**NO. 22-ICA-58**

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

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**JASON RYAN MOORHEAD,**

**Plaintiff Below, Petitioner,**

**v.**

**Civil Action No.: 18-C-71**
**Honorable Steven L. Shaffer**

**WEST VIRGINIA ARMY NATIONAL GUARD, and WEST VIRGINIA MOUNTAINEER CHALLENGE ACADEMY,**

**Defendants Below, Respondents.**

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# PETITIONER'S BRIEF

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I. The Circuit Court of Preston County erred in dismissing Plaintiff's Complaint based upon a finding that Defendants were entitled to qualified immunity, Plaintiff's claims are not subject to immunity and/or fall under clearly recognized exceptions to immunity

II. The Circuit Court of Preston County erred in determining that failure to apply the detailed, mandatory protocol regulating how students were to exit their bunks constituted a discretionary, as opposed to a ministerial, duty.

III. The Circuit Court of Preston County erred in determining that Plaintiff had no right to a "safe and secure [learning] environment" implicit in the right to education under the West Virginia Constitution merely because the Mountaineer Challenge Academy is not a traditional, public school.

IV. The Circuit Court of Preston County erred in determining that Mountaineer Challenge Academy's actions had not violated Plaintiffs right to an education under the West Virginia Constitution.

V. The Circuit Court of Preston County erred in determining that Mountaineer Challenge Academy is not subject to the doctrine of in loco parentis.

VI. The Circuit Court of Preston County erred in determining that there was no genuine dispute of material fact concerning whether Mountaineer Challenge Academy's actions toward Plaintiff were fraudulent, malicious, and/or oppressive under the facts of this case, that determination should be made by a jury.

## STATEMENT OF THE CASE

This matter comes before the Intermediate Court of Appeals of West Virginia on appeal of Jason Ryan Moorhead, the Plaintiff below ("Petitioner" or "Moorhead") from an order granting

the *Motion for Summary Judgment* of Defendants below, the West Virginia Army National Guard and the Mountaineer Challenge Academy, an affiliate thereof (collectively "MCA" or "Respondents"). Petitioner alleged, *inter alia*, that MCA's failure to enforce its own guidelines regarding how students are to exit their beds proximately caused the exacerbation of Petitioner's pre-existing leg injuries, which ultimately led to him being unfairly dismissed from the MCA because of a purported lack of participation.

Petitioner's *Complaint* contains the following counts: Failure to Notify Parent; Failure to Seek Proper Medical Treatment; Failure to Provide a Safe Environment; Failure to Supervise; Breach of Fiduciary Duty; and Unconscionable Conduct. (*Complaint* ("*Compl.*"), Appendix Record ("A.R.") 6-10). Petitioner alleged that Respondents are liable because they were required pursuant to the West Virginia Constitution and/or the doctrine of *in loco parentis* to provide Petitioner with a safe and secure learning environment and that MCA failed to enforce its mandatory protocol regulating how students were to exit from the top bunk during the playing of Reveille.

Petitioner seeks compensatory, consequential, and incidental damages, including the cost of medical bills incurred as a result of Respondents' wrongful conduct. Petitioner also seeks his costs, attorney fees, and pre- and post-judgment interest to the full extent permitted by law.

Petitioner filed *Plaintiff's Motion for Leave to File Amended Complaint*, *Plaintiff's Memorandum in Support of Motion for Leave to File Amended Complaint*, and a *[Proposed Amended Complaint* (collectively "*Motion for Leave to Amended*") on July 13, 2021. (A.R. 24-40.) Respondents filed *Defendants' Response in Opposition to Plaintiff's Motion for Leave to File Amended Complaint*. (A.R. 41-51.)

Respondents filed a *Motion for Summary Judgment* on December 1, 2021, arguing that

MCA was protected by qualified immunity. (*Defendants' Motion for Summary Judgment* ("*Motion"*), A.R. 68-335.) On that same day, Respondents also filed a *Motion to Dismiss* seeking dismissal of the *Complaint* on the basis that Respondents were entitled to qualified immunity. (*Defendants' Motion to Dismiss* ("*Motion to Dismiss"*), A.R. 52-67.) Respondents argued that they were entitled to qualified immunity because they were engaged in discretionary acts; Petitioner failed to allege violation of a clearly established right or law; if a violation occurred, Petitioner failed to alleged the violation was a proximate cause of his injuries; and, Petitioners only alleged negligence. (*Id*.)

Petitioner filed a combined response to the *Motion to Dismiss* and the *Motion for Summary Judgment.* (*Plaintiff Jason Ryan Moorhead's Combined Memorandum in Response to Defendants' Motion to Dismiss and Motion for Summary Judgment* ("*Combined Response"*), A.R. 336-540.) Petitioner asserted, and still asserts, that his claims are not subject to qualified immunity and/or fall under clearly recognized exceptions thereto.

Additionally, Petitioner filed a *Motion for Partial Summary Judgment of Plaintiff Jason Ryan Moorhead* ("*Petitioner's Motion for Summary Judgment"*) and accompanying *Memorandum in Support* on the issue of proximate cause. (A.R. 541-665.) Petitioner sought judgment as a matter of law on the issues of whether his exit from the top bunk was the proximate cause of the aggravation of his pre-existing condition and necessitated the need for his surgery and other medical treatment. Further, Petitioner sought judgment as a matter of law that the medical expenses that he incurred as a result of the surgery were reasonable and necessary, and, thus, recoverable as damages by him. Defendants filed a response addressing the issue of negligence, which was not argued in *Petitioner's Motion for Summary Judgment*, and disputed the interpretation of the testimony of each of the parties' experts. (*Defendants' Response in*

*Opposition to Plaintiff's Motion for Partial Summary Judgment* ("*Response to Petitioner's Motion for Summary Judgment"*), A.R. 666-895.) Defendants further argued that the medical expenses were not reasonable and necessary.

Additionally, the parties below entered into an *Agreed Order to Seal the Exhibits to Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment* because a portion of the exhibits contained psychological records of Petitioner. (A.R. 685-688.)

The Preston County Circuit Court conducted several hearings regarding the pending motions of the parties below. On August 20, 2021, a remote hearing was held regarding *Plaintiff's Motion for Leave to File Amended Complaint*. (*Transcript of Proceedings Held on August 20, 2021 ("August 2021 Trans."*) A.R. 896-921.) Petitioner's counsel withdrew the *Motion* at the hearing. (A.R. 913, lines 22-24).

