In the Circuit Court of Logan County, West Virginia

Dakota Jones,	)	
Matilda (Mother) Workman,	)	
Plaintiffs,	)	
	)	
vs.)	)	Case No. CC-23-2019-C-145
	)	
Logan County Board of Education,	)	
Defendant	)	
	)	

Order Granting Defendant's Motion to Dismiss

On January 15, 2020, came the Plaintiff, Dakota Jones, by counsel, Kirk Lightner, and the Defendant, Logan County Board of Education, by counsel, Duane J. Ruggier II, for a hearing on Defendant Logan County Board of Education's *Motion to Dismiss*, filed on November 13, 2019. Plaintiff filed a *Memorandum in Opposition to Defendant's Motion to Dismiss* on December 19, 2019. Defendant filed a *Reply* on January 10, 2020. Upon consideration of the same, the pleadings, and the applicable law, the Court finds and concludes as follows.

FINDINGS OF FACT

1. Plaintiff Dakota Jones filed his Complaint on October 1, 2019, alleging that he was bullied at Logan Middle School. Plaintiff is now eighteen years old. Plaintiff's Complaint identifies and alleges six separate occasions in which he was bullied.
2. First, on December 14, 2012, when Plaintiff was in sixth grade, other students wrote on his body with permanent markers. Plaintiff alleges the incident was reported to Principal Sutherland who told Dakota's mother, Matilda Workman, that the issue would be handled.[1]
3. Second, when Plaintiff was in seventh grade, Plaintiff alleges another student aggressively grabbed Dakota's notebook out of his hand, cutting and ultimately scarring Plaintiff's hand. Plaintiff does not allege that any principal was notified regarding this alleged incident.[2]
4. Third, Plaintiff alleges that when he was in eighth grade, other students secretly put

pieces of pencil lead in Plaintiff's clothing. Plaintiff does not allege that any principal was notified, and Plaintiff does not allege any injury caused by this incident.[3]

5. Fourth, Plaintiff alleges that on September 21, 2015, presumably when Plaintiff was still in eighth grade, another student choked Dakota with a rope, causing red welts on his neck. Plaintiff alleges he reported the incident to his teacher and principal. Plaintiff alleges the principal was required to tell his mother but did not do so.[4]
6. Fifth, Plaintiff alleges that on September 23, 2015, a student was throwing pencils at Dakota when Dakota shoved the student so he would stop. Dakota then sat down, and the student who had been throwing pencils got up and punched Dakota in the face, knocking him unconscious. The school nurse informed Dakota's mother, Ms. Workman. Ms. Workman went to the school with her niece, Hollie Johnson, and met with Principal Sutherland. Ms. Workman asked the principal what could be done about the persistent bullying, and Principal Sutherland responded that there "aren't really any laws on bullying."[5]
7. Sixth, Plaintiff alleges that at some time unspecified in the Complaint, another student stabbed Plaintiff with a pencil, breaking Plaintiff's skin. Plaintiff visited the school nurse. No one from the school notified Plaintiff's mother, Ms. Workman.[6] Plaintiff does not allege that any principal was notified. Plaintiff alleges his grades suffered because of the bullying, and his mother was worried he might try to commit suicide.[7]
8. The Court notes that Plaintiff pleads no facts stating where these instances occurred at the Logan Middle School, who was bullying Plaintiff in each instance, and whether any Board employee had reason to know that Plaintiff would be bullied in any of the alleged instances.
9. Based on the above allegations, Plaintiff asserts the following claims: Count I - State Constitutional Tort; Count II - Negligence; Count III - Tort of Outrage; Count IV - Assault; Count V - Violation of a Statute. Plaintiff seeks past and future damages and punitive damages.

STANDARD OF REVIEW

10. Pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a party may move for dismissal of a complaint for "failure to state a claim upon which relief can be granted." A Court addressing a motion to dismiss is to construe the complaint in the light most favorable to the plaintiff and take its allegations as true.[8] To survive a motion to dismiss, a plaintiff's complaint must "at a minimum . . . set forth sufficient information to outline the elements of his claim."[9] A complaint that fails to set forth claims upon which relief could be granted warrants dismissal where the counts either do not contain allegations setting forth facts in support of the required elements of the claims, or pertained to claims such that the complaining party does not have standing to pursue.[10] A Court must dismiss a complaint for failure to state a claim where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.[11]

11. Here, immunities are involved as the Logan County Board of Education is a political subdivision under the West Virginia Tort Claims and Insurance Reform Act (Tort Claims Act); thus, the legal question of immunity must be decided at the earliest stage in litigation under West Virginia law. The West Virginia Supreme Court has mandated "claims of immunities, where ripe for disposition, should be summarily decided before trial."[12]"Immunity is a threshold issue" that should be decided even before discovery.[13]Likewise, "a ruling on qualified immunity should be made early in the proceedings so that the expense of trial is avoided where the defense is dispositive."[14] The West Virginia Supreme Court has stated in syllabus:

> The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.[15]

12. Accordingly, the Court takes all of Plaintiff's factual allegations as true, views the Complaint in a light most favorable to Plaintiff, and finds and concludes as follows.

