NO. 21-0217

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Dakota Jones and Matlida Workman (mother),

Plaintiff Below, Petitioner,

vs.

Logan County BOE,

Defendants Below, Respondents.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. The Circuit Court of Logan County erred in dismissing Petitioner's Complaint as Petitioner's claim for negligence as the claim falls under clearly recognized exceptions to immunity.

II. The Circuit Court of Logan County erred in dismissing Petitioner's Complaint as Petitioner sufficiently pled facts to establish negligence and proximate cause.

STATEMENT OF THE CASE

Petitioner Dakota Jones ("Petitioner Jones") filed the present action against Respondent Logan County Board of Education ("Respondent Board") seeking compensation for the harm he suffered as a result of Respondent Board's failure, by and through its employees, to prevent repeated acts of bullying visited upon Petitioner Jones while a student at Logan Middle School. (*Complaint* ("*Comp.*"), Appendix Record ("A.R."), pp. 1-14.) Petitioner Jones alleged claims for a State Constitutional Tort (Count I); Negligence (Count II); Tort of Outrage (Count III); Assault (Count IV); and, Violation of Statute (Count V). (*Id.*) Respondent Board filed a Motion to Dismiss all counts of the Complaint and the request for punitive damages. (*Defendant Logan County Board of Education's Motion to Dismiss*, *A*.R., pp. 15-42.) Petitioner Jones filed a Memorandum in Opposition to the Motion to Dismiss. (*Plaintiff Dakota Jones' Memorandum in Opposition to Defendant Logan County Board of Education's Motion to Dismiss* A.R., pp. 43-65.) Respondent Board filed a Reply. (*Defendant Logan County Board of Education's Reply to Plaintiff's Response to Defendant's Motion to Dismiss* A.R., pp. 66-85.)

On February 10, 2021, the Circuit Court of Logan County issued an *Order Granting Defendant's Motion to Dismiss*. (A.R., pp. 193-212.) The Circuit Court dismissed all counts of the Complaint and the request for punitive damages. (A.R., p. 208.) Petitioner Jones only appeals the

dismissal of Count II of the Complaint for Negligence.

Petitioner Jones alleged that all times relevant to the Complaint, he was a student at Logan Middle School. (*Comp.*, ¶ 3 (A.R., p. 4).) Respondent Board governs the public schools in Logan County and controlled and maintained Logan Middle School. (*Comp.*, ¶ 2 (A.R., p. 4).) Petitioner Jones sets forth various allegations regarding the bullying he experienced at Logan Middle School. While in sixth grade, specifically on December 14, 2012, students would write on Petitioner Jones with permanent markers. (*Comp.*, ¶ 5 (A.R., p. 4).) This bullying was reported to Principal Sutherland, who informed Petitioner Jones' mother that the issue would be handled. (*Comp.*, ¶ 6 (A.R., p. 5).) The bullying was not handled and increased in nature and frequency. (*Id.*)

The next year, while in seventh grade, Petitioner Jones was accosted by another student who demanded Jones give him his seat. (*Comp.*, ¶ 3 (A.R., p. 5).) When Petitioner Jones declined, the student grabbed Petitioner Jones' notebook out of his hand, causing a cut to his hand, which left a scar. (*Comp.*, ¶¶ 7-8, 10 (A.R., p. 5).) The school nurse attended to Petitioner Jones after this incident. (*Comp.*, ¶ 9 (A.R., p. 5).) In the eighth grade, students would place bits of lead from graphite pencils in Petitioner Jones' clothes without his knowledge. (*Comp.*, ¶ 11 (A.R., p. 5).)

On September 21, 2015, Petitioner Jones was choked by a student with a rope of some sort, which left red welts on his neck. (*Comp.*, ¶¶ 13-14 (A.R., p. 5).) Petitioner Jones went with his teacher to report the incident to the principal. (*Comp.*, ¶ 15 (A.R., p. 5).) Petitioner's mother was never informed of the incident by any one from the school. (*Comp.*, ¶ 16, (A.R., p. 5).) On or about September 23, 2015, approximately two days later, a student was repeatedly throwing pencils and crayons at Petitioner Jones. (*Comp.*, ¶ 17 (A.R., p. 5).) Petitioner Jones told the student to stop, but the student continued in his actions. (*Comp.*, ¶ 18 (A.R., p. 5).) Petitioner Jones went and shoved the student away so he would quit throwing things and then sat down. (*Comp.*, ¶ 19 (A.R., p. 6).)