Another hearing was held on June 22, 2022. (*Transcript of Proceedings Held on June 22, 2022 ("Jun. 2022 Trans."*), A.R. 925-998.) This hearing was a continuation of a hearing held on February 23, 2022 regarding the pending motions of the parties below. (*Order Regarding Hearing on Parties' Dispositive Motions*, A.R. 922-924 and *Jun. 2022 Trans.*, 927, lines 8-11.) A transcript of that hearing is not available because the recording equipment was inoperable.

On July 28, 2022, the Circuit Court of Preston County entered its *Order Granting Defendants' Motion for Summary Judgment* ("*Order*"), determining that Respondents were entitled to qualified immunity and dismissed Petitioner's *Complaint*. (A.R. 999-1013.) Having granted the *Motion* on this basis, the Circuit Court did not consider the remaining arguments in *Defendants' Motion for Summary Judgment* or the other pending motions. (A.R. 68-335.) It is from this Order that Petitioner now appeals.

MCA accepted Petitioner to its program in 2015 and Petitioner began the program on July

12. (*Order*, A.R. 1001.) The program initially consists of an orientation and acclimation period. (*Id*.) The acclimation period is two weeks and during that period, employees of MCA determine whether the participants will stay in the program or be discharged. (*Id*.)

The Circuit Court opined that the parties below agreed on the timeline for the events, which Petitioner disputes. (*Id*. at A.R. 1001-1002.) The Circuit Court concluded that the parties below agreed to the following timeline:

1. Petitioner participated in orientation for MCA on July 12, 2015;
2. Petitioner underwent a routine medical examination on July 15, 2015;
3. On July 17, 2015, Petitioner exited the top bunk in an improper manner;
4. On July 18, 2015, an employee of MCA took Petitioner to see a Preston Memorial Hospital nurse;
5. On July 18, 2015, Petitioner was provided with crutches by an unknown person;
6. On July 20, 2015, a nurse practitioner placed Petitioner on lower body restrictions, which meant no physical activity;
7. On July 22, 2015, Dr. Pumphrey cleared Petitioner of any physical restrictions;
8. On July 22, 2015, MCA discharged Petitioner from the program; and,
9. Between July 19, 2015 and July 22, 2015, MCA staff issued 19 write-ups for Petitioner.

(*Id*.)

The parties below also agreed on the fact that Respondents were state agencies and no insurance policy waived the defense of qualified immunity. (*Id*., A.R. 1004.)

Using only this limited information, the Circuit Court found that "no genuine issues of material fact arise in this matter due to the agreed facts by counsel and the parties." (*Id*. at 1003.)

In reaching this conclusion, the Circuit Court stated it was considering the issues of whether MCA actions were discretionary and if the acts were discretionary whether they violated clearly established statutory or constitutional rights which a reasonable person would have known or were otherwise fraudulent malicious or oppressive. (*Id*. at 1005.)

MCA was granted a special alternative school status by the Legislature in 2005. (Deposition of Robert Morris, Corporate Representative ("Morris Depo."), A.R. 367.) This legislation gave schools the ability to transfer a student to MCA without having the student drop from their school. (*Id*.) MCA has admissions counselors who go to public high schools for recruitment purposes. (Morris Depo., A.R. 369.) In fact, Moorhead was recruited in this manner. (Personal Application Letter, A.R. 389.) Moorhead wanted to attend MCA to get a better education. (*Id*.) If Moorhead had been able to complete the 22-week MCA program and meet all of the requirements, then pass his equivalency diploma, then he would have been "done with the public school as a high school graduate." (Morris Depo., A.R. 369-370.)

MCA represents that it "adheres to the eight core components as a bedrock for instruction" as stated in it mission statement. (*Id*.) The eight core components are: "1. Academic Excellence; 2. Life Coping Skills; 3. Job Skills; 4. Health and Hygiene; 5. Responsible Citizenship; 6. Service to the Community; 7. Leadership/Followership; and 8. Physical Fitness."[1]

The quasi-military program of MCA controlled everything Moorhead did. Moorhead was told when to wake up; when to go to sleep; where he was going to be during the day; when, where, and how to exercise; what to wear; and when to eat. (Morris Depo., A.R. 374.) p. 20.) This was all done in a residential setting with adult supervision. (*Id*.)

Robert Morris, state director of MCA, established that the goal of MCA is to "provide a

[1] https://wvchallenge.org/about-us/core-components/, accessed December 2, 2021.

safe environment" and "do the best for the candidates." (Morris Depo. A.R. 364-366 and 384.) Nothing is "more paramount than the safety of the cadets in the 22-week residential phase." (Morris Depo., A.R. 377.) MCA admits that it is important to take steps proactively to prevent injuries and to address and treat any injuries of a cadet. (Morris Depo., A.R. 376.)

Students at MCA are supervised 24/7. (Morris Depo., A.R. 373-374.) Sharon Moorhead, Plaintiff's mother, signed a Power of Attorney and Voluntary Appointment of Guardian as part of Moorhead's application. (Power of Attorney and Voluntary Appointment of Guardian, A.R. 388.) MCA also is granted a power of attorney to give them "the ability to take their child to the doctor and make sure they are being treated well." (Morris Depo., A.R. 372 and Health Care Power of Attorney, A.R. 388) MCA contracts for treatment with a medical provider that has an office in a MCA building. (Morris Depo., A.R. 375.) Moorhead was seen by these medical providers, Preston Memorial, for a medical examination upon presentation for their residency at MCA. (Morris Depo., A.R. 379.) He was cleared for participation. (Morris Depo., A.R. 378.)

Moorhead was awoken by Reveille and had 21 seconds to go from the prone position asleep to standing at attention next to their rack. (Morris Depo., A.R. 380.) At 5:00 a.m., the lights go on; it is identified as time to get up; and Reveille is played, loudly. (Morris Depo., A.R. 380-381.) According to Mr. Morris as corporate representative, the official policy regarding the method for exiting the top rack was to slide down on the back or belly. (Morris Depo., A.R. 376.)[2]

A detailed analysis of the safety issues related to exiting from the top bunk was performed by Lisa A. Thorsen, Ed. D., an expert retained by Petitioner. Dr. Thorsen obtained her doctorate in education in 2012. (Deposition of Lisa A. Thorsen, Ed. D. ("Dr. Thorsen Depo."), A.R. 394.)