DISCUSSION & CONCLUSIONS OF LAW

Heightened Pleading Standard

13. The Court finds and concludes that the Logan County Board of Education is a political subdivision as defined in the West Virginia Tort Claims and Insurance Reform Act (Tort Claims Act).[16] Statutory immunity of a political subdivision is "governed exclusively by the West Virginia Tort Claims and Insurance Reform Act."[17] The Act provides that its "purposes are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability."[18] Consistent therewith, the West Virginia Supreme Court has stated:

> The legislative decision to clothe certain actions of governmental agencies and employees in a cloak of immunity is not one that should be casually disregarded. Without that promise of immunity, it is probable that many critical governmental decisions would cease to be made and the services that most citizens expect their government to provide would consequently be unavailable.[19]

14. Accordingly, unless the Plaintiff satisfies his burden of showing by "specific allegations" that the exceptions to the Logan County Board of Education's immunity apply, then the Board is entitled to immunity under the Act, and the Complaint must be dismissed.[20] The West Virginia Supreme Court has recently explained in Doe v. Logan County Board of Education:

> In *Hutchison*, this Court discussed the importance of making specific allegations when governmental immunity is at issue. *Hutchison*, 198 W.Va. at 148, 479 S.E.2d at 658. This is because "[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be the subject to the burden of trial at all." *Id.* Thus, the Court called for "heightened pleading by the plaintiff" in "civil actions where immunities are implicated[.]" *Id.* at 149, 479 S.E.2d at 659.[21]

The Court in *Doe* further quoted *Hutchison*:

> A plaintiff is not required to anticipate the defense of immunity in his complaint, *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923-24, 64 L.Ed.2d 572 (1980), and, under the West Virginia Rules of Civil Procedure, the plaintiff is required to

> file a reply to a defendant's answer only if the circuit court exercises its authority under Rule 7(a) to order one. We believe, in cases of qualified or statutory immunity, court ordered replies and motions for a more definite statement under Rule 12(e) can speed the judicial process. Therefore, the trial court should first demand that a plaintiff file "a short and plain statement of his complaint, a complaint that rests on more than conclusion alone." *Schultea v. Wood*, 47 F.3d at 1433. Next, the court may, on its own discretion, insist that the plaintiff file a reply tailored to an answer pleading the defense of statutory or qualified immunity. The court's discretion not to order such a reply ought to be narrow; where the defendant demonstrates that greater detail might assist an early resolution of the dispute, the order to reply should be made. **Of course, if the individual circumstances of the case indicate that the plaintiff has pleaded his or her best case, there is no need to order more detailed pleadings.** If the information contained in the pleadings is sufficient to justify the case proceeding further, the early motion to dismiss should be denied.[22]

15. Unlike in Doe, here, Plaintiff has anticipated immunity, pleading: "To the extent that any claims asserted herein are subject to governmental immunity, said claims are being asserted only to the extent of available insurance coverage."[23] Plaintiff also pleads, "Furthermore, by alleging violations of the United States Constitution, the West Virginia Governmental Tort Claims and Insurance Reform Act are inapplicable."[24] Plaintiff has clearly anticipated Defendant's immunity; thus, the Court finds and concludes that the individual circumstances indicate that the Plaintiff has pleaded his best case, and there is no need to order more detailed pleadings. The heightened pleading standard applies to Plaintiff's clams as they are pled.

Negligence
(Count II)

16. Plaintiff asserts a negligence claim in Count II, alleging:

> 40. Defendant Board owed a duty of care to Dakota Jones to conduct their activities in a reasonable and prudent manner.
> 41. Defendant Board negligently and recklessly breached the duty of care they owed to Dakota Jones.
> 42. The actions and inactions, as described above, proximately caused physical and emotional harm to Dakota Jones.
> 43. Defendant Board's negligent and reckless misconduct was the sole proximate cause of the harm experienced by Dakota Jones.
> 44. As a direct and proximate result of Defendant Board's intentional and reckless misconduct, Dakota Jones is entitled to

compensatory damages.

