IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-404

Estate of D.E., D.E., individually by and through his mother, Christine Erickson, Christine Erickson, individually, and I.E., a minor, by and through her mother Christine Erickson,

Plaintiff Below, Petitioner,

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, Marshall County Sheriff's Department, William Helms, Jr., and Samuel Robinson, individually and in his capacity as an employee/agent of Marshall County Sheriff's Department,

Defendants Below, Respondents.

Appeal from the Circuit Court of Marshall County, West Virginia (23-C-42)

BRIEF OF RESPONDENT JENNIFER L. RAPER

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A. INTRODUCTION

This appeal arises from the Circuit Court of Marshall County's recognition that the doctrine of qualified immunity applies to the discretionary decisions made by a West Virginia Department of Health and Human Resources ("WV DHHR") employee in the course of her professional duties.[1] The Circuit Court of Marshall County, in recognizing the applicability of qualified immunity to Respondent Jennifer L. Raper ("Respondent Raper"), properly dismissed Petitioners' Complaint below for failure to state a claim upon which relief may be granted. Respondent Raper respectfully asks this Honorable Court to affirm the Circuit Court's ruling in its totality.

B. STATEMENT OF THE CASE

This case stems from the discretionary decisions of a child protective services worker in implementing a Temporary Protection Plan for two minor children and the immunity which attaches to those discretionary decisions. This matter was initiated with the filing of the Petitioners-Plaintiffs' ("Petitioners") Complaint on April 21, 2023, in the Circuit Court of Marshall County, West Virginia, following the death of a minor child, D.E.[2]

On December 7, 2022, I.E., the minor child of Petitioner Christine Erickson ("Petitioner Erickson") and brother of D.E, reported to school administrators at John Marshall High School that she felt unsafe in her home because her mother abused alcohol and drugs in the home, and also because she was exposed to domestic violence in the home.[3] As a result of these allegations and an ensuing DHHR investigation, Petitioner Erickson voluntarily entered into a Temporary Protection Plan with WV DHHR, which was signed and dated by Petitioner Erickson as well as

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[1] JA 194–209; see also Pet'rs' Brief at 1.

[2] JA 1–26 (Compl. generally)

[3] Pet'rs' Brief at 1.

WV DHHR employee Jennifer Raper.[4] By the terms of the Temporary Protection Plan, the minor children were to be taken to a safe haven/home for a period of seven (7) days.[5]

Petitioners alleged that, pursuant to the Temporary Protection Plan, Respondent Raper and members of the Marshall County Sheriff's Department met I.E. and D.E. at the school bus drop off point on December 7, 2022.[6] Respondent Raper and the members of the Sheriff's Department allegedly escorted I.E. and D.E. to their home, where they collected clothing and other items to bring to the safe haven/home during the pendency of the Temporary Protection Plan.[7] Petitioners acknowledge that, thereafter, Respondent Raper transported I.E. to the safe haven/home; however, they contend that Respondent Raper failed to safely transport D.E. to the identified safe haven/home.[8] Plaintiffs allege that, instead of transporting D.E., herself, Respondent Raper permitted, condoned, ratified, and acquiesced in permitting D.E. to leave his mother's residence on a dirt bike without a supervising adult.[9] Approximately one hour and fifteen minutes after leaving his mother's home, D.E. was involved in a dirt bike crash, which caused his death. [10]

In their Complaint, which was properly dismissed below, Petitioners asserted one cause of action—negligence—against WV DHHR, various employees of WV DHHR, and the Marshall County Sheriff's Department.[11] Petitioners sought recovery for damages stemming from

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[4] JA 170–172.

[5] JA 171.

[6] JA 6, 21; *see also* JA 212.

[7] JA 198.

[8] JA 198.

[9] JA 21; s*ee also* JA 42.

[10] JA 198.

[11] JA 1–26.

Respondent Raper's acts or omissions in failing to "assure the safe transportation, care and custody of minor Plaintiff [D.E.]."[12]

C. PROCEDURAL HISTORY

After the filing of Petitioners' Complaint on April 21, 2023, Respondent Raper filed her Motion to Dismiss on May 22, 2023.[13] By her Motion to Dismiss, Respondent Raper argued that she was entitled to qualified immunity related to Petitioners' claims, as her actions related thereto were discretionary and did not violate any of Petitioners' clearly established statutory or constitutional rights.[14] The Circuit Court of Marshall County agreed and granted Respondent Raper's Motion on August 7, 2023, stating that Petitioners' Complaint failed to "meet the heightened pleading standard of identifying a clearly established statutory or constitutional right allegedly violated by Ms. Raper in her interactions with [D.E]."[15]

More particularly, the Circuit Court of Marshall County noted that "[t]he sole Code Section cited in Plaintiffs' Complaint which Ms. Raper is alleged to have violated is West Virginia Code § 49-1-105(b), which sets forth the purpose of the child welfare system[,]" and emphasized that "Plaintiffs' Complaint does not plead any specific conduct by Ms. Raper which would constitute a violation of this statute."[16] The Circuit Court also added that Plaintiffs, both in their Complaint and through their briefing, "fail[ed] to cite to any authority which would support the conclusion that this general statute [§ 49-1-105(b), supra] would create an affirmative statutory duty to act in

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[12] JA 8.

[13] JA 42–57.

[14] *Id.*

[15] JA 204.

