No. 22-745

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE MERCER COUNTY BOARD OF EDUCATION AND DR. DEBORAH AKERS,

Defendants Below, Petitioners,

v.

AMANDA SHREWSBURY

Respondent Below, Respondent.

From the Circuit Court of Mercer County, West Virginia
The Honorable Mark Wills
Civil Action No. 19-C-108

PETITIONERS' BRIEF

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ASSIGNMENT OF ERROR NO. 1: THE CIRCUIT COURT OF MERCER COUNTY ERRED IN NOT FINDING THAT THESE PETITIONERS WERE ENTITLED TO QUALIFIED IMMUNITY.

Governmental officials who are acting within the scope of their authority and are not covered by the provisions of W.Va. Code §29-12A-1 *et seq*. [the West Virginia Governmental Tort Claims and Insurance Reform Act], are entitled to qualified immunity with respect to the discretionary judgments, decisions, and actions of the governmental official insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492. 766 S.E.2d 751, 755 (2014); Syl. pt. 6, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995); Syl. Pt. 4, *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011). Qualified immunity is immunity from suit rather than mere defense to liability. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Moreover, the immunity of the governmental agency is coterminous with the qualified immunity of a governmental official whose acts or omissions give rise to the case. *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 755 (2014). "The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine." Hutchison at Syl. pt. 1; Syl. pt. 3, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).

ASSIGNMENT OF ERROR NO. 2: THE CIRCUIT COURT OF MERCER COUNTY ERRED IN NOT FINDING THAT ALL OF RESPONDENT'S NEGLIGENCE CAUSES OF ACTION WERE CATEGORICALLY BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

In Counts V and VII, Respondent brings various negligence claims against these Petitioners. However, the doctrine of qualified immunity bars claims of mere negligence against governmental agencies not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code §29-12A-1, et seq., and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer. Syl. pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995); Accord *Jarvis v. W. Va. State Police*, 227 W. Va. 472, 481–82, 711 S.E.2d 542, 551–52 (2010).

ASSIGNMENT OF ERROR NO. 3: THE CIRCUIT COURT OF MERCER COUNTY ERRED IN FINDING THAT WHETHER THE RESPONDENT SUSTAINED AN ADVERSE EMPLOYMENT ACTION WAS A QUESTION OF FACT.

There is no genuine issue of material fact that Respondent's contract of employment with Mercer County Schools, was and remains, as a substitute teacher. Respondent's employment with the Mercer County Board of Education was never terminated and remains the same to date.

ASSIGNMENT OF ERROR NO. 4: THE CIRCUIT COURT OF MERCER COUNTY ERRED IN FAILING TO PROVIDE ANY SPECIFIC ANALYSIS AS TO THE CLAIMS AGAINST PETITIONER, DR. DEBORAH AKERS. MOREOVER, COUNTS I AND II AGAINST DR. AKERS MUST FAIL AS SHE IS INCAPABLE OF TERMINATING THE RESPONDENT'S EMPLOYMENT.

ASSIGNMENT OF ERROR NO. 5: THE CIRCUIT COURT OF MERCER COUNTY ERRED IN FINDING THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO THE NEGLIGENT SUPERVISION CLAIMS ASSERTED AGAINST THESE PETITIONERS.

The underlying "negligence," which forms the basis of such claims, is the alleged assault and battery of Respondent purportedly committed by Non-Participant, Alma Belcher. Ms. Belcher was dismissed from the underlying matter. The lower court dismissed a claim of assault and battery against Ms. Belcher. The prerequisite for any negligent supervision claim is that the alleged underlying conduct must be negligent. Here, the Respondent does not allege that the alleged conduct of Ms. Belcher was negligent but instead alleges that it was intentional.

STATEMENT OF THE CASE

This appeal arises from the Circuit Court of Mercer's County's partial denial of the Petitioners' Motion for Summary Judgment. The underlying civil action arises from allegations that Respondent Amanda Shrewsbury's employment with the Mercer County Board of Education ("MCBE") was "wrongfully terminated," that the Respondent sustained an assault and battery, and that the Defendants negligently and intentionally inflicted emotional distress upon the Respondent. AR at pp. 9-18. The Respondent named the MCBE; Former Superintendent of Mercer County Schools, Dr. Deborah Akers; Principal, Steve Hayes; and former teacher, Alma Belcher as Defendants. *Id.*

The Respondent, Amanda Shrewsbury, was employed as a substitute teacher's aide at Cumberland Heights Early Learning Center ('Cumberland Heights') located in Bluefield, Mercer County, West Virginia. *Id.* at p. 12; *see also* AR at p. 70. The Respondent is a substitute teacher's aide and, therefore, participates in the "call system." AR at p. 71. The Respondent

has been registered in the *e*School call system since December 8th, 2015. AR at p. 80. Importantly, the Respondent has had a contract with the Mercer County Board of Education since the 2014-2015 school year through the present date. *See* AR at pp. 71 and 576.

During the 2018-2019 school year, it was determined that the Cumberland Heights enrollment was such that it needed a teacher and teacher's aide. AR at p. 138. Shrewsbury was called out to serve as a substitute teacher's aide. *Id.* The teacher in Respondent's classroom at the time was also a substitute, Carolyn Hayes. *Id.* at p. 139.

Ms. Hayes left Cumberland Heights and a new substitute teacher was placed in the classroom, Alma Belcher. AR at p. 142. Shrewsbury knew her position as a substitute teacher's aide was temporary; she texted a classroom parent "that's my last day. I agreed to stay so that they [the students] could have time to get to know Alma and I only do this part time... So I took the job and was just supposed to be there until October 1st... then I was asked to stay until the transition and I agreed... I'm sorry but I really had not planned to be there this long." AR at p. 144.

On December 6, 2018, the Respondent was involved in a verbal confrontation with another substitute teacher, Shrewsbury advised Mr. Hayes "that Ms. Belcher was yelling at the kids, and was forcing them to sit down." AR at p. 143. At that time, Mrs. Belcher had been experiencing difficulties with the Respondent as she was texting during class and using her cell phone to call parents to tell them that their child is sick and to come pick them up without Ms. Belcher's knowledge. Respondent was also texting parents photographs of other children.

On January 4, 2019, Shrewsbury had a confrontation with Mrs. Belcher in the lunchroom. Presumably, this is the incident, which is referenced in Paragraph 15 and Counts V and VII of the Complaint. This is the incident which the lower court construed to form the

basis of such claims. The day before, on January 3rd, 2019, a parent had requested his child not sit with two other students. AR at p. 145. Reportedly, on January 4th, the child "sat down beside a friend and not near the two other students. Amanda... was moving the students together that the parent did not want near each other. [Mrs. Belcher] called her aside and told her she could not do this because the parent made a request and [Mrs. Belcher] was honoring that request. In a loud voice [Shrewsbury] told [Mrs. Belcher] that they wanted to eat with her and she was [d]oing this and they were going to move beside her. In a stern voice [Mrs. Belcher] informed [Shrewsbury] that [Mrs. Belcher] was the Teacher and [Mrs. Belcher] was honoring a parent request. In a loud voice [Shrewsbury] said that [Mrs. Belcher] was unfair, and she was filing a grievance." *Id.* Elaborating on the incident, in Mr. Hayes' "Performance Evaluation Report for Substitute Personnel" he indicated:

> On January 4, 2019, Mrs. Amanda Shrewsbury, engaged in a verbal confrontation with her classroom teacher (Alma Belcher) during the student lunch period. According to written statements from 7 MCELC employees present during the altercation, Mrs. Shrewsbury became agitated with the classroom teacher and the volume of her voice got louder and louder. Several statements indicated that Mrs. Shrewsbury was yelling at Mrs. Belcher and making allegations that Mrs. Belcher had disrespected her. According to eyewitnesses, Mrs. Belcher remained calm during this incident and kept reiterating to Amanda that she was the classroom teacher.
>
> Let it be known that this incident occurred while the entire student body of MCELC was present. Also be advised that Mrs. Shrewsbury was asked to provide a statement but has yet to turn one in.

AR at p. 146. As Mr. Hayes indicated, the statements of Shrewsbury's co-workers corroborate Mrs. Belcher's statement of events. Indeed, within a matter of days, Dr. Filipek was sent a letter signed by ten of Shrewsbury's co-workers, including Shrewsbury's mother-in-law, requesting Shrewsbury's termination:

> We, the staff at Mercer County Early Learning Center: Bluefield, are writing this letter in regards to a long-term sub who has been at our school since the beginning of the 2018-2019 School Year. Her name is Amanda

> Shrewsbury. She has been working as a Transportation & Classroom Aide....
>
> We have experienced numerous problems and issues with her throughout the year. We have witnessed Amanda violating the Professional Code of Ethics and the Employee Code of Conduct... This has created a hostile work environment and we fear for our safety and for that of the children we teach on a daily basis. We have witnessed Amanda verbally attack two Mercer County School Employees on two separate occasions in front of teachers and students. Amanda has been seen on her phone while supervising children on multiple occasions and has stated that she was communicating via text and email with parents on a daily basis. Amanda has made libelous comments about coworkers to others in the community, one of which is under investigation by the Mercer County Board of Education. We feel that she has been reprimanded for her behavior but has continued in an unprofessional manner throughout the year.
>
> As teachers and aides we are all held to a standard. Under the circumstances and due to her continued violation of county policies, Amanda Shrewsbury's presence in our school has created a hostile work environment and an unsafe atmosphere for the adults and an unhealthy atmosphere for the children in attendance. As a sub, who has committed so many flagrant offences, Amanda Shrewsbury should be removed from our school and the county sub list. She simply does not need to be working in a school setting with our most precious resource, our children. We have grave concerns about Amanda's mental health.

AR at p. 150.

On January 11, 2019, Mr. Hayes evaluated Shrewsbury and determined that she did not meet the expectations of an aide. Shrewsbury was advised that texting parents is "a direct violation of Mercer County Schools policies on confidentiality." AR at p. 146. Mr. Hayes, along with the Assistant Director of Special Education, Emily Huddle, met with Shrewsbury who provided a "synopsis" of events occurring in the cafeteria on January 4, 2019. AR at p. 152. The "synopsis" further outlines a number of incidents in which Mrs. Belcher purportedly abused the students. *Id.* Dr. Akers also testified that she was unaware of any such allegation until Monday, January 14, 2019. *Id.* Shrewsbury also reported Mrs. Belcher's alleged misconduct to the Department of Health and Human Resources. AR at p. 153. Notably, the Department of Health

and Human Resources determined that "Child abuse has not occurred." *Id.* The record is devoid of any evidence that these Petitioners were aware of any report of alleged abuse to DHHR prior to January 11, 2019.

Shrewsbury alleges that her employment at Mercer County Board of Education was terminated on January 11, 2019. AR at pp. 65-66. Shrewsbury seems to allege that, Principal, Mr. Hayes was instructed by Dr. Deborah Akers, Mercer County Schools Superintendent, to advise Respondent not to accept positions if called. AR at pp. 72-73. However, in actuality, Shrewsbury suffered no adverse employment action and she failed to accept any other position with the MCBE the following school year. AR at p. 140. As stated by Rachel Cole, who oversees the call system for Mercer County Schools, the Respondent is still active. AR at pp. 79-80. Perhaps more importantly, Shrewsbury concedes she was employed with Mercer County Schools after January 11, 2019. AR at p. 70.

In short, Respondent Amanda Shrewsbury was never terminated. Rather, Shrewsbury's position at Cumberland Heights was temporary. Shrewsbury concedes that she was never taken off the substitute call list and has been called for, and accepted, other substitute positions ***after*** she left Cumberland Heights. AR at p. 169. In fact, Shrewsbury was called ***593 times*** when she was either "not reached" or did not answer. AR at pp. 74 and 85.

A hearing on these Petitioners' Motion for Summary Judgment and all other Motions for Summary Judgment, was conducted on July 20, 2022. Following oral argument, the Court issued its Order granting in part and denying in part these Petitioners' Motion for Summary Judgment. Specifically, the Court denied these Petitioners' Motion as to Counts I, II, V, and the negligent supervision portion of Count VII. The Order fails to specifically address the application of qualified immunity in the subject matter.

These Petitioners maintain that the lower court erred in deciding the issue of qualified immunity and other arguments asserted in these Petitioners' Motion. These Petitioners also maintain that the Respondent's claims against these Petitioners are barred by the doctrine of qualified immunity and other arguments set forth herein and form the basis of this interlocutory appeal.

SUMMARY OF THE ARGUMENT

First, the Petitioners maintain that the lower court committed reversible error (1) not expressly holding that qualified immunity applied to the claims being asserted by the Respondent, (2) not making any finding that the Respondent identified a clearly established statutory or constitutional right of the Respondent that these Petitioners allegedly violated, and (3) not finding that qualified immunity barred the Respondent's remaining causes of action not previously dismissed. Second, the Petitioners maintains that the lower court erred in not finding that qualified immunity is a categorical bar to the negligence claims being asserted by Respondent. Third, the lower court erred in finding that there existed a genuine issue of material fact as to whether the Plaintiff sustained any "adverse employment action." Fourth, the lower court erred in not providing any independent analysis as to the claims being asserted against Petitioner, Dr. Akers and moreover, Counts I and II of the Complaint fail as to Petitioner, Dr. Akers as she is not capable of terminating the Respondent's employment and the Respondent's employment was never terminated. Last, the Petitioners maintain that any negligent supervision claim contained within Counts V and VII must fail as a matter of law as the alleged underlying conduct of Belcher was not negligent but intentional and criminal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner 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 defendant 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 MERCER COUNTY ERRED IN NOT FINDING THAT THESE PETITIONERS WERE ENTITLED TO QUALIFIED IMMUNITY.

The Petitioner maintains that the Circuit Court erred in (1) not expressly holding that qualified immunity applied to the claims being asserted by the Respondent, (2) not making any finding that the Respondent identified a clearly established statutory or constitutional right of the Respondent that these Petitioners allegedly violated, and (3) not finding that qualified immunity barred the Respondent's remaining causes of action not previously dismissed. The Order fails to address the specific applicability of qualified immunity to the facts and allegations being asserted in this matter. AR at pp. 604-614.

Governmental officials who are acting within the scope of their authority and are not covered by the provisions of W.Va. Code §29-12A-1 et seq. [the West Virginia Governmental Tort Claims and Insurance Reform Act], are entitled to qualified immunity with respect to the discretionary judgments, decisions, and actions of the governmental official insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492. 766 S.E.2d 751, 755 (2014); Syl. pt. 6, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995); Syl. Pt. 4, *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011). Qualified immunity is immunity from suit rather than mere defense to liability. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Moreover, the immunity of

the governmental agency is coterminous with the qualified immunity of a governmental official whose acts or omissions give rise to the case. *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 755 (2014). "The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine." *Hutchison* at Syl. pt. 1; Syl. pt. 3, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). Once the qualified immunity defense is asserted, the burden then shifts to the plaintiff to defeat the immunity. Underlying qualified immunity is the need to enable government officials to act decisively without undue fear of judicial second guessing. *Swanson v. Powers*, 937 F.2d 965, 967 (4th Cir. 1991), cert. denied, 502 U.S. 1031 (1992); *Akers v. Caperton*, 998 F.2d 220, 225-226 (4th Cir. 1993).

The Mercer County Board of Education is comprised of elected governmental officials who appoint the Superintendent of Schools. It is undisputed that the acts of the members of these Petitioners, the Mercer County Board of Education and former Superintendent of Mercer County Schools, Dr. Akers, occurred within the scope of their employment as the Complaint indicates that all conduct of these Petitioners were within the scope of their employment. AR at pp. 12-13.

Respondent's claims do not fall within the West Virginia Governmental Tort Claims and Insurance Reform Act because it is a civil suit against a political subdivision arising out of the employment relationship between Respondent and the Mercer County Board of Education. W. Va. Code §29-12A-18(b). The subject code provision states that "[t]his article [W.Va. Code § 29-12A-1 *et seq.*] does not apply to, and shall not be construed to apply to… [c]ivil actions by an employee, or the collective bargaining representative of an employee, against his or her political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision." W. Va. Code §29-12A-18. Thus, because Respondent's

allegations against these Petitioners arise out of an employment relationship with the MCBE such allegations are not covered under W.Va. Code §29-12A-1 *et seq.* and these Petitioners are not covered by the West Virginia Governmental Tort Claims and Insurance Reform Act.

This Court has previously held in an employment related matter that the Mercer County Board of Education, is entitled to avail itself of the doctrine of qualified immunity. *Mercer Cty. Bd. of Educ. v. Ruskauff*, No. 18-0711, 2019 W. Va. LEXIS 514, at *1 (Nov. 4, 2019) ("[t]he BOE is entitled to qualified immunity.") (Memorandum Decision). The MCBOE is entitled to qualified immunity in the instant matter as the Respondent's claims against these Petitioners arise from Respondent's employment relationship with the MCBE. The *Ruskauff* matter concerned the publishing of a disciplinary action against an employee in MCBE meeting minutes. In that matter, this Court held that "[t]here is no dispute that respondent's claim is not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act. See W. Va. Code § 29-12A-18(b) (stating that the Act does not apply to "[c]ivil actions by an employee . . . against his or her political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision." *Id.* at p. 8.

Next, this Court must then identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive, administrative policy-making acts or involve otherwise discretionary governmental functions. *W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 663, 783 S.E.2d 75 (2015). In this matter, although the Respondent's employment was never terminated, if it did as Respondent alleges, such action constitutes discretionary acts for which these Defendants are immune. Similarly, any alleged supervision claim also constitutes a discretionary act. It is undisputed that "the broad categories of training, ***supervision***, and

employee retention, as characterized by Respondent, easily fall within the category of 'discretionary' governmental functions." *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 514, 766 S.E.2d 751, 773 (2014) (emphasis added); cited with approval in *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 663, 783 S.E.2d 75, 84 (2015). Also, this Court has repeatedly recognized that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Syl. Pt. 3, in part, *Dillon v. Board of Educ.*, 177 W.Va. 145, 351 S.E.2d 58 (1986).' Syllabus Point 3, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000)." *Bolyard v. Bd. of Educ. of Grant County*, 214 W.Va. 381, 589 S.E.2d 523, 526 (2003). All of Respondent's remaining claims contained within Counts I, II, V, and VII concern employment retention decisions or supervision issues. Thus, any employment decision or supervision issue concerning the Respondent constitutes a discretionary act.

Furthermore, the Respondent has failed to demonstrate that any act or omission of these Defendants was in violation of any clearly established statutory or constitutional right of the Respondent's. The lower court's order does not address whether the Respondent has stated any clearly established statutory or constitutional right of the Respondent, which these Petitioners allegedly violated. The Respondent failed to articulate any specific statutory or constitutional right to which she is entitled. The Respondent merely states in a conclusory manner that she purportedly sustained an adverse employment decision in violation of some substantial public policy without citing to any controlling authority, either statutorily or constitutionally.

The lower court seems to conflate the issues of articulating a substantial public policy and a clearly established statutory or constitutional right. The lower court seems to imply that W.Va. Code § 49-2-803 forms the basis of a substantial public policy but does not hold that such code

provision creates a clearly established statutory or constitutional right of the Respondent. Moreover, these Petitioners maintain that the lower court neglected to make such a finding because said code provision does not create any right as to the Respondent. Under the previous version of the Child Welfare Act, this Court expressly held that the mandatory reporting statute "does not give rise to an implied private civil cause of action, in addition to criminal penalties imposed by the statute, for failure to report suspected child abuse where an individual with a duty to report under the statute is alleged to have had reasonable cause to suspect that a child is being abused and has failed to report suspected abuse." *Arbaugh v. Ed. of Educ., County of Pendleton*, 214 W.Va. 677, 591 S.E.2d 235, Syl. pt. 3 (2003).

While the Child Welfare Act mandatory reporting statute has been amended since *Arbaugh*, the amendments did not establish a private cause of action but, instead, were designed to "rearrange all of the existing child welfare laws in the state of West Virginia. This bill essentially functions as a restructuring of the old juvenile justice and welfare law. It regroups the sections of the bill into seven articles that all feature related content, instead of various sections being spread across the bill. It creates a General Provisions article, an article concerning the responsibilities of the executive branch agencies, an article regarding special programs such as disabilities, an article regarding court actions, a record keeping article, an article about missing children, and an article about interstate cooperation, West Virginia Legislative Wrap Up, February 6, 2015, and "clarify[ies] that sexual abuse and sexual assault constitute abuse of a child for reporting purposes; reduc[es] the time period in which a mandated reporter is required to report suspected abuse or neglect; require[es] mandated reporters to directly report known or suspected abuse or neglect; eliminat[es] certain broad reporting requirements applicable to any person over the age of 18; ciarify[ies] that minors are not mandated reporters; eliminat[es]

certain exceptions to the reporting time limit; eliminating particularized reporting requirements for education employees; and eliminat[es] provisions pertaining to conduct involving students or students and school personnel." SB 465 (2018). The amendments do not in any way evidence a legislative intent to create an implied, private cause of action that this Court has already found nonexistent in the previous statutory version. In short, there is no cause of action for the alleged violation of the mandatory reporting statute, there are only criminal penalties. See, e.g., W.Va. Code § 49-2-812. Respondent's attempt to obscure her lack of an employment claim by alleging violations of the Child Welfare Act cannot be sustained.

"For a statutory or constitutional right to be "clearly established," so that a government official lacks qualified immunity from civil damages liability for violating that right because the right was clearly established at the time of the challenged conduct, the right must be sufficiently clear that every reasonable official would have understood that what he is doing violated that right; in other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 132 S.Ct. 2088 (2012). W.Va. Code § 49-2-803 does not create any right of the Respondent in this matter.

Therefore, because these Petitioners are a governmental agency and a governmental officer not covered under W.Va. Code § 29-12A-1 *et seq.*, and any alleged conduct that they engaged in was discretionary, and the Respondent has failed to cite to any statutory or constitutional right to that these Petitioners violated, the Respondent's claims are barred by the doctrine of qualified immunity.

III. THE CIRCUIT COURT OF MERCER COUNTY ERRED IN NOT FINDING THAT ALL OF RESPONDENT'S NEGLIGENCE CAUSES OF ACTION WERE CATEGORICALLY BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

In Counts V and VII, the remaining negligence causes of action, Respondent brings various negligent supervision claims against these Petitioners, apparently arising out of their supervision of Alma Belcher. However, the doctrine of qualified immunity bars claims of mere negligence against governmental agencies not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code §29-12A-1, et seq., and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer. Syl. pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995); Accord *Jarvis v. W. Va. State Police*, 227 W. Va. 472, 481–82, 711 S.E.2d 542, 551–52 (2010).

This Court has consistently upheld governmental agencies' immunity from liability for claims of mere negligence. In *Clark*, the West Virginia Supreme Court of Appeals upheld the immunity of the Department of Natural Resources against negligence allegations for the negligent actions of its officer against negligence allegations for the negligent actions of its officer, which led to an accidental shooting. The Court held that the DNR was a State agency not under the Act and was, therefore, immune from liability for "negligence." The West Virginia Supreme Court of Appeals most recently held in *A.B.*, that the West Virginia Regional Jail Authority was immune from allegations of negligent hiring, training, and retention of correctional officers accused of sexually assaulting female inmates.

As discussed above, these Petitioners are a governmental agency and official entitled to qualified immunity. The supervision of an employee (i.e. Alma Belcher) is a discretionary act of these Petitioners. Therefore, Respondent's claim of negligence against these Petitioners are

categorically barred by the doctrine of qualified immunity and the lower court erred in not making such a finding.

IV. THE CIRCUIT COURT OF MERCER COUNTY ERRED IN FINDING THAT WHETHER THE RESPONDENT SUSTAINED AN ADVERSE EMPLOYMENT ACTION WAS A QUESTION OF FACT.

The lower court found that "[w]hether the [Respondent] suffered an adverse employment action is a question of fact for the jury." AR at p. 606. However, as stated in the statement of the case above, there is no genuine issue of material fact that the Respondent's employment was never terminated as she was hired as a substitute, she accepted positions with the MCBE after January 11, 2019, and she was called for positions approximately 593 times.

The Respondent, Amanda Shrewsbury, was employed as a substitute teacher's aide at Cumberland Heights Early Learning Center ('Cumberland Heights') located in Bluefield, Mercer County, West Virginia. *Id.* at p. 12; *see also* AR at p. 70. The Respondent is a substitute teacher's aide and, therefore, participates in the "call system." AR at p. 71. The Respondent has been registered in the *e*School call system since December 8th, 2015. AR at p. 80. Importantly, the Respondent has had a contract with the Mercer County Board of Education as a substitute since the 2014-2015 school year through the present date. *See* AR at pp. 71 and 576.

In short, Respondent Amanda Shrewsbury was never terminated. Rather, Shrewsbury's position at Cumberland Heights was temporary. Shrewsbury concedes that she was never taken off the substitute call list and has been called for, and accepted, other substitute positions ***after*** she left Cumberland Heights. AR at p. 169. In fact, Shrewsbury was called ***593 times*** when she was either "not reached" or did not answer. AR at pp. 74 and 85.

Therefore, this Court should reverse the lower court's decision and find that the Respondent's claims contained in Counts I and II against Petitioners are barred because the

Respondent's employment with Petitioner MCBE was not terminated and therefore any retaliatory discharge/wrongful termination claim must fail as a matter of law.

V. THE CIRCUIT COURT OF MERCER COUNTY ERRED IN FAILING TO PROVIDE ANY SPECIFIC ANALYSIS AS TO THE CLAIMS AGAINST PETITIONER, DR. DEBORAH AKERS. MOREOVER, COUNTS I AND II AGAINST DR. AKERS MUST FAIL, AS SHE IS INCAPABLE OF TERMINATING THE RESPONDENT'S EMPLOYMENT.

The subject Order issued by the lower court fails to provide any specific analysis concerning allegations against Petitioner Dr. Deborah Akers. Similar to the lower court's ruling concerning Steven Hayes and Alma Belcher, Counts I and II of the Respondent's Complaint should be dismissed against Petitioner Dr. Akers as she too was incapable of terminating the Respondent's employment. Also, as stated above the Respondent's employment with the MCBE was never terminated.

The duplicitous Counts I and II of Respondent's Complaint alleges "Public Policy Violations" and "Wrongful Discharge/Retaliatory Discharge/Public Policy Violations." AR at pp. 14-15. Specifically, Respondent alleges Dr. Akers "violated the public policy of the State of West Virginia by threatening her and eventually terminating her position for reporting illegal conduct" and she "illegally retaliated against the Plaintiff and violated the public policy of this State through their illegal employment actions." *Id.* Irrespective of the fact that the Respondent was never terminated, and while continuing to preserve all available defenses to such claims, Petitioner Dr. Akers submits that Counts I and II undisputedly fail as the Superintendent has no power to terminate the employment of a county board of education teacher's aide.

This Court has repeatedly recognized that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Syl. Pt. 3, in part, *Dillon v. Board of Educ.*, 177 W.Va. 145, 351 S.E.2d 58 (1986);

Syllabus Pt. 3, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000); *Bolyard v. Bd. of Educ. of Grant County*, 214 W.Va. 381, 589 S.E.2d 523, 526 (2003). According to the West Virginia Code, "School personnel" is defined as "all personnel employed by a county board whether employed on a regular full-time basis, an hourly basis or otherwise." "School personnel" is comprised of two categories: Professional personnel and service personnel. W.Va. Code § 18A-1-1(a). The statutory definition of "service personnel" specifically includes aides. W. Va. Code § 18A-1-1 (e).

A teacher's aide is considered a "service" rather than "professional" employee. *Hazelwood v. Mercer Co. Bd. Of Educ.*, 200 W.Va. 205,488 SE.2d 480 (1997). West Virginia law provides, in relevant part, that "The board is authorized to employ such service personnel, including substitutes, as is deemed necessary for meeting the needs of the county school system. W.Va. Code § 18A-2-5. According to the Code, "[b]efore entering upon their duties service personnel shall execute with the board a written contract." *Id.* Our Court has long held that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353, 359 (1959) (citations omitted). Consequently, Dr. Akers had no authority to employ or terminate the Respondent.

In fact, Shrewsbury executed a "Contract of Employment for Substitute Service Personnel" for the 2018-2019 school year. AR at p. 576. The Contract specified that "[t]he Employee [Amanda Shrewsbury] is employed by the Board as a substitute...." *Id.* And, as commentators have noted, "[t]he power to remove or dismiss is generally vested in the school board or authorities who have the power of employing teachers and of controlling and managing

the school." 78 C.J.S. Schools and School Districts § 399. Dr. Akers, even as the former Superintendent, is not the school board, and cannot terminate the Respondent's contract of employment with the county. Consequently, Dr. Akers cannot be sued for the Plaintiff's alleged wrongful termination of employment.

Therefore, the lower Court erred in failing to provide any independent analysis regarding claims asserted against Dr. Akers. Also, the lower court erred in not finding that Counts I and II of the Respondent's Complaint must be dismissed against Petitioner Dr. Akers as she was not capable of terminating the Respondent's employment and the Respondent's employment was never terminated.

VI. THE CIRCUIT COURT OF MERCER COUNTY ERRED IN FINDING THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO THE NEGLIGENT SUPERVISION CLAIMS ASSERTED AGAINST THESE PETITIONERS.

The lower court interpreted Counts V and VII to be variations of negligent supervision claims against these Petitioners. The lower court did dismiss the negligent retention claim contained within Count VII. The lower court's reasoning for not granting Petitioners' Motion with regard to the negligent supervision claim contained in Count V was that the "[Respondent] has established a question of material fact as to negligence. The Defendant had a duty to properly supervise the [Respondent] and [] Belcher and under their supervision, Plaintiff allegedly suffered a battery at the hands of [] Belcher." AR at p. 611. The lower court's reasoning for not granting Petitioners' Motion with regard to the negligent supervision claim contained in Count VII was that "[b]ecause the alleged battery of [Respondent] by [] Belcher is a requisite element of the claim for negligent supervision, and whether the battery in fact occurred is a question of fact for the Jury, [Petitioners], Mercer County Board of Education's and Deborah Aker's, (sic)

Motions for Summary Judgment as to the claim of negligent supervision under Count VII of the Indictment is [denied]." AR at p. 612.

Aside from the fact that the previous holdings are inconsistent with having dismissed Count V of the Complaint against Alma Belcher who was the alleged perpetrator of the assault and battery, the previous holding is clearly erroneous. Counts V of Respondent's Complaint alleges the legally incognizable claim of negligent permission/failure to remediate an alleged civil assault and battery. Specifically, Respondent alleges that these Petitioners breached an alleged "duty to use reasonable care, including but not limited to the civil assault and battery inflicted upon [Respondent] along with the [Petitioners] negligent failure to report and remediate the misconduct." AR at p. 25. These Petitioners asserted that there is no viable cause of action for the negligent allowance/failure to remedy a civil assault and battery and, therefore, is subject to summary judgment. Consequently, these Petitioners moved for Summary Judgment as to Count V as it fails to set forth any cognizable legal cause of action.

It is also well-settled that "[a] master cannot be held liable for a servant's assault on a third person unless the assault was committed, either by direction of master, or in performance by servant of duties within scope of his employment, or in course of and connected with such employment." *Porter v. Southn Penn Oil Co.*, 125 W.Va. 361, 24 S.E.2d 330, (1943). The record before the lower tribunal and this Court is devoid of any such evidence.

Furthermore, any negligent supervision claim against these Petitioners in Counts V and VII should have been dismissed as the Respondent did not assert that the alleged conduct of Alma Belcher was negligent. The Respondent alleged that the underlying conduct of Alma Belcher which formed the basis of Respondent's negligent supervision claims was intentional and in fact, criminal.

This Court has noted that the failure to allege underlying claims of negligence results in the failure of a negligent supervision claim:

> Although our body of caselaw concerning negligent supervision is sparse, our current definition of this cause of action requires, as a predicate prerequisite of a negligent supervision claim against an employer, underlying conduct of the supervised employee that also is negligent. *See Taylor*, 208 W. Va. at 134, 538 S.E.2d at 725. In *Taylor*, we specifically recognized that ***'[t]he ... claim of negligent supervision must rest upon a showing that the [employer] failed to properly supervise [its employee] and, as a result, [the employee] committed a negligent act which proximately caused the appellant's injury.***' *Id.* This definition of a negligent supervision claim in West Virginia also has been adopted by our federal courts. See, e.g., *Launi v. Hampshire Cty. Prosecuting Attorney's Off.*, 480 F.Supp.3d 724 (N.D. W.Va. 2020) (memorandum opinion and order) (''Plaintiffs alleging negligent supervision or training must first make an underlying showing of a negligence claim as to an employee, and then demonstrate that the employee was negligently trained or supervised.' *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128[, 134], 538 S.E.2d 719, 725 (2000)[(per curiam)].'). ***Therefore, under this Court's current construction of a negligent supervision cause of action, the circuit court correctly dismissed the Petitioners' cause of action for negligent supervision in Count 6 of their complaint because all of the allegedly wrongful conduct with which the Petitioners charge the Assistant Principal is intentional—false imprisonment, assault, sexual harassment, and intentional infliction of emotional distress—that, because it is not negligent, cannot form the basis of a negligent supervision claim***. Thus, because all of the acts alleged to have been committed by the Assistant Principal were comprised of intentional conduct, the circuit court correctly ruled that the Petitioners had not made the requisite predicate showing of the Assistant Principal's negligence to support a claim of negligent supervision by the Board and that their claim in this regard should be dismissed. See W. Va. R. Civ. P. 12(b)(6).

C.C. v. Harrison Co. Bd. of Educ., 245 W.Va. 594, 859 S.E.2d 762, 774-5 (2021) (footnote omitted). Indeed, the Respondent does not even identify the acts allegedly unsupervised, stating only that these Defendants "had a duty to supervise the relevant Defendants" and "failed to uphold [his] duty of supervision along with negligently retaining the at-fault employees." The lower court's holding that the alleged conduct of the employee which formed the basis of the claim was assault and battery clearly cannot form the basis of any negligent supervision claim.

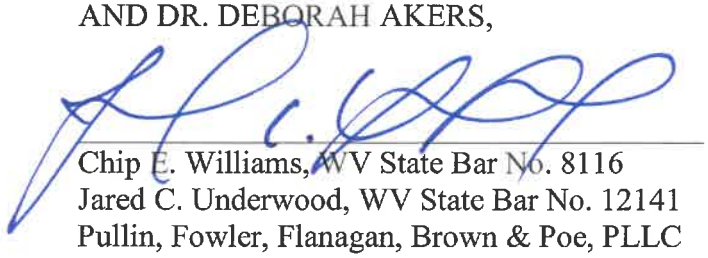
Therefore, the decision of the lower court should be reversed and Counts V and VII of the Respondent's Complaint must be dismissed as a matter of law.

CONCLUSION

WHEREFORE, based upon the above reasons, the Petitioners request that this Court reverse the lower court's decision and find that the remaining claims of Respondent not previously dismissed by the lower court are barred by the doctrine of qualified immunity and for the other reasons argued above. The Petitioners also request any and all other relief, in equity or otherwise, that this Court sees fit to grant.

Respectfully Submitted,

MERCER COUNTY BOARD OF EDUCATION
AND DR. DEBORAH AKERS,



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No. 22-745

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE MERCER COUNTY BOARD OF EDUCATION AND DR. DEBORAH AKERS,

Defendants Below, Petitioners,

v.

AMANDA SHREWSBURY

Respondent Below, Respondent.

From the Circuit Court of Mercer County, West Virginia
The Honorable Mark Wills
Civil Action No. 19-C-108

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioner, Mercer County Board of Education, does hereby certify on this 1st day of December, 2022, that a true copy of the foregoing ***"PETITIONERS' BRIEF"*** was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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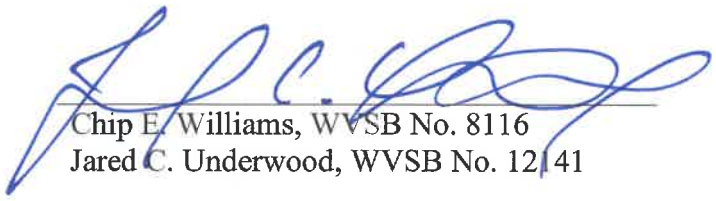

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