17. The Tort Claims Act allows only certain negligence claims against a political subdivision. Specifically, under W. Va. Code § 29-12A-4(b) of the Tort Claims Act,

> Except as provided in subsection (c) of this section, a political subdivision **is not liable in damages in a civil action for injury**, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function[.] [25]

Therefore, the Board is immune from suit unless an exception provided in subsection (c) applies. Here, the only applicable exceptions are subsections (c)(2) and (c)(4), which provide that the Board may be liable for the negligence of its employees:

> (2) Political subdivisions are liable for injury, death, or loss to persons or property caused by **the negligent performance of acts by their employees** while acting within the scope of employment.
>
> (4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the **negligence of their employees** and that occurs within or on the grounds of buildings that are used by such political subdivisions, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility.

18. The West Virginia Supreme Court has explained, "[t]he standard for liability set forth in W. Va. Code § 29-12A-4(c) is, by its plain terms, a negligence standard."[26] Thus, the Court finds and concludes that the Defendant Logan County Board of Education is immune unless the Plaintiff shows with specific allegations that a Board employee was negligent. Generally, in order for a plaintiff to state a negligence cause of action, Plaintiff must establish (1) The defendant owed the plaintiff a duty of care; (2) the defendant breached said duty by failing to exercise ordinary care; (3) the defendant's breach caused the plaintiff to be injured; and (4) the plaintiff suffered damages as a result of defendant's breach.[27]

19. The Court recognizes the fundamental legal principle that negligence, to be actionable, must be the proximate cause of the injury complained of and must be such as might have

been reasonably expected to produce an injury.[28] "To recover in an action based on negligence the plaintiff must prove that the defendant was guilty of primary negligence and that such negligence was the proximate cause of the injury for which the plaintiff seeks a recovery of damages."[29] "Proximate cause is a vital and an essential element of actionable negligence and must be proved to warrant a recovery in an action based on negligence."[30] The West Virginia Supreme Court has consistently said that "the proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred."[31]

20. Generally addressing the causation element of his negligence claim, Plaintiff alleges "[t]he actions and inactions, as described above, proximately caused physical and emotional harm to Dakota Jones."[32] The Court finds and concludes that Plaintiff cannot establish causation with a formulaic recitation of the elements. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" does not sustain a claim under Rule 12(b)(6).[33] Under West Virginia law, "[b]are allegations of negligence claims based on employee negligence alone do not remove the cloak of immunity."[34]The Court finds that Plaintiff has not identified any employee who was negligent, and has failed to plead facts establishing that the Board was the proximate cause of Plaintiff's injuries.

21. Taking Plaintiff's factual allegations as true, the Court concludes that the Board's action or inaction was not the last act contributing to the injury. Rather, whoever bullied Plaintiff committed the last act causing injury. Plaintiff alleges injury caused by bullying. Ipso facto, the alleged injury would not have occurred without the alleged bullying. Thus, Plaintiff has failed to plead facts showing causation, and Plaintiff has likewise failed to plead a negligence claim.

22. Moreover, under West Virginia law, a willful, malicious, or criminal act breaks the chain of causation, unless the act was foreseeable.[35] The West Virginia Supreme Court has consistently stated:

> A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct. **However, generally, a willful, malicious, or criminal act breaks the chain of causation.**[36]

More specifically, a defendant is not liable to a plaintiff if the unforeseeable intervening acts of a third party cause Plaintiff's injury.[37]

23. Here, the Court notes that questions of proximate cause are generally questions for a jury. However, the Court finds that this general rule does not render Plaintiff's Complaint well-pled. Plaintiff must establish his claim with specific allegations. Plaintiff alleges he was bullied six times spanning three years. Plaintiff has pled no facts indicating that any of these instances were foreseeable. Moreover, only in three of the six instances was a principal notified. Taken as true, Plaintiff's allegations that the principal was notified of three instances of bullying does not render the Board liable. Plaintiff's allegation that the principal was aware of the bullying does not demonstrate that any future instance of bullying is foreseeable. Taking these allegations as true, it is unreasonable to expect anyone to foresee when, where, and by whom Plaintiff would be bullied again if at all. Plaintiff has not pled any facts that any Board employee was aware that Plaintiff would be bullied at any particular time by any particular student at any particular location at the school. Plaintiff's negligence claim fails as a matter of law because Plaintiff has not pled facts that establish the foreseeability of his injuries. Thus, willful, malicious, or criminal acts break the chain of causation. Accordingly, Plaintiff has failed to plead a negligence claim under the Tort Claim Act. The Defendant Board is therefore immune from suit. Count II must be dismissed.