[16] *Id.*

a specified fashion based on the situation as presented to Ms. Raper on December 7, 2022."[17] In sum, the Circuit Court appropriately recognized Petitioners' claims for what they are: "skeletal assertions" which are "insufficient to strip Ms. Raper of qualified immunity inherent to her position as a caseworker."[18]

The Circuit Court also recognized that the allegations contained in the Complaint as to Respondent Raper were related to conduct which was within the scope of her role as a child protective services caseworker, and that "Plaintiffs' criticism of Ms. Raper's decision-making rests squarely on her alleged decision concerning the method of transport of [D.E.] from his mother's residence."[19] To that end, the Circuit Court explained, "Plaintiffs provide conclusory allegations that Ms. Raper violated DHHR policy directives to protect children but nothing more."[20] The Circuit Court ultimately concluded that "Ms. Raper's decision-making with respect to the situation presented at the Erickson/Edsill residence on December 7, 2022, falls squarely within the discretionary decision-making for which the State and its employees are entitled to immunity and which is to be insulated from the harassment of prospective litigation."[21] In so concluding, the Circuit Court acknowledged that "[t]he nature of the minor's transport from his residence is not specified by statute or the West Virginia State Constitution, and Ms. Raper's interactions with [D.E] and/or alleged omissions in response to his exit from the residence are discretionary and therefore immune from liability under the foregoing authorities."[22] Ultimately, Petitioners'

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[17] *Id. see also* FN 36, JA 204.

[18] JA 204.

[19] JA 205.

[20] *Id.*

[21] *Id.*

[22] *Id.*

assertions of liability "based on vague or principle notions of governmental responsibility [were] insufficient to overcome the legislature's clear intent to provide WV DHHR workers such as Ms. Raper with immunity."[23]

Petitioners filed their Notice of Appeal in this matter on September 5, 2023, and filed their appeal on December 7, 2023.

D. SUMMARY OF ARGUMENT

This Honorable Court should **AFFIRM** the Circuit Court of Marshall County's Order Granting Defendant Jennifer Raper's Motion to Dismiss because Respondent Jennifer L. Raper is entitled to qualified immunity from the claims brought by Petitioners below. Specifically, the Circuit Court of Marshall County correctly concluded that Respondent Jennifer L. Raper was entitled to qualified immunity based on the conclusions that: (1) Petitioners failed to meet their heightened pleading standard to show that Respondent Raper's alleged actions violated a clearly established statutory or constitutional right; and (2) Respondent Raper's actions with respect to the Temporary Protective Order on December 7, 2022, were discretionary.

More particularly, in their Complaint and in their responsive briefing below, Petitioners failed to assert any statutory provision or case law which could show the existence of a statutory or constitutional right which Respondent Raper allegedly violated. The Supreme Court of Appeals of West Virginia (herein "West Virginia Supreme Court") has previously recognized that an official who is acting within the scope of his or her authority is entitled to qualified immunity if the conduct involved did not violate clearly established laws of which a reasonable official would have known.[24] Based on Petitioners' inability to show the existence of such clearly established

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[23] JA 207.

[24] *See Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

laws which were violated by Respondent Raper's alleged conduct, the Circuit Court of Marshall County appropriately dismissed Petitioners' Complaint.

Additionally, the Circuit Court of Marshall County correctly found that Respondent Raper's actions with respect to the Temporary Protective Order on December 7, 2022, were discretionary. It is well-established that officials like Respondent Raper are immunized from liability for the discretionary decision-making aspects of their job, including decisions as to how to execute a Temporary Protection Plan for the safety of minors. As the West Virginia Supreme Court has previously held:

> "If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby."[25]

Because the Circuit Court correctly applied the precedential case law of the West Virginia Supreme Court of Appeals to the allegations of Petitioners' Complaint to conclude that said allegations are barred by qualified immunity, Respondent Raper respectfully requests this Court affirm the Circuit Court's decision in its totality.

E. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, no oral argument is necessary, as the dispositive issue has been authoritatively decided in Respondent's favor, and the facts and legal arguments are adequately presented in the briefs and record on appeal with the decisional process not being significantly aided by oral argument.

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[25] Syl. Pt. 4, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

F. STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*."[26] Relevant to this particular matter, "[t]o the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, ***a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive***[.]"[27] "In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability."[28]

G. ARGUMENT

The issue before this Court on appeal is whether Respondent Jennifer Raper is entitled to qualified immunity for the actions she took with respect to the implementation and execution of the Temporary Protection Plan on December 7, 2022. West Virginia law is clear that:

> "[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 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."[29]

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[26] Syl. Pt. 2, *State ex rel McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

[27] Syl. Pt. 11, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).

[28] *Id.*

[29] Syl. Pt. 3, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

Further, it is well established that officials like Respondent Raper are immunized from liability for the discretionary decision-making aspects of their job, including decisions as to how a Temporary Protection Plan is implemented and executed for the safety of minors.[30]

As is further discussed below, the Circuit Court of Marshall County concluded correctly that Respondent Raper is entitled to qualified immunity because: (1) Petitioners' Complaint below failed to identify a clearly established statutory or constitutional right which was allegedly violated by Ms. Raper; and (2) Ms. Raper's actions related to the December 7, 2022, Temporary Protection Plan were wholly discretionary. As such, the Circuit Court of Marshall County correctly dismissed Petitioners' Complaint below because it failed to state a claim upon which relief could be granted. Accordingly, this Court should **AFFIRM** the Circuit Court of Marshall County's August 7, 2023, Order Granting Defendant Jennifer L. Raper's Motion to Dismiss.[31]