[2] This testimony directly contradicts Morris' testimony taken in his individual capacity, as well as the deposition testimony of the prior director of MCA as to what constitutes a safe method of exiting the bunks.

She also obtained a Master's of Science in education and rehabilitation counseling and a Bachelor of Science in education. (*Id*.) Dr. Thorsen is currently certified as a school district administrator, playground safety inspector, and rehabilitation counselor. (Dr. Thorsen Depo., A.R. 395.) Dr. Thorsen previously provided expert review of residential programs, alternative schools, and schools. (Dr. Thorsen Depo., A.R. 396.) The Circuit Court did not consider any of Dr. Thorsen's testimony in reaching the decision to grant judgment as a matter of law.

Dr. Thorsen classified MCA as a residential alternative school. (Dr. Thorsen Depo., A.R. 396.) The students at MCA consist of youths of secondary education age that are at risk of not graduating. (Dr. Thorsen Depo., A.R. 397-398.) The school has a structure requiring policies and procedures. (Dr. Thorsen Depo., A.R. 398.) Creating policies and procedures requires risk analysis and preventative policies put in place. (*Id*.)

As shown in a video viewed by Dr. Thorsen, Moorhead jumped out of his bunk bed. (Dr. Thorsen Depo., A.R. 399.) He was sitting on his top bunk with his back to the wall and jumped down to the ground. (*Id*.) He was landing on concrete flooring, which had no impact attenuation. (Dr. Thorsen Depo., A.R. 399-400.) A fall from 60 inches to a concrete floor may result in an injury. (Morris Depo., A.R. 377.) MCA recognized that there is a hazard from jumping down from a bunk bed. (Dr. Thorsen Depo., A.R. 401.) As a lot of accidents occur with the use of bunk beds, preventative measures have to be implemented. (Dr. Thorsen Depo., A.R. 402.) MCA was required to put preventative measures in place. (Dr. Thorsen Depo., A.R. 403.)

MCA purported to train or instruct the children in the proper method of exiting the top bunk. (*Id*.) Dr. Thorsen testified, however, that "on the day of the incident, he jumped down and there was a cadre there with many of the children doing the same thing. And nobody stopped them. Nobody instructed them. Nobody did any corrective action in regard to it." (Dr. Thorsen

Depo., A.R. 401.) If Moorhead was instructed on the proper method of exiting, the instruction was not effective and it was not enforced. (*Id*. and 404.) That is, MCA employees failed to implement the mandatory procedures implement for the safety of Petitioner and other minors.

Video evidence exists that not all of the cadets were exiting the bed in the proper manner and no video evidence or written documentation exists that they were corrected when they did this. (Morris Depo., A.R. 371.) MCA needed to enforce the rule not to exit a bunk bed by jumping because it was unsafe. (Dr. Thorsen Depo., A.R. 404.) Put bluntly, MCA had video evidence of the improper and unsafe exits; did nothing to correct the unsafe behavior; and Moorehead was injured as a result. MCA failed to put preventative strategies in place to exit the top bunk in a safe manner to prevent unintentional injuries. (Dr. Thorsen Depo., A.R. 408.)

Moorhead's dismissal from the MCA was allegedly due to lack of participation. (Morris Depo., A.R. 376.) However, Moorhead had no acclamation reports until July 18 and he reported being injured on July 17, (Dr. Thorsen Depo., A.R. 405-406.) "The video shows him jumping out of the bunk bed. He indicates that's when it started hurting. Any by the 18th, it was visible on the videos and also to the cadre. And on the 19th, it was reported officially." (Dr. Thorsen Depo., A.R. 407.)

MCA also ignored the information presented to them and failed to investigate further to determine a definitive cause of Moorhead's continued pain. (Dr. Thorsen Depo., A.R. 409.) They had the authority and ability to obtain further testing for someone who appeared to be suffering. (Dr. Thorsen Depo., p. 410 and 412.) MCA is observing him 24/7, while the medical personnel only saw him for limited periods of time. (Dr. Thorsen Depo., A.R. 411.) MCA is acting in the place of his parent and has responsibility for his care. (Dr. Thorsen Depo., A.R. 413.) and Guardian Appointment, A.R. 388.) Moorhead's mother appointed MCA as his guardian. (*Id*.)

MCA needed to listen to his complaints that he is not doing physically well and he is in pain. (Dr. Thorsen Depo., A.R. 413.) "The school is responsible for the child's health and education while they are under their jurisdiction." (Dr. Thorsen Depo., A.R. 414.) MCA also dismissed him based upon their perceptions of his lack of motivation and effort and failed to consider a medical reason for his actions. (Dr. Thorsen Depo., A.R. 415.) MCA failed to adhere to their own core program components. (Dr. Thorsen Depo., A.R. 416.) MCA did not create a safe environment or supervise him appropriately. (*Id*.)

As a result of Respondents' wrongful acts, Moorhead was injured. Brian M. Torre, M.D. was identified as an expert witness on behalf of Moorhead. Dr. Torre is licensed to practice medicine in the state of Virginia. (Deposition of Brian M Torre, M.D. ("Dr. Torre Depo."), A.R. 422-423.) Dr. Torre is an orthopedic surgeon with a subspecialty in hand and upper extremity. (Dr. Torre Depo., A.R. 424.)

Dr. Torre noted that Moorhead's initial evaluation at MCA did not reveal any orthopedic problems. (Dr. Torre Depo., A.R. 428.) On July 19, Moorhead complained of knee pain stating that he jumped out of his rack and landed wrong. (Dr. Torre Depo., A.R. 429.) The diagnosis was knee strain. (*Id*.) When x-rays were finally completed at the Emergency Department, they demonstrated bilateral proximal tibial metaphysical fractures with subacute findings. (Dr. Torre Depo., A.R. 433.) "Subactue" meant that Moorhead had a pre-existing condition prior to jumping off of the bunk. (*Id*.) The x-rays also demonstrated an acute finding, that is, the cortex of the tibia was broken. (Dr. Torre Depo., A.R. 434.) Dr. Torre stated that there is an acute component on top of a subacute component. (*Id*.) Dr. Torre opined that Petitioner suffered an acute fracture that superimposed his pre-existing stress fracture. (Dr. Torre Depo., A.R. 434.) In essence, the pre-existing stress fractures were healing when the trauma caused additional injury. (Dr. Torre Depo.,

A.R. 435-436.) Dr. Torre also testified that the surgery that Moorhead underwent for his injuries needed to be done. (Dr. Torre Depo., A.R. 439.)