Intentional Torts (Counts III & IV)

24. The Court finds that Plaintiff asserts a claim of outrage and assault in Counts III and IV, respectively. In Count III, Plaintiff asserts in pertinent part, "Defendant Board's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of

decency. Defendant Board acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from their conduct."[38] In Count IV, Plaintiff asserts in pertinent part, "During Dakota Jones' years in the Logan County Board of Education System, Defendant Board willfully, wantonly, and intentionally permitted the assaults of Dakota Jones while under their care."[39]

25. As discussed above, under the Tort Claims Act, the Defendant Board can be liable for the negligence of its employees. The Court finds and concludes that no provision of the Tort Claims Act that renders the Defendant Board liable for intentional conduct. The West Virginia Supreme Court has so stated: "intentional and malicious acts are included in the general grant of immunity in W.Va. Code, 29-12A-4(b)(1). Only claims of negligence specified in W. Va. Code, 29-12A-4(c) can survive immunity from liability under the general grant of immunity in W. Va. Code, 29-12A-4(b)(1)."[40] The Court finds and concludes that assault and the tort of outrage are not negligence claims as a matter of law.

26. To prove the tort of outrage under West Virginia law, "it is not enough that the defendant acted with a tortious intent or . . . that the defendant's conduct could be characterized as malicious."[41] The acts must have amounted to something more egregious than conduct that is intentional, tortious, or criminal. To sustain a tort of outrage claim, the Plaintiff must allege and present facts that an employee acted with malice, which has been defined by the West Virginia Supreme Court as "willful or intentional wrongdoing."[42] Malice has also been defined as "having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will."[43]

27. The Court finds and concludes that assault also requires intention: "An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension."[44]

28. Under West Virginia law, there is a valid distinction between negligence and willful, wanton, and reckless conduct.[45] Explaining the difference, the West Virginia Supreme Court has explained, on one hand, "negligence conveys the idea of heedlessness, inattention, inadvertence"; on the other hand

> willfulness and wantonness convey the idea of purpose or design, actual or constructive . . . In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.[46]

29. The Court finds and concludes that Plaintiff's claim of outrage and assault, by law, require intentional acts at the very least. The Court finds and concludes that, in his tort of outrage claim, Plaintiff asserts that the Board acted intentionally, and, in his assault claim, Plaintiff asserts that the Board acted "willfully, wantonly, and intentionally." As a matter of law, these claims are not negligent claims, but are claims legally requiring intentional acts. The Court finds and concludes that Defendant Logan County Board of Education cannot be liable for intentional acts or intentional torts under the Tort Claims Act. Thus, Court finds and concludes that Plaintiff's claims for assault and tort of outrage must be dismissed.

30. In Plaintiff's Memorandum in Opposition, Plaintiff avers that the Board can be liable for assault for failing to "take reasonable and prudent steps to prevent the same."[47] Plaintiff provides no legal basis for this theory of assault. Thus, the Court finds and concludes that Plaintiff's contention has no merit. The Court concludes that failing to "take reasonable and prudent steps to prevent" an assault is not assault. Moreover, as assault by law requires intentional conduct (the Plaintiff repeatedly alleges intentional conduct in Court IV), and the West Virginia Governmental Tort Claims and Insurance Reform Act allows only negligence claims against a political subdivision, the Board cannot be liable for intentional conduct and thus cannot be liable for assault.

31. For the reasons aforesaid, the Court finds and concludes that the Defendant Board is immune from Plaintiff's assault and tort of outrage claims. Thus, Plaintiff's tort of outrage and assault claims (Counts III & IV) must be dismissed as a matter of law.

Violation of a Statute
(Count V)

32. Plaintiff asserts a claim for "violation of a statute" in Count V. Specifically, in Count V, Plaintiff alleges that the Board violated W. Va. Code § 18-2C-3 and that W. Va. Code § 55-7-9 authorizes a cause of action based on a violation of a statute. The Court finds and concludes that Plaintiff's "violation of a statute" claim is not recognized or allowed under the Tort Claims Act. As discussed supra, the Board may only be liable for the negligence of its employees.[56] Moreover, "In the interpretation of statutory provisions the familiar maxim expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of another, applies."[57] As the Tort Claims Act does not allow any "violation of a statute" claim, the Court finds and concludes that it cannot be brought against the Defendant Board. Thus, the Board cannot be liable for Plaintiff's "violation of a statute" claim, and Count V must be dismissed.

33. The Court notes that, under § 18-2C-3, boards of education are required to adopt a no-harassment policy or rule. Plaintiff alleges that the Defendant Board violated this section. The Court finds that, by alleging the Board violated § 18-2C-3, the Plaintiff's claim in Count V amounts to the allegation that the Board failed to adopt the policy required by said section. The Court finds and concludes that, whether or not the Board violated W. Va. Code § 18-2C-3, the Board is entitled to absolute immunity from Plaintiff's claim that Defendant violated said section.

