23-ICA-404

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
At Charleston

**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

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES AND JEFFERY M. PACK's BRIEF

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This appeal arises from an order from the Circuit Court of Marshall County, West Virginia, granting a motion to dismiss filed by The West Virginia Department of Health and Human Resources ("WVDHHR") and Jeffrey M. Pack based upon numerous immunities. (App. 210-222.) Specifically, the circuit court determined that WVDHHR and Commissioner Pack were entitled to: (1) sovereign immunity as state agents; (2) statutory immunity as all actions alleged were undertaken pursuant to a good faith report of child abuse or neglect; and (3) qualified immunity because there are no allegations that WVDHHR or Pack violated a clearly established law in connection with the alleged events or otherwise acted fraudulently, maliciously, or oppressively. The circuit court concluded that, because Petitioners, the Estate of Dawson Edsill, Dawson Edsill, individually, Christine Erickson, individually, and I.E., a minor (collectively referred to as "Petitioners"), failed to state a claim upon which relief could be granted, dismissal of the complaint was proper. This Court should affirm that decision.

STATEMENT OF THE CASE

This case involves the discretionary decisions of a child protective services worker in carrying out a Temporary Protection Plan for two minors. Petitioners allege that Jennifer L. Raper, while working as a child protective services worker for the WVDHHR, was negligent while enacting a Temporary Protection Plan.[1] (App. 6, 8.) Petitioners further allege that pursuant to the Temporary Protection Plan, on December 7, 2022, Ms. Raper was to meet minors I.E. and the decedent, Dawson Edsill, at their drop off school bus location. (App. 6.) The minors were to gather their clothing at their home then be transported to a safe haven/home location. (App. 6.) Petitioners

[1] Per the Temporary Protection Plan, Christine Erickson's minor daughter, I.E., reported that she was scared to be around her mother because she observed a rolled-up dollar and white powder in her mother's room. (app. 171.) Thereafter, her mother grabbed her. (App. 171.) The Temporary Protection Plan provided that I.E. and the decedent would be cared for by a friend's parent. (App. 172.) Typically, a Temporary Protection Plan is in effect for 7 days. (App. 172.)

allege that Ms. Raper failed to assure for the safety of Dawson Edsill, who died later in the evening while operating a dirt bike. (App. 5, 9.) Petitioners assert that WVDHHR is vicariously liable for the negligent conduct of Ms. Raper. (App. 12.) Petitioners further assert that Commissioner Pack "managed and supervised Defendant Jennifer L. Raper by any [sic] through his supervisors and or managers" working out of the Marshall County office of WVDHHR. (App. 3.) Petitioners do not provide specific facts as to how Commissioner Pack managed Ms. Raper. Petitioners seek compensatory damages and the recovery of costs and interest.

STANDARD

"When a party . . . assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed de novo." Syl. pt. 4, in part, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998). "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint." *Cantley v. Lincoln Cty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) (per curiam). Furthermore, "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff . . ., and its allegations are to be taken as true." *West Virginia Board of Education v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015) (quotations and citation omitted). "[D]ismissal for failure to state a claim is only proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint." *Id.* (citation omitted). However, a plaintiff's complaint must, "at a minimum[,] . . . set forth sufficient information to outline the elements of his [or her] claim," and "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Id.* (quotations and citations omitted).

Furthermore, with respect to the immunity issues presented in this case,

> [t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary because the dispositive issue in this case has been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record, it does not present a novel issue, and the decisional process would not be significantly aided by oral argument. See Rule 19(a), W. Va. R. App. P.

SUMMARY OF ARGUMENT

The circuit court's order should be affirmed because the WVDHHR and Commissioner Pack are entitled to: (1) sovereign immunity as state agents; (2) statutory immunity as all actions alleged were undertaken pursuant to a good faith report of child abuse or neglect; and (3) qualified immunity because there are no allegations that they violated a clearly established law in connection with the alleged events.