1. <u>Petitioners' assertions that the Temporary Protection Plan transferred custody of D.E. away from Petitioner Erickson and to the WV DHHR are factually and legally inaccurate, do not negate the immunity analysis, and must, therefore, be ignored by this Court.</u>

As a threshold matter, any assertion that Petitioner Erickson temporarily transferred custody of D.E. to the WV DHHR by way of the Temporary Protection Plan is factually and legally inaccurate. Even if factually accurate, this would not negate the immunity which would attach to

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[30] *See Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995) (holding that officer was engaged in the performance of discretionary judgments as to disarming hunters within the course of his authorized law enforcement duties); *West Virginia Department of Health and Human Resources v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (holding that DHHR was entitled to qualified immunity regarding claims of negligent licensure of day habilitation center because licensing of behavioral health facilities was matter placed entirely within the discretion of DHHR); *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018) (holding that DHHR workers responding to a complaint of child abuse were entitled to qualified immunity even after the child that was the subject of the investigation was killed by the parent suspected of abuse, because the DHHR workers exercised discretionary judgments in the course of the child abuse investigation).

[31] *See generally*, JA 194–209.

Respondent Raper's discretionary decision making. Accordingly, and as is further discussed herein, this Court should ignore Petitioners' numerous references to Petitioner Erickson's supposed relinquishment of custody, and WV DHHR's apparent assumption of custody of her children.[32]

Petitioners contend that, by executing the Temporary Protection Plan, Petitioner Erickson voluntarily relinquished custody of her children to the WV DHHR.[33] In reality, the Temporary Protection Plan is without any language which would effectuate a transfer of custody of the minor children from Petitioner Erickson to the WV DHHR.[34] Without clear and express language in the Temporary Protection Plan which could demonstrate Petitioner Erickson's wish to relinquish custody of her children and transfer it to the WV DHHR—such language being absent here—Petitioners' claims that such transfer of custody occurred are merely hollow, baseless assertions.[35] Indeed, as the West Virginia Supreme Court previously held, "[i]f a natural parent intends to voluntarily transfer temporary custody of a child to a third person, then the document effecting the transfer should expressly provide that it is the intention of the parent to temporarily transfer custody to the third person."[36]

Here, as described above, there is no language in the Temporary Protection Order which shows Petitioner Erickson's intent to voluntarily transfer custody of her children to the WV DHHR.[37] As Respondent Raper appropriately and correctly argued below for the Circuit Court's

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[32] *See* Brief of Pet'r at 1, 2, 5, 6, 15, 19.

[33] *Id.*

[34] *See* JA 170–173.

[35] *Id.*

[36] Syl. Pt. 5, *Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996).

[37] *See generally* JA 170–173.

consideration, Respondent Raper and the WV DHHR did not, at any time, have "sole and exclusive custody"[38] of D.E. Put simply, the Temporary Protection Plan did not operate to effect a transfer of custody of the minor children to Respondent Raper or the WV DHHR.[39] In fact, the clear language of the Temporary Protection Plan makes evident that a transfer of custody had not occurred, *but that it might occur in the future* if there was non-compliance with the Plan.[40] The Temporary Protection Plan reads, in pertinent part, that:

> I/we have discussed the Protection Plan with the worker. We understand its contents and that it is voluntary, and we agree to abide by the terms and conditions of the plan. If something happens which prevents us from carrying out the plan, we will immediately notify the worker. If the worker is unavailable, we will notify the supervisor. We understand that failure to agree to the plan or carry out the plan may result in a reassessment of my home ***and possible protective custody and/or referral to the Prosecuting Attorney's office for a court order to remove my children from my home***. I will then have the opportunity to plead my case in court.[41]

The Plan clearly states that protective custody and/or a referral for removal of the children may occur *if* there is non-compliance with the Plan.[42] As is clear, and despite Petitioners' assertions to the contrary, Petitioner never transferred sole, exclusive custody of her children to Respondent Raper or the WV DHHR.

Moreover, Petitioners fail to establish how a transfer of custody from Petitioner Erickson to WV DHHR would alter the qualified immunity analysis in any respect. Petitioners have offered no authority for the proposition that qualified immunity only attaches to discretionary acts or

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[38] JA 161.

[39] *See generally* JA 170–173.

[40] *Id.*

[41] *Id.* (emphasis added).

[42] *Id.*

decisions involving minors outside of the custody of WV DHHR or its employees. Instead, the immunity clearly applies to those acts taken within the official's scope of authority, and Petitioners' emphasis on custody does not affect that analysis. Thus, the Court should disregard this argument and any intended application to the legal analysis at hand in favor of affirming the Circuit Court's Order.

2. The Circuit Court of Marshall County correctly found that Petitioners' Complaint below failed to identify a clearly established statutory or constitutional right which was allegedly violated by Respondent Raper; accordingly, the Circuit Court of Marshall County correctly dismissed Petitioners' Complaint under qualified immunity grounds.

The only West Virginia Code Section cited in the Complaint below which Petitioners alleged Respondent Raper to have violated was West Virginia Code § 49-1-205(b). That Code Section does not create a constitutional or statutory right such that any violation thereof would remove Respondent Raper's actions from the protections of qualified immunity. Accordingly, because Petitioners' Complaint failed to allege a constitutional or statutory right which was violated by Respondent Raper's discretionary actions, the Circuit Court of Marshall County appropriately dismissed the Complaint.