Respondents retained David Soulsby, M.D. as an expert. Dr. Soulsby reviewed Moorhead's medical records review and performed an examination, but did not review the actual x-rays. (Deposition of David Soulsby, M.D. ("Dr. Soulsby Depo."), A.R. 463 and 464.) Dr. Soulsby is a board-certified orthopedic surgeon who currently primarily performs only independent medical examinations. (Dr. Soulsby Depo., A.R. 461-462.)

Dr. Soulsby testified that Moorhead had bilateral tibial fractures, which he would classify as pathological rather than subacute. (Dr. Soulsby Depo., A.R. 465.) Pathological fractures are fractures that are not specifically related to trauma, but could be aggravated by trauma. (*Id*.) Dr. Soulsby opined, to a reasonable medical probability, that Moorhead had stress fractures that preexisted the event of getting off of the bed and that event caused an aggravation of the stress fractures. (Dr. Soulsby Depo., A.R. 468, 474, 476, and 477.) Further, Dr. Soulsby agreed that the surgery Moorhead underwent was necessitated by the aggravation of his preexisting condition. (Dr. Soulsby Depo., A.R. 467 and 475.)

## SUMMARY OF ARGUMENT

The Circuit Court of Preston County failed to follow the proper procedure in determining whether Respondents were entitled to judgment as a matter of law. The Court decided issues of material fact; disregarded facts and law that did not support its conclusion, and determined the credibility of witnesses. A review of the Court's *Order* demonstrates that no factual disputes are identified and fails to explain why the supposedly "agreed facts" are the only facts necessary for the determination of the motion.

Further, the Circuit Court erred in determining that Respondents' employees were

performing a discretionary function while supervising the exit from the bunk beds. The Court relied upon cases that are factually and legally inapposite and failed to recognize that some acts by Respondents' employees may be ministerial, especially when the act is related to a single safety rule that is to be enforced daily in a confined space. The Court erroneously concluded that Respondents' employees had the discretion to allow the students to violate a safety rule and potentially suffer an injury as a result.

Even if the acts of Respondents' employees were discretionary, the Circuit Court erred in determining that Petitioner was not entitled to a safe and secure learning environment as constitutionally required because MCA was not a traditional public school. The Court failed to consider relevant statutes and failed to consider the extent of the State's obligations. Rather, the Court engaged in an exercise of statutory construction that was contrary to the actual establishment, function, and operation of MCA. The Circuit Court continued this erroneous reasoning and conclusion to permit Petitioner to be deprived of his constitutional right to an education and to find that the doctrine of *in loco parentis* was inapplicable to Petitioner.

Finally, the Circuit Court erred in determining that Respondents, through their employees, acted in a fraudulent, malicious, or oppressive manner. The determination of this issue is for the jury in the face of disputed facts, and, despite the Circuit Court's contention that the "agreed facts" are sufficient to render a decision in this matter, disputed facts and inferences to be drawn from these facts exist in the present case.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this Appeal involve assignments of error addressing the constitutional rights of Petitioner and the determination of the status of Mountaineer Challenger Academy as an educational institution subject to the dictates of the *West Virginia Constitution*. Therefore, the

case *sub judice* presents issues that require clarification under West Virginia Law. Thus, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

## ARGUMENT

I. The Circuit Court of Preston County erred in dismissing Plaintiff's Complaint based upon a finding that Defendants were entitled to qualified immunity, Plaintiff's claims are not subject to immunity and/or fall under clearly recognized exceptions to immunity.

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 3, *Ayersman v. Wratchford*, 874 S.E.2d 756 (W. Va. 2022) (quoting Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, *Painter v. Peavey,* 192 W.Va. 189, 451 S.E.2d 755 (1994). Judgment as a matter of law is proper only when no genuine issues of fact exist. *W.Va. R. Civ. P. 56.* A circuit court is required to "set out findings sufficient for appellate review" in its decision granting a motion for summary judgment. *W. Va. Dep't of Health & Human. Res. v. Payne*, 231 W. Va. 563, 569, 746 S.E.2d 554 (2013) (quoting Syl. Pt. 3, *Fayette Cnty. Nat'l Bank v. Lilly,* 199 W. Va. 349, 484 S.E.2d 232 (1997)).

The Circuit Court failed to follow this mandate in considering Respondents' *Motion for Summary Judgment* and ignored the underlying material factual disputes that preclude the grant of judgment as a matter of law. A "bona fide dispute as to the foundational or historical facts that underlie the immunity determination" renders summary judgment inappropriate. *See, Syl. Pt. 4, W. Va. Dep't of Health & Human. Res. v. Payne,* 231 W. Va. 563, 569, 746 S.E.2d 554 (2013) (citing, *Syl. Pt. 1, Hutchison v. City of Huntington,* 198 W.Va. 139, 479 S.E.2d 649 (1996).)

The Circuit Court erroneously relied upon what it termed "undisputed facts" to the

exclusion of material disputed facts. Under the Circuit Court's reasoning, the only relevant facts are the chronological sequence of events, that Respondents are state agencies, and the insurance contract does not waive the defense of qualified immunity. (*Order*, A.R. 1002-1003.)

Further, instead of analyzing the issues based upon the extensive discovery and evidence presented, the Circuit Court erroneously recites the claims alleged in the *Complaint* as a talismanic summary for the extensive factual testimony presented by the parties. (*Id*. at A.R. 1008.) Thus, it appears that the Circuit Court was actually deciding Respondents' *Motion to Dismiss*, while designating the *Order* as a grant of summary judgment. Neither the arguments of counsel nor assertions in briefs are facts or evidence. *State v. Stepanian*, No. 20-0721, 2022 W. Va. LEXIS 81, at *5 (Jan. 18, 2022) (memorandum decision) (See also, *State v. Benny W*., 242 W. Va. 618, 629, 837 S.E.2d 679, 690 (2019).)

Other than the bare bone facts surrounding Petitioner's acceptance into the MCA program, acclimation period, instruction on how to exit a bunk bed, Petitioner claimed to have been injured, and the timeline set forth by the Circuit Court, the Circuit Court does not identify any other "agreed facts" in the opinion. These supposedly "agreed facts" do not address the central issue of the case of whether Respondents are entitled to immunity. In order to reach that decision, the Circuit Court erroneously decided disputed issues of material fact and erroneously granted Respondents' *Motion for Summary Judgment*.