34. Under the Tort Claims Act, regardless of negligence, a political subdivision is absolutely immune from suit if a claim involves any of the items listed in W. Va. Code § 29-12A-5(a).[58] The negligence claims allowed against political subdivisions under W. Va. Code § 29-12A-4(c) are expressly subject to § 29-12A-5.[59] If a loss or claim results from any item listed in § 29-12A-5(a), a political subdivision is entitled to absolute immunity from

that claim. Under W. Va. Code § 29-12A-5(a)(4), "A political subdivision is immune from liability if a loss or claim results from: . . . (4) Adoption or failure to adopt a law, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy." In other words, when a claim depends on any item in W. Va. Code § 29-12A-5(a), the political subdivision is immune—no exceptions.

35. Here, the Court finds that Plaintiff claims that the Board violated W. Va. Code § 18-2C-3, which requires boards of education to adopt a no-bullying policy. Plaintiff's claim in Count V thus results from the Board's "[a]doption or failure to adopt a law, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy."[60] The Court concludes that the Board is entitled to absolute immunity, and Count V must be dismissed.

36. The Court notes that, in Plaintiff's Memorandum in Opposition, Plaintiff avers that the Board indeed adopted a policy per W. Va. Code § 18-2C-3, but not an adequate one.[61] Plaintiff appears to take issue with the Board's policy's adequacy and enforcement. Regarding its adequacy, the Court finds and concludes that Plaintiff cannot circumvent the Board's absolute immunity by contesting the adequacy of the policy. Plaintiff's Memorandum in Opposition alleges: "W. Va. Code § 18-2C-3 sets forth minimum standards to be followed by Defendant Board, that is, to prohibit and address harassment, intimidation or bullying. Defendant Board failed to satisfy these minimum standards by its failures, including its failures to discipline the wrongdoers and protect the Plaintiff."[62] Plaintiff's claim amounts to the Board's failure to adopt a policy. Whether the Board failed to adopt a policy altogether or failed to adopt an adequate policy, the Court finds and concludes that W. Va. Code § 29-12A-5(a)(4) does not differentiate, and the Board is immune.

37. Regarding the policy's enforcement, the Plaintiff alleges in his Memorandum in Opposition that the Board's failure to follow W. Va. § 18-2C-3 supports a cause of action under W. Va. Code § 55-7-9, which states, "Any person injured by the violation of any

statute may recover from the offender such damages as he may sustain by reason of the violation, . . ." As discussed, the Court finds and concludes the Tort Claims Act exclusively governs Plaintiff's claims against the Board. Again, the maxim, expressio unius est exclusio alterius, applies. No provision of the Tort Claims Act allows for a claim against a political subdivision to be based on a general violation of a statute. Moreover, "[i]f . . . two statutes cannot be reconciled, the language of the more specific promulgation prevails. The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."[63] The Tort Claims Act specifically applies to political subdivisions, such as the Board, whereas § 55-7-9 applies generally to "persons." Accordingly, the Court finds and concludes that the Tort Claims Act prevails, and Count V fails as a matter of law.

United States Constitutional Tort
(Count I)

38. In Count I, Plaintiff claims the Board violated provisions of the West Virginia Constitution and the United States Constitution. The Court addresses Plaintiff's ostensible United States Constitutional Tort claim first.

39. The Court finds and concludes that the Tort Claims Act, at W. Va. Code § 29-12A-18(e), states, "This article does not apply to, and shall not be construed to apply to, the following: . . . (e) Civil claims based upon alleged violations of the constitution or statutes of the United States except that the provisions of section eleven [§ 29-12A-11] of this article shall apply to such claims or related civil actions."[64] Thus, the Act does not apply to actions brought under the United States Constitution.

40. To bring a cause of action under the United States Constitution, Plaintiff must plead a claim under 42 U.S.C. § 1983. Plaintiff has disavowed the only applicable vehicle for alleging a violation of federally protected rights by local entities and their officials.[65] Plaintiff states, Count I "specifically is not filed pursuant to 42 U.S.C. § 1983 or any other related federal statute."[66] Plaintiff expressly attempts to avoid federal jurisdiction,

stating, "[b]y alleging that Defendant Board violated Dakota Jones' rights under the West Virginia and United States Constitutions, Dakota Jones clearly and unambiguously has not created any federal cause of action to warrant the removal of this case to federal court."[67]

41. The Court finds and concludes, under federal law, although a direct action for damages based on certain constitutional provisions may be had against federal officials and agents under Bivens,[68] there is no such action for damages available against a state or a political subdivision.[69] Because no implied private action exists under the United States Constitution, a claim under the United States Constitution must be pled 42 U.S.C. § 1983, or a plaintiff has no federal constitutional claim.[70] Here, the Court finds that Plaintiff has disavowed 42 U.S.C. § 1983. Also, Plaintiff clarifies in his Memorandum in Opposition that Count I is solely a "state constitutional tort." The Court concludes that Plaintiff has asserted no cognizable claim under the United States Constitution.