As the West Virginia Supreme Court previously held:

> "[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 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."[43]

Regarding the allegation of whether a clearly established right has been violated, the West Virginia Supreme Court stated:

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[43] *Clark*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

> To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a ***"particularized showing"*** that a ***"reasonable official would understand that what he is doing violated that right"*** or that "in the light of preexisting law ***the unlawfulness" of the action was "apparent."*** *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).[44]

Additionally, in cases involving the defense of qualified immunity, a plaintiff's complaint must meet a "heightened pleading standard."[45] The West Virginia Supreme Court has also expressly recognized this principle, stating that "[w]e believe that in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff."[46]

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[44] *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 n. 11, 479 S.E.2d 649, 659 n. 11 (1996)(emphasis added); *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 517, 766 S.E.2d 751, 776 (2014).

[45] *See W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W. Va. 273, 282, 852 S.E.2d 773, 782 (2020) ("Accordingly, we find that the circuit court erred by failing to apply the ***heightened pleading standard*** in this particular matter and reverse its ruling in this regard.")(emphasis added).

[46] *See Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc) (a § 1983 **696 *737 action); *see generally, Parkulo v. West Virginia Board of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507(1996). *See also, West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 196 n.5, 800 S.E.2d 230, 234 n.5 (2017) ("In *Hutchison v. City of Huntington*, 198 W. Va. 139, 149-50, 479 S.E.2d 649, 659-60 (1996), we stated that when a defendant's answer pleads the defense of governmental immunity, the circuit court should order the plaintiff to file a reply tailored to the defendant's immunity defense.... Ms. McGraw's original complaint provided scant detail of the basis of her constitutional tort claim against the DOE, and consequently, she filed two amended complaints in the course of the proceedings before the circuit court. Had the circuit court required Ms. McGraw to file a reply to the DOE's motion to dismiss pleading qualified immunity, it might have assisted an early resolution to this dispute."); *West Virginia Bd. of Educ. v. Croaff*, No. 16-0532, 2017 WL 2172009, at *3 (W. Va. May 17, 2017) (memorandum decision) ("'In civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff.' *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659."); *West Virginia Board of Education v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 ("Furthermore, 'in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff.' *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659.").

The only Code Section cited in Petitioners' Complaint below which they allege Respondent Raper to have violated is West Virginia Code § 49-1-105(b).[47] This Code Section merely sets forth the purpose of the child welfare system, stating as follows:

> (b) The child welfare and juvenile justice system shall:
>
> (1) Assure each child care, safety and guidance;
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> (2) Serve the mental and physical welfare of the child;
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> (3) Preserve and strengthen the child family ties;
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> (4) Recognize the fundamental rights of children and parents;
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> (5) Develop and establish procedures and programs which are family-focused rather than focused on specific family members, except where the best interests of the child or the safety of the community are at risk;
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> (6) Involve the child, the child's family or the child's caregiver in the planning and delivery of programs and services;
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> (7) Provide community-based services in the least restrictive settings that are consistent with the needs and potentials of the child and his or her family;
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> (8) Provide for early identification of the problems of children and their families, and respond appropriately to prevent abuse and neglect or delinquency;
>
> (9) Provide for the rehabilitation of status offenders and juvenile delinquents;
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> (10) As necessary, provide for the secure detention of juveniles alleged or adjudicated delinquent;
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> (11) Provide for secure incarceration of children or juveniles adjudicated delinquent and committed to the custody of the director of the Division of Juvenile Services; and
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> (12) Protect the welfare of the general public.[48]

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[47] *See*, e.g., JA 13.

[48] W. Va. Code § 49-1-105(b).

Below, Petitioners did not cite any legal authority which would establish that this code section creates a mandatory duty to act in a specified manner with respect to the circumstances presented to Respondent Raper on December 7, 2022, in her interactions with Petitioner Erickson or her minor children. Rather, the broad language of this Code Section clearly expresses only the Legislature's wish that the statutory scheme be directed toward the broad goal of promoting the welfare of the children of the State of West Virginia and the general public. Even a cursory review of this Code Section demonstrates that there are no specific directives given to the officials operating thereunder such that an official—such as Respondent Raper—would be on notice that acting in any specific manner would be in violation of a specific, articulable right.[49] For certain, the Code Section is silent as to the individuals who would operate under it, and it speaks only in terms of the "child welfare and juvenile justice system."[50] Indeed, the Code Section makes no reference to Child Protective Service workers at all, and there is no language within the Code Section which establishes a specific directive for the transport of minors.[51]

Petitioners, in their Complaint, criticize Respondent Raper for how she responded when D.E. voluntarily left his mother's residence on his dirt bike. Nowhere in the original Complaint, in Petitioners' briefing below, or in Petitioners' Brief filed before this Court do Petitioners provide any allegation or argument which might demonstrate that D.E.'s decision to leave his mother's residence constitutes, in any way, an unlawful act *on the part of Ms. Raper*.

Additionally, Respondents, in their Brief filed before this Court, make skeletal allegations that Respondent Raper's conduct was "malicious or otherwise oppressive" or "gross[ly] negligent,

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[49] *See* W. Va. Code § 49-1-105(b).