In order to find immunity, the Circuit Court had to conclude that Respondents' employees were acting in a discretionary manner at the time they permitted the violation of the safety regulation. The underlying basis for this decision had to be that the employees had the freedom to disregard this particular rule (as opposed to other rules). Respondents presented no evidence that this discretion was granted.

Additionally, the Circuit Court completely disregarded the evidence of Petitioner's expert, Lisa A. Thorsen, Ed. D. The Court apparently concluded that Dr. Thorsen's testimony was not relevant or credible.

Further, the Circuit Court determined that MCA was not subject to constitutional protections by relying upon certain statutory provisions that supported the conclusion and ignoring other statutory provisions that supported the conclusion that Petitioner was entitled to constitutional protections while at MCA.

Finally, the sparse evidence cited by the Circuit Court regarding the conclusion that Petitioner did not establish that Respondents acted in with malice or in a fraudulent or oppressive manner means that the Court had to determine that all of the evidence Petitioner presented to the contrary was not credible and/or refuted by Respondents' evidence. One cannot read the acclimation incident reports with the background of Petitioner's injuries and not wonder how individuals could be so callous. One cannot help but reach the inference that the employees of Respondents wanted to be rid of Petitioner and accomplished that goal by any means necessary.

The Circuit Court failed to properly analyze the Respondents' *Motion for Summary Judgment* and Petitioner respectfully requests that this Court reverse the decision of the Circuit Court granting Respondents' *Motion for Summary Judgment*.

II. The Circuit Court of Preston County erred in determining that failure to apply the detailed, mandatory protocol regulating how students were to exit their bunks constituted a discretionary, as opposed to a ministerial, duty.

Every action by a state actor cannot be deemed to be discretionary. The result would be to eliminate government liability all together. The Circuit Court erroneously concluded that the implementation of an established policy for the safety of minors was discretionary. The cadre were required to enforce the rule regarding exiting the top bunk. The students were in a confined

space and the action prohibited was clear. The fact that the rule was intended for the safety of the students is not disputed, so much so that there were multiple trainings on this task.[3] No discretion would be required to be utilized in enforcing this particular rule even though the exercise of discretion may have been appropriate for other rules not at issue in this case.

Mr. Morris viewed a video that demonstrated that not all of the cadets were exiting the top bunk correctly. (Morris Depo., A.R. 377.) No video or documentary evidence exists establishing that the cadets were corrected for failing to follow this procedure. (*Id.*) The policy of correctly dismounting or not jumping off of the top bunk, was already established and enforcing the policy to provide for the safety of Petitioner and other minors did not involve a discretionary judgment, decision, or act. No evidence was presented by Respondents that the cadres were "either authorized or required, in the exercise of his judgment or discretion, to make a decision and to perform acts in the making of that decision." (*Order*, A.R. 1006, quoting Syl. Pt. 4 [sic], *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (quoting Syl. Pt. 4, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).)

The West Virginia Supreme Court of Appeals confirmed in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.* that "the State enjoys no immunity" for "the negligent performance of ministerial duties" that occurs within the scope of employment. *Id*. at 506. In order to reach a conclusion with respect to the entitlement of immunity in the face of clearly established policies, a court must determine the precise nature of the policies and whether Respondents' employees "failed in any ministerial duties" imposed by the policies. *Bowden v. Monroe Cty. Comm'n*, 232 W. Va. 47, 750 S.E.2d 263 (2013) (Employee's ministerial duties could have encompassed the requirement that the employee impound the dogs, which were not properly registered and maimed

[3] Respondents have produced no evidence that Petitioner was in fact trained.

and killed plaintiff's decedent.)

The cases relied upon by the Circuit Court are inapposite to the case *sub judice*. Petitioner did not make a claim for negligent training or supervision of employees. See, *W. Va. State Police v. J.H.*, 244 W. Va. 720, 856 S.E.2d 679 (2021). Nor is the enforcement of a specific safety requirement tantamount to the exercise of discretion required in the employor-employee relationship.

The issue decided by the West Virginia Supreme Court of Appeals in *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018) was "whether the CPS Guidelines rise to the level of a clearly established statutory or constitutional right, and, if so, whether Mr. Gillispie has demonstrated acts or omissions in violation of the CPS Guidelines." *Id*. at 229. The Court found that they were not based upon the facts that the guidelines "in effect at the operative time [2010] had been revised in 2009, were revised again in 2010, and have not been adopted or approved by the Legislature." *Id*. at 235. The Court further noted that the guidelines were "interim rules" and even so were "not uniformly applied across the state." *Id*. Therefore, the Court concluded that it had "difficulty elevating those interim guidelines to a clearly established statutory or constitutional law." *Id*.

Thus, the Court was not addressing the issue of whether the acts were discretionary or ministerial. Moreover, the Court relied upon that fact that no evidence established that the guidelines were violated. *Id*. In contract, video-taped evidence exists to show that Respondents' policy was violated. Finally, the Court also stated that evidence was lacking regarding the issue of the causal relationship between the violation and the death of the plaintiff's decedent. *Id*. Petitioner has presented expert testimony establishing a causal relationship. Therefore, the Circuit Court's reliance on *Couch* is entirely unwarranted as *Couch* is legally and factually inapposite to

the issue of whether Respondents' employees were engaged in a discretionary function in failing to enforce the safety rule.

Likewise, the factual and legal circumstances in *W. Va. Dep't of Health & Human. Res. v. Payne*, 231 W. Va. 563, 746 S.E.2d 554 (2013) are inapposite. Initially, the case may seem applicable because plaintiff's decedent died from choking on a hot dog fed to him at the D.E.A.F. Education and Advocacy Focus, Inc. day habilitation center while being supervised by their employee. The plaintiff's allegations, however, were that: "the DHHR defendants were negligent in 'failing to ensure' that DEAF 1) properly trained staff; 2) complied with state and federal regulations; 3) had an adequate workforce; and 4) disclosed 'licensing issues and/or problems' to clients." *Id.* at 562 and 568. The Supreme Court of Appeals somewhat summarily disposed of the issue of whether the defendant's actions were discretionary by citation to *West Virginia Code § 27-9-1*, which, in essence, stated that the secretary of DHHR "'may make such terms and regulations in regard to the conduct of any licensed hospital, center or institution, or part of any licensed hospital, center or institution, *as he or she thinks proper and necessary*.'" *Id.* at 573 (emphasis in original). No such statute exists in the present case regarding the exiting of bunk beds at MCA.