State Constitutional Tort
(Count I)

42. Plaintiff asserts a state constitutional tort claim in Count I. As discussed, the Tort Claims Act provides no exception for a claim brought under the West Virginia Constitution.[71] Section 29-12A-18(e) makes exception only for claims brought under the constitution and statutes of the United States: "This article does not apply to, and shall not be construed to apply to, the following: . . . Civil claims based upon alleged violations of the constitution or statutes of the United States . . . ."[72] Elsewhere in the Act, it is clear that a political subdivision is not liable except in those scenarios listed in W. Va. Code § 29-12A-4(c). Under § 29-12A-4(b),

> Except as provided in subsection (c) of this section, a political subdivision **is not liable in damages** in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function: Provided, That this article shall not restrict the availability of mandamus, injunction, prohibition, and other extraordinary remedies.

43. As discussed, § 29-12A-4(c) only allows a political subdivision to be liable for the negligence of its employees. In sum, no provision of the Tort Claims Act allows or provides for a claim of "state constitutional tort."[73] Thus, the Court finds and concludes that the Plaintiff's "state constitutional tort" claim is not a cognizable claim under the Tort Claims Act, and for the reasons discussed, Count I must be dismissed.

44. In addition, West Virginia Supreme Court has stated in syllabus that the only state constitutional tort allowed in West Virginia is subject to immunity. Plaintiff's Complaint identifies certain West Virginia constitutional provisions—Article III, Sections 1, 5, 10, and 14, and Article XII, Section 1—as the basis for Count I's "State Constitutional Tort" claim. Of the state constitutional provisions identified in the Complaint, the West Virginia Supreme Court has only recognized a cause of action under Article III section 10. In syllabus point 2 of Hutchison v. City of Huntington, the Court stated "Unless barred by one of the recognized statutory, constitutional or common law immunities, a private cause of action exists where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution."[74] After Hutchison, West Virginia courts rejected subsequent attempts to advance a private cause of action alleging a violation of any other provision of the West Virginia Constitution.[75] Federal courts in West Virginia have repeatedly held that claims for money damages are not available to remedy violations of Article III of the West Virginia Constitution.[76] Therefore, the Court finds and concludes that sections 1, 5 and 14 of Article III and section 1 of Article XII of the West Virginia Constitution do not afford Plaintiff any relief. The Court finds and concludes that claims against and immunity of political subdivisions are governed exclusively by the Tort Claims Act.[77] Thus, the Court finds and concludes that Plaintiff's claim under Article 3, § 10 of the West Virginia Constitution is subject to the Tort Claims Act and, therefore, is not permitted as discussed supra. Accordingly, the Court concludes that Count I fails to state a claim upon which

relief can be granted as a matter of law.

Punitive Damages

45. Under the Tort Claims Act, "[i]n any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited."[78]Having found that the Tort Claims Act governs this matter and having found that the Plaintiff has failed to satisfy the exception for "civil claims based upon alleged violations of the constitution or statutes of the United States," the Court finds and concludes that the Tort Claims Act's prohibition of punitive damages requires dismissal of Plaintiff's punitive damages claim.

DECISION

Accordingly, the Court does **ORDER** that Defendant Logan County Board of Education's *Motion to Dismiss* be **GRANTED** for the reasons set forth herein. The Court does **ORDER** that this matter be **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk is **DIRECTED** to send a copy of this *Order* to all parties and counsel.

Prepared By:

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[1] Compl. ¶¶ 5-6.
[2] *Id.* at ¶¶ 7-10.
[3] *Id.* at ¶¶ 11-12.
[4] *Id.* at ¶¶ 13-16.
[5] *Id.* at ¶¶ 17-24.
[6] *Id.* at ¶¶ 25-26.