[50] *Id.*

[51] *Id.*

malicious, willful, and wanton[.]"[52] In so arguing, Petitioners reference their mistaken assertion that sole, exclusive custody of the minor children was transferred to Respondent Raper and the WV DHHR. Because this transfer occurred, they argue, Respondent Raper's conduct must have been malicious, oppressive, grossly negligent, willful, or wanton. As previously addressed, the Temporary Protective Order *did not* effectuate a transfer of custody of the minor children to Respondent Raper or the WV DHHR. And, as also referenced above, the West Virginia Supreme Court has consistently held that "'skeletal assertions' are insufficient to strip the DHHR of qualified immunity[.]"[53]

Indeed, as was evidenced by the West Virginia Supreme Court's decision in *Markham v. West Virginia Department of Health and Human Resources*,, the mere allegation in a complaint that a defendant's conduct falls outside the protections of qualified immunity does not mean that the complaint necessarily survives a motion to dismiss.[54] And although Petitioners make slight reference to "malicious, willful, wanton, reckless and or grossly negligent" conduct in their briefing below and in their Brief filed before this Court, they refuse to acknowledge that their Complaint below does not separately assert any cause of action for such conduct.[55] The Complaint, in fact, contained only three counts, none of which allege an exception to the immunity afforded

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[52] Brief of Pet'r at 17.

[53] 2020 WL 2735435, at *7

[54] *See generally, Markham,* No. 19-0163, 2020 WL 2735435 (W. Va. May 26, 2020) (memorandum decision). ("Petitioners cite several facts that, they argue, demonstrate Respondents' 'gross negligence, willful and wanton misconduct or intentional misconduct.' These include: 1) Respondents' failure to maintain accurate records; 2) Respondents' failure to immediately refer the financial exploitation investigation to the appropriate law enforcement agency; 3) Respondent's failure to 'fact-check' information and to obtain financial information legally by obtaining subpoenas and/or appropriate releases; and 4) making false, unsubstantiated accusations[.] The Circuit court determined that these 'skeletal arguments' were insufficient to overcome Respondents' entitled to qualified immunity. We agree.")

[55] *See* JA 1–26.

to Respondent Raper.[56] As is clear, the first count of the Complaint contained general allegations; the second count of the Complaint alleged a cause of action for negligence; and the third count of the Complaint sets forth damages.[57]

Because Petitioners' Complaint below did not allege a specific right which was violated by Respondent Raper's discretionary actions, and because they similarly did not specifically allege causes of action for conduct which would remove Respondent Raper's conduct from the protections of qualified immunity, the Circuit Court of Marshall County properly dismissed Petitioners' Complaint.

Similarly, the West Virginia Code Sections cited, for the very first time, in Petitioners' *Response to Defendant Jennifer L. Raper's Motion to Dismiss* (the "Response") do not create a constitutional or statutory right such that any alleged violation thereof would remove Respondent Raper's actions from the protections of qualified immunity. Respondent Raper discussed this issue below, at length, in *Defendant Jennifer L. Raper's Reply in Support of Her Motion to Dismiss*. In their *Response* below, Petitioners alleged that "[p]ermitting, authorizing, and acquiescing in a minor not being safely transported is not only intentional, but malicious, willful, wanton, grossly negligent, and a direct violation of WV DHHR's policies and procedures, their mission statement, and federal policies and procedures to protect our most vulnerable, our children."[58] Nowhere in this statement—nor anywhere else in Petitioners' Complaint or Response—did Petitioners cite to a specific, clearly established, constitutional or statutory right that Respondent Raper allegedly violated such that she would no longer be entitled to qualified immunity. As Respondent Raper

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[56] *Id.*

[57] *Id.*

[58] JA 73.

argued, and the Circuit Court agreed, the Code Sections contained in Petitioners' *Response* below failed to establish a constitutional or statutory right implicated by the alleged facts in this case.[59]

Specifically, Petitioners' *Response* below cited to § 49-2-802(b)[60] and § 49-2-802(c)(3),[61] which Respondent Raper addressed in turn. Petitioners' citations to these Code Sections below merely parroted conclusory statements, without citation to any supporting factual allegations, which could show that Respondent Raper's actions violated a clearly established constitutional or statutory right. For example, Petitioners argued that Respondent Raper's actions in permitting, authorizing, and acquiescing in D.E. traveling on a dirt bike for 15 miles is "absolutely not" in compliance with the statutory language of West Virginia Code § 49-2-802(b) and subpart (6)(e).[62] In so arguing, Petitioners offered no explanation for how Respondent Raper's conduct was out of compliance with the statute (i.e., they merely state that it simply is, with nothing more).

The case law cited by Petitioners in their *Response* was also devoid of reference to any clearly established constitutional or statutory right that was allegedly violated by Respondent

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[59] *See* JA 149–172.

[60] West Virginia Code § 49-2-802(b) reads: "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."

[61] West Virginia Code § 49-2-802(c)(3) reads: "Each local child protective services office shall: . . . (3) Upon notification of suspected child abuse or neglect, commence or cause to be commenced a thorough investigation of the report and the child's environment. As a part of this response, within 14 days there shall be a face-to-face interview with the child or children and the development of a protection plan, if necessary, for the safety or health of the child, which may involve law-enforcement officers or the court[.]"

[62] JA 74.

