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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Marietta either fundamentally misunderstands or misrepresents Camden-Clark/WVUHS's argument. Camden-Clark/WVUHS urges the Court to confirm that a West Virginia claim for negligent supervision against an employer does not encompass intentional or reckless acts by employees outside the scope of employment. This is not an argument based purely on policy, as Marietta would have the Court believe, but one grounded squarely on the prior (and recent) decisions of this Court. The Court got this right in *C.C.* Employers are simply not in a special position to foresee irrational and unpredictable wrongdoing on the part of their employees outside of their specifically defined employment responsibilities.

Furthermore, Marietta's recitation of their factual allegations makes abundantly clear that this is *not* the case the Court should use to overturn its existing jurisprudence on negligent supervision. Marietta alleges a conspiracy between a healthcare system and its employee to pursue a fraudulent *Qui Tam* against its regional rival. That employee—Camden Clark Memorial Hospital's former general counsel, Todd Kruger—is alleged to have acted with the knowledge and express support of his employer.[1] These are not allegations of negligence. The Court should decline to answer the certified questions presented because those allegations—as presented by Marietta—are not grounded in a negligence theory of liability.

ARGUMENT

I. Marietta Misrepresents Petitioners' Respective Positions and the Findings of the Department of Justice regarding the *Qui Tam*.

At the outset, it is necessary to correct certain factual misrepresentations made by Marietta. Marietta deceptively and collectively refers to Camden-Clark/WVUHS as "WVU Medicine."[2] The

[1] *See* Brief of Respondents Marietta Area Healthcare, Marietta Memorial Hospital, and Marietta Healthcare Physicians, Inc. ("Resp. Br.") 1–5.
[2] *See, e.g.*, Resp. Br. 1.

moniker is misleading. There are four defendants named in the underlying action from which these certified questions arise. West Virginia United Health System, Inc. ("WVUHS") is a nongovernment, non-for-profit corporation providing health care services throughout West Virginia and in surrounding states. WVUHS is the parent company of Camden-Clark Health Services, Inc., which in turn is the holding company for Camden-Clark Memorial Hospital Corp., (collectively, "Camden-Clark"), a non-profit organization providing hospital and other medical services in Parkersburg, West Virginia. West Virginia University Hospital ("WVUH"), on the other hand, is a hospital operating in Morgantown, West Virginia, well over 100 miles from where the alleged events in the Second Amended Complaint took place. WVUH's only apparent connection to the allegations lodged by Marietta is that it shares its parent company, WVUHS, with Camden-Clark.

Marietta also flagrantly misrepresents the record when it claims that the Department of Justice's ("DOJ") decision not to pursue the *Qui Tam* absolved Marietta of any wrongdoing.[3] The DOJ did *not* conclude that the *Qui Tam* allegations were unsubstantiated. The truth is that the DOJ expressed concerns about Marietta's practice of paying physicians over fair market value to entice them to move their practices across the river from Parkersburg and presented Marietta with specific examples of potentially unlawful behavior uncovered in the investigation.[4] After discussions with Marietta, the DOJ did not dismiss the *Qui Tam* outright—which the DOJ could have done if it believed the allegations were wholly without merit[5]—but instead gave the Relators the opportunity to continue the *Qui Tam* without DOJ involvement. The instructions given to the jury in *Marietta*

[3] Resp. Br. 4 ("In the end, federal investigators concluded that the allegations of the *qui tam* were unsubstantiated . . . .").
[4] *See* Ex. B. This exhibit is included in Camden-Clark/WVUHS's contemporaneously filed "Motion to Supplement Joint Appendix."
[5] *See* 31 U.S.C. § 3730(c).

I, a case involving allegations nearly identical to those presented here, explicitly state that the DOJ's election not to intervene or become involved in the *Qui Tam* "does not necessarily mean that the suit had no merit. The Government may have other legitimate reasons to decline to intervene."[6] Camden-Clark/WVUHS has filed a Motion to Supplement the Appendix Record to address this factual inaccuracy.

