IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-0569

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CAMDEN-CLARK MEMORIAL HOSPITAL CORP.; CAMDEN-CLARK HEALTH SERVICES, INC.; WEST VIRGINIA UNITED HEALTH SYSTEM, d/b/a West Virginia University Health System; and WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioners, Defendants below,

v.

MARIETTA AREA HEALTHCARE; MARIETTA MEMORIAL HOSPITAL; and MARIETTA HEALTHCARE PHYSICIANS, INC.,

Respondents, Plaintiffs below.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

CERTIFIED QUESTIONS 2

STATEMENT OF THE CASE 3

I. WVU Medicine secretly instigates a fraudulent *qui tam* complaint against Marietta, triggering a comprehensive, three-year federal investigation. 3

II. Marietta files suit against Relators, eventually discovering the involvement of Kruger and, later, WVU Medicine. 5

SUMMARY OF ARGUMENT 7

STATEMENT REGARDING ORAL ARGUMENT 9

STANDARD OF REVIEW 9

ARGUMENT 10

I. Negligent supervision against an employer is a viable claim under West Virginia common law. 10

II. Negligent supervision against an employer arises when the employer negligently breaches a duty to supervise an employee, proximately causing the plaintiff's injuries. 10

III. An employee's intentional or reckless tort can give rise to a negligent supervision claim against the employer. 14

A. Employers have a duty to prevent employees from committing intentional and reckless torts that are foreseeable. 14

B. *C.C.*'s remarks on underlying intentional acts are not binding. 18

1. The remarks that purport to bar negligent supervision claims based on underlying intentional acts are dicta. 18

2. The decision in *Taylor*—the only decision of *this Court* relied upon by *C.C.*—is a per curiam decision with little or no precedential weight here... 19

3. Federal courts are split on applying *C.C.* 21

C. To the extent this Court believes *C.C.*'s remarks respecting intentional acts are binding, they should be overruled. 22

D. There are no policy reasons to categorically bar negligent supervision claims arising from an employee's intentional or reckless conduct. 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

A.H. by next friends C.H. v. Church of God in Christ, Inc., 831 S.E.2d 460 (Va. 2019) 12

Adkins v. St. Francis Hosp. of Charleston, 149 W. Va. 705, 143 S.E.2d 154 (1965) . 23

Aikens v. Debow, 208 W. Va. 486, 541 S.E.2d 576 (2000) 26

Anicich v. Home Depot U.S.A., 852 F.3d 643 (7th Cir. 2017)..... 27

Braley v. Thompson, No. 2:22-CV-00534, 2023 WL 2351881 (S.D. W. Va. Mar. 3, 2023) 24

Brown v. Brown, 739 N.W.2d 313 (Mich. 2007)..... 12

Brueckner v. Norwich Univ., 730 A.2d 1086 (Vt. 1999)..... 12

C.C. v. Harrison County Board of Education, 245 W. Va. 594, 859 S.E.2d 762 (2021) 17, 18, 19, 20, 21, 22, 23, 24

Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974)..... 22, 24

Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S.E. 582 (1895)..... 10

Doe Parents No. 1 v. Dep't of Educ., 58 P.3d 545 (Haw. 2002)..... 12

Doe v. Bishop of Charleston, 754 S.E.2d 494 (S.C. 2014) 12

Doe v. Boston Med. Ctr. Corp., 36 N.E.3d 1258 (Mass. App. Ct. 2015) 12

Doe v. Coe, 135 N.E.3d 1 (Ill. 2019) 12

Doe v. Guthrie Clinic, Ltd., 5 N.E.3d 578 (N.Y. 2014)..... 12

Doe v. Roman Catholic Church of Diocese of Phoenix, 525 P.3d 265 (Ariz. Ct. App. 2023) 12

Doe v. St. Francis Hosp. & Med. Ctr., 72 A.3d 929 (Conn. 2013) 12

Dragomir v. Spring Harbor Hosp., 970 A.2d 310 (Me. 2009)..... 12

Erickson v. Christenson, 781 P.2d 383 (Or. 1989) 12

Fields v. King, 576 F. Supp. 3d 392 (S.D. W. Va. 2021) 24

Garrison v. Sagepoint Fin., Inc., 345 P.3d 792 (Wash. Ct. App. 2015)..... 12

Graves v. N. E. Servs., Inc., 345 P.3d 619 (Utah 2015) 12

Griffin v. Acacia Life Ins. Co., 925 A.2d 564 (D.C. Ct. App. 2007) 12

Hall v. SSF, Inc., 930 P.2d 94 (Nev. 1996)..... 12

Hayden v. Franciscan All., Inc., 131 N.E.3d 685 (Ind. 2019)..... 12

Hecksher v. Fairwinds Baptist Church, Inc., 115 A.3d 1187 (Del. 2015) 12

Heller v. Patwil Homes, Inc., 713 A.2d 105 (Pa. Super. Ct. 1998) 12

Henley v. Prince George's Cnty., 503 A.2d 1333 (Md. 1986) 12

Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 752 S.E.2d 336 (2013) 26

Hoag v. Brown, 935 A.2d 1218 (N.J. Super. Ct. App. Div. 2007)..... 12

Holmes v. Campbell Props., Inc., 47 So. 3d 721 (Miss. Ct. App. 2010)..... 12

Intermed Ins. Co. v. Hill, 367 S.W.3d 84 (Mo. Ct. App. 2012) 12

Iverson v. NPC Intern., Inc., 801 N.W.2d 275 (S.D. 2011) 12

J.C. on behalf of N.C. v. St. Bernard Parish School, 336 So.3d 92 (La. Ct. App. 2022) 12

Jackson v. Burrell, 602 S.W.3d 340 (Tenn. 2020)..... 12

Jones v. Logan Cnty. Bd. of Educ., 247 W. Va. 463, 881 S.E.2d 374 (2022)..... 14, 16, 21, 22, 24

Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587 (Kan. 1991) 12

Keith v. Health-Pro Home Care Servs., Inc., 873 S.E.2d 567 (N.C. 2022) 12

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., 418 P.3d 400 (Cal. 2018) 12

Little-Thomas v. Select Specialty Hospital-Augusta, Inc., 773 S.E.2d 480 (Ga. Ct. App. 2015) 12

Los Ranchitos v. Tierra Grande, Inc., 861 P.2d 263 (N.M. Ct. App. 1993) 12

MacDonald v. City Hosp., Inc., 227 W. Va. 707, 715 S.E.2d 405 (2011)..... 25

Madden v. Aldrich, 58 S.W.3d 342 (Ark. 2001) 12

Maguire v. State, 835 P.2d 755 (Mont. 1992)..... 12

Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) 12

Marcus v. Staubs, 230 W. Va. 127, 736 S.E.2d 360 (2012)..... 14, 17

Marquay v. Eno, 662 A.2d 272 (N.H. 1995) 12

Merritt v. Casto, No. 2:22-CV-00556, 2023 WL 2589679 (S.D.W. Va. Mar. 21, 2023) 21, 22, 24

Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233 (Wisc. 1998) 12

Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995)..... 15, 17, 27

Moore Freight Servs., Inc. v. Munoz, 545 S.W.3d 85 (Tex. Ct. App. 2017)..... 12

Morningstar v. Black and Decker Mfg. Co., 162 W.Va. 857, 253 S.E.2d 666 (1979)… 25

Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993) 12

Overbaugh v. McCutcheon, 183 W. Va. 386, 396 S.E.2d 153 (1990) 16

Pajak v. Under Armour, Inc., No. 1:19-CV-160, 2023 WL 2726430 (N.D.W. Va. Mar. 30, 2023) 21

Richard v. Washburn Pub. Schs., 809 N.W.2d 288 (N.D. 2011) 12

Robertson v. LeMaster, 171 W. Va. 607, 301 S.E.2d 563 (1983) 15

Roe v. Wade, 410 U.S. 113 (1973) 23

Safeco Ins. Co. of Am. v. White, 913 N.E.2d 426 (Ohio 2009) 12

Schoff v. Combined Ins. Co. of Am., 604 N.W.2d 43 (Iowa 1999) 12

Schovanec v. Archdiocese of Okla. City, 188 P.3d 158 (Okla. 2008) 12

Semrad v. Edina Realty, Inc., 493 N.W.2d 528 (Minn. 1992) 12

Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 32 (1988) 10

Shafer v. TNT Well Serv., Inc., 285 P.3d 958 (Wyo. 2012) 12

Sinsel v. Olsen, 777 N.W.2d 54 (Neb. 2009) 12

Smith v. Isaacs, 777 S.W.2d 912 (Ky. 1989) 12

Speedway LLC v. Jarrett, 248 W. Va. 448, 889 S.E.2d 21 (2023) 16, 22

State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 583 S.E.2d 80 (2003) 18

State ex rel. State v. Gustke, 205 W. Va. 72, 516 S.E.2d 283 (1999) 16

State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 829 S.E.2d 35 (2019). 18

State ex rel. W. Va. Dep't of Transp., Div. of Highways v. Reed, 228 W. Va. 716, 724 S.E.2d 320 (2012) 22

Sterling v. Bloom, 723 P.2d 755 (Idaho 1986) 12

Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004) 14

Svacek v. Shelley, 359 P.2d 127 (Alaska 1961) 12

SWN Prod. Co., LLC v. Kellam, 247 W. Va. 78, 875 S.E.2d 216 (2022) 24

Synergies3 Tec Servs., LLC v. Corvo, 319 So. 3d 1263, 1277 (Ala. 2020) 12

Taylor v. Cabell Huntington Hosp., Inc., 208 W. Va. 128, 538 S.E.2d 719 (2000)….

..... 10, 20

Town of Weston v. Ralston, 48 W. Va. 170, 36 S.E. 446 (1900)..... 23

Verba v. Ghaphery, 210 W. Va. 30, 552 S.E.2d 406 (2001) 25

W. Va. Reg'l Jail & Corr. Fac. Auth. v. A.B., 234 W. Va. 492, 766 S.E.2d 751 (2014)

..... 10, 15

Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001)..... 19, 20

Welsh Mfg. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984)..... 12

Westfield Ins. Co. v. Sistersville Tank Works, Inc., ---W. Va.---, 895 S.E.2d 142 (2023)

..... 9

OTHER AUTHORITIES

Restatement (Second) of Torts § 315..... 15

Restatement (Second) of Torts § 317..... 15, 17

Restatement (Third) of Agency § 7.05..... 15, 28

INTRODUCTION

This case is presented upon certified questions from a federal district court in West Virginia. Those questions seek clarification regarding the existence, definition, and scope of the common law claim of negligence brought under a supervisory theory of liability—more commonly called "negligent supervision." The crux of the matter here is the third certified question: whether intentional or reckless torts committed by an employee can form the basis for a claim of negligent supervision against an employer. Not "always will," not even "often"—but "can." To that, the answer is manifestly "Yes."

That answer is compelled by this Court's longstanding negligence precedent, the *Restatement (Second) of Torts* (this Court has adopted the on-point sections), and the unanimous authority of every other State and the District of Columbia (see Part II of the Argument for a fifty-state and D.C. survey).

Yet in the face of that overwhelming, controlling authority, WVU Medicine seeks to have this Court manufacture an unprecedented, *categorical limitation* into negligence law for a particular class of defendants based on its view of "sound policy." Pet'r Br. 15. To be clear, WVU Medicine would have this Court declare that intentional or reckless torts committed by an employee can *never* form the basis for a direct claim of negligent supervision against the employer—*regardless of the foreseeability of the risk of harm by that employer* (which defines the duty owed). Instead of conducting a case-by-case evaluation of the existence of a duty by the court in a given case—which is long what negligence law has required—WVU Medicine urges this Court to create a special exception that applies *in all cases*, but

just for employers. That may or may not be good "policy," but that can and should be left to the Legislature, which has undertaken significant tort reform in recent years.

This brief provides every reason for this Court to resist WVU Medicine's invitation to have this State stand alone by altering fundamental principles of the common law under the guise of "sound policy." The certified questions should therefore be answered as follows.

CERTIFIED QUESTIONS

The U.S. District Court for the Northern District of West Virginia certified three questions to this Court:[1]

1. Is a claim for negligent supervision against an employer viable under West Virginia common law?

   ANSWER: Yes.

2. If yes, what are the elements of the claim?

   ANSWER: Negligent supervision is simply a negligence claim so named because of the legal duty of supervision involved. Like ordinary negligence, negligent supervision arises when the employer negligently breaches a duty to supervise an employee, proximately causing the plaintiff's injuries.

3. Can intentional or reckless torts committed by an employee form the basis for a claim for negligent supervision against the employer?

   ANSWER: Yes.

[1] Of course, the Court may reformulate these questions.

STATEMENT OF THE CASE

I. WVU Medicine secretly instigates a fraudulent *qui tam* complaint against Marietta, triggering a comprehensive, three-year federal investigation.

On November 22, 2016, WVU Medicine[2] instigated the filing of a *qui tam* complaint under the False Claims Act against Marietta[3] in the Wheeling Division of the Northern District of West Virginia. JA 71–73, 83–84; *see also id.* at 97–166. The *qui tam* was filled with knowingly false, misstated, and unsupported allegations that Marietta violated the federal Stark Law and Anti-Kickback Statute by criminally overpaying various physicians in a scheme to drive referrals to Marietta. *See id.* at 74–79. As WVU Medicine intended, the *qui tam* triggered a comprehensive federal investigation into Marietta that lasted nearly three years. *Id.* at 65, 79. WVU Medicine hoped that the federal investigation would, at the very least, give it an undeserved competitive edge in the Mid-Ohio Valley market. *See id.* at 65, 82. At best, WVU Medicine intended for the federal investigation to take down its competitor Marietta for good. *See id.* at 84, 719–23.