The Circuit Court also erroneously relied upon a generalized duty to maintain a safe workplace to support the conclusion that enforcement of a specific safety regulation was discretionary. *W. Va. Bd. of Educ. v. Croaff*, No. 16-0532, 2017 W. Va. LEXIS 338 (May 17, 2017). The Circuit Court reasoned that the method and manner of maintaining a safe work environment involves an exercise of discretion. (*Order*, A.R. 571.) Had Petitioner alleged that Respondents failed to maintain a safe environment by not having a policy regarding the exiting of the top bunk, the reasoning in *Croaff* may have been applicable. However, a policy existed. The

policy was not enforced. No evidence indicates that the cadre had the discretion not to enforce the policy. Petitioner was injured. Respondents are not entitled to immunity.

Finally, the Circuit Court likens the cadre at MCA, a facility designed to educate and improve individuals, to a corrections officer in a prison. (*Order*, A.R. 1007 (citing, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 509, 766 S.E.2d 751, 768 (2014).) Further, while a state employee's actions may be "*broadly* characterized as discretionary," that characterization does not preclude the individual from also performing ministerial functions. See e.g., *State ex rel. Core v. Merrifield*, 202 W. Va. 100, 110, 502 S.E.2d 197 (1998) (stating that clerks of courts have "several non-judicial or ministerial duties.")

The conclusion that the Circuit Court misapprehended the issue in this case and erroneously determined that the failure to implement the specific safety requirement was discretionary is evidenced by the Court's statement that "the issue is whether the supervision [of minors while exiting the top bunk] was reasonable or adequate." (*Order*, A.R. 1007.) Whether the supervision was reasonable or adequate does not answer the question of whether it was ministerial.

The correct issue is whether the implementation of a specific requirement regarding the safety of a minor under the supervision and control of MCA was a ministerial function that was not performed. The answer is "yes," or, at least, the answer is that genuine issues of material fact exist with respect to the determination of foundational facts regarding whether Respondents are entitled to qualified immunity. If "[i]t is unclear, however, as to how the Appellee's averment that the Appellant failed to take steps to remedy unsafe conditions stems from any discretionary, administrative policy-making act or omission. Once more facts are ascertained, it may be that the substance of this allegation may also have involved administrative, policy-making act(s) [or not]."

*Hess v. W. Va. Div. of Corr.*, 227 W. Va. 15, 20, 705 S.E.2d 125, 130 (2010).

The Circuit Court erroneously determined that the acts of Respondents' employees were not ministerial. The Court's relied upon factually and legally inapposite cases and engaged in broad generalizations rather than making a determination on the specific action at issue herein. Therefore, Petitioner respectfully requests that the grant of summary judgment be reversed and the case remanded for trial.

III. The Circuit Court of Preston County erred in determining that Plaintiff had no right to a "safe and secure [learning] environment" implicit in the right to education under the West Virginia Constitution merely because the Mountaineer Challenge Academy is not a traditional, public school.

The Circuit Court of Preston County erroneously determined that Petitioner was not entitled to the protections afforded by *W.Va. Const. Art. XII, Section 1*, which provides that "The legislature shall provide, by general law, for a thorough and efficient system of free schools." The Circuit Court made this determination on its conclusion that MCA was not a "school." In order to determine whether MCA was a school, the Circuit Court relied upon the statutes contained in *Chapter 18A of the West Virginia Code*, School Personnel; *Chapter 18 of the West Virginia Code*, Education; and, *Chapter 15 of the West Virginia Code*, Public Safety. (*Order*, A.R. 1009.)

The West Virginia Supreme Court of Appeals interpreted *W.Va. Const. Art. XII, Section 1* as follows:

> We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.
>
> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work -- to know his or

> her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.
>
> *Pauley v. Kelly*, 162 W. Va. 672, 705-06, 255 S.E.2d 859 (1979).

Similarly, MCA represents that it "adheres to the eight core components as a bedrock for instruction" as stated in it mission statement. (Morris Depo., A.R. 369-370) The eight core components are: "1. Academic Excellence; 2. Life Coping Skills; 3. Job Skills; 4. Health and Hygiene; 5. Responsible Citizenship; 6. Service to the Community; 7. Leadership/Followership; and 8. Physical Fitness."[4] These core components coincide with the definition of a thorough and efficient school, yet the Circuit Court still found that the constitutional protections were inapplicable.

*West Virginia Code § 18-2-6(g)* requires the West Virginia State Board of Education to support the operation of MCA which is designated as a special alternative education program pursuant to *West Virginia Code § 15-1B-24*. *West Virginia Code § 18A-1-1(k)* defines "Alternative education" as "an authorized departure from the regular school program designed to provide educational and social development for students whose disruptive behavior places them at risk of not succeeding in the traditional school structures and in adult life without positive interventions."

The West Virginia State Board of Education is also required to promulgate a rule that "shall set forth policies and procedures applicable only to the Mountaineer Challenge Academy." *W. Va. Code § 18-2-6(g)*. The policies and procedures are required to provide for "Consideration of a student participating in the Mountaineer Challenge Academy special alternative education

[4] https://wvchallenge.org/about-us/core-components/, accessed December 2, 2021.

program at full enrollment status in the referring county for the purposes of funding and calculating attendance and graduation rates." *W. Va. Code § 18-2-6(g)(3)*.

Additionally, the policies and procedures are required to provide for the "[p]ayment of tuition by a county board to the Mountaineer Challenge Academy for each student graduating from the academy with a high school diploma that resides in that county board's school district." *W. Va. Code § 18-2-6(g)(6)*. Moreover, "a student enrolled in the public schools of the county may continue to be enrolled while also enrolled in an alternative program," subject to certain conditions." *W. Va. Code § 18-2-6(j).*

MCA implemented the Option Pathway program for students to obtain a high school diploma. *2015 W. Va. CSR § 126-32-8.1.* The Option Pathway regulations are promulgated, in part, based upon *West Virginia Constitution, Article XII, Section 2*. *2015 W. Va. CSR § 126-32-1.2*. Further, the West Virginia Department of Education published an "Organizational Manual 2015" addressing the Option Pathway as applicable to MCA in Chapter 5.[5]

MCA, as a special alternative education program, is a public school whose students are in residence. The students at MCA graduate from their county high school upon successful completion of the requirements resulting in their time at MCA being funded by public money. MCA is subject to various provisions governing the Options Pathway. The Circuit Court disregarded these provisions that clearly indicate that MCA should be considered a public school to conclude that Respondents are not required to follow the constitutional protections that flow from *West Virginia Constitution, Article XII, Section 2*. This conclusion is unfounded.