Raper. Petitioners cited to *Ayersman v. Wratchford*[63] and *State v. Chase Securities*[64] regarding the law on qualified immunity and their obligations to identify that right as Plaintiffs. Neither of these cases identify a clearly established right or law which was allegedly violated. Petitioners also cited to *State ex rel Paul v. Hill,*[65] which references a court's obligation to provide for the best interests of the child, and *In Re George Glen B,*[66] which references the "traumatic experience" that children experience when they undergo dramatic changes in their permanent custodians. None of these cases references or even implies a clearly established constitutional or statutory right, let alone how that right was violated by Ms. Raper pursuant to the allegations of the Complaint.

At bottom, Petitioners simply failed to identify any clearly established constitutional or statutory right that was allegedly violated by Respondent Jennifer Raper, such that she would not

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[63] *Ayersman v. Wratchford*, 246 W. Va. 644, 874 S.E.2d. 756 (2022). The Court in *Ayersman* reiterated the principle that under the doctrine of discretionary function immunity, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision. The Court held that in this case, homeowners' negligence claim against State Fire Marshal's Office fire investigator, related to his conduct in investigation and filing criminal complaints, accusing homeowner of committing arson to collect insurance proceeds, was not a claim of mere negligence but, instead, was one predicated on intentional conduct. Thus, the claim was not barred by the doctrine of qualified immunity.

[64] *State v. Chase Securities*, 188 W. Va. 356, 424 S.E.2d 591 (1992). Similarly, the Court in *Chase Securities* held members of the State Board of Investments were entitled to qualified immunity because the complaint did not allege or support any violation of a clearly established law. The Court reaffirmed the principle that a public executive official who is acting within the scope of his authority 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.

[65] *State ex rel. Paul v. Hill*, 201 W. Va. 248, 257-58, 496 S.E.2d 198, 207 (1997). This case stands for the proposition that a parent's relinquishment of his/her parental rights, either in anticipation of future adoption proceedings or as a part of previously initiated adoption proceedings, does not constitute abandonment for abuse and neglect purposes. Clearly, the investigation had not progressed to the point of parental rights termination at the time of the events alleged.

[66] *In Re George Glen B*, 207 W. Va. 346, 532 S.E.2d 64 (2000). This case stands for the proposition that while the WV DHHR has a mandatory duty to file a petition to terminate current parental rights of a parent who has previously had parental rights to another child terminated by the court, the trial court may not terminate parental rights without additional evidence of abuse or neglect of the child. Clearly, termination of parental rights had not yet been raised in this case.

be entitled to qualified immunity. Accordingly, the Circuit Court of Marshall County appropriately dismissed Petitioners' Complaint, and this Court should **AFFIRM** that decision.

3. The Circuit Court of Marshall County correctly found that Respondent Raper's actions were discretionary and appropriately held that she was entitled to qualified immunity.

First, it is imperative that Respondent Raper address Petitioners' reliance on *Phillips v. Thomas*, 555 So.2d 81, 86 (Ala. 1989), an Alabama Supreme Court case, *which Petitioners failed to cite, rely on, or otherwise reference in the proceedings below*. Petitioners rely on *Phillips* because, as they state, "[t]he West Virginia Supreme Court has been reluctant to articulate a clear test to distinguish discretionary acts from ministerial acts."[67] While it is true that the West Virginia Supreme Court previously recognized that "immunities must be assessed on a case-by-case basis[,]"[68] it is simply not the case that the Court has been so unwilling to engage with this issue that this Court must resort to extra-judicial case law in order to decide whether Respondent Raper's actions were discretionary or ministerial. The West Virginia Supreme Court has *already provided* ample guidance to resolve this issue, but Petitioners would prefer to avoid reference to controlling holdings which might be contradictory to their positions.

As the West Virginia Supreme Court previously stated, "certain governmental actions or functions may involve both discretionary and non-discretionary or ministerial aspects, ***the latter of which may constitute 'a clearly established law of which a reasonable public official would have known.***"[69] As previously discussed, a major factor in the Circuit Court's decision to dismiss

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[67] Brief of Pet'r at 12.

[68] Syl. Pt. 9, *Parkulo v. West Virginia Bd. of Probation*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

[69] *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014), (emphasis added) (citing *W. Virginia Dep't of Health & Hum. Res. V. Payne*, 231 W. Va. 563, 746 S.E.2d 554 n.4 (2013).

Petitioners' Complaint below was the fact that they could not point to a violation of any specific, clearly established, constitutional or statutory right that Respondent Raper allegedly violated, or to any unlawful conduct on the part of Respondent Raper. Thus, Petitioners' desire to urge this Court to consider extra-judicial authority is just as unnecessary as it is improper. Under *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, and *Payne*, it is clear that Respondent Raper's conduct related to the subject events of December 7, 2022, was discretionary and not ministerial, and Petitioners can point to nothing which would constitute Respondent Raper's violation of any clearly established law.

Turning to the merits of Petitioners' *Phillips*, 555 So.2d 81, 86 (Ala. 1989), argument, Petitioners fail to mention a key distinction between the circumstances in the instant case and those in *Phillips*. Petitioners, in their Brief filed before this Court, correctly state that the Alabama Supreme Court *ultimately* concluded that the state employee in *Phillips* was not entitled to qualified immunity for the alleged negligent performance of the inspection at issue. What Petitioners ignore, however, is that, in *Phillips*, the Alabama Supreme Court recognized that the Alabama Legislature had set forth clear, specific, and binding statutory requirements which governed the inspection of day care facilities.[70] The relevant statutory scheme in *Phillips* governed the specific frequency and method of day care inspections, and imposed an affirmative duty on the Alabama Department of Human Resources.[71] The existence of those statutory requirements, which the defendant was alleged to have violated, removed the alleged conduct in *Phillips* from the realm of discretionary to that of ministerial.[72] As has now been set forth multiple times herein,

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[70] *See Phillips* at 555 So.2d 85 (Ala. 1989).

