No. 21-0217

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAKOTA JONES, MATILDA JONES,
Plaintiffs Below, Petitioners,

v.

LOGAN COUNTY BOARD OF EDUCATION,
Defendant Below, Respondent.

From the Circuit Court of Logan County, West Virginia

The Honorable Joshua Butcher

Civil Action No. 19-C-145

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Respondent does not dispute Petitioner's statement of the case, as the *Complaint* speaks for itself. However, Respondent offers the following in an attempt to organize Petitioner's allegations and illustrate the lacking of specific key facts.

Petitioner Dakota Jones filed his *Complaint* on October 1, 2019, alleging that he was bullied in middle school. Petitioner is now eighteen years old. Petitioner identifies and alleges six separate occasions in which he was bullied.

First, on December 14, 2012, when Petitioner was in sixth grade, other students wrote on his body with permanent markers. The incident was reported to Principal Sutherland who told Dakota's mother, Matilda Workman, that the issue would be handled.[1]

Second, when Petitioner was in seventh grade, another student aggressively grabbed Dakota's notebook out of his hand, cutting and ultimately scarring Petitioner's hand. Petitioner does not allege that any principal was notified.[2]

Third, when Petitioner was in eighth grade, other students secretly put pieces of pencil lead in Petitioner's clothing. Petitioner does not allege that any principal was notified, and Petitioner does not allege any injury caused by this incident.[3]

Fourth, on September 21, 2015, presumably when Petitioner was still in eighth grade, another student choked Dakota with a rope, causing red welts on his neck. Petitioner reported the incident to his teacher and principal. Petitioner alleges the principal was required to tell his mother but did not do so.[4]

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[1] A.R. 4–6, Compl. ¶¶ 5–6.
[2] *Id.* at ¶¶ 7–10.
[3] *Id.* at ¶¶ 11–12.
[4] *Id.* at ¶¶ 13–16.

Fifth, 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]

Sixth, at some time unspecified in the *Complaint*, another student stabbed Petitioner with a pencil, breaking Petitioner's skin. Petitioner visited the school nurse. No one from the school notified Petitioner's mother, Ms. Workman.[6] Petitioner does not allege that any principal was notified. Petitioner alleges his grades suffered because of the bullying, and his mother was worried he might try to commit suicide.[7]

Respondent offers the following procedural background. On November 13, 2019, the Board filed a *Motion to Dismiss* with *Memorandum* in support seeking dismissal on immunity grounds.[8] On December 19, 2019, Petitioner filed a *Memorandum in Opposition*.[9] On January 10, 2020, the Board filed a *Reply*.[10] The Board and Petitioner submitted proposed orders addressing the *Motion to Dismiss* on January 10, 2020, and January 31, 2020, respectively.[11] The Court heard the Board's *Motion to Dismiss* on January 15, 2020.[12]

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[5] A.R. 4–6, Compl.¶¶ 17–24.
[6] *Id.* at ¶¶ 25–26.
[7] *Id.* at ¶¶ 27–28.
[8] A.R. 15–42.
[9] A.R. 43–64.
[10] A.R. 66–85.
[11] A.R. 86–120.
[12] A.R. 235.

The Court entered a *Time Frame Order* on February 14, 2020.[13] Despite the pending *Motion to Dismiss*, the parties engaged in written discovery and exchanged witness disclosures per the *Time Frame Order*. On June 24, 2020, the Board moved the Court for a status hearing on the *Motion to Dismiss* and a new time frame order in light of the pandemic and the pending *Motion to Dismiss*.[14] On July 14, 2020, the Board moved to stay discovery pending resolution of the *Motion to Dismiss*.[15] After thorough briefing by the parties, the Circuit Court granted the stay on December 8, 2020.[16]

The Court held several status hearings including on January 28, 2021, wherein the Circuit Court asked Petitioner if he would like opportunity to file additional pleadings to support his *Complaint* in light of the pending *Motion to Dismiss*. Petitioner declined.[17] On February 10, 2021, the Circuit Court entered its *Order Granting Defendant's Motion to Dismiss*.[18]

