

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
At Charleston

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ESTATE OF DAWSON EDSILL,
DAWSON EDSILL, INDIVIDUALLY
BY AND THROUGH HIS MOTHER,
CHRISTINE ERICKSON, AND
CHRISTINE ERICKSON, INDIVIDUALLY,
I.E., A MINOR, BY AND THROUGH HER
MOTHER, CHRISTINE ERICKSON,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,
JEFFERY M. PACK,
JENNIFER L. RAPER, INDIVIDUALLY AND
IN HER CAPACITY AS AN EMPLOYEE/AGENT OF
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

Respondents.

*From the Circuit Court of Marshall County, West Virginia,
Civil Action No. 23-C-43*

PETITIONERS' BRIEF

Ronald W. Zavolta (W. Va. State Bar No. #8739)
Michael P. Zavolta (W. Va. State Bar No. # 13871)
Matthew A. Jones (W. Va. State Bar No. # 14377)
Zavolta Law Office
1287 Fairmont Pike Road,
Wheeling, WV 26003
Telephone: (304) 905-8073
Facsimile: (304) 905-8992
E-mail: michael@zavoltalawoffice.com
Counsel for Petitioner-Plaintiffs

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CERTIFICATE OF SERVICE

I, Ronald W. Zavolta, counsel for the Petitioner-Plaintiffs do hereby certify that I served a true copy of the foregoing **Petitioner's Brief** upon the following individuals, on this 7th day of December 2023:

Lou Ann Cyrus, Esq.
Shuman McCuskey Slicer PLLC;
1411 Virginia Street, E., Suite 200, Post Office Box 3953, Charleston, WV 25339;
Counsel for Defendant-Respondent West Virginia Department of Health and Human Resources
and Defendant-Respondent Jeffery M. Pack

Chelsea Brown, Esq.
Bowles Rice LLP
University Town Centre 125 Granville Square, Suite 400, Morgantown, WV 26501
Counsel for Defendant-Respondent

/s/ Ronald W. Zavolta, Esq.
Ronald W. Zavolta, Esquire (W. Va. State Bar No. 8739)

I. STATEMENT OF THE CASE

This horrific case concerns the tragic and wrongful death of sixteen (16) year-old minor, Dawson Edsill. At the time of his death, he was unquestionably and undeniably in the exclusive care, custody, and control of West Virginia DHHR CPS worker Jennifer Raper. It is indisputable, that minor Dawson Edsill's untimely death was as a direct and proximate result of the reckless, intentional, malicious acts and omissions of West Virginia DHHR, and their CPS employee Jennifer Raper. It is Petitioners-Plaintiff's position that all of the aforementioned, reckless, acts and omissions violate West Virginia codes §49-2-802 et seq., §49-1-105(b) et seq., and the understood policy and procedures of West Virginia DHHR.

On December 7, 2022, minor, I.E., the younger sister of, now deceased, minor Dawson Edsill, reported allegations of misconduct to John Marshall High School Administrators, West Virginia DHHR CPS worker, Jennifer Raper, and a Marshall County Sheriff and or Sheriff Deputy. Minor, I.E. alleged including but not to be strictly limited to: that she felt unsafe in her home because her mother Christine Erickson was an alcoholic, used drugs, was subjected to ongoing domestic violence, and her mother had physically grabbed her, trying to take her cell phone from her.^{1 2 3}

As a result of these serious allegations, West Virginia DHHR CPS worker Raper determined that the children's safety may be at risk, and that a CPS investigation needed to be conducted to assure the children were safe while in their home. The investigation is referred to as a Temporary Protection Plan (hereinafter referred to as "TPP") and requires the removal of Ms.

¹ Ms. Erickson was subjected to ten (10) unannounced drug screenings from, All results were negative. Therefore, Administratrix Erickson was not a drug addict. (JA 108-115)

² In November 2022, Ms. Erickson filed a domestic violence petition against Johnnie Allen with the Marshall County Magistrate Court. (JA 86-107).

³ Christine Erickson's attempt to take minor I.E.'s cellphone was predicated on a believe that minor I.E. may have been sending or receiving lewd/sexual pictures from adult men.

Erickson's children from her custody and care during this seven (7) day time period. (JA 24-26). The minor children are transported by Raper West Virginia DDHR to a predetermined, safe haven/home where there is adult supervision and the children will be safe.

