No. 22-745

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE MERCER COUNTY BOARD OF EDUCATON AND DR. DEBORAH AKERS,
Defendants Below, Petitioners,

v.

AMANDA SHREWSBURY,
Plaintiff Below, Respondent.

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

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Petitioners Mercer County Board of Education ("MCBOE") and Deborah Akers' ("Akers") ask this Court for immunity from protected employment activity of the most important kind. That is – the ability of a school employee to report student abuse without fear of retaliation by her superiors. The circuit court correctly denied Petitioners' efforts to shield themselves from a public trial. At the appellate level, a ruling in Petitioners' favor would result in a seismic shift of immunity law in this State and provide expanded protection for illegal employment decisions by public entities.[1]

From approximately 2015 through 2019 Respondent Amanda Shrewsbury ("Respondent" or "Ms. Shrewsbury") was employed by the MCBOE as a teacher's aide. AR at 409. Her employment record was spotless until the 2018-2019 school year when she was hired as an aide at Cumberland Heights Elementary School ("Cumberland Heights").[2] During that school year Cumberland Heights Principal Steve Hayes ("Hayes") admits that Ms. Shrewsbury notified him of child welfare complaints arising from the alleged misconduct by the teacher in Mrs. Shrewsbury's room, Alma Belcher ("Belcher").[3] Hayes conceded that Respondent first

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[1] It is also worth noting that this appeal relates to two other cases pending in Mercer County, involving the same set of facts. One of those cases involves a special needs child who was also allegedly abused in the classroom at issue. The second involves another employee of Mercer County schools who claims she suffered an adverse employment event after she and her husband reported that their daughter was also abused in the classroom at issue. Their daughter's abuse claims are also pending. The Petitioners will surely argue that any favorable immunity ruling in this matter should apply equally in those other cases. In short, this appeal will immediately impact other pending cases along with future cases involving allegations of misconduct by boards of education, which are the largest employers in some West Virginia counties.

[2]This was reflected in Respondent's voluminous employee file that produced to all the parties in the underlying litigation. That file was not produced as part of the Appendix Record, but this same issue was raised and undisputed at the trial court level. Witness testimony by MCBOE employees, cited later in this Brief confirms that Ms. Shrewsbury's MCBOE employment file showed no adverse entries until after she made her first complaint to the administration of Cumberland Heights.

[3] Hayes and Belcher were defendants in the underlying litigation. The Respondent individually named them when she filed suit since it was not clear if the MCBOE would, for example, disclaim liability for its employees. After the circuit court denied the MCBOE's and Akers' immunity claims, it was no longer necessary to pursue individual claims against Hayes and Belcher. Their dismissal by the circuit court was not appealed.

approached him no later than December 6, 2018 regarding Belcher's abusive behavior towards the children in their classroom.[4] AR at 433.

Respondent testified that after she complained to Principal Hayes about Belcher's misconduct, her teacher's aide position at his school was posted so that she could no longer work at Cumberland Heights. AR at 413. However, according to Respondent, the MCBOE did not properly post her teacher's aide position at the close of the fall semester. Sometime over Christmas break she was asked if she would return in January 2019 to refill her job. Ms. Shrewsbury did so. AR at 414.

However, during that same period, Hayes began e-mailing other Mercer County administrators asking how he could terminate Respondent from Cumberland Heights. AR at 441. That e-mail was sent after Hayes and MCBOE Human Resources Officer Dr. Crystal Filipek admit they met with Respondent on or around December 11, 2018. Respondent again reported Belcher's abusive conduct towards students during that meeting. AR at 421.

Respondent testified that Belcher appeared to be "very frustrated within the classroom because maybe she had never worked with special needs kids or kids that age, three and four." AR at 415. Belcher's abusive conduct ran the gamut.[5] By example, on one occasion Belcher screamed and yelled at a 4-year-old female student who Belcher did not know was previously given permission to go to the restroom. Belcher dragged the little girl out of the restroom and shoved her back into class. AR at 415. Ms. Shrewsbury saw Belcher drag another little boy by his arm. AR at 419-420. Belcher pinched children, slammed them down in their chairs, pulled

[4] At different times Hayes put that date as December 1, 2018. In any event, at the trial court level it was undisputed that the Respondent's complaints to Hayes occurred no later than December 6, 20128, approximately one month before she was removed from Cumberland Heights.

[5] Some of the children in Belcher and Respondent's class were not special needs but were enrolled in a pre-school program, during which they were in the same class as special needs children.

one child's hair out, glued one special needs child's hands together and restrained a special needs child in a chair for long periods of time. AR at 420.

Respondent testified that Principal Hayes "acted like it was too difficult. So that's the reason why he says that I needed to write it down, leave it for him to look over." AR at 418. Ms. Shrewsbury further testified that in a group conversation with other teachers she was told that Hayes was reporting her complaints to Petitioner Dr. Deborah Akers, who is the former Superintendent of Mercer County School. AR at 420.

Respondent's employment situation reached its nadir in January 2019 after she went outside the school system by calling the West Virginia Department of Health and Human Resources ("WVDHHR") to report Belcher's abusive conduct.[6] AR at 422. Respondent then met with law enforcement at the Bluefield City Police Department on January 11, 2019. That meeting was prompted after allegations against Belcher were made by someone else. AR at 423.

January 11, 2019 was also Respondent's last day at Cumberland Heights. AR at 424. Respondent had a January 11, 2019 meeting with Hayes where she says she was told that Akers directed Hayes to no longer call the Plaintiff out for employment opportunities with Mercer County Schools. AR at 426. Respondent will respond later in this brief to the Petitioners' logic defying claim that Respondent's removal from her full-time job at Cumberland Heights into a placement on the substitute call list was not an adverse employment decision. It clearly was.

Principal Hayes admitted that Respondent told him no later than December 6, 2018 that Belcher was "yelling at the kids, and was forcing them to sit down." AR at 433. Hayes admitted

[6] The MCBOE Employee Handbook directed employees to report allegations of abuse to the "person in charge of the school," in this case Principal Hayes. AR at 451. It is undisputed that Respondent, an aide but not a teacher, was never included in any MCBOE group training on mandatory reporting. AR at 450. She therefore reported to the "person in charge of the school" as directed by her Handbook, and less than a week later to Dr. Filipek, who oversees Human Resources for MCBOE. AR at 438. She then went outside the school and reported directly to CPS. She lost her full-time aide job a few days later.

that conduct, at a minimum, may qualify as abusive and/or neglectful. This admission paralleled that of Petitioner Akers, Dr. Crystal Filipek and Principal Hayes' direct supervisor, Rick Ball. AR at 433.

Principal Hayes admitted that Respondent brought up allegations of abusive conduct by Belcher in the aforementioned December 11, 2018 meeting with Dr. Filipek, the MCBOE HR Officer. AR at 434. In that same meeting Respondent was disciplined for an unrelated reason.[7] AR at 434. However, it is undisputed that no disciplinary action was taken against Belcher, *nor was any investigation even conducted.* The only employee who was ever disciplined related to this case was the Respondent.

Principal Hayes admitted during his deposition that he and/or Dr. Filipek should have reported Ms. Shrewsbury's allegations of abusive conduct by Belcher no later than their December 11, 2018 meeting. AR at 435. Hayes admitted that he did not interview even one child in Belcher and Ms. Shrewsbury's classroom. AR at 435. Hayes furthermore did not tell one parent of those children that allegations of abuse were made within the classroom. AR at 435.

As evidence of the abusive misconduct began surfacing, however, Hayes described one of the parents in Belcher's classroom removing his daughter from Cumberland Heights on January 7, 2019. AR at 435. Hayes testified that parent told him his daughter was afraid of Belcher. AR at 435. Just as before, Hayes never questioned Belcher regarding that allegation. AR at 432; 436. Even after parents began removing their children, Hayes admitted he still never spoke with any of the children in Belcher's classroom to determine exactly what occurred. AR at 436.

[7] Ms. Shrewsbury got into an argument with another teacher who Ms. Shrewsbury thought disclosed Ms. Shrewsbury's private health information from December 2018 hospitalization.

Six families ultimately withdrew their children from Cumberland Heights on January 11, 2019. AR at 436. In notes he made after the fact, multiple family members of students confirmed their children were afraid of Belcher and that she had done everything from yell at them to pull their hair and push them down. AR at 444-445 (relevant portions highlighted).[8] While Hayes did not interview any parents or children at the school prior to their withdrawal, he did take time on January 11, 2019 to tell Respondent she was no longer employed at Cumberland Heights. As noted, Respondent testified this was communicated to her as a directive by former Superintendent Akers.

Hayes says he did report that alleged misconduct to Assistant Superintendent of Elementary Schools, Rick Ball, in December 2018. AR at 438. In other words, Respondent's allegations of abusive conduct were both corroborated by third parties while they were also reported within her school and to MCBOE central office. Yet, despite the admitted reporting from the school to the central office, which was run by Petitioner Akers, no child was ever interviewed, no parent was ever notified and Respondent was the only employee who was disciplined.

Hayes also admitted that Mr. Ball himself took no further action, performed no investigation, did not report the allegations of abusive conduct to any outside agency. Ball merely told Hayes to keep his eye on the situation. AR at 438. This is despite Hayes' admission that Child Protective Services should have been called in December 2018 when he conceded that

[8] Respondent realized upon review of the Appendix Record submitted by Petitioners that Hayes' personal notes at AR 444-445 are illegible at the highlighted portions. The first highlighted portion at AR 444 reads, in part, that a parent "had come by MCBOE to complain about treatment her son had received at [Cumberland Heights]. She stated that her son did not want to come to school anymore." The second highlighted portion on AR 444 reads, in part, "the teacher (Belcher) was putting her hands on her child and forcing her to sit down. [The child] herself said that this had occurred." The highlighted portion on AR 445 reads, in part, "[The mother] arrived at school requesting a withdrawal form…They said that [the student] told them that Mrs. Belcher had been screaming at her and pulling her down onto the carpet. She said that Mrs. Belcher had pulled her down by her hair and she comes home crying every day. She also said that whenever she wears a bow in her hair that it is pulled out."

he first knew of Ms. Shrewsbury's allegations of abusive conduct by Belcher. AR at 439. Instead, after Principal Hayes and Respondent met with Dr. Filipek, the only outcome was discipline against Ms. Shrewsbury and, later, the loss of Respondent's full-time position.

Dr. Filipek has worked at MCBOE since 2012 as Human Resources Director. She was personally responsible for reviewing Ms. Shrewsbury's employment paperwork along with making recommendations related to hiring her. AR at 447; 448. Dr. Filipek testified that she was unaware of any complaints or concerns related to Ms. Shrewsbury prior to her employment at Cumberland Heights. AR at 449. Again, it is undisputed that the Respondent's employment file with MCBOE was spotless until she made her first report of abuse at Cumberland Heights, a report she was directed to make by her Employee Handbook.

Dr. Filipek, Petitioner Akers and other Mercer County School personnel drafted the MCBOE Department of Human Resources Employee Handbook. AR at 459. Dr. Filipek admitted that Page 6 of that Employee Handbook directs employees to report suspicions of child abuse and/or neglect to the "person in charge of the school." AR at 451. This means that Ms. Shrewsbury followed MCBOE written policy when she reported her concerns to Principal Hayes. A few days later, Principal Hayes admitted she also told Dr. Filipek.

While Dr. Filipek claimed that employees are also verbally instructed to contact the DHHR, it is undisputed that neither she, Defendant Hayes or Rick Ball contacted DHHR after Hayes testified they were notified of Ms. Shrewsbury's reports. AR at 451 (relating to instructions to report to DHHR; it is otherwise undisputed that no report was made). It is important for this Court to remember that the Respondent was never disciplined for any delay in reporting to CPS (which she eventually did). Rather, she was disciplined less than a week after her first internal reporting and then lost her full-time within a few days of reporting to CPS.

None of the multiple administrators who completely and totally failed to report Belcher's conduct were disciplined at all.

This is despite Dr. Filipek admitting that allegations of screaming or yelling in a child's face is conduct that should be reported as abusive and/or neglectful. AR at 452. Those allegations should have been reported both within the school system and to DHHR. AR at 453. Dr. Filipek admitted that allegations of "pushing a child down" is also potentially abusive and/or neglectful conduct that should be reported both within the school system and to DHHR. AR at 453. Dr. Filipek admitted the same is also true for allegations of slapping a child, pulling a child's hair, and holding a child down. AR at 453. Dr. Filipek admitted knowing about "hearsay" from parents complaining of that exact behavior by Belcher. However, Dr. Filipek, the HR Director for all of MCBOE schools, was not "directly involved" in any investigation regarding those claims. AR at 453. So, again, yet another administrator in Petitioner Akers' central office knew of these allegations but did nothing.

Despite the serious allegations against Belcher and despite six families removing their children from Cumberland Heights, Dr. Filipek admitted that Mercer County Schools never removed Belcher as a certified and qualified teacher within the Mercer County school system. AR at 454. Dr. Filipek further admitted that she was unaware of any discipline ever administered against Belcher. AR at 454. Dr. Filipek testified that Hayes, per normal protocol, should have told Petitioner Akers about Ms. Shrewsbury's allegations of abusive conduct by Belcher the first time he learned of it, which was admittedly in early December 2018. AR at 455. However, it is undisputed that Hayes did not do so. Dr. Filipek furthermore admitted that Hayes violated MCBOE school policies by not doing so. AR at 455. He received no discipline. Respondent lost her full-time job.

At the time of his deposition in the underlying case, Rick Ball had served as the Assistant Superintendent for Mercer County Schools, a job he held for more than a decade. AR at 457. Overall, he worked for Mercer County Schools for more than 40 years. Mr. Ball admitted in his deposition the law requires MCBOE personnel to enforce legal requirements within the school system. AR at 457. This includes his admission that Mercer County Schools has a legal requirement to investigate allegations that a teacher treated students in an abusive and neglectful manner, such as pushing and yelling at students. AR at 458.

Mr. Ball further admitted that the Mercer County School system requires its employees to err on the side of its students to maximize their protection and safety. AR at 458. This would include interviewing students who were allegedly involved in the abusive and neglectful conduct. AR at 459. Even though Principal Hayes notified Mr. Ball in December 2018 of allegations of abusive conduct by Belcher, Mr. Ball admitted he never reported those allegations within the school system or to any outside agency.[9]

Aside from reporting within the school system, Mr. Ball testified that Hayes should have reported the allegations of Defendant Belcher's abusive and neglectful conduct to an outside agency when he was first notified in early December 2018. AR at 461. In fact, Mr. Ball testified "that's the first call you make [CPS has] to be notified. You are a statutory reporter." AR at 461. Mr. Ball therefore admitted that Belcher's abusive and neglectful conduct should have been reported both to the Central Office and to CPS when Respondent brought that information to Hayes' attention no later than the first week of December 2018. AR at 462.

[9] Ball testified he could not recall either way whether Hayes told him of Respondent's reporting. AR at 460. Hayes unequivocally said he did. AR at 438. To the extent it matters, that admission/inference must be weighed in Respondent's favor.

Petitioner Dr. Deborah Akers is the former Superintendent of Mercer County Schools, a position she served in for approximately 30 years. AR at 464. She agreed with her Assistant Superintendent, Rick Ball, when she testified that Hayes should have reported Ms. Shrewsbury's allegations of abusive and neglectful conduct by Belcher when he learned of them. AR at 466. Akers furthermore said Hayes should have reported the allegations of abusive conduct to both CPS and his immediate supervisor, Mr. Ball.[10] AR at 467. Hayes did make that report to Ball, who did nothing. Hayes did not notify CPS. However, he did ask Dr. Filipek how he could get rid of Respondent.

It is undisputed that no report outside the school system, such as to CPS, was made until after Ms. Shrewsbury herself contacted DHHR the first week of January 2019. Despite these admitted failings within Mercer County Schools, Akers admitted that she never held a meeting with Hayes and/or any other school personnel responsible for failing to report Belcher's abusive conduct. AR at 467. In fact, Petitioner Akers, who asks this Court for immunity, herself admitted that she never personally sought out the families of any of the children involved to ask questions. This was even after she knew those children were interviewed by law enforcement and that Respondent's reports were corroborated in Hayes' note. AR at 465. Instead, Respondent Amanda Shrewsbury, who made the corroborated reports of abusive/neglectful conduct is the only MCBOE employee who was investigated and disciplined throughout this entire process. Her testimony, which must be weighed in her favor, is that Petitioner Akers was behind it.

[10] Again, Defendant Hayes testified that he did report the allegations to Mr. Ball. Mr. Ball neither confirmed nor denied that conversation took place.

II. SUMMARY OF THE ARGUMENT

The circuit court correctly denied Petitioners' motion for summary judgment related to Counts I, II, V and VII of Respondent's Complaint. There is no qualified immunity for the Respondent's employment claims and there remain genuine issues of material fact in dispute regarding Respondent's negligent supervision claims. Respondent alleges she faced workplace reprisal as a result of reporting student abuse by a teacher at her school, which is protected activity under the public policy of this State. The circuit court's Order was correct, should be affirmed and this case should be remanded so that the Respondent may have her day in court.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Due to the significant implications of this case, that extend beyond these parties, Respondent believes oral argument is appropriate pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure. As outlined later in this Brief, the dispositive issue or issues have not been authoritatively decided and the Respondent believes the decisional process would be significantly aided by oral argument. This is obviously at the Court's discretion.

IV. LAW AND ARGUMENT

A. Standard of Review

Respondent generally agrees with the standard of review outlined in Petitioner's Brief to the extent that it applies to the appellate review of Rule 56(c) summary judgment rulings. Respondent further notes that "any permissible inference from the underlying facts [must be viewed] in the most favorable light to the party opposing the motion." Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (citations omitted). "In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as '[c]redibility

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]'" (citations omitted). Id.[11]

Respondent also generally agrees with the legal standard included within Petitioners' Brief regarding qualified immunity. However, Respondent disagrees that a qualified immunity analysis even applies in this case. Petitioners either misunderstand the application of the qualified immunity defense or are attempting to redefine it in such a way that public entities are protected from employment claims for which qualified immunity does not apply.

B. Qualified Immunity Does Not Shield These Petitioners from Trial.[12]

Petitioners' qualified immunity argument remains misguided before this Court, as it was before the trial court. As Respondent noted at the summary judgment stage, this possibly arises from this Court previously writing, "admittedly, our case law analyzing and applying the various governmental immunities—sovereign, judicial, quasi-judicial, qualified, and statutory—to the vast array of governmental agencies, officials, employees and widely disparate factual underpinnings has created a patchwork of holdings." West Virginia Dep't of Health & Human Res. v. Payne, 231 W.Va. 563, 580, 746 S.E.2d 554, 571 (W.Va. 2013). Petitioners concede they are not entitled to the immunity protections of W.Va. Code §29-12A-1 et seq. (the West Virginia Governmental Torts Claims and Insurance Reform Act, or "GTCA"). This is because

[11] Respondent recognizes that arguments such as those surrounding qualified immunity usually turn on legal grounds. However, throughout their Brief the Petitioners included (disputed) facts that have no bearing on a purely legal analysis. To the extent that Petitioners attempted to color this Court's decision with allegedly negative facts about the Respondent, those facts must be construed in Respondent's favor. Moreover, many of those purported facts post-dated the lynchpin events in this case. By example, Petitioners allege (which was disputed at the trial level) that they called the Respondent out for substitute positions hundreds of times after she lost her full-time job at Cumberland Heights. Those calls occurred after the adverse employment events of which Respondent complains had already occurred and are irrelevant to the issues on appeal. Petitioners allege this shows that the Respondent was not "terminated." However, it is undisputed that she had already been removed from her full-time position within the MCBOE. If the facts are weighed in Respondent's favor, then the loss of her full-time job is proof of illegal retaliatory conduct. Petitioners are attempting to create negative inferences around the Respondent despite the requirement that those inferences must be weighed for her and against them.

[12] This portion of Respondent's Brief relates to Petitioners' first two assignments of error, which both deal with qualified immunity arguments.

county boards of education are expressly liable for employment claims under W.Va. Code § 29-12A-18(b).

This Court held long ago that "[l]ocal boards of education do not have state constitutional immunity nor common law governmental immunity from suit." Syl., Ohio Valley Contractors v. The Board of Education of Wetzel County, 170 W.Va. 240, 293 S.E.2d 437 (1982). It was because of Ohio Valley Contractors, and related cases such as the abolition of municipal immunity, the GTCA was passed in 1986.[13] In other words, a statutory grant of immunity was required expressly because no other immunity existed for county school boards. That statutory immunity then expressly carved out exception for employment claims such the one currently before this Court. Nevertheless, Petitioners continue grasping for immunity regardless of their wrongdoing, now in the form of qualified immunity.

Perhaps it is because of the existing "patchwork" of immunity holdings that Petitioners rely heavily upon Mercer County Bd. of Educ. v. Ruskauff, No. 18-0711, 2019 W.Va. LEXIS 514 (Nov. 4, 2019). Ruskauff is a memorandum decision issued under Rule 21 of the West Virginia Rules of Appellate Procedure. Petitioners may admittedly cite to that case under Rule 21(e). However, as a memorandum decision Ruskauff is an abbreviated, "limited circumstances" 21(d) ruling that does not contain any syllabus points and was not published in the West Virginia Reports. In short, while any decision of this Court has value and is due consideration, Ruskauff is not authoritative on any specific issue and does not settle this matter in Petitioners' favor. The facts are different. No points of law were made.[14]

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[13] Municipal immunity was abolished in Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975).

[14] Ruskauff is the only authority, via Memorandum Decision, Petitioners pointed to for their novel legal argument that political subdivision employment claims are shielded by qualified immunity while concurrently and expressly allowed by West Virginia Code §29-12A-18(b).

At the outset, for whatever reason, the board of education employee/plaintiff in Ruskauff did not dispute that qualified immunity existed in her case. Respondent made no such concession here and still denies that this employment case falls within that court-defined concept.[15] After conceding qualified immunity the Ruskauff plaintiff then argued that the Board violated a clearly established right, with which this Court disagreed. However, that alleged right revolved around general privacy claims that are inapposite here.

Moreover, just as they did at the circuit court level, the Petitioners twisted their immunity argument to ostensibly fit a square peg into around hole. The best example of this is found in a conclusory sentence of Petitioners' Brief where they write:

> Therefore, because 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 [sic] that these Petitioners violated, the Respondent's claims are barred by the doctrine of qualified immunity.

Petitioner's Brief (Tr. No. 68484062) at 18.[16] In other words, the Petitioners make the extraordinary concession that they are not immune from employment claims under the GTCA,

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[15] Respondent has no idea why the Ruskauff plaintiff agreed to a qualified immunity defense in her employment case, which appeared inapplicable. Perhaps some strategic decision was made. Or maybe it was a simple miscalculation. Regardless, that was an uncontested finding with no legal analysis and no points of law on immunity were provided. This Respondent could not disagree more that qualified immunity applies to these types of employment claims. A different finding here than in Ruskauff will have no impact on existing authority since that case made no points of law.

[16] Respondent also notes the contradiction that exists in Petitioner's Response to Respondent's pending Motion to Dismiss (Tr. No. 68878289). In that Response, Petitioners offered no substantive legal support for the clear jurisdictional defect related to their late filed appeal. However, they did criticize the Respondent for filing her Motion to Dismiss after Petitioners filed their appellate Brief, and not before. Never mind whether Respondent believed the jurisdictional defect may have been addressed in that Brief, or the fact that she was legally allowed to raise a jurisdictional defect "at any time." Regardless, Petitioners could have likewise raised their qualified immunity defense "at any time" during the underlying litigation. *See, by example,* Syl. pt.2, The West Virginia State Police v. J.H., 244 W.Va. 720, 856 S.E.2d 679 (2021) ("A circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.") (citation omitted). Instead Petitioners waited until after this case was fully litigated (by the hour) before filing a motion for summary judgment alleging qualified immunity. In her response to that motion

but then allege this must mean they are immune vis-à-vis qualified immunity. They also remarkably claim that the Respondent pointed to no statutory rights violations, when she clearly did so at the trial court level both in her briefing and at oral argument. AR at 377; 615.

Before pointing out those statutory violations, it requires extreme credulity to believe the Legislature specifically excluded employment claims like this one from statutory immunity so that these Petitioners could then simply fall back onto a wholly separate, judicially created immunity. If political subdivisions/boards of education were meant to have legal immunity from employment claims then our Legislature, the public policy making branch of government, would have afforded it.[17] "Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged to not add to statutes something the Legislature purposely omitted." Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007). The Petitioners are asking this Court to give them back an immunity that our Legislature expressly excluded, which would contravene the clear legislative intent to allow employment claims against political subdivisions.

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the Respondent did not raise the timing or criticize the Petitioners for bringing up a defense at the Pretrial that they could have raised in their initial pleading. After all, qualified immunity is a legal defense that does not turn upon the facts of the case and could have been argued at the 12(b)(6) stage, right out of the gate. In any event, Respondent did not personalize Petitioner's underlying litigation strategy in a case with over 180 circuit court docket entries (AR at 2-10), she simply responded to the motion for summary judgment. Respondent thought Petitioners' counsel was doing their job, just as her counsel did his.

[17] In a different context, this Court has held, in part, "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Syl. Pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965). This case does not involve the constitutionality of a statute, but this Court has clearly spoken on its deference to legitimate legislative action. Respondent notes more than once in her Brief - if the Legislature wanted immunity for political subdivisions/county boards of education in employment claims, it would not have expressly removed that protection under West Virginia Code §29-12A-18(b).

Petitioners wrongly point to State agency cases for the proposition that they are likewise similarly shielded. Those cases include W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B., 234 W.Va. 496, 766 S.E.2d 751 (2014) and W.Va. Bd. of Educ. v. Marple, 236 654, 663 S.E.2d 75 (2015), in which State entities and/or officials were granted qualified immunity from various claims. A.B., importantly did not involve employment claims but, rather, revolved around allegations of sexual misconduct by a corrections officer against an inmate. Petitioners may want to quickly assert that Marple did involve employment related decisions. However, even a cursory look at those cases shows why they do not apply here.

In A.B. this Court distinctly noted the differences between claims against the State versus political subdivisions (i.e. – boards of education):

> The paucity of guidance on the vicarious liability of the State and its agencies, both in West Virginia and other jurisdictions, is occasioned almost entirely by the fact most other jurisdictions have enacted some form of tort claims act which governs action against the state and its agencies. In West Virginia, however, the Governmental Tort Claims and Insurance Reform Act, West Virginia Code §29-12A-1 *et seq.*, is limited to political subdivisions and their employees and does not cover claims made against the State or its agencies.

A.B. at 502, 761. This single statement, in one of Petitioners' primary sources of authority, eviscerates the foundation of their immunity argument. This Court recognized that immunity for political subdivisions/boards of education was legislatively provided, a critical distinction from the State, which has no such legislative protection.[18]

This distinction is even more important in cases such as Marple, which did involve an employment action, also in relation to a board of education, but at the State level. That case

[18] These types of distinctions exist throughout immunity law holdings. By well-known example, 42 U.S.C. 1983 claims are permissible against municipalities and municipal officers. *See*, Monell v. Department of Social Services, 436 U.S. 658 (1978). However, states, state agencies and state officials sued in their official capacities cannot be held liable under 1983 claims. *See*, Will v. Michigan Department of State Police, 491 U.S. 58 (1989).

addressed multiple issues. This included whether West Virginia Code §29-12-5 and the State's procurement of liability insurance impacted all available immunities.[19] No such issue exist here.

Marple also included a discussion of qualified immunity and whether the State Board of Education had the discretion to terminate Ms. Marple's employment. The first key difference between Marple and this case relates back to this Court's analysis in A.B., where the distinction between the protections afforded to political subdivisions/boards of education versus the State was described. There is no corollary State statute in which Ms. Marple's employment claim was expressly carved out. In this case the GTCA, West Virginia Code §29-12A-18(b), allows for exactly this type of carve out.

Yet, even if Marple were on point, Petitioners still miss the mark. That is because this Court did not simply provide the State with blanket qualified immunity against Ms. Marple's claim. Rather, this Court analyzed whether the State arguably violated any of her clearly established statutory or constitutional rights. In the end, Ms. Marple only identified a broad and inapplicable constitutional claim, just like the Ruskauff plaintiff.[20]

Respondent again contends qualified immunity does not apply. However, even if a qualified immunity analysis is somehow triggered:

> [O]nce the judgments, decisions, and actions of a governmental official are determined to be discretionary, the analysis does not end. Rather, even if the complained-of actions fall within the discretionary functions of an agency or an official's duty, they are not immune if the discretionary actions violate clearly established laws of which a reasonable official would have known. A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code 29-12A-1, et seq. [the West Virginia

[19] In short, the State's procurement of liability insurance constitutes a waiver of sovereign immunity but not qualified immunity, unless expressly stated in the policy of insurance. Marple at 62, 83.

[20] In essence Ms. Marple alleged her due process rights were violated since, by example, she held a liberty interest in her at-will employment. Such a finding would have created a new legal duty in this State and completely changed the landscape of at-will employment, at least in the public realm. The Respondent in this case is not making any such claim. To the contrary, it is the Petitioners who are seeking to invent a new legal concept of immunity from employment claims; claims that are expressly provided for by statute and have been since 1986.

> Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known.

Syllabus, State v. Chase Securities, Inc., 188 W. Va. 356, 424 S.E.2d 591 (1992). Syl. Pt. 3, in part, Clark v. Dunn, 195 W.Va. 272, 465 S.E.2d 374 (1995). The trial court correctly found that clearly established laws of which a reasonable official would have known are at issue, among those W.Va. Code §49-2-803, otherwise known as the mandatory reporter statute. AR at.

Petitioners only response to this statute is their claim that it does not create a private cause of action. That argument is wrong on its face.[21] In a long-recognized decision this Court held that State administrative rules regulating hospital staffing were evidence of substantial public policy in a workplace retaliation claim.

> In the instant case, it does not take an in-depth analysis for this Court to hold that West Virginia Code of State Regulations § 64-12-14.2.4 sets forth a specific statement of a substantial public policy which contemplates that a hospital unit will be properly staffed to accommodate the regulation's directive; to ensure that patients are protected from inadequate staffing practices; and to assure that medical care is provided to hospital patients, especially children and young adolescents, who must depend upon others to protect their medical interests and needs.

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[21] For examples of cases in which this Court found the existence of a public policy basis for an employment claim, *see, by example*: Collins v. Elkay Mining Co., 179 W.Va. 549, 371 S.E.2d 46 (1988) (finding right of action for retaliatory discharge based on a refusal to violate the West Virginia Mine Safety Act, West Virginia Code § 22A-1A-20); McClung v. Marion County Comm'n, 178 W.Va. 444, 360 S.E.2d 221 (1987) (finding right of action for retaliatory discharge based on a right to file for overtime wages pursuant to West Virginia Code § 21-5C-8); Cordle v. General Hugh Mercer Corp., 174 W.Va. 321, 325 S.E.2d 111 (1984) (finding right of action for retaliatory discharge based, in part, on West Virginia Code § 21-5-5b, which restricts an employer's use of polygraph testing); Shanholtz v. Monongahela Power Co., 165 W.Va. 305, 270 S.E.2d 178 (1980) (finding right of action for retaliatory discharge based on a right to file a claim under the West Virginia Workers' Compensation Act, West Virginia Code § 23-5-1). The statutory, administrative and local policies regarding the reporting of child abuse and neglect must also evidence the substantial public policy of this State. Importantly, the statutes related to the above cases do not universally provide for a private cause of action. Employees facing illegal retaliation have always been permitted to point to a statute or rule as an expression of public policy, even if that statute or rule itself does not provide for a direct claim. Petitioners' allegation that the mandatory reporter statute contains no provision for a cause of action must be disregarded.

Tudor v. Charleston Area Medical Center, 203 W.Va. 111, 124, 506 S.E.2d 554, 567 (1997). The administrative rules cited in that holding contained no provision allowing for a private cause of action. If a private cause of action was required, then a substantial amount of historic employment precedent in this State would not exist. It is merely necessary that a statute express the public policy of this State, not that the statute express a private cause of action.

It is difficult to conceive that Petitioners argue the Mandatory Reporter statute does not likewise express the public policy of this State that allows a school employee to report abuse while remaining free from retaliatory conduct by his or her public employer. The Respondent never sought damages arising from that statute. She only pointed to it as a clear expression of public policy for which no retaliation is allowed.

The Respondent also pointed to another anti-retaliation statue at the trial court level, which Petitioners continue to ignore. Namely:

> 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.

West Virginia Code §6C-1-3. Petitioners do not even address this statute in their brief. Instead, they continue to argue that the Respondent was never "terminated" as proof that they did nothing wrong.

However, Respondent described earlier how this is nothing more than sleight of hand. It is undisputed that "the compensation, terms, conditions, location, or privileges of [Respondent's] employment" were changed after she reported "wrongdoing" within Mercer County Schools. Meanwhile, the multitude of supervisory employees who admitted they should have reported

wrongdoing, but did not, suffered no changes to their compensation, terms, conditions, location or privileges of their employment.[22]

As the circuit succinctly concluded:

> Employees who report such abuse or neglect, as mandated, cannot do so if they fear negative employment retaliation for doing so and this constitutes a violation of public policy. Furthermore, the Court finds that alleged negative employment action would violate clearly established laws of which a reasonable official would have known, as all parties in this case knew of the duty to report alleged abuse and neglect and it is reasonable to assume that Plaintiff had a right not to face adverse employment actions because of her reports.

AR at 607. The circuit court's conclusion is inarguable. At this stage of the appellate process Petitioners must concede the Respondent's allegations are taken as true. The Respondent reported corroborated instances of teacher abuse and then suffered multiple adverse employment decisions immediately after.

Despite this, Petitioners argue that they should escape even the threat of trial through court granted immunity that our Legislature previously abrogated. Surely this cannot be the jurisprudence of this State, especially on the heels of high-profile changes to our special education classrooms.[23] In this case, qualified immunity is an attempted end around of political subdivision liability and should not be allowed. The circuit court's Order should be affirmed.

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[22] To the extent it matters to the Petitioners, that code section does provide for a private cause of action. Regardless, that statute along with the Mandatory Reporter statute are both examples of well-known legal provisions expressing this State's public policy prohibiting retaliation for reporting wrongdoing in general, and school abuse in particular.

[23] *See, by example*, https://wvpublic.org/w-va-senators-unanimously-approve-bill-to-bolster-law-requiring-cameras-in-special-ed-classrooms/. That legislation, SB621, was signed into law by the Governor following last year's legislative session. SB621 added additional safeguards to special education classrooms. Unfortunately, neither that bill, nor its 2019 predecessor, were in effect in late 2018 or early 2019 when Ms. Shrewsbury was at Cumberland Heights. The Respondent mentions this both to express the clear public policy of this State and to answer any question as to why video footage may not exist in this case. At the relevant times in question, none was required.

C. Genuine Issues of Material Fact Exist Regarding Petitioners' Adverse Employment Actions

Respondent remains perplexed at Petitioners' continuing attempt to escape liability by claiming they never "terminated" her. As noted throughout this Brief, and as conceded by Petitioners, Respondent's full-time job at Cumberland Heights ended in January 2019, after Respondent had already returned to the school. While the Respondent was not "terminated" from the employment role of MCBOE, she still clearly suffered adverse employment decisions including termination of her full-time position.[24]

Those adverse events began on December 11, 2018 when Respondent was disciplined following her meeting with Principal Hayes and Dr. Filipek. Throughout the rest of December Principal Hayes asked Dr. Filipek how he could get rid of Respondent. He then told Respondent on January 9, 2019 that she would no longer work at Cumberland Heights. On January 11, 2019 Principal Hayes gave Ms. Shrewsbury a negative employment evaluation for the first time in her career with MCBOE. AR at 440; 441. She then was only offered sporadic substitute positions throughout the remainder of the 2018-2019 school year.[25]

"Termination" from Mercer County Schools was never the litmus test. Rather, as the Respondent already noted, it was illegal for the Petitioners to:

> [D]ischarge, 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

[24] Respondent recognizes the Petitioners will never agree as to why Respondent lost her full-time job at Cumberland Heights. Regardless, at this stage, all inferences as to why weigh in her favor.

[25] It should go without saying that a full-time job as an aide is more valuable than a job as a temporary aide. Respondent made more money as a full-time aide. Her schedule was known. She was at the same school every day, with the same students. Ms. Shrewsbury chose full-time employment but after she complained about Belcher's abuse, she was only ever offered temporary jobs. The Petitioners may argue over why that happened, but that cannot be the basis of summary judgment in their favor.

> employer or appropriate authority, an instance of wrongdoing or waste.

W.Va. Code § 6C-1-3. At the circuit court level the Respondent pointed to statutory and regulatory legal authority that gave the Respondent the right to report "wrongdoing." Those included but may not be limited to the mandatory reporter statute contained within W.Va. Code §49-2-803, administrative rules such as 126 C.S.R. 99. She also reported in compliance with the MCBOE Employee Handbook that Petitioner Akers helped draft. AR at 450.

The Petitioners must concede that these legal and administrative requirements represent the public policy of the State of West Virginia and Mercer County Schools. Genuine issues of material fact exist regarding the adverse employment action taken against Ms. Shrewsbury after she reported violations of wrongdoing. The Respondent presented the trial court, and this Court, with substantial evidence of adverse action taken against her in temporal relation to her complaints of teacher abuse in Mercer County Schools. The circuit court's Order should be affirmed.

D. Genuine Issue of Material Fact Exist Regarding Petitioner Akers' Role in the Adverse Employment Action Taken Against Respondent

Petitioners provided this Court with no legal authority as to why Petitioner Akers cannot be held liable under Counts I and II of Respondent's Complaint (collectively, the employment claims). Instead, Petitioners simply provided caselaw noting that boards of education have discretionary authority over their employees along with a discussion of Respondent's job as a "service" rather than "professional" personnel. All the while, Petitioners ignore the factual record of Petitioner Akers' involvement.

MCBOE Director of Human Resources Dr. Crystal Filipek testified that in all of her years working for Mercer County Schools she has never seen the Board disagree with Petitioner Akers' recommendation for a principal. AR at 448. Dr. Filipek went so far as to say the Board

"defers" to Petitioner Akers. AR at 448. When it comes to personnel Petitioner Akers "did not want to be left in the dark about that." AR at 455. "[A]nything major...[s]he wants to know what is going on with employees and our students." AR at 455. Dr. Filipek obviously agreed, "accusations of child abuse, that is major[.]" AR at 455.

This mirrored the testimony of Principal Hayes. As noted earlier, Principal Hayes told his direct supervisor, Rick Ball, of Respondent's reporting sometime in December 2018. Hayes could not say with certainty what Ball did with that information. However, he agreed that Respondent's reporting is something he believes Ball would normally pass along to Petitioner Akers. AR at 439.

When Respondent went outside of the school system in January 2019 and reported to CPS, she was then relieved of her full-time aide job at Cumberland Heights.[26] Respondent testified that Principal Hayes told her this was done at the direction of Petitioner Akers. AR at 426. While Petitioner Akers goes to much trouble to claim that she cannot "terminate" the Respondent, she does have the authority to place personnel within the school system. *See, by example*, West Virginia Code §18A-2-7. Respondent agrees she technically remained on the roles of Mercer County Schools. There is no dispute, however, that she lost her full-time job at Cumberland Heights after a series of adverse employment decisions.

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[26] Employees rarely have "smoking gun" evidence of discrimination or retaliation. Therefore, one way to infer intent is by looking at the proximity in time between the protected conduct and the adverse employment action. Thus, if there is a close proximity in time between the protected conduct and the adverse employment decision, the jury may infer that the reason for the decision was that the employee engaged in protected conduct. Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009). Here the Respondent reported abuse no later than December 6, 2018. On December 11, 2018 she was disciplined, for the first time ever, for an unrelated reason. The rest of December Principal Hayes did not investigate Belcher, but instead investigated how to remove Respondent from his school. By January 9, 2019 Respondent had reported abuse to CPS and given an interview to the Bluefield Police. That day she was removed from Cumberland Heights and on January 11, 2019 she received her first negative evaluation. For lack of a better phrase, "the timing stinks."

Genuine issues of material fact exist as to the involvement of Petitioner Akers in those adverse employment decisions. Petitioner Akers alleges she was not involved. The Respondent's evidence contradicts her claims and may only be probably adjudicated by a jury. The circuit court's Order should be affirmed.

E. Genuine Issues of Material Fact Exist Regarding the Defendants' Negligent Supervision

Here Petitioners point only to Respondent's allegation that they negligently supervised Belcher when she allegedly committed a battery against the Respondent. This presumptively arises from the circuit court referencing that single incident in its Order denying Petitioners' motion for summary judgment on this Count. AR at 612.

However, in her Complaint Respondent alleged negligent supervision of all named defendants, which at the time also included Principal Hayes. AR at 16. Respondent will not recite the litany of allegations made against Hayes. Suffice to say, he failed to properly investigate and himself report on Respondent's allegations of abuse; he attempted to remove Respondent from his school after she reported abuse, and; he gave the Respondent a negative evaluation after she reported abuse. This was all known at the central office, at a minimum, by Dr. Filipek and Mr. Ball.[27]

Petitioners contend "a predicate prerequisite of a negligent supervision claim against an employer [is] underlying conduct of the supervised employee that is also negligent." C.C. v. Harrison Co. Bd. Of Educ., 245 W.Va. 594, 859 S.E.2d 774 (2021); *citing*, Taylor v. Cabell Huntington Hosp., Inc., 208 W. Va. 128, 538 S.E.2d 719 (2000).[28] If this is the standard, then

[27] Respondent's evidentiary inferences also point to Petitioner Akers knowing.

[28] C.C. is the primary authority relied upon by the Defendants on this issue. That majority opinion was strenuously objected to on the issue of negligent supervision by Justice Hutchison in his dissent. Justice Hutchison noted that

Respondent's direct supervisor, Principal Hayes, was admittedly negligent in how he handled her reporting of abuse.[29] His negligence, at a minimum, then led to a cascade of documented employment problems.

A reasonable trier of fact may conclude that things would have ended differently had Hayes not admittedly failed in his own duties. A jury may believe, for example, that instead of working on ways to remove her from his school, Hayes should have investigated Respondent's reporting. Instead of emailing Dr. Filipek those two supervisory personnel could have looked into Respondent's reporting, instead of planning on ways to discipline her.

A jury may believe that the eventual claim of an altercation between Respondent and Belcher would not have occurred if Belcher had been properly investigated and removed from Cumberland Heights. Dr. Filipek admitted Belcher should have been disciplined, but she never was. AR at 454. "While '[g]enerally, a willful, malicious, or criminal act breaks the chain of causation 'we have held that '[a] tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.'" Jones v. Logan Co. Bd. of Educ., No. 21-0217 (November 17, 2022) (citations omitted). Regardless of the nature of Belcher's conduct, the actions of other MCBOE personnel were a substantial factor in bringing about what Belcher did.

It is well-settled that "[q]uestions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining

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C.C. relied upon a dicta from Taylor, a per curiam opinion, which contradicts existing West Virginia state and federal law. Regardless, even while recognizing C.C. the Defendants' argument does not preclude the Plaintiff's negligent supervision claims in this case.

[29] Regardless of the existence of a negligent supervision claim, the MCBOE is still liable for Principal Hayes, Dr. Filipek, Rick Ball, Petitioner Akers and its other employees. *See, e.g.*, W. Va. Code § 29-12A-4(c)(2) (a political subdivision may be liable for damages caused by its own negligence or the negligent acts of its employees when engaged in the scope of their employment).

to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." Syl. Pt. 6, McAllister v. Weirton Hosp. Co., 173 W.Va. 75, 312 S.E.2d 738 (1983). The circuit court correctly determined that the Respondent's negligent supervision claim revolved around disputed material facts. Those facts and that claim went beyond the alleged assault and battery by Belcher. As such, summary judgment was inappropriate, and the circuit court's Order should be affirmed.

III. CONCLUSION

Respondent has given this Court a legal basis to deny Petitioners' appeal. At the same time, Respondent asks this Court to consider the broader ramifications of a ruling in Petitioners' favor. If their argument is adopted then all political subdivisions, not just county boards of education, would raise qualified immunity defenses in a myriad of employment claims going forward. Those are the very same claims in which our legislature expressly waived governmental immunity. Petitioners are therefore attempting to create a new body of law, based upon dicta from a single memorandum order from this Court.[30] This is especially egregious under the facts of this case.

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[30] Respondent does not presume to think this Court wants a historical deep dive into the history of qualified immunity. However, she believes it is worth pointing out how far afield the Petitioners' position is from the genesis of that court created doctrine, which was initially described as a "modest exception" to liability. *See, by example*, https://illinoislawrev.web.illinois.edu/wp-content/uploads/2022/01/Levy.pdf. Qualified immunity was first announced in Pierson v. Ray, 386 U.S. 547 (1967), which involved 42 U.S.C. 1983 claims against a police court justice and police officers after an allegedly illegal arrest. This was nearly one hundred years after Section 1983 was first passed by Congress in 1872. Section 1983 was a Reconstruction era safeguard against constitutional civil rights violations. Respondent is not arguing that split second, life or death decisions by law enforcement officers, for example, do not arguably deserve some level of judicial protection. Nor is she in any way arguing for the abolition of qualified immunity. However, the initial genesis for the qualified immunity doctrine has now morphed to the point that a county school board and its superintended ask this Court for judicial protection from an employment claim that did not involve any split-second, life or death decisions. Respondent's claims arise from a series of events that unfolded over an entire month. There were multiple levels of administrative review by a public agency that has its own human resources department. This is simply not the type of case that qualified immunity should shield, especially when our legislature excluded such claims from political subdivision liability in the first place. In any event, Respondent is not whistling in the wind when she raises this point. Conservative Justice Clarence Thomas criticized the modern application of the doctrine when he wrote, "[i]n further elaborating the doctrine of

As it relates to this specific case, Petitioners should not be shielded from merely going to trial. The circuit court agreed that the Respondent presented evidence sufficient to proceed to a jury. This is because the Respondent suffered a series of clear adverse employment events after she reported teacher on student abuse, reports which were never investigated by Petitioners even though they were later corroborated by those students and their families. A jury should be given the opportunity to weigh why it is that all the MCBOE employees who failed to report abuse suffered no consequences while the one employee who did report, was disciplined.

Respondent respectfully requests that this Court affirm the trial judge's Order, dismiss the Petitioner's appeal and remand this matter so that Respondent may present her case to a jury.

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qualified immunity...we have diverged from the historical inquiry mandated by the statute." Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment). Conservative Justice Antonin Scalia agreed in an earlier opinion when he noted, ""[i]n the context of qualified immunity ... we have diverged to a substantial degree from the historical standards." Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). A plethora of legal criticisms of the expansion of the doctrine exist online, from a range of commenters both liberal and conservative. In short, Respondent is not asking this Court to claw back its caselaw on qualified immunity. Rather, it is the Petitioners who are seeking to expand the doctrine once again. Respondent respectfully offers that qualified immunity was never meant to protect a political subdivision from an employment claim such as this, especially when the public policy-making branch of our government, the State Legislature, expressly allowed it. Even if it were, Respondent provided this Court with substantial public policy grounds to set aside the defense and allow her to proceed to trial.

No. 22-745

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE MERCER COUNTY BOARD OF EDUCATON AND DR. DEBORAH AKERS,
Defendants Below, Petitioners,

v.

AMANDA SHREWSBURY,
Plaintiff 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 Respondent, Amanda Shrewsbury, does hereby certify that on this 6th day of February, 2023, a true copy of the foregoing **"RESPONDENT'S BRIEF"** was served upon counsel of record by depositing the same in the U.S. Mail, postage prepaid, in envelopes addressed as follows:

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