SUMMARY OF ARGUMENT

Petitioner's *Complaint* acknowledged the Board's immunity yet failed to plead facts showing that the six alleged instances of bullying occurring over three years was foreseeable and rendered the Board negligent. Petitioner failed to allege the location of the instances of bullying at the Logan Middle School, the individual who was bullying Petitioner in each instance, whether it was the same bully or bullies, and whether any Board employee had reason to know that Petitioner would be bullied in any of the alleged instances—facts pertinent to whether the Board was negligent. After the *Motion to Dismiss* had been thoroughly briefed by the parties, proposed

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[13] A.R. 122.
[14] A.R. 131.
[15] A.R. 135.
[16] This is not provided in the Appendix.
[17] A.R. 190–191, Order.
[18] A.R. 193–211. Petitioner takes issue with the Circuit Court's "wholesale adoption" of the Board's proposed order. However, Trial Court Rule 24.01 expressly provides for submission of proposed orders for the purpose of entry by a Circuit Court.

orders submitted, and status hearings held, the Circuit Court asked Petitioner whether he wanted opportunity to file any additional pleading as allowed under *Hutchison*. Petitioner declined. The Circuit Court properly granted the Board's *Motion to Dismiss*, finding that without facts showing that the bullying was foreseeable, Petitioner's negligence claim fails for want of proximate cause and duty. Taking Petitioner's allegations as true, the Board does not have a duty to protect against unforeseeable injury and the Board did not cause the bullying. As such, the Board is immune. Moreover, whether negligent or not, under the West Virginia Governmental Tort Claims and Insurance Reform Act, the Board cannot be liable for, and is immune from any claim arising from, any failure to adopt a policy. Accordingly, the Circuit Court was correct in dismissing the *Complaint*. The Board is immune.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure, disposition by issuance of a memorandum decision affirming the ruling of the circuit court is appropriate. There exists no substantial question of law; the circuit court did not commit prejudicial error; and just cause exists for summary affirmance. The Respondent Board defers to the Court regarding oral argument.

ARGUMENT

Per Rule 10(d) of the Appellate Rules of Procedure, Respondent specifically responds to Petitioner's assignments of error as follows. As a preliminary matter, Respondent iterates that longstanding pillars of West Virginia jurisprudence that questions of immunity are to be decided at the earliest possible stage *by the court.* At the earliest stage of litigation, a court is required to make immunity determinations as a matter of law. In *Hutchison v. City of Huntington*, this Court announced 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.[19]

This Court explained that it is "mandated, that claims of immunities, where ripe for disposition, should be summarily decided before trial."[20] Ever since *Hutchison*, the Court has consistently held that the question of immunity is a legal question and, where the facts underlying the immunities analysis are not disputed, or taken as true, immunity must be determined before trial.[21]

The importance of determining immunity early in a case cannot be understated. "[T]he need for early resolution in cases ripe for summary disposition is particularly acute when the defense is in the nature of an immunity."[22] "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."[23] As stated by Justice Cleckley: "Immunities 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 subject to the burden of trial at all."[24] "The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case. In this vein, unless expressly limited by statute, the sweep of these immunities is necessarily broad."[25] As this Court recently explained, "an objective of qualified

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[19] Syl. pt. 1, *Hutchison*, 198 W.Va. 139, 479 S.E.2d 649 (1996); syl. pt. 5, *City of Saint Albans v. Botkins*, 228 W. Va. 393, 394, 719 S.E.2d 863, 865 (2011).
[20] *Hutchison*, 198 W. Va. at 147, 479 S.E.2d at 657.
[21] *See, e.g., Albert v. City of Wheeling*, 238 W. Va. 129, 131, 792 S.E.2d 628, 630 (2016); syl. pt. 3, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).
[22] *Hutchison*, 198 W. Va. at 147, 479 S.E.2d at 657.
[23] *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014).
[24] *Hutchison*, 198 W. Va. at 148, 479 S.E.2d at 658 (1996).
[25] *Id.*

immunity is to save specific individuals and agencies from suit and, when appropriate, from pre-trial discovery and litigation[.]"[26]

As discussed *infra*, the Circuit Court below correctly found that the allegations, taken as true, required a finding of immunity for the Board.

I. PETITIONER FAILED TO SATISFY THE HEIGHTENED PLEADING STANDARD AND REFUSED THE OPPORTUNITY TO AMEND HIS COMPLAINT

Petitioner alleges that the Circuit Court erred in imposing federal standards. This is not grounds for reversal. The Circuit Court cited to *Iqbal* in one instance, stating "[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)."[27] The West Virginia Supreme Court has recognized that the West Virginia Rules of Civil Procedure are modeled after and follow Federal Rules of Civil Procedure.[28] Moreover, the proposition for which the Circuit Court cited *Iqbal* is in line with longstanding West Virginia law that "[b]are allegations of negligence claims based on employee negligence alone do not remove the cloak of immunity."[29] In any event, Petitioner's argument is of no moment as the Circuit Court applied the proper heightened pleading standard.

Petitioner's bare and conclusory allegations cannot overcome the Board's immunity under the applicable heightened standard. Petitioner's initial summation of the standard of review for a motion to dismiss[30] ignores the heightened pleading requirement and is thus incorrect as the heightened pleading standard applies. Plaintiff later concedes that "the 'heightened' pleading

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[26] *W. Va. State Police v. J.H.*, 856 S.E.2d 679, 689–90 (W. Va. 2021); *W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 852 S.E.2d 773, 782 (W. Va. 2020) ("rulings on qualified immunity claims should be made as early in the proceedings as possible.").

[27] *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (quoting *Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)). This Court 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).

[28] *See Wilfong v. Wilfong*, 156 W. Va. 754, 758, 197 S.E.2d 96, 99 (1973) (acknowledging that West Virginia's Rules are modeled after Federal Rules); A.R. 209 at n. 33.

[29] *Zirkle v. Elkins Rd. Pub. Serv. Dist.*, 221 W. Va. 409, 414, 655 S.E.2d 155, 160 (2007); A.R. 105.

[30] Pet. at 7.

standard simply means that a Petitioner cannot rely upon conclusory allegations"—a statement that accords with *Iqbal*.[31] When immunity is involved, there is no question that a heightened pleading standard applies.[32] Under the heightened pleading standard, more than a short plain statement is required; rather, Petitioner has the burden of showing by "specific allegations" that the immunity does not apply.[33]

While *Hutchison* does not require that a Petitioner anticipate the immunity defense,[34] Petitioner's *Complaint* anticipated immunity and pleads: "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."[35] The *Complaint* further states: "Furthermore, by alleging violations of the United States Constitution, the West Virginia Governmental Tort Claims and Insurance Reform Act are inapplicable."[36] The Circuit Court properly decided the issue of immunity under the appropriate heightened standard.[37]

Petitioner next states that his case is like *Doe* and that dismissal should likewise be reversed.[38] In *Doe*, Petitioner alleged that she was sexually abused by a teacher, Cain, and other teachers observed inappropriate interactions between the teacher and failed to do anything. This Court reversed the Circuit Court's dismissal because the Circuit Court failed to provide Petitioner with any of the opportunities outlined in *Hutchison*, such as providing a more definite statement.[39]

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[31] *Id.* at 8.
[32] *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996); *Doe v. Logan Cty. Bd. of Educ.*, 242 W. Va. 45, 49, 829 S.E.2d 45, 49 (2019); *W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 852 S.E.2d 773, 781 (W. Va. 2020) ("it is well-established that matters involving qualified immunity, such as the case presently before us, require a type of 'heightened pleading' standard.").
[33] *Hutchison.* at 148, 657–658.
[34] *Id.* at 150, 660.
[35] A.R. 6, ¶ 30.
[36] *Id.* at ¶ 37, in part.
[37] A.R. 196–197.
[38] Pet. at 9.
[39] *See Doe*, 242 W. Va. at 50, 829 S.E.2d at 50.

Unlike in *Doe*, the Petitioner was provided with ample opportunity to amend his *Complaint* to satisfy the heightened pleading standard and make specific allegations to overcome the Board's immunity. The Board's *Motion to Dismiss* was pending before the Circuit Court from December 13, 2019, to February 10, 2021.[40] At no time did the Petitioner move to amend his complaint or provide a more definite statement. The Circuit Court heard the Board's *Motion to Dismiss* and thereafter held four hearings. During none of the hearings did Petitioner seek to amend his *Complaint* or provide a more definite statement. At the last hearing before the Circuit Court, the Court inquired whether Petitioner wanted time to file any additional pleadings as allowed under *Hutchison*, and Petitioner declined.[41] The Circuit Court therefore properly determined the immunity issue.

Further, unlike in *Doe*, Petitioner did not even identify who bullied him, whether there was one or multiple bullies, the location of the bullying, or any facts showing that the bullying was foreseeable. Certainly, this is information available to or in possession of the Petitioner and the Petitioner declined to provide the same. Petitioner failed to provide specific allegations to satisfy the foreseeability component of any negligence claim. "Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence[.]"[42] The West Virginia Supreme Court has consistently stated 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."[43] "[A] willful, malicious, or criminal act breaks the chain of causation, unless the act was foreseeable.[44] This Court has consistently stated:

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[40] A.R. 21, 195.
[41] A.R. 190–191.
[42] *Gillingham v. Stephenson*, 209 W. Va. 741, 749, 551 S.E.2d 663, 671 (2001) (quoting Syl. pt. 7, in part, *Puffer v. Hub Cigar Store*, 140 W. Va. 327, 84 S.E.2d 145 (1954) *overruled on other grounds by Mallet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999)).
[43] *Sergent v. City of Charleston*, 209 W. Va. 437, 446, 549 S.E.2d 311, 320 (2001).
[44] *Yourtee v. Hubbard*, 196 W. Va. 683, 690, 474 S.E.2d 613, 620 (1996).

> 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.**[45]

More specifically, a defendant is not liable to a Petitioner if the unforeseeable intervening acts of a third-party cause Petitioner's injury.[46]

Taking Petitioner's allegations as true, the unidentified bully's or bullies' actions were the last act contributing to the injury. Moreover, even if they were not the last contributing act, Petitioner failed to plead facts showing that the acts were foreseeable. Taking Petitioner's allegations as true, Petitioner was bullied six times over the course of three years by unidentified student(s) at unidentified places in the school. Only in three of the six instances was a principal notified. Petitioner's allegation that the principal was aware of the bullying does not demonstrate that any future instance of bullying was foreseeable. Taking these allegations as true, it is unreasonable to expect anyone to foresee when, where, and by whom Petitioner would be bullied again if at all. Petitioner has not pled any facts that any Board employee was aware that Petitioner would be bullied at any particular time by any particular student at any particular location at the school. Petitioner's negligence claim fails as a matter of law because Petitioner has not pled facts that establish the foreseeability of his injuries. Thus, the bullies' alleged willful, malicious, or criminal acts break the chain of causation, and Petitioner's negligence claims for want of foreseeability.

A. THE BOARD'S TO ADOPT A POLICY IS NOT PROPERLY BEFORE THIS COURT AND IN ANY EVENT CANNOT SUPPORT ANY CLAIM AGAINST THE BOARD

[45] *Sergent v. City of Charleston*, 209 W. Va. 437, 446, 549 S.E.2d 311, 320 (2001) (internal citations omitted).
[46] *Id.*, 474 S.E.2d at 621 (citing Syl. Pt. 13, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990)).

Next, under the same heading, Petitioner alleges that the Board was negligent for failing to "establish a policy prohibiting harassment, intimidation or bullying" under W. Va. Code § 18-2C-3(a), failing to "establish procedures for reporting, documenting, investigating, and responding to the prohibited acts," failing to develop a "disciplinary policy," and failing to "develop a strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report" again under W. Va. Code § 18-2C-3(b)(8).[47] None of these arguments were raised below with respect to Petitioner's negligence claim.[48] Petitioner clarifies in his *Petition* that he is only appealing dismissal of his negligence claim in Count II of his *Complaint*.[49] Because the Petitioner does not dispute the dismissal of all other counts of his *Complaint*, including Count V wherein these allegations were made, and now only appeals dismissal of his negligence claim in Count II, Petitioner is raising arguments not made below to support his negligence claim. This Court has explained that the "general rule is that non jurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered."[50] "[W]hen an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal."[51] Petitioner's arguments were not raised below to support his negligence claim. Accordingly, this Court need not consider them.

Petitioner's allegations that the Board failed to adopt said policies and rules are not allowed under the Tort Claims Act in any event, whether these arguments were raised below and whether the Board was negligent or not. Under the West Virginia Tort Claims and Insurance Reform Act (Tort Claims Act) at W. Va. Code § 29-12A-4(b) and (c), the Board can only be liable for the

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[47] Pet. at 10.
[48] These allegations were made with respect to Petitioner's Count V: Violation of a Statute, the dismissal of which is not being appealed here.
[49] Pet. 1–2.
[50] *Whitlow v. Bd. of Educ. of Kanawha Cty.*, 190 W. Va. 223, 438 S.E.2d 15 (1993)
[51] *Id.* at 226, 18.

negligence of its employees.[52] The liability allowed under (c) is expressly subject to § 29-12A-5. Section 29-12A-5(a) contains eighteen instances in which the Board is entitled to immunity, no exception. These immunities are "absolute immunities."[53]

Among these absolute immunities is immunity from "[a]doption or failure to adopt a law, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy" under § 29-12A-5(a)(4). Under this section, negligent or not, the Board cannot be liable if a claim results from failure to adopt a policy or rule. Recently, this Court affirmed dismissal of a negligence claim based on a board of education's adoption and failure to adopt a policy under W. Va. Code § 18-2C-3.

In *C.C. v. Harrison County Board of Education*, a Petitioner asserted a negligence claim against a board of education based on the board's failure to adopt an anti-harassment policy per § 18-2C-3 and alternatively, the board's inadequate anti-harassment policy.

> because the Petitioners' allegations of negligence by the Board in this count pertain to its alleged failure to adopt an anti-harassment policy or adoption of an allegedly inadequate anti-harassment policy, both of which come within the ambit of the Act's grant of immunity to political subdivisions, we find that the circuit court did not err by dismissing [the negligence claim].[54]

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[52] It is not contested that the Board is a political subdivision as defined in W. Va. Code § 29-12A-3(c) ("political subdivision means any . . . county board of education.")

[53] *See State 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.").

[54] *C.C. v. Harrison Cty. Bd. of Educ.*, No. 20-0171, 2021 W. Va. LEXIS 332, at *15 (W. Va. June 17, 2021). It is worth noting that, unlike in *C.C.*, here, Petitioner has asserted no negligent hiring or retention claim. Thus, unlike in *C.C.*, Petitioner's allegations do not "complement" any allegation that the Board negligently retained any employee. *See id.* *16–17. Moreover, Petitioner has not asserted a negligence *per se* claim, and to the extent Petitioner's Count V (A.R. 10) is a negligence *per se* claim, Petitioner is not appealing its dismissal.

Here, the Petitioner squarely alleges that the Board was negligent for failing to adopt the same policy or rule per the same statute at issue in *C.C.*. Under W. Va. Code § 29-12A-5(a)(4) and *C.C.*, Petitioner cannot base his negligence claim on the Board failing to adopt a policy or rule. The Board is therefore immune without exception.

B. PETITIONER CANNOT BASE HIS NEGLIGENCE CLAIM ON INAPPOSITE CASE LAW AND THE INAPPLICABLE SPECIAL DUTY DOCTRINE

Next, under the same heading, Petitioner relies on a series of inapplicable cases.[55] First, Petitioner quotes language from and relies on *Cathe A. v. Doddridge Cty. Bd. of Educ.* However, Petitioner takes *Cathe* out of context. In *Cathe*, the Court determined the constitutionality of the Productive and Safe School Act, W. Va. Code § 18A-5-1a(g).[56] Neither W. Va. Code § 18A-5-1 *et seq* nor *Cathe* imposes liability on a school board for other students' bullying. To the contrary, the West Virginia Supreme Court has clarified that, although teachers have parental authority to discipline per statute,[57] teachers do not have a parental duty.[58] Because Petitioner cannot establish a duty, the Board cannot be liable, but is immune. Taking every factual allegation as true and taking each of Petitioner's citations in turn, the Petitioner has failed to overcome the Board's immunity.

Petitioner's citation to *Bd. of Educ. v. Chaddock* is also misguided.[59] In *Chaddock* the West Virginia Supreme Court never held that "[a] teacher has a duty to exercise reasonable care to protect students in the classroom from those injures which can be reasonably anticipated." Rather, the Court acknowledged that "[t]he **parties do not disagree** over the legal principle established

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[55] Pet. 11–12; *see* A.R. 79.
[56] *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 525, 490 S.E.2d 340, 344 (1997).
[57] W. Va. Code § 18A-5-1
[58] *W. Va. Dep't of Human Servs. v. Boley*, 178 W. Va. 179, 181, 358 S.E.2d 438, 440 (1987); *Gring v. Harrison Cty. Bd. of Educ.*, No. 14-0248, 2014 WL 6607668, at *2 (W. Va. Nov. 21, 2014); *see Carroll K. v. Fayette Cty. Bd. of Educ.*, 19 F. Supp. 2d 618, 624 (S.D.W. Va. 1998) (holding that a student's attendance at a school does create a special relationship).
[59] Pet. 11.

by the hearing examiner and the circuit court that a teacher has a duty to exercise reasonable care to protect students in the classroom from those injuries which can be reasonably anticipated."[60] Moreover, *Chaddock* involved teacher discipline, not any injury to a student. *Chaddock* does not support Petitioner's negligence claim or render the *Complaint* well-pled.

Petitioner cites to *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*,[61] a case involving a teacher disciplined for harassing a student based on race. Petitioner misrepresents the import of *Cobb* to support the argument that a teacher has a duty to discipline children. However, the portion quoted by Petitioner, in context, explains that the teacher's actions were justified because Article XII, Section 1 of the West Virginia Constitution requires schools and teacher to impose discipline reasonably required to maintain order.[62] This language justified the teacher's actions, but did not impose a duty on teachers to protect and anticipate a student from the bullying of other students. Nothing in *Cobb* places a duty on a teacher to anticipate and protect a particular student from being bullied.

Next, Petitioner cites *Goodwin v. Bd. of Educ.*[63] to support his claim. However, *Goodwin* expressly avoided imposing or analyzing any sort of duty on teachers, concluding that "[i]n light of the unique facts of this case, we need not go into a detailed analysis of the duty to supervise public school students. This is because we agree with the circuit court that, under the narrow facts of this case, the Respondents did not owe a duty of supervision to the Petitioner once he left the school building without authorization."[64] The quoted portion Petitioner relies on does not establish a duty under West Virginia law. As stated, the *in loco parentis* doctrine recognized in W. Va. Code

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[60] *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 641, 398 S.E.2d 120, 123 (1990).
[61] 217 W. Va. 761, 765, 619 S.E.2d 274, 278 (2005)
[62] *Cobb*, 217 W. Va. 761, 776, 619 S.E.2d 274, 289 (2005).
[63] *Goodwin v. Bd. of Educ.*, 835 S.E.2d 566 (W. Va. Nov., 2019).
[64] *Id.*

§ 18A-5-1 does not impose a duty on teachers. Further, the latter part of the block quote relies on a concurring opinion in *Doe v. Logan Cty. Board of Educ.* in which Justice Workman quotes a foreign case that noted, "schools share a special relationship with students entrusted to their care, which imposes on them certain duties of reasonable supervision."[65] This is not controlling West Virginia law. The majority opinion imposed no duty and found no duty breached. *Goodwin* does not support Petitioner's claim and does not render his *Complaint* sufficiently pled.

Petitioner attempts to extrapolate a special duty from the absolute immunity provisions of the Tort Claims Act, alleging that a "special duty" exists because 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."[66] Here, Petitioner is severely misguided and cites *Bowden v. Monroe County Commission* for this proposition. In context, *Bowden* was explaining the public duty doctrine, or W. Va. Code § 29-12A-5(a)(5), which requires immunity for a political subdivision's "failure to provide, or the method of providing, police, law enforcement or fire protection." This immunity provision does not apply to schools. The Court in *Moore* clarified this point

> As this Court said in syllabus point three of *Beckley v. Crabtree*, 189 W. Va. 94, 428 S.E.2d 317 (1993), "the phrase 'the method of providing police, law enforcement or fire protection' contained in W.Va. Code § 29-12A-5(a)(5) refers to the formulation and implementation of policy related to how police, law enforcement or fire protection is to be provided." **A county school board's policy regarding supervision of students on school grounds is neither police, law enforcement, nor fire protection, and the immunity cited by the circuit court does not therefore apply**.[67]

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[65] *Doe v. Logan County Bd. of Educ*, 242 W. Va. 45, 829 S.E.2d 45, 52 (2019) (Workman, J. concurring) (quoting *Marquay v. Eno*, 139 N.H. 708, 662 A.2d 272, 279 (N.H. 1995)).
[66] Pet. 12.
[67] *Moore by & Through Knight v. Wood Cty. Bd. of Educ.*, 200 W. Va. 247, 251, 489 S.E.2d 1 (1997).

Thus, the Petitioner's attempt to establish a "special duty" fails as a matter of law and does not rehabilitate his deficient *Complaint*.

Lastly, Petitioner avers that questions of proximate cause are questions of fact for a jury. However, taking all of Petitioner's allegations as true, the *Complaint* fails to demonstrate that the Board proximately caused her injuries. The general rule that proximate cause is usually a jury question does not render Petitioner's *Complaint* well-pled. Taken as true, Petitioner's allegations that the principal was notified of the bullying does not render the Board liable. Petitioner's allegation that the principal was aware of the bullying does not demonstrate that the bullying was foreseeable. Again, Petitioner alleges he was bullied six times spanning three years. A duty to prevent future bullying cannot be imposed on the Board when a student is bullied six times over a three-year span with no facts alleged showing foreseeability. Only in three of the six instances was a principal notified. Taking these allegations as true, it is unreasonable to expect anyone to foresee when, where, and by whom Petitioner would be bullied again if at all. Petitioner has not pled any facts that any Board employee was aware that Petitioner would be bullied at any particular time by any particular student at any particular location at the school. Taking the allegations as true, the Board did not have duty, and the Board did not breach a duty. Taking these allegations as true, other students' willful, malicious or criminal acts broke the chain of causation. Other students' actions were the proximate cause of Petitioner's injuries. The *Complaint* was properly dismissed.

II. PETITIONER'S COMPLAINT FAILED TO STATE A CLAIM FOR NEGLIGENCE AND PROXIMATE CAUSE

The Circuit Court did not ignore paragraphs 1–29 of Petitioner's *Complaint*. The Court specifically found:

> 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.[68]

The Court's reasoning relies on paragraphs 1–29 of Petitioner's *Complaint*.

The remainder of *Petition* restates arguments addressed above. Again, Petitioner's *Complaint* acknowledged the Board's immunity, yet failed to contain facts to support a negligence claim and show that the six instances of bullying over three years was foreseeable. Nonetheless, the Circuit Court provided Petitioner with ample opportunity to file additional pleadings or a more definite statement in accordance with *Hutchison*—and this was after the Board laid out in its *Motion to Dismiss* what kind of facts were missing from the *Complaint* that rendered the Board immune. The Circuit Court squarely asked if Petitioner's counsel would like opportunity to file additional pleadings to overcome the Board's immunity, and counsel declined and waived the opportunity to supplement specific facts. The Circuit Court therefore dismissed the *Complaint* in a reasonably and thoroughly explained *Order*, supporting its findings with applicable law under the applicable heightened pleading standard.

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[68] A.R. 200.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court's February 10, 2021, *Order*.

LOGAN COUNTY BOARD OF EDUCATION,

By counsel,

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No. 21-0217

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAKOTA JONES, MATILDA JONES,

Plaintiffs Below, Petitioners,

v.

LOGAN COUNTY BOARD OF EDUCATION,

Defendant Below, Respondent.

From the Circuit Court of Logan County, West Virginia

The Honorable Joshua Butcher

Civil Action No. 19-C-145

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Logan County Board of Education, do hereby certify that on this **26th** day of **July, 2021**, a true copy of the foregoing ***"Respondent's Brief"*** has been served via U.S. Mail to the following counsel of record:

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