[7] *Id.* at ¶¶ 27-28.
[8] *See, e.g.*, *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).
[9] *Id.*; *Price v. Halstead*, 177 W. Va. 592, 594, 355 S.E.2d 380, 383 (1987).
[10] *Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 492, 655 S.E.2d 509, 541 (2007).
[11] *Adams v. Ireland*, 207 W. Va. 1, 5, 528 S.E.2d 197, 201 (1999); *Kessel v. Leavitt*, 204 W. Va. 95, 118, 511 S.E.2d 720, 743 (1998).
[12] *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996) (quoting *see Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985)).
[13] *Tomashek v. Raleigh Cty. Emergency Operating Ctr.*, 344 F. Supp. 3d 869, 875 (S.D. W. Va. 2018) (citing *Weigle v. Pifer*, 139 F. Supp. 3d 760, 768 (S.D. W. Va. 2015)); *Smith v. Reddy*, 101 F.3d 351, 357 (4th Cir. 1996).
[14] *W. Va. Dep't of Health & Human Res. v. V.P.*, 825 S.E.2d 806, 812 (W. Va. 2019) (quoting *Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015)).
[15] Syl. pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996); Syl. pt. 1, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 500, 766 S.E.2d 751, 759 (2014).
[16] W. Va. Code § 29-12A-3; *Bender v. Glendenning*, 219 W. Va. 174, 179, 632 S.E.2d 330, 335 (2006).
[17] *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 51, 750 S.E.2d 263, 267 (2013); *See also* W.Va. Code § 29-12A-1 *et seq.*
[18] W. Va. Code § 29-12A-1.
[19] *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014).
[20] *See Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649, 657-658 (1996).
[21] *Doe v. Logan Cty. Bd. of Educ.*, 829 S.E.2d 45, 49 (W. Va. 2019).
[22] *Id.* at 49-50 (emphasis added).
[23] Compl. ¶ 30.
[24] *Id.* at ¶ 37, in part.
[25] W. Va. Code § 29-12A-4(b)(1)(emphasis added).
[26] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 281, 787 S.E.2d 546, 552 (2016).
[27] *See Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E.2d 898, 898 (1939).
[28] Syl. pt. 2, *McCoy v. Cohen*, 149 W. Va. 197, 140 S.E.2d 427 (1965).
[29] *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 134, 538 S.E.2d 719, 725 (2000) (quoting syl. pt. 2, *Tolliver v. Shumate,* 151 W.Va. 105, 150 S.E.2d 579)(1966)).
[30] *Id.* at syl. pt. 3.
[31] *Sergent v. City of Charleston*, 209 W. Va. 437, 446, 549 S.E.2d 311, 320 (2001).
[32] Compl. ¶ 43.
[33] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (quoting *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)). The Court notes that the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, and the West Virginia Supreme Court often refers to interpretations of the Federal Rules when discussing West Virginia's rules. *See, e.g., Hardwood Grp. v. LaRocco*, 219 W. Va. 56, 61 n.6, 631 S.E.2d 614, 619 (2006).
[34] *Zirkle v. Elkins Rd. Pub. Serv. Dist.*, 221 W. Va. 409, 414, 655 S.E.2d 155, 160 (2007).
[35] *Yourtee v. Hubbard*, 196 W. Va. 683, 690, 474 S.E.2d 613, 620 (1996).
[36] *Sergent v. City of Charleston*, 209 W. Va. 437, 446, 549 S.E.2d 311, 320 (2001) (internal citations omitted).
[37] *Id.*, 474 S.E.2d at 621 (Citing Syl. Pt. 13, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990)).
[38] Compl. ¶¶ 46-47.

[39] *Id.* at ¶ 51.
[40] *Zirkle v. Elkins Rd. Pub. Serv. Dist.*, 221 W. Va. 409, 414, 655 S.E.2d 155, 160 (2007).
[41] *Philyaw v. E. Associated Coal Corp.*, 219 W. Va. 252, 258, 633 S.E.2d 8, 14 (2006).
[42] *W. Virginia Div. of Nat. Res. v. Dawson*, No. 18-0026, 2019 WL 2414736, at *12 (W. Va. June 3, 2019) (citing *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996)).
[43] *W. Virginia Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 51, 602 S.E.2d 483, 494 (2004).
[44] *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 52, 602 S.E.2d 483, 495 (2004).
[45] *Groves v. Groves*, 152 W. Va. 1, 6, 158 S.E.2d 710, 713 (1968); *seeStephens v. Rakes*, 235 W. Va. 555, 566, 775 S.E.2d 107, 118 (2015).
[46] *Id.*
[47] Pl's Mem. in Opp. to Def's Mot. to Dismiss at 7.
[48] Pl's Mem. in Opp. to Def's Mot. to Dismiss at 7-8.
[49] *State v. Blatt*, 235 W. Va. 489, 498, 774 S.E.2d 570, 579 (2015) (internal citations omitted).
[50] *See State ex rel. Summerfield v. Maxwell*, 148 W. Va. 535, 543, 135 S.E.2d 741, 747 (1964) ("When this Court is presented with a question of first impression and finds that the constitutional and statute law of this state are silent upon it, the Court looks to the decisions of courts of last resort in other jurisdictions for guidance although it is not bound by the decisions of such courts.").
[51] *Williamson v. Harden*, 214 W. Va. 77, 81, 585 S.E.2d 369, 373 (2003) ("This Court has explained that the tort of outrage is synonymous with intentional or reckless infliction of emotional distress.").
[52] *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).
[53] No. 3:07-CV-49, 2009 U.S. Dist. LEXIS 65083 * 28 (N.D.W. Va. July 28, 2009).
[54] Pl's Mem. in Opp. to Def's Mot. to Dismiss at 8.
[55] *Zirkle*, 221 W. Va. at 414, 655 S.E.2d at 160.
[56] W. Va. Code § 29-12A-4.
[57] Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007).
[58] The West Virginia Supreme Court has described W. Va. Code § 29-12A-5 as providing political subdivisions with "absolute immunity." *seeState ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014); *Hutchison v. City of Huntington*, 198 W. Va. 139, 151, 479 S.E.2d 649, 661 (1996) ("To read into these words [W. Va. Code 29-12A-5(a)(1)] anything but a grant of absolute immunity would take us beyond the plain meaning of the statute."); *Albert v. City of Wheeling*, 238 W. Va. 129, 133, 792 S.E.2d 628, 632 (2016) (holding that W. Va. Code 29-12A-5(a) provides immunity "regardless of whether such loss or claim, asserted under West Virginia Code § 29-12A-4(c)(2), is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment.").
[59] W. Va. Code § 29-12A-4(c) ("**Subject to** sections five [§ 29-12A-5] and six [§ 29-12A-6] of this article, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows . . . ." (emphasis added)).
[60] W. Va. Code § 29-12A-5(a)(4).
[61] Pl's Mem. in Opp. to Def's Mot. to Dismiss at 9-10.
[62] *Id. at 10.*
[63] *Zimmerer v. Romano*, 223 W. Va. 769, 784, 679 S.E.2d 601, 616 (2009) (internal

quotation omitted); Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) ("[S]pecific statutory language generally takes precedence over more general statutory provisions."); Bowers v. Wurzburg, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails." (citations omitted)); *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute when an unreconcilable conflict arises between the terms of the statutes." (citations omitted)).

[64] (emphasis added). W. Va. Code § 29-12A-11 provides for defense and indemnification of employees.

[65] *See Lilly v. Town of Clendenin*, No. CIV.A. 2:05-0303, 2005 WL 2171670 (S.D.W. Va. Sept. 6, 2005); *S.R. v. Fayette Cty. Bd. of Educ.*, Civil Action No. 15-13466, 2016 U.S. Dist. LEXIS 160925, at *11 (S.D. W. Va. Nov. 21, 2016).

[66] Compl. ¶ 32.

[67] Compl. ¶ 36; *see also id.* at ¶ 32.

[68] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971). In *Bivens*, the Supreme Court held that "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages," despite the absence of any federal statute creating liability."
See Holly v. Scott, 434 F.3d 287, 289 (4th Cir. 2006).

[69] *See Cale v. City of Covington*, 586 F.2d 311, 313 (4th Cir.1978); *Farmer v. Ramsay*, 41 F.Supp.2d. 587, 591 (D.Md.1999).

[70] *See Lilly v. Town of Clendenin*, No. CIV.A. 2:05-0303, 2005 WL 2171670 (S.D.W. Va. Sept. 6, 2005); *S.R. v. Fayette Cty. Bd. of Educ.*, Civil Action No. 15-13466, 2016 U.S. Dist. LEXIS 160925, at *11 (S.D. W. Va. Nov. 21, 2016).

[71] W. Va. Code § 29-12A-18(e); *see Perdue v. City of Charleston*, No. 2:11-cv-01011, 2012 U.S. Dist. LEXIS 87492, at *9 (S.D. W. Va. June 25, 2012).

[72] (emphasis added).

[73] "In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007).

[74] Syl. pt. 2, *Hutchison v. City of Huntington*, 198 W. Va. 139, 145, 479 S.E.2d 649, 655 (1996) (emphasis added).

[75] *See, e.g., Hill v. Stowers*, 224 W.Va. 51, 55-56, 680 S.E.2d 66, 70-71 (2009)); *Nichols v. Cty. Comm'n*, at *30, 2018 WL 4016311 (S.D. W. Va. Aug. 22, 2018).

[76] *See Harper v. Barbagallo*, No. 2:14-cv-07529, 2016 WL 5419442, at *12-13 (S.D. W. Va. Sept. 27, 2016); *Howard v. Ballard*, No. 2:13-cv-11006, 2015 WL 1481836, at *4 (S.D. W. Va. Mar. 31, 2015); *McMillion-Tolliver v. Kowalski*, No. 2:13-CV-29533, 2014 WL 1329790, at *2 (S.D.W. Va. Apr. 1, 2014); *Smoot v. Green*, No. 2:13-10148, 2013 WL 5918753, at *4-5 (S.D. W. Va. Nov. 1, 2013)." *Spry v. W. Virginia*, No. 2:16-CV-01785, 2017 WL 440733, at *9 (S.D.W. Va. Feb. 1, 2017).

[77] *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 51, 750 S.E.2d 263, 267 (2013); *see also* W.Va. Code § 29-12A-1 *et seq.*

[78] W. Va. Code § 29-12A-7(a).

/s/ Joshua Butcher
Circuit Court Judge
7th Judicial Circuit

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