WVU Medicine concealed its involvement in the *qui tam* from the start. *See id.* at 72. The named plaintiffs, or "Relators," on the face of the *qui tam* were Michael A. King, a then-retired executive of Camden, which is a WVU Medicine satellite campus, and Michael D. Roberts, a private-practice surgeon aligned with

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[2] WVU Medicine includes each of the defendants: Camden-Clark Memorial Hospital Corporation and Camden-Clark Health Services, Inc. (together, "Camden"); West Virginia United Health System, Inc. (the "System"); and West Virginia University Hospitals, Inc. ("WVU Hospital").

[3] For ease of reading, the Respondents are simply referred to as "Marietta."

the WVU Medicine network. *See id.* at 97–166. Unbeknownst to anyone outside WVU Medicine's orbit until several years later, Todd A. Kruger, Camden's then-general counsel, was the actual driver of the *qui tam* effort, as explained below.

Camden, through its CEO and two board members (who were also directors for the System), authorized Kruger to participate in the *qui tam* in his official capacity as Camden's general counsel. Indeed, Camden viewed the *qui tam* as an institutional undertaking carried out on WVU Medicine's behalf and actively provided support to Kruger and Relators. *See* JA 71–73; *see also id.* at 718. However, despite lending the *qui tam* its full-throated support, Camden conditioned Kruger's participation on keeping his and WVU Medicine's involvement a secret. *See id.* at 718; *see also id.* at 719–23 (agreeing to keep Kruger's and Camden's involvement and support secret as condition to Kruger's pursuit). Kruger and the Relators thus did not identify Kruger on the *qui tam* complaint. They even misled the Department of Justice about Kruger's involvement, falsely swearing to the DOJ that Kruger was merely a personal counsel uninvolved in the substance of the *qui tam*. *See id.* at 724–25.

In the end, federal investigators concluded that the allegations of the *qui tam* were unsubstantiated and informed Kruger and Relators that the DOJ would not intervene in the case. *Id.* at 726. Because the *qui tam* was utterly baseless, on March 20, 2020, Kruger and Relators moved to voluntarily dismiss the action, which the district court granted. *Id.* at 246–48, 257–63. On April 24, 2020, the district court ordered the *qui tam* unsealed. *Id.* at 261–63. For the first time,

Marietta learned the identity of Relators and of the false allegations that triggered the comprehensive federal investigation. *Id.* at 80. However, Kruger and WVU Medicine's involvement was still hidden from Marietta and would remain so for some time due to the deliberate acts of Kruger and WVU Medicine. *See id.* at 82–83.

II. Marietta files suit against Relators, eventually discovering the involvement of Kruger and, later, WVU Medicine.

In September 2020, Marietta filed a federal complaint against Relators, seeking recovery based on Relators' intentional and malicious attempt to ruin Marietta through the fraudulent *qui tam*. *Id.* at 66. It was not until over one year later that Marietta—through an apparently inadvertent document production by one of Relators—uncovered Kruger's role in pursuing the *qui tam*.[4] Marietta thereafter amended its suit to add Kruger as a defendant. Still, at that time, Marietta had no reason to suspect that WVU Medicine had any knowledge of, let alone involvement in, Kruger's malicious and fraudulent abuse of judicial processes alongside an ex-Camden employee (King) and an independent practitioner (Dr. Roberts). But that would soon change.

Eight months after adding Kruger to the suit, and only a few months before trial, Marietta received in discovery a declaration prepared by Dave McClure, Camden's President and CEO when Kruger and Relators were preparing the *qui tam* effort. *Id.* at 718. McClure averred that he and two Camden board members

[4] A detailed account of how Marietta uncovered Kruger's involvement is publicly available on the docket of the civil action against Relators and Kruger, Northern District of West Virginia, Civil Action No. 5:21-cv-00025, ECF No. 97.

(who were also System board members) approved of Kruger's pursuit of the *qui tam* and authorized Kruger and members of Camden's senior leadership to provide material support—including internal Camden documents and information—for the *qui tam* effort. *Id.* Indeed, Camden considered the *qui tam* an institutional effort. *Id.*

At trial of the suit against Kruger and Relators, a critical aspect of Kruger's defense was to shift responsibility to *WVU Medicine*. Kruger blamed WVU Medicine for Marietta's injuries and told the jury that Marietta should have sued WVU Medicine instead of him.[5] Moreover, Marietta learned for the first time *during trial* that WVU Medicine had wrongfully used inside knowledge of the *qui tam* to steer physicians away from employment with Marietta, telling them that Marietta would be going out of business because of the federal investigation—which was sealed.[6]

The new federal civil action against WVU Medicine soon followed (from which this certified question proceeding springs). Marietta seeks recovery based on WVU

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[5] Kruger's defense is reflected on page 1055 of the publicly available trial transcript, Civil Action No. 5:21-cv-00025, ECF No. 534.

This strategy gored Marietta on the horns of a dilemma. WVU Medicine had agreed to indemnify Kruger as part of his executive employment. But neither Kruger nor WVU Medicine informed Marietta that Kruger's indemnity was at risk until the eve of trial. *See* JA 755–66. Thus, at the same time WVU Medicine appeared ready to deny Kruger indemnification, Kruger's key trial defense was that WVU Medicine caused Marietta's injuries, and that Marietta should have sued WVU Medicine instead. The trial ultimately ended in a mistrial, and Marietta filed this action soon after.

[6] This testimony is found at page 914 of the publicly available trial transcript, Civil Action No. 5:21-cv-00025, ECF No. 533.

Medicine's role, vicarious *and* direct, in the pursuit and abuse of the fraudulent *qui tam*.

One theory Marietta advances is negligent supervision. *Id.* at 92–93. WVU Medicine viewed the *qui tam* as an institutional campaign against its competitor, Marietta. *Id.* at 718. It expressly approved of a WVU Medicine executive employee—Kruger—pursuing the *qui tam* and authorized senior leadership to provide the *qui tam* team ongoing support in the form of inside information and documents. *Id.* at 92, 718. But then, WVU Medicine failed to properly supervise Kruger and its other senior leaders as they pushed a *fraudulent qui tam* in a plan that WVU Medicine knew was designed to take down its competitor Marietta for good. *Id.* at 93, 721. WVU Medicine should not escape *direct* liability for activity it authorized and actively supported but failed to properly supervise.

SUMMARY OF ARGUMENT

I. In answering the first certified question, the parties agree: Negligent supervision is a viable claim under West Virginia law. This Court has previously recognized negligent supervision claims against employers, private and public. This means that, depending on the facts of the particular case, employers in West Virginia have a duty to prevent their employees acting or failing to act in a manner that causes harm to another.