On December 7, 2022, at approximately 3:45 PM, West Virginia DHHR employee, Jennifer Raper, and Marshall County Law Enforcement met Ms. Erickson's minor children as they got off their school bus. The children were safely escorted to their home where they were permitted to gather seven (7) days of clothing and essentials for the TPP plan. Respondent-Defendant Raper provided minor I.E. transportation to her safe haven/home in her State of West Virginia provided vehicle. However, Raper intentionally and recklessly failed to provide safe transport for sixteen (16) year-old minor, Dawson Edsill. Rather she abandoned him, permitting him to leave alone unsupervised on a motorized dirt bike. It is important to know that sixteen (16) year-old minor Dawson Edsill did not have a learner's permit or a driver's license at this time. Furthermore, it is understood driving a dirt bike on Glendale and or Moundsville, West Virginia's public roadways violates applicable West Virginia and or local law.

West Virginia DHHR, representative Raper proceeded to safely transport, I.E. to her predetermined, safe, haven/home, further demonstrating her outrageous, intentional, malicious, and reckless failure to provide minor Dawson Edsill, the same safeguard protection and safe transport. It is critical to note, at absolutely no point did Minor Dawson Edsill flee from his home and the care custody and control of Raper/West Virginia DHHR. Additionally, at absolutely no time, did Raper, West Virginia DDHR, and or law enforcement attempt to stop minor Edsill from leaving.

Tragically and horrifically, approximately forty-five to sixty (45-60) minutes after Raper, maliciously, intentionally, and recklessly failed to safely transport sixteen (16) year-old minor

Dawson Edsill to his safe haven/home, he was involved in a head-on collision with another dirt bike and died at the scene. (JA 16). It is essential to note, West Virginia DDHR/Raper, assured mother Erickson prior to her, agreeing to the TPP that she /West Virginia DHHR would safely transport her children to their predetermined safe haven/home. Even without this assurance, clearly Raper/WVDHHR must safely transport the minor children to their pre-determined safe haven/home. This is not, under any analysis, a discretionary decision, rather a non-negotiable ministerial requirement striking at the heart of protecting children.

Plaintiff filed a wrongful death complaint in the Circuit Court of Marshall County on or about April 21, 2023. Despite the aforementioned indisputable, horrific, malicious facts and overwhelming evidence and without the benefit of conducting any discovery, Marshall County Circuit Court dismissed this case, pursuant to the Respondent-Defendants' Motions to Dismiss. (JA 194-210). The basis for dismissal were findings, that the malicious act and omissions of Raper were somehow "discretionary" and therefore, protected by qualified immunity. Additionally, the Circuit Court ruled, Petitioner-Plaintiff had failed to state a claim. (JA 194-210).

No thoughtful, reasonable, informed analysis can somehow conclude that the reckless, malicious, intentional acts and mission of West Virginia DHHR and CPS employee Raper in failing to safely transport minor Dawson Edsill to his safe haven/home are somehow discretionary. Keep in mind, Raper safely transported his sister I.E. and there is only a one (1) year age difference. Plaintiffs strenuously take the position granting Ms. Raper and WVDHHR Qualified Immunity for the above-referenced horrific and life-altering acts and omissions is ***Absolute Total Blanket Immunity***. Jennifer Raper, and West Virginia DHHR absolutely should not be afforded Qualified Immunity under this unique set of facts and insurmountable evidence.

Plaintiff, therefore, respectfully moves this Court to overturn the Circuit Court Order Granting the Defendants' Motion to Dismiss and thereby provide the Petitioner-Plaintiffs and the Estate of Dawson Edsill their rightful opportunity to pursue justice for his wrongful death. Plaintiffs additionally take the position granting Miss Raper and West Virginia DHHR qualified immunity for the above-referenced horrific reckless, malicious, intentional acts and omissions in this case is not only a granting of absolute total blanket immunity but also places all West Virginia children at serious risk for injury, impairment, and or death.

II. STATEMENT OF FACTS

On December 7, 2022, minor I.E. reported to school officials at John Marshall High School that she felt unsafe in her home. Alleging that her mother was essentially a drug addict, an alcoholic, had physically attempted to take her cell phone from her, and she had observed the remnants of drugs in a dish in her mother and her mother's live-in boyfriend of two (2) years, Johnny Allen's bedroom.^{4 5}

John Marshall High School officials upon hearing minor I.E. allegations, immediately contacted the West Virginia Department of Health and Human Resources (hereafter referred to as WVDHHR) and Marshall County Sheriff's Department for assistance. Defendant Jennifer Raper, a CPS worker for WVDHHR, was assigned this matter. Based upon the serious report of minor, I.E., CPS/WVDDHR made a decision that the children were at risk, and therefore a temporary protection plan investigation needed to be facilitated. It would be remiss to not point out, the reported incident about Erickson getting physical with her minor child, I.E., trying to take her cellphone was, in fact, nothing more than a mom concerned that her minor daughter may

⁴ Ms. Erickson was subjected to ten (10) unannounced drug screenings. All results were negative. Therefore, Administratrix Erickson was not a drug addict. (JA 108-115)

⁵ At all times material and relevant herein, the father of now deceased Dawson Edsill and I.E., his sister had no parental rights and had not been in the children's life for over five (5) years.

have been sending and or receiving improper nude photos on her cell phone from an adult male and wanting to assure her daughter's safety. It is also noteworthy, when Raper asked Minor I.E., if her older brother, by one (1) year, Dawson was asked, would he agree that their mother was doing drugs and was an alcoholic, etc. She stated "she did not know."

Respondent-Defendant Raper, on December 7, 2022, promptly met and interviewed Christine Erickson at her residence in Moundsville, West Virginia. Erickson acknowledged there had been some very limited experimentation with drugs, but not in the presence of her minor children. Additionally, Erickson advised CPS Raper of the numerous domestic violence incidents involving Johnny Allen, her live-in boyfriend at the time, and her two (2) minor children and that a Temporary Restraining Order was entered against Allen on her and her minor children's behalf in late November 2022. (JA 86-107). CPS Raper concluded her preliminary investigation, and provided Ms. Erikson with two options:

(1) Ms. Erickson could sign off consenting to the seven (7) day Temporary Protection Plan to determine whether or not her minor children were safe at their home, and thereby agree to turn over care and custody of her minor children to WVDHHR during this temporary protection plan seven (7) daytime period; or

(2) Not consent to the Temporary Protection Plan and its conditions, and Raper would promptly turn the matter over to the Marshall County Prosecutors Office.

A temporary protection plan (hereinafter referred to as a "TPP"), is an administrative mechanism that permits, West Virginia DHHR to temporarily take custody care and control of minors from their parents/guardians and permits West Virginia DHHR to place the minor children temporarily, in a safe haven/ home with consenting adult supervision, during this time period.

Naturally, Ms. Erickson, a mom, was extremely reluctant to relinquish custody, care, and control of her two minor children to West Virginia DHHR. CPS worker Raper advised Ms. Erickson, she could not transport her minor children to the safe haven/home. CPS worker Raper promised Erickson she would personally meet her minor children, Dawson Edsall, and minor, I.E., after school at their school bus drop-off location on December 7, 2022. That she would personally escort them to their home to gather seven (7) days of clothing and, most importantly, safely transport them to their pre-determined safe haven/home. Based upon these assurances, Ms. Erickson signed off consent for the temporary protection plan. (JA 24-26). At all times, Ms. Erickson followed all directives and requirements of West Virginia DDHR and CPS worker Raper with the unequivocal clear understanding of the mutual agreement and assurance her minor children would be safely transported by West Virginia DHHR /CPS Raper, to their pre-determined safe haven/home.

CPS worker Raper advised Erickson, as a condition to the TPP, she absolutely could not be present at the school bus drop-off location or when the children arrived home from school on December 7, 2022. Plaintiff Erickson was upset and devastated that she could not be present to speak with her children and assure them everything would be okay. However, she understood and respected the TPP process and its goal to protect children at risk. It must be reiterated, Christine Erickson received absolute unequivocal, clear assurance that her two (2) minor children would be under the care, custody and supervision, in *loco parentis*, of Respondent-Defendants WVDHHR and CPS Raper and that they would be safely transported on December 7, 2022, to a pre-determined safe haven/home, where there would be adult supervision during the seven (7) day TPP.

On December 7, 2022, at approximately 3:45 PM, consistent with the TPP, Erickson's minor children were met by West Virginia DHHR employee Raper and a Marshall County Sheriff Deputy at their school bus drop-off location. The children, as promised, were escorted by Raper to their home and permitted to gather seven (7) days, clothing and essentials. Erickson, as directed and required, was not present at either the school bus drop-off location or her home when the children arrived with CPS worker Raper.

Unfathomably and inexcusably, CPS Raper made the affirmative, intentional, reckless, willful, malicious, and wanton decision to safely transport only I.E. to her pre-determined safe haven/home. Thereby maliciously, intentionally, recklessly, and consciously failing to transport, and abandoning sixteen (16) year-old minor Dawson Edsill. Permitting him to leave alone unsupervised on a motorized dirt bike. Dawson did not in any manner, flee WVDHHR CPS worker Raper or Marshall County Law Enforcement. Neither West Virginia DHHR/CPS worker Raper, nor Marshall County Sheriff Department attempted to chase and or stop minor Edsill. It's disturbing but important to note, sixteen (16) year-old minor Dawson Edsill did not have a West Virginia learner's permit or driver's license, and it's understood driving a motorized dirt bike on Glen Dale and or Moundsville, West Virginia public roadways is in violation of West Virginia, and or local law/ordinance. Equally disturbing and serving to further demonstrate the undeniable maliciousness and recklessness of defendant Raper and WVDHHR, 's acts and omissions, are the totally undisputed facts and evidence that Defendant Raper, safely transported 15-year-old minor Dawson Edsill's sister, I.E., to her pre-determined safe haven/home in a State of West Virginia provided sport utility vehicle.

Approximately forty-five to sixty (45-60) minutes after WVDHHR CPS worker Raper intentionally, maliciously, and recklessly failed to transport innocent minor Dawson, as promised

and required, he was killed in a head-on collision with another dirt bike. (JA 16). This horrendous failure by Defendants Raper and WVDHHR unfortunately, but without question, caused minor Dawson's wrongful and untimely death at the tender age of sixteen (16). (JA 16).

Although it is well recognized and fully understood, it must be stated, the ultimate purpose and goal of WVDHHR is, above all else, PROTECT OUR CHILDREN. It is totally unclear how or why defendant Raper, made the affirmative decision to safely transport only minor I.E. having unequivocally assured Christine Erickson, both her minor children would be safely transported to their safe haven/home by CPS Raper/WVDHHR.

In support of its Order Granting the Defendant's Motion to Dismiss, the Circuit Court argued Christine Erickson, somehow, had custody, care, and control of her minor children at all times material and relevant. (JA 197). This argument is as disappointing as it is nauseating concerning the life of a sixteen (16) year-old minor teenager. More importantly, this argument is without support or basis, and blatantly ignores the material facts and probative evidence. Ms. Erickson was not present when her minor children got off the school bus because she was told and directed after signing the TPP that she could not be present because she placed her minor children's safety and well-being at risk. Ms. Erikson was not present when her children arrived home from school, because she was directed after signing the TPP not to be there for the same reason. It is critical to understand, once WVDHR CPS worker Raper made a decision to investigate all allegations of abuse, the minor children were deemed at risk and absolutely could not be in the presence of their mother, Christine Erickson. This is why CPS worker directed and required Erickson to not be present when the children arrived home on December 7, 2022.

The Defendants contend that the malicious, reckless, willful, wanton acts and omissions are somehow discretionary acts and therefore afforded qualified immunity. (JA 27-57). If this

illogical unsound argument and legal position stands, a grave injustice has been done to now deceased sixteen (16) year old minor, Dawson Edsill, and his estate.

III. PERTINENT PROCEDURAL BACKGROUND

Petitioner-Plaintiffs filed a Complaint in the Circuit Court of Marshall County on or about April 21, 2023. (JA 1-26). At all times material and relevant, Petitioner-Plaintiff's claims arise out of but should not be strictly limited to, West Virginia Code §49-2-802 et seq. While not specifically referencing this code section, Plaintiffs' Complaint is replete with allegations of reckless, willful, wanton, malicious acts and omissions consistent with West Virginia Code §49-2-802 et seq. (JA 1-26). Specifically, Petitioner-Plaintiffs alleged the West Virginia Department of Health and Human Resources, its director, Jefferey Pack, and its CPS Agent Raper were willful, wanton, malicious, and reckless in failing to safely transport minor Dawson Edsill to his safe haven/home thereby causing his wrongful and completely preventable death.⁶ The Defendants, by and through counsel filed Motion to Dismiss asserting WVDHHR and Raper's actions were discretionary and therefore afforded qualified immunity. (JA 27-57). WVDHHR and Jeffery Pack also noted that Petitioner-Plaintiff's claims were barred because Plaintiff's Complaint as stated inadvertently sought state funds as opposed to the State's liability insurance coverage. (JA 27-41).

Petitioner-Plaintiff filed a Response Opposing the Defendants Motion to Dismiss, strenuously taking the position that WVDHHR and Agent Raper's acts were not only ministerial but also oppressive and malicious; therefore, qualified immunity does not apply. (JA 67-115).

⁶ Additionally, Plaintiff brought claims against the Marshall County Sheriff's Department, Sheriff William Helms, and Sheriff's Deputy Samuel Robinson. Plaintiff's Complaint alleged Robinson was present for the incident at issue and negligently failed to transport minor Dawson Edsill. Plaintiff additionally advanced claims against Marshall County Sheriff's Department and Sheriff William Helms under the theory of *respondent superior*. The Circuit Court dismissed all of Plaintiff's claims against Marshall County Sheriff's Department and Sheriff William Helms and Deputy Robinson.

Additionally, on July 19, 2023, Petitioner-Plaintiff filed a Motion for Leave to Amend Plaintiff's Complaint. (JA 129-136). Plaintiffs sought to clarify the remedy sought, and articulate they only intended to pursue a recovery up to the available limits of the state's applicable liability insurance coverage. (JA 129-136). See Syl. pt. 2, *Pittsburgh Elevator v. W. Va. Board of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983)(holding a case falls outside the traditional constitutional bar to suits against states when the recovery sought is limited by the states available liability insurance coverage).

The Defendant's both filed Replies in Support of their Motions to Dismiss. (JA 137-172). In Respondent-Defendant Raper's Reply she further asserted Petitioner-Plaintiff Christine Erickson maintained custody and control of her minor children at all times material and relevant and provided a copy of the *completed* TPP form, which documented minor Dawson Edsill and I.E.'s predetermined safe haven/homes, and included Safety Resource Information as well as signatures from Joe Davis, Erin Davis, and Ashley Boston.(JA 170-172).⁷

On August 7, 2023, the Circuit Court of Marshall County summarily dismissed all of Petitioner-Plaintiff's claims, concluding that they were barred by the doctrine of qualified immunity. (194-222). It is noteworthy, the Circuit Court never addressed Plaintiff's Motion for Leave to Amend the Complaint or Plaintiff's Motion to Partially Strike.

IV. SUMMARY OF ARGUMENT

The Circuit Court, in direct contravention of well-established West Virginia law, failed to find Respondent WVDHHR and Respondent Raper's acts and omissions were malicious or otherwise oppressive and should, therefore, not be afforded qualified immunity. Additionally, the Circuit Court erred in failing to find Respondent Raper's acts and omissions at issue were

⁷ Petitioner-Plaintiffs understand Joe Davis, Erin Davis, and Ashley Boston were the adults who agreed to monitor and supervise minors during the TPP investigation.

ministerial, not discretionary, and should, therefore, not be shielded by the cloak of qualified immunity.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is warranted pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. The Petitioner-Plaintiff respectfully submits that the decisional process would be significantly aided by oral arguments in that this appeal involves the application of settled law, vis-à-vis, the landmark precedent of *State v. Chase Securities, Inc.*, 188 W. Va. 356 (W. Va. 1992).

Petitioner-Plaintiffs additionally maintains this case has far-reaching, serious, and significant effects on the citizens of West Virginia and beyond the State of West Virginia.

VI. ARGUMENT

A. Qualified Immunity

The State of West Virginia's history with the doctrine of qualified immunity is as complex as the doctrine itself. It is critical to note, the West Virginia Supreme Court held, Qualified immunity protects ‘**all but the plainly incompetent or those who knowingly violate the law.**’ *Crouch v. Gillispie*, 809 S.E.2d 699 (W. Va. 2018). In *Manns*, the West Virginia Supreme Court held,

No public officer is liable to one dealing with him for the ill-performance of an official act, if he is legally vested with discretion, or must use his own judgment, as to the manner or method of performing such act. ...officers in performing acts which involve official discretion likewise incur no personal liability in the absence of fraud.

State ex Rel. Bank v. Manns, 126 W. Va. 643, 647 (W. Va. 1944).

On May 28, 1986, the West Virginia Legislature enacted West Virginia Code §29-12A-5, Immunities from liability, which afforded political subdivisions immunity from civil actions, with a number of exceptions. The 1992 *Chase* Court, tasked with reconciling the *Manns* holding,

West Virginia Code §29-12A-5, and developing federal law, note three (3) prominent principles. First, the *Chase* Court advances the proposition, “[t]here is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.” *State v. Chase Securities, Inc.*, 188 W. Va. 356, 365 (W. Va. 1992). Second, the *Chase* Court held that “qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.” *Id.* at 361. (citing *Burns v. Reed*, 500 U.S. 478 (1991)). Third, the “purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation.” *State v. Chase Securities, Inc.*, 188 W. Va. 356, 365 (W. Va. 1992) (citing *Westfall v. Erwin*, 484 U.S. 292 (1988)).

The West Virginia Supreme Court has been reluctant to articulate a clear test to distinguish discretionary acts from ministerial acts because “immunities must be assessed on a case-by-case basis.” Syl. Pt. 9, *Parkulo v. West Virginia Bd. of Probation*, 199 W. Va. 161 (W. Va. 1996). “Ministerial acts, by definition, are official acts which, under the law, are so well prescribed, certain, and imperative that nothing is left to the public official's discretion.” *State v. Chase Securities, Inc.*, 188 W. Va. 356, 364 (W. Va. 1992)

Thus, a review of the History of the Qualified Immunity Doctrine in West Virginia reveals several reoccurring principles. First, “our law with regard to public official immunity is meager” *State v. Chase Securities, Inc.*, 188 W. Va. 356, 358 (W. Va. 1992). Second, qualified immunity protections apply to government agent’s discretionary acts that were negligent, it does not shield ministerial acts or acts that exceed mere negligence. Finally, qualified immunity is sufficient to insulate government agent when making a decision, absolute blanket immunity is not necessary.

Petitioner-Plaintiff finds *Phillips v. Thomas*, 555 So.2d 81, 86 (Ala.1989) insightful, noting the *Payne* Court relied upon the Alabama Supreme Court's rationale. *W. Va. Dep't of Health & Human Res. v. Payne*, 746 S.E.2d 554, 565 n.26 (W. Va. 2013). In *Phillips*, the Plaintiffs brought a claim against the director Department of Human Resources Family and Children's Services Division, claiming he had been negligent in his inspection of a Department of Human Resources Family and Children's Services Division operated facility. *Id.* at 82. The Plaintiff's also brought a claim against the Child Services Division employee who negligently and wrongfully inspected said facility. *Id.* at 86. The Alabama Supreme Court found the Director of the Alabama Department of Human Resources Family and Children's Services Division was entitled to qualified immunity which barred *some* of Plaintiff's negligence claims. *Id.* The Alabama Supreme Court clarified that discretionary acts can be comprised of ministerial acts, noting the distinction between Director's discretionary duty to inspect the facility, and the Child Services Division employee's ministerial acts in perform said inspection, which could be actionable if negligently performed. *Id.* at 85. The Alabama Court further explained, while the Director had affirmative duties to train, monitor, and direct his subordinates, those acts required "constant decision making and judgement." *Id.* at 85. The Alabama Supreme Court further explained if a Department of Human Resources Family and Children's Services Division employee may be directed or required to act, their acts are not discretionary and are therefore actionable. *Id.* The Alabama Supreme Court concluded by finding the state employee was not entitled to qualified immunity for their negligent performance of the inspection at issue. *Id.* at 86.

Recognizing the difficulty in separating discretionary from ministerial acts, the Supreme Court of West Virginia has previously held, where a bona fide dispute as to the foundational or

historical facts that underlie the immunity determination exists, the trial court may pose the issue to a jury. Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 144 (W. Va. 1996).

- 1. The Circuit Court, in direct contravention of well-established West Virginia law, failed to find Respondent WVDHHR and Respondent Raper's acts and omissions non-discretionary and, therefore Respondent-Defendants should not be afforded qualified immunity.**

The defense of Defendant Raper argues *Crouch v. Gillispie* in support of their position that qualified immunity applies to the facts and evidence at issue herein. **Their arguments and position are misplaced as *Gillispie's* acts and omissions were without question arguably discretionary.**

In *Gillispie* WVDHHR CPS received an anonymous tip that Leslie Boggs was “unable to care for her child” *Crouch v. Gillispie*, 809 S.E.2d 699 (W. Va. 2018). Specifically, the anonymous reporter alleged Ms. Boggs lived with a convicted felon with a history of violence and was an alcoholic. *Id.* A CPS agent met with Ms. Boggs to investigate the claims of the anonymous caller. *Id.* at 702. Determining no present danger existed, the CPS agent made the affirmative decision to leave the child in the custody of Ms. Boggs while continuing to investigate the allegations. *Id.* at 703. Roughly 18 days after the CPS agent met with Ms. Boggs, the minor at issue was killed. *Id.* Evidently, Ms. Boggs had rolled onto the child while sleeping after consuming alcohol. *Id.* The question before the *Gillispie* Court was whether or not WVDHHR was negligent in determining that leaving the minor in Ms. Boggs’ custody presented no present danger. *Id.* The West Virginia Supreme Court noted, “[t]he challenges facing a CPS worker in making the determination of whether or not a situation of present danger exists and, so, whether to remove a child from a home, strikes at the heart of qualified immunity,” before holding the CPS agent was entitled to qualified immunity. *Id.* at 706.

It is critical to note, the investigation was ongoing, and the decision was made that no present danger existed. At absolutely no point was care, custody, and control of the minor ever exercised and or voluntarily relinquished to WVDHHR, therefore, the acts and omissions at issue in Gillispie, including the determination that no eminent danger was present, were discretionary.

In the present case, we have a voluntary relinquishment of care, custody, and control of two minor children Dawson Edsill, now deceased, and I.E. to WVDHHR. (JA 24-26). The care, custody, and control of Plaintiff Dawson Edsill, a minor, was at no point impeded and/or limited, rather **it rested solely and exclusively with Defendants Raper and WVDHHR.** Contrastingly, the sole care, custody, and control of Plaintiff minor I.E. became limited or quasi-custody when WVDHHR safely transported her to her predetermined TPP safe haven/home. The exclusive custody and care of minor Dawson Edsill and minor I.E. would arguably end with the safe transporting of the minor children to their pre-determined and verified safe haven/home with consenting adults present. There is, however, absolutely no discretion in the safe transport and drop off at a safe haven/home of minor children in WVDHHR custody and care. Furthermore, Agent Raper/WVDHHR has no discretion to afford one minor, I.E., a year younger than minor Dawson Edsill, safe transport and drop off and intentionally, maliciously, and grossly negligently abandon minor Dawson Edsill by not transporting him.

Defendant Jennifer Raper's Motion to Dismiss concludes by acknowledging that minor sixteen (16) year-old Plaintiff Dawson Edsill's death was untimely and tragic but calls for the judiciary and legislature to maintain decision-making powers of WVDHHR employees by affording the same protection. Plaintiff concurs with that proposition; however, once Defendant WVDHHR affirmatively take sole and exclusive custody, control, and care of a minor from a family unit and/or parent Defendant WVDHHR is mandatorily required to provide all minors safe

transport to their predetermined safe haven/home with proper adult supervision and care. **This mandatory job task and duty is absolutely not subject to any employee discretionary decision making. Any contrary decision or ruling provide in essence blanket total immunity to Defendant WVDHHR, Child Protective Service worker Defendant Raper, and ultimately sanctions reckless, willful, wanton, malicious, and gross negligence by Child Protective Service workers thereby, placing innocent children at severe risk for injury, harm, and death.**

As referenced above, the distinction and definition of a discretionary act and or ministerial act are important for our analysis concerning qualified immunity. At this present time, Petitioner-Plaintiff readily concedes that CPS Agent Raper had discretion to implement a seven (7) day TPP. Petitioner-Plaintiff's claims, however, arise from CPS Agent Raper's execution and or lack thereof, of the agreed upon seven (7) day TPP. Petitioner-Plaintiff's vociferously take the position, consistent with *Phillips v. Thomas* and West Virginia Law, that CPS Agent Raper's failure to safely transport minor Dawson Edsill to their safe haven/home is a non-discretionary ministerial act for which qualified immunity just does not apply. Petitioner-Plaintiff respectfully request this Court reverse the Circuit Court's August 7, 2023, finding that the Respondent-Defendants are entitled to qualified immunity and send this case back to the Circuit Court of Marshall County to be decided upon the merits.

A. Standard of Review

Plaintiff respectfully takes the position this Court should apply a de novo standard when reviewing a motion to dismiss. Syl. pt. 1, *Albright v. White*, 202 W.Va. 292, 503 S.E.2d 860 (1998). A motion to dismiss should be granted only when the facts are construed in the light most favorable to the nonmoving party, "it is clear that no relief could be granted under any set

of facts that could be proved consistent with the allegations.” See *Murphy v. Smallridge*, 196 W. Va. 35, 36 (W. Va. 1996); see also Syl. pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977), (The court may grant the motion only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of [their] claim which would entitle [them] to relief”). The West Virginia Supreme Court has previously held, “ ‘[c]omplaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure.’ ” *State ex Rel. Smith v. Kermit Lumber*, 200 W. Va. 221, 227 (W. Va. 1997). Generally, the West Virginia Supreme Court disfavors motions to dismiss and “counsel[s] lower courts to rarely grant such motions” *Lodge Dist. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606 (W. Va. 1978).

2. The Circuit Court, in direct contravention of well-established West Virginia law, failed to find Respondent WVDHHR and Respondent Raper’s acts and omissions were malicious or otherwise oppressive and should, therefore, not be afforded qualified immunity.

The defense incorrectly argues and asserts that Plaintiffs’ Complaint sounds in negligence. In fact, Plaintiff’s Complaint is replete with relevant references to **gross negligence, malicious, willful, and wanton acts and omissions**. (JA 1-26). These allegations are supported by indistinguishable facts and evidence consistent with West Virginia Code §49-2-802(h). It is also worth noting, Petitioner-Plaintiff also alternatively alleged the Respondent-Defendant Raper was acting inside or outside the scope of her employment. Additionally, the allegations of gross negligence comport with applicable West Virginia law. Raper and WVDHHR also aver West Virginia Code §49-2-802(b) somehow supports Defendant Raper’s position for statutory immunity. They argue West Virginia Code §49-2-802(b) shields discretionary actions and then somehow conclude Ms. Raper’s acts and omissions were discretionary. West Virginia Code § 49-2-802(b) states

The local child protective services office shall investigate all reports of child abuse or neglect. Under no circumstances may investigating personnel be relatives of the accused, the child or the families involved. In accordance with the local plan for child protective services, it shall provide protective services to prevent further abuse or neglect of children and provide for or arrange for and coordinate and monitor the provision of those services necessary to ensure the safety of children. The local child protective services office shall be organized to maximize the continuity of responsibility, care, and service of individual workers for individual children and families. Under no circumstances may the secretary or his or her designee promulgate rules or establish any policy which restricts the scope or types of alleged abuse or neglect of minor children which are to be investigated or the provision of appropriate and available services.

A thorough reading of the applicable West Virginia Code documents not one word or reference to discretionary acts. Even more revealing is the clear unmistakable specific reference by West Virginia Code 49-2-802(h) that authorizes Child Protective Service workers liability from operation of a motor vehicle or **for any loss caused by gross negligence, willful, and wanton misconduct, or intentional misconduct. See W. Va. Code 49-2-802(h).** At all times material and relevant, Plaintiffs maintain the Defendants, CPS Agent Raper and WVDHHR's acts and omissions are grossly negligent, malicious, willful, wanton, and reckless.

The West Virginia Supreme Court said it best, as it relates to malicious, willful, wanton, and grossly negligent acts and omissions of Defendants Raper and WVDHHR noting, "Qualified immunity, as we have discussed, 'is broad **and protects 'all but the plainly incompetent or those who knowingly violate the law.'**" *Crouch v. Gillispie*, 809 S.E.2d 699, 704 (W. Va. 2018). It is of critical import to take note, Defendant Raper and Defendant WVDHHR's investigation concerning whether or not take custody and care and control of Plaintiff Christine Erickson's minor children and implement a TPP was completed. The moment Christine Erickson signed the TPP form, with the understanding Agent Raper would safely escort her minor children from the school bus stop to the family residence, allow them to get seven (7) days of clothes, and safely transport them to a pre-determined safe haven/home. There is no discretion involving the critical

safeguarding of children once care, custody, and control rest solely with Defendant Raper and Defendant WVDHHR. Permitting a 16-year-old distraught and emotionally unstable minor to not be safely transported to his safe haven/home with responsible concerned adult supervision, care, custody, and control in the face of contemporaneously transporting his sister I.E. is just incompetent and rises to an unmistakable level of malicious, oppressive, willful, wanton, reckless, and gross negligence. At absolutely no point in Defendant Raper or Defendant WVDHHR's motion to dismiss and memorandums do they suggest, infer, or put forth arguments that the aforementioned acts and omissions in failing to safely transport minor Dawson Edsill were in accordance/complied with WVDHHR's policies and procedures. Petitioner-Plaintiffs respectfully request this Court reverse the Circuit Court's August 7, 2023, finding that the Respondent-Defendants are entitled to qualified immunity and send this case back to the Circuit Court of Marshall County to be decided upon the merits.

VII. CONCLUSION

As this Court has previously noted, Qualified Immunity determinations are often difficult to determine on a Motion to Dismiss and must be reviewed carefully and cautiously on a case-by-case basis. *W.Va. State Police v. J.H.*, 19-0741 (2021)(signed opinion); see also Syl. Pt. 9, *Parkulo v. West Virginia Bd. of Probation*, 199 W. Va. 161(W. Va. 1996). For this, and all of the above reasons, Petitioner-Plaintiffs respectfully request this Court reverse the Circuit Court's August 7, 2023, Order and send this case back to the Circuit Court of Marshall County to be decided upon the merits.