No. 22-631

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID CHRISTOPHER KEFFER

Petitioner Below, Petitioner,

v.

FAYETTE COUNTY BOARD OF EDUCATION

Respondent Below, Respondent.

From the Circuit Court of Fayette County, West Virginia
The Honorable Paul M. Blake, Jr.
Civil Action No. 20-C-70

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This appeal arises from the Circuit Court of Fayette's County's granting of Respondent's Motion for Summary Judgment. The underlying civil action arises from Petitioner's termination from the Fayette County Board of Education ("FCBE") as the result of impermissibly removing copper/brass from the Collins Middle School complex ("CMS") and having scrapped the same and keeping the proceeds. The Petitioner was criminally indicted and entered into a pre-trial diversion agreement as a result of the subject criminal charges. The records in this case show that the Petitioner identified himself as the owner of the scrap metal and he received cash in return for scrapping the subject copper/brass. The Petitioner did not have permission to remove the copper/brass and did not give the proceeds from the scrapping of the copper/brass to the FCBE. After learning of the previous conduct, a criminal investigation was conducted into the same and Petitioner's employment with the FCBE was terminated for failure to comply with the financial/budgetary process that apply to school/county property. The Petitioner testified during his deposition that the basis of all of his claims which he asserted in the underlying matter stem from the investigation into his removal of the copper/brass from CMS and no other incidents. Appendix Record ("AR") at pp. 6-7.

FCBE technology employees, Chris Marty and Moses Shrewsbury, became aware of a disturbance in the ceiling tiles and disturbed pipe wrapping at CMS. AR at pp. 9-10; 12-17. Mr. Marty and Mr. Shrewsbury reported the disturbance to Jack Herron, Maintenance Supervisor, and asbestos contact for Fayette County Schools. *Id.* They reported the disturbance to Mr. Herron as they were concerned as to the disturbance of asbestos containing materials. *Id.* Mr. Shrewsbury and Mr. Marty observed the disturbance to the ceiling tiles and pipes, one or two weeks prior to June 1, 2018. *Id.*

In June of 2018, Mr. Herron was alerted to some asbestos related issues at CMS by the IT department. AR at pp. 21-23. Moses Shrewsbury informed Mr. Herron of some possible asbestos disturbance/removal. *Id.* at p. 21. Mr. Herron then reviewed video of CMS, which showed the Petitioner with a ladder and sawzall removing copper piping wrapped in insulation containing some asbestos material. *Id.* Once Mr. Herron saw removal of asbestos containing material, he knew that he had to take some sort of action as he was tasked with ensuring county compliance with its asbestos management plan. *Id.* Although the Petitioner was Mr. Herron's direct supervisor, because the conduct in question involved the Petitioner, Mr. Herron sought guidance on how to report the issue from Gary Hough, Associate Superintendent at the time. *Id.* at pp. 21; 23. At the point, Mr. Herron initially reviewed the footage, he was unaware if the Petitioner was supposed to be removing any piping and his sole focus was on asbestos related disturbance. *Id.* at pp. 22-23. The Petitioner was aware of the asbestos management plan for the county and its protocol for removing any asbestos containing materials. *Id.* Mr. Herron reported the issue to Mr. Hough on Monday or Tuesday of the week of June 1, 2018. *Id.* at p. 24.

Mr. Hough offered testimony confirming that Mr. Herron alerted him to an asbestos related issue and a concern about missing pipe at CMS around the end of May. AR at p. 36. Mr. Herron also informed Mr. Hough that there was video of the event(s). *Id.* After being alerted to the issue, Mr. Hough contacted Mr. Marty and Mr. Shrewsbury and asked that they provide him with a copy of the video. *Id.* Mr. Hough did alert Margaret Pennington, Director of Personnel, at the time, and advised her that there may be an issue with the Petitioner. *Id.* Mr. Hough received a copy of the video the next morning and reviewed the same with Ms. Pennington. *Id.* After reviewing the video, Mr. Hough and Ms. Pennington discussed what the next step should be and that is when they contacted Terry George, Superintendent for Fayette County Schools at the

time. *Id.* at p. 37. Mr. George confirmed that Mr. Hough notified him of copper pipes being removed from CMS by the Petitioner off company time. AR at p. 44.

The following day, June 1, 2018, Mr. Hough and Ms. Pennington took the video to Mr. George's home for him to review. AR at p. 37. After reviewing the video, Mr. George then reached out to general counsel for the FCBE, Denise Spatafore, Esq. *Id.* Ms. Spatafore advised that the Petitioner should be placed on administrative leave pending the investigation. *Id.* at 45-46. After meeting with Mr. George, Mr. Hough and Ms. Pennington were then instructed to contact the Sheriff's Department to see if the copper/brass had been sold. *Id.* at pp. 37; 44.

Mr. Hough then contacted the Fayette County Sheriff's Department. AR at p. 37. Mr. Hough spoke with Sheriff Fridley, who then set up an appointment that same day to view the video. *Id.* at p. 38. Mr. Hough, Ms. Pennington, Prosecutor Larry Harrah, Sheriff Mike Fridley, and Deputy Shawn Campbell, then met and viewed the video. *Id.* After the meeting with the Prosecutor and Sheriff, Ms. Pennington contacted the Petitioner and notified him that she and Mr. Hough needed to meet with him when school resumed the following week on June 4, 2018. *Id.* The meeting was conducted on June 4, 2018 at the main FCBE office. *Id.* During the meeting Petitioner was notified of the allegation of potential illegal activity and informed that he was being placed on paid administrative leave while the allegation was being investigated. *Id.* During the meeting, the Petitioner never provided any explanation as to what he did with the pipe he removed from CMS. *Id.* at p. 39. Following the meeting, the Petitioner contacted Mr. Herron and informed Mr. Herron that there was some money in his desk drawer and asked that he get the money and hold on to it for him. *Id.* at p. 25. Mr. Herron immediately reported the Petitioner's request to Mr. Hough. *Id.*

There was a second meeting, which took place on June 11, 2018, with the Petitioner

along with his counsel and Ms. Pennington and Mr. George. AR at p. 39. During this meeting, the charges against the Petitioner were elaborated upon, he was advised of the investigation, and the Petitioner invoked his 5th Amendment Right against self-incrimination and provided no explanation for his conduct. *Id.*

By letter dated June 18, 2018, the Petitioner was notified of the charges being brought against him and again notified of a hearing on June 26, 2018, wherein he was an afforded an opportunity to explain his actions. AR at pp. 51-52.

A copy of the investigatory file obtained from the Fayette County Sheriff's Department and produced in the course of discovery. AR at pp. 53-118. The Summary of Captain Campbell's findings are as follows:

- The Fayette County BOE representatives advise that Mr. Keffer is not authorized to cut and/or remove piping and related materials from the Collins school property.
- Security footage provided by the BOE depicts Mr. Keffer in the Collins annex on May 10th, 21st and 25th, 2018, cutting down, stripping insulation off of, and removing copper piping from the building.
- Receipts from JR's Recycling Company indicate copper and brass transactions with Mr. Keffer on May 10th, 21st and 25th, 2018. These receipts indicate that Mr. Keffer received $853.85 for these sales.
- Video from JR's Recycling Company indicate that Mr. Keffer arrived at their facility on May 25th, 2018 while operating his assigned county vehicle, and per the BOE was on an approved vacation day.
- $768.00 in U.S. currency was recovered from Mr. Keffer's desk.

AR at p. 7. Mr. George confirmed that once the report was made to the Sheriff and Prosecuting Attorney, the criminal prosecution was out of Respondent's control. AR at p. 50.

After receiving the findings of the Fayette County Sheriff's Department, a third meeting was held on June 26, 2018, with the Petitioner and his counsel where the Petitioner was advised that the FCBE would be recommending his termination during the Board meeting on July 17, 2018. AR at p. 120. Mr. George made the recommendation to terminate the Petitioner upon the

advice of counsel. AR at p. 47. During the July 17, 2018 Board meeting Ms. Spatafore made her case on behalf of the Board and the Petitioner made the decision not to be present for the meeting. AR at p. 48. By letter dated July 18, 2018, the Petitioner was notified that Board terminated his employment with the FCBE effective July 17, 2018. AR at p. 121.

The Respondent certainly had overriding legitimate justification for terminating the Petitioner's employment (i.e. misappropriation of County resources/funds). Also, the Petitioner's termination was based upon advice of counsel Denise Spatafore, Esq. Furthermore, the Petitioner was indicted as a result of the May 10, 21, and 25th incidents. SAR at pp. 14-16. Perhaps more importantly, the Petitioner entered into a pre-trial diversion related to the aforementioned indictment. SAR at pp. 17-18.

Despite all of the previous evidence, the Petitioner's Complaint asserts that he was terminated "despite Respondent's knowledge of his purported innocence." AR at p. 123. The Petitioner's Complaint contains the following causes of action: (1) alleged retaliation against Petitioner, Christopher Keffer, for reporting unlawful activities, (2) violations of the West Virginia Human rights Act ("WVHRA") for harassment and hostile work environment, and (3) malicious prosecution. The Petitioner testified during his deposition that the basis of all of his claims which he has asserted in this matter stem from the investigation into his removal of the copper/brass from CMS and no other incidents. AR at pp. 6-7.

Although not alleged in the Complaint, throughout the course of discovery the Petitioner contended that his termination was in some way linked to his report of a possible missing bumper that he had left at the Fayette Institute Technology school and believed was placed on the vehicle of Denton Pennington. AR 4-5. However, no person with supervisory authority over the Petitioner was aware of any purported report that was ever made prior to Petitioner's

termination. AR at pp. 40, 49, 128.

The previous facts can be summarized succinctly as follows: there is no genuine issue of material fact that the Petitioner was terminated for scrapping copper for which he did not have permission and for failure to comply with the financial/budgetary process that apply to school/county property. In the course of the criminal investigation it was evident that the Petitioner scrapped copper/brass on at least three occasions to JR's Recycling. The Petitioner received approximately $853.85 in scrap value. The Petitioner did not report the sales, the copper was not identified as surplus, the Petitioner was not given permission to scrap the copper. The disposition of the copper and management of its cash proceeds was in violation of Policies 8100 and 8200 for the West Virginia Board of Education, specifically Policy 8100 Cash Management and Policy 8200 Section 31 disposition of surplus real and personal property.

SUMMARY OF THE ARGUMENT

The Respondent maintains that the lower court did not err in finding that there were no genuine issues of material fact, which would preclude the lower court's granting of summary judgment. Moreover, the lower court correctly held that the Petitioner failed to meet his prima facie burden in establishing any of the claims he asserted in his Complaint. The Respondent also maintains that the lower court correctly held that the Respondent did not act with malice, there was probable/reasonable cause to support Petitioner's prosecution, the Respondent did not procure the Petitioner's prosecution, and the criminal prosecution did not terminate in the Petitioner's favor and therefore the lower court correctly held that the Petitioner's malicious prosecution claim must fail as a matter of law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent respectfully states that oral argument is unnecessary pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure regarding the specific assignments of error.

ARGUMENT

I. STANDARD OF REVIEW

"This Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 2, *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018) (quoting Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002)).

A motion for summary judgment should be granted where the pleadings, exhibits, and discovery forming the basis for the motion reveal that the case contains no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Redden v. Comer*, 200 W. Va. 209, 211, 488 S.E.2d 484, 486 (1997). "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 3, *Brady v. Deals on Wheels, Inc.*, 208 W. Va. 636, 542 S.E.2d 457, 462 (W. Va. 2000) (quoting Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

This Honorable Court has held that "claims of immunities, where ripe for disposition, should be summarily decided before trial." *Robinson v. Pack*, 223 W. Va. 828, 831, 679 S.E.2d 660 (2009); see also *Hutchison v. City of Huntington*, 198 W. Va. 139, 147, 479 S.E.2d 649 (1996). This is so because, "[i]mmunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the

burden of trial at all. The very heart of the immunity defense is that it spares the Respondent from having to go forward with an inquiry into the merits of the case." *Hutchison*, 198 W. Va. at 148, 479 S.E.2d 649 (citing *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203 (1995)).

II. THE CIRCUIT COURT OF FAYETTE COUNTY DID NOT ERR IN FINDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED WITH REGARD TO PETITIONER'S *HARLESS* CLAIM.

Causes of action for wrongful discharge exist when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination. *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 795 S.E.2d 530 (2016). Four factors courts should weigh to determine whether an employee has successfully presented a claim of relief for wrongful discharge in contravention of substantial public policy. The test requires the plaintiff to plead and prove the following elements: 1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element). 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element). 3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element). 4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element). *Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 714, 815 S.E.2d 520, 525 (2018) Under the test to determine whether an employee has successfully presented a claim of relief for wrongful discharge in contravention of substantial public policy, a plaintiff cannot simply cite a source of public policy and then make a bald allegation that the policy might somehow have been violated; there must be some elaboration upon the employer's act jeopardizing public policy and its nexus to the plaintiffs

discharge. *Id.* To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, courts look to established precepts in the West Virginia Constitution, legislative enactments, legislatively approved regulations, and judicial opinions. A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury. *Herbert J. Thomas Mem'l Hosp. Ass'n* , 238 W. Va. at 380.

Throughout the course of discovery in this matter, the Petitioner failed to identify any substantial public policy, other than mere conclusory statements, that this Respondent allegedly violated. In addition, the Complaint does not identify any specific public policy that this Respondent allegedly violated. To the extent the Petitioner is trying to articulate that his alleged reporting of a possible missing bumper to the Principal at the Fayette Institute of Technology, there is no evidence in the record that such report was made to anyone in the central Board office or that anyone with any supervisory authority over the Petitioner was aware of any such issue prior to his termination. AR at pp. 40, 49, 128.

In the Petitioner's Response in Opposition to Respondent's Motion for Summary Judgment, the Petitioner for the first time argued that the substantial public policy which this Respondent allegedly violated was W.Va. Code § 6C-1-3. However, the subject code provision is inapplicable in the instant matter. The Petitioner did not make any report of wrongdoing or waste to his employer or appropriate authority as defined in W.Va. Code § 6C-1-3. W.Va. Code § 6C-1-3 states:

> No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location, or privileges of employment because the employee, acting on his or her own volition, or a person acting on behalf of or under the direction of the employee, ***makes a good faith report, or is about to report, verbally or in writing, to the employer or appropriate authority, an instance of wrongdoing or waste.***

W. Va. Code § 6C-1-3 (emphasis added).

In the instant matter, even if Petitioner's allegations are taken as true, the report does not amount to wrongdoing or waste. "Waste" means an employer or employee's conduct or omissions, which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision sources. W. Va. Code § 6C-1-2(f). "Wrongdoing" means a violation, which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer. W. Va. Code § 6C-1-2(h). Here, even if this Court were to believe the Petitioner made such a report of a "missing bumper" it does not amount to a substantial abuse or anything more than a mere minimal incident. Also, it should not be lost on the Court that the subject bumper was never discovered on Mr. Pennington's vehicle nor was any report ever made to any person with supervisory authority over the Petitioner.

Additionally, even if the Court were to believe the Petitioner's alleged report, he never reported the alleged missing bumper to an employer or appropriate authority. An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction of the employee, had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the ***employer or an appropriate authority***. W. Va. Code § 6C-1-4(b) (emphasis added).

This Article defines "employer" as:

> [a] person supervising one or more employees, including the employee in question, a superior of that supervisor, or an agent of a public body.

W. Va. Code § 6C-1-2(c). This Article also defines "appropriate authority" as:

> [a] federal, state, county or municipal government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the Attorney General, the office of the State Auditor, the Commission on Special Investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

W. Va. Code § 6C-1-2(a). In the instant matter the Petitioner allegedly reported the missing bumper to Barry Crist, who was the Principal at Fayette Institute of Technology. Mr. Crist is not an employer or appropriate authority as defined by the previous code sections. Mr. Crist had no supervisory authority over the Petitioner, who was the Director of Operations for Fayette County Schools, and the record is devoid of any evidence that he ever reported the alleged incident to anyone with supervisory authority over the Petitioner

Also, to the extent that the Petitioner has articulated W.Va. Code § 18A-5-7 as the source of substantial public policy, it too is inapplicable. The Petitioner is not a teacher as defined in Chapters 18 and 18A. The previous Chapters and Articles define teacher as "[a] teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state." W. Va. Code § 18-1-1(g). The Petitioner in this matter was the Director of Operations and does not fit within any of the previous definitions. Thus, W.Va. Code § 18A-5-7 cannot be a source of any substantial public policy.

Furthermore, to identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, courts look to established precepts in the West Virginia Constitution, legislative enactments, legislatively approved regulations, and judicial opinions. A determination of the existence of public policy in West Virginia is a question of law, rather than

a question of fact for a jury. *Herbert J. Thomas Mem'l Hosp. Ass'n* , 238 W. Va. at 380. This Respondent maintains that as a matter of law the Petitioner has failed to articulate any substantial public policy, which was allegedly violated as a result of Petitioner's discharge.

Furthermore, there is no evidence that the Petitioner's termination was motivated by conduct related to any alleged public policy. The clear weight of the evidence demonstrates that the Petitioner was terminated for scrapping copper for which he did not have permission and for failure to comply with the financial/budgetary process that apply to school/county property. In the course of the criminal investigation it was evident that the Petitioner scrapped copper/brass on at least three occasions to JR's Recycling. The Petitioner received approximately $853.85 in scrap value. The Petitioner did not report the sales, the copper was not identified as surplus, the Petitioner was not given permission to scrap the copper. The disposition of the copper and management of its cash proceeds was in violation of Policies 8100 and 8200 for the West Virginia Board of Education, specifically Policy 8100 Cash Management and Policy 8200 Section 31 disposition of surplus real and personal property. Also, the Petitioner has been unable to identify any way in which he was retaliated against in violation of any public policy. To the extent the Petitioner is attempting to causally link his termination to any issue concerning a bumper, Mr. Hough, Mr. George, and Ms. Pennington all confirmed that they had no knowledge of any such event prior to Petitioner's termination. AR at pp. 40, 49, 128.

Last, the Respondent certainly had overriding legitimate justification for terminating the Petitioner's employment (i.e. misappropriation of County resources/funds). Also, the Petitioner's termination was based upon advice of counsel Denise Spatafore, Esq.

Therefore, the Respondent respectfully asks this Court to affirm the decision of the lower tribunal and find that it did not err in its ruling.

III. THE CIRCUIT COURT OF FAYETTE COUNTY DID NOT ERR IN FINDING THAT THE PETITIONER HAD FAILED TO MEET HIS PRIMA FACIE BURDEN CONCERNING ANY RETALIATORY DISCHARGE CLAIM.

The Petitioner in this matter is not asserting any claim of discrimination based upon his being a member of any protected class. He also testified during his deposition that he never experienced any pervasive hostile environment while employed by the Respondent. The sole basis of any such claim is the investigation into his criminal activity. The Petitioner during his deposition was unable to identify any event, other than the investigation into his criminal activity that he believed showed a hostile work environment. AR at . pp. 6-7. Such conduct falls well short of evidencing any severe and pervasive hostile work environment.

To the extent the Court wants to examine the subject allegation pursuant to the West Virginia Human Rights Act, for a hostile work environment claim to be actionable, the offensive environment must be "sufficiently severe or pervasive" so as to alter the conditions of the victim's employment and create an abusive working environment. *Erps v. W. Va. Human Rights Comm'n*, 224 W. Va. 126, 128, 680 S.E.2d 371, 373 (2009). In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, *et seq.*, as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity; (2) that complainant's employer was aware of the protected activities; (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation); (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. *Id.*

In this matter, the Petitioner has failed to meet his prima facie burden regarding each of the previous elements. The Petitioner did not engage in any protected activity. The Respondent

was unaware of any purported protected activities. The Respondent had a legitimate business justification for Petitioner's termination. Last, the alleged reporting of the bumper incident according to the Petitioner occurred in December 2017 or January 2018 and the Petitioner was not terminated until July 17, 2018.

Also, the Petitioner was unable to identify any way in which he was retaliated against in violation of any public policy. To the extent the Petitioner is attempting to causally link his termination to any issue concerning the bumper, Mr. Hough, Mr. George, and Ms. Pennington all confirmed that they had no knowledge of any such event prior to Petitioner's termination. AR at pp. 40, 49, 128.

Last, the Respondent certainly had overriding legitimate justification for terminating the Petitioner's employment (i.e. misappropriation of County resources/funds). Also, the Petitioner's termination was based upon advice of counsel Denise Spatafore, Esq. Furthermore, the Petitioner was indicted as a result of the May 10, 21, and 25th incidents. SAR at pp. 14-16. The Petitioner entered into a pre-trial diversion related to the aforementioned indictment. SAR at pp. 17-18.

Therefore, the lower court did not err in finding that no genuine issue of material fact concerning Petitioner's hostile work environment claim and correctly dismissed the same. This Respondent respectfully asks this Court to affirm the lower tribunal's decision.

IV. THE CIRCUIT COURT OF FAYETTE COUNTY DID NOT ERR IN FINDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED WHICH WOULD PRECLUDE DISMISSAL OF PETITIONER'S MALICIOUS PROSECUTION CLAIM.

Two separate lines of cases delineate the elements of malicious prosecution. The first line of cases uses a three element rule: "to maintain an action for malicious prosecution it is essential to prove (1) that the prosecution was malicious, (2) that it was without probable cause, and (3) that it terminated favorably to plaintiff." *Norfolk Southern Railway Company v. Higginbotham*,

228 W.Va. 522, 527, 721 S.E.2d 541 (2011). In the second line of cases, this Court held that, in an action for malicious prosecution, the plaintiff must show: "(1) that the prosecution was set on foot and conducted to its termination, resulting in plaintiff's discharge; (2) that it was caused or procured by defendant; (3) that it was without probable cause; and (4) that it was malicious. If the plaintiff fails to prove any of these, he [or she] cannot recover." *Id.*

Although, the element of procurement of the prosecution is not explicitly stated in the first rule, this Court held that the two rules are the same, and procurement is an inherent element in both. *Id.* In *Vinal*, this Court stated that the "meaning of procurement is not that the defendants jointly applied to the justice of the peace to issue the warrant against the plaintiff, but that they consulted and advised together, and both participated in the prosecution, which was carried on under their countenance and approval." *Vinal v. Core*, 18 W.Va. 1, 2 (1881); *Norfolk Southern Railway Company*, 228 W.Va. at 527-528. It is apparent that procurement within the meaning of a malicious prosecution suit requires more than just the submission of a case to a prosecutor; it requires that the Defendant assert control over the pursuit of the prosecution. *Id.*

In the instant matter, it is clear that the Respondent did not procure the Petitioner's prosecution. The Respondent presented what evidence it had to the Fayette County Sheriff's Department and the Fayette County Prosecuting Attorney to see what they felt was necessary and appropriate under the circumstances. After being presented with the subject information, the Respondent was removed from Petitioner's prosecution. Moreover, there is no evidence that the prosecution was malicious. There was probable cause to have prosecuted the Petitioner. The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances...the substance of all the definitions of probable cause is a reasonable ground for belief of guilt.

Maryland v. Pringle, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003) cited with approval in *United States v. Douglas*, No. 5:18-CR-14-8, 2020 U.S. Dist. LEXIS 25077, at *9 (N.D.W. Va. Feb. 13, 2020). In this case as the Court can tell, the overwhelming weight of the evidence demonstrates that there was probable-cause to have charged the Petitioner criminally which is further supported by the criminal complaint issued by the unbiased third-party Fayette County Magistrate. Also, the Petitioner was indicted by the grand jury for his conduct.

Furthermore, because the Petitioner entered into a pre-trial diversion the matter did not terminate favorably on his behalf. "Courts have held that when the plaintiff has entered into a pretrial diversion program, he cannot prove the third element of the malicious prosecution claim, i.e. that the criminal prosecution terminated in his favor." *Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Circ. 1994) (overruled in part on other grounds). The United States District Court for the Southern District of West Virginia has agreed with the previous holding and also stated that "[c]ourts that have addressed the issue have overwhelmingly held that entering a pre-trial diversion agreement, as the plaintiff did, does not terminate a criminal action in favor of the defendant for purposes of bringing a malicious prosecution claim, and that such claims are legally barred." *Patterson v. Yeager*, No. 2:12-cv-01964, 2015 U.S. Dist. LEXIS 75657, at *27-28 (S.D. W. Va. Apr. 24, 2015); *See also, e.g., Uboh v. Reno*, 141 F.3d 1000 (11th Cir. 1998); *Taylor v. Gregg*, 36 F.3d 453 (5th Cir. 1994); *Buck v. East Baton Rouge Sheriff's Office*, 2014 U.S. Dist. LEXIS 78727, 2014 WL 2593852 (M.D. La., June 10, 2014).

Therefore, Petitioner's malicious prosecution claim was correctly dismissed by the lower tribunal and it did not err in dismissing the same.

CONCLUSION

WHEREFORE, based upon the above reasons, the Respondent requests that this Court affirm the lower court's decision and find that it did not commit err in reaching its decision. The Respondent also requests any and all other relief, in equity or otherwise, that this Court sees fit to grant.

Respectfully Submitted,

FAYETTE COUNTY BOARD OF EDUCATION,

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, Fayette County Board of Education, does hereby certify on this 9th day of January, 2023, that a true copy of the foregoing ***"RESPONDENT'S BRIEF"*** was served upon counsel of record via West Virginia File & Serve and by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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