II. As to the second certified question, it is readily apparent from this Court's longstanding caselaw, the *Restatement (Second) of Torts*, and the caselaw of every other jurisdiction in this country, that an employee's intentional or reckless tort can give rise to a negligent supervision claim against the employer. To be sure,

this Court has not had occasion to specifically outline the elements of negligent supervision, but that makes sense. It is simply negligence based on a supervisory theory of duty. It is well-known that negligence generally arises when three elements are met: the existence of a legal duty, the breach of that duty, and damage as a proximate result. Accordingly, a negligent supervision claim against an employer arises when (1) the employer has a duty to supervise an employee to prevent the employee from acting or failing to act in a manner that causes harm to another, (2) the employer negligently fails to supervise the employee, and (3) the employer's negligence is the proximate cause of the plaintiff's injuries. Or, in the simplest formulation, negligent supervision arises when the employer negligently breaches a duty to supervise an employee, proximately causing the plaintiff's injuries.

III. As to the third and final certified question: Intentional or reckless torts committed by an employee *can* form the basis for a claim for negligent supervision against the employer. But this does not mean such underlying acts will always—or even most of the time—result in the judicial determination that a duty of reasonable care was owed by the employer. Rather, the existence of a duty depends on the facts showing the foreseeability of the risk of harm in a given case. That is classic negligence law, and it makes good sense. It is thus also entirely consistent with the extensive body of precedent on common law negligence both here and nationwide. So it should be no surprise that this Court has long recognized that

employers have a duty to protect others from the *foreseeable* intentional, even criminal, acts of employees.

STATEMENT REGARDING ORAL ARGUMENT

The certified questions seek to clarify the elements of negligent supervision. Thus, this appeal is suitable for Rule 19 argument because it involves certified questions involving a narrow issue of law.

The certified questions also ask this Court to resolve an important issue concerning negligent supervision: whether an employer can escape liability simply because the negligently supervised conduct constituted an intentional or reckless act. The facts of this case provide a clear example of why the answer to that question must be "Yes." WVU Medicine should not escape direct liability for negligent supervision simply because the conduct it supported—yet failed to properly supervise—was intentional. Nor should any principal escape such liability. Thus, this appeal is also suitable for Rule 20 argument because it involves issues of fundamental public importance.

STANDARD OF REVIEW

"A *de novo* standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court." Syl. Pt. 2, *Westfield Ins. Co. v. Sistersville Tank Works, Inc.*, ---W. Va.---, 895 S.E.2d 142, 144 (2023) (citation omitted).

ARGUMENT

I. Negligent supervision against an employer is a viable claim under West Virginia common law.

The parties do not dispute the answer to the first certified question: that negligent supervision against an employer is a viable claim under West Virginia common law. This Court has previously recognized negligent supervision claims against employers, private and public. *See W. Va. Reg'l Jail & Corr. Fac. Auth. v. A.B.*, 234 W. Va. 492, 513–14, 766 S.E.2d 751, 772–73 (2014); *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 134, 538 S.E.2d 719, 725 (2000). That is, under the right factual circumstances, employers in West Virginia have a duty to prevent their employees acting or failing to act in a manner that causes harm to another. *Cf.* Syl. Pt. 1, *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511, 23 S.E. 582 (1895) ("Negligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstance of time, place, manner, or person."). The Court should thus answer the first certified question in the affirmative.

II. Negligent supervision against an employer arises when the employer negligently breaches a duty to supervise an employee, proximately causing the plaintiff's injuries.

The second certified question asks this Court to define negligent supervision by an employer. Though this Court has not specified the elements of negligent supervision, negligence generally arises when three elements are met: "[1] the existence of a legal duty, [2] the breach of that duty, and [3] damage as a proximate result." *Sewell v. Gregory*, 179 W. Va. 585, 587, 371 S.E.2d 32, 84 (1988).

Accordingly, a negligent supervision claim against an employer arises when (1) the employer has a duty to supervise an employee to prevent the employee from acting or failing to act in a manner that causes harm to another, (2) the employer negligently fails to supervise the employee, and (3) the employer's negligence is the proximate cause of the plaintiff's injuries. Or more simply stated, negligent supervision arises when the employer negligently breaches a duty to supervise an employee, proximately causing the plaintiff's injuries. The Court should answer the second certified question with that formulation of negligent supervision.

WVU Medicine attempts to complicate this straightforward answer by advocating that the Court engraft a new categorical limitation onto—that is, fundamentally alter as a matter of policy—the common law of negligence. Although WVU Medicine agrees that the elements of negligent supervision should track general negligence principles, it also urges this Court to "narrowly circumscribe[]" the duty element in the employer-employee context as a categorical matter. Pet'r Br. 9. Insisting that intentional and reckless conduct "is inherently unforeseeable to the employer," WVU Medicine argues that the elements of negligent supervision must *in all cases* exclude liability for any intentional or reckless act by an employee. *Id.* at 18.

That is the central issue on this appeal and is the subject of the third certified question, discussed in detail below. For purposes of defining the duty element here, WVU Medicine's position is in direct conflict with well-established negligence and agency principles—not only in West Virginia, but in all fifty states

and the District of Columbia. *No other jurisdiction* has engrafted a categorical bar onto negligent supervision claims when the underlying conduct is intentional or reckless.[7] West Virginia would be the sole outlier in the Nation if this Court were to adopt WVU Medicine's unprecedented categorical rule.