II. The Court Should Decline to Answer the Certified Questions Because Marietta's Allegations of Intentional Conduct Cannot Support a Negligent Supervision Claim.

Marietta alleges facts that bear no resemblance to a typical case of negligent supervision.[7] Marietta, a hospital system located in Marietta, Ohio, accuses its regional rival (Camden-Clark) of manufacturing an elaborate hoax to bring about its ruin.[8] Camden-Clark's former general counsel, Kruger, allegedly schemed with two other individuals connected to the area healthcare industry to accuse Marietta of unfair business practices.[9] Marietta alleges that Kruger acted within the scope of his employment, with the blessing of Camden-Clark's board of directors, the conscious approval of its parent company (WVUHS), and the support of an out-of-town hospital (WVUH). Marietta's response brief makes abundantly clear that these are allegations of *intentional* wrongdoing,[10] and thus cannot plausibly state a claim of negligence.

According to Marietta, all these various entities and individuals acting together were motivated by a specific desire to tarnish Marietta's reputation and take competitive advantage.[11] Marietta alleges they did this by commandeering Kruger and two other individuals to act as Relators in the filing of the *Qui Tam.* Marietta paints a picture that the Relators and Kruger pursued

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[6] *See* Ex. C. This exhibit is included in Camden-Clark/WVUHS's contemporaneously filed "Motion to Supplement Joint Appendix."
[7] *See generally* Resp. Br.
[8] Resp. Br. 4–5.
[9] Resp. Br. 3–4.
[10] *See* Resp. Br. 3–7.
[11] Resp. Br. 13.

the *Qui Tam* with the hope that the DOJ would be gullible enough to investigate what Marietta asserts were bogus claims. Yet, the DOJ's investigation into the allegations in the *Qui Tam* lasted over two years. Finally, the DOJ decided not to intervene in the *Qui Tam* claims without foreclosing the Relators' right to pursue the action if they chose. The two individual Relators opted to voluntarily dismiss the *Qui Tam* rather than proceed without the benefit of the DOJ's investigatory and financial resources. In retaliation, Marietta sued Relators and Kruger ("*Marietta I*") after the *Qui Tam* was unsealed. But, unable to obtain a verdict against Relators or Kruger, the ever-litigious Marietta initiated a second suit, now naming Camden-Clark/WVUHS ("*Marietta II*") and settled *Marietta I*. By its own admission, Marietta opted to pursue an action against Camden-Clark/WVUHS because of an affidavit of Camden-Clark's former CEO, David McClure, which Marietta claims demonstrated that the *Qui Tam* was "an institutional effort," as well as Kruger's counsel's argument at trial that "WVU Medicine" was to blame for Kruger's actions.[12]

Marietta's factual allegations bear no resemblance to a typical claim of negligent supervision and could not meet the elements of a negligent supervision claim in any jurisdiction, including West Virginia.[13] *See Honaker v. Town of Sophia*, 184 F. Supp.3d 319, 325–26 (S.D. W. Va. 2016) (allegations of intentional, as opposed to negligent, conduct cannot support a negligence claim under West Virginia law). Marietta alleges that Camden-Clark/WVUHS not only knew of Kruger's conduct, but that Camden-Clark/WVUHS sanctioned, oversaw, and participated in the effort alongside him, calling the *Qui Tam* an "institutional undertaking."[14] According to Marietta, Camden-Clark/WVUHS was not negligent, it actively participated in the effort to harm Marietta.[15]

[12] Resp. Br. 5–6; J.A. 718. While it is Marietta's allegations that control consideration of the certified question, the truth is that there was no institutional effort by Camden-Clark/WVUHS to pursue the *Qui Tam*. Instead, Kruger advised outside third parties that he was acting independently from Camden-Clark/WVUHS and concealed the extent of his involvement from Camden-Clark/WVUHS.
[13] Resp. Br. 11–12 n.7.
[14] Resp. Br. 4.
[15] *Id.*