The student stood up, punched Petitioner Jones in the face, rendering him unconscious. (*Comp.*, ¶ 20 (A.R., p. 6).) Thus, within a span of approximately two days, Petitioner Jones was choked, resulting in red welts, and was hit, resulting in a loss of consciousness.

After Petitioner Jones was rendered unconscious by another student in the classroom, his mother and her niece met with Principal Sutherland. (*Comp.*, ¶¶ 22-23 (A.R., p. 6).) Principal Sutherland was asked what would be done about the persistent bullying. (*Comp.*, ¶ 23 (A.R., p. 6).) Principal Sutherland replied that bullying goes on everywhere and there "aren't really any laws on bullying." (*Comp.*, ¶ 24 (A.R., p. 6).)

Subsequent to this meeting, the bullying persisted. (*Comp.*, ¶ 25 (A.R., p. 6).) Petitioner Jones was stabbed with a pencil and had to be seen by the school nurse again. (*Comp.*, ¶ 25 (A.R., p. 6).) Petitioner Jones' mother worried that he might commit suicide and his grades declined. (*Comp.*, ¶¶ 27-28 (A.R., p. 6).)

Petitioner Jones further alleged that Respondent Board owed him a duty of care to conduct their activities in a reasonable and prudent manner. (*Comp.*, ¶ 40 (A.R., p. 8).) The Respondent Board negligently and recklessly breached that duty. (*Comp.*, ¶ 41 (A.R., p. 8).) The breach proximately caused physical and emotional harm to Petitioner Jones. (*Comp.*, ¶ 42 (A.R., p. 8).) Respondent Board did not dispute that Petitioner suffered damages for purposes of its *Motion to Dismiss*.

Therefore, the Complaint alleges that Petitioner Jones was a student at Logan Middle School who was subject to multiple instances of bullying that were known to Principal Sutherland teachers, and the school nurse. The Complaint further alleges that Petitioner Jones' mother had conversations with Principal Sutherland regarding the bullying and inquired what steps Principal Sutherland was taking to protect her son from the bullying. The Complaint alleges that Principal Sutherland

promised to address the bullying, but, despite these promises, Principal Sutherland did nothing to address the bullying. The Complaint also alleges that Principal Sutherland stated that bullying goes on everywhere, implying that bullying was acceptable. He also stated there were really no laws against bullying despite the existence of *W.Va. Code § 18-2C-3(b)(8)*, which requires Respondent Board to develop "[a] strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report."

Respondent Board's arguments were adopted *in toto* by the Circuit Court of Logan County. In adopting the arguments requesting dismissal of the claim for damages arising from negligence, the Circuit Court erroneously concluded 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." (*Order*, ¶ 20 (A.R., p. 199).) Further, the Circuit Court erroneously concluded that the bullying was not foreseeable; therefore, the willful, malicious, or criminal acts broke the chain of causation. (*Order*, ¶¶ 21-23 (A.R., p. 199-200).) Petitioner again directs this Court's attention to *W.Va. Code § 18-2C-3(b)(8)*, which requires Respondent Board to develop "[a] strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report." This mandate clearly demonstrates that multiple acts of bullying are foreseeable.

As demonstrated below, Respondent Board's arguments and the wholesale adoption of those arguments by the Circuit Court of Logan County with respect to the claim for negligence were erroneous and require reversal of the dismissal of Count II for negligence.

SUMMARY OF ARGUMENT

Petitioner Dakota Jones brought this present action against Respondent Logan County Board of Education to seek damages that he suffered as a result of bullying that occurred while he

was a student at Logan Middle School. This bullying was persistent and was reported to the principal of the school, Mr. Sutherland. Not only was the bullying reported, Petitioner's mother, Matilda Workman, had conversations with Principal Sutherland, who promised to address the problem and did not. The bullying continued and increased to the point where Petitioner Jones was choked on one occasion and punched on another occasion wherein he became unconscious.