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[7] *Synergies3 Tec Servs., LLC v. Corvo*, 319 So. 3d 1263, 1277 (Ala. 2020); *Svacek v. Shelley*, 359 P.2d 127, 130–31, 131 n.5 (Alaska 1961); *Doe v. Roman Catholic Church of Diocese of Phoenix*, 525 P.3d 265, 274 (Ariz. Ct. App. 2023); *Madden v. Aldrich*, 58 S.W.3d 342, 350 (Ark. 2001); *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.*, 418 P.3d 400, 403–04 (Cal. 2018); *Moses v. Diocese of Colo.*, 863 P.2d 310, 329 (Colo. 1993) (en banc); *Doe v. St. Francis Hosp. & Med. Ctr.*, 72 A.3d 929, 952 n.29 (Conn. 2013); *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1206 (Del. 2015); *Griffin v. Acacia Life Ins. Co.*, 925 A.2d 564, 576–77 (D.C. Ct. App. 2007); *Malicki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002); *Little-Thomas v. Select Specialty Hospital-Augusta, Inc.*, 773 S.E.2d 480, 483 (Ga. Ct. App. 2015); *Doe Parents No. 1 v. Dep't of Educ.*, 58 P.3d 545, 598 (Haw. 2002); *Sterling v. Bloom*, 723 P.2d 755, 767–68 (Idaho 1986); *Doe v. Coe*, 135 N.E.3d 1, 16 (Ill. 2019); *Hayden v. Franciscan All., Inc.*, 131 N.E.3d 685, 693 (Ind. 2019); *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999); *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 598 (Kan. 1991); *Smith v. Isaacs*, 777 S.W.2d 912, 914 (Ky. 1989); *J.C. on behalf of N.C. v. St. Bernard Parish School*, 336 So.3d 92, 98 (La. Ct. App. 2022); *Dragomir v. Spring Harbor Hosp.*, 970 A.2d 310, 312, 315 (Me. 2009); *Henley v. Prince George's Cnty.*, 503 A.2d 1333, 1341–42 (Md. 1986); *Doe v. Boston Med. Ctr. Corp.*, 36 N.E.3d 1258, 1260 (Mass. App. Ct. 2015); *Brown v. Brown*, 739 N.W.2d 313, 316–18 (Mich. 2007); *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992); *Holmes v. Campbell Props., Inc.*, 47 So. 3d 721, 729 (Miss. Ct. App. 2010); *Intermed Ins. Co. v. Hill*, 367 S.W.3d 84, 89–91 (Mo. Ct. App. 2012); *Maguire v. State*, 835 P.2d 755, 757, 760 (Mont. 1992); *Sinsel v. Olsen*, 777 N.W.2d 54, 57–58 (Neb. 2009); *Hall v. SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996); *Marquay v. Eno*, 662 A.2d 272, 278–80 (N.H. 1995); *Hoag v. Brown*, 935 A.2d 1218, 1230 (N.J. Super. Ct. App. Div. 2007); *Los Ranchitos v. Tierra Grande, Inc.*, 861 P.2d 263, 269–70 (N.M. Ct. App. 1993); *Doe v. Guthrie Clinic, Ltd.*, 5 N.E.3d 578, 580–81 (N.Y. 2014); *Keith v. Health-Pro Home Care Servs., Inc.*, 873 S.E.2d 567, 582–83 (N.C. 2022); *Richard v. Washburn Pub. Schs.*, 809 N.W.2d 288, 297–98 (N.D. 2011); *Safeco Ins. Co. of Am. v. White*, 913 N.E.2d 426, 432–34 (Ohio 2009); *Schovanec v. Archdiocese of Okla. City*, 188 P.3d 158, 169–73 (Okla. 2008); *Erickson v. Christenson*, 781 P.2d 383, 386–87 (Or. 1989); *Heller v. Patwil Homes, Inc.*, 713 A.2d 105, 107–09 (Pa. Super. Ct. 1998); *Welsh Mfg. v. Pinkerton's, Inc.*, 474 A.2d 436, 443 (R.I. 1984); *Doe v. Bishop of Charleston*, 754 S.E.2d 494, 500 (S.C. 2014); *Iverson v. NPC Intern., Inc.*, 801 N.W.2d 275, 282–84 (S.D. 2011); *Jackson v.*

The position advocated by WVU Medicine also blinks at the practical reality that employers often can, in fact, foresee the risk that an employee will engage in intentional or reckless conduct harmful to another. As always, it depends on the particular facts of a given case whether such a duty ultimately arises.

Take this case, for example. WVU Medicine authorized Kruger and senior Camden employees to pursue the *qui tam* using inside information and documents, with knowledge that the *qui tam* was designed to take down Marietta. The *qui tam* turned out to be a fraud designed to damage—if not eliminate—Marietta as a competitor in the healthcare marketplace. Marietta should be permitted to discover facts that could show WVU Medicine had a duty to supervise Kruger and other senior employees as they tortiously attacked Marietta using bogus legal process at WVU Medicine's behest, using WVU Medicine information and documents, and with some degree of involvement by WVU Medicine.

Of course, this is not to say that a duty to supervise will arise in every case—or even most cases—where an employee commits an intentional or reckless tort. One can surely conjure such cases easily. But employers do have a duty to supervise with reasonable care *under the right circumstances*, and as will be explained below, that has long been the law in this state (and every other). Litigants like Marietta

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Burrell, 602 S.W.3d 340, 350 (Tenn. 2020); *Moore Freight Servs., Inc. v. Munoz*, 545 S.W.3d 85, 97 (Tex. Ct. App. 2017); *Graves v. N. E. Servs., Inc.*, 345 P.3d 619, 627 (Utah 2015); *Brueckner v. Norwich Univ.*, 730 A.2d 1086, 1093 (Vt. 1999); *A.H. by next friends C.H. v. Church of God in Christ, Inc.*, 831 S.E.2d 460, 468–73, 475 (Va. 2019); *Garrison v. Sagepoint Fin., Inc.*, 345 P.3d 792, 801, 809–10 (Wash. Ct. App. 2015); *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 238–39 (Wisc. 1998); *Shafer v. TNT Well Serv., Inc.*, 285 P.3d 958, 962, 966–67 (Wyo. 2012).

are entitled to discover the facts to explore whether that duty arises under circumstances that give rise to a plausible claim for relief. And should a plaintiff fail to do so, courts (both federal and state) can and should employ the summary judgment device to dispense with it. That is how the rules are supposed to work.

Accordingly, the Court should reject WVU Medicine's proposed (and quite unprecedented) definition of negligent supervision because it improperly rules out—as a categorical matter—claims where employers have a duty of care in supervising their employees. Instead, the Court should adopt Marietta's formulation, which is based on longstanding principles of negligence and this Court's caselaw: negligent supervision arises when the employer negligently breaches a duty to supervise an employee, proximately causing the plaintiff's injuries.

III. An employee's intentional or reckless tort can give rise to a negligent supervision claim against the employer.

A. Employers have a duty to prevent employees from committing intentional and reckless torts that are foreseeable.

Foreseeability of harm is the most important marker of determining the existence of a legal duty in a particular case. *See* Syl. Pt. 4, *Jones v. Logan Cnty. Bd. of Educ.*, 247 W. Va. 463, --, 881 S.E.2d 374, 376 (2022).[8] An injury is foreseeable if "the ordinary man in the defendant's position, knowing what he knew or should

[8] Legal duty is the only element of negligence decided as a matter of law. *See* Syl. Pt. 9, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004). The remaining elements, as well as the facts about foreseeability, are issues of fact for the factfinder. Syl. Pts 8, 14, *Marcus v. Staubs*, 230 W. Va. 127, 736 S.E.2d 360 (2012) (per curiam).

have known, [would] anticipate that harm of the general nature of that suffered was likely to result." *Id*. (citation omitted).

This Court has long recognized that employers have a duty to protect others from the foreseeable intentional—even criminal—acts of employees. "Usually, this obligation arises in two situations: (1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct." *Miller v. Whitworth*, 193 W. Va. 262, 266, 455 S.E.2d 821, 825 (1995) (adopting *Restatement (Second) of Torts* §§ 315 & 302B cmt. e, respectively).