[71] *Id.*

[72] *Id.* at 86.

unlike the plaintiffs in *Phillips*, Petitioners are unable to point to any violation of a clearly established law by Respondent Raper. Thus, Petitioners' reliance on *Phillips* is misplaced, as it is clearly distinguishable from the instant matter.

Next, evaluating the Circuit Court's decision on the briefing and authority which was actually put before it, it is clear that the Circuit Court was correct in concluding that Respondent Raper's decision-making related to the Temporary Protection Plan on December 7, 2022, was discretionary. It is well-established that officials like Respondent Raper are immunized from liability for the discretionary decision-making aspects of their job, including decisions as to how to execute a Temporary Protection Plan for the safety of minors.[73]

The West Virginia Supreme Court discussed, extensively, the doctrine of qualified immunity and its application to State agencies and their employees in *Clark v. Dunn*. There, the Court ultimately issued a new syllabus point, stating that:

> "If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby."[74]

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[73] *See Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995), (holding that officer was engaged in the performance of discretionary judgments as to disarming hunters within the course of his authorized law enforcement duties); *West Virginia Department of Health and Human Resources v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (holding that DHHR was entitled to qualified immunity regarding claims of negligent licensure of day habilitation center because licensing of behavioral health facilities was matter placed entirely within the discretion of DHHR); *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018) (holding that DHHR workers responding to a complaint of child abuse were entitled to qualified immunity even after the child that was the subject of the investigation was killed by the parent suspected of abuse, because the DHHR workers exercised discretionary judgments in the course of the child abuse investigation).

[74] Syl. Pt. 4, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

More recently, in 2018, the West Virginia Supreme Court addressed the concept of qualified immunity in *Crouch v. Gillispie,* ultimately finding that WV DHHR workers responding to a complaint of child abuse were entitled to qualified immunity even after the minor child that was the subject of the investigation was killed by the parent suspected of abuse.[75] In *Crouch*, Eric Gillispie, the biological father of the minor child, made a report to CPS that the child's mother, Leslie Boggs, was unable to care for the child and allowed her boyfriend, a convicted felon, to be in the house around the child.[76] In response, a CPS worker attempted face-to-face contact with Leslie Boggs and the minor child but was unable to successfully schedule that interaction until three days after the initial report by Mr. Gillispie.[77] At the face-to-face interview, the CPS worker completed a Present Dangers and Family Functioning Assessment and observed Ms. Boggs with the minor child.[78] Ms. Boggs denied abusing drugs and alcohol and reported that her relationship with Mr. Gillispie was strained, and that she had a domestic violence petition pending against him for threats that culminated in him setting her apartment on fire.[79]

Based upon her first-hand observations, as well as the context of the biological parents' apparently volatile relationship, the CPS worker determined that the conditions of, and circumstances surrounding, the home did not warrant removal of the minor child from the home at that time.[80] The CPS worker later met with her supervisor to report the results of her investigation and conclusion that no present danger existed. Her supervisor concurred in these

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[75] 240 W. Va. 229, 809 S.E.2d 699 (2018).

[76] 240 W. Va. at 231.

[77] *Id.* at 232.

[78] *Id.*

[79] *Id.*

[80] *Id.*

findings.[81] Tragically, the minor child died just two weeks after the CPS worker's face-to-face interview as a result of Ms. Boggs rolling on top of her while sleeping after consuming alcohol.[82] Mr. Gillispie filed suit, alleging that DHHR's investigation was not sufficiently thorough, resulting in the child's death. The case came before the Supreme Court after the Circuit Court denied WV DHHR's motion seeking summary judgment based upon qualified immunity.[83]

The West Virginia Supreme Court analyzed whether the conduct of the WV DHHR agents violated a clearly established or statutory right.[84] On this issue, the Court explained that specificity is required:

> To prove that a clearly established right has been infringed upon, **a plaintiff must do more than allege that an abstract right has been violated.** Instead, the plaintiff must make a **"particularized showing"** that a "**reasonable official would understand that what he is doing violated that right**" or that "in the light of preexisting law the unlawfulness" of the action was "apparent."[85]

The Court recognized that Mr. Gillispie's challenge to the CPS investigation was, in actuality, a challenge to the CPS worker's failure to make a finding of present danger, which would

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[81] *Id.*

[82] *Id.*

[83] In its underlying decision, the Circuit Court determined that: "[t]here is no question that the **CPS policy gives workers substantial discretion when they conduct investigations** … [a]nd ultimately, the CPS worker and supervisor will make a decision at the end of the investigation as to whether the case should be closed or further action should be taken. **These decisions and actions fall within the CPS workers' discretionary functions and they have qualified immunity against any alleged negligence in their exercise of the same**." *Id.* at 234 (emphasis added). Despite this finding, the Circuit Court refused to grant DHHR's request for dismissal, finding, instead, that the CPS Guidelines rose to the level of a statutory law, which the DHHR workers did not follow. In its review, the Supreme Court adopted the Circuit Court's first finding and rejected the second.

