# IN THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

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**Docket No. 22-ICA-58**

*(Underlying Preston County Civil Action No. 18-C-71)*

**Jason Ryan Moorhead,**
Petitioner / Plaintiff Below,

**v.**

**The West Virginia Army National Guard and**
**West Virginia Mountaineer Challenge Academy,**
Respondents / Defendant Below.

## RESPONDENTS' BRIEF

Counsel for Petitioner

Stephen P. New, Esq. (#7756)
New, Taylor & Associates
430 Harper Park Drive
PO Box 5516
Beckley, WV 25801
Phone: (304) 250-6017
Fax: (304) 250-6012
Email: steve@newlawoffice.com

Counsel for Respondents

Christopher C. Ross, Esq. (#10415)
Omar D. Ahmad, Esq. (#10804)
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
James Mark Building
901 Quarrier Street
Charleston, WV 25301
Phone: (304) 344-0100
Fax: (304) 342-1545
Email: cross@pffwv.com
Email: oahmad@pffwv.com

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## I. STATEMENT OF THE CASE

Petitioner Jason Ryan Moorhead is an adult resident of Logan County, West Virginia and graduate of Man Senior High School. Respondent Mountaineer Challenge Academy ("MCA") is a 22-week, quasi-military training and mentorship residential program.[1] It is one of 39 such voluntary National Guard programs across the country, and it is not a juvenile detention facility nor is it a drug treatment program. The MCA program includes an initial two week "Acclimation Period", during which candidates for consideration as cadets are introduced to the MCA life and evaluated for suitability as cadets. *See A.R.* at 1001. Acclimation Reports are part of a national standard to gauge the candidate's mental ability and attitude to engage with and to successfully complete the program. *See A.R.* at 961. They also serve to weed out candidates who will not succeed in the program early for the dual purpose of not setting the candidate up for delayed failure, and not permitting the candidate to become a disruptive or a divisive element for the rest of the class. *A.R.* at 746.

An MCA cadet does not graduate or obtain their high school diploma from the MCA. Rather, the cadet must complete the High School Equivalency Exam, which is offered and administered by the Educational Testing Service, a wholly separate entity.[2] Only if the cadet passes that exam will he or she have the opportunity to receive a diploma from his or her respective home high school, as if he or she graduated therefrom. The cadet does not receive a diploma from the MCA, as it is not a school and cannot confer such status. *See A.R.* at 707-708. A cadet that completes the MCA program but does not complete the High School Equivalency Exam will not receive any diploma. *See A.R.* at 538.

[1] https://wvchallenge.org/about-us/
[2] https://wvchallenge.org/about-us/program-phases/

In order to provide access to health care for its candidates and cadets, Respondents contracted with Preston Memorial Hospital ("Preston Memorial") to provide on-site medical evaluations and care to its cadets on a daily basis. The MCA discloses this fact to parents before admission and obtains parental consent and proof of medical insurance if treatment becomes necessary. *See A.R.* at 794. All candidates receive a physical examination in the first week of the program where Preston Memorial staff medically clear all candidates prior to full participation (Petitioner received such an examination on Wednesday, July 15, 2015). *See A.R.* at 748.

Whenever a candidate or cadet needs medical attention, he or she will be provided a sick call form to be completed by the candidate/cadet to identify the date and nature of the injury or condition. *See A.R.* at 752. The injured candidate/cadet is then taken to the Preston Memorial on-site treatment clinic for sick call at the next available opportunity, unless it is an emergency. The Preston Memorial staff will then medically evaluate the candidate/cadet, provide necessary treatment, and if necessary, issue activity restrictions. *See A.R.* at 168. If a candidate/cadet needs more extensive medical treatment, the candidate/cadet will be taken to Preston Memorial Hospital by MCA personnel. *See A.R.* at 720. All medical decisions are made by the staff from the medical clinic which is run entirely by Preston Memorial Hospital. The MCA has no control over the Preston Memorial treatment providers and does not dictate the manner in which they provide health care. Preston Memorial is not an agency of the state of West Virginia, nor is it otherwise affiliated with the MCA.

Contrary to Petitioner's representations, there is no evidence of record to indicate he was recruited to the MCA other than his own statement. *A.R.* at 767. Petitioner's mother acknowledged in his application documents that he would "not go to school" and was "way behind in credits". *See A.R.* at 757. Petitioner also indicated that he was failing in school because the "school does

not explain things very well" despite the fact he was having behavioral issues, threatened to bite a teacher, and was suspended from school. *See A.R.* at 184, 804. Petitioner's mother acknowledged that he was "very difficult to manage at school and at home" and needed letters from Petitioner's physician agreeing that he was able to attend the MCA in the first place. *See A.R.* at 804.

Petitioner submitted his application for voluntary admission to the MCA on April 5, 2015. *See A.R.* at 756. In his application, Petitioner acknowledged and agreed that (1) the program was voluntary, (2) a high school diploma was not guaranteed, and (3) "[e]ducation credentials are not a requirement for graduation from the [MCA]". *See A.R.* at 762-763. After a review of Petitioner's educational records, letters from his treatment providers, and an interview, Petitioner was accepted to attend the Acclimation Period of the MCA for the 2nd MCA Class of 2015 by letter dated June 22, 2015. *See A.R.* at 788. During the opening day of MCA, candidates were acclimated to the MCA campus, program and rules and given a safety briefing by the Commandant of Cadets. *A.R.* at 113. Opening day included a demonstration on how to properly dismount the top bunk of the bunk beds candidates would be sleeping upon during their time at the MCA. *A.R.* at 223. Candidates were also instructed on the proper method of dismounting their top bunks when they were taken to the barracks in which they would be residing, before they spent their first night at the MCA. *See A.R.* at 231, 691-692. This method consisted of the candidate sitting upright, turning so that they were face down on the bed, and then sliding down off the bunk on their stomachs. *A.R.* at 376.

Each morning at the MCA, candidates are awakened by the playing of Reveille. During this time, candidates are required to dismount their bunks as instructed and stand at attention in preparation for the day. *See A.R.* at 380. Although Reveille is played with the intention of mobilizing the cadets, they are not required to dismount their bunks hurriedly or get in formation

before Reveille ends. *Id*. On the morning of July 17, 2015, Reveille began playing in Petitioner's barracks. Petitioner acknowledged that he did not exit the bunk as he was instructed and just "slid off the top of the bunk." *See A.R.* at 224. Upon landing, he testified that he felt a pinch in his right knee, but believed he simply landed wrong and "kept going." *Id*.