The Respondent filed a Motion to Dismiss all claims of the Complaint. Petitioner only appeals from the dismissal of Count II of the Complaint for negligence. Petitioner contends that the Circuit Court of Logan County, West Virginia committed reversible error in dismissing the claim for negligence.

Respondent Board generally is entitled to immunity under the *West Virginia Governmental Tort Claims and Insurance Reform Act*. In the case *sub judice*, Petitioner Jones' claim falls under exceptions to immunity as set forth in *West Virginia. Code § 29-12A-4(c)(2) and (4)*. The former section waives immunity for negligence by employees of a political subdivision in the scope of their employment and the latter section waives immunity for negligence of the employees that occurs within or on grounds or buildings used by political subdivision.

A "heightened" pleading standard applies in immunity cases in order to enable a political subdivision to determine if it is entitled to immunity. Despite Petitioner Jones meeting this heightened pleading standard, the Circuit Court dismissed the count for negligence erroneously concluding that "Plaintiff has not identified any employee who was negligent." Petitioner identified Principal Sutherland as the employee who was negligent.

Petitioner Jones has a constitutional right to an education, including a safe and secure school environment. Public school teachers and administrators stand *in loco parentis* to their students, which imposes upon them certain duties of reasonable supervision. These employees are also

required to develop "[a] strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report." *W.Va. Code § 18-2C-3(b)(8)*. Finally, the special duty rule, which is an exception to immunity, applies. Principal Sutherland specifically promised Petitioner's mother that the bullying would be addressed. It was not. One or more of these aforementioned duties were breached when Principal Sutherland did nothing to protect Petitioner Jones and allowed the bullying to continue, resulting in harm.

The Circuit Court also determined that Petitioner Jones did not sufficiently plead proximate cause. The Circuit Court incorrectly concluded that the allegation that the principal was aware of the bullying does not demonstrate that any future instance of bullying is foreseeable. The West Virginia Legislature concluded otherwise and required policies to prevent future bullying and retaliation for reporting bullying.

Further, the Circuit Court required a degree of specificity in the allegations of the Complaint not required under West Virginia precedent when it concluded that Petitioner Jones was required to plead facts that an employee was aware that Petitioner would be bullied at any particular time by any particular student at any particular location at the school. Therefore, under the Circuit Court's reasoning, Petitioner Jones and other students in West Virginia can only recover from unchecked bullying if the student can inform a school board employee who was going to attack the student next and when and where the attack was going to occur. Imposing such an impossible standard would negate the student's constitutional right to an education, including a safe and secure school environment.

Based upon the Circuit Court's erroneous reasoning, the dismissal of Petitioner Jones claim for negligence should be reversed and this case remanded for further proceedings regarding that claim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this Appeal involve assignments of error in the application of well-settled law respecting dismissal under Rule 12 of the *West Virginia Rules of Civil Procedure* and the application of immunity with respect to political subdivisions. These issues are central to the civil trial process. Therefore, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

ARGUMENT

I. THE CIRCUIT COURT OF LOGAN COUNTY ERRED IN DISMISSING PETITIONER'S CLAIM FOR NEGLIGENCE AS THE CLAIM FALLS UNDER CLEARLY RECOGNIZED EXCEPTIONS TO IMMUNITY.

Appellate review of a circuit court's grant of a motion to dismiss is de novo. *Evans v. United Bank, Inc.*, 235 W.Va. 619, 623, 775 S.E.2d 500, 504 (2015). "A motion to dismiss should be granted only where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Forshey v. Jackson*, 222 W. Va. 743, 749, 671 S.E.2d 748 (2008) (citation omitted) (*quoting Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 516 (1995)). Accordingly, motions to dismiss are viewed with disfavor, and this Court has expressly counseled lower courts to rarely grant such motions. *Id.* (*citing John W. Lodge Distrib. Co., Inc. v. Texaco*, 161 W. Va. 603, 605–06, 245 S.E.2d 157 (1978)). For the purposes of a motion to dismiss, the complaint is to be construed in the light most favorable to the plaintiff, and its allegations are to be taken as true. *Id.* Viewing the motion to dismiss in this light, the same should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* (*quoting* Syl. pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 530–31, 236 S.E.2d 207, 207–08 (1977) (citation omitted)). "All that is required to state a cause of action is a short and plain statement of a claim that will give the defendant fair notice of

what plaintiff's claim is and the grounds upon which it rests." *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653 (2014).

