Constitutional Liberty Interests

Finally, Respondent points to a "right to bodily integrity, safety, and well-being" guaranteed by the substantive due process clause, Article 3, Section 10 of the West Virginia

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[5] Respondent also makes the vague allegation that DHHR violated "multiple federal, state, and internal statutes, standards, policies, and procedures" which she alleges require a "proper" background check and drug screen. [Resp. Br. at 29, 37]. She declines, however, to identify exactly what they are to allow proper analysis of them and these allegations should be disregarded. *A.B., supra* at 775 ("Respondent's case suffers from the same fundamental flaw as did the case in *Payne*: '[A]t no time do respondents identify a specific law, statute, or regulation which the DHHR defendants violated.'") (citation omitted).

Constitution. [Resp. Br. at 29]. She also string-cites a series of rights sourced from the United States Constitution, including: the right not to be removed from a safe environment; the right to possession and control of one's own person; and liberty interests in interracial marriage and procreation, among others. [*Id.* at 34-35]. Respondent then asserts that DHHR should have been aware of these Constitutional rights and therefore is not entitled to qualified immunity. [*Id.*]. At the risk of sounding repetitive, Respondent again skips the crucial steps of making a "particularized" showing 1) how these rights apply to this case; 2) what actions ***by DHHR*** (rather than Kinser) violated them; and 3) how the alleged violations caused her injury.

2. Respondent Has Not Established that Any Acts by DHHR Were Fraudulent, Malicious, or Oppressive.

Respondent's Brief contains absolutely no allegation that DHHR made any fraudulent representation to her. Neither does her Amended Complaint. [Appx. AR186-200]. Accordingly, Respondent has not met the heightened standard of pleading required of allegations of fraud. *See* W. VA. R. CIV. P. 9(b). Similarly, the Brief contains no allegation that DHHR's conduct was malicious or oppressive. Again, neither does the Amended Complaint (beyond vague boilerplate designed to elicit punitive damages). [Appx. AR186-200]. If one were to "hunt through the truffles," Respondent may argue that Kinser "[a]ssert[ed] his capacity and authority as a CPS caseworker" to begin his conduct toward her. [Resp. Br. at 3]. However, even if Kinser unilaterally made such a false statement to assert DHHR-backed authority in a situation where he had none, it was ***his*** allegedly fraudulent act, ***not DHHR's***. *Teter v. Old Colony Co.*, 190 W. Va. at 717, 441 S.E.2d 728, 734 (citing *Horton v. Tyree*, 139 S.E. 737 (W. Va. 1927) (an essential element of fraud is that "the act claimed to be fraudulent was the act of the defendant or induced by him"). More importantly, as discussed thoroughly above, Respondent cannot use *Kinser*'s alleged actions to abrogate *DHHR's* qualified immunity.

E. DHHR IS ENTITLED TO QUALIFIED IMMUNITY FROM RESPONDENT'S NEGLIGENCE CLAIMS.

Respondent's Brief provides no basis to support abrogating DHHR's qualified immunity from her claims of negligence and negligent hiring/supervision in this matter. Without identification of a violation ***by DHHR*** (rather than Kinser) of clearly established laws about which DHHR should reasonably know, or conduct ***by DHHR*** (rather than Kinser) that is fraudulent, oppressive, or malicious under the applicable "heightened standard" of pleading, Respondent is left with little more than the assertion that DHHR "could have done more" to prevent Kinser's conduct. This Court has already disposed of this exact argument. *W. Va. Div'n of Corr. v. P.R.*, 2019 WL 6247748 at *7 (W.Va. Nov. 22, 2019) (memorandum opinion) ("When 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) (emphasis added); *see also W. Va. Dep't of Health & Human Res. v. Payne*, 746 S.E.2d 554, 565 (W. Va. 2013) ("Respondents seem to argue simply that if the DHHR defendants were doing their job properly, this incident would not have occurred. . . . Although this overly simplistic analysis may be appealing in light of these tragic events, qualified immunity insulates the State and its agencies from liability based on vague or

principled notions of [government responsibility]."). Accordingly, the fate of Respondent's claims of negligence and negligent hiring and supervision against DHHR is plain:

> To be clear, this Court does not condone sexual assault or the vulgar comments described by P.R. However, we are duty-bound to follow the law of qualified immunity. For the foregoing reasons, we reverse the circuit court's ruling regarding the application of qualified immunity to P.R.'s negligence claim.

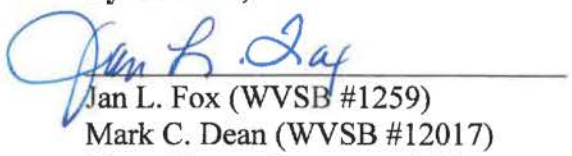
Id. at * 8.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons set forth in Petitioner's opening Brief, Petitioner West Virginia Department of Health and Human Resources respectfully requests that this Court **REVERSE** the circuit court's Order failing to dismiss the negligence and negligent hiring/supervision claims against it, and remand this Civil Action back to the circuit court with directions that the circuit court enter an Order granting judgment and dismissal with prejudice as to those claims.

Respectfully submitted this 26th day of October, 2022.

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 the foregoing "**Petitioner's Reply Brief**" was served on all counsel of record via U. S. First Class Mail, 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