[84] This Court also analyzed whether applicable CPS Guidelines were equivalent to statutory law for purposes of evaluating the DHHR agents' conduct and compliance, or lack thereof, with the same. It is found in the negative, stating that it had difficulty in elevating the guidelines to "clearly established statutory or constitutional law."

[85] *Id.* (quoting *Hutchinson v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996) (emphasis added)).

require her to remove the minor child from the home at the time of the face-to-face interview. The Court noted that "[t]he challenge 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…"[86] Ultimately, the Court concluded that it was "unable to view this case as more than an abstract assertion that DHHR could have investigated more thoroughly…" and, thus, reversed the Circuit Court's decision and remanded the case for the entry of summary judgment and dismissal.[87, 88]

Petitioners, in their *Response* below, argued that "the critical safe transport of any minor children to a safe haven/home, while in the full sole custody and care of Defendant Raper/Defendant WDHHR [sic], is absolutely non-discretionary and non-delegable."[89] In support of their argument, Plaintiffs allege that the "reason and rationale" for the safe transport being non-discretionary are that WV DHHR has "sole exclusive custody, control, and care of said minor children."[90] Of course, as has been discussed at length herein, Respondent Raper and/or the WV DHHR did not, at any time, have "sole exclusive custody, control, and care" of D.E. The Temporary Protection plan did not operate to effectuate a transfer of custody of the minor children to Ms. Raper or the WV DHHR. In fact, the language of the Temporary Protective Order indicates

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[86] *Id.* at 236.

[87] *Id.*

[88] It is of significant importance to note that the West Virginia Supreme Court found that the actions of the CPS worker in *Crouch* did not violate any statutory or constitutional right, despite the fact that the plaintiffs alleged that the CPS worker violated specific CPS/DHHR guidelines. Here, Petitioners are unable to make such allegations, which further evidences the fact that Respondent Raper's actions did not violate any clearly established statutory or constitutional right.

[89] JA 73.

[90] *Id.*

that Petitioner Erickson retained sole, exclusive, custody, control, and care of D.E. during all periods described in the Complaint.[91]

Respondent Raper's actions following the execution of the Temporary Protection Plan, including concerning the transport of the minors from the home, are discretionary in nature. Petitioners do not cite to any statute or case that suggests that Respondent Raper's conduct, which was made during the performance of her official duties as a Child Protective Services worker, was anything but discretionary. Petitioners' argument that the execution of the Temporary Protection Plan somehow turned Respondent Raper's actions from discretionary to non-discretionary has no basis in law. Indeed, Respondents cite to no authority that would form a basis for this proposition,

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[91] West Virginia Code § 49-4-303 contains the exclusive procedure for a CPS worker to obtain emergency custody prior to the filing of an abuse and neglect complaint. That section provides:

> Prior to the filing of a petition, a child protective service worker may take the child or children into his or her custody (also known as removing the child) without a court order when:
>
> (1) In the presence of a child protective service worker a child or children are in an emergency situation which constitutes an imminent danger to the physical well-being of the child or children, as that phrase is defined in section two hundred one, article one of this chapter; and
>
> (2) The worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered.
>
> After taking custody of the child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or referee of the county where custody was taken and immediately apply for an order. If no judge or referee is available, the worker shall appear before a circuit judge or referee of an adjoining county, and immediately apply for an order. This order shall ratify the emergency custody of the child pending the filing of a petition.

Petitioners do not allege and, in fact, appear to dispute, that imminent danger existed which would even authorize Respondent Raper to take emergency custody of either minor. Thus, under the allegations, as pled, and, in the absence of a Court order authorizing the transfer of legal custody of the minors, this remained with Petitioner Erickson.

and pure argument does not suffice to meet their heightened pleading burden or cure the deficiencies in their Complaint.

Ultimately, the applicable precedential case law requires that this Court **AFFIRM** the finding of the Circuit Court of Marshall County that Respondent Raper's actions were discretionary. The binding precedent establishes that officials such as Respondent Raper are immunized from liability for the discretionary decision-making aspects of their job, including decisions as to how to execute a Temporary Protection Plan for the safety of I.E. and D.E. Where, as in *Crouch*, the CPS workers were immunized for their discretionary decision, it absolutely stands to reason that Respondent Raper is entitled to immunity for the discretionary judgments she made while attempting to transport D.E. to a safe home or, as alleged in the Complaint, in allowing him to leave the home. This is exactly the type of "decision-making process" that is to be shielded from the "harassment of prospective litigation."[92]

Moreover, within the four corners of the Complaint, Petitioners do not allege, with any particularity, how Respondent Raper was negligent in the "care, custody, control, and safe transport" of D.E.[93] They merely assert that Respondent Raper failed to safely transport D.E. to a safe home, but they do not explain which particular acts or omissions led to the breakdown of that transport, or how Respondent Raper violated any clearly established statutory or constitutional right. Rather, Petitioners provide conclusory allegations that Respondent Raper violated generalized and vague policy directives to protect children. As the West Virginia Supreme Court

[92] *Id.*

[93] JA 10–11.

has repeatedly held, "skeletal assertions" are insufficient to strip WV DHHR employees of qualified immunity.[94]

H. Conclusion

Based on the foregoing, Respondent Jennifer L. Raper respectfully requests that this Honorable Court **AFFIRM** the Circuit Court of Marshall County's *Order Granting Defendant Jennifer L. Raper's Motion to Dismiss*, thereby recognizing the clear existence of qualified immunity in this case.

Respectfully submitted,

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[94] 2020 WL 2735435, at *7