IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0480

STATE OF WEST VIRGINIA ex rel. GABRIEL DEVONO and THE BOARD OF EDUCATION OF THE COUNTY OF RANDOLPH,

Petitioners,

v.

HONORABLE DAVID H. WILMOTH, Judge of the Circuit Court of Randolph County, West Virginia, SHERMAN ARBOGAST, and MARLENE ARBOGAST,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

Susan L. Deniker (WV Bar ID #7992)
Jeffrey M. Cropp (WV Bar ID #8030)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330-4500
(304) 933-8000
Susan.Deniker@Steptoe-Johnson.com
Jeffrey.Cropp@Steptoe-Johnson.com

Counsel for Petitioners The Randolph County Board of Education and Gabriel Devono

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I. QUESTIONS PRESENTED

The questions presented in this petition are as follows:

(1) Given that Respondent Marlene Arbogast failed to grieve several of her claims through the Public Employees Grievance Procedure, should the Circuit Court have dismissed those claims for lack of subject matter jurisdiction?

(2) Because Respondents failed to state a claim under the W. Va. Human Rights Act and also cannot properly assert a claim for tortious interference with medical care or a derivative claim for loss of consortium, should the Circuit Court have dismissed those claims as a matter of law?

These questions should be answered in the affirmative, and the Circuit Court's Order denying the RCBOE and Mr. Devono's partial motion to dismiss should be reversed.

II. STATEMENT OF THE CASE

Petitioners, the Randolph County Board of Education ("RCBOE") and Gabriel Devono, its former (retired) superintendent, are the defendants below. Marlene Arbogast, a plaintiff below, is a former employee of RCBOE, who had access to the W. Va. Public Employees Grievance Procedure ("PEGP") (W. Va. Code § 6C-2-1, et seq.) to address grievable employment disputes.

Filing a grievance pursuant to the PEGP is a jurisdictional prerequisite for all grievable claims other than those arising under the West Virginia Human Rights Act ("WVHRA"). However, Ms. Arbogast did not grieve any claims before filing the underlying civil action.

Instead, Ms. Arbogast and her husband Sherman Arbogast brought the case below alleging five causes of action for wrongful, retaliatory, and/or constructive discharge (Counts I – V); a cause of action for "tortious interference with medical care" (Count VII); and claims for tortious

interference with employment and for punitive damages (Counts VI and VIII).[1] (App. at 008-023). Sherman Arbogast has brought derivative claims for loss of consortium. (App. at 008-023). Ms. and Mr. Arbogast filed their original Complaint on February 1, 2021, but failed to serve it on RCBOE until June 17, 2021, or on Gabriel Devono until July 9, 2021. (App. at 199). On August 18, 2021, the Arbogasts filed their Amended Complaint, in which they attempted to set forth eight causes of action, including those at issue in this petition. (App. at 024-042).

Ms. Arbogast is a former employee of RCBOE. (App. at 024 ¶ 2.) Mr. Devono was RCBOE's Superintendent and acted within the scope of his employment at all relevant times. (App. at 024, 029 ¶¶ 3, 37.) The Arbogasts allege that their son "was previously a student in the Beverly Elementary Pre-K program[,] which is administered by [RCBOE]." (App. at 024 ¶ 5.) Ms. Arbogast allegedly "became aware that her son and other students in the Beverly Elementary Pre-K program had been confined to a closet and mistreated by the Pre-K teacher," who had allegedly "engaged in multiple malicious acts of physical, emotional, and mental abuse toward her students[.]" (App. at 25 ¶¶ 6-7.)

Ms. Arbogast alleges that she "was employed as a cafeteria manager (head cook) at Beverly Elementary when she learned of the outrageous acts committed by the Pre-K staff." (App. at 26 ¶ 14.) She alleges that, as "an employee and mother of an abuse victim," she was required to, and she did, inform Mr. Devono and the RCBOE of her son's mistreatment. (App. at 026-027 ¶¶ 16, 20-21.) Rather than investigating the reports of abuse, Mr. Devono allegedly "attempted to cover-up the abuse and took adverse employment actions against Marlene Arbogast." (App. at 027 ¶¶ 24-25.) The Arbogasts claim that Mr. Devono "created bogus and false employment infractions to cause the termination of Marlene Arbogast's employment" and intimidated, bullied, and coerced

[1] Counts VI and VIII of the Arbogasts' Amended Complaint are not at issue in this petition.

Ms. Arbogast "not to disclose the abuse or file a lawsuit." (App. at 027-028 ¶¶ 26, 28.)

The Arbogasts claim that Ms. Arbogast sought medical treatment and "had to miss work to cope with the abuse." (App. at 029 ¶ 34.) Mr. Devono allegedly "interfered with Marlene Arbogast's medical care and also wrongfully attempted to obtain her private, confidential medical records as intimidation and retaliation for seeking medical care and as a basis for terminating [Ms. Arbogast's] employment." (App. at 029 at ¶ 36.)

Count I in the Amended Complaint is a cause of action for retaliatory discharge. In Count I, the Arbogasts claim that the RCBOE and Mr. Devono discharged Ms. Arbogast in retaliation for her act of reporting alleged mistreatment of students, in violation of "public policy prohibiting the intimidation or interference with potential witnesses" and in violation of the West Virginia Human Rights Act ("WVHRA"), "which prohibits threats and reprisals, and other adverse employment actions, and also prohibits encouraging, aiding and abetting others to take adverse employment actions." (App. at 027-30 ¶¶ 22, 25-26, 33, 42.) The Arbogasts further claim that the RCBOE and Mr. Devono "violated substantial public policy in wrongfully terminating Marlene Arbogast for expressing her First Amendment Constitutional Right to Free Speech in reporting and discussing the abuse." (App. at 029 ¶ 40.) Finally, they allege that Ms. Arbogast was discharged in retaliation for her intent "to retain counsel and seek legal redress." (App. at 030 ¶ 41.)

In Count II, the Arbogasts set forth a cause of action for constructive retaliatory discharge based on their allegations that the RCBOE and Mr. Devono "created a hostile, threatening and intimidating work environment in retaliation" against Ms. Arbogast for "disclosing the abuse and to impede and obstruct Marlene Arbogast's truthful testimony and interfere with her right to seek legal redress." (App. at 031 ¶ 46.) According to the Amended Complaint, the RCBOE and Mr. Devono "created false and bogus employment infractions in retaliation for [Ms. Arbogast's]

disclosing the abuse and with the intention to intimidate and coerce Marlene Arbogast not to provide testimony or support the group of likely parent litigants all in violation of the West Virginia Human Rights Act." (App. at 031 ¶ 49.)

In Count III, the Arbogasts claim that Ms. Arbogast was wrongfully discharged in violation of the Whistle Blower Statute, W. Va. Code § 6C-1-3; the WVHRA; and RCBOE's "policy prohibiting discharge or retaliation for the good faith reporting of wrong doing." (App. at 033 ¶¶ 63-65.) They allege that, in violation of the WVHRA, Mr. Devono "engaged in a pattern of conduct to cover-up the mistreatment and abuse of students and to create bogus reasons to discharge Marlene Arbogast as punishment for Plaintiff informing him of the wrongdoing . . . ." (App. at 033 ¶ 61.)

Count IV sets forth the Arbogasts' claim of retaliatory discharge in violation of Ms. Arbogast's First Amendment right to free speech under the U.S. Constitution. (App. at 035 ¶ 73.) She claims that Mr. Devono "created bogus reasons to discharge Marlene Arbogast as punishment for [Ms. Arbogast] exercising her First Amendment Rights to free speech." (App. at 035 ¶ 73.)

In Count V, the Arbogasts claim wrongful discharge in violation of purported rights under the U.S. Constitution "to retain counsel to pursue claims on her behalf and on behalf of her son" and "to seek access to the Courts and for a jury trial to seek legal remedies for harm caused to her daughter [sic]." (App. at 035-036 ¶¶ 77-81.)

In Count VII, the Arbogasts assert a claim for "Tortious Interference with Medical Care." (App. at 038-039 ¶¶ 95-101.) The Arbogasts claim that Mr. Devono "used his position of authority as Superintendent to interfere with Marlene Arbogast's medical care that she was seeking for the stress and anxiety caused by his intimidation and harassment." (App. at 038 ¶ 95.) They also allege that Mr. Devono "in bad faith sought information concerning [Ms. Arbogast's] treatment and her

medical records from [Ms. Arbogast's] healthcare provider with the intent to harass, intimidate, degrade and retaliate against Marlene Arbogast and to create bogus reasons for her discharge, in violation of the [WVHRA]." (App. at 038 ¶ 96.) The Arbogasts claim that Mr. Devono "intended to" and did "induce the disclosure of [Ms. Arbogast's] medical care, knowing that the disclosure would violate [her] confidentiality and with the intent to obtain embarrassing information that he could use as harassment a basis for termination in violation of the" WVHRA. (App. at 038-039 ¶¶ 98-99.)

Counts I – V and VII also set forth Mr. Arbogast's derivative claims for loss of consortium. (App. at 030, 032, 034, 035, 036, 039 ¶¶ 43, 57, 67, 76, 83, 101.)

Ms. Arbogast has not filed any of her claims as grievances pursuant to the Public Employees Grievance Procedure (W. Va. Code § 6C-2-1, *et seq.*).

The style of the case does not indicate whether the Arbogasts intended to sue Mr. Devono in his individual or official capacity; however, the Arbogasts claim that the "actions of Defendant Devono as set forth in this entire complaint were within the scope of his employment and in furtherance of the goals and objectives of his employer." (App. at 008, 024, 029 ¶ 37.)

On September 1, 2021, the RCBOE and Mr. Devono filed "Defendants' Partial Motion to Dismiss Plaintiffs' Amended Complaint" and a "Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Plaintiffs' Amended Complaint." (App. at 043-153.) The motion sought dismissal of Counts I – V and VII pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure. As is set forth in the partial motion to dismiss, the Circuit Court lacks subject matter jurisdiction over Counts I – V and VII because Ms. Arbogast did not exhaust her administrative remedy on those claims before filing suit. The motion also sought dismissal of Counts I, II, III, and VII pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

On December 3, 2021, the Arbogasts filed "Plaintiffs' Response to Defendants' Motion to Dismiss" in opposition to the motion. (App. at 154-176.) On December 7, 2021, the RCBOE and Mr. Devono filed their "Reply in Support of Defendants' Partial Motion to Dismiss Plaintiffs' Amended Complaint." (App. at 177-194.) On December 9, 2021, the Honorable David H. Wilmoth presided over a hearing on the motion. (App. at 001, 196-198.)

At the December 9, 2021 hearing, Judge Wilmoth denied the RCBOE and Mr. Devono's partial motion to dismiss Counts I–V and VII. (App. at 001-007.) After the parties agreed on its contents, the Court entered its Order Denying Partial Motion to Dismiss on May 5, 2022. (App. at 001-007.) In that Order, the Court denied the RCBOE and Mr. Devono's motion to dismiss Counts I through V and VII, finding that Ms. Arbogast did not have to file a grievance as a jurisdictional prerequisite, that she had stated claims under the WVHRA, and that she had set forth sufficient factual allegations to support her claims. (App. at 003-004, 006 ¶¶ 6-7, 18.)

III. SUMMARY OF ARGUMENT

The Circuit Court erred when it refused to dismiss Respondents' claims in Counts I – V and VII of the Amended Complaint despite its lack of subject matter jurisdiction. The Circuit Court lacks jurisdiction over those claims because Ms. Arbogast, a former employee of the RCBOE, undisputedly failed to grieve her claims pursuant to the West Virginia Public Employees Grievance Procedure ("PEGP") (W. Va. Code § 6C-2-1, *et seq.*). Thus, she did not exhaust her administrative remedies before filing suit.

Exhaustion of administrative remedies is a jurisdictional prerequisite for bringing a civil action over any grievable claim except those arising under the West Virginia Human Rights Act ("WVHRA") (W. Va. Code § 5-11-1, *et seq.*). *See, e.g.*, *Ragione v. Bd. of Educ. of Preston Cty.*, No. 17-0037, 2018 WL 300576, at *2–3 (W. Va. Jan. 5, 2018). The WVHRA protects against

employment discrimination only when it is based on membership in certain protected classes, such as race, sex, and disability. Ms. Arbogast does not allege that she is a member of any protected class under the WVHRA, a defect she attempted to remedy in her Amended Complaint by merely inserting the phrase "all in violation of the West Virginia Human Rights Act" – a non-substantive legal conclusion, not an allegation of fact -- that did nothing to alter her substantive allegations.

In Counts I – V, Ms. Arbogast brought claims for wrongful, retaliatory, and constructive discharge, and in Count VII, she claims "tortious interference with medical care." While Counts I, II, III, and VII contain conclusory allegations that Ms. Arbogast's discharge violated the WVHRA, the Arbogasts do not claim that Ms. Arbogast was discriminated against or otherwise treated unlawfully due to her membership in any of the classes protected by the WVHRA. Therefore, none of the Arbogasts' claims fall under the WVHRA. Subject matter jurisdiction thus does not exist over Counts I – V and VII, all of which Ms. Arbogast could have filed as a grievance pursuant to the PEGB. The Circuit Court erred when it refused to dismiss those claims pursuant to W. Va. R. Civ. P. 12(b)(1).

Additionally, Counts I, II, III, and VII fail to state claims upon which relief can be granted, and thus the Circuit Court erred when it refused to dismiss those claims under W. Va. R. Civ. P. 12(b)(6). Counts I, II, and III fail to state claims under the WVHRA because, again, Ms. Arbogast does not claim that she experienced discrimination based on membership in any class protected by the WVHRA, and thus she has no viable claim under the WVHRA. Count VII, "tortious interference with medical care," has been recognized as a cause of action available only to workers' compensation claimants, and because Ms. Arbogast is not such a claimant, the cause of action is not available to her. *See Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11, 20, 537 S.E.2d 632, 641 (2000).

Because Ms. Arbogast's primary claims in Counts I – V and VII must be dismissed under Rules 12(b)(1) and 12(b)(6), Mr. Arbogast's derivative loss of consortium claims also fail as a matter of law. *S. Env't, Inc. v. Bell*, 244 W. Va. 465, 854 S.E.2d 285, 293 (2020).

A writ of prohibition is the only avenue that leads to relief for the RCBOE and Mr. Devono. Absent a writ, they will be forced to defend six causes of action over which the Circuit Court lacks jurisdiction, four of which also fail to state a claim upon which relief can be granted. No favorable ruling at a later time can relieve the RCBOE and Mr. Devono of the damages they would incur defending against claims that cannot be prosecuted against them pursuant to clearly established law. A writ of prohibition should be issued to prevent the enforcement of the circuit court's order denying the RCBOE and Mr. Devono's partial motion to dismiss, reversing the circuit court's order, and directing the circuit court to dismiss Counts I–V and VII of the Arbogasts' Amended Complaint.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISIONS

Petitioners request oral argument of this petition. Oral argument is appropriate under W. Va. R. App. P. 19(a), which provides for argument in cases involving assignments of error in the application of settled law, and cases involving a narrow issue of law. The Circuit Court's unwarranted exercise of jurisdiction over the claims at issue contravenes this Court's precedent and the provisions of the Public Employees Grievance Procedure and the WVHRA. The case is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Standard of Review

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. Rule 16 of the W. Va. Rules of Appellate Procedure provides that the Court has original jurisdiction over cases seeking a writ of prohibition (as well as other types of writs) and that "[i]ssuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised."

However, like W. Va. Code § 53-1-1, the Court has stated that, when "a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right, regardless of the existence of other remedies, and regardless of whether or not the objections to the jurisdiction of the trial court have been presented to that court prior to the application for relief here." *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003) (citation omitted); *State ex rel. Monster Tree Serv., Inc. v. Cramer*, 244 W. Va. 355, 853 S.E.2d 595, 602 (2020)); *see also State ex rel. Grant Cnty. Comm'n v. Nelson*, 244 W. Va. 649, 654, 856 S.E.2d 608, 613 (2021) (writ of prohibition will "issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." (citations omitted)); *State ex rel. Maxxim Shared Servs., LLC v. McGraw*, 242 W. Va. 346, 348–49, 835 S.E.2d 590, 592–93 (2019) (granting a writ of prohibition as to a non-viable negligent infliction of emotional distress claim but denying the writ as to a general negligence claim).

This Court has held that a writ of prohibition is the appropriate avenue to relief when a circuit court denies a motion to dismiss. *State ex rel. Skyline Corp. v. Sweeney*, 233 W. Va. 37, 40,

754 S.E.2d 723, 726 (2014) (citations omitted)). The "review of a circuit court's order granting a motion to dismiss a complaint is de novo," including when the matter is before the court on a writ of prohibition. *Sweeney*, 233 W. Va. at 40, 754 S.E.2d at 726 (citation omitted). Similarly, the interpretation of "a statute or an administrative rule or regulation presents a purely legal question subject to de novo review." *Sweeney*, 233 W. Va. at 40, 754 S.E.2d at 726 (citation omitted).

Rule 12(b)(1) of the W. Va. Rules of Civil Procedure provides for the dismissal of a claim for "lack of jurisdiction over the subject matter." "Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 492–93, 211 S.E.2d 705, 706 (1975). Rule 12(b)(1) requires the dismissal of a claim that can be brought before the W. Va. Public Employees' Grievance Board ("PEGB") pursuant to W. Va. Code § 6C-2-1 *et seq.*, in cases in which the plaintiff did not exhaust the grievance procedure with regard to the claim. *See Ragione v. Bd. of Educ. of Preston Cty.*, No. 17-0037, 2018 WL 300576 (W. Va. Jan. 5, 2018).

Rule 12(b)(6) of the W. Va. Rules of Civil Procedure provides for a motion to dismiss when the plaintiff's complaint fails to state a claim upon which relief can be granted. "On a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff. However, a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations." *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014) (citation omitted). "The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist." *Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 52-53, 350 S.E.2d 562, 563-64 (1986) (citations omitted). A bald statement that the plaintiff has a valid claim is insufficient to

withstand a motion to dismiss under Rule 12(b)(6). *See id.* "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995); *State ex rel. Maxxim Shared Servs., LLC v. McGraw*, 242 W. Va. 346, 348–49, 835 S.E.2d 590, 592–93 (2019).

B. Ms. Arbogast's Failure to Grieve Several of Her Claims Through the Public Employees Grievance Procedure Deprived the Circuit Court of Jurisdiction Over Those Claims

As the RCBOE and Mr. Devono argued to the Circuit Court in their partial motion to dismiss, Ms. Arbogast, as an employee of the RCBOE, was required to grieve the claims set forth in Counts I – V and VII of the Amended Complaint before filing suit over those claims. (App. at 043-153, 177-193.) Exhaustion of her administrative remedy was a jurisdictional prerequisite to filing Counts I – V and VII in a civil action, and her failure to exhaust the administrative remedy deprives courts of subject matter jurisdiction over these six claims.

1. Exhaustion of the Public Employees Grievance Procedure Is a Jurisdictional Prerequisite to a Civil Action

West Virginia Code § 6C-2-1 *et seq.*, the W. Va. Public Employees Grievance Procedure ("PEGP"), governs grievances by certain West Virginia public employees. The statute defines "employer" in a way that includes RCBOE. W. Va. Code § 6C-2-2(g) ("'Employer' means a . . . county board of education . . ."). A "grievance" is defined under the statute as "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee," including those "regarding compensation, hours, terms and conditions of employment, employment status or discrimination"; any "discriminatory or otherwise aggrieved application of unwritten policies or practices" of the employer; any incident of harassment or favoritism; and any "action, policy or practice constituting

a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee." W. Va. Code § 6C-2-2(i)(1). The only matters excluded from the definition of "grievance" are "any pension matter or other issue relating to public employees insurance . . ., retirement or any other matter in which the authority to act is not vested with the employer." W. Va. Code § 6C-2-2(i)(2).

Grievances are required to be filed within fifteen days of the event, of the date when the employee learned of the event, or of the most recent occurrence of a continuing practice. W. Va. Code § 6C-2-4. Grievances may be filed at level one (consisting of a hearing), after which they may proceed to level two (mediation) and level three (a hearing before an administrative law judge ("ALJ")). W. Va. Code § 6C-2-4. Certain grievances, including those contesting an employee's discharge, may be filed at level three. W. Va. Code § 6C-2-4(a)(4). The ALJ's level three decision may be appealed to the Circuit Court of Kanawha County, the decision of which may be appealed to the Supreme Court of Appeals of West Virginia. W. Va. Code §§ 6C-2-5, 6C-2-6.

A public employee to whom the PEGP applies must exhaust the exclusive procedure set forth in W. Va. Code § 6C-2-1 *et seq.* before a court may act on the employee's claims. *Subramani v. W. Va. Univ. Bd. of Governors*, No. 14-0924, 2015 WL 7628720, at *5 (W. Va. Nov. 20, 2015) (citing, *inter alia*, Syl. Pt. 7, *Expedited Transp. Sys., Inc., v. Vieweg,* 207 W. Va. 90, 529 S.E.2d 110 (2000)). Accordingly, in a case in which an employee had filed three grievances but had pursued none of them to the end of the grievance procedure, the employee was barred from pursuing a civil action. *Subramani*, 2015 WL 7628720.

The Court noted that "there are some exceptions to the rule of exhaustion of administrative remedies," but "none appear to be applicable here, nor have any such exceptions been asserted in this case." *Id.* (citing Syl. Pt. 1, *State ex rel. Bd. of Educ. of Kanawha County v. Casey,* 176 W.

Va. 733, 349 S.E.2d 436 (1986) (resort to available procedures would be an exercise in futility); *State ex rel Arnold v. Egnor,* 166 W. Va. 411, 421, 275 S.E.2d 15, 22 (1981) (lack of agency jurisdiction or the constitutionality of the underlying agency statute); Syl. Pt. 2, *Daurelle v. Traders Fed. Sav. & Loan Assn.,* 143 W. Va. 674, 104 S.E.2d 320 (1958) (no administrative remedy provided)).

2. A Limited Exception to the Exhaustion Doctrine Exists Only for Claims Cognizable Under the West Virginia Human Rights Act

As the *Subramani* Court recognized, West Virginia precedent provides that "the filing of a grievance by a public employee is a permissive, but not exclusive remedy, when the employee's claims relate to violations of the West Virginia Human Rights Act." *Subramani*, 2015 WL 7628720, at *6 (citing *Weimer v. Sanders,* 232 W.Va. 367, 752 S.E.2d 398 (2013); *Vest v. Bd. of Education of the County of Nicholas,* 193 W.Va. 222, 455 S.E.2d 781 (1995)). The W. Va. Human Rights Act ("WVHRA") protects against discrimination in employment on the basis of specific protected classes, including only "race, religion, color, national origin, ancestry, sex, age, blindness [and] disability." W. Va. Code § 5-11-2, § 5-11-3(h), § 5-11-9(1).

The WVHRA exception to the rule of exhaustion of administrative remedies is a narrow one that applies only to causes of action properly brought under the WVHRA. No exception applies to the rule of exhaustion of administrative remedies for a claim, including but not limited to a retaliatory discharge cause of action, that is *not* properly brought under the WVHRA. *Schade v. W. Va. Univ.*, No. 18-0512, 2019 WL 2406730, at *3 (W. Va. June 7, 2019) (not reported).

3. Before a Public Employee May File a Civil Action Raising a Claim Not Cognizable Under the West Virginia Human Rights Act, the Claim Must Be Grieved, and the Grievance Procedure Must Be Exhausted

The *Subramani* Court addressed a petitioner / public employee's argument that filing a

grievance over non-WVHRA claims was a permissive, rather than an exclusive remedy, and that he therefore was not required to exhaust the grievance procedure before filing a civil action. 2015 WL 7628720, at *6. The Court disagreed with the petitioner, writing, "Respondents argue that petitioners' reliance on *Vest* and *Weimer* is misplaced. Petitioner herein, unlike the petitioners in *Vest* and *Weimer,* did not assert any claims under the [WVHRA]; rather, petitioner's claims herein were for due process violations, discrimination, harassment, and reprisal, all of which were within the express jurisdiction of the grievance procedure. We agree." 2015 WL 7628720, at *6.

Similarly, in *Schade*, the Court rejected the petitioner's request that it revisit and reverse its previous decisions requiring claimants to "exhaust all administrative remedies in order to pursue a civil action outside of the grievance proceedings." 2019 WL 2406730, at *3. The Court looked to "the Legislature's intention [in the PEGP, W. Va. Code § 6C-2-1] to resolve grievances through the statutorily provided procedure so that redress may be had in a 'fair, efficient, cost-effective and consistent manner'" and to the general rule that administrative remedies must be exhausted before courts will act. *Schade*, No. 18-0512, 2019 WL 2406730, at *3 (W. Va. June 7, 2019) (citing W. Va. Code § 6C-2-1(b); Syl. Pt. 2, in part, *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 558 S.E.2d 217 (2003)). Because the petitioner in *Schade* had failed to exhaust the grievance procedure with regard to her retaliatory discharge and intentional infliction of emotional distress claims, summary judgment against her was warranted. *Id.*

Here, in the underlying civil action, when the Arbogasts argued to the Circuit Court that Ms. Arbogast was not required to exhaust her administrative remedy before filing a civil action, they misstated applicable law. The Arbogasts made it appear that *Ragione* stands for the proposition that filing a written grievance under the PEGP is permissive, not mandatory. (App. at

164.) But that is not true, as this Court has made clear; there simply is an exception to the doctrine of exhaustion of administrative remedies for claims arising under the WVHRA.

As the *Ragione* decision states:

> On appeal, petitioner argues that the circuit court erred in granting the Board's motion to dismiss under Rule 12(b)(1) as to his breach of contract, fraudulent inducement, and unjust enrichment claims.[] Petitioner contends that the court's ruling misinterprets the language of West Virginia Code § 6C–2–5(a) and (b), and that, as a result, violated his constitutional right to a jury trial. *See* U.S. Const. amend. VII; W.Va. Const. art. III, § 1. Under West Virginia Code § 6C–25(a) and (b), "(a) The decision of the administrative law judge is final upon the parties and is enforceable in the Circuit Court of Kanawha County. (b) A party may appeal the decision of the administrative law judge ... [.]" *Id.* in relevant part. **Petitioner argues that this Court should interpret the term "may" in this statutory language in a manner similar to its holding in syllabus point six of *Weimer v. Sanders*, in which it held that "[a] public employee *may* file a written grievance to the West Virginia Public Employee Grievance Board pursuant to W.Va. Code § 6C2–4(a)(1) (2008) (Repl.Vol.2010); however, such filing is permissive and not mandatory under the clear wording of the statute."** 232 W. Va. 367, 752 S.E.2d 398 (2015). Petitioner argues that this Court should similarly hold that, under West Virginia Code § 6C–2–5(a) and (b), a party should be permitted, but not be required, to appeal a decision of the Grievance Board to the Circuit Court of Kanawha County "before he is entitled to bring a civil action[.]"
>
> **We find petitioner's argument to be without merit.** One of the issues in *Weimer* was whether a public employee who initiated proceedings under the grievance procedure was precluded, while the grievance process was still pending, from instituting a circuit court action alleging that her employer refused to provide reasonable accommodation for her disability. Reasoning that the differences between the grievance procedure and the procedures employed by either a court or the Human Rights Commission are "of profound significance,"[] **we held that "[a] civil action commenced in circuit court under the West Virginia Human Rights Act, W.Va. Code § 5–11–1 *et seq.*, is not precluded by a grievance that was filed with, but not decided by the West Virginia Education and State Employees Grievance Board,** W.Va. Code § 6C–2–1 *et seq.*, and arising out of the same facts and circumstances." 232 W. Va. at 370, 752 S.E.2d at 401, syl. pt. 12. *See also* Syl. Pt. 3, *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d

781 (1995) (holding that "[a] civil action filed under the West Virginia Human Rights Act, W.Va. Code, 5–11–1, *et seq.*, is not precluded by a prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances.").[]

Petitioner's argument that his case should be similarly decided ignores our subsequent decisions in *Subramani* v. *West Virginia University Board of Governors,* No. 14–0924, 2015 WL 7628720 (W.Va. Nov. 20, 2015) (memorandum decision), **and *Redd* v. *McDowell County Board of Education***, No. 15–0566, 2016 WL 2970303 (W.Va. May 20, 2016) (memorandum decision). In both cases, the grievants initiated grievance proceedings but did not appeal adverse level three decisions. Instead, the grievants filed civil actions in circuit court. Neither grievant's circuit court claims alleged violations of the West Virginia Human Rights Act, which distinguished them from *Weimer* and *Vest*.[] This Court determined, in both *Subramani* and *Redd*, that the grievants' claims fell within the express jurisdiction of the Grievance Board and were properly dismissed for failure to exhaust administrative remedies.

As in *Redd* and *Subramani*, petitioner's claims herein do not involve alleged violations of the West Virginia Human Rights Act and, thus, do not fall within this exception to the exhaustion of administrative remedies. Rather, petitioner's claims of breach of contract, fraudulent inducement, and unjust enrichment fall within the grievance procedure. *See* West Virginia Code § 6C–2–2(i)(1) (defining "[g]rievance" as "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication, or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination[.]"). **Accordingly, we find that petitioner's claims were properly dismissed under Rule 12(b)(1).**

Ragione v. Bd. of Educ. of Preston Cty., No. 17-0037, 2018 WL 300576, at *2–3 (W. Va. Jan. 5, 2018) (footnotes omitted) (bolded emphasis added).

The Arbogasts also mischaracterized the decision in *Subramani* in their briefing to the Circuit Court. In *Subramani*, the plaintiff/petitioner was an associate professor who challenged the denial of his request for promotion to the rank of full professor. 2015 WL 7628720, at *2. In their briefing, the Arbogasts made it appear as if, in that case, after filing multiple grievances but not

completing any of them, the petitioner filed lawsuits claiming that the grievances were conducted without providing him with due process. (App. at 165.) The Arbogasts stated in their briefing to the Circuit Court that the action was dismissed because the petitioner's position was inherently flawed, inasmuch as he claimed lack of due process in an administrative proceeding in which he refused to participate. (App. at 165.)

In actuality, the petitioner's due process claim had to do with documents that had been placed in his promotion and tenure file without his knowledge; it was not a claim challenging the grievance process itself. *Subramani*, 2015 WL 7628720, at *3. The *Subramani* Court determined that the circuit court had properly dismissed the plaintiff's claims of "due process violations, discrimination, harassment, and reprisal" because those claims "were within the express jurisdiction of the grievance procedure," and he had not exhausted his administrative remedies. *Id.*, 2015 WL 7628720, at *6. Permitting the petitioner to bring a civil action over his grievable claims would have been "inconsistent with the underlying purposes of the grievance procedure, and would only serve to usurp the legislative scheme." *Subramani*, 2015 WL 7628720, at *7.

The Arbogasts also argued to the Circuit Court that the Court's decision in *Redd* has no bearing on this case. (App. at 165.) To the contrary, in *Redd*, after a county board of education employee's discrimination claims under the WVHRA had been dismissed, the Court found that the remaining claims "fell squarely within the express jurisdiction of the grievance board." *Redd*, 2016 WL 2970303, at *4. The Court thus affirmed the circuit court's grant of summary judgment to the defendants. *Id.*, 2016 WL 2970303, at *5.

The *Ragione*, *Subramani*, and *Redd* decisions are analogous to the case at hand and demonstrate that the Circuit Court erred when it denied the RCBOE and Mr. Devono's motion to dismiss.

4. *Challenges to Employment Actions Are Grievable Even When the Challenge Is Premised on Constitutional Rights*

The Arbogasts argued to the Circuit Court, without citing to authority in support of their position, that the PEGB cannot adjudicate constitutional rights. Their argument is unsupported and incorrect.

Contrary to the Arbogasts' argument, the U.S. District Court for the Southern District of West Virginia found that it lacked subject matter jurisdiction over, and thus dismissed, claims alleging wrongful termination/constructive discharge that were purportedly based on constitutional rights because the plaintiff had not first exhausted his administrative remedies under the PEGP. *Corbett v. Duerring*, 726 F. Supp. 2d 648, 650-51, 656 (S.D.W. Va. 2010). There, the plaintiff claimed that he had been wrongfully or constructively discharged "'in retaliation for his exercise of his ***constitutional right to free speech and expression*** and his refusal to "make deals" [with students whose parents were "persons of influence"] effecting the unequal treatment of students in Kanawha County Schools.'" *Id.*, 726 F. Supp. 2d at 650-51 (emphasis added). The Court dismissed the claim for lack of subject matter jurisdiction, holding that the administrative procedure provided in the PEGP was designed to first address such claims. *Id.*, 726 F. Supp. 2d at 652, 655.

Accordingly, here, it does not matter that the Arbogasts have pointed to the U.S. Constitution as a source of alleged public policies that they allege were violated by Ms. Arbogast's discharge. Even where a wrongful, retaliatory discharge claim is premised on a public policy manifested in the federal constitution, the plaintiff must exhaust the grievance procedure available under W. Va. Code § 6C-2-1 *et seq.* before filing a civil action in court.

Moreover, Ms. Arbogast's claims are not standalone claims alleging violations of constitutional rights. Rather, they are common-law wrongful, retaliatory, and constructive discharge claims, which this Court has repeatedly recognized are grievable claims. The first element of such claims is proof that a public policy is "manifested in a state or federal constitution, statute or administrative regulation, or in the common law." *Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 726, 815 S.E.2d 520, 537 (2018); *see* Syl. Pt. 5, *Slack v. Kanawha Cty. Hous. & Redevelopment Auth.*, 188 W. Va. 144, 146, 423 S.E.2d 547, 549 (1992) (stating in part, "Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish the retaliatory discharge.")

Common-law claims for retaliatory or wrongful discharge premised on a policy manifested in a constitution are thus different from standalone claims alleging violations of constitutional rights. *See Burke*, 240 W. Va. at 725, 815 S.E.2d at 536 (2018) (distinguishing "a claim for retaliatory discharge in violation of [the plaintiff's] constitutional rights" from "a stand-alone claim for a violation of his constitutional right to run for public office"). Nothing in Ms. Arbogast's claims excused her from exhausting her remedies under the PEGP.

5. The Court's Decisions in Burke *and* McClung *Do Not Support the Arbogasts' Argument to the Circuit Court that Ms. Arbogast Did Not Have to Exhaust Her Administrative Remedy*

In their briefing to the Circuit Court, the Arbogasts relied heavily on *Burke* (240 W. Va. 709) and also on *McClung v. Marion Cty. Comm'n*, 178 W. Va. 444, 447, 360 S.E.2d 221, 224 (1987) to argue that Ms. Arbogast may pursue the underlying civil action without first exhausting her administrative remedy. However, *Burke* and *McClung* do not support their argument.

As the Arbogasts have acknowledged, the *Burke* decision contains no discussion of administrative remedies or the PEGP (W. Va. Code § 6C-2-1, *et seq.*). (App. at 167.) Likewise,

the *McClung* Court did not discuss the PEGP, exhaustion of administrative remedies, or any jurisdictional impediments to the suit. That is because, unlike Ms. Arbogast and the RCBOE, the parties to *Burke* and *McClung* were not employees or employers covered by the PEGP. The defendants in *Burke* were the Wetzel County Commission and the Wetzel County Assessor. *Burke*, 240 W. Va. at 715, 815 S.E.2d at 526. In *McClung*, the defendant employee was the Marion County Commission. *McClung*, 178 W. Va. at 447, 360 S.E.2d at 224.

The *Burke* Court and the *McClung* Court had no reason to discuss or consider whether the PEGP (W. Va. Code § 6C-2-1 *et seq.*) applies because the defendants to those actions were not "employers" as defined by that Act. Under W. Va. Code § 6C-2-2(g), "'Employer' means a ***state*** agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section." W. Va. Code § 6C-2-2 (emphasis added). The only ***county*** entities defined as "employers" under the PEGP are therefore county boards of education such as RCBOE – ***not*** county commissions or county assessors such as the defendants to the *Burke* and *McClung* actions.

Burke and *McClung* thus contain no authority permitting the Arbogasts to bring the present civil action without first grieving claims pursuant to the PEGP.

6. Counts I, II, III, and VII Fail to State Claims Under the West Virginia Human Rights Act

The Arbogasts' original complaint set forth causes of action in Counts I–V for wrongful, retaliatory, and/or constructive discharge, all of which were premised on the allegation that Ms. Arbogast was discharged (or constructively discharged) in violation of public policies. (App. at 010-019.) In their Amended Complaint, the Arbogasts set forth the same five causes of action, but

in Counts I, II, and III (though not in Counts IV or V), they added conclusory allegations that Ms. Arbogast's discharge violated the WVHRA. (App. at 027-034 ¶¶ 22, 27, 32-33, 39, 42, 45, 49, 52, 55-56, 61, 64, 66.) Similarly, in their Amended Complaint, the Arbogasts added an allegation in Count VII, which attempts to set forth a claim for "tortious interference with medical care," that Mr. Devono sought Ms. Arbogast's medical records and information about her treatment "to create bogus reasons for her discharge, in violation of the" WVHRA. (App. at 038-039 ¶¶ 96, 98-99.)

However, the WVHRA protects against discrimination in employment only where the discrimination is based on "race, religion, color, national origin, ancestry, sex, age, blindness or disability." W. Va. Code § 5-11-2, § 5-11-3(h), § 5-11-9(1). The WVHRA thus prohibits "unlawful discriminatory practice[s]," including by prohibiting any person and any employer from engaging in threats, reprisal, and/or harassment; from aiding, abetting, inciting, compelling, or coercing another to engage in an unlawful discriminatory practice; from willfully obstructing or preventing someone from complying with the WVHRA; and from engaging in reprisal or discrimination against a person due to that person's opposition to practices or acts prohibited by the WVHRA. W. Va. Code § 5-11-9(7)(A) – (C).

The WVHRA is not generally applicable to any and all reprisal, harassment, discrimination, etc. Rather, as the Court has explained, the WVHRA, including in § 5-11-9(7), prohibits certain actions only when they are motivated by an individual's race, religion, color, national origin, ancestry, sex, age, blindness, disability, or familial status:

> We wish to clarify that, to be covered under the Human Rights Act, prohibited actions must be perpetrated against a member of one of the specific protected classes identified therein. **Although W. Va. Code § 5–11–9(7)(A) does not expressly state that it applies only to members of a protected class, this limitation is understood** because W. Va. Code § 5–11–9 expressly proscribes "unlawful *discriminatory* practices." (Emphasis added). The meaning ascribed to the term "discriminate" or "discrimination" by the Human Rights

> Act is "to exclude from, or fail or refuse to extend to, a person equal opportunities *because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status* and includes to separate or segregate." W. Va. Code § 5–11–3(h) (1998) (Repl. Vol. 2006) (emphasis added).

Michael v. Appalachian Heating, LLC, 226 W. Va. 394, 402 n.16, 701 S.E.2d 116, 124 n.16 (2010) (bolded emphasis supplied). *See also Roth v. DeFeliceCare, Inc.*, 226 W. Va. 214, 224-25, 700 S.E.2d 183, 193-94 (2010) (dismissing a retaliatory discharge claim brought under the WVHRA where the plaintiff did not allege that retaliation was based on complaints of sexual harassment or discrimination or opposition to any violation of the WVHRA).

In the present civil action, the Arbogasts claim in Counts I, II, III, and VII that a violation of the WVHRA occurred, though Count VII was not brought under the WVHRA, and Count III is titled "Wrongful Discharge in Violation of Whistle Blower Statute". No reasonable construction of these claims could find that they arose under the WVHRA, because nowhere in the Complaint do the Arbogasts allege that the RCBOE or Mr. Devono discriminated, harassed, or retaliated against Ms. Arbogast based on her membership in any WVHRA-protected class or for opposing any violation of the WVHRA. Instead, the Arbogasts clearly allege that Mr. Devono and the RCBOE's motivation for the acts alleged in the Complaint arose from Ms. Arbogast's report of alleged abuse of her son by a teacher, which is not a report which invokes any provision of the WVHRA.[2] Thus, the Arbogasts' contention that the WVHRA prohibits reprisal and retaliation generally is incorrect.

[2] A common law cause of action exists apart from the WVHRA for plaintiffs who allege wrongful discharge in violation of public policy. *See Harless v. First Nat. Bank in Fairmont*, 162 W. Va. 116, 124, 246 S.E.2d 270, 275 (1978) (deciding, after the WVHRA was enacted, to create a cause of action for at will employees "where the employer's motivation for the discharge contravenes some substantial public policy principle"). *Harless*-type wrongful/retaliatory discharge claims, as set forth in detail above, are subject to the PEGP.

The claims in Counts I, II, and III, like Counts IV and V, are clearly *Harless*-type wrongful and retaliatory discharge claims based on alleged violations of alleged public policies outside of the scope of the WVHRA. The Amended Complaint contains conclusory allegations that Ms. Arbogast's discharge violated the WVHRA, but it contains absolutely no allegations of fact implicating any of the classes or conduct protected by the WVHRA.

On the other hand, the Amended Complaint repeatedly alleges that the RCBOE and Mr. Devono discharged or constructively discharged Ms. Arbogast because she reported alleged abuse by a teacher. (App. at 025-027, 030, 033 ¶¶ 6-16, 20-22, 26, 45, 58-61.) For example, the Arbogasts allege that "[s]ubstantial public policy protects Marlene Arbogast from retaliation for the reporting of abuse to the school system including the West Virginia Human Rights Act . . . ." (App at 027 ¶ 22.) But again, the alleged public policies that the Arbogasts rely on as the legal bases for the discharge claims do not arise from the WVHRA. Rather, the Arbogasts claim that the policies violated by Ms. Arbogast's discharge include, for example, public policies allegedly prohibiting the intimidation of witnesses and retaliation for reporting abuse and/or wrongdoing. The Arbogasts thus have no viable claim for public policy-based wrongful, retaliatory, or constructive discharge *under the WVHRA*.

Because the Arbogasts relied heavily on the Court's opinion in *Burke* in their briefing to the Circuit Court, it is worth noting that the *Burke* Court found that the plaintiff there had sufficiently alleged claims under the WVHRA such that he could survive a Rule 12(b)(6) motion because he alleged disability discrimination, and disability is one of the classes that the WVHRA protects. *Burke*, 240 W. Va. at 723, 815 S.E.2d at 534. Obviously, *Burke* is distinct because, here, Ms. Arbogast does not allege that she was discriminated against or otherwise mistreated due to her membership in any class protected by the WVHRA.

Therefore, to the extent that the Arbogasts have alleged a cause of action under the WVHRA, they have failed to state a claim upon which relief can be granted. Accordingly, the Circuit Court clearly erred when it denied the RCBOE and Mr. Devono's W. Va. R. Civ. P. 12(b)(6) motion to dismiss Counts I, II, III, and VII to the extent that they allege one or more violations of the WVHRA. A writ of prohibition should be issued to correct this error and prevent further irreparable harm to the RCBOE and Mr. Devono.

7. Because Ms. Arbogast's Wrongful, Retaliatory, and Constructive Discharge Claims in Counts I – V Do Not Implicate the WVHRA, Courts Lack Subject Matter Jurisdiction over Those Claims

Because Ms. Arbogast did not grieve her claims in Counts I–V before filing suit, courts lack subject matter jurisdiction over those claims. Counts I–V all allege wrongful, retaliatory, and/or constructive discharge due to alleged violations of various alleged public policies, none of which are manifested in the WVHRA. The Arbogasts did not bring Counts IV or V under the WVHRA, and their claims in Counts I, II, and III do not implicate the WVHRA. Rather, the claims set forth in Counts I–V are all based on alleged violations of alleged public policies existing outside of the WVHRA.

Therefore, pursuant to many clear and consistent decisions of the Court, Ms. Arbogast was required to grieve the claims set forth in Counts I–V and to exhaust her administrative remedies before pursuing a civil action on those claims. Her failure to do so deprives the Circuit Court of subject matter jurisdiction over her claims and Mr. Arbogast's derivative claims of loss of consortium.

The Arbogasts cannot avoid the fact that subject matter jurisdiction does not exist over Counts I, II, and III simply by inserting the conclusory phrase "in violation of the West Virginia Human Rights Act" in those counts; such unsupported legal conclusions should be ignored when

determining whether dismissal is appropriate. *See Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014). The Arbogasts' allegations of fact clearly allege no violation of the WVHRA, and Counts I, II, and III, like Counts IV and V, are unequivocally *Harless*-type claims that must be grieved as a jurisdictional prerequisite before suit may be filed.

The Circuit Court made a "'substantial, clear-cut, legal error[] plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts'" when it denied the RCBOE and Mr. Devono's W. Va. R. Civ. P. 12(b)(1) motion to dismiss Counts I, II, III, IV, and V for lack of subject matter jurisdiction. *Maxxim Shared Servs.*, 242 W. Va. at 349, 835 S.E.2d at 593. A writ of prohibition should be issued to stop enforcement of, and reverse, the Circuit Court's clearly and substantially erroneous order.

8. Subject Matter Jurisdiction Does Not Exist over Count VII, "Tortious Interference with Medical Care"

Similarly, the Circuit Court erred when it refused to dismiss Count VII, in which the Arbogasts allege "Tortious Interference with Medical Care," under W. Va. R. Civ. P. 12(b)(1). In that cause of action, the Arbogasts claim that Mr. Devono interfered with Ms. Arbogast's medical care and that he sought medical records and information about her treatment from her healthcare provider. (App. at 038 ¶¶ 95-96.) The claim set forth in Count VII, although not available to Ms. Arbogast as a civil cause of action (as is explained below), was grievable. Thus, even if such a claim were available to Ms. Arbogast in a civil action, courts would lack subject matter jurisdiction over it.

As the U.S. District Court for the Southern District of West Virginia has recognized, claims including breach of privacy, harassment, intentional infliction of emotional distress, and retaliation

due to the plaintiff's "vocal criticism of administration" "clearly fall within the definition of grievance and, consequently, must be submitted to the PEGB for consideration." *Hallman-Warner v. Bluefield State Coll.*, No. 1:17-CV-02882, 2018 WL 1309748, at *11 (S.D.W. Va. Jan. 19, 2018) (not reported) (emphasis added) (citing *Subramani*, 2015 WL 7628720, at *5-6 (W. Va. Nov. 20, 2015)), *report and recommendation adopted*, No. CV 1:17-02882, 2018 WL 1309726 (S.D.W. Va. Mar. 13, 2018). Because the *Hallman-Warner* plaintiffs had not exhausted their administrative remedy under W. Va. Code § 6C-2-1, *et seq.*, the court dismissed their claims of "harassment, intentional infliction of emotional distress, retaliation, . . . and breach of privacy" due to lack of subject matter jurisdiction. *Hallman-Warner*, 2018 WL 1309748, at *10-11.

Furthermore, grievance board decisions establish that Ms. Arbogast's claim is grievable. For example, the PEGB heard a grievance that alleged that the grievant's personal medical information had been revealed to her coworkers and thus that her privacy rights had been violated. *Tammy L. Jones v. Dep't of Health and Human Res.*, 2010 WL 2854927, at *1 (W. Va. Pub. Emp. Grievance Bd., July 1, 2010) (App. at 115-118.) There, a supervisor who was aware that the grievant took medication for depression and concentration had asked the grievant in front of another employee "if she was taking her medication, because she would need it." *Id.* The grievant claimed that the supervisor thus had invaded her privacy.

The PEGB stated, "privacy issues can be grieved, as they are a guaranteed right for a public employee, and disclosure of sensitive information could be perceived as hostile or provoking." *Jones*, 2010 WL 2854927 at *3. The PEGB proceeded to analyze the grievant's claims for invasion of privacy and hostile work environment. *Id.*, at *4. *See also Sandra F. Parker v. W. Va. Dep't of Health and Human Res./Div. of Health/Welch Emergency Hosp.*, 1992 WL 802025, at *5 (W. Va. Pub. Emp. Grievance Bd., Apr. 22, 1992) (PEGB decided a grievance alleging invasion of privacy

when a supervisor asked a doctor, who had assessed the grievant's health, whether the grievant was really sick) (App. 119-126); *William Watson, Jr. v. W. Va. Dep't of Health and Human Res./Bureau for Behavioral Health and Health Facilities/Mildred Mitchell-Bateman Hosp.*, 2009 WL 5386058 (W. Va. Pub. Emp. Grievance Bd., Dec. 31, 2009) (PEGB determined that a policy was overly broad and void because it invaded the grievant's right to privacy) (App. at 127-135)).

The PEGB can also hear grievances challenging an employee's discharge for failing to comply with the employer's requirement to provide it with certain information from the employee's medical provider. For example, the PEGB decided a grievance brought by a tenured professor who challenged her discharge "based upon her failure to present medical certification of her ability to resume her teaching duties following the expiration of an approved Medical Leave of Absence, as provided in a Return to Work Agreement[.]" *L. A. v. Marshall Univ.*, 2013 WL 8332682, at *1 (W. Va. Pub. Emp. Grievance Bd., Nov. 21, 2013) (App. at 144-153.) There, the employer had tried to connect the professor with, and encouraged the professor to see, medical providers to obtain treatment, but the employee was not able to demonstrate that she was medically fit to return to teaching. *Id.* The PEGB found that the employer's requirement that the employee provide such medical evidence was reasonable and thus denied the grievance. *Id.*

Here, in Ms. Arbogast's claim for "tortious interference with medical care," she alleges that Mr. Devono sought and induced the disclosure of confidential information about her treatment and her medical records from her health care provider. (App. at 038-039 ¶¶ 96-99.) Ms. Arbogast's claim is similar to the grievance the PEGB decided in *L. A. v. Marshall Univ.*, where the employer required certain medical evidence about the employee. Her claim is also similar to the grievance the PEGB decided in *Tammy L. Jones v. Dep't of Health and Human Res.*, where the grievant's

medical information was disclosed to an employee. These similarities show that Ms. Arbogast's claim was grievable.

Moreover, her claim fits within the PEGP's broad definition of "grievance," which includes claims alleging a violation of statute, policies, rules, or written agreements; any "discriminatory or otherwise aggrieved application of unwritten policies or practices"; harassment; favoritism; and any "action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee." W. Va. Code § 6C-2-2(i)(1). In her claim, Ms. Arbogast alleges that Mr. Devono interfered with her medical care and that he sought her medical records and information about her treatment "with the intent to harass, intimidate, degrade and retaliate against Marlene Arbogast . . .." (App. at 038 ¶¶ 95-96.) Her claims of alleged harassment and interference with her health explicitly fit within the definition of "grievance."

It follows that, regardless of whether Ms. Arbogast's claim of "tortious interference with medical care" is a viable claim under West Virginia law, she was required to file a grievance and exhaust her administrative remedy before asserting her claim in a civil action. Until then, courts lack subject matter jurisdiction over the claim and Mr. Arbogast's derivative claim for loss of consortium.

The Circuit Court made a "'substantial, clear-cut, legal error[] plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts'" when it denied the RCBOE and Mr. Devono's W. Va. R. Civ. P. 12(b)(1) motion to dismiss Count VII for lack of subject matter jurisdiction. *See Maxxim Shared Servs.*, 242 W. Va. at 349, 835 S.E.2d at 593. A writ of prohibition should therefore be issued to correct the Circuit Court's clear and substantial error.

9. A Writ of Prohibition Should Be Issued to Correct the Circuit Court's Clear Legal Error in Denying the Motion to Dismiss Under Rule 12(b)(1)

The RCBOE and Mr. Devono have met their burden of clearly demonstrating that the Circuit Court lacks subject matter jurisdiction over Counts I, II, III, IV, V, and VII. *See Health Mgmt., Inc. v. Lindell*, 207 W. Va. 68, 72, 528 S.E.2d 762, 766 (1999). Therefore, pursuant to W. Va. Code § 53-1-1 and the precedent of this Court, a writ of prohibition lies as a matter of right in this matter, regardless of the existence of other remedies, because the Circuit Court does not have jurisdiction of the subject matter in controversy. *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003); *State ex rel. Monster Tree Serv., Inc. v. Cramer*, 244 W. Va. 355, 853 S.E.2d 595, 602 (2020).

The RCBOE and Mr. Devono have no other adequate means to obtain relief. Absent the issuance of a writ of prohibition, they will be forced to defend themselves against six causes of action in a forum that lacks jurisdiction over those claims. A successful appeal at the end of the litigation in Circuit Court could not correct the inevitable expense of money, time, and resources that the RCBOE and Mr. Devono would waste litigating claims over which the Circuit Court lacks jurisdiction. Thus, the only relief available to the RCBOE and Mr. Devono is the issuance of the requested writ of prohibition, which lies as a matter of right under the circumstances.

C. A Writ of Prohibition Should Be Issued Because Counts I, II, III, and VII, and Mr. Arbogast's Loss of Consortium Claims in Counts I–V and VII, Plainly Fail to State Claims Upon Which Relief Can Be Granted

In addition to moving to dismiss under W. Va. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, the RCBOE and Mr. Devono moved the Circuit Court to dismiss Counts I, II, III, and VII, as well as Mr. Arbogast's loss of consortium claims in Counts I–V and VII, pursuant to W. Va. R. Civ. P. 12(b)(6) for failure to state claims upon which relief can be granted. (App. at 043-

053, 177-198.)

The RCBOE and Mr. Devono showed above, in Section V.B.6, that Counts I, II, and III fail to state claims under the WVHRA as a matter of law because the Arbogasts do not claim that Ms. Arbogast was discriminated against based on either membership in any of the classes or engagement in any conduct protected by the WVHRA. Therefore, for the reasons articulated above, the Circuit Court made a clear and substantial legal error when it denied the RCBOE and Mr. Devono's partial motion to dismiss Counts I, II, and III to the extent that they allege violations of the WVHRA.

Additionally, as shown below, Count VII, as well as Mr. Arbogast's loss of consortium claims in Counts I–V and VII, plainly fail to state claims upon which relief can be granted, and therefore the Circuit Court also committed clear and substantial legal error when it denied the RCBOE and Mr. Devono's motion to dismiss those claims under W. Va. R. Civ. P. 12(b)(6).

1. Count VII Fails to State a Claim Because No Cause of Action Against a Third Party for Inducing a Physician to Breach a Fiduciary Relationship Has Been Recognized Outside of the Workers' Compensation Context

Count VII contains Ms. Arbogast's claim for "tortious interference with medical care." This is not a recognized claim in West Virginia, but the Court has recognized that a workers' compensation claimant has a cause of action against a third party who induces a physician to breach the fiduciary relationship if certain elements are met. *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 435, 446 S.E.2d 648, 657 (1994). However, "the *Morris* Court expressly limited its holding to 'unauthorized, *ex parte* oral communications between an employer and the treating physician *of a workers' compensation claimant* regarding confidential physician/patient information.'" *Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11, 20, 537 S.E.2d 632, 641 (2000) (emphasis added) (citing *Morris*, 191 W.Va. at 431, 446 S.E.2d at 653).

In *Keplinger*, the Court answered a certified question asking whether a cause of action as recognized in *Morris* exists "based upon a violation of the provisions of W. Va. Code §§ 57–5–4a—4j, when the violation allegedly occurred by virtue of the party's action in subpoenaing medical professionals pursuant to Rules 34 and 45 of the West Virginia Rules of Civil Procedure for the sole purpose of inspecting and copying the opposing party's medical records rather than subpoenaing such records in connection with a hearing, deposition or trial." *Keplinger*, 208 W. Va. at 16, 537 S.E.2d at 637.

In answering the certified question "in the negative," the Court reasoned in part that, "by its own terms, *Morris* would apply to a lawyer's failure to comply with W. Va. Code §§ 57–5–4a—4j only if that failure occurred in connection with a workers' compensation case, and only where it involved an unauthorized *ex parte* oral communication. While, at some point, we may deem it appropriate to further extend our holding in *Morris,* we decline to do so in connection with the case at bar." *Keplinger*, 208 W. Va. at 20, 537 S.E.2d at 641.

In the present civil action, Ms. Arbogast is not a workers' compensation claimant. Therefore, the cause of action recognized in *Morris* is not available to her. The Arbogasts suggested to the Circuit Court (without citation) "that obtaining someone's medical records without her consent is . . . a violation of HIPPA [sic]," (App. at 171), but they have not brought a cause of action under the Health Insurance Portability and Accountability Act ("HIPAA") or otherwise alleged a violation of HIPAA in their complaint.

Accordingly, Count VII fails to set forth a claim upon which relief can be granted. The Circuit Court thus committed a substantial and clear legal error when it did not dismiss Count VII under W. Va. R. Civ. P. 12(b)(6).

2. *Mr. Arbogast's Claims for Loss of Consortium in Counts I – V and VII Fail as a Matter of Law*

In each of Counts I, II, III, IV, V, and VII, Mr. Arbogast has set forth a claim for loss of consortium, derivative of each of the causes of action Ms. Arbogast asserts in those counts. "A claim for loss of consortium cannot be maintained independent of a cognizable personal injury claim." *S. Env't, Inc. v. Bell*, 244 W. Va. 465, 854 S.E.2d 285, 293 (2020) (citing *State ex rel. Small v. Clawges,* 231 W. Va. 301, 745 S.E.2d 192 (2013)). Where a personal injury claim is not cognizable and is dismissed, a derivative loss of consortium claim "must also be dismissed." *Id.*

Because Ms. Arbogast's claims in Counts I, II, III, IV, V, and VII all fail under Rules 12(b)(1) and/or 12(b)(6) of the West Virginia Rules of Civil Procedure, Mr. Arbogast's derivative loss of consortium claims pursuant to those Counts also necessarily fail to state claims upon which relief can be granted. Therefore, the Circuit Court clearly and substantially erred when it did not dismiss the loss of consortium claims pursuant to W. Va. R. Civ. P. 12(b)(6).

3. *The Standard for Issuance of a Writ of Prohibition Based on a Rule 12(b)(6) Motion to Dismiss Is Satisfied*

Here, the five-factor test for the issuance of a writ of prohibition arising from a W. Va. R. Civ. P. 12(b)(6) motion to dismiss is satisfied, meaning that a writ should be issued. *See State ex rel. Maxxim Shared Servs., LLC v. McGraw*, 242 W. Va. 346, 349–50, 835 S.E.2d 590, 593–94 (2019). The five factors are:

> "(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Id. (citation omitted). All five factors do not need to be satisfied, and the third factor must be "'given substantial weight.'" *Id.* (citation omitted). A writ of prohibition is appropriate, for example, where a circuit court's order denying a motion to dismiss "wrongly extend[s] this State's common law." *Id.*, 242 W. Va. at 353, 835 S.E.2d at 597.

Writs of prohibition are granted "'to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.'" *Maxxim*, 242 W. Va. at 349, 835 S.E.2d at 593. Issuance of a writ reversing a circuit court's denial of a motion to dismiss one claim is appropriate even if another claim will remain pending in the circuit court. *See id.*, 242 W. Va. at 353-54, 835 S.E.2d at 597-98 (granting a writ of prohibition based on a circuit court's refusal to dismiss one claim but denying the writ as to the circuit court's refusal to dismiss a second claim).

Based on the applicable standard, in the present civil action, it is most important to consider that, when the Circuit Court denied the RCBOE and Mr. Devono's motion to dismiss the retaliatory, constructive retaliatory, and wrongful discharge claims in Counts I, II, III (to the extent that they purport to arise under the WVHRA); Count VII (tortious interference with medical care); and all of Mr. Arbogast's derivative loss of consortium claims in Counts I – V and VII, it clearly made a "substantial, clear-cut, legal error[] plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts." *See Maxxim*, 242 W. Va. at 349, 835 S.E.2d at 593.

Under the law, Ms. Arbogast absolutely does not have a claim under the WVHRA, and she is not a workers' compensation claimant and thus has no claim for tortious interference with

medical care. Mr. Arbogast plainly has no loss of consortium claims where Ms. Arbogast's primary claims fail. These issues may be resolved independently of any disputed facts; the claims are not viable as a matter of law. Thus, the third and most important factor weighs heavily in favor of granting the requested writ of prohibition.

Furthermore, the RCBOE and Mr. Devono have no other adequate means to obtain relief because if the Court does not issue a writ of prohibition, they will be forced to fully litigate and defend themselves against six clearly non-viable causes of action. Their defense would cost a substantial amount of time, money, and other resources, and it would most likely require the use of one or more expert witnesses. Given that the Circuit Court has refused to dismiss these claims despite their non-viability, the claims would likely proceed to trial, which would be unduly burdensome particularly given that the claims are not viable under clearly established law. Even a successful appeal could not correct the damages (substantial lost resources) the RCBOE and Mr. Devono would incur by being forced to defend against the Arbogasts' non-viable claims. Accordingly, the first and second factors weigh heavily in favor of granting a writ of prohibition.

While the RCBOE and Mr. Devono do not know whether the Circuit Court's error "is an oft repeated error or manifests persistent disregard for either procedural or substantive law," the contested order in the underlying civil action clearly demonstrates disregard for the WVHRA and decisions of this Court explaining it, as well as disregard for the Court's decision not to provide for a claim for "tortious interference with medical care" (at least for non-workers' compensation claimants). The Circuit Court's order certainly raises "important problems," which should be corrected so that the RCBOE and Mr. Devono are not unjustly harmed and, hopefully, so that the Circuit Court does not repeat its errors in the future. It follows that the fourth and fifth factors also weigh in favor of granting a writ of prohibition.

Under these circumstances, a writ of prohibition should be issued.

VI. CONCLUSION

For all of the foregoing reasons, Petitioners the RCBOE and Mr. Devono petition the Court to issue a writ of prohibition reversing the Circuit Court's order denying the RCBOE and Mr. Devono's partial motion to dismiss and directing the Circuit Court to dismiss Counts I – V and VII of the Amended Complaint due to lack of subject matter jurisdiction and failure to state claims upon which relief can be granted.

Susan L. Deniker (WV Bar ID #7992)
Jeffrey M. Cropp (WV Bar ID #8030)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330-4500
(304) 933-8000
Susan.Deniker@Steptoe-Johnson.com
Jeffrey.Cropp@Steptoe-Johnson.com

Counsel for Petitioners The Randolph County Board of Education and Gabriel Devono

VERIFICATION

State of West Virginia, Randolph County, to-wit:

Gabriel Devono, a petitioner named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, he believes them to be true.

Gabriel Devono,
Petitioner.

Taken, sworn to and subscribed before me this 22nd day of June, 2022.

Notary Public

OFFICIAL SEAL
Notary Public, State of West Virginia
MELISSA D. WOLFE
400 White Oaks Blvd.
Bridgeport, WV 26330
My commission expires April 9, 2024

VERIFICATION

State of West Virginia, Randolph County, to-wit:

Debra Schmidlen, the Superintendent of the Randolph County Board of Education, one of the petitioners named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, she believes them to be true.

Debra Schmidlen

Debra Schmidlen,
Superintendent of Petitioner the Randolph County Board of Education.

Taken, sworn to and subscribed before me this 14th day of June, 2022.

Notary Public

Commission Expires: 3/3/26

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Vickie Louise Dewitt
37 Livingston Street
Beverly, WV 26253
My Commission Expires 03/03/2026

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

STATE OF WEST VIRGINIA ex rel. GABRIEL DEVONO and THE BOARD OF EDUCATION OF THE COUNTY OF RANDOLPH,

Petitioners,

v.

HONORABLE DAVID H. WILMOTH, Judge of the Circuit Court of Randolph County, West Virginia, SHERMAN ARBOGAST, and MARLENE ARBOGAST,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2022, I served a true and complete copy of the foregoing "***Verified Petition for Writ of Prohibition***" and "***Appendix***" upon those listed below, by overnight mail addressed as follows:

James R. Fox, Esquire
FOX LAW OFFICE, PLLC
3359 Teays Valley Road
Hurricane, WV 25526
Counsel for Plaintiff

Honorable David H. Wilmoth
Circuit Court of Randolph County
Randolph County Courthouse
2 Randolph Avenue
Elkins, WV 26241

Susan L. Deniker (WV Bar ID #7992)
Jeffrey M. Cropp (WV Bar ID #8030)
400 White Oaks Boulevard
Bridgeport, WV 26330-4500
(304) 933-8000

Counsel for Defendants The Randolph County Board of Education and Gabriel Devono

STEPTOE & JOHNSON PLLC
OF COUNSEL