The Circuit Court recognized that in cases implicating governmental immunity, a heightened pleading standard applies. *Doe v. Logan Cty. Bd. of Educ.*, 829 S.E.2d 45, 49 (W. Va. 2019) (citing, *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996).) In essence, the "heightened" pleading standard simply means that a plaintiff cannot rely upon conclusory allegations. Petitioner Jones' Complaint meets the standards set forth in *Doe v. Logan Cty. Bd. of Educ.* as he alleged specific acts of bullying, knowledge of the bullying by the Board's employee Principal Sutherland, failure by Principal Sutherland to take any action to protect Petitioner Jones, and harm directly and proximately resulting from Principal Sutherland's failure to act.

To the extent that the Circuit Court, in adopting Respondent Board's *Proposed Order* almost without modification, imposed federal standards upon Petitioner's Complaint, such imposition is plain error as the this Court strictly adheres to notice pleading. *See Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 854 S.E.2d 870, fn. 4, (W. Va. 2020); *Gomez v. A.C.R. Promotions, Inc.*, No. 17-1048, 2019 W. Va. LEXIS 379, ** 5-6 (June 17, 2019) (memorandum decision); *Goldstein v. Peacemaker Props., Ltd. Liab. Co.*, 241 W. Va. 720, 730, 828 S.E.2d 276 (2019); *Roth v. Defelicecare, Inc.*, 226 W. Va. 214, fn. 4, 700 S.E.2d 183 (2010). (*Order*, (*A*.R., p. 199, ¶ 20), ("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)." *citing, Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009)).)

The purpose of a heightened pleading standard is to allow a determination of whether the Respondent Board has an immunity defense. *Doe v. Logan Cty. Bd. of Educ.*, at 51. The deficiency

in the allegations in *Doe v. Logan Cty. Bd. of Educ.* were that "[t]he Complaint details Cain's grooming and sexual behavior toward Jane Doe, and the Complaint expressly asserts that other 'educators' observed inappropriate interactions between teacher and student but failed to act. Jane Doe was a minor and may not have known the names or the jobs of the people who observed the interactions." *Id.*, at 50. In the present case, Petitioner Jones identified Principal Sutherland as the employee of Respondent Board and the allegations, taken as true, establish that Principal Sutherland had notice of the bullying and failed to act reasonably to keep Petitioner safe on the school grounds, despite promises to do so. The Circuit Court failed to recognize these factual allegations and erroneously stated that: "Plaintiff has not identified any employee who was negligent." (*Order*, ¶ 20 (A.R., p. 199).) "If the information contained in the pleadings is sufficient to justify the case proceeding further, [as it is in this case] the early motion to dismiss should be denied." *Hutchison v. City of Huntington*, 198 W. Va. 139, 150, 479 S.E.2d 649 (1996).

The Circuit Court recognized that *West Virginia Code § 29-12A-4(b)(1)* grants immunity to political subdivisions from liability for damages for acts occurring in the performance of governmental and proprietary functions by the political subdivision, subject to certain exceptions set forth in subsection (c). The exceptions applicable to the negligence claims in the present case are set forth as follows:

> (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: . . .
>
> > (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. . . .

(*Order*, (A.R., p. 198, ¶ 17).)

Respondent Board is a political subdivision. *W. Va. Code § 29-12A-3(c)*. Principal Sutherland was an employee of a political subdivision at the time of the events alleged in the Complaint. *W. Va. Code § 29-12A-3(c)*. The elected members of Respondent Board are also defined as employees. *Id.* A County Board of Education employs and assigns public school principals. *W. Va. Code § 18A-2-9(a)*. Principals are responsible for the management and operation of the school. *Id.*

Respondent Board is required by *West Virginia Code Section 18-2C-3* to "establish a policy prohibiting harassment, intimidation or bullying." *W.Va. Code § 18-2C-3(a)*. The minimum requirements of such policy include defining and prohibiting harassment, intimidation or bullying. *W.Va. Code § 18-2C-3(b)(1) and (2).* Respondent Board is also required to establish procedures for reporting, documenting, investigating, and responding to the prohibited acts. *W.Va. Code § 18-2C-3(b)(3), (4), (6), and (7)*. Further, parents or guardians of any student involved in a prohibited incident are required to be notified. *W.Va. Code § 18-2C-3(b)(5)*. A disciplinary policy is required to be developed. *W.Va. Code § 18-2C-3(b)(9)*. Most importantly, Respondent Board was required to develop "[a] strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report." *W.Va. Code § 18-2C-3(b)(8)*.