On Saturday, July 18, Petitioner was taken to the on-call nurse because he was complaining that his legs hurt and he was not fully participating. *A.R.* at 820. However, Petitioner first reported pain associated with his alleged injury to his cadre on Sunday, July 19, 2015 because that was when it "started bothering him." *A.R.* at 232-233. Cadre Bircher helped Petitioner complete a sick call form for the next available sick call the following morning on Monday, July 20. *See A.R.* at 168. On the morning of Monday, July 20, 2015, Petitioner was taken to sick call and evaluated by Preston Memorial Nurse Practitioner Brian Steffke. Steffke treated Petitioner and placed him on lower body restricted duty, prohibiting him from engaging in physical training or organized activities until he could be re-evaluated in three days. *See A.R.* at 168. On July 22, 2015, Petitioner was re-evaluated by Preston Memorial physician Dr. Jennifer Pumphrey, who noticed that Petitioner walked into the clinic with a stiff right hip when he arrived for sick call. *See A.R.* at 169. After her evaluation, Dr. Pumphrey determined that Petitioner had non-specific complaints of knee pain, instructed him to walk correctly to avoid injury, and returned him to full duty. *Id.*

Based on the representations of Steffke, a Preston Memorial nurse practitioner, the MCA resumed Petitioner's participation in the program subject to Steffke's limitation of his physical training. However, throughout Petitioner's Acclimation Period, he was consistently documented as being a disinterested, unmotivated candidate. *A.R.* at 722-743. Several Acclimation Reports, completed by various cadre, revealed that Petitioner showed little insight when counseled, was reluctant to participate, made excuses, and was "able to perform but unwilling." *Id*. MCA

personnel had no reason to believe that Petitioner was physically unable to perform the non-physical portions of the program based on Steffke's representations. Moreover, Petitioner's injury did not appear to be an issue, as Cadre Bolyard noticed that Petitioner was walking properly after sick call. *A.R.* at 114. Bolyard also noticed that Petitioner would switch the legs upon which he was limping. *See A.R.* at 115. Based on the medical information provided by Preston Memorial, MCA personnel concluded that Petitioner's behavior contradicted the goals and purpose of the MCA, which sought to impart life skills and self-discipline upon struggling youth who could not succeed in the traditional school setting.

On July 22, 2015, at the close of the acclimation period and following several negative Acclimation Reports, a meeting was convened to discuss Petitioner's candidacy at the MCA. *A.R.* at 746. This meeting included MCA leadership and squad leaders familiar with Petitioner's tenure at the MCA. It was noted, during the meeting, that Petitioner exhibited unacceptable behavior and would not participate in activities.[3] *Id.* The MCA leadership highlighted the fact that Petitioner was checked by medical personnel multiple times and no issues were found that would prohibit his participation. The decision was ultimately made to discharge Petitioner from the MCA on July 22, 2015. Petitioner's discharge was not due to any injury he suffered, including the leg injuries at issue in this cause of action. *See A.R.* at 126.

Following Petitioner's discharge, he enlisted in an at-home educational program that allowed him to complete the necessary coursework and improve his overall GPA as it stood prior to the MCA. *See A.R.* at 260-262. He eventually received his high school diploma and graduated with his class without ever completing the MCA program. *See A.R.* at 227. Nothing from

[3] Some of these behaviors include, but are not limited to, Petitioner's refusal to shower, (*see A.R.* at 735), showing little insight when counseled (*see A.R.* at 723), reluctance to participate or being unwilling (*see A.R.* at 724), quitting easily (*see A.R.* at 736), and nonverbal disrespect (*see A.R.* at 740).

Petitioner's Acclimation Reports or discharge from the MCA prevented Petitioner from earning his high school diploma from his high school following his dismissal from the program. More importantly, Petitioner was able to complete his course of study and graduate from Man High School without having to offer or verify his completion of any MCA program or requirements whatsoever.

Petitioner commenced this litigation on July 16, 2018, and Respondents filed its *Answer* on August 20, 2018. *See A.R.* at 6, 16. On June 29, 2021, Petitioner filed *Plaintiff's Motion for Leave to File Amended Complaint*, to which Respondents filed a *Response in Opposition* on July 9, 2021. *See A.R.* at 24, 41. However, Petitioner withdrew this motion during the August 20, 2021 hearing on the same. *See A.R.* at 896. Respondents filed their *Motion to Dismiss* and *Motion for Summary Judgment* on November 30, 2021. *See A.R.* at 52, 68. Petitioner filed a *Combined Response* to Respondents' filings on December 9, 2021. *See A.R.* at 336. Petitioner also filed *Plaintiff's Motion for Partial Summary Judgment* on February 2, 2022, which Respondents opposed by *Response* on February 16, 2022. *See A.R.* at 541, 666.

The parties came before the Court for a hearing on *Defendant's Motion to Dismiss* on February 23, 2022. *See A.R.* at 922. The parties returned for a hearing on the parties' remaining dispositive motions on June 22, 2022. *See A.R.* at 925. On July 28, 2022, the Court issued its *Order Granting Defendants' Motion for Summary Judgment*. *See A.R.* at 999. It is from this Order that Petitioner now appeals.

## II. SUMMARY OF ARGUMENT

The Circuit Court of Preston County properly granted Respondents' motion for summary judgment. As an agency of the State of West Virginia, Respondents are shielded by the qualified immunity doctrine. This immunity absolves such agencies from liability for negligence-based

claims that are not based on violations of clearly-established rights or laws or are fraudulent, malicious, or oppressive. The alleged acts or omissions of the MCA and its personnel in this case were functions left to their discretion, as they were not functions set forth with any direction or mandate so as to constitute them ministerial in nature. There is no question that Respondents are entitled to qualified immunity in this case, as the alleged acts or omissions of its employees in this case were purely and solely discretionary and did not violate any statutory or constitutional right of the Petitioner.

Furthermore, the MCA is not a public school subject to the authority of any Board of Education in West Virginia. It is a program operated by the Adjutant General under the West Virginia Department of Homeland Security and is not constitutionally mandated to provide an education to any of its voluntary participants. The West Virginia Legislature has made it clear that an MCA participant is withdrawn from the West Virginia public school system. Petitioner did not have a constitutional or statutory right to attend the MCA, and even if he did, he was given every opportunity to participate in the program and failed to do so. As such, Petitioner's claims do not fall under any exception to the qualified immunity to which Respondents are entitled.

The MCA is a voluntary program, not a school formed under our state's constitution. There was no "special relationship" between Petitioner and Respondents, and Respondents did not stand *in loco parentis* with respect to Petitioner. The doctrine of *in loco parentis* only applies to licensed teachers and school personnel in a public school setting under West Virginia law. Petitioner has identified absolutely no law, statute, or authority that brings Respondents within the purview of *in loco parentis* status. Therefore, Petitioner cannot use this inapplicable doctrine as the basis for a perceived violation of statutory or constitutional law that circumvents Respondents' qualified immunity protection.

Petitioner has also failed to allege a material factual issue with respect to qualified immunity exceptions. He must adhere to a heightened pleading requirement where Respondents are invoking immunity and he cannot do so. Petitioner has simply failed to develop any evidence of fraudulent, malicious, or oppressive conduct on the part of the MCA that would strip Respondents of qualified immunity. For the above reasons, and for the arguments of law stated herein, the Petition for Appeal should be denied and the Circuit Court should be upheld as to all matters before this Court.

## III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the Revised Rules of Appellate Procedure (R.R.A.P.), Respondents believe that the deliberation process would be aided by oral argument in this matter.

## IV. STANDARD OF REVIEW

Pursuant to Rule 56(a) of the West Virginia Rules of Civil Procedure, "[a] party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may…move with or without supporting affidavits for a summary judgment in the party's favor upon all part thereof." W.Va. R. Civ. P. 56(a). Under this standard, "a party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists." *Poweridge Unit Owners Ass'n v. Highland Props*., 196 W.Va. 692, 698-699, 474 S.E.2d 872, 878-879 (1996). "[A] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). A plaintiff seeking to prevail against a defendant who invokes qualified immunity must meet a heightened pleading requirement: "in civil actions where

immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996).

Significantly, Respondents' entitlement to qualified immunity is ripe for the Court's determination as the United States Supreme Court and Supreme Court of Appeals of West Virginia view immunity as "immunity from suit rather than a mere defense to liability" that is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 513, 105 S. Ct. 2806, 2808 (1985); *Accord Hutchison*, 198 W.Va. at 147, 479 S.E.2d at 657 (1996). The Supreme Court emphasizes the importance of determining immunity at the earliest possible stage of litigation to avoid expending unnecessary costs and resources. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001); *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789, 1793 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). *Accord* Syl. Pt. 1, *Hutchison*.

## V. ARGUMENT

Petitioner alleges that the Preston County Circuit Court improperly found, as a matter of law, that the Respondents were not liable for Petitioner's claims due to the application of qualified immunity to a state agency. Petitioner further claims that the Circuit Court improperly relied upon "limited information" to reach its conclusion without fully considering or explaining disputed facts in the case. Petitioner also claims that the Circuit Court improperly found that the Respondents were engaged in discretionary acts and that Respondents are not subject to the doctrine of *in loco parentis*. Lastly, Petitioner claims that the Circuit Court improperly found that Respondents have

not fraudulently and maliciously sought to violate Petitioner's constitutional right to an education.

### A. THE PRESTON COUNTY CIRCUIT COURT PROPERLY FOUND, AS A MATTER OF LAW, THAT THE RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY AS TO PETITIONER'S CLAIMS, WHICH DO NOT FALL UNDER CLEARLY RECOGNIZED EXCEPTIONS TO THE QUALIFIED IMMUNITY DOCTRINE.

As a threshold issue, Respondents must first address Petitioner's generalized claims that the Circuit Court committed error(s) sufficient to invalidate the Order granting summary judgment in favor of Respondents. One of Petitioner's claims is that the Circuit Court "erroneously recites the claims alleged in the *Complaint* as a talismanic[4] summary for the extensive factual testimony presented by the parties." *Pet. Brief* at 14. It appears that Petitioner is suggesting that the Circuit Court was capricious in its selection of the facts and evidence that it considered in granting summary judgment in favor of Respondents. However, Respondents believe that the Circuit Court gave careful consideration to all of the relevant facts by holding two days of hearings on the dispositive motions and addressing various questions to both counsel to elucidate the facts and arguments.[5] *A.R.* at 896-1013. If the Court relied upon the claims raised in Petitioner's *Complaint*, it can hardly be faulted for that as Petitioner only attempted to amend his *Complaint*, to bring in new causes of action, in the fourth year of this five-year-old case, but then Petitioner withdrew his *Motion for Leave to Amend* during the oral argument on the same as counsel decided that everything about his case sounded in "simple negligence". *A.R.* at 896. Nevertheless, the Circuit Court more than addressed the reasons why a case that sounds in simple negligence against a state

[4] It is unclear whether Petitioner is referring to a talisman as an object ascribed with magical powers intended to heal or protect the Respondents; a reference to Stephen King's *The Talisman* which examines themes of lost innocence and the corrupting nature of power; or as some other usage with which Respondents' counsel is unfamiliar

[5] Over the course of the two hearings over two days, the parties presented their arguments to the Court for more than five collective hours. During this time, the Honorable Steven L. Shaffer had before him, and diligently referred to, the parties' dispositive motions, supporting memoranda, and corresponding exhibits, which make up the vast majority of the 1,016 *Joint Appendix Record* agreed to by the parties in this appeal.

agency engaged in discretionary acts is defeated by the qualified immunity doctrine, regardless of whether the Circuit Court addressed each and every one of Petitioner's various claims and sub-claims in this matter.

The MCA is an agency of the State of West Virginia, which entitles it to qualified immunity from Petitioner's negligence claims. An agency's entitlement to qualified immunity "is an immunity from suit rather than a mere defense to liability" which is "effectively lost if the case erroneously is permitted to go to trial." *W.Va. Bd. of Educ. v. Marple*, 236 W.Va. 654, 660, 783 S.E.2d 75, 81 (2015). Under West Virginia qualified immunity law, modeled after its federal counterpart, qualified immunity shields state employees from liability for claims arising out of acts or omissions that do not violate clearly established rights or are fraudulent, malicious, or oppressive. *See* Syl. Pt. 6, *Clark v. Dunn*, 195, W.Va. 272, 465 S.E.2d 374 (1995); Syl. Pt. 7, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014).

> To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.,* 188 W.Va. 356, 424 S.E.2d 591 (1992). **In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.**

*Id.* at Syl. Pt. 11 (emphasis added). To determine whether the state agencies or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit to determine whether such acts or omissions constitute legislative, judicial, executive, or administrative policy-making acts or involve other discretionary governmental functions. *See* Syl. Pt. 10, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). For those state officials whose functions are discretionary in nature,

qualified immunity "is broad and protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Crouch v. Gillispie*, 240 W.Va. 229, 234, 809 S.E.2d 699, 704 (2018). "A public officer is entitled to qualified immunity for discretionary acts, even if committed negligently." *Mason v. Wagner*, 236 W.Va. 488, 500, 781 S.E.2d 936, 948 (2015).

There is no question that the claims asserted by Petitioner are grounded exclusively in simple negligence as to the Respondents. A review of the *Complaint* and subsequent pleadings shows that each of Petitioner's claims is premised on Respondents' alleged failure to adhere to certain duties. Moreover, the MCA, based upon the medical opinions provided by the Preston Memorial treatment providers, exercised its discretion with respect to how to handle Petitioner in the MCA setting. *A.R.* at 134. There should be no dispute that Respondents' operation of the MCA requires the exercise of discretionary decision making. *Cf. Crouch*, at 234, 809 S.E.2d at 704. At issue is whether Respondents may be stripped of qualified immunity because Petitioner alleges, without meeting the heightened pleading standard, that Respondents violated a clearly recognized statutory or constitutional right. *See B.R. v. W.Va. Dept. of Health & Human Res.*, No. 18-1141 (W.Va., Oct. 13, 2020) ("Pleading simple negligence, without a violation of a clearly established right, is insufficient to overcome qualified immunity.")

There is no genuine, material factual issue that precludes qualified immunity for Respondents in this cause of action. The record is clear that Respondents did not violate any clearly established statutory or constitutional right that would strip them of qualified immunity. In Petitioner's case, he underwent medical evaluation a total of four (4) times in the ten (10) days he was at the MCA. He was placed on an activity restriction by the individuals with the expertise and licensure to provide medical care and evaluations, which was honored by the MCA. Given Petitioner's lack of observable signs of an acute, traumatic injury, the Preston Memorial medical

providers made a good faith diagnosis that Petitioner was suffering nothing more than tendonitis from an increase in activity to which he was not accustomed. *A.R.* at 168-169. Multiple MCA employees testified that if they had reason to believe Petitioner suffered a significant injury, he would have been taken to the hospital for further evaluation. *See A.R.* at 135; *A.R.* at 112; *A.R.* at 234-235. MCA personnel exercised their discretion in their approach to Petitioner based on what they believed was an accurate medical opinion as to his health and ability to participate. This conduct amounts to simple negligence, at best, and clearly entitles Respondents to qualified immunity for Petitioner's claims.

There was no violation of any clearly established statutory or constitutional rights regarding Petitioner's participation and discharge from the MCA. Petitioner's lack of focus and inability to stay attentive were documented from the moment he applied to join the MCA. *A.R.* at 722-743. During the MCA's acclimation period, Petitioner was cited by multiple MCA personnel as demonstrating a persistent lack of motivation and unwillingness to perform a myriad of MCA activities of differing participation levels. *Id*. This unwillingness to perform was not limited to physical training or other similar activities, as Petitioner was also noted as being unwilling to even shower and lacking insight as to what the program expected of him. All of the Acclimation Incident Reports completed by various MCA personnel paint a collective picture of Petitioner as an unmotivated individual who made excuses for almost every activity and function in which he was asked to participate. *Id*.

Once Petitioner reported his pain to the MCA staff, arrangements were made for him to be medically evaluated. The Preston Memorial medical personnel restricted Petitioner from engaging in lower body physical activity, which was honored by the MCA. Despite his return to full duty by the Preston Memorial medical personnel, Petitioner continued to demonstrate an unwillingness

to participate. The MCA had no reason or indication to believe that Petitioner was physically unable to participate given the representations of the Preston Memorial medical personnel, the entity charged with the responsibility for providing medical opinions to a reasonable degree of medical certainty. In light of the information available to them, the MCA made the legitimate, discretionary decision to discharge Petitioner from the program at the end of his two-week Acclimation Period. This decision was made not only because Petitioner did not adhere to the MCA's goals, but also so that Petitioner's lack of motivation and willingness to participate did not negatively affect the remaining at-risk youth at the MCA. *A.R.* at 163. For the forgoing reasons, Respondents are entitled to summary judgment as a matter of law and the Preston County Circuit Court should be affirmed.

### B. THE PRESTON COUNTY CIRCUIT COURT PROPERLY DETERMINED, AS A MATTER OF LAW, THAT THE MOUNTAINEER CHALLENGE ACADEMY WAS ENGAGED IN DISCRETIONARY FUNCTIONS AND NOT MINISTERIAL DUTIES REGARDING ENFORCEMENT OF PETITIONER'S METHOD OF EXITING HIS BED.

While Petitioner believes that the Circuit Court and Respondents' reliance on the facts and law cited in *W.Va. Dep't of Health & Human Res. v. Payne*, 231 W.Va. 563, 746 S.E.2d 554 (2013) are inapposite to the instant matter, *Payne* is, perhaps, the best reference for the analysis of whether or not the Circuit Court properly considered the issue of the qualified immunity doctrine before granting the same to Respondents in the instant case. The Supreme Court of Appeals of West Virginia in *Payne* was tasked with determining whether the Kanawha County Circuit Court properly denied WVDHHR's motion for summary judgment on the grounds of qualified immunity in a case involving the death of a resident at a DHHR licensed facility. The Supreme Court began its analysis by finding that it had authority to hear the appeal due to qualified immunity being an interlocutory ruling under the collateral order doctrine. *See Id.* at Syl. Pts. 1 & 2. The Supreme

Court further found that a circuit court's order denying summary judgment on qualified immunity must contain sufficient detail to permit a meaningful review of material facts and evidence upon which the order is based.[6] *See Id.* at Syl. Pts. 3 & 4. The Supreme Court was clear that the ultimate determination of whether qualified immunity exists as a bar to a civil action is a matter of law for the court to determine and not a question for the jury. *See Id.* at Syl. Pt. 5. The Supreme Court set out the basic qualified immunity standard as:

> A public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va. Code 29-12A-1 *et seq*. [the West Virginia Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known.

*See Id.* at Syl. Pt. 7. The Supreme Court then reiterated that:

> If a public officer is either authorized or required in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual.

*See Id.* at Syl. Pt. 8.

*Payne* acknowledged that West Virginia caselaw analyzing and applying the various governmental immunities has created a "patchwork of holdings" where each particular set of facts must be analyzed on a case-by-case basis to the facts and circumstances of each individual case. *See Id.* at 571, 746 S.E.2d at 562. The Supreme Court ultimately found that the plaintiff, who alleged simple negligence, failed to produce evidence that the WVDHHR had violated a clearly established law. *See Id.* at 574-75, 746 S.E.2d at 565-66. The Supreme Court noted that the

[6] The Preston County Circuit Court, in the instant case, submitted a 15-page opinion that is comprised of four pages of factual assessment followed by ten pages of discussion of that factual assessment.

Kanawha County Circuit Court had made part of its determination as to whether the acts of the WVDHHR employees were discretionary or ministerial and found that the DHHR involves a mix of ministerial and discretionary actions and that many of the discretionary actions extend from ministerial functions. *See Id.* at 572, 746 S.E.2d at 563.

The Supreme Court extensively opined that the distinction between "discretionary" and "ministerial" acts is not a useful distinction and is highly arbitrary and difficult to apply. *See Id.* at n.26.[7] The Supreme Court discussed these "repudiated" terms in *Payne*, finding them useful in illustrating how certain governmental actions or functions "may involve both discretionary and non-discretionary or ministerial aspects, the latter of which may constitute clearly established law of which a reasonable public official would have known." *Id*. Thus, the new standard, reiterated by the *Payne* Court, found that the standard requiring violation of a clearly established law of which a reasonable person would have known:

> will ordinarily have the same effect as the invocation of the "ministerial acts" principle followed elsewhere. Ministerial acts, by definition, are official acts which, under the law, are so well prescribed, certain, and imperative that nothing is left to the public official's discretion. Obviously, a public official who ignores or violates such clearly established precepts of law … would not be entitled to qualified immunity.

*Id* at n.26, *quoting State v. Chase Securities, Inc.*, 188 W.Va. 356, 364, 424 S.E.2d 591, 599 (1992).[8]

The *Payne* case involved a death that occurred because a disabled adult was negligently fed a hot dog at a DHHR facility that caused him to choke and asphyxiate. *See Id.* at 567, 746

[7] Citing *State v. Chase Securities, Inc.*, 188 W.Va. 356, 364, 424 S.E.2d 591, 599 (1992).
[8] The Supreme Court further noted that it would be inappropriate to relegate the distinction between discretionary and ministerial functions to the jury, because such a question is "purely a legal issue which is a predicate to the qualified immunity analysis." *Payne* at n.31, *citing Cartwright v. McComas*, 223 W.Va. 161, 164, 672 S.E.2d 297, 300 (2008).

S.E.2d at 558. The plaintiffs in *Payne* pointed to numerous problems with the actors following DHHR policies and procedures including: the facility failed to provide a modified diet to Mr. Payne; the direct-care staff was newly hired and had not been trained as to the special needs of Mr. Payne; the direct-care staff had not been trained on the Heimlich maneuver; there was no emergency plan in place; the license for the facility had been previously revoked and was only provisionally reinstated; and that there were numerous deficiencies in the operations of the facility that should have resulted in a loss of its license to operate. *See Id*. In sum, the plaintiffs in *Payne* alleged that the death was caused by negligence in the monitoring and enforcement of the applicable standards of care, policies, protocols, and management of the subject facility, essentially characterizing these as "ministerial" functions.

The Supreme Court determined that the *Payne* plaintiffs failed to identify ministerial duties which the DHHR defendants negligently performed, but rather took issue with the discretionary judgments which derived from the DHHR defendants' ministerial functions. *See Payne* at n.26. As part of that analysis, the Supreme Court found that the various DHHR regulations, cited by the plaintiffs, "do not require the DHHR defendants to micro-manage the daily functions of the facilities within their regulatory enforcement power to ensure constant, unwavering compliance in all aspects of their affairs." *Id.* at 574, 746 S.E.2d at 565. Thus, in the grand scheme of things, the plaintiffs failed to produce evidence that the WVDHHR had violated a clearly established law of which a reasonable person would have known. *See Id.* at 574-75, 746 S.E.2d at 565-66. The Supreme Court further rejected the plaintiffs' attempts to "recast the discretionary nature of licensing functions as an affirmative, ministerial duty by attempting to utilize the deficiencies identified in the prior license revocation." The Supreme Court ultimately held:

> [S]imply characterizing the regulatory power of the Secretary to revoke a license upon certain criteria as "mandatory" does not strip

> the *decision to invoke* such power of its discretionary nature. To permit this action to proceed against the DHHR defendants on the basis of their discretionary licensing function would defeat the entire purpose of qualified immunity as articulated by the United States Supreme Court.
>
> The purpose of such official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make officials unduly timid in carrying out their official duties.

*Id* at 576-77, 746 S.E.2d at 567-68 (citations omitted). The Supreme Court then reversed and remanded the matter with directions to enter summary judgment for the state entity. *See Id*.

In the instant case, there is no constitutional provision, statute, case, regulation, or any other law governing the actions of MCA staff during every part of their day. Much like a police officer, the MCA staff have discretion in the manner and method of enforcing the MCA polices and procedures which renders the actions of the Respondents as discretionary and, moreover, not violative of a clearly established law of which a reasonable person would have known. For the forgoing reasons, Respondents are entitled to summary judgment as a matter of law and the Preston County Circuit Court should be affirmed.

### C. THE PRESTON COUNTY CIRCUIT COURT PROPERLY DETERMINED, AS A MATTER OF LAW, THAT THE MOUNTAINEER CHALLENEGE ACADEMY IS A STATE AGENCY AND IS NOT A PUBLIC SCHOOL GOVERNED BY A BOARD OF EDUCATION.

Petitioner has not demonstrated that he had a constitutional or statutory right to complete or even attend the MCA program. Petitioner has provided no evidence that the MCA is a school beholden to his right to an education. Article 12 of the West Virginia Constitution provides for a fundamental right to education through the state's "system of free schools." W.Va. Const. Art. XII, §1. This system of free schools, which are the only schools constitutionally required to provide a free public education, are supervised by the West Virginia Board of Education. *See* W.Va. Const.

Art. XII, §2.

The West Virginia Legislature has made it clear that the MCA is a separate and distinct entity from those public schools through which the fundamental right to education is provided. Specifically, W.Va. Code §18-2-6, setting forth the classification and standardization of schools, identifies the MCA as a "special alternative education program." W.Va. Code §18-2-6(f). The MCA is operated by the Adjutant General under the Secretary of State, not by *any* board of education in this state. *See* W.Va. Code §18-2-6(g). The "special alternative education program" is "for students who are at risk of not succeeding in the traditional school structure", which demonstrates a clear intent by the Legislature to differentiate the MCA from the traditional, public-school structure to which Article 12 of the West Virginia Constitution applies. *Id*.

West Virginia law also mandates "policies and procedures applicable only to the Mountaineer Challenge Academy…" *Id.* Among these policies is the deferral to "[p]recedence of the policies and procedures designated by the National Guard Bureau for the operation of the Mountaineer Challenge Academy special alternative education program". W.Va. Code §18-2-6(g)(2). Further, MCA participants are not considered part of the public school system: "[c]onsideration of the student at full enrollment status in the referring county is for the purposes of funding and calculating attendance and graduation rates only. **For any other purpose, a student participating in the MCA is considered withdrawn from the public school system."** W.Va. Code §18-2-6(g)(3)(D) (emphasis added). There is no law that "compels the Mountaineer Challenge Academy to be operated as a special alternative education program **or to be subject to any other laws governing the public schools except by its consent**." W.Va. Code §18-2-6(h) (emphasis added).

The rules specifically relating to the MCA are set forth in a separate code provision

altogether, further confirming the Legislature's intent to distinguish it from West Virginia public schools. The MCA was established pursuant to an agreement between the U.S. Secretary of Defense and Governor. *See* W.Va. Code §15-1B-24(a). It is operated by the Adjutant General with "full cooperation of the executive agencies of state government…" *See* W.Va. Code §15-1B-24(b). The State Board of Education's obligations, as it relates to the MCA, are specifically set forth in this code provision, solidifying the legislative intent not to treat the MCA as a public school. These obligations are limited to (1) including the MCA in the child nutrition program, (2) providing information for all high school dropouts to the MCA, and (3) providing for participation in the adult basic education program following completion of the MCA. *See Id*. The Legislature went to great lengths to highlight the fact that the MCA does not operate within the West Virginia public school system, and that its cadets are not students within the purview of that system.

There is no fundamental right to a free education of a student's choice, and there is certainly no law mandating that the MCA must accept any particular candidate who applies for admission. The MCA is not a West Virginia public school, constitutionally mandated to provide a free public education to anyone who applies. The MCA staff and leadership are not considered "school personnel", defined by West Virginia law as "all personnel employed by a county board [of education]…" W.Va. Code §18A-1-1(a) (emphasis added). There is not a single MCA employee that is employed by, or even supervised by, any county or state board of education. *See Id.; see also A.R.* at 162. The "alternative education" designation of the MCA is characterized 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". W.Va. Code §18A-1-1(k). For the forgoing reasons, Respondents are entitled to summary judgment as a matter of law

and the Preston County Circuit Court should be affirmed.

### D. THE PRESTON COUNTY CIRCUIT COURT PROPERLY DETERMINED, AS A MATTER OF LAW, THAT THE MOUNTAINEER CHALLENEGE ACADEMY DID NOT VIOLATE PETITIONER'S RIGHTS TO AN EDUCATION PURSUANT TO THE STATE CONSTITUTION.

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." *Crouch*, 240 W.Va. at 235, 809 S.E.2d at 705. Petitioner alleges that Respondents acted negligently in failing to provide a safe environment and supervision for Petitioner. Petitioner further alleges that the Respondents' failure to follow its own policies, handbook, and operating procedures constitutes negligence in carrying out non-discretionary (ministerial) functions that are a violation of a clear legal or constitutional right. However, Petitioner has failed to demonstrate that Respondents have violated any constitutional provision, statute, case, regulation, or any other law governing the facts and circumstances described in this litigation.

The negligence alleged by Petitioner is not that of a ministerial duty, prescribed by law, and required to be followed without any discretionary decision making. The policies and guidelines are created by the MCA, much like the guidelines promulgated by the DHHR in the *Payne* case, *supra*. However, the State of West Virginia is not bound by policies that have not been approved or promulgated by the West Virginia Legislature. *See* Syl. Pt. 3, *Darlington v. Mangum*, 192 W.Va. 112, 450 S.E.2d 809 (1994); *see also Chico Dairy Co. v. Human Rights Comm'n*, 181 W.Va. 238, 243-47, 382 S.E.2d 75, 80-84 (1989), *Williams v. Brown*, 190 W.Va. 202, 208, 437 S.E.2d 775, 781 (1993). Thus, none of the operating procedures, policies, and handbooks setting forth the duties and responsibilities of the staff at the MCA carry the approval of the West Virginia

Legislature and cannot be held out to be a law, constitutional provision, statute, or regulation.[9] Even if these polices were officially promulgated and adopted by the Legislature, the procedures that Petitioner complains of are not mandates to be followed without the discretion of how to enforce the same.

Assuming, *arguendo*, that Petitioner established that he had a fundamental right to attend and participate in the MCA, the MCA provided for Petitioner's participation and complied with all applicable statutory provisions. Petitioner's candidacy to enter the MCA and become a cadet was fully and fairly considered by MCA leadership. *A.R.* at 756-769. From the moment Petitioner arrived for the MCA's two-week Acclimation Period, he consistently demonstrated a general unwillingness to participate in MCA activities. *A.R.* at 722-743. Petitioner complained about MCA life and did not heed instruction, as evidenced by his lack of recall and misunderstanding of the training provided to cadet candidates on how to properly dismount a bunk.[10] *A.R.* at 224. Despite the fact that Petitioner was not required to participate in physical training, given his physical activity restriction, he persistently refused to complete other non-physical aspects of the program. *A.R.* at 722-743. MCA leadership, in reliance on the opinion of medical professionals and a desire to maintain the *esprit de corps* of the unit, determined that Petitioner's general lack of motivation and unwillingness to participate was grounds for dismissal from the program.[11] Therefore, in an

[9] The standard used in *West Virginia State Police v. Hughes,* 238 W.Va. 406, 414, 796 S.E.2d 193, 201 (2017), was whether the State Police had violated a constitutional provision, statute, case, regulation, or any other such law governing the duties of the officers.

[10] Petitioner erroneously claimed he had 10 seconds to get out of bed or he would have to do physical training. This has not been confirmed by any other deponent in this case and is untrue. *See A.R.* at 119. Petitioner further mischaracterizes his action as "leaping" or "jumping" from the top bunk where the video of the incident clearly shows the Petitioner lowering himself by his arms to the floor, albeit while facing outward rather than on his stomach.

[11] The nature of the acclimation reporting determined that receiving more than five incident reports during the acclimation period indicates a low likelihood of successful completion of the 22-week program, and such failure in the program has a tendency to negatively affect other cadets and their successful completion of the same. Petitioner had 19 such reports and was dismissed from the program, per program guidelines.

effort to preserve the integrity and cohesiveness of the group of MCA candidates to which Petitioner belonged, MCA leadership made the decision to discharge Petitioner from the program after careful consideration. *See A.R.* at 163. None of these acts or circumstances classify the MCA as a school and the Respondents did not deprive Petitioner of the right to an education. For the forgoing reasons, Respondents are entitled to summary judgment as a matter of law and the Preston County Circuit Court should be affirmed.

### E. THE PRESTON COUNTY CIRCUIT COURT PROPERLY DETERMINED, AS A MATTER OF LAW, THAT THE DOCTRINE OF *IN LOCO PARENTIS* IS NOT APPLICAPLE TO THE MOUNTAINEER CHALLENGE ACADEMY.

The West Virginia Supreme Court of Appeals further addressed the issues of discretionary acts, the public duty doctrine, and its exception of special relationship in *West Virginia State Police v. Hughes*, 218 W.Va. 406, 796 S.E.2d 193 (2017). In *Hughes* the Supreme Court was tasked with addressing whether the West Virginia State Police were entitled to qualified immunity in relation to a suicide and subsequent claims of mishandling of the remains by the State Police after the Berkeley County Circuit Court denied summary judgment on the same. The Supreme Court began its analysis with the observation:

> Under the doctrine of qualified immunity, state government employees are immune for negligent acts committed in the exercise of discretion; government employees can be liable only if their actions violate some clear legal or constitutional right. The doctrine shields officials from harassment, distraction, and liability when they exercise their discretion within the bounds of the law.

*Id.* at 408, 238 W.Va. at 195. The plaintiffs in *Hughes* asserted that the actions of the West Virginia State Police were non-discretionary, ministerial responsibilities, and were therefore covered by the "public duty" doctrine. *See Id.* at 411, 238 W.Va. at 198. The circuit court misapplied the public duty doctrine and its primary exception, the "special relationship," to find that the State Police

owed a special duty to the plaintiffs and that presented a jury question. The Supreme Court found that the public duty doctrine exists where a government entity or officer cannot be held liable for breaching a general, non-discretionary duty owed to the public as a whole such that no specific duty is owed to any individual citizen.[12] *See Id.* at 412, 238 W.Va. at 199. The exception to the public duty doctrine is when a "special relationship" exists between the government entity and a specific individual that has been taken on beyond the duty owed to the general public. *See Id*. Such a special relationship exists only where a plaintiff is able to demonstrate four factors:

> (1) An assumption by the state governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the state governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the state governmental entity's affirmative undertaking.

*Id.* at 412-13, 238 W.Va. at 199-200. The Supreme Court found that no evidence existed in *Hughes* that the State Police were engaged in anything but acts that involved the use of their discretion, and that those acts did not violate a clear legal or constitutional right. *See Id.* at 414, 238 W.Va. at 201. The Supreme Court then reversed and remanded the matter to the circuit court to enter summary judgment for the State Police and its employees. *See Id*.

In the instant case, Petitioner's attempt to apply the doctrine of *in loco parentis* to the facts and circumstances of this case is motivated by a desire to create an issue of fact by pleading a special relationship exception to the public duty doctrine. However, no such special relationship exists in this case as the duty to Petitioner is no different than the duty to any other cadet candidate attending the MCA. Thus, a duty to all is a duty to none. Further, the public duty doctrine is only

[12] This doctrine is often referred to as the "duty to all, duty to no one" doctrine. *See Id.* at 412, 238 W.Va. at 199. For example, no private liability attaches when a fire department or police department fails to provide adequate protection, which is a ministerial duty, to an individual.

applicable where the state agency or agent is carrying out non-discretionary, ministerial acts. The manner in which the MCA and its staff follow its own polices and procedures are, by their very nature, discretionary, thus the public duty doctrine and the special relationship exception to the same do not exist in this matter.

Further, as a matter of law, Petitioner has produced no evidence identifying the MCA as a school and/or that the MCA stands *in loco parentis* as it relates to its cadets. *In loco parentis* literally translates to "in the place of a parent", and an individual who holds such a legal duty in West Virginia is often referred to as a "psychological parent". However, the historical application of this legal doctrine in West Virginia makes it clear that it has no application in the case at hand. The doctrine of *in loco parentis* is rarely applied in civil litigation in West Virginia. From a statutory perspective, this legal principle is primarily recognized in criminal matters.[13]

The only reference to the *in loco parentis* concept in codified civil actions is in reference to claims for seduction (W.Va. Code §55-7-1) and wrongful death (W.Va. Code §55-7-5). The *in loco parentis* doctrine is also referenced in one area of the West Virginia Code relating to education: Chapter 18A: School personnel. Particularly, W.Va. Code §18A-5-1(a) states, in pertinent part, "[t]he teacher shall stand in the place of the parent(s), guardian(s) or custodian(s) in exercising authority over the school and has control of all students enrolled in the school from the time they reach the school until they have returned to their respective homes…". As previously established, no part of this code chapter is applicable to the MCA. It defines school personnel as those individuals employed by a county board of education (W.Va. Code §18A-1-1(a)) and

[13] W.Va. Code §61-2-5: Involuntary manslaughter; penalty; W.Va. Code §61-8B, *et seq.*: Sexual offenses; W.Va. Code §61-2-14d: Concealment or removal of minor child from custodian or from person entitled to visitation; penalties; defenses; W.Va. Code §61-2-14: Abduction of person; kidnapping or concealing child; penalties) and family law proceedings, specifically addressing child welfare (W.Va. Code §49-4-708: Juvenile Proceedings - Preliminary hearing; counsel; custody; court requirements; preadjudicatory community supervision period; W.Va Code §49-4-601: Procedures in Cases of Child Neglect or Abuse - Petition to court when child believed neglected or abused…

specifically refers to the MCA's brand of "alternative education" as separate and distinct from the traditional school system (W.Va. Code §18A-1-1(k)).

West Virginia case law addressing the doctrine of *in loco parentis* makes it more apparent that it has no place in this cause of action. The Supreme Court of Appeals of West Virginia defines a psychological parent as "a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support." *Clifford K. v. Paul S. ex rel. Z.B.S.*, 217 W.Va. 625, 644, 619 S.E.2d 138, 157 (2005). It cannot be said that the MCA or any of its personnel served as any type of "psychological parent" to Petitioner and Petitioner's parents are not able to meet the definition of *in loco parentis* by any document that they might sign for Petitioner's participation in the program. *In loco parentis* is a statutory designation that is applicable to public schools but is inapplicable here.

Petitioner's own educational evaluation expert, Dr. Lisa Thorsen, cannot identify a single law or policy that indicates the MCA stood *in loco parentis* to Petitioner. *See A.R.* at 264. Dr. Thorsen testified that the MCA acted as Petitioner's parents because "when children are in school, the school is responsible for the child's health, safety and well-being." *Id.* When asked if this legal responsibility applied to the MCA, Dr. Thorsen replied "I don't know legal. I know they have a responsibility for his care." *Id*. Dr. Thorsen also wrongfully identified a day care as a school and indicated that a day care has the same responsibility as a school. *See A.R.* at 264-265. Yet when asked for the basis for her opinion, legal or otherwise, Dr. Thorsen could identify no law or policy that substantiated her opinion that the MCA was a school. *See A.R.* at 266. The entire basis of Dr. Thorsen's erroneous opinion that the MCA is a school is because Petitioner "was being handed over" to the MCA, and as such they assumed responsibility "for his health and safety and

education." *See A.R.* at 265. Therefore, it should be no surprise that the Circuit Court gave no weight or consideration to what Dr. Thorsen had to say in weighing the issue of the application of qualified immunity.

Under West Virginia law, the *in loco parentis* relationship is clearly reserved for situations and individuals outside the realm of the MCA. It is more consistently found in the context of child custody and family matters as well as criminal matters. Neither candidates nor cadets are required by law or court order to attend the MCA. The only educational application of *in loco parentis* does not apply to the MCA, as it is not an educational institution as defined by statute. Petitioner has not, and cannot, produce evidence that the MCA, or anyone acting on its behalf, stood *in loco parentis* as it relates to Petitioner. This is a component of determining the application of qualified immunity, which is solely in the discretion of the judge as a matter of law. For the forgoing reasons, Respondents are entitled to summary judgment as a matter of law and the Preston County Circuit Court should be affirmed.

### F. THE PRESTON COUNTY CIRCUIT COURT PROPERLY DETERMINED, AS A MATTER OF LAW, THAT NO ISSUE OF FACT HAD BEEN ADDUCED BY PETITIONER TO DEMONSTRATE THAT THE MOUNTAINEER CHALLENGE ACADEMY'S ACTIONS TOWARD PETITIONER WERE FRAUDLENT, MALICIOUS, AND/OR OPPRESSIVE UNDER THE FACTS OF THIS CASE.

Petitioner has not developed or produced any evidence of fraudulent, malicious or oppressive actions taken by the MCA that elevate simple negligence to an intentional tort that would strip Respondents of qualified immunity protections. The MCA relied on the medical advice of the Preston Memorial treatment providers, and based on this advice, the MCA had no reason to believe Petitioner was not physically capable of participating in MCA activities. Respondents determined that Petitioner was simply unwilling to be a part of the MCA, and this was not an unreasonable determination given the circumstances.

Petitioner only dedicated a couple of sentences in his pleadings to the argument of willful, malicious, and intentional torts as an exception to the qualified immunity doctrine. Petitioner ascribed this conduct to the Cadre personnel who issued false negative acclimation reports that were relied upon in the decision to terminate Petitioner's participation in the program. The Circuit Court asked Petitioner if he had deposed the authors of those negative acclimation reports during the hearing on Respondents' Motion for Summary Judgment so that he could determine if there was a malicious or intentional act and Petitioner responded that he had not deposed them all and was not able to articulate specific malicious conduct:

> MR. ROSS: Your Honor, we actually do have them if you would like to –
>
> THE COURT: You have them. Okay.
>
> MR. ROSS: May I approach?
>
> THE COURT: Yes. There's one of these in here that's able to perform, but unwilling. Unwilling. Many I can't. Do we know what they were unwilling or I can't to do.
>
> MR. ROSS: We do not. Mr. New did not ask the questions of those people who filled out those responses to see what they meant.
>
> THE COURT: Their depositons were taken.
>
> MR. ROSS: Yes.
>
> MR. NEW: Yes, Your Honor.
>
> THE COURT: And what did they say?
>
> MR. NEW: I don't know exactly.
>
> THE COURT: That was their response or is that your response.
>
> MR. NEW: That's my response is that I don't have the deposition testimony of Mr. Bircher pulled for instance to ask specifically why he wrote on a day that, Jason Ryan Moorhead was on restrictive duty able to perform, but unwilling, or why Mr. Cottrell wrote on July,

the 20th when Mr. Moorhead was on restrictive duty, makes excuses, unwilling, and maybe unable, or July, the 20th, Mr. Bircher, all day able to perform, but unwilling slash showering. July the 21st, many I can't. Quits easily. Makes excuses. Makes excuses. Able to perform, but unwilling. On those days he's still on restricted duty yet their cadre is talking about all of his excuses and the many I can't. Just as I said. I didn't lie.

MR. ROSS: No, I believe that the statement that you made Mr. New was that he was on crutches and he couldn't walk. there's nothing in there about that. That would be if not a lie, a gross overstatement.

MR. NEW: Well, there was an issue during this time about the cadre and the crutches and being encouraged to walk without crutches at a time.

MR. ROSS: To our knowledge he was never prescribed crutches we don't know where he got the crutches from, or why he was using them, but there was no medical record of him ever being given crutches, so if he was given crutches by somebody trying to help him out we're not really clear on that. Again, the person who was supposed to of taken the crutches away, Mr. New chose not to take his deposition even though we offered him the opportunity to do so, and we're willing to go out there and sit at the deposition with him. In this case Mr. New assumes that everything in the acclimation reports is physical, but the Mountaineer Challenge Academy is more than just phsyical activity. It's mental, it's educational, it is some physical, and of course he's only on restrictive duty for lower body restrictions. So not doing PT or jumping jacks, or running, but they walk around in different places and if they think that he's able to walk and unwilling to walk that might be what they're talking about, or they might be talking about something else, but we don't really know because that wasn't developed by Mr. New, and it's his duty as Plaintiff to develop that so he can defeat a summary judgement.

***

MR. ROSS: Here we are today at this point not knowing exactly what those things mean except that Mr. New's spin on it is that they're all physical limitations, but I don't think that's at all what it says. That's just a creative interpretation of what he thinks that the acclimation report is reflecting.

MR. NEW: Well, compare that to prior to him going on sick call. Not a single incident report. Not in anything. I believe that that's evidence that we're able to show the jury of this malicious and

oppressive conduct by the Mountaineer Challenge Academy, and the records speak for themselves, and the witnesses they can explain at trial what that was for. What they -- whatever they say that it's for. There's no spin these are documents that speak for themselves, Your Honor, including the dates of this which are telling.

THE COURT: Just a minute. I don't think the documents speak for themselves. I mean -- I just --

MR. ROSS: Plaintiff has a heightened pleading requirement because of qualified immunity being involved. He can't just say we will let the jury decide, because we shouldn't even get to a jury unless he has something that can defeat qualified immunity, because we shouldn't even have to stand trial or even be a part of the process. Mr. New made a lot of points on our motion to dismiss that we should have raised them at the outset of litigation. We didn't raise it because most circuit Courts are not comfortable granting a motion to dismiss on qualified immunity where there might be factual issues. We developed the factual issues. We learned a lot through that process. We learned what the nurses and doctors that are related to Preston Memorial did and didn't do, and Mr. New learned those things too, and through the course of the findings we didn't find a single incidence of malice.

***

THE COURT: Okay. I got a question. It says on the 17th that's when Samuel took him to see the nurse. That was an interview in the hall.

***

**THE COURT: So Samuel's deposition was not taken.**

**MR. ROSS: That's correct, Your Honor.**

**THE COURT: And the nurse who saw him on the 18th deposition was not taken.**

**MR. ROSS: That is correct.**

**THE COURT: So Cottrell deposition was taken.**

**MR. NEW: Yes.**

**THE COURT: Weaver's taken.**

**MR. NEW: I'm not certain, Your Honor.**

**MR. ROSS: Cottrell was not taken, Your Honor, I'm sorry that was -- his were not taken. We told him he was available to be deposed.**

**THE COURT: Cottrell's wasn't taken. Weaver's was not taken right?**

**MR. ROSS: That's correct.**

**THE COURT: What about Bircher?**

**MR. ROSS: Yes sir.**

**THE COURT: Wharton?**

**MR. ROSS: No sir.**

*See A.R.* 965-968, 970, 972-974 (emphasis added).[14]

A plaintiff seeking to prevail against a defendant who invokes qualified immunity must meet a heightened pleading requirement: "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Hutchison*, 198 W.Va. at 149, 479 S.E.2d at 659 (1996). Further, once a party has moved for summary judgment and shown by affirmative evidence that no genuine issue of material fact exists, the burden of production shifts to the nonmoving party who must (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided by Rule 56(f) of the West Virginia Rules of Civil Procedure. Syl. Pt. 3*, Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

Petitioner has not met the heightened pleading requirement to demonstrate an intentional

[14] Respondents found numerous typographical errors in the transcript of this hearing. These errors have been corrected here, without reference, but they are available in their original form in the Record Appendix as noted.

tort exception to qualified immunity and he has not met his burden of production to respond to summary judgment on the same. Therefore, for the forgoing reasons, Respondents are entitled to summary judgment as a matter of law and the Preston County Circuit Court should be affirmed.

## VI. CONCLUSION

For the foregoing reasons, Respondents West Virginia Army National Guard and West Virginia Mountaineer Challenge Academy respectfully request that this Honorable Court enter dismiss this appeal and affirm the decision of the Preston County Circuit Court and its grant of summary judgment in favor of the Respondents, as well as any additional relief the Court deems equitable and just.

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

**By Counsel**

/s/ Christopher C. Ross

Christopher C. Ross (WVSB #10415)
Omar D. Ahmad (WVSB #10804)

***PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC***
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545

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

**Jason Ryan Moorhead,**

Plaintiff Below, Petitioner,

v.

**Docket No.: 22-ICA-58**
(Underlying Preston County Civil Action No. 18-C-71)
Honorable Steven L. Shaffer, Judge.

**The West Virginia Army National Guard and West Virginia Mountaineer Challenge Academy,**

Defendants Below, Respondents.

## CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Respondents, The West Virginia Army National Guard and West Virginia Mountaineer Challenge Academy, do hereby certify on this 12th day of January, 2023, that a true copy of the foregoing "***Respondents' Brief***" was served via File & Serve Xpress upon the following:

Stephen P. New, Esq.
New, Taylor & Associates
430 Harper Park Drive
PO Box 5516
Beckley, WV 25801
steve@newlawoffice.com

Counsel for Petitioner

/s/ Christopher C. Ross

Christopher C. Ross (WVSB #10415)
Omar D. Ahmad (WVSB #10804)

***PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC***
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545