The WVDHHR and Commissioner Pack are entitled to sovereign immunity because Petitioners do not limit the recovery request in their complaint to the applicable limits of insurance available to the State and its agents. West Virginia law is clear that a plaintiff may only recover from the State up to the applicable insurance limits. If a complaint does not specify that the recovery is limited to the insurance limits, then a West Virginia court should dismiss the complaint. Here, Petitioners did not specify in the Complaint that they sought recovery up to the State's limits of insurance; therefore, it was not error for the circuit court to determine that the WVDHHR and Commissioner Pack are entitled to sovereign immunity.

Additionally, the WVDHHR and Commissioner Pack are entitled to statutory immunity for the claims in Petitioners' complaint. West Virginia Code § 49-2-1, et seq., codifies statutory immunity for the State and its employees who are participating in any act authorized by the statute. Specifically, any person or institution participating in good faith in any act permitted or required by the Act is immune from any civil liability. Here, Petitioners' claims arise from acts by a WVDHHR employee in connection with a report of suspected child abuse or neglect and resulting investigation. The entire factual basis for the complaint is the enaction of a Temporary Protection Plan regarding two minor children. Petitioners' claims are precisely the type the Legislature intended for the immunity to attach. Therefore, it was not error for the circuit court to find that the WVDHHR and Commissioner Pack are entitled to statutory immunity for the claims in Petitioners' complaint.

Finally, the WVDHHR and Commissioner Pack are entitled to qualified immunity for the claims asserted in Petitioners' complaint. Petitioners wish to hold the WVDHHR and Commissioner Pack liable for investigating and responding to an accusation of child abuse but the Supreme Court of Appeals of West Virginia has conclusively determined that the investigation process of the WVDHHR in child abuse cases requires the exercise of discretion and strikes at the heart of qualified immunity. Here, the WVDHHR's CPS worker was investigating a referral for suspected abuse or neglect. As part of that process, a Temporary Protection Plan was enacted. The WVDHHR and its worker are entitled to immunity for discretionary decisions, including the manner in which to enact a Temporary Protection Plan. Absent clearly established law that would have required a different action be taken (which Petitioners have identified none), it was not error for the circuit court to determine that the WVDHHR and Commissioner Pack are entitled to qualified immunity.

ARGUMENT

A. The circuit court properly determined that the WVDHHR and Commissioner Pack are entitled to sovereign immunity because the damages sought in the complaint seek State funds.

The circuit court did not err in dismissing Petitioners' complaint because Petitioners failed to allege that recovery was under and up to the limits of the State's liability insurance coverage. West Virginia Code § 55-17-2(2) defines a government agency as "a constitutional officer or other public official named as a defendant or respondent in his or her official capacity, or a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government that has the capacity to sue or be sued." *Id.* The WVDHHR is a government agency created within the executive branch of the state government pursuant to West Virginia Code § 5F-1-2(a)(3). Petitioners acknowledge this fact expressly. (App. 2) Plaintiffs' complaint identifies Commissioner Jeffrey M. Pack as "a chief officer of said state agency." (App. 3.) As such, he also falls within the statutory definition of a government agency. Article VI, Section 35, of the Constitution of the State of West Virginia peremptorily provides for the State's sovereign immunity:

> The state of West Virginia shall never be made defendant in any court of law or equity, except the state of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

W. Va. Const., Art. VI, § 35. The Supreme Court of Appeals has held that this grant of sovereign immunity also extends to State agencies and instrumentalities. *See Parkulo v. West Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 167-68, 483 S.E.2d 507, 513-14 (1997). Therefore, the State and its agencies – including the WVDHHR – are immune from suit. That said, one exception to the State's sovereign immunity exists for suits where the State has insurance coverage for alleged

negligent acts:

> Any policy of insurance purchased or contracted for by the [West Virginia Board of Risk and Insurance Management] shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits: Provided, That nothing herein shall bar a state agency or state instrumentality from relying on the constitutional immunity granted the State of West Virginia against claims or suits arising from or out of any state property, activity or responsibility not covered by a policy or policies of insurance.