Camden-Clark/WVUHS is aware that this Court sits in review of the certified questions presented and not a motion to dismiss for failure to state a claim. However, it is important to this Court's consideration of the certified questions that the facts alleged are uniquely bad facts upon which to base any change to this State's law of negligence or negligent supervision. "Bad facts make bad law." *Am. Modern Home Ins. Co. v. Corra*, 222 W. Va. 797, 804, 671 S.E.2d 802, 809 (2008) (Starcher, J., concurring). This Court's recent decision in *C.C. v. Harrison Cty. Bd. of Educ.*, which involved a prototypical claim of negligent supervision, gives this Court straightforward answers to the certified questions. 245 W. Va. 594, 859 S.E.2d 762 (2021). By contrast, Marietta's theory of negligence as to Camden-Clark/WVUHS is fatally flawed and indistinct from the predominant themes of intentional, deliberate conduct, and vicarious liability asserted in its other claims.

The Court should decline to answer the questions certified because Marietta has not alleged facts to support negligence, and accordingly there is no need for the Court to clarify the contours of negligent supervision. *See State ex rel. Advance Stores Co., Inc. v. Recht*, 230 W. Va. 464, 740 S.E.2d 59 (W. Va. 2013) ("[T]his Court "will not answer a certified question if, in doing so, we would have to render a non-controlling, advisory answer.") (citing *In re Vasquez*, 266 P.3d 1053, 1057 (Ariz. 2011)).

III. If Electing to Answer the Questions Certified, the Court Should Endorse the Principle of *Stare Decisis* and Follow Existing Precedent.

Marietta attempts to mislead this Court by repeatedly asserting that Camden-Clark/WVUHS's view of the law of negligent supervision is "unprecedented."[16] On the contrary, Camden-Clark/WVUHS's position is unquestionably in favor of retaining the *status quo* and asks

[16] Resp. Br. 1, 12, 14, 18, 22.

this Court to reaffirm existing law. It would be fundamentally unjust to change the law, and then without notice, retroactively apply the new law to Camden-Clark/WVUHS in this case.

This Court has already acknowledged that employers are not liable in negligent supervision for intentional torts committed by their employees. In *C.C.*, this Court provided an explicit and detailed description of the current law of negligent supervision—upon which courts across West Virginia have relied for over two decades—and then applied it, affirming the dismissal of a negligent supervision claim against an employer whose employee allegedly committed intentional torts. *See C.C. v. Harrison Cty. Bd. of Educ.*, 245 W. Va. 594, 859 S.E.2d 762 (2021).[17] The definition of negligent supervision that this Court relied on *C.C.* is the law, and Camden-Clark/WVUHS asks this Court to keep the law as it stands.

Throughout their brief, Marietta refers to the reasoning endorsed by the majority of the *C.C.* Court as "remarks."[18] Such a characterization is nothing more than a weak attempt to minimize this Court's reasoning in *C.C.* Less than three years ago, this Court affirmed the circuit court's dismissal of a negligent supervision claim on the basis that the claim did not allege underlying *negligent* employee conduct. *C.C.*, 245 W. Va. at 605–06, 859 S.E.2d at 773–74. *C.C.* represents controlling law in this State, and it is disingenuous to reduce the legal theory of the decision as mere "remarks."

Marietta's position, at base, is that *C.C.* was decided wrongly because the Court improperly relied on the holding in *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 538 S.E.2d 719 (2000). As stunning as it is for an out-of-state hospital system to tell this Court that it does not know how to interpret its own precedent, Marietta is also simply incorrect. The Court in *C.C.* properly relied on *Taylor* and the multitude of West Virginia decisions uniformly stating and

[17] *See also* Pet'r Br. Argument § II.B.
[18] *See* Resp. Br. 17, 18, 19, 22, 23.

applying the law of negligent supervision. *C.C.*, 245 W. Va. at 606–07, 859 S.E.2d at 774–75. Marietta reads the holding of *Taylor* narrowly, arguing that the true meaning of that case is that the plaintiff failed to state a claim for negligent supervision because the plaintiff did not show underlying tortious conduct on the part of the employee, not because the employee had to have been specifically negligent. While this could be a permissible reading of *Taylor*'s holding, courts across the State for the past two decades interpreted *Taylor* to hold that an underlying showing of *negligent employee conduct* is necessary to hold an employer directly liable for supervising its employee's actions taken within or outside the scope of employment. The law as this Court interpreted it in *C.C.* is clearly not "serious judicial error," as Marietta claims.[19]

West Virginia courts have elected to follow the holding in *Taylor* exactly as it is written. Their interpretation is not and was not "wrong," and it is thus not necessary to upset this simple and settled area of law in favor of the "certainty, stability, and uniformity in the law" attendant to upholding the principle of *stare decisis* in this instance. Syl. Pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974).