W.Va. Code § 18-2C-3 sets forth duties to prohibit and address harassment, intimidation or bullying. These duties were breached by Principal Sutherland, Respondent Board's employee, when

he failed to protect the Petitioner Jones. "'Violation of a statute is *prima facie* evidence of negligence.' In order to be actionable, such violation must be the proximate cause of the plaintiff's injury." Syl. pt. 2, in part, *Sartin v. Evans*, 186 W. Va. 717, 414 S.E.2d 874, 874 (1991)(quoting, Syl. Pt. 1, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990)).

The management and operation of the school required that Petitioner's complaints of bullying receive a response and investigation and that Petitioner, as a victim, be protected. *W. Va. Code § 18-2C-3(b)(7) and (8)*. Respondent Board and principals are responsible for administering proper discipline in schools. *See, W. Va. Code § 18A-5-1a*. The allegations in the Complaint clearly demonstrate that the middle school was negligently managed and operated and Respondent Board negligently failed to provide Petitioner Jones with a safe environment.

Even without statutorily imposed duties, Petitioner Jones has a constitutional right to an education, including a safe and secure school environment. *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 527-28, 490 S.E.2d 340, 346-47 (1997). "[A] teacher has a duty to exercise reasonable care to protect students in the classroom from those injuries which can be reasonably anticipated." *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 641, 398 S.E.2d 120 (1990); *See also, Gring v. Harrison Cty. Bd. of Educ.*, No. 14-0248, 2014 W. Va. LEXIS 1247 (Nov. 21, 2014) (memorandum decision). Petitioner Jones did not have a safe and secure school environment. Petitioner Jones was injured repeatedly at school.

> Accordingly, we hold that *Article XII, Section 1 of the West Virginia Constitution*, which guarantees the right to a thorough and efficient education, requires West Virginia public schools and teachers to impose such discipline as is reasonably required to maintain order in our public schools and to facilitate the education of our children.
>
> *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 217 W. Va. 761, 776, 619 S.E.2d 274 (2005).

Further, the West Virginia Supreme Court of Appeals has recently reaffirmed the statutory

duty pursuant to *W.Va. Code § 18A-5-1* to supervise students while they are at school. *Goodwin v. Bd. of Educ.*, No. 18-0211, 2019 W. Va. LEXIS 569 (Nov. 12, 2019). The *Goodwin* Court reiterated this long-standing principle:

> We have previously recognized that 'this Code provision [W. Va. Code § 18A-5-1(a)] embodies the *in loco parentis* doctrine which originated in the English common law and recognizes that a parent delegates part of his parental authority while the child is in their custody.' *W. Va. Dep't of Human Servs. v. Boley,* 178 W. Va. 179, 181, 358 S.E.2d 438, 440 (1987) (internal quotations and citation omitted). *See* Syl. pt. 7, in part, *Cobb v. W. Virginia Human Rights Comm'n,* 217 W. Va. 761, 619 S.E.2d 274 (2005) ('West Virginia public school teachers and school administrators stand *in loco parentis* to their students[.]'); *Smith v. W. Virginia State Bd. of Educ.,* 170 W. Va. 593, 597, 295 S.E.2d 680, 684 (1982) ('the *in loco parentis* doctrine contained in W.Va. Code, 18A-5-1, is merely an embodiment of the common law [.]'). Under the *in loco parentis* doctrine 'schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable supervision.' *Doe v. Logan Cty. Bd. of Educ.,* 242 W. Va. 45, 829 S.E.2d 45, 52 (2019) (Workman, J. concurring) (internal quotation marks and citation omitted).
>
> *Id.* at * 21 - * 22 (footnote omitted).

