IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 22-0389

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Defendant Below,
Petitioner

v.

A.R., Plaintiff Below,
Respondent

Appeal from order of the
Circuit Court of Kanawha County
Case No. 20-C-571 and
Case No. 20-C-963

BRIEF OF RESPONDENT A.R.

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THE HONORABLE JUSTICES OF THE
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The Respondent, A.R., by and through her counsel, L. Dante diTrapano of Calwell Luce diTrapano, PLLC, and W. Jesse Forbes and Jennifer N. Taylor of Forbes Law Offices, PLLC, respectfully moves that this Honorable Court **DENY** the appeal filed by the Petitioner, the West Virginia Department of Health and Human Resources, and **AFFIRM** the order of the Circuit Court of Kanawha County, West Virginia, denying the Petitioner's Motion to Strike and for Partial Dismissal in the matter below. The Respondent hereby offers the following brief in response to the Petitioner's appeal thereof:

I. ASSIGNMENTS OF ERROR

THE CIRCUIT COURT DID NOT ERR IN DENYING THE PETITIONER'S MOTION TO STRIKE AND FOR PARTIAL DISMISSAL OF ANY OF THE RESPONDENT'S CLAIMS

As an infant, the Respondent A.R. was one of the most vulnerable of victims, a child placed in the care and custody of the Child Protection Services ("CPS") agency within the West Virginia Department of Health and Human Resources ("the Department"). While in the alleged care and custody of the Department, A.R. suffered what the Petitioner has deemed a "terrible series of events" - sexual and physical assault, abuse, emotional distress, and other injuries that were a direct result of the negligent actions of the Petitioner and its employees.

The Circuit Court of Kanawha County correctly denied the Petitioner's Motion to Strike and for Partial Dismissal of all of the Respondent's claims, including the claims for negligence and negligent hiring/supervision. The Circuit Court properly found that the Respondent, the West Virginia Department of Health and Human Resources is not entitled to qualified immunity

at this stage, because it allegedly violated duties that were mandatory and not discretionary, and that the actions or inactions of the Department directly and proximately caused injuries to A.R. as a minor child in its custody. The Circuit Court also properly held that the Respondent's Amended Complaint alleged violations of clearly established statutory and constitutional laws regarding the performance of mandatory duties, and that the Petitioner's attempt to assert qualified immunity is unsupported by the facts of the underlying case as the same was brought at the *W.Va. Rule of Civil Procedure* 12(b)(6) stage, and discovery has not yet begun in the matter such that factual development of the allegations could occur..

II. STATEMENT OF THE CASE

The Respondent's petition for appeal arises from two underlying actions currently consolidated and pending in the Circuit Court of Kanawha County, *A.R. v. Dustin Kinser, a West Virginia Child Protective Services Worker, and Capitol Hotels, Inc., d/b/a Knights Inn,* Case No. 20-C-571, and *A.R. v. The West Virginia Department of Health & Human Resources, a West Virginia State Agency,* Case No. 20-C-963. [1]

In July 2018, the Respondent, A.R., was a minor child who was often the subject of investigations by the CPS agency of the West Virginia Department of Health and Human Resources. As specifically asserted in the Respondent's Amended Complaint, upon information and belief one particular caseworker, Dustin Kinser ("Kinser") accessed internal Department

[1] A.R., the Plaintiff below, originally named the Department in her first Complaint in Case No. 20-C-571, but failed to provide the required pre-suit notice, and the Circuit Court of Kanawha County granted the Department's Motion to Dismiss. [AR 034, AR 042.] The Plaintiff then provided the required notice and filed her second complaint against the Department on November 2, 2020, Case No. 20-C-963 [AR 046]. The Plaintiff filed her Amended Complaint on January 6, 2022. [AR196]. By order entered January 27, 2021, the two cases were under Case No. 20-C-571[AR 093.]

databases to obtain relevant information about the child, befriended the Respondent, and groomed and shaped A.R. into developing a trusting relationship with him. [AR 188.]

One night A.R reported to Kinser circumstances in the home that the child believed constituted neglect. Kinser disguised his true intentions and offered to assist A.R. in leaving the home. Under the guise of being able to assist her, and after being informed of the potentially dangerous conditions in the home, Kinser convinced A.R. to abscond from the home at approximately 2:00 in the morning, and run off with him, purportedly for her own safety. [AR 188.] Asserting his capacity and authority as a CPS caseworker, Kinser took the child from her home, which was just the beginning of the "terrible series of events" that resulted in substantial damages to A.R.

Instead of taking A.R. to a foster home or other safe placement, Kinser violated practically every procedure required of caseworkers employed by the Petitioner. He failed to open a Department file on the matter; failed to follow statutory mandatory reporting procedures; and failed in his duty to keep A.R. safe. [AR 198]. Kinser took A.R. to a local hotel; obtained a room for him and the minor child; use illegal drugs in the presence of the child, including methamphetamine; supplied alcohol to the minor A.R.; and subjected the child to sexual assault, sexual abuse, and continued mental and physical abuse. [AR 188.]

The following day, Kinser continued to abuse A.R. when he took the child to several private residences in Kanawha County, West Virginia; once more used illicit drugs in the presence of the child; and further physically and sexually injured and abused A.R. During the next two days Kinser took A.R. with him while he performed his duties as a Department CPS worker; transported the child in a vehicle on official Department business, in which he smoked

methamphetamine; and even took the child to his office, where other employees and his supervisors saw Kinser and A.R. together, but failed to question his actions or stop him. [AR 189.] At one point, Kinser drove to a foster home with A.R., conducted a home visit of another child under the watch of the Department, and told the foster family that A.R. was a CPS intern or trainee. [AR 189.]

The moment Kinser, acting in his capacity as a CPS caseworker, removed A.R. from her family home, the infant was under the care and custody of the Department, who had a duty to assure that she received safe, proper and appropriate treatment. *W.Va. Code* § 49-1-105. Specifically, the Department was required to provide the infant A.R. with care, safety, and guidance; serve her mental and physical welfare; and provide care, support, and protective services. *W.Va. Code §* 49-1-105, *W.Va. Code §* 49-2-101.

As a CPS caseworker, Kinser was responsible for overseeing, managing, investigating, caring for, and ensuring the welfare of children who were placed in the care and custody of the Department. [AR 198.] The Amended Complaint specifically alleges that the Petitioner failed to conduct an adequate background check of Kinser prior to employing him as a CPS caseworker and assigning to him these serious duties. The Petitioner further failed to ensure that Kinser received adequate training, experience, and supervision so as to protect the children placed in the care and custody of the Department from harm. [AR 189, 190, 200.] The background check and trainings were not discretionary actions or decisions, but rather were mandated by federal and state laws and the Petitioner's own internal policies and procedures.