W. Va. Code § 29-12-5(a)(4). The Supreme Court of Appeals of West Virginia explained that the Legislature did not seek to waive the State's constitutional immunity in enacting West Virginia Code §29-12-5(a) but instead, recognized that, "where recovery is sought against the State's liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable." *Pittsburgh Elevator v West Virginia Board of Regents*, 310 S.E.2d 675, 687, 172 W. Va. 743, 755 (1983).

Accordingly, "[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State." Syl. pt. 2, *Pittsburgh Elevator*, 310 S.E.2d 675, 172 W. Va. 743 (1983). As "*Pittsburgh Elevator* approved only those suits against the State which 'allege that recovery is sought under and up to the limits of the State's liability insurance coverage', . . . pleadings should state that qualification, limiting the relief sought to the coverage actually provided by the applicable insurance policies." *Parkulo*, 199 W. Va. at 169, 483 S.E.2d at 515.

Therefore, in accordance with Article VI, Section 35 of the West Virginia Constitution, West Virginia Code Section 29-12-5(a)(4), and *Pittsburgh Elevator*, the WVDHHR and Commissioner Pack cannot be made proper defendants in any action unless they have liability insurance coverage for the loss alleged in a complaint *and* the pleading alleges that recovery is sought pursuant to said insurance coverage. Here, Petitioners sought monetary damages against

the WVDHHR and Commissioner Pack but did not allege that their claimed damages are limited to the applicable liability insurance coverage. Accordingly, it was proper for the circuit court to grant dismissal. This Court should affirm that decision.

B. The circuit court did not err when it dismissed Petitioners' complaint because the WVDHHR and Commissioner Pack are entitled to statutory immunity.

West Virginia Code § 49-2-1, *et seq.*, (known as the "Child Welfare Act") provides the framework in which reports of child abuse and neglect are handled by the State of West Virginia. Within this framework is the codification of statutory immunity for the State and its employees who are participating in any act authorized by the Child Welfare Act:

> ***Any person, official, or institution participating in good faith in any act permitted or required by this article is immune from any civil or criminal liability that otherwise might result by reason of those actions***, including individuals … who otherwise provide information or assistance, including medical evaluations or consultations, in connection with a report, investigation or legal intervention pursuant to a good faith report of child abuse or neglect.

W. Va. Code § 49-2-810 (emphasis added). This immunity has been explicitly recognized by the Supreme Court of Appeals of West Virginia, and the only reasonable interpretation of the language chosen by the Legislature is that the WVDHHR and Commissioner Pack are immune from suit in this matter. *See State ex rel. West Virginia Dep't of Health and Human Resources v. Kaufman*, 203 W. Va. 56, 506 S.E.2d 93 (1998) (per curiam). Certainly, the WVDHHR is an "institution" within the purview of this statute. *See, e.g., Frederick v. W. Va. HHS*, Civil Action No. 2:18-cv-01077, 2019 U.S. Dist. LEXIS 41524 (S.D.W.Va. Feb. 15, 2019) (adopted by *Frederick v. W. Va. HHS*, Civil Action No. 2:18-cv-01077, 2019 U.S. Dist. LEXIS 40409 (S.D.W.Va., Mar. 13, 2019)) (finding that the WVDHHR defendants were entitled to "absolute immunity" under W. Va. Code § 49-2-810).

Despite the circuit court finding that the Petitioners' "claims are the type the Legislature intended to prohibit and, therefore, are barred under West Virginia Code § 49-2-810[,]" the Petitioners do not address this ground for dismissal in their brief to this Court.[2] Nor can they because the immunity is absolute. Petitioners' claims arise from acts by a WVDHHR employee in connection with a report of suspected child abuse or neglect and resulting investigation. The entire factual basis for the complaint is the enaction of a Temporary Protection Plan regarding two minor children. Petitioners' claims are precisely the type the Legislature intended to prohibit and, therefore, are barred under West Virginia Code § 49-2-810.

Additionally, the WVDHHR and Commissioner Pack are entitled to immunity pursuant to W. Va. Code 49-2-802(h) which states:

> No child protective services caseworker may be held personally liable for any professional decision or action taken pursuant to that decision in the performance of his or her official duties as set forth in this section or agency rules promulgated thereon. However, nothing in this subsection protects any child protective services worker from any liability arising from the operation of a motor vehicle or for any loss caused by gross negligence, willful and wanton misconduct, or intentional misconduct.

Id. Because the Petitioners seek to hold the WVDHHR and Commissioner Pack liable for the actions of a child protective services caseworker, this immunity extends to them, as all claims arise from "professional decision[s] or action[s] taken pursuant to that decision in the performance of his or her official duties." Accordingly, this Court should affirm the circuit court's dismissal of the complaint because the WVDHHR and Commissioner Pack are entitled to statutory immunity for the actions alleged in the Complaint.

C. The circuit court did not err in finding that the WVDHHR and Commissioner Pack are entitled to qualified immunity.

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[2] The Supreme Court of Appeal of West Virginia has acknowledged that the failure to address a properly raised ground for dismissal amounts to concession of the argument raised. *See Lilly v. Huntington Nat'l Bank*, 2021 W. Va. LEXIS 248 (2021).

Petitioners' theories of liability resulting from Ms. Raper's alleged failure to assure for the safety of Dawson Edsill and vicarious liability on the part of the WVDHHR constitute negligence claims for which the WVDHHR is immune. With respect to the theories of liability asserted against Commissioner Pack, these also constitute negligence for which Commissioner Pack is immune, as the alleged failure to supervise falls within discretionary functions for which qualified immunity applies.

Qualified immunity shields state agencies and their officials who are performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In the performance of these duties, such actions are shielded from liability:

> If a public officer, other than a judicial officer, is either authorized or required, 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, at the suit of a private individual claiming to have been damaged thereby.***

Syl. Pt. 4, in part, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995) (emphasis added).

It is well-settled law in West Virginia that the doctrine of qualified immunity exists to protect public employees and agencies from claims of mere negligence, and this purpose has been echoed several times in recent years by the Supreme Court of Appeals of West Virginia. *See Jarvis v. W. Va. State Police, et al.*, 227 W.Va. 472, 711 S.E.2d 542 (2010); *City of Saint Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011); *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 746 S.E.2d 554 (2013); *W. Va. Reg'l Jail & Corr. Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014); *W. Va. State Police v. Hughes*, 238 W. Va. 406, 796 S.E.2d 193 (2017) and *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018). Qualified immunity bars a claim

of negligence against a State agency "and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer." Syl. Pt. 7, *A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (quoting Syl. Pt. 6, *Clark*, 195 W.Va. 272, 465 S.E.2d 374). The Supreme Court has found time and time again that it is beyond dispute that the State's insurance policy does not waive qualified immunity. *See e.g., W.Va. Bd. Of Educ. v. Marple*, 236 W.Va. 654, 662, 783 S.E.2d 75, 83 (2015).

Regarding the application of qualified immunity, the Supreme Court in *A.B.* held that the first inquiry is whether the nature of the actions or omissions giving rise to the suit constitute legislative, judicial, executive, or administrative policy-making acts or involve otherwise discretionary governmental functions. Syl. Pt. 10, *id.* When such acts giving rise to the claims at issue are discretionary functions of an agency or official, a plaintiff must show that such discretionary "acts or omissions were in violation of some clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992)." Syl. Pt. 11, *id.* If a plaintiff fails to make such a showing, the State and its employees performing such discretionary functions are immune from liability. *Id.* If a plaintiff identifies a clearly established right or law which has been violated or can show fraudulent, malicious, or oppressive acts, the court must then determine whether such conduct was within the scope of the employee's duties, authority and/or employment. Syl. Pt. 12, *id.*

In determining what constitutes a clearly established right or law, our Supreme Court has held that not every law, statute, rule, policy, procedure, or enactment will be considered "clearly established law" for purposes of defeating qualified immunity. A "clearly established" law is one which defines a "clearly established right." *Id.* 234 W.Va. at 517, 766 S.E.2d at 776. A right is

considered "'clearly established' when its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (additional citation omitted). Sources of law that are too vague or abstract, or that do not establish a right, will not suffice to defeat qualified immunity. *Id.*; *R.L.D. v. W. Va. Dep't of Health & Human Res.*, 2018 W. Va. LEXIS 756 at *14 (W. Va. Nov. 19, 2018) (Memorandum Decision).

It is abundantly clear that the decisions made by CPS workers are the precise types of discretionary decisions that are protected by qualified immunity. *Crouch*, *supra.*; *R.L.D.*, *supra.* In *White by White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit considered circumstances where a child had been removed from her parent's home by the South Carolina Department of Social Services and placed in a foster home, where she subsequently died from abuse at the hands of her foster parents. *Id.* at 733-34. The Fourth Circuit concluded that although the death was tragic, the state officials had violated no "clearly established" law in removing the child and were entitled to qualified immunity. *Id.* The Fourth Circuit discussed its reasoning, explaining that:

> The discretionary judgment which was made in removing the White children was obviously not an easy one. It involved weighing professional opinions of child abuse against the obvious interests in maintaining the integrity of a household. Here the tug and pull of competing concerns is evident. ***Premature action by a social worker can disrupt the legitimate interest parents possess in raising and disciplining their children.*** On the other hand, a failure to act can leave a child defenseless in the face of physical abuse and brutality. ***These types of decisions are precisely the sort that the doctrine of qualified immunity is designed to protect.***

Id. at 736 (emphasis added) (internal citations omitted).

In their briefing to this Court, Petitioners suggest that qualified immunity is not afforded here because Ms. Raper's duties in connection with the events were ministerial rather than discretionary. However, Petitioners fail to identify or describe any source of law that sets forth in

any detail the manner in which a Temporary Protection Plan is to be carried out. Petitioners further attempt to distinguish the facts of this case by contending that, because the minor children were in the custody and control of the WVDHHR, qualified immunity should not apply. This argument demonstrates a complete misunderstanding of the legal effect of the operative facts. Specifically, the enaction of a Temporary Protection Plan does not result in a transfer of custody of children. Instead, the arrangement is voluntary. (App.25-26.) The signature page of the Temporary Protection Plan indicates that, by signing, the parent has discussed the Protection Plan with the worker, understands its contents, "and that it is voluntary." All of Plaintiffs' arguments stemming from the WVDHHR and its worker allegedly having custody of the children at any time is simply legally incorrect and should be disregarded by this Court.

Moreover, Petitioners wish to hold the WVDHHR liable in hindsight, but our Supreme Court has guarded against such efforts, stating "...there is no dispute that the investigative process of WVDHHR in child abuse and neglect proceedings requires the exercise of discretion." *Crouch*, 240 W. Va. at 234, 809 S.E.2d at 707. Indeed, "...[h]indsight-based reasoning should not be used as a basis for determining a government official's qualified immunity from suit." *State ex rel. McGraw v. Zakaib*, 192 W. Va. 195, 451 S.E.2d 761 (1994) (citations omitted).

Here, the WVDHHR's CPS worker was investigating a referral for suspected abuse or neglect. As part of that process, a Temporary Protection Plan was enacted. WVDHHR and its worker are entitled to immunity for discretionary decisions, including the manner in which to enact a Temporary Protection Plan. Allegations and opinions that the CPS worker could have done something differently strike at the very heart of qualified immunity. Absent clearly established law that would have required a different action be taken, it was not error for the circuit court to determine that the WVDHHR and Commissioner Pack are entitled to qualified immunity.

Petitioners allege that Ms. Raper violated W. Va. Code §49-1-105(b). (App. 13.) However, W.Va. Code §49-1-105 does not constitute a clearly established law for qualified immunity purposes because it does not prescribe any specific behavior and it does not clearly define any rights. The statute, entitled "Purpose," sets forth generally that the purpose of the Child Welfare Act is to "provide a system of coordinated child welfare and juvenile justice services for the children of this state." W. Va. Code §49-1-105(a). The statute directs that the child welfare system shall, among other things, "[a]ssure each child care, safety and guidance." W. Va. Code §49-1-105(b)(1). While the statute broadly identifies the purpose of the Child Welfare Act, it does not define any "clearly established right." *A.B.*, 234 W.Va. at 517, 766 S.E.2d at 776. A right is considered "'clearly established' when its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (additional citation omitted). There is nothing in this statute that sets forth the manner in which a Temporary Protection Plan is to be enacted by a CPS worker in any specific circumstance.