The Circuit Court also does not address the special duty rule. *W. Va. Code § 29-12A-5* "incorporates the common-law special duty rule and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular individual." Syl. pt. 1, in part, *Bowden v. Monroe Cty. Comm'n*, 239 W. Va. 214, 800 S.E.2d 252 (2017) (citation omitted).

> 'To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local 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 local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.' Syllabus point 2, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307

(1989).

Id. at Syl. pt. 2.

Petitioner Jones alleges that Principal Sutherland assured his mother that the bullying would be handled. (*Comp.*, ¶ 6 (A.R., p. 5).) It was never handled and Petitioner Jones suffered injuries as a result. The Circuit Court did not address this aspect of the Complaint. Therefore, Petitioner Jones sufficiently alleged violation of the common-law public duty rule, which is an exception to immunity.

Further, the Circuit Court correctly recognized that the issue of proximate cause is a jury question, but erred in proceeding to decide that question. The issues of "proximate cause, intervening cause, and concurrent negligence are questions of fact for the jury" when the evidence conflicts or different conclusion can be drawn from undisputed facts." Syl. pt. 14, *Marcus v. Staubs*, 230 W.Va. 127, 736 S.E.2d 360 (2012) (quoting Syl. Pt. 2, *Evans v. Farmer,* 148 W. Va. 142, 133 S.E.2d 710 (1963) and Syl. Pt. 10, *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000)); *See also*, *Carroll K. v. Fayette Cty. Bd. of Educ.*, 19 F. Supp. 2d 618 (S.D. W. Va. 1998).

In the present case, the facts have not been developed yet and only the allegations of Petitioner's Complaint can be considered. Those allegations set forth a pattern of bullying causing harm to Petitioner, which was reported to the principal who did nothing but allow repeated acts to occur despite promises to address the bullying.

The Circuit Court further erroneously concluded that "[p]laintiff 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." (*Order*, ¶ 23 (A.R., 200).) The Circuit Court denied Petitioner Jones the right to seek redress for his injuries because no one had a crystal ball to determine when and where the next act of bullying would occur. Neither the Circuit Court

nor Respondent has cited any precedent that requires such specificity in determining foreseeability. Dismissal on this basis is improper and reversible.

II. COUNT II STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS PETITIONER HAS SUFFICIENTLY PLED FACTS TO ESTABLISH NEGLIGENCE AND PROXIMATE CAUSE.

In deciding to dismiss Petitioner's count for negligence, the Circuit Court focused on Paragraphs 40 (Forty) through 44 (Forty-Four) of the Complaint, which sets forth the elements of a cause of action for negligence, duty, breach, causation, and harm. (*Order,* ¶ 16 (A.R., p. 197) and ¶ 18 (A.R.,198).) The Circuit Court, however, failed to consider Paragraphs 1 (One) through 29 (Twenty-Nine) of Plaintiff's Complaint. (*Comp.*, (A.R., pp. 4-6).)

Petitioner Jones was a student at Logan Middle School who was subject to multiple instances of bullying that were known to Principal Sutherland teachers, and the school nurse. (*Comp.*, ¶¶ 3, 6, 9, 15, and 23 (A.R., pp. 4-6).) Petitioner Jones' mother had conversations with Principal Sutherland regarding the bullying and inquired what steps Principal Sutherland was taking to protect her son from the bullying. (*Comp.*, ¶ 6 (A.R., p. 5).) Principal Sutherland promised to address the bullying, but, despite these promises, Principal Sutherland did nothing to address the bullying, which continued, increasing in nature and frequency. (*Id.*) Principal Sutherland stated that bullying goes on everywhere, implying that bullying was acceptable. He also stated there were really no laws against bullying. (*Comp.*, ¶ 24 (A.R., p. 6).) During Petitioner Jones' time at Logan Middle School, the bullying escalated from writing on Petitioner's body with permanent markers to being choked and knocked unconscious. (*Comp.*, ¶ 5 (A.R., p. 4) ¶ 13 (A.R., p. 5), and ¶ 20 (A.R., p. 6).)

The Circuit Court also erroneously found that "[p]laintiff has not pled facts that establish the foreseeability of his injuries. Thus, willful, malicious, or criminal acts break the chain of

causation." (*Order*, ¶ 23 (A.R., p. 200).) The Circuit Court acknowledged that "questions of proximate cause are generally questions for a jury," then proceeded to decide that "allegation that the principal was aware of the bullying does not demonstrate that any future instance of bullying is foreseeable." (*Order*, ¶ 23 (A.R., p. 200).) Future foreseeability of bullying is foreseeable as a matter of law as *W.Va. Code § 18-2C-3(b)(8)* requires Respondent Board to develop **"[a] strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report**." (emphasis added.) The Complaint alleges, and the Circuit Court admitted, that the bullying was reported to Principal Sutherland. (*Comp.*, ¶¶ 6, 15, and 23 (A.R., pp. 4-6) and *Order*, ¶ 23 (A.R., p. 200).) *W.Va. Code § 18-2C-3(b)(8)* specifically recognizes that once a victim has been subjected to bullying that additional bullying or retaliation following a report can occur and a strategy for protecting the victim must be developed. In fact, Petitioner Jones was choked by a student on September 21, 2015; the incident was reported to Principal Sutherland; and, on or about September 23, 2015, approximately two days later, Petitioner Jones was punched in face and knocked unconscious. (*Comp.*, ¶¶ 13, 15, 17, and 20 (A.R., pp. 5-6).) These foreseeable harmful events are exactly the dangers that Respondent Board and its employees had a duty to prevent. The allegations of the Complaint unequivocally set forth a series of bullying incidents that were reported and, thus, future incidents were foreseeable, subjecting the Respondent Board to liability.

> The general rule in this regard is that 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. [. . .] In *Rappaport v. Nichols*, 31 N.J. at 204-05, 156 A.2d at 10, 75 A.L.R.2d at 832, the New Jersey Supreme Court stated the rationale for the rule, quoting from *Menth v. Breeze Corp., Inc.*, 4 N.J. 428, 441-42, 73 A.2d 183, 189, 18 A.L.R.2d 1071,1078-79 (1950):

> '"[T]he original negligence continues and operates contemporaneously with an intervening act which might reasonably have been anticipated so that the negligence can be regarded as a concurrent cause of the injury inflicted. One who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof although the act of a third person may have contributed to the final result."'
>
> *Anderson v. Moulder*, 183 W.Va. 77, 89, 394 S.E.2d 61 (1990)(internal citations omitted).

"'An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury'." Syl. Pt. 8, *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000) (citing Syl. Pt. 3, *Wehner v. Weinstein,* 191 W. Va. 149, 444 S.E.2d 27 (1994) (internal citations omitted).

Additionally, one whose "affirmative actions or omissions unreasonably created or increased the risk of injury" from the willful, malicious, or criminal actions of others present issues to be determined by a jury. *Estate of Hough by & Through LeMaster v. Estate of Hough by & Through Berkeley Cty. Sheriff*, 205 W. Va. 537, 545 519 S.E.2d 640 (1999).

Petitioner Jones alleges a series of acts of bullying that went unchecked after being reported to a school official. Petitioner's mother was informed that the bullying issue would be addressed. It was not addressed. As a direct and proximate result of this failure, Plaintiff Dakota Jones suffered substantial harm, not as the result of unforeseen acts of third parties, but as the result of the failure of Principal Sutherland to take any action at all. The Circuit Court's dismissal on this basis is directly contrary to the precedent regarding proximate cause. Principal Sutherland's omissions unreasonably created or increased the risk of injury from the harmful acts of other students at Logan Middle School. His *laissez faire* approach to a serious problem recognized and addressed by the

West Virginia Legislature renders Respondent Board liable for Petitioner Jones' injuries and damages.

CONCLUSION

Wherefore, based upon the foregoing, Petitioner Dakota Jones respectfully prays that the Supreme Court of Appeals of West Virginia reverse the Circuit Court of Logan County's dismissal of his claim for Negligence (Count II), and remand this matter for trial on the merits.

Respectfully submitted,

PETITIONER
by counsel,

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CERTIFICATE OF SERVICE

COMES NOW Amanda J. Taylor, as counsel for petitioner, and hereby certifies that a true and accurate copy of the foregoing Petitioner's Brief, along with a copy of the Appendix Record, was served upon counsel for Respondent on this 4th day of June, 2021 via U.S. Mail as follows:

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