Particularly critical here, Section 315 of the *Restatement* incorporates Sections 316 through 319. *See Restatement (Second) of Torts* § 315 cmt. c. And Section 317 *specifically* imposes an obligation on employers to protect others from the intentional misconduct of employees under specified circumstances. *See Restatement (Second) of Torts* § 317; *see also Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983) (citing Section 317 of the *Restatement (Second) of Torts*). This Court has explained that these situations "are not exclusive." *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825. The Court thus takes an adaptable approach to the duty to protect from the intentional acts of employees that, again, turns on the facts of a given case.[9]

[9] This Court's adaptable approach is more akin to the broader approach to negligent supervision taken in the *Restatement of Agency*. *See generally Restatement (Third) of Agency* § 7.05.

Employers in West Virginia can therefore be directly liable for the *foreseeable* criminal, intentional, or reckless acts of their employees. For instance, in *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, that the public employer could be liable for the criminal misconduct of an employee seemed to be implicitly understood. 234 W. Va. at 513–17, 766 S.E.2d at 772–76.[10] In *Overbaugh v. McCutcheon*, this Court explained that an employer could have a duty to protect others from an employee's drunk driving—recklessness—again, *if the facts showed foreseeability on the part of the employer*. 183 W. Va. 386, 391–92, 396 S.E.2d 153, 158–59 (1990); *see also Speedway LLC v. Jarrett*, 248 W. Va. 448, 456–57, 889 S.E.2d 21, 29–30 (2023) (recognizing that an employer could owe a duty of reasonable care to protect others from the reckless conduct of an intoxicated employee under certain circumstances); *State ex rel. State v. Gustke*, 205 W. Va. 72, 81, 516 S.E.2d 283, 292 (1999) (stating that drunk driving is reckless).

And although perhaps not perfectly on point, in *Jones v. Logan County Board of Education*, this Court recently found that a public employer could be found negligent for its employees' failure to protect a student from violent bullying. 247 W. Va. 463, 581 S.E.2d at 384–85.[11] Finally, as noted above, these cases unite West Virginia with every other state and the District of Columbia in holding that

[10] The Court did not address whether the public employer, a state agency, had sovereign immunity or if the claim was covered by the State's insurance policy.

[11] The difference in *Jones* was that the Board's employees negligently failed to protect a student from other students in the Board's charge. *See* 247 W. Va. 463, 581 S.E.2d at 384–85. The situation is nonetheless parallel to employer-employee.

employers *can* have a duty to protect others from the intentional or reckless misconduct of their employees.

This case fits neatly within the Court's longstanding precedent. WVU Medicine authorized Kruger and other senior employees to pursue the *qui tam* take-down attempt against Marietta and retained some degree of involvement—yet it failed to properly supervise the effort—giving rise to possible liability for "affirmative actions or omissions [that] have exposed another to a foreseeable high risk of harm from the intentional misconduct." *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825. WVU Medicine also furnished Kruger with access to inside information and documents, which implicates liability for failing to supervise an employee "using a chattel of the master" when the master knows or should know what its servant is up to. *Restatement (Second) of Torts* § 317. Discovery may well yield additional facts bearing on WVU Medicine's ability to foresee the intentional harm Kruger and other senior WVU Medicine employees inflicted on Marietta.

For its part, WVU Medicine relies on this Court's general observation in *Miller* that the intentional acts of others are typically difficult to foresee. *See* 193 W. Va. at 266, 455 S.E.2d at 825. But this Court has cautioned against reading too much into that observation, calling it "mere[] dicta" and a "generality." *Marcus*, 230 W. Va. at 136–37, 736 S.E.2d at 369–70. Otherwise, WVU Medicine points to brief remarks in this Court's recent decision in *C.C. v. Harrison County Board of Education*, 245 W. Va. 594, 859 S.E.2d 762 (2021). But for reasons explained below, those remarks are confined to that case and not controlling here.

B. *C.C.*'s remarks on underlying intentional acts are not binding.

1. The remarks that purport to bar negligent supervision claims based on underlying intentional acts are dicta.

In *CC.*, this Court affirmed a Rule 12(b)(6) dismissal of an insufficiently pled negligent supervision claim. Specifically, this Court concluded that the plaintiff's complaint was "*factually deficient* in stating a claim for negligent supervision because the complaint does not set forth factual allegations to provide notice to the Board that it is stating a claim for negligent supervision." *C.C.*, 245 W. Va. at 607, 859 S.E.2d at 775 (emphasis added). Though that was the extent of the Court's *holding*, WVU Medicine nonetheless relies on additional remarks suggesting that underlying intentional conduct can *never* support a negligent supervision claim. This additional analysis was unnecessary to the decision, and this Court is not bound to it here. *See State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003) ("[D]icta . . . is language unnecessary to the decision in the case and therefore not precedential.").

We also know these additional remarks did *not* bring about a sea-change to the law by establishing an unprecedented, categorical limitation on claims of negligent supervision, because the Court *did not* cite to or adopt a new syllabus point announcing the apparent new rule that WVU Medicine advocates. *See State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 42–43, 829 S.E.2d 35, 42–43 (2019) ("[W]e have made it clear that the language utilized in our syllabus points, rather than our dicta, is controlling. As we have repeatedly stated, new points of law . . . will be articulated through syllabus points as required by our state

constitution.") (cleaned up). To paraphrase Justice Walker, "if this Court were to create [a new legal] requirement, it would do so in a syllabus point and not in dicta." *Id*. Indeed, Justice Hutchison, concurring in *C.C.*, alerted future litigants and circuit courts to the very remarks now relied on by WVU Medicine. *See C.C.*, 245 W. Va. at 615, 859 S.E.2d at 783 (Hutchison, J., concurring in part, dissenting in part) ("I warn lawyers not to rely upon the majority's legal discussion [regarding negligent supervision] because it has little precedential value beyond the unique facts of this case.").

2. The decision in *Taylor*—the only decision of *this Court* relied upon by *C.C.*—is a per curiam decision with little or no precedential weight here.

Even if not dicta, when this Court traces the error back from *C.C.*, it will find that it was the federal district courts—and not this Court—that first misapprehended (and then perpetuated this erroneous reading of) this Court's decision in *Taylor*. Indeed, in *C.C.*, the only decision this Court cited from *its own precedent* was *Taylor*—and no other. So we must look to *Taylor*. But even if that case could be read to support the commentary in *C.C.*—and it does not—this Court should give it little to no precedential weight in this case.

Although no longer issued since the advent of memorandum decisions, per curiam decisions have a long history at the Court. This Court's decision in *Walker v. Doe*, 210 W. Va. 490, 491, 558 S.E.2d 290, 291 (2001), *overruled in part by State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014), sets forth this Court's view on the precedential value of per curiam decisions. Syllabus Point 3 in *Walker* describes the rule as follows:

> Per curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases.

Id. Put another way, *Walker* instructs that per curiam opinions have precedential weight *only to the extent* they can be used to show lower courts how already settled legal rules can apply to *different sets of facts*. Therefore, to the extent the facts material to the legal analysis in a per curiam decision are meaningfully different from another case at bar, the per curiam decision is of little to no weight. And that makes perfect sense.

Viewed through this lens, *Taylor* offers little basis for the belief that *C.C.* somehow established the novel and far-reaching categorical rule of negligence law that WVU Medicine advocates. In *Taylor*, in which the plaintiff alleged a nurse's negligence, this Court stated that the plaintiff's negligent supervision claim against her employer was moot because the jury found the plaintiff had failed to establish that the employee nurse's negligence caused the plaintiff's injury. 208 W. Va. at 134, 538 S.E.2d at 725. Critically, there were *no allegations* that the nurse's conduct was intentional and, therefore, there was no reason or opportunity for this Court to discuss an employee's intentional versus negligent conduct as a basis for a negligent supervision claim against the employer. And it certainly did not render a new syllabus point on the issue. Since *Taylor* was the only decision of this Court that was cited as precedent in *C.C.*, its minimal precedential value means that this Court in *C.C.* was almost certainly not intending to establish such a sweeping new

rule (which, as noted, would make West Virginia an extreme outlier in negligence law nationwide).

3. Federal courts are split on applying *C.C.*

Since *C.C.*, federal decisions illustrate a splintered view on the true impact of that decision on state negligence law. While some courts have simply applied the statements from *C.C.* as having announced a new categorical rule of negligence law, *see, e.g., Pajak v. Under Armour, Inc.*, No. 1:19-CV-160, 2023 WL 2726430, at *13 (N.D.W. Va. Mar. 30, 2023) (Kleeh, J.)—others have not, *see, e.g.*, *Merritt v. Casto*, No. 2:22-CV-00556, 2023 WL 2589679, at *7–8 (S.D.W. Va. Mar. 21, 2023) (Berger, J.). Only Judge Berger in *Merritt* has conducted an analysis of the alleged new rule in *C.C.*—considering this Court's other negligence cases—in concluding that the decision is best read as being confined to its facts.

Crucial to Judge Berger's conclusion that *C.C.* is limited to its facts is this Court's subsequent decision in the case of *Jones v. Logan County Board of Education*, 247 W. Va. 463, 881 S.E.2d 374. In this decision by Justice Walker, the Court concluded that a negligence claim against a board of education employee had been sufficiently pled where the allegation was that employee failed to stop bullying of a school child. Judge Berger, in evaluating the force of *C.C.*, found that the *Jones* majority "seemingly distanced itself from *C.C.*" *Merritt*, 2023 WL 2589679, at *8. Judge Berger aptly explained:

> If the holding in *C.C.* is strictly followed, it would constitute a sharp departure from the basic tenets of negligence. Accepting that the court engaged in such a sharp departure without thorough review and an

> announced syllabus point *would necessarily require accepting the fall of historical practice and precedent*.

Id. (footnotes omitted; emphasis added). Ultimately, as Judge Berger explained, "[a] review of *Jones*, decided after *C.C.*, makes it apparent that the court did not intend for the holding in *C.C.* to be binding outside of the facts of that case." *Id*. Indeed, since issuing *Jones*, this Court unanimously issued its decision in *Speedway LLC*, in which the Court restated its longstanding principle that employers can be liable for the reckless acts of employees when the risk of harm is foreseeable to the employer. 248 W. Va. at 456–57, 889 S.E.2d at 29–30 (stating the rule but ultimately finding no duty because no foreseeability in that case).

C. To the extent this Court believes *C.C.*'s remarks respecting intentional acts are binding, they should be overruled.

If this Court finds itself inextricably bound to the errant remarks in *C.C.* that would seem to create a new and unprecedented categorical rule sharply limiting longstanding principles of negligence law, those statements should be overruled. Considerations of stare decisis favor making this course correction.

The basic principle of stare decisis, which this Court has long described as "judicial policy" rather than an inflexible rule of law, *State ex rel. W. Va. Dep't of Transp., Div. of Highways v. Reed*, 228 W. Va. 716, 720, 724 S.E.2d 320, 324 (2012), is that an appellate court "should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law," Syl. Pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974).

At the same time, a "principle of law should not be adhered to if the only reason therefor is that it has been sanctified by age," because "it is better to be right than to be consistent with the errors of a hundred years." *Adkins v. St. Francis Hosp. of Charleston*, 149 W. Va. 705, 718, 143 S.E.2d 154, 162 (1965) (quotations omitted); *see also, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). An early and learned mind of this Court, Justice Henry Brannon, once put it: "No legal principle is ever settled until it is settled right." *Town of Weston v. Ralston*, 48 W. Va. 170, 36 S.E. 446, 450 (1900).

Here, *C.C.*'s remarks that could be read to categorically bar claims of negligent supervision where the underlying acts of the employee were intentional rather than negligent constitute serious judicial error. This is reason enough to overrule them (if necessary). As already explained above, that purported holding—which came with only a conclusory analysis of the law of negligence—remains (1) contrary to this Court's own longstanding decisions on law of negligence, as well as subsequent decisions applying those principles; (2) contrary to this Court's adoption of on-point sections of the *Restatement of (Second) Torts*; (3) contrary to the common law in every other state and the District of Columbia; (4) founded on a misunderstanding of a per curiam decision (*Taylor*) and conflicting and, frankly, unfounded language from federal district court decisions; and (5) likely to produce illogical and unprincipled outcomes that are inconsistent with the foundation and purpose of tort law.

But there is more. Far from "promot[ing] certainty, stability, and uniformity in the law," Syl. Pt. 2, *Dailey*, 157 W. Va. 1023, 207 S.E.2d 169, *C.C.* almost immediately sowed uncertainty and confusion in the law of negligence, *see SWN Prod. Co., LLC v. Kellam*, 247 W. Va. 78, 99, 875 S.E.2d 216, 237 (2022) (Walker, J., dissenting) (applying stare decisis, explaining that the "certified questions from the district court highlights the ambiguous and unworkable standards" of the challenged decision, and that the court "could remove all confusion by wiping the slate clean"). Indeed, this very case—a certified question from a federal district court—is a strong indication of the legal uncertainty that remains afoot in the wake of *C.C.* In all events, there can be no credible claim of significant reliance interests that favor reaffirming *C.C.* simply for the sake of doing so.

This Court need look no further than recent decisions of the West Virginia-based federal courts, who are regularly called upon to apply West Virginia law while sitting in diversity. *See*, *e.g.*, *Merritt*, 2023 WL 2589679, at *7–8 (Berger, J.) (finding C.C. a "sharp departure" from "historical practice and precedent" as well as in tension the more recent decision in *Jones*); *Braley v. Thompson*, No. 2:22-CV-00534, 2023 WL 2351881, at *4 n.3 (S.D. W. Va. Mar. 3, 2023) (Goodwin, J.) (observing that *C.C.* was "contentious" and "has not been consistently applied"); *Fields v. King*, 576 F. Supp. 3d 392, 404 n.4, 408 (S.D. W. Va. 2021) (Johnston, C.J.) (upholding negligent supervision claim "[f]or the same reasons Plaintiff has adequately alleged claims of negligent hiring and negligent retention," while

expressly declining to determine whether any of employee's alleged conduct was negligent rather than intentional)).

D. There are no policy reasons to categorically bar negligent supervision claims arising from an employee's intentional or reckless conduct.

Let there be no mistake about what is being sought here. WVU Medicine is advocating for this Court to categorically change substantive law by judicial decree as a matter of what it believes is appropriate *policy*. Specifically, it contends that making a special exception for employers under negligent supervision law is "sound policy." Pet'r Br. at 15. This gambit should be rejected for at least two reasons.

First, while no one doubts this Court's rarely used power to alter the common law, *see* Syl. Pt. 2, *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979), this Court has recently and consistently deferred to the lawmaking branch of government in its enactments that have intentionally altered the common law, including through tort reform. *See, e.g.*, *Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001) (concluding that the state constitution authorizes the Legislature to enact statutes that abrogate the common law, which includes the power to "set reasonable limits on recoverable damages in civil causes of action"); *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 720, 715 S.E.2d 405, 418 (2011) (upholding damages caps, stating "the choice between competing notions of public policy is to be made by elected representatives of the people") (cleaned up). And on occasion, the Legislature has acted to *reverse* changes to the common law that had been made by this Court. *See, e.g., Hersh v. E-T Enterprises, Ltd. P'ship*,

232 W. Va. 305, 752 S.E.2d 336 (2013) (abolishing the "open and obvious doctrine"), *abrogated by* W. Va. Code § 55–7–27 (reinstating it).

Second, even if this Court is open to crafting new tort policy, this Court should not alter the common law to create a special categorical exception for employers because, as this Court itself has previously held, identifying the extent of tort duty "is not a matter of protection of a certain class of defendants." *Aikens v. Debow*, 208 W. Va. 486, 502, 541 S.E.2d 576, 592 (2000). Every State—including this one—and the District of Columbia hold that employers have a duty to supervise employees with reasonable care to prevent intentional and reckless misconduct where the risk of harm is foreseeable. There is simply no policy reason to excuse employers from that liability merely by virtue of being employers. (Marietta itself is, of course, also an employer).

In fact, the case for allowing the imposition of supervisory liability in the employer-employee context is arguably much greater than in other third-party situations where a duty of reasonable care to protect can arise, such as landlord-tenant, because the degree of control is relatively high. One can only guess what other classes will be next in seeking special categorical carveouts from negligence law in circuit courts across the State. There may be good reasons for doing so, but as noted, the most appropriate venue for the sort of interest balancing necessary for making such policy determinations is the Legislature—not the Judiciary.

Otherwise, WVU Medicine relies on decisions from this Court for the notion that "a person has no duty to protect the public from intentional bad acts of third

parties." Pet'r Br. 15. But none of the cases cited stand for that proposition. In fact, each case recognizes the opposite as described above. A person has the duty to protect the public from intentional bad acts of third parties *provided such acts are sufficiently foreseeable* and other elements of negligence are met. *See, e.g., Miller*, 193 W. Va. at 266, 455 S.E.2d at 825 ("[C]ertain exceptions are recognized in which a person has an obligation to protect others from the criminal activity of a third party.").

WVU Medicine tries to rely on a federal appellate decision, *Anicich v. Home Depot U.S.A.*, as a cautionary tale but badly loses the plot. *See* Pet'r Br. 16–17. In *Anicich*, a supervisor had a "*known history* of sexually harassing, verbally abusing, and physically intimidating his female subordinates," including one female employee in particular. 852 F.3d 643, 646 (7th Cir. 2017) (emphasis added); *see also id.* at 647–48. The supervisor then abused his authority over the employee to force her to accompany him on a personal trip, where he murdered her. *Id.* at 646. WVU Medicine all but ignores the *Anicich* employer's *full knowledge of the supervisor's behavior*—that is, facts critical to its foreseeability of the employee's abuse of authority and criminal misconduct. *Anicich* is a prime example of why courts can and should hold such employers liable for negligent supervision because the employer could have taken steps to protect its employee by removing the supervisor's authority over her—at the very least. Again, *foreseeability is the key* to establishing duty, and that will always be determined by the facts on a case-by-case basis. That is how negligence law works.

WVU Medicine also asserts that limiting "negligent supervision to underlying negligence is consistent with the *Restatement of Agency*." Pet'r Br. 17. But the *Restatement of Agency* explicitly states the opposite. To take one example, the *Restatement* provides that "[s]ome tasks require performance in settings that pose a foreseeable risk of criminal or other intentional misconduct against third parties or their property unless the actor is chosen with due care in reference to that risk." *Restatement (Third) of Agency* § 7.05 cmt. b. Clearly the *Restatement* does not support WVU Medicine's position.

Finally, WVU Medicine argues that because the Legislature has extended intentional tort immunity to local governments, *this Court* should do the same for private employers that negligently supervise employees who commit intentional torts. Pet'r Br. 19–20 (citing W. Va. Code § 29-12A-4(c)(1)–(4)). Setting aside the fact that negligent supervision is a direct claim that should not be subject to intentional tort immunity granted to government officials, *the Legislature's choice* highlights why the Court should not adopt a special policy preference sought here. The West Virginia Constitution vests courts with the judicial, not the legislative, power. The fact that it took an act of the Legislature to exempt public employers from direct liability for the intentional torts of employees (again, that is not the case) demonstrates why this Court should not, *on its own*, do the same for private employers. That WVU Medicine is even asking this Court to do so here is yet another red flag.

CONCLUSION

Accordingly, this Court should answer the certified questions as follows:

1. Is a claim for negligent supervision against an employer viable under West Virginia common law?

ANSWER: Yes.

2. If yes, what are the elements of the claim?

ANSWER: Negligent supervision is simply a negligence claim so named because of the legal duty of supervision involved. Like standard negligence, negligent supervision arises when the employer negligently breaches a duty to supervise an employee, proximately causing the plaintiff's injuries.

3. Can intentional or reckless torts committed by an employee form the basis for a claim for negligent supervision against the employer?

ANSWER: Yes.

MARIETTA AREA HEALTHCARE; MARIETTA MEMORIAL HOSPITAL; and MARIETTA HEALTHCARE PHYSICIANS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2023, ***Respondent's Brief*** was filed and served via File&ServeXpress on all counsel of record.

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