In *A.B.*, *supra.*, the Supreme Court of Appeals specifically determined that the Prison Rape Elimination Act ("PREA") does not constitute clearly established law because it does not grant prisoners any specific rights. *A.B.*, 766 S.E.2d at 774 (additional citations omitted). As a result, the Supreme Court found that neither PREA nor the standards promulgated at its direction provide any basis to defeat qualified immunity under West Virginia law. *Id.*, 766 S.E.2d at 774. The same holds true with respect to W. Va. Code §49-1-105(b).

Within that purview, Petitioners have failed to support their claims by identifying any clearly established law or right believed to be violated by Ms. Raper or, by extension, the WVDHHR. In *A.B.*, the Supreme Court found that, in the context of a simple negligence case

against the State, the failure to identify a violation of a clearly established law is fatal. *Id.*, 766 S.E.2d at 775. Therefore, the circuit court did not err in finding that the WVDHHR is entitled to dismissal as a matter of law on the theory of vicarious liability for the alleged negligence of CPS worker Raper.

Similarly, the only claim asserted against Commissioner Pack appears to be based upon alleged negligent supervision of Ms. Raper by and through supervisors and managers working out of the Marshall County WVDHHR office. (App. 3.) To the extent Petitioners assert a negligence claim by way of alleging that Commissioner Pack failed to properly supervise WVDHHR employees, the Supreme Court of Appeals of West Virginia has held that "we believe the broad categories of training, supervision, and employee retention...easily fall within the category of discretionary governmental functions." *A.B.*, 234 W. Va. 492, 514, 766 S.E.2d 751, 773 (internal quotation marks omitted). Therefore, the application of qualified immunity is warranted, unless Petitioners allege violation of clearly established law regarding employee supervision of which a reasonable person in Commissioner Pack's position would have known. Syl. Pt. 11, *Id.*

Petitioners have not identified any clearly established law that would apply to Commissioner Pack in connection with employee supervision, and failure to do so is fatal to their claims of negligence against Commissioner Pack. *A.B.*, 766 S.E.2d at 775. Therefore, it was not error for the circuit court to find that Commissioner Pack is entitled to dismissal as a matter of law based on qualified immunity. This conclusion is consistent with the West Virginia Supreme Court of Appeals's decision in *Markham v. W. Va. Dep't of Health and Human Resources*, 2020 W.Va. LEXIS 312, at **21-22 (W.Va. May 26, 2020) (Memorandum Decision) (affirming entry of summary judgment for both adult protective services worker and the WVDHHR based upon qualified immunity).

In *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018), the Supreme Court of Appeals explained that specificity of a right is required to defeat qualified immunity:

> 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..."

Id. Here, Petitioners have alleged nothing more than a violation of abstract rights. They have not pointed to any clearly established law that was allegedly violated.

Finally, Petitioners contend that the WVDHHR and Ms. Raper were "malicious, willful, wanton, reckless and or grossly negligent and or intentional." (App. 12.) These barebones conclusory assertions are not sufficient to overcome qualified immunity. There are no facts alleged that could remotely be considered malicious, fraudulent, or oppressive conduct on the part of the WVDHHR, Commissioner Packk, or Ms. Raper in connection with the Petitioners' allegations. Where factual allegations fail to clearly establish any fraudulent or oppressive conduct on the part of the defendants, qualified immunity applies. *Markham v. W. Va. Dep't of Health & Human Res.*, 2020 W. Va. LEXIS 312, at *22. As such, it was not error for the circuit court to determine that the WVDHHR and Commissioner Pack are entitled to qualified immunity.

CONCLUSION

For the reasons articulated herein, this Court should affirm the Circuit Court of Marshall County's order granting the WVDHHR and Commissioner Pack's motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January 2024, the foregoing **"West Virginia Department of Health and Human Resources and Jeffrey M. Pack's Brief"** was served electronically via File and Serve Express to the following counsel of record:

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