Other Department employees and supervisors who worked with Kinser knew of and/or suspected that he used illicit drugs and engaged in inappropriate behavior with minors, and

openly discussed and reported these issues. However, Kinser's supervisors failed to investigate or report such actions, and failed to take any disciplinary action against him. [AR 190, AR 199]. As noted in the sworn affidavit of a Department employee attached to the Respondent's Amended Complaint:

> It was common knowledge in the Kanawha County CPS office that Dustin Kinser was on drugs. There was always suspicion that he was using drugs prior to the time he was fired and during the time he was a worker in the office. Mr. Kinser had what appeared to be meth sores on his face at times during his employment with CPS and he displayed erratic behavior. People in the office including his supervisors knew this but they allowed him to continue working with children anyway. I would see him during my employment and there was general office gossip about him, his suspected drug use, and inappropriate behavior.

Affidavit, Exhibit A to Amended Complaint [AR 199.]

The Department maintains a *Child Protective Services Policy (2018)* based upon the Safety Assessment Management System ("SAMS"), a safety-based model developed and implemented in West Virginia in 2009 and 2010.[2] The 2018 version of the *Policy* specifically states:

> All DHHR employees who have any responsibility for any part of Child Protective Services must be familiar with and have immediate access to the CPS Policy, Foster Care Policy, Adoption Policy, Chapters 48 and 49 of the Code of West Virginia and the (Court) Rules of Procedure for Child Abuse and Neglect Proceedings; . . .

West Virginia Department of Health and Human Resources, Bureau for Children and Families, Office of Children and Adult Services, *Child Protective Services Policy, p. 8,* Revised May

[2] See, https://dhhr.wv.gov/bcf/policy/Documents/Child%20Protective%20Services%20Policy.pdf. The 2018 version of the *Policy* includes concepts and tools developed through consultation with the National Resource Center for Child Protective Services, a review of cases decided by the West Virginia Supreme Court of Appeals, and federal policies enacted by the U.S. Congress, including the Child Abuse Prevention and Treatment Act (Public Law No. 93-247, 1974) and the Adoption and Safe Families Act (Public Law No. 1-5-89, 1997).

2018.)[3] Pursuant to the Petitioner's own policies and procedures, each employee must be familiar with not only federal and state laws regarding CPS services, but other state policies and court rules of procedure. Each part of the "required reading" for CPS employees constitutes a recognition and protection of clearly established statutory or constitutional laws.

The West Virginia Division of Personnel also maintains a "*Drug and Alcohol-Free Workplace Policy*" which covers all employees of the State of West Virginia, and seeks to enforce the provisions of the federal *Drug-Free Workplace Act* of 1988, 41 U.S.C. 81. [4] Said Act requires all federal grantees, including the State of West Virginia, to agree that they will provide drug-free workplaces as a precondition of receiving a grant from a federal agency. The policy adopted by West Virginia prohibits the use of alcohol and/or illegal drugs in the workplace, as specifically notes that "such use may affect an . . . employee's job performance; bring discredit upon the reputation of the State of West Virginia, as the employer, and/or threaten the safety of . . . individuals entrusted to the care of the State and the general public." West Virginia Division of Personnel "*Drug and Alcohol-Free Workplace Policy*" (October 2004).

The Division of Personnel policy specifically imposes a duty upon a State employer to investigate any allegations of substance abuse by its employees. "When reasonable suspicion exists that an . . . employee has reported to work under the influence of alcohol, illegal drugs, or is impaired due to abuse or misuse of controlled substances or prescribe medications, the

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[3] The 2018 Child Protective Services Policy is an entirely different document from the interim CPS guidelines noted in *Crouch v. Gillispie*,809 S.E.2d 699 (2018). This Court in *Crouch* specifically noted that "We differentiate the CPS Guidelines relating specifically to safety assessments from the broader CPS policy that governs CPS activities generally." *Id.*, 809 S.E.2d 708.

[4] See, https://personnel.wv.gov/SiteCollectionDocuments/Policies/DrugFree.pdf

individual may be subject to assessment and disciplinary action or termination of service agreement." Each state agency has a responsibility to enforce the Policy "and take appropriate action against individuals who . . . violate the policy." Employees who are in violation of the Drug-Free Workplace Act or the Division Policy are subject to disciplinary action, up to an including dismissal.

The West Virginia Department of Health and Human Resources, as the employer of Dustin Kinser, knew or should have known about the statutory provisions included in Chapters 48 and 49 of the *W.Va. Code,* as well as the federal statutes regarding child abuse prevention, *Child Protective Services Policy,* the Drug-Free Workplace statutes, and the Division of Personnel *Drug- and Alcohol-Free Workplace Policy* when it hired Kinser, trained him, and supervised him. [AR 190.] The duty imposed upon the Petitioner was mandatory under both federal and state laws, as well as Department and Division of Personnel policies.

Discovery in the present matter has not yet begun. Nevertheless, the Respondent's Amended Complaint contains substantial information sufficient to justify the case proceeding further, including a sworn affidavit from a Department employee that supports the Respondent's claims, and if nothing else, creates a genuine issue of material facts. The Amended Complaint alleges in great detail that the Department failed to conduct a proper background check and investigation of Kinser before employing him to work with vulnerable children such as A.R. The Petitioner further failed to require a drug screen, and failed to act upon reports of Kinser's substance abuse and suspicious behavior with minors, all of which were mandatory procedures required by federal and state laws and internal procedures. [AR 186 -200.] The Petitioner brought their motion below at the 12(b)(6) stage and as such, the

Court was required to construe the facts alleged in the Amended Complaint in a light most favorable to the Respondent for purposes of ruling upon the Motion. The Circuit Court did so and properly denied the Petitioner's Motion.

As a result of the Petitioner's negligence and negligent hiring and supervision of Kinser, the Respondent A.R. suffered sexual assault, sexual abuse, mental and physical abuse, and significant infliction of emotional distress. The Respondent's Amended Complaint against the Department sets forth the failures and inactions of the Petitioner in great detail, including allegations that the Petitioner violated provisions of the of the Child Welfare Act, Chapter 49 of the *W.Va. Code,* the West Virginia Human Rights Act, and the West Virginia Human Trafficking Statute. The Respondent further alleged liability on the part of the Petitioner for intentional infliction of emotional distress; extreme and outrageous conduct; negligence; negligent hiring/supervision, and vicarious liability.

The Department filed a Motion to Strike and for Partial Dismissal of Plaintiff's Amended Complaint, seeking to strike Count IV (extreme and outrageous conduct) as duplicative of Count III (infliction of emotional distress), and seeking dismissal of the remaining counts in the Amended Complaint. [AR 218.] The Circuit Court of Kanawha County properly denied the motion [AR 313], and the Department now appeals with regard to the dismissal of the causes of action alleging mere negligence and negligent hiring/supervision on the basis of qualified immunity.