IV. West Virginia's Restriction on Employer Liability in Negligent Supervision is Not Out of Sync with Other Jurisdictions and the Restatement.

A. Marietta's fifty-state survey takes a too-narrow view of the law.

Marietta provides a cursory overview of other states' laws on this matter, arguing no other jurisdiction has adopted a "categorical bar" in negligent supervision claims where the underlying conduct is intentional or reckless.[20] Its interpretation is misleading in several instances. For example, in Virginia, a negligent supervision claim is not recognized as a valid cause of action at all. *See A.H. v. Church of God in Christ, Inc.*, 831 S.E.2d 460, 473, 475 (Va. 2019) ("[The

[19] Resp. Br. 23.
[20] Resp. Br. 12.

plaintiff's] allegations of negligence . . . cannot be predicated upon a stand-alone theory that the church defendants owed her a duty to supervise.").

In other jurisdictions, the standard for foreseeability is so high that it effectively operates as a bar to liability. The Nebraska case cited by Marietta, *Sinsel v. Olsen*, 777 N.W.2d 54 (Neb. 2009), addressed negligent supervision in the context of a parent-child relationship. The Supreme Court of Nebraska held that when a parent's minor child inflicted intentional injury upon another, the "plaintiff must show more than the parents' general knowledge of a child's dangerous propensities" – specific knowledge of prior conduct that would make the alleged tortious conduct foreseeable is required. *Id.* at 59; *see also Dinsmore-Poff v. Alvord*, 972 P.2d 978, 986 (Ak. 1999) (holding in parental negligent supervision case that liability hinges on the parent's specific knowledge of a present opportunity for the child to commit "imminently foreseeable harm").

Likewise, in *Holmes v. Campbell Props.*, 47 So. 3d 721, 729 (Miss. App. 2010), the Mississippi Court of Appeals expressly held that "specific evidence of an employer's actual or constructive knowledge of its employee's dangerous or violent tendencies is necessary in order to create a genuine issue of material fact on an improper training or supervision theory of liability." *Id.* at 729. Absent credible allegations that an employer had actual knowledge or constructive knowledge of an employee's tendencies or past behavior that would indicate the employee's propensity to commit the injury alleged, a claim for negligent supervision fails. *Id.*

In *Brown v. Brown*, 739 N.W.2d 313 (Mich. 2007), the Michigan case cited by Marietta, the Michigan Supreme Court considered whether an employer was on notice of its employee's "sexual propensities" such that it could foresee the employee's likelihood to perpetrate rape. The Michigan court cautioned that the test for foreseeability in negligence is not an "avoidability" test, merely allowing a judge to determine "in hindsight whether the harm could have been avoided."

Id. at 318. An employer should be able to "assume that its employees will obey . . . criminal laws," and the court emphasized that employers should not be made "effectively vicariously liable for the criminal acts of third parties." *Id.* at 318 (citing *MacDonald v. PKT, Inc.*, 628 N.W.2d 33 (Mich. 2001)).

While other states may not hold outright that employers are not liable in negligent supervision for intentional or reckless misconduct of their employees, the above cases demonstrate that employers have a right to assume their employees will follow the law and that foreseeability is a question to be viewed prospectively. This treatment of the tort is not altogether different from the Court's pronouncement in *C.C.* However, even if Marietta is correct that West Virginia alone explicitly limits employer liability in negligent supervision to an employee's negligent acts taken in or outside the scope of their employment, this limitation is not meaningfully different from the general limitation that the employee's actