In the Supreme Court of Appeals of West Virginia

No. 23-569

Camden-Clark Memorial Hospital Corp.; Camden-Clark Health Services, Inc.; West Virginia United Health System, Inc. d/b/a West Virginia University Health System; and West Virginia University Hospitals, Inc.,
Petitioners,

v.

Marietta Area Healthcare, Marietta Memorial Hospital, and Marietta Healthcare Physicians, Inc.,

Respondents.

On Certified Question from the United States District Court
for the Northern District of West Virginia
Case No. 5:23-cv-131

BRIEF OF PETITIONERS

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CERTIFIED QUESTIONS

This case is before the Court for consideration of certified questions from the United States District Court for the Northern District of West Virginia ("the Northern District"). In its Order of Certification, the Northern District framed the certified questions as follows:

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

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

3. Can intentional or reckless torts committed by an employee form the basis for a claim for negligent supervision against the employer?[1]

STATEMENT OF THE CASE

I. Background

The certified questions presented here arose out of the Northern District's consideration of Petitioners Camden-Clark Memorial Hospital Corp. ("CCMC"); Camden-Clark Health Services, Inc. ("CCHS"); West Virginia United Health System, Inc., d/b/a West Virginia University Health System ("WVUHS"); and West Virginia University Hospitals, Inc.'s ("WVUH") (collectively, "Camden-Clark/WVUHS") Motion to Dismiss the Second Amended Complaint filed by Respondents Marietta Area Healthcare, Marietta Memorial Hospital, and Marietta Healthcare Physicians, Inc.'s (collectively, "Marietta").[2]

Camden-Clark Memorial Hospital and Marietta Memorial Hospital are hospitals serving patients in and around the neighboring communities of Parkersburg, West Virginia and Marietta, Ohio, respectively.[3] On November 22, 2016, two individuals in the healthcare industry in and around Parkersburg, West Virginia, Michael A. King and Dr. Michael D. Roberts ("Relators"),

[1] J.A. 000842, Northern District's Partial Dismissal Order.
[2] J.A. 000794–842, Northern District's Partial Dismissal Order.
[3] J.A. 000069, J.A. 000370.

filed a *Qui Tam* against Marietta under seal in the Northern District, challenging Marietta's physician compensation and recruiting practices under the False Claims Act, 31 U.S.C. §§ 3729–3733 ("FCA"). *See United States ex rel. King et al.*, 5:16-cv-175 (N.D. W. Va.) ("*Qui Tam*").[4] The action was stayed under 31 U.S.C. § 3730(b)(2) while the Department of Justice ("DOJ") investigated.[5]

The filing of a *qui tam* case invites the government to investigate the allegations and decide whether to intervene and join in prosecution of the case. 31 U.S.C. §§ 3730(a) & (c). While the Northern District repeatedly extended the stay in the *Qui Tam* matter at DOJ's request, DOJ ultimately decided not to intervene.[6] On March 23, 2020, upon Relators' request and with DOJ's consent, the Northern District dismissed the *Qui Tam* without prejudice.[7] The docket was unsealed on April 24, 2020.[8]

II. Procedural History

A. *Marietta I* Trial and Settlement

Five months after the *Qui Tam* docket became public, Marietta sued Relators.[9] *See Marietta Area Healthcare, Inc., et al. v. Michael A. King, et al.*, 2:20-cv-639 (S.D. W. Va.); 5:21-cv-25 (N.D. W. Va.) ("*Marietta I*").[10] By complaint filed September 25, 2020, Marietta alleged Relators manufactured false and unsupported *Qui Tam* allegations[11] and asserted claims for

[4] *Qui Tam* Complaint, J.A. 000097–165.
[5] The investigation reportedly lasted from November 22, 2016, to March 23, 2020, and the DOJ asked the *Qui Tam* Court for (and apparently received) six 180-day extensions. J.A. 000200–44 (Ex. A, Defs.' Mem. Supp. Mot. Summ. J., *Marietta I* at 6 (N.D. W. Va. Jan. 3, 2023), ECF No. 329).
[6] J.A. 000063–96, Second Am. Compl., ¶ 7.
[7] J.A. 000245–59, Ex. B, Relators' Notice of Voluntary Dismissal Without Prejudice, *Qui Tam* (Mar. 20, 2020), ECF No. 42; Ex. C, United States' Notice of Consent to Dismissal, *Qui Tam* (Mar. 20, 2020), ECF No. 41; Ex. D, Order, *Qui Tam*, (Mar. 23, 2020), ECF No. 43.
[8] J.A. 000260–63, Ex. E, Am. Order, *Qui Tam* (Apr. 24, 2020), ECF No. 45.
[9] J.A. 000264–357, Ex. F, Compl., *Marietta I* (S.D. W. Va. Sept. 25, 2020), ECF No. 4.
[10] J.A. 000264–357.
[11] J.A. 000264–357, *Id.* ¶¶ 1 - 6, 13, 33, 35, 49 – 51, 62, 64.

malicious prosecution, tortious interference, abuse of process, and fraudulent legal process.[12] On February 3, 2022, Marietta amended its complaint to add a third individual, Todd A. Kruger, as a defendant and to assert a conspiracy claim against all defendants.[13] Kruger was identified as the "Vice-President and General Counsel to Camden Clark Health Services, Inc. located in Parkersburg, West Virginia"[14] and alleged to be a "fellow – but unnamed relator."[15]

Marietta's claims against Relators settled before trial.[16] Marietta's claims against Kruger – CCMC's former general counsel – were tried to a jury between March 27 and 31, 2023.[17] The proceedings ended in a mistrial.[18] Marietta and Kruger then reached a settlement. On May 18, 2023, the Court dismissed Kruger with prejudice and closed the case.[19]

B. *Marietta II*

The instant case represents Marietta's second attempt to avenge the *Qui Tam* filed against it by Relators. On April 5, 2023, while *Marietta I* was still pending, Marietta filed *Marietta II* against CCMC and CCHS, repeating five of the Marietta I claims – malicious prosecution, tortious interference, abuse of process, fraudulent legal process, and civil conspiracy – and asserting two "new" claims for aiding and abetting allegedly tortious conduct and vicarious liability.[20] All of Marietta's claims in *Marietta II* are based on the events from *Marietta I* – alleged authorization of,

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[12] J.A. 000264–357. *See id.* ¶¶ 69 - 98.
[13] J.A. 000358–66, Ex. G, Pls.' Mot. Leave File Am. Compl., *Marietta I* (N.D. W. Va. Feb. 3, 2022), ECF No. 97.
[14] J.A. 000367–463, Ex. H, Am. Compl., *Marietta I* (N.D. W. Va. Feb. 11, 2022), ECF No. 107, ¶ 12.
[15] J.A. 000358–66, Ex. G, Pls.' Mot. Leave File Am. Compl., *Marietta I* at 5.
[16] J.A. 000467–82, *See* Ex. J, Joint Mot. Dismiss Michael D. Roberts, M.D., *Marietta I* (N.D. W. Va. Feb. 24, 2023), ECF No. 428; Ex. K, Order, *Marietta I* (N.D. W. Va. Feb. 24, 2023), ECF No. 429; Ex. L, Joint Mot. Dismiss Michael A. King, *Marietta I* (N.D. W. Va. Mar. 24, 2023), ECF No. 490; Ex. M, Order, *Marietta I* (N.D. W. Va. Mar. 24, 2023), ECF No. 491.
[17] J.A. 000173, Defs.' Mem. Supp. Mot. Dismiss, *Marietta II* (N.D. W. Va. Aug. 21, 2023), ECF No. 33).
[18] J.A. 000173.
[19] J.A.000483–88, *See* Ex. N, Proposed Order Dismissing Todd A. Kruger, *Marietta I* (N.D. W. Va. May 17, 2023), ECF No. 546; Ex. O, Order, *Marietta I* (N.D. W. Va. May 18, 2023), ECF No. 547.
[20] J.A. 000001–29.

involvement in, or responsibility for the filings of the *Qui Tam*; actions taken by Relators and Kruger; and the alleged financial losses to Marietta arising from the United States' FCA investigation. On May 1, 2023, Marietta filed the First Amended Complaint adding WVUHS and WVUH.[21] Camden-Clark/WVUHS filed a Motion to Dismiss Marietta's First Amended Complaint on June 30, 2023, but it was rendered moot by the Court upon Marietta's filing of a Motion for Leave to File Second Amended Complaint.

On July 31, 2023, Marietta obtained leave to file a Second Amended Complaint to assert a claim for negligent supervision.[22] That claim – Count VI of the Second Amended Complaint – focuses on the employment supervision of Kruger, CCMC's former general counsel. Count VI alleges that Camden-Clark/WVUHS "failed to properly supervise, if not entirely failed to supervise, Kruger and others in the pursuit and assistance in the pursuit of the *qui tam* action."[23]

On August 21, 2023, Camden-Clark/WVUHS filed a Motion to Dismiss the Second Amended Complaint based on res judicata, FCA preemption, statute of limitations, and, as to Count VI, failure to state a claim.[24] Regarding Count VI, Camden-Clark/WVUHS argued that Marietta's claim for negligent supervision was based entirely on alleged *intentional* misconduct of Kruger and others, while West Virginia precedent recognizes a claim for negligent supervision only where the underlying conduct is *negligent*.[25] On September 1, 2023, Marietta responded, urging the Northern District to certify a question concerning the scope of the claim of negligent supervision,[26] and Camden-Clark/WVUHS replied on September 8.[27] On September 18, 2023,

[21] J.A.000030–62.
[22] J.A.000063–96.
[23] J.A. 000063–96.
[24] J.A. 000167–99, Mot. Dismiss.
[25] J.A. 000167–99.
[26] J.A.000691–717.
[27] J.A. 000777–93.

the Northern District issued an order denying Camden-Clark/WVUHS's claims as to Counts I, II, III, IV, V, VII, and VIII, and deferring its determination of Count VI (Negligent Supervision) pending the outcome of the certified questions presented here.[28]

III. Marietta Alleges Camden-Clark/WVUHS are Liable for Kruger's Purported Intentional Misconduct.

The factual allegations presented in Marietta's Second Amended Complaint do not state, show, or imply any negligence on the part of Camden-Clark/WVUHS. Marietta's claims are those of intentional conduct based on Kruger's participation in the *Qui Tam*. In its opening paragraph of the Second Amended Complaint, Marietta asserted that the tortious action on which it bases this suit was undertaken "with the express approval of Defendant Camden through certain of its officers or directors."[29] As Marietta explained, its impetus for filing the Second Amended Complaint is "to hold Defendant Camden accountable for its *involvement, approval, authorization, sanctioning, support, and participation* in the egregious intentional misuse of the judicial system and to recover for the extensive damages that it caused" due to Relators' filing of the *Qui Tam* and Kruger's involvement in that effort.[30] Marietta alleges that all Kruger's allegedly-tortious actions were "imbued with the authorization of Defendant Camden."[31]

Likewise, Marietta's references to Kruger's actions for which Camden-Clark/WVUHS are allegedly liable describe intentional — not negligent — behavior. The only difference between Marietta's Amended Complaint and Second Amended Complaint is the addition of the claim for negligent supervision; in amending, Marietta did not supply facts beyond those it alleges in support

[28] J.A. 000794–846, Order re Defendants' Mot. Dismiss.
[29] J.A. 000063–96, Sec. Am. Compl. at ¶ 1.
[30] J.A. 000063–96, Sec. Am. Compl. at ¶ 8 (emphasis added).
[31] J.A. 000063–96, Sec. Am. Compl. at ¶ 4. Camden-Clark/WVUHS categorically denies Marietta's unfounded allegations concerning any involvement in Kruger's conduct. Discovery will show that Kruger intentionally concealed his actions from his employer.

of its other seven claims, all of which are claims of intentional conduct based on the participation of Mr. Kruger in the *Qui Tam*. In paragraphs 8 and 12 of the Second Amended Complaint, Marietta explains that, in filing suit, it "seeks to hold Defendant Camden accountable for its involvement, approval, authorization, sanctioning, support, and participation in the egregious *intentional* misuse of the judicial system," meaning Kruger's involvement in the *Qui Tam*. Marietta repeatedly claims that, through Kruger's actions, Camden-Clark/WVUHS "intentionally" caused harm.[32] Marietta also asserts that "Kruger, within the scope of his employment for Defendant Camden, played an integral role in the scheme by helping to develop, plan, initiate, and pursue" the *Qui Tam*.[33] Kruger's conduct was plainly pled as intentional and not negligent.

SUMMARY OF ARGUMENT

The Court should answer the first certified question in the affirmative. Negligent supervision is a viable claim of independent tortious conduct recognized at common law. *C.C. v. Harrison Cty. Bd. of Educ.*, 245 W. Va. 594, 859 S.E.2d 762 (2021). The answer to the second certified question is equally plain: the elements of the claim track those of general negligence, with the additional requirement that the plaintiff prove incompetence on the part of the employee and the employer's knowledge of the same.

However, the Court's answer to the third certified question – whether intentional or reckless torts committed by an employee may form the basis for a claim for negligent supervision against the employer – should be "no." More than twenty years ago, a majority of sitting justices of this Court agreed that negligent conduct by an employee is a necessary predicate to employer liability for negligent supervision. *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 124, 538 S.E.2d 719, 725 (2000) (per curiam). In 2021, this Court expressly confirmed what was

[32] J.A. 000063–96, Sec. Am. Compl. at ¶¶ 105, 109–10.
[33] J.A. 000063–96, Sec. Am. Compl. at ¶ 43.

implicit in *Taylor*'s holding: Employers are not liable in negligent supervision for *intentional* acts of their employees. *C.C.*, 245 W. Va. at 606–07, 859 S.E.2d at 775. *C.C.*'s decision was announced in a signed opinion, and its holding on negligent supervision was joined by two of the justices currently sitting on this Court.

The Court should not upend the elements of negligent supervision as defined in its current jurisprudence. The limitation on employer liability announced in *Taylor* and endorsed by *C.C.* has been the law in this State for more than two decades. It has been adopted almost without exception by West Virginia's federal courts. *Stare decisis* should govern this Court's analysis, as the natural development of the common law has provided a clear and functional formulation of the cause of action that requires no revision. The elements as currently defined provide an appropriate mechanism to hold employers accountable for employee conduct that is actually under the purview of the employer's influence and control.

Indeed, intentional or reckless conduct by an employee should not serve as the basis for a negligent supervision claim against an employer. Deliberate employee misconduct unrelated to the conditions of employment is unforeseeable by employers and an extension of duty to encompass this unforeseeable conduct would place an unduly onerous burden on employers. Employers would be forced to monitor the personal characteristics and proclivities of their employees and intervene in their behavior to a degree beyond what is expected in any other relationship between adults. The Court should therefore answer the third certified question in the negative.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Marietta asks the Court to overrule its long-standing precedent and expand liability of private employers to extend to intentional, unforeseeable torts committed by their employees.

Camden-Clark/WVUHS requests Rule 20 argument to address these issues of broad public significance.

ARGUMENT

I. West Virginia Recognizes a Common Law Claim for Negligent Supervision.

Negligent supervision is a viable claim under West Virginia common law. This point – the subject of the first certified question presented here – is uncontroversial. Though this Court has not had frequent opportunity to address the contours of negligent supervision, it has nevertheless consistently recognized the claim as an available variant on a traditional claim for negligence. *See, e.g., W. Va. Reg. Jail and Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 513, 766 S.E.2d 751, 772 (2014) (noting government agency may be subject to liability for negligent supervision if it violated "clearly established" law with respect to its training or supervision of corrections officer); *State ex rel. W. Va. State Police v. Taylor*, 201 W. Va. 554, 560, 499 S.E.2d 283, 289 n.7 (1997) (recognizing cause of action for similar theory of negligent hiring); *Thomson v. McGinnis*, 195 W. Va. 465, 470–71, 465 S.E.2d 922, 927–28 (1995) (same).

Unlike vicarious liability imposed by the doctrine of *respondeat superior*, negligent supervision is a cause of action based on primary or direct liability to the employer. In other words, liability under negligent supervision is not based on the employer-employee relationship but instead on whether an employer acted negligently in supervising the employee. *See Bourne v. Mapother & Mapother, P.S.C.*, 998 F. Supp.2d 495, 506 (S.D. W. Va. 2014); *see also Hamstead v. Former D. R. Walker,* No. 3:18-cv-79, 2019 U.S. Dist. LEXIS 238303, at *28–29 (N.D. W. Va. Jun. 7, 2019). The claim arises from the failure of an employer to take reasonable care in supervising its agent so as to prevent foreseeable harm to third parties. *Bourne*, 998 F. Supp.2d at 506 (reasoning that a negligence action for failure to supervise arises when "the principal

negligently supervises its agents such that harm proximately results to a third party"). The Court should answer the first certified question in the affirmative and confirm negligent supervision as a viable negligence claim in West Virginia.

II. Proof of Underlying Negligence by the Employee is an Essential Element of a Claim for Negligent Supervision.

A. Negligent supervision incorporates general elements of negligence, with additional elements to define the scope of the employer's duty.

A claim for negligent supervision starts with the elements common to any negligence claim. "To succeed on [a] negligence claim, a plaintiff must establish by the preponderance of the evidence that the defendant owes him a duty, that there was a negligent breach of that duty, and that injuries received by the plaintiff resulted proximately from the breach of the duty." *Jones v. Logan Bd. of Educ.*, 247 W. Va. 463, 473, 881 S.E.2d 374, 383 (2022) (citing *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 118, 21 S.E.2d 898, 899 (1939)). Likewise, in a claim for negligent supervision, the plaintiff must prove that the employer had a duty to protect the plaintiff from harm caused by its employee, that the employer breached that duty, and that the employer's breach of duty was a proximate cause of the plaintiff's harm. *See Launi v. Hampshire Cty. Prosecuting Atty's Office*, 480 F. Supp. 3d 724, 733 (N.D. W. Va. 2020) (citing *Ferrell v. Santander Consumer USA, Inc.*, 859 F. Supp. 2d 812, 817–18 (S.D.W. Va. 2012)).

In a claim for negligent supervision, the employer's duty must be narrowly circumscribed. A person typically owes no duty to protect others from the conduct of third parties. *Miller v. Whitworth*, 193 W. Va. 262, 266, 455 S.E.2d 821, 825 (1995). This is particularly true where injury results from the deliberate misconduct of a third party. *See Jones*, 247 W. Va. at 473, 881 S.E.2d at 384. As this Court has recognized, "[n]ormally a person has much less reason to anticipate intentional misconduct than he has to anticipate negligence." *Id.* (quoting *Miller,* 193

W. Va. at 266, 455 S.E.2d at 825). Thus, while the tort of negligent supervision recognizes that an employer may breach a duty to third parties by failing to exercise due care in the supervision of its employee, that duty extends only to negligent, not intentional, acts by the employee. *See C.C.*, 245 W. Va. at 606, 859 S.E.2d at 774.

Thus, in addition to the standard elements of negligence, a West Virginia common law claim for negligent supervision requires the plaintiff to prove the following: first, an employment relationship existed between the employer and the tortfeasor (without which no duty arises); second, incompetence on the part of the employee; third, the employer's knowledge of its employee's incompetence; fourth, the employee's negligent act or omission causing injury to the plaintiff; and fifth, the employer's negligence in supervision is the proximate cause of the plaintiff's injury. *See C.C.*, 245 W. Va. at 606, 859 S.E.2d at 774; *Launi*, 480 F. Supp. 3d at 733; *see also Negligent Hiring and Retention of an Employee*, 29 Am. Jur. Trials 267 § 5 (Oct. 2023 update); *Mitchell v. Rite Aid of Md., Inc.*, 290 A.3d 1125, 1160 (Md. App. 2023) (setting forth elements of negligent supervision under Maryland common law); *Bratcher v. Pharm. Prod. Dev., Inc.*, 545 F. Supp.2d 533, 546 (E.D.N.C. 2008) (knowledge of employee incompetence is necessary to establish notice on the part of employer).

B. This Court's established precedents hold that negligent supervision liability is not available for intentional torts of the employee.

This Court has made clear that an employer is liable for negligent supervision only when the underlying tortious conduct of the employee is also negligent. The claim does not provide for recovery against an employer for an employee's intentionally tortious acts.

The Court first made this pronouncement in *Taylor v. Cabell Huntington Hospital, Inc.*, 208 W. Va. 128, 538 S.E.2d 719 (2000) (per curiam). In *Taylor*, the plaintiff sued a hospital after being treated in the emergency room for a bee sting. She alleged that her treating nurse negligently

combined incompatible medications in the same syringe. *Id.* at 132, 723. The jury found that the nurse did not cause the complained-of injury and returned a verdict for the defense. *Id.* In its first case to directly consider the parameters of negligent supervision, this Court affirmed the judgment of the lower court. "The . . . claim of negligent supervision," this Court reasoned, "must rest upon a showing that the hospital failed to properly supervise Nurse Grim and, as a result, Nurse Grim committed a *negligent act* which proximately caused the [plaintiff's] injury." 208 W. Va. at 134, 538 S.E.2d at 725 (emphasis added). According to *Taylor*, negligent supervision is premised on the underlying negligence of the employee, without which the claim cannot stand. *Id.*

Just two years ago, this Court affirmed *Taylor*'s finding and confirmed the accuracy of how courts have interpreted *Taylor* for two decades: A West Virginia claim for negligent supervision must be premised on negligent, not intentional, employee conduct. *C.C. v. Harrison Cty. Bd. of Educ.*, 245 W. Va. 594, 859 S.E.2d 762 (2021). *C.C.* concerned allegations of harassment (*i.e.*, intentional misconduct) brought by a transgender high school student against the school's assistant principal. The student's claims included a claim for negligent supervision based on the school board's alleged failure to supervise its employee. The lower court dismissed the negligent supervision claim on Rule 12(b)(6) grounds and the student sought review in this Court.

In *C.C.*, this Court upheld *Taylor*, holding that negligent supervision requires proof that "the employer failed to supervise its employee, and as a result, the employee ***committed a negligent act*** and caused injury." *C.C.*, 245 W. Va. at 605, 606, 859 S.E.2d at 773–74 (emphasis added). "[B]ecause all of the acts alleged to have been committed by the [assistant principal] were comprised of intentional conduct, the circuit court correctly ruled that the Petitioners had not made the requisite predicate showing of the [assistant principal's] negligence to support a claim of negligent supervision[.]" 245 W. Va. at 606, 607, 859 S.E.2d at 774-75. The Court repeatedly

characterized *Taylor* as West Virginia's "current construction of a negligent supervision cause of action." *Id.*

To eliminate any doubt that *Taylor*'s legal requirement remains controlling law in West Virginia, this Court cited a host of federal court cases relying on the formulation of negligent supervision from *Taylor* and recognizing that intentional employee misconduct cannot serve as the basis of a negligent supervision claim. *Id.* at n.13. Indeed, almost without exception, West Virginia's federal courts have adopted *Taylor* and *C.C.*'s reasoning to find that intentional misconduct by an employee cannot form the basis of a negligent supervision claim. *See, e.g.*, *Pennington v. Mercer Cty. Comm'n*, No. 1:21-00335, 2023 U.S. Dist. LEXIS 89867, at *38 (S.D. W. Va. May 23, 2023) ("In this case, the allegedly wrongful conduct . . . was intentional conduct, not negligence. Therefore, it cannot form the basis of a negligent supervision claim."); *Braley v. Thompson*, No. 2:22-cv-00534, 2023 U.S. Dist. LEXIS 35805, at *11 (S.D. W. Va. Mar. 3, 2023) ("[A] negligent supervision claim may not rest on an employee's intentional misconduct, as opposed to his negligence."); *Gold v. Joyce*, No. 2:21-cv-00150, 2021 U.S. Dist. LEXIS 118104, at *27-28 (S.D. W. Va. Jun. 24, 2021) (dismissing negligent supervision claim based on intentional tort); *Selders v. MegaCorp Logistics, LLC*, No. 2:14-CV-60, 2014 U.S. Dist. LEXIS 192474, at *3 (N.D.W. Va. Dec. 22, 2014) (Bailey, J.) (citing *Taylor* and dismissing negligent supervision claim when the "alleged acts in the [plaintiff's pleading] were intentional" as opposed to negligent); *Heslep v. Ams. for African Adoption, Inc.*, 890 F. Supp. 2d 671, 687 (N.D.W. Va. 2012) (holding that "a claim for negligent supervision requires a separate finding of negligence on the part of the employee being supervised") *but see Merritt v. Casto*, No. 2:22-cv-00556, 2023 U.S. Dist. LEXIS

47504, at *17 (S.D. W. Va. Mar. 21, 2023) (distinguishing *C.C.* and allowing negligent supervision claim based on underlying intentional misconduct to proceed).

C. The Court is bound by its decisions in *Taylor* and *C.C.*

This Court's recent decision in *C.C.* carries significant precedential weight because it affirms, in a published, signed opinion, *Taylor*'s exclusion of intentional torts from negligent supervision liability established over two decades ago. The Court has recognized a three-tiered system of precedent consisting of first, signed opinions containing original syllabus points; second, signed opinions that do not contain new syllabus points; and third, memorandum decisions. *State v. McKinley*, 234 W. Va. 143, 153, 764 S.E.2d 303, 313 (2014). Signed opinions without new syllabus points, like *C.C.*, "carry significant, instructive, precedential weight" because they "apply settled principles of law in different factual and legal scenarios." *Id.* Further, signed opinions are "the primary sources relied upon in the development of the common law." *Id.*

Taylor's limitation on supervisory liability was contained in a per curiam opinion which, though not signed by an individual member of the Court, still constitutes binding authority. *See McKinley*, 234 W. Va. at 150, 764 S.E.2d at 310 (noting that while the precedential value of the Court's per curiam opinions was called into question in the 1990s, they remained binding because they were concurred in by a majority of justices) (citing W. Va. Const. art. VIII, § 4). However, in *C.C.*'s adoption of *Taylor* in a published, signed opinion, there can be no question that exclusion of intentional torts by an employee from supervisory liability in negligence is the settled precedent of this Court. And overturning Court precedent, which Marietta will ask this Court to do, should not be considered lightly.

"The doctrine of *stare decisis* requires this Court to follow its prior opinions." *State ex rel. W. Va. Dep't of Transp., Div. of Highways v. Reed*, 228 W. Va. 716, 719, 724 S.E.2d 320, 323

(2012) (citation and internal quotation marks omitted). Though the doctrine is not inflexible, it has long been the policy of this Court to stand by its precedents and exercise caution in considering whether to overrule precedent. *See id.*; *see also SWN Prod. Co., LLC v. Kellam*, 247 W. Va. 78, 88, 875 S.E.2d 216, 226 (2022). Adhering to previous decisions promotes "certainty, stability, and uniformity in the law." *Stepp v. Cottrell ex rel. Estate of Cottrell*, 246 W. Va. 588, 595, 874 S.E.2d 700, 707 (2022) (quoting Syl. Pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974)). Overruling precedent is for "rare instances" when this Court clearly committed a serious error or, due to changing conditions, an outmoded rule causes injustice. *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 248, 744 S.E.2d 625, 646 (2013) (citations omitted). This case is not one of those rare exceptions.

Stare decisis counsels against overruling the recent *C.C.* decision. *C.C.* was published just over two years ago and its holding on negligent supervision was joined by two of the same justices asked to decide these certified questions. The Court's decision to limit an employer's liability for negligent supervision to negligent acts of its agent was not in any way limited to the facts of the case. It was a confirmation and continued endorsement of the way state and federal courts have interpreted West Virginia common law. *C.C.*, 245 W. Va. at 606, 859 S.E.2d at 774 (recognizing that negligent conduct of the supervised employee has been a "predicate prerequisite" to a negligent supervision claim since *Taylor*). Clearly, the conditions giving rise to that decision have not changed. Further, this Court committed no error in *C.C.* when it affirmed the decades-old holding of *Taylor*. Courts across West Virginia have relied on that holding for over two decades, and, as explained below, limiting employer liability in negligent supervision to negligent torts by the employee is supported by the Restatement and the public policy of this state.

III. Shielding Employers From Liability for the Intentional or Reckless Torts of Their Employees Committed Outside the Scope of Employment is Sound Policy.

A. The scope of duty in a negligent supervision claim should remain limited to employee conduct within an employer's traditional sphere of control.

The Court's holding in *C.C.* limiting employer liability in negligence to negligent acts by their employees comports with West Virginia's framing of a duty to protect, and the recognized limitations of that duty. As stated, a person has no duty to protect the public from intentional bad acts of third parties. *See Jones*, 247 W. Va. 463, 881 S.E.2d at 384 (citing *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825). This is because "a person has much less reason to anticipate intentional misconduct than he has to anticipate negligence." *Id.* (citing *Miller*, 193 W. Va. at 266, 455 S.E.2d at 825). The same is true for employers.

In considering whether to recognize a duty in negligence, this Court has held:

> [C]ourts must consider foreseeability of risk and, "[b]eyond the question of foreseeability, . . . policy considerations underlying the core issue of the scope of the legal system's protection . . . includ[ing] the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant."

Speedway LLC v. Jarrett, 248 W. Va. 448, 889 S.E.2d 21, 27 (2023) (quoting *Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983)). When an employee engages in deliberate criminal conduct, the foreseeability of the risk to the employer is slight. *See Jones*, 247 W. Va. at 473, 881 S.E.2d at 384. The moral judgment required to assess whether an individual is likely to engage in a reckless or intentional tort, especially outside the scope of the individual's employment, is beyond a supervisor's ordinary duties in the workplace. Many work environments are not conducive to the kind of close personal observation necessary to know whether an

employee is likely to commit a reckless or intentional tort.[34] Lack of foreseeability counsels against imposing a duty on employers to prevent the deliberate misconduct of their employees.

Further, the consequences of imposing such a duty would place too great a burden on West Virginia businesses. *See Speedway LLC*, 889 S.E.2d at 27 (court must consider consequences to defendant before imposing duty). If the definition of negligent supervision were to expand beyond the current definition, employers in this State would be subject to suit for a broad range of intentional employee conduct completely beyond their control. The tragic facts of *Anicich v. Home Depot U.S.A., Inc.*, 852 F.3d 643 (7th Cir. 2017), offer an example. In *Anicich*, the defendant's supervisor, Brian Cooper, had been romantically interested in his female subordinate Alisha Bromfield for some time and engaged in sexually harassing behavior at work. It was alleged that Cooper would call Alisha names, yell, and swear at her. *Id.* at 647. Though their employer, Home Depot, allegedly knew about Cooper's anger problems, *see id.*, there was no allegation that Cooper had been physically violent toward Alisha or anyone else. In 2012, Cooper persuaded Alisha to attend a family wedding with him in another state. *Id.* at 648. After the wedding, Cooper asked Alisha to be in a relationship with him, and she refused. *Id.* Cooper became enraged and murdered her. *Id.* The district court dismissed the negligent supervision claim brought by Alisha's mother against Home Depot, finding Home Depot had no duty to control Cooper's behavior. *See id.* The

[34] The relationship between CCMC and Mr. Kruger was also not that of a typical supervisor/supervisee or employer/employee. Mr. Kruger was CCMC's General Counsel and, as Marietta alleges, "an executive-level official" of the corporation at all times relevant to the allegations in the Second Amended Complaint. *See* J.A. 000063–96, Sec. Am. Compl. at ¶ 3. In this capacity, he was generally not subject to supervision in the traditional sense. At this early stage of the litigation, it is also unclear what, if any, duty Marietta can allege was owed to it by Camden-Clark/WVUHS and none is obvious based on the pleadings. This case is thus a bizarre vehicle for the parties to argue before this Court about the proper statement of a claim based on negligent supervision of an employee. What limited application the facts presented here may have to a tort of negligent supervision only counsels in favor of a definition that allows liability for employers based only on the negligent acts of their employees.

Seventh Circuit reversed, reasoning that Illinois's iteration of negligent supervision allows a victim to hold an employer liable for criminal conduct committed by employees. *Id.* at 649. At the motion to dismiss stage, the Seventh Circuit held that Alisha's mother had plausibly alleged a deviation on the part of Home Depot from its duty to protect its employee. *Id.* In so ruling, the Seventh Circuit subjected Home Depot to potential liability for a murder occurring in a place beyond its control and entirely separate from the job that Cooper had been employed to perform.

The outcome of the *Anicich* case demonstrates the economic and social ramifications of imposing a duty on employers to protect against deliberate misconduct by their employees, whether or not that misconduct is criminal in nature. Expanding liability for employers for employee misconduct committed intentionally outside the scope of employment that rises above professional incompetence will not better ensure the safety of the public and will make it more expensive and riskier to operate a business in this State. Employers would be induced to surveil their employees not only when they are at work, but when they have left the job and are engaged in activities that bear no relationship to their employment. It is for this reason that the Court has recognized that "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 258, 685 S.E.2d 219, 231 (2009). The public is better served by a cause of action that assigns liability to the appropriate actors – the employee who chose to engage in deliberate wrongdoing – and does not impose a duty on employers to assess an employee's moral fiber.

B. Limitation of negligent supervision to underlying negligence is consistent with the Restatement of Agency.

The Court's settled definition of negligent supervision finds support in the Restatement (Third) of Agency. The Restatement provides:

> A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.

Restat. 3d of Agency, § 7.05(1).[35] As the drafters explain in comments to the rule, "[c]onduct that results in harm to a third person is not negligent or reckless unless there is a foreseeable likelihood that harm will result from the conduct." *Id.*, cmt. *d*.

West Virginia's current formula for evaluating whether an employer is liable for negligent supervision is consistent with the Restatement. West Virginia law does not expose employers to liability in negligence when an employee commits a reckless or intentional tort outside the scope of employment because such conduct is inherently unforeseeable to the employer. *See* Syl. Pt. 8, *Aikens v. Debow,* 208 W. Va. 486, 489, 541 S.E.2d 576, 579 (2000) ("The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised."). There is value in limiting liability in this way. By foreclosing potential liability for employers based on those classes of torts that are less likely to be foreseeable, the current law conserves the resources of both plaintiffs and defendants. Plaintiffs are saved the trouble of prosecuting claims that would ultimately be found meritless, and defendants are not burdened with the substantial expense of defending claims based on conduct it could not have foreseen.

Employers, by virtue of their position, are already liable for the actions of others to a greater degree than essentially any other category of person in West Virginia. In this context, it makes

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[35] Subsection (2) of the text reads:

> (2) When a principal has a special relationship with another person, the principal owes that person a duty of reasonable care with regard to risks arising out of the relationship, including the risk that agents of the principal will harm the person with whom the principal has such a special relationship.

It is unclear at this early stage of the litigation what, if any, basis Marietta has to assert that Camden Clark/WVUHS is in a special relationship with it and owes it a duty of care.

sense to uphold a bright line rule that relieves employers from defending suits under a negligence theory based on intentional employee conduct inherently less likely to be foreseeable to them.

C. The Court's current iteration of negligent supervision preserves for private employers the same shield from liability enjoyed by political subdivisions in West Virginia.

The Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-4 provides another indication that the current scope of liability for negligent supervision is appropriate. This statute explicitly limits the liability of political subdivisions for injuries to third parties to those damages caused by the subdivision's *negligence* or the negligence of their employees. *See* § 29-12A-4(c)(1)–(4). Political subdivisions are not liable for intentional or reckless misconduct by their employees. *See id.*; *see also Zirkle v. Elkins Road Public Serv. Dist.*, 221 W. Va. 409, 414, 655 S.E.2d 155, 160 (2007) (confirming that intentional and malicious acts are included in the immunity granted to political subdivisions). The purpose of the immunity grant is straightforward: it shields political subdivisions from liability because the excessive cost of litigating claims for injury, death, or loss made it difficult for government entities to obtain insurance coverage. In creating this broad shield from liability, the Legislature cited the "high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services." § 29-12A-2. The Legislature determined that limiting liability for government employers to the negligent acts of their employees struck an appropriate balance between the interests of injured parties and that of government employers, who must defend such claims using limited public revenue.

The Legislature's reasoning for drawing the line for political subdivisions tort liability at the negligent acts of employees is equally applicable to private employers. As this Court has noted,

governmental immunity from intentional torts is "necessary to relieve the government of liability where its connection to the tort is too remote." *A.B.*, 234 W. Va. at 506, 766 S.E.2d at 765 (citing George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1213 (1977)) (internal quotation marks omitted). In *A.B.*, this Court reasoned, "We can perceive no stated public policy which is justifiably advanced by allocating to the citizens of West Virginia the cost of wanton official or employee misconduct by making the State and its agencies vicariously liable for such acts which are found to be manifestly outside of the scope of his authority or employment." *Id.*

Private employers are in no better position than political subdivisions to predict and prevent intentional or reckless torts by their employees. Given that the Legislature found it appropriate and sufficiently protective of the public to limit liability in this way for political subdivisions, it would be prudent for this Court to maintain its existing legal framework for considering claims of negligent supervision.

CONCLUSION

For these reasons, the Court should answer the certified questions as follows:

1. Yes, negligent supervision is a viable claim against employers under West Virginia common law, as the Court recognized in *Taylor* and *C.C.*

2. The elements of negligent supervision track the elements of general negligence. To succeed in a claim for negligent supervision, the plaintiff must prove: first, an employment relationship existed between the employer and the tortfeasor; second, employee incompetence; third, the employer's knowledge of employee incompetence; fourth, the employee's negligent act or omission causing injury to the plaintiff; and fifth, the employer's negligence in supervision is the proximate cause of the plaintiff's injury.

3. No, West Virginia does not recognize a claim for negligent supervision against an employer arising from the intentional or reckless acts of an employee. The Court's long-standing precedent limits employer liability for intentional torts committed outside the scope of employment, and it would be unwise to contravene the public policy of this State by expanding the claim to include unforeseeable conduct unrelated to the employer's business.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to W. Va. R. App. P. 38A, I certify that on November 20, 2023, true and accurate copies of the foregoing Brief of Petitioners were served on all counsel of record via the Court's E-Filing system.

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