The Respondent maintains that the Circuit Court's order should be **AFFIRMED** in all regards, and that the matter be remanded with directions to proceed with discovery and trial. The Petitioner would be, of course, free to raise any matters at a *W.Va. Rule of Civil Procedure*

56 stage as may be appropriate, although Respondent maintains that there are genuine issues of material fact that would and should survive any such motion.

III. SUMMARY OF ARGUMENT

The order of the Circuit Court of Kanawha County denying the Petitioner's motion to strike and for partial dismissal should be **AFFIRMED.** The Circuit Court was correct in finding that the Department was not entitled to qualified immunity for any of the claims filed by the Respondent A.R., who was abducted as a child by a Department CPS worker; held unwillingly for several days; exposed to drugs and alcohol; physically and sexually abused and assaulted; and subjected to significant emotional distress. [5] Further, as the Circuit Court correctly determined, dismissal at this stage is wholly inappropriate as this young victim of child abuse has brought forth her claims in a well-pleaded amended complaint that survives any appropriate level of scrutiny and she should be able to proceed through discovery to develop her allegations. If the Petitioner still wishes to assert qualified immunity at the close of discovery, it can do so on a motion for summary judgment after the facts have been developed to the extent that the Circuit Court and this Honorable Court would have an evidentiary record for review.

The allegations in the Amended Complaint must be construed in a light most favorable to the Petitioner, and, since qualified immunity is involved, are subject to a heighted standard

[5] The Circuit Court of Kanawha County denied the Petitioner's motion to dismiss all of the claims included in the two complaints, including gross negligence, gross dereliction of duty, willful, wanton, deceitful, extreme and outrageous conduct, negligent hiring/supervision, infliction of emotional distress, violations of the Child Welfare Act, violations of the West Virginia Human Trafficking statutes, and vicarious liability. While the Petitioner's brief on appeal only addresses the Circuit Court's decision regarding negligence and negligent hiring/supervision, the Respondent maintains that all aspects of the order should be affirmed, even those not raised by the Department in this appeal.

of review. The Respondent's Amended Compliant more than meets that standard. The allegations are clear, specific, and concise, and are further supported by a sworn affidavit. The Amended Complaint has pleaded the best case possible, and there is no need for more detailed pleadings.

The Respondent agrees with the Petitioner that the actions and inactions of the Department resulted in "a terrible series of events" that culminated in substantial injuries to a minor child entrusted to its custody and care through the Department's own CPS agency. However, the Petitioner is liable to A.R. because it failed to comply with mandatory procedures regarding staffing and supervision, and proximately caused the injuries suffered by the Respondent through its negligence and the negligent hiring and supervision of Kinser.

While choosing a person to be hired as a state employee may be a matter of discretion, taking steps to ensure that the person chosen is appropriate for the position is not, especially when the safety of children is involved. The Department had a non-discretionary, mandatory duty to ensure that its caseworkers for the CPS division met fundamental statutes and policies established by both federal and state laws and its own agency. The Petitioner had a duty to keep children entrusted to its care safe by conducting criminal background checks of potential employees and enforcing drug-free workplace policies adopted by the Department and the West Virginia Division of Personnel. The Department failed in this duty when it hired Kinser without conducting a background check or a drug screen, and failed again when it did not conduct an investigation into his known drug use and improper activities with minors.

Even if the hiring, training, and supervision of Kinser is deemed discretionary, the Petitioner's violation of known federal, state, and internal requirements constitutes a blatant

disregard for clearly established statutory or constitutional law, and destroys any claim to qualified immunity. The Petitioner's own *Child Protective Services Policy* requires that DHHR employees must be familiar with and have immediate access to that policy, federal and state laws, and even court rules of practice and procedure. All of these are clearly established legislative, judicial, executive, and administrative requirements of which every employee, not only just supervisors, were required to know. The Petitioner ignored these requirements that are focused on maintaining safety for state employees and for persons served by those employees, including the minor child A.R.

The Department is not entitled to qualified immunity for its negligence or negligent hiring/supervision, or any of the Respondent's other claims in the Amended Complaint, and the decision of the Circuit Court should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the provisions of Rule 19 of the *West Virginia Rules of Appellate Procedure,* oral argument may not be necessary inasmuch as the dispositive issue has been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal. If the Court desires oral argument, a Rule 19 argument would be appropriate. This is a matter that could be determined by a memorandum decision. The Respondent believes the appeal is without merit and should be promptly denied so that the matter may proceed to the discovery stage below.

V. ARGUMENT

The order of the Circuit Court of Kanawha County denying the Petitioner's motion to dismiss should be **AFFIRMED,** and the Petitioner's appeal should be **DENIED**. The allegations set forth in the Respondent's Amended Complaint and the supporting affidavit, viewed in a light most favorable to the plaintiff, are detailed and specific, and clearly establish a set of facts that support the claims of A.R. They also provide a solid basis for denying the motion to dismiss based upon qualified immunity, since the actions and inactions of the Petitioner were not discretionary, but mandatory. Even if the actions of the Petitioner are deemed discretionary, the Department violated clearly established laws on multiple levels, all of which proximately resulted in the abuse and damages suffered by the Respondent as a child in the care and custody of the Department.

A. STANDARD OF REVIEW

The standard of review for appellate review of a circuit court's order regarding a motion to dismiss a complaint is *de novo. Boone v. Activate Healthcare, LLC,* 245 W.Va. 476, 859 S.E.2d 419, 422 (2021); Syl. Pt. 1, *Barber v. Camden Clark Mem'l Hosp. Corp.,* 240 W.Va. 663, 815 S.E.2d 474 (2018); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E. 2d 516 (1995); *West Virginia Regional Jail and Correctional Facility Authority v. A.B.,* 234 W.Va. 492, 766 S.E.2d 751 (2014).

The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief. *Boone,* 859 S.E.2d at 422; Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.,* 160 W.Va. 530, 236 S.E.2d 207

(1977); *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957). The court must construe the factual allegations in the light most favorable to the plaintiff. *Boone,* 859 S.E.2d at 442; *Murphy v. Smallridge,* 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996); *West Virginia Board of Education v. Marple,* 236 W.Va. 654, 783 S.E.2d 75 (2015).

When the issue of qualified immunity is added to the mix, there is a heightened standard of review, but the decision still must be made on a case-by-case basis, with a close focus on the nature of the allegations:

> The various holdings against which each particular set of facts must be analyzed lead inevitably to a situation where some allegations fit more comfortably with certain syllabus points than others. Much of the absence of harmony is simply the nature of the beast: immunities must be assessed on a case-by-case basis in light of the governmental entities and/or officials named and the nature of the actions and allegations giving rise to the claims.

W.Va. Department of Health and Human Resources v. Payne, 231 W.Va. 563, 571, 746 S.E. 2d 554, 562 (2013) (emphasis added). The plaintiff's complaint must, at a minimum, set forth sufficient information to outline the elements of the claims. The trial court "takes the pleadings and record as it finds them and the adversarial process makes it incumbent on the partis to plead the causes of action and present the requisite evidence necessary to maintain viability of their case." *A.B.,* 866 S.E.2d at 776.

"[I]in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *W. Va. Reg'l Jail & Correctional Facility Authority v. Grove*, 852 S.E.2d 773 (2020) . Under the heightened pleading standard, complaints implicating immunity need more than basic bare-boned allegations: The plaintiffs "should supply in their complaints or other supporting materials greater factual specificity and particularity than is

usually required." *Grove, 852 S.E.2d at 782, citing Elwood v. Rice City,* 423 N.W.3d 671, 676 (Minn. 1988). Once that information is provided, the case should proceed:

> [I]f 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.

Hutchison v. City of Huntington, 198 W.Va. 139, 149-50, 479 S.E.2d 649, 659-60 (1996) (emphasis added); *Portee v. City of Mount Hope,* No. 17-0546, 2018 WL 3203157 (W.Va. 2018); *Judy v. E. W.Va. Community & Technical College,* No. 21-0004 (W. Va. 2022) (Armstead, Justice, concurring, in part, and dissenting, in part).

In construing the factual allegations of the Respondent's Amended Complaint – including the sworn affidavit attached thereto – in the light most favorable to the plaintiff, the information outlining the elements and claims of the Respondent were more than sufficient to maintain the action, even under the heightened pleadings standard. The sworn statement of the Department's own employee not only supported the allegations in the Amended Complaint, but also provided greater factual specificity and particularity than normally included in initial pleadings. The Petitioner could not show beyond doubt that the Respondent can prove no set of facts in support of the facts and claims as alleged.

B. THE PETITIONER IS NOT ENTITLED TO DISMISSAL BASED ON QUALIFIED IMMUNITY FOR ANY OF THE RESPONDENT'S CLAIMS.

The Petitioner is not entitled to dismissal based upon qualified immunity because the allegations in the Amended Complaint and the accompanying sworn affidavit, viewed in a light most favorable to the Plaintiff, establish that there are definite facts that support each and every claim. The Petitioner violated multiple mandatory, non-discretionary federal, state, and

internal requirements regarding the hiring, training and supervision of CPS employees, all of which were known or should have been known by the supervisors of the caseworker who abused the Respondent A.R.

Moreover, the Petitioner is not entitled to a dismissal based upon qualified immunity because the Department is a state agency, not an individual. This Court has consistently stated that the application of the qualified immunity defense in state actions should follow the precedents established by federal courts. *See, City of St. Albans v. Botkins*, 228 W.Va. 393, 398, 719 S.E.2d 863, 868 (2011) ("Our approach to matters concerning immunity historically has followed federal law due in large part to the need for a uniform standard . . . ."); *Ballard v. Delgado*, 241 W.Va. 495, 504, 826 S.E.2d 620, 629 (2019). ("Accordingly, federal law will guide our analysis in determining whether the circuit court erred in denying summary judgment to the petitioners based on their assertion of qualified immunity.").

With these precedents in mind, Respondent respectfully submits that the Petitioner, the Department of Health and Human Resources, is not entitled to assert qualified immunity. In federal constitutional tort actions, qualified immunity is **only** applicable to an individual defendant and not the employer, agency, or state. *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (4th Circ. 2006); *Brandon v. Holt*, 469 U.S. 464, 83 L.Ed.2d 878, 105 S.Ct. 873 (1985); *Owen v. City of Independence, Missouri*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). The Petitioner is a State agency, and not an individual, and therefore it cannot, as a matter of law, assert qualified immunity.

1. **The Respondent's Amended Complaint Contains Substantial and Clearly Stated Allegations and Facts That Preclude a Premature Disposition.**

This Court has long held that 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. First and foremost, qualified immunity is an entitlement not to stand trial, not merely a defense from liability." *Maston v. Wagner*, 236 W.Va. 488, 498, 781 S.E.2d 936, 946 (2015) (emphasis added); *West Virginia Dept. of Health and Human Resources v. V.P.*, 241 W.Va. 478, 825 S.E.2d 806, 812 (2019).

Under the heightened standard of pleadings theory, a well-drafted complaint can withstand scrutiny in qualified immunity cases, while insufficient allegations in a complaint can be a fatal factor in determining a motion to dismiss. *See, West Virginia Regional Jail and Correctional Facility Authority v. A.B., 234 W.Va. 492, 766 S.E.2d 751* (failure to identify regulations violated which proximately caused alleged actions); *Crouch v. Gillespie,* 809 S.E. 2d 699 (W.Va. 2018). (an absence of causal relation or allegations tying the actions of the government defendant to the injuries suffered by the plaintiff); *W.Va. State Police v. J.H.,* 856 S.E.2d 679 (W.Va. 2021) (no supporting factual allegations; no identification of any policy, procedure, rule, regulation or statute violated). Considering *A.B., Crouch,* and *J.H.* as a collective primer for the scriveners of complaints against state agencies, a plaintiff is held to a heightened pleading standard, and must provide more than scant details of the basis of any claim. However, it is notable that in both *A.B.* and *Crouch*, the matters proceeded through discovery to a Rule 56 stage before being appealed to this Honorable Court after denial of Motions for Summary Judgment.

Once a court determines that the information contained in the complaint is sufficient to justify proceeding with the action, any motion to dismiss must be denied as required by the *Hutchison* decision. This was demonstrated in a 2020 decision by this Court, where a plaintiff's initial pleading against the Department and its agencies was dismissed because it alleged negligence, but did not clearly identify a specific statute that was allegedly violated. *B.R. v. West Virginia Department of Health and Human Resources, et al.* (Supreme Court Case No. 18-1141 (W.Va. 2020). When the circuit court again dismissed the second complaint, this Court reversed, finding that the "complaint in the instant case contains an additional count (Count 2) which alleges that the respondents violated *W.Va. Code* § 49-2-802." *Id.,* p. 2. In noting the distinction that made the difference, the *B.R.* decision was clear: "Petitioner failed to satisfy the pleading requirement necessary to defeat the defense of qualified immunity in *B.R. I.* because 'she failed to identify any specific law that was allegedly violated . . ' In the instant case she identified a specific statute that was allegedly violated. For that reason, the circuit court erred in concluding that the complaint in the instant case suffers from the same deficiency as the complaint in B.R.I." *Id.,* p. 5.

In addition to a well-drafted complaint, the trial court may also consider facts submitted beyond the four corners of the document, including exhibits attached to the complaint. "[M]aterials can be considered without converting to a motion for summary judgment <u>if they were attached to the complaint</u> or incorporated into the complaint by reference." *Forshey v. Jackson*, 222 W.Va. 743, 747, 671 S.E.2d 748, 752 (2008) (emphasis added); *W. Va. State Police v. J.H.*, 856 S.E.2d 679 . See also, *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996) (court may look beyond the technical nomenclature of the complaint to reach the substance of the

parties' positions); *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) (information brought out in a response to a motion to dismiss is relevant to the extent that it could be proved consistent with the allegations).

The very nature of the actions and the allegations contained in a complaint may provide the basis for denying an immunity defense. *W.Va. Reg'l Jail & Correctional Facility Authority v. Grove*, 852 S.E.2d at 782, *citing, Gleason v. Metro. Council Transit Operations,* 563 N.W.2d 309, 318 (Minn. App. 1997), aff'd in part, 582 N.W.2d 216 (Minn. 1998). Noting again the holding in *Hutchison*, "[I]f 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 . . . [and] the early motion to dismiss should be denied." *Id.*, 842 S.E.2d at 781, citing *Hutchison v. City of Huntington*, 198 W.Va. 139, 149-150, 479 S.E.2d 649, 659-60.[6]

In the present matter, the Respondent has succinctly stated specific facts that clearly outline the causes of action for negligence, negligent hiring/supervision, and all other counts in the Amended Complaint. Unlike the pleadings analyzed in *A.B.*, the Respondent's Amended Complaint is more like the second complaint filed in *B.R.* - it <u>does</u> identify a specific law, statue, and regulation that the Petitioner violated – in fact, it identified several mandatory requirements: federal law (Child Welfare Act), Chapter 49 of the *W.Va. Code,* the Human Rights

[6] As noted by Justices Wooton and Hutchison in their dissents to *J.H.*, the standard established by *Hutchison* "recognized that heightened pleadings are important when qualified immunity is an issue, <u>and that a deficient pleading does not require automatic dismissal of plaintiff's complaint.</u> Rather, *Hutchison* instructs that a circuit court should require the plaintiff to file a more definite statement, or to file a reply to the defendant's answer . . [or] an amended complaint." *J.H.*, 856 S.E.2d at 704.

Act, the Human Trafficking Statute, policies, procedures and protocols statutorily mandated under Chapter 49. [7]

The Respondent's Amended Complaint also survives scrutiny under the *Crouch* decision. In that case the plaintiff filed a wrongful death suit, alleging that the Department investigation into a child abuse and neglect matter was not sufficiently thorough and resulted in the death of a child. The circuit court found that while the investigation may have been discretionary, the Department was not entitled to qualified immunity because it had violated the *Interim Child Protective Services Policy for West Virginia Safety Assessment and Management System Pilot Counties (CPS Guidelines).* This Court reversed, finding that the temporary *CPS Guidelines* were not clearly established statutory or constitutional rights; that the plaintiff had not shown that the *CPS Guidelines* were violated; nor did he show that the caseworker would have known that she was violating the *Guidelines.* The crux of the decision, however, was the lack of proximate cause: "In the absence of allegations tying the alleged violations to [the child's] death, we are unable to view this case as more than an abstract assertion that DHHR could have investigated more thoroughly." *Crouch,* 809 S.E.2d at 708.

The Respondent's Amended Complaint overcomes each of the hurdles presented to the plaintiff in *Crouch.* It clearly asserts that the Petitioner had a legal and statutory duty to provide appropriately for A.R. It states with particularity that the Petitioner violated multiple federal, state, and agency mandates, and listed each one. The Amended Complaint further specifically alleges that the Petitioner failed to conduct an adequate background of Kinser; failed to

[7] "Clearly established law" may include a specific law, statute or regulation (*A.B);* or a policy, procedure, rule, regulation or statue (*J.H.)* or constitutional rights or laws of which a reasonable person would have known (*Grove).*

conduct adequate drug testing and screening; and failed to take action on reports of Kinser's suspected drug use and other inappropriate behavior. The Respondent also included a specific statement on causation: "The Defendants actions, inactions, and conduct caused injuries to A.R. due to sexual assault, sexual abuse, mental and physical abuse, and other conditions that A.R. was forced to endure." [AR 190.] All of those allegations were supported by the sworn affidavit of the Petitioner's own employee. [AR 199.]

The Respondent's Amended Complaint properly alleges that the Petitioner had a legal and statutory duty to provide appropriately for A.R. under Chapter 49 of the *W.Va. Code* and, under the applicable policies and procedures, owed A.R. a special duty to take reasonable measures to ensure her safety and well-being, and negligently failed to conduct meaningful background checks, drug screening and investigations of CPS employees. [AR 190, 195].

The applicable policies and procedures include the *Child Abuse & Neglect Policy (2018) (CPS Policy).* Petitioner's brief incorrectly assumes that the temporary *CPS Guidelines* analyzed in *Crouch* are the same as the *CPS Policy*. [Petitioner's Brief, p. 7.] In fact, the *Crouch* decision specifically differentiated between the temporary, interim guidelines applicable only to limited pilot counties, and the *CPS Policy,* a directive that governs CPS activities generally. *Crouch,* at 708, *fn. 1.*

The 2018 *CPS Policy* incorporated into the Amended Complaint in the present case applied to all Department employees statewide. It was not a rule that required legislative approval, but rather a policy adopted by the Department pursuant to the mandates of not only Chapter 49 of the *W.Va. Code,* but federal and state statutes, and even court requirements:

> This material is also based upon a combination of requirements from various sources, including but not limited to: social work standards for practice; Council

> on Accreditation Standards, the statutes contained in Chapters 48 and 49 of the Code of West Virginia; the amended consent decree entered in the case of Gibson v. Ginsberg; the Rules of Procedure for Child Abuse and Neglect Proceedings; Rules of Practice and Procedure for Domestic Violence Proceedings and Rules of Practice and Procedure for Family Court, all issued by the Supreme Court.
>
> All DHHR employees who have any responsibility for any part of Child Protective Services must be familiar with and have immediate access to the CPS Policy, Foster Care Policy, Adoption Policy, Chapters 48 and 49 of the Code of West Virginia and the (Court) Rules of Procedure for Child Abuse and Neglect Proceedings; Rules of Practice and Procedure for Domestic Violence Proceedings, and Rules of Practice and Procedure for Family Court.

West Virginia Child Protective Services Policy (2018), p. 8 (emphasis added.)

For the same reasons, this matter can also be distinguished from *J.H.,* where the plaintiff was found to have fallen short on the crafting of the complaint. The Petitioner "failed to identify in either his complaint or amended complaint any clearly established constitutional or statutory law or right that was violated" by the State agency, not the individual employee. *W.Va. State Police v. J.H.,* 856 S.E.2d at 699. This Court could not find any clear allegations in the complaint as to what the State agency did or failed to do regarding the supervision, retention, and training of the employee who caused the plaintiff's injuries. The Respondent in this matter has clearly identified each violation committed by the Petitioner, and noted every clearly established constitutional or statutory law or right. The Respondent has provided not just any single law or right, but rather a plethora of the same. Moreover, the Amended Complaint set forth in great detail the precise reasons why the hiring and/or supervisions of CPS caseworker Kinser was negligent.

The Respondent has clearly stated her cause of action and counts against the Petitioner, and has met the heighted pleading standards required by this Court. The Amended

Complaint has gone beyond that standard, however, and provided the sworn affidavit of a Department employee noting particular failures on the part of the Department. The sworn affidavit falls into the category of "other supporting materials" that contains greater factual specificity and particularity than is usually required, and raises a bona fide dispute as to the "foundational or historical facts" that underlie the entire case. The Respondent submitted more than enough to provide a basis to proceed with her action, and the decision of the Circuit Court in denying the motion to dismiss should be **AFFIRMED.**

2. The Petitioner is Not Entitled to Qualified Immunity Because Its Actions and Inactions Were Not Discretionary and Constituted Violations of Clearly Established Statutory and Constitutional Law by a Government Agency and Government Actors Performing Mandatory Duties.

West Virginia jurisprudence has long recognized that if "a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decisions are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, in a suit of a private individual claiming to have been damaged thereby." *Syl. Pt. 4, Clark v. Dunn*, 195 W.Va. 272, 465 S.E. 2d 374 (1995). However, neither public officials nor the State is entitled to immunity where the defendant's actions properly give rise to a cause of action that is found to be within the scope of authority or employment. *West Virginia. Regional Jail & Correctional Facility Authority v. A.B,* 766 S.E.2d at 765.

Petitioner, as governmental defendants often do, seeks to be shielded from liability by asserting qualified immunity and emphasizes the discretionary nature of the decisions at issue. Often governmental defendants assert that their agents and employees made discretionary decisions and argue that this should be the end of the analysis. However, as the United States

Supreme Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) it is extraordinarily difficult to make the distinction between a ministerial or discretionary act or decision, which was the standard for qualified immunity prior to *Harlow*. The *Harlow* court eliminated the subjective aspects of the qualified immunity standard and instead adopted an objective test for qualified immunity whereby the objective legality, whether the conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Id* at 815-819. While child abuse investigations do involve discretionary decisions, that does not mean an individual is entitled to qualified immunity. Instead, the question revolves around whether the conduct violated clearly established rights.

This Honorable Court has recognized the federal standards noted previously, and has provided a concise summary of the qualified immunity defense in this State:

> A public officer is entitled to qualified immunity from civil damages for performance of discretionary functions where: (1) a trial court finds the alleged facts, taken in the light most favorable to the party asserting injury, do not demonstrate that the officer's conduct violated a constitutional right; or (2) a trial court finds that the submissions of the parties could establish the officer's conduct violated a constitutional right but further finds that it would be clear to any reasonable officer that such conduct was lawful in the situation confronted. Whenever the public officer's conduct appears to infringe on constitutional protections, the lower court must consider both whether the officer's conduct violated a constitutional right as well as whether the officer's conduct was unlawful.

Syllabus Point 6, City of St. Albans v. Botkins, 228 W.Va. 393, 398, 719 S.E.2d 863, 868.

As a practical matter, once the objective test was adopted by the United States Supreme Court and by the West Virginia Supreme Court, whether or not the act or decision is discretionary

is irrelevant.[6] However, the word discretionary is often still used in connection with this defense and we will therefore address the distinction of mandatory versus discretionary acts and the applicable qualified immunity standards as previously identified by this Honorable Court as well as the inapplicability of the defense to the facts of this case.

The elements for determining whether qualified immunity applies under the specific circumstances of a case were clarified in the 2014 *A.B.* decision, which has been a basis for several subsequent decisions. In that case, the plaintiff asserted negligence against a State agency. In considering an appeal of the denial of the defendant's motion for summary judgment, the *A.B.* Court undertook a substantial analysis of the development of qualified immunity cases in West Virginia, and ultimately clarified the applicable standards and elements:

> [W]henever a defendant raises the issue of qualified immunity in a motion to dismiss, the circuit court must look to our qualified immunity body of law and follow the steps this Court expressly has outlined to make the determination of whether qualified immunity applies under the specific circumstances of that particular case. Specifically, these steps include whether: (1) a state agency or employee is involved; (2) there is an insurance contract waiving the defense of qualified immunity; (3) the West Virginia Governmental Tort Claims and Insurance Reform Act, *W.Va. Code* § 29-12A-1 *et seq.* would apply; (4) the matter involves discretionary judgments, decisions, and/or actions; (5) the acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive; and (6) the State employee was acting within his/her scope of employment.

W.Va. Regional Jail & Correctional Authority v. Grove, 852 S.E.2d at 784, *citing generally A.B. 234 W.Va. 492, 766 S.E.2d 751.*

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[6]In *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 at 599 (1992) the West Virginia Supreme Court noted, "[W]e find the discretionary-ministerial act distinction highly arbitrary and difficult to apply."

The first three elements are easily ascertained. When there is no assertion of the existence of an insurance contract that waives qualified immunity; when it is undisputed that a party is a State agency that is not within the purview of the Governmental Tort Claims; and when it is undisputed that the defendants are agencies or employees of State agencies, the analysis quickly moves to whether the actions complained of involved discretionary judgments, decisions, or actions. *W. Va. State Police v. J.H.,* 856 S.E.2d at 696.[8] "This critical first step may be evident from the nature of the allegations themselves." *West Virginia. Regional Jail Corrections Facility Authority v. A.B.*, 234 W.Va. at 514, 766 S.E. 2d at 773 (emphasis added.) A finding of whether an agency was acting in a discretionary manner directly affects whether that party is entitled to qualified or official immunity that may bar a claim of mere negligence against a State agency. *See,* Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374; *West Virginia Regional Jail & Correctional Facility Authority* v. A.B. , 234 W. Va. 492, 766 S.E.2d 751 ; *W. Va. State Police v. J.H.*, 856 S.E.2d 679.

Certain governmental actions or functions may involve both discretionary and non-discretionary aspects. *A.B.,* 776 S.E.2d at 774. The broad categories of training, supervision, and employee retention generally fall within the category of 'discretionary' governmental functions. *A.B.,* 234 W.Va. at 514, 766 S.E.2d at 773. However, the *A.B.* Court did note that a broadly-characterized governmental action may fall under the "umbrella" of a discretionary function, but may also include "particular laws, rights,

[8] In the present matter, The Respondent's insurance policy does not specifically waive qualified immunity. *Parkulo v. W.Va. Bd. Of Probation & Parole,* 199 W.Va. 161, 483 S.E.2d 507 (1996); *W.Va. Bd. of Education v. Marple*, 236 W.Va.654, 783 S.E.2d 75. There is no dispute that the Petitioner is a State agency, nor any dispute that the claims of the Respondent fall outside the scope of *W.Va. Code §* 29-12A-1.

statutes, or regulations which impose ministerial duties on the official charged with these functions." *Id.* The *so-called "ministerial"* duties have been historically exempted from the realm of governmental functions for which the State, its officials, and employees are entitled to immunity. *Id.; citing Clark, 195 W.Va. at 278 n. 2, 465 S.E.2d at 380*

Should such actions ultimately be deemed discretionary functions, a reviewing court must then "determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.,* 188 W.Va. 356, 424 S.E.2d 591 (1992). *A.B.,* 234 W.Va. at 509.

> [W]here a public official or employee's conduct which properly gives rise to a cause of action is found to be within the scope of his authority or employment, neither the public official nor the State is entitled to immunity and the State may therefore be liable under the principles of respondeat superior. We find that this approach is consistent with the modern view that "the cost of compensating for many such losses is regarded as an ordinary expense of government to be borne indirectly by all who benefit from the services that government provides." [citation omitted]. Much like the negligent performance of ministerial duties for which the State enjoys no immunity, we believe that situations wherein State actors violate clearly established rights while acting within the scope of their authority and/or employment, are reasonably borne by the State.

W. Va. Regional Jail & Correctional Facility Authority v. A.B., 766 S.E.2d at 766.

As noted above, a determination that an action is discretionary does not automatically entitle an agency to qualified immunity. For example, as noted in *A.B.,* the conclusion that employee training, supervision, and retention are discretionary governmental functions is "not necessarily fatal" to a plaintiff's claim. *Id.* Once the decision and actions of a governmental official are determined to be discretionary, the analysis does not end. "Rather, even if the complained-of actions fall within the discretionary functions of an agency or an official's duty, they are not

immune if the discretionary actions violate "clearly established laws of which a reasonable official would have known." *Id.*, 234 W.Va. 515; *Payne,* 231 W.Va. at 572, 746 S.E.2d at 563.

"To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a "particularized showing" that a "reasonable official would understand that what he is doing violated that right" or that "in the light of preexisting law the unlawfulness" of the action was "apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034 3039, 97 L. Ed. 2d 523 (1987); *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 n. 11, 479 S.E.2d 649, 659 n. 11; *W. Va. State Police v. J.H.*, 856 S.E.2d 679.

A fundamental issue in claims against a State agency is whether the agency failed to do what it was specifically required to do under a clearly established law or right. The pleadings must establish that the agency itself acted in a manner which violated a clearly established right of which a reasonable official would have known. *A.B.,* 766 S.E.2d at 776, 777. There must be a "particularized showing" that a "reasonable official would understand that what he is doing violated that right" or that in the light of pre-existing laws, the impropriety or "unlawfulness" of the action was apparent. *Id.; Hutchison v. City of Huntington,* 198 W.Va. at 149.

The final factor in determining qualified immunity is whether the State employee was acting within his or her scope of employment. *Grove, A.B., supra.* "Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when the facts are undisputed and no conflicting inferences are possible." *A.B., 234 W.Va. at 510, (citation omitted.)*

The Amended Complaint of the Respondent meets each and every factor and element established by *A.B., Grove,* and *J.H.* The first three elements are not contested – the Petitioner is a state agency; its insurance contract does not waive qualified immunity; and the actions of the Department fall outside the scope of the provisions of *W.Va. Code* § 29-12A-1. The last element is also undisputed, in that the Petitioner was acting within its scope of employment when it committed the negligence and negligent hiring, training, and supervision of its CPS employees, including the caseworker Kinser.

The fourth element – whether the matter involves discretionary acts – should not apply in the present case, because the Petitioner was not performing discretionary activities, but was supposed to be conducting mandatory duties required by multiple laws, standards, and policies. The allegations of the Amended Complaint clearly state that that the actions and inactions of the Petitioner constituted negligence and negligent hiring, training, and/or supervision because they violated "mandatory" (not "discretionary") duties required by statutory requirements; violated various Constitutional laws; constituted gross negligence and/or gross dereliction of duty; were willful and/or wanton; and possibly were willful and deceitful and performed with an intent to conceal. These must be taken as true for purposes of a motion to dismiss. They are not only clearly stated with precision, but they are further supported by the sworn affidavit of the Petitioner's own employee. [9]

The actions – and inactions – of the Petitioner that form the basis of the Respondent's Amended Complaint were mandatory, non-discretionary duties imposed upon the Petitioner by

[9] The Respondent's Amended Complaint includes, but is not limited to, allegations of gross negligence, gross dereliction of duty, willful, wanton, deceitful, and outrageous conduct. As such, the claims of A.R. are not simply based on "mere negligence" as Respondent contends.

federal and state laws and internal policies and procedures of the Department that the supervisors of Kinser knew or should have known about when they hired, trained, and supervised the CPS caseworker who committed the vile, abhorrent atrocities against the Respondent A.R. Much like the second complaint filed in *B.R.*, the Respondent's Amended Complaint not only pled simple negligence, but it also specifically satisfied "the pleading requirement necessary to defeat the defense of qualified immunity" because it identified numerous specific statutes that were allegedly violated. *See, B.R. v. W. Va. Department of Health & Human Resources,* No. 18-1141, p. 4.

Even if compliance with federal, state, and internal standards is deemed to be a discretionary act – and it should not be - the Petitioner remains liable to the Respondent because it violated clearly established constitutional and statutory rights of A.R. As noted in *A.B.* and *Payne,* even if the complained-of actions fall within the discretionary functions of an agency's duties, it is not immune if the discretionary actions violate clearly established laws of which a reasonable official would have known.

The Respondent, as an infant child in the care and custody of the Department, had an unquestionable right to bodily integrity, safety, and well-being under the West Virginia Constitution's Substantive Due Process Clause, reflected in Article 3, Section 10. *See, e.g., Phillips v. County of Allegheny*, 515 F.3d 224, 235 (3d Cir.2008) (personal bodily integrity is a liberty interest under the Due Process Clause); *K.S.S. v. Montgomery County Board of Commissioners*, 871 F.Supp.2d 389 (E.D. Pa. 2012); *Harris v. Lehigh County Office of Children & Youth Services*, 418 F.Supp.2d 643, 647 (E.D.Pa.2005) (citing *Youngberg v. Romeo*, 457 U.S. 307, 315–19, 102

S.Ct. 2452, 73 L.Ed.2d 28 (1982)) (recognizing an individual's liberty interest in his personal security and well-being).

Furthermore, the Respondent had a "'right to not be removed from a safe environment and placed into one in which it is clear that harm is likely to occur, particularly when the individual may, due to youth or other factors, be especially vulnerable to the risk of harm.'" *M.B. v. Schuylkill County*, 375 F.Supp.3d 574, 591 (E.D. Pa. 2019) (quoting *L.R. v. School District of Philadelphia*, 836 F.3d 235, 249 (3d Cir. 2017)). *See also, Hurtado v. People of California*, 110 U.S. 516, 536, 4 S.Ct. 111, 121, 28 L.Ed. 232 (1884) (liberty right under Fourteenth Amendment protects the integrity of one's body).

A key holding by the United States Supreme Court of Appeals long ago still applies to this very day:

> [N]o right is more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law.

Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). The *Botsford* decision has been the basis for decades of decisions recognizing a multitude of clearly established constitutional rights. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823–24, 18 L.Ed.2d 1010 (1967) (statutes banning interracial marriages violates Fourteenth Amendment liberty interests); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (statute mandating forced sterilization of certain habitual criminals violated equal protection and liberty interests); *Kedra v. Schroeter,* 876 F.3d 424, 440 (3d Cir. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 1990, 201 L.Ed.2d 249 (2018); *K.H. through Murphy v. Morgan,* 914 F.2d 846, 852 (7th Cir.1990) (citing *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73

L.Ed.2d 28); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir.1987) (en banc), cert. denied, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 808 (1989); *Doe v. New York City Dep't Soc. Servs.*, 649 F.2d 134 (2d Cir.1981); *J.H. v. Curtis*, 2002 WL 31133207 (N.D. Ill. 2002); *T.M. v. Carson*, 93 F.Supp.2d 1179 (D.WY. 2000); *B.H. v. Johnson*, 715 F.Supp. 1387, 1396 (N.D.Ill.1989).

Clearly established constitutional rights are not only recognized by the courts, but are also deemed to be known by a reasonable person, especially government employees who are charged with such knowledge. *See, e.g., Id.; M.B. v. Schuylkill County*, 375 F.Supp.3d 574, 593 (quoting *L.R. v. School District of Philadelphia*, 836 F.3d 235, 251) (finding reasonable government officials must know that '"reckless, conscience shocking conduct that altered the status quo and placed a child at substantial risk of serious, immediate, and proximate harm" is unconstitutional).

The Respondent's Amended Complaint, in plain language and with painstakingly precise detail, met the fifth element required under the heighted pleadings standard. The Amended Complaint carefully followed the directions given by this Court in the recent qualified immunity cases, and precisely pointed out violations of specific, clearly established laws and policies that the Department knew or should have known applied to its actions and inactions. (Child Welfare Act, Chapter 49 of the W.Va. Code; Human Rights Act, WV Trafficking Act, etc.)

Of great significance is the language in the Petitioner's own *Child Protective Services Policy,* which specifically requires that each CPS employee "must be familiar with and have immediate access to" not only that policy, but also to all applicable state and federal statutes, and even court rules of procedure. The Petitioner thus knew, or should have known, of multiple sources of clearly established standards that would have protected A.R. had they been followed.

The Respondent's Amended Complaint alleges violations of clearly established statutory and constitutional law by a government agency and government actors performing mandatory, not discretionary, duties. As such, Defendants' attempt to assert qualified immunity for the claims of A.R. is unsupported by the facts and the law.

In the many cases considered by this Court using the heightened pleading standard and the factors needed to determine whether qualified immunity applies to a case, there have been multiple remands to the circuit courts for further development. As noted in *Grove:*

> [There was] absolutely no examination or analysis of our well-established qualified immunity framework. At no point . . . did the circuit court examine whether the Petitioners were state actors or that the alleged acts or omissions . . . were discretionary functions. Neither did the circuit court even attempt to identify a clearly established statutory or constitutional right or law which a reasonable person would have known. Furthermore, the circuit court did not consider whether any alleged conduct by the . . . [defendants], if taken as true, evidences an intent by either . . . to violate a clearly established statutory or constitutional right or whether such actions or inactions otherwise could be found to be fraudulent, malicious, or oppressive.

W. Va. Regional Jail & Correctional Facility Authority v. Grove, 852 S.E.2d 773, 785.

In the present matter, the Circuit Court of Kanawha County thoroughly considered and discussed each of the required elements. The lengthy order recognized the precedent case law and properly applied each factor, ultimately finding that the Respondent's Amended Complaint properly alleged violations of clearly established statutory and constitutional law, and that the Petitioner's attempt to assert qualified immunity was unsupported by the facts of the case.

The Respondent would be remiss in not noting herein that this Court has always held that the primary goal in cases involving abuse and neglect must be the health and welfare of the children. Syl. Pt. 3, *In Re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). In fact, "the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State*

ex rel. Lipscomb v. Joplin, 131 W. Va. 302, 47 S.E.2d 221 (1948); *In Re S.W.*, 233 W.Va. 91, 755 S.E.2d 8 (2014).

The Petitioner and its employees ignored that "polar star" when it blatantly ignored multiple federal, state, and internal statutes, standards, policies and procedures in hiring the undeniably wicked CPS caseworker Kinser without conducting a proper background check or drug screening, and when it failed to investigate reports of his substance abuse and questionable behavior. The Petitioner should not be able to turn the doctrine of qualified immunity into "an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials." *See, Hutchison, J.H.,* (Justices Hutchison and Wooton dissent.)

VI. CONCLUSION

The Respondent's civil action has only just been filed and has not yet proceeded to discovery. The Amended Complaint includes a detailed affidavit, which supports the precise, pleading requirements of this Court, identical to the complaint supported in B.R. The acts of the Petitioner were not discretionary, but were mandatory. Even if they were deemed discretionary, which would need to be borne out through discovery, the actions were in violation of clearly established laws and policies of which each and every employee of the Petitioner was charged with knowing.

Dismissal of the Respondent's Amended Complaint would be a premature denial of this young child abuse victim's opportunity to fully develop her claim and further substantiate the allegations included in her Amended Complaint. The Petitioner will have another shot at avoiding the trial of this matter once discovery is completed and the case moves to the

summary judgment stage. The Respondent's claims should not be dismissed when she has painstakingly complied with all of the elements and requirements needed for a claim involving qualified immunity, and when it is clear that the non-discretionary actions (or even the discretionary ones) violated multiple clearly established laws and rights of the child.

The Petitioner should not be able to use the reasoned principles of qualified immunity to deprive a young victim such as this of the ability to hold those who caused her abuse accountable through our system of civil justice. The Circuit Court correctly found that this matter should proceed to discovery and respectfully, the Respondent prays that this Honorable Court uphold that determination.

The record below clearly supports the decision of the Circuit Court to deny the Department's motion to strike and motion for partial dismissal of the Respondent's amended complaint. Therefore, the decision of the Circuit Court should be **AFFIRMED and this appeal should be DENIED.**

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

The undersigned does hereby certify that true and accurate copies of the foregoing "Brief of Respondent A.R." were delivered to the following persons this 6th day of October 2022, by electronic delivery and depositing the same in the United States Mail, postage pre-paid, and addressed to:

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