Moorhead has a constitutional right to an education, including 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,

[5] wvde.us/wp-content/uploads/2017/12/altmeans_hscredit_manual_oct20-2015_FINAL_003.pdf, accessed December 6, 2021.

346-47 (1997). He was required to be protected from reasonably anticipated injuries by the exercise of reasonable care. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 641, 398 S.E.2d 120 (1990); *See also, Gring v. Harrison Cty. Bd. of Educ.*, No. 14-0248, 2014 W. Va. LEXIS 1247 (Nov. 21, 2014) (memorandum decision). By failing to enforce the established policy regarding jumping off of the top bunk, MCA failed to use reasonable care to provide Moorhead with a safe environment.

The Circuit Court misapprehends the nature of this constitutional requirement, which caused the Court to erroneously rule the requirement was inapplicable to MCA. In footnote18 of the *Order*, the Circuit Court states that West Virginia Government Tort Claims and Insurance Reform Act does not grant immunity for most claims of negligence committed by county boards of education. (*Order*, A.R. 573.) The Circuit Court then concludes "[t]his indicates a clear policy decision by the West Virginia Legislature." (*Id*.)

An obvious tension exists between sovereign immunity and the constitutional mandate that children be provided a safe and secure school environment. Any act by the Legislature that granted immunity to government officials for failing to provide a safe and secure environment would violate the mandates of *W.Va. Const. Art. XII, Section 1*. A government cannot immunize itself against constitutional wrongs, yet the decision of the Circuit Court reaches that prohibited result.

Petitioner respectfully requests that the Court reverse the decision of the Circuit Court and fine that Petitioner had a right to a safe and secure learning environment.

IV. The Circuit Court of Preston County erred in determining that Mountaineer Challenge Academy's actions had not violated Plaintiffs right to an education under the West Virginia Constitution.

The Circuit Court of Preston County completely disregards the fact that Petitioner has a

constitutional right to an education. “[E]ducation [is] a fundamental, constitutional right in this State." Syl. Pt. 1, in part, *Cathe A. v. Doddridge Cty. Bd. of Educ*., 200 W. Va. 521, 490 S.E.2d 340 (1997) (citation omitted). Even if a student is expelled from the school, the State has a responsibility to provide state-funded educational opportunities and services to children depending on the circumstances of each case. *Id*. at Syl. Pt. 8. The West Virginia Board of Education was created by the *West Virginia Constitution* and granted the power over "[t]he general supervision of the free schools.” *W. Va. Bd. of Educ. v. Bd. of Educ.*, 239 W. Va. 705, 712, 806 S.E.2d 136, 143 (2017).

The Circuit Court’s concluded that Petitioner and/or his family decided “to remove him from the public school system into an alternative education program which does not offer the same constitutional protections.” (*Order*, A.R. 1011-1013.) The Circuit Court’s conclusion that the statutory language in Chapters 18, 18A, and 15 override any constitutional considerations is wholly unsupportable.

In essence, the Circuit Court determined that despite the State being required to provide an education to its children and despite the numerous statutory and regulatory provisions regarding the State’s relationship with MCA, the State may, with impunity, deprive Petitioner of his right to an education at a facility that provides the education under the auspices of the State. The Circuit Court violated the principle that statute must be interpreted to uphold the constitutionality of a statute. Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 742, 143 S.E.2d 351, 355 (1965). If the statutes relied upon by the Circuit Court are constitutional, then those statutes must protect Petitioner’s constitutional right to an education. The Circuit Court interpreted these statutes to find that Petitioner does not have a constitutional right to an education (and a safe learning environment).

The evidence presented by Petitioner demonstrates that genuine issues of material fact exist with respect to whether the concerted actions of the employees of Respondents were intended to ensure Petitioners' dismissal form MCA and deprive him of his education. Petitioner was given nineteen acclimation incident reports in a span of four days, guaranteeing his dismissal. Not one individual took into consideration that Petitioner may actually have had pain related to his injury. Not one individual sat down with Petitioner and offered him alternatives if he could not physically participate. MCA just dumped him.

Petitioner requests that this Court reverse the grant of summary judgment to Respondents and permit this case to proceed to trial regarding the genuine issues of material fact that exist with respect to whether Petitioner's constitutional right to an education was violated.

V. The Circuit Court of Preston County erred in determining that Mountaineer Challenge Academy is not subject to the doctrine of *in loco parentis*.

The Circuit Court of Preston County erroneously relied upon Respondents' argument in this regard is based partly upon the fallacious conclusion that MCA is not a public school. The West Virginia Supreme Court of Appeals recently reaffirmed the statutory duty pursuant to *W.Va. Code § 18A-5-1* to supervise students while they are at school. *Goodwin v. Bd. of Educ.*, 242 W. Va. 322, 835 S.E.2d 566, (2019). The *Goodwin* Court reiterated the long-standing principle that *W. Va. Code § 18A-5-1(a)* "embodies the *in loco parentis* doctrine which originated in the English common law and recognizes that a parent delegates part of his parental authority while the child is in their custody." *Id*., at 331, 575 (internal citations and quotation marks omitted.) "Under the *in loco parentis* doctrine 'schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable supervision.'" *Id.* (quoting, *Doe v. Logan Cty. Bd. of Educ.*, 242 W. Va. 45, 829 S.E.2d 45, 52 (2019) (Workman, J. concurring) (internal quotation marks and citation omitted).)

Even if this precedent were not applicable to MCA, Respondents would still be responsible for the overall care of Moorhead. Petitioner's mother signed a healthcare power of attorney; a power of attorney; and a Voluntary Appointment of Guardian. (Health Care Power of Attorney and Guardian Appointment, A.R. 388.) The Health Care Power of Attorney authorized MCA "to do all acts necessary or desirable for maintaining the health of my child, Jason Ryan Moorhead."

"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) (quoting *In re Richard P.*, 227 W.Va. 285, 293, 708 S.E.2d 479, 487 (2010) (quoting Black's Law Dictionary 1290 (9th ed. 2009)). Therefore, MCA was granted the power to act as the agent of Sharon Moorhead with respect to the parental responsibilities to care for her son. West Virginia common law provides that, "a parent may grant authority over the care of their children to another adult." *In re Richard P.*, 227 W. Va. 285, 293, 708 S.E.2d 479, 487 (2010).

No doubt exists that a school is required to provide a safe environment. Moreover, MCA was specifically granted guardianship over Petitioner, which required that the Petitioner be kept in a safe environment. The Circuit Court, however, engages in a cursory exercise in statutory interpretation that contains numerous gaps in reasoning to find the doctrine of *in loco parentis* inapplicable. The Circuit Court never addresses the issue of why, if alternative education is part of the public school system, an alternative special school is not part of a public school system. The Court's reasoning glosses over the payment of money by the county board of education if the MCA student obtains a diploma. Is not this public money? The Court never mentions the oversight of the state Board of Education over MCA and completely ignores the fact that the rules

and regulations of the Option Pathway program, which allows for students to obtain a high school diploma and applies to MCA, are promulgated, in part, based upon *West Virginia Constitution, Article XII, Section 2.*

Instead of taking all of the relevant law, disputed material facts, and undisputed material facts into consideration, the Circuit Court adopts the arguments of Respondents *in toto* to arrive at an incorrect conclusion that the doctrine of *in loco parentis* is inapplicable. Petitioner respectfully requests that this Court reverse the grant of summary judgment and find that the doctrine of *in loco parentis* is applicable to MCA and that genuine issues of material fact exist as to whether MCA violated that doctrine.

VI. The Circuit Court of Preston County erred in determining that there was no genuine dispute of material fact concerning whether Mountaineer Challenge Academy's actions toward Plaintiff were fraudulent, malicious, and/or oppressive under the facts of this case, that determination should be made by a jury.

The Circuit Court states that "[t]he facts agreed to by both the Plaintiff and Defendant do not establish any action on the part of the Defendants that rise to the level of being fraudulent, malicious, or oppressive. Instead, the allegations involve simple negligence." (*Order*, A.R. 1012.) Petitioner presented evidence that Respondents acted in a fraudulent, malicious, or oppressive manner. Where factual disputes exist as to whether a person acted in a fraudulent, malicious, or oppressive manner, the matter is for a jury to decide. *Ayersman v. Wratchford*, 874 S.E.2d 756, 769 (W. Va. 2022). This proposition has long been the law of West Virginia:

> Whether malice exists or not is a pure question of fact for the jury, and should not be passed upon by the court, except to define to the jury clearly what is meant by malice. Whether particular facts admitted, undisputed or assumed, do or do not constitute malice, or are such, that malice may be inferred from, is a mere question of fact for the jury. The court can draw no inference from any state of facts, that malice does or does not exist.
>
> Syl. Pt. 7, *Vinal v. Core*, 18 W. Va. 1, 19 (1881).

The evidence presented by Petitioner demonstrated that Petitioner was awoken by Reveille, which is played loudly, and had 21 seconds to go from the prone position asleep to standing at attention next to his rack. (Morris Depo., A.R. 380-381.) According to Mr. Morris testifying as a corporate representative, the official policy regarding the method for exiting the top rack was to slide down on the back or belly. (Morris Depo., A.R. 376.) Mr. Morris also admitted that nothing is "more paramount than the safety of the cadets in the 22-week residential phase." (Morris Depo., A.R. 376.) MCA admits that it is important to take steps proactively to prevent injuries and to address and treat any injuries of a cadet. (Morris Depo., A.R. 377.)

On July 17, 2015, Petitioner exited the top bunk. (A.R. 1002.) "The video shows him jumping out of the bunk bed. He indicates that's when it started hurting. Any by the 18th, it was visible on the videos and also to the cadre. And on the 19th, it was reported officially." (Dr. Thorsen Depo., A.R. 407.) Respondents' medical expert, Dr. Soulsby, opined to a reasonable medical probability that Petitioner had stress fractures that preexisted the event of getting off of the bed and that event caused an aggravation of the stress fractures. (Dr. Soulsby Depo., A.R. 468, 474, 476, and 477.)

As Dr. Thorsen testified, Moorhead was having continued pain and was unable to perform as requested. Rather than seek additional medical workup for a diagnosis, MCA cut him from the program. (Dr. Thorsen Depo., A.R. 409.) **All of Moorhead's nineteen negative evaluations occurred after he injured his leg. (Morris Depo., A.R. 385.) A squad leader without any medical training instructed Moorehead to walk without his crutches. (Morris Depo., A.R. 384-385.) Despite being able to change Moorhead's dismissal to medical, it was not done after MCA was informed of the nature of his injuries. (Morris Depo., A.R. 382.)**(emphasis added)

This testimony in this case establishes that genuine issues of material fact exist as to whether Respondents acted in a fraudulent, malicious, or oppressive manner, yet the Circuit Court summarily disregarded the underlying factual bases that would permit a jury to find that Respondents' employees acted in a fraudulent, malicious, or oppressive manner.

Petitioner respectfully requests that this Court reverse the decision of the Circuit Court granting Respondents' *Motion for Summary Judgment*. The Circuit Court determined a factual issue despite the existence of disputed evidence regarding the actions of Respondents' employees in permitting the students to violate a safety regulation, ignoring Petitioner's complaints of pain and using his valid complaints of pain to issue negative evaluations, which resulted in Petitioner's discharge from MCA.

## CONCLUSION

Wherefore, based upon the foregoing, Petitioner Jason Ryan Moorhead respectfully requests the *Order Granting Defendants' Motion for Summary Judgment* entered by the Circuit Court of Preston County be reversed and the case remanded for trial on the genuine issues of material fact.

**JASON RYAN MOORHEAD**

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**NO. 22-ICA-58**

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

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**JASON RYAN MOORHEAD,**

**Plaintiff Below, Petitioner,**

**v.**

**Civil Action No.: 18-C-71**
**Honorable Steven L. Shaffer**

**WEST VIRGINIA ARMY NATIONAL GUARD, and WEST VIRGINIA MOUNTAINEER CHALLENGE ACADEMY,**

**Defendants Below, Respondents.**

## CERTIFICATE OF SERVICE

I, Stephen P. New, counsel for Petitioner do hereby certify that the foregoing *Petitioner's Brief* was served via File & Serve Xpress system on this 28th day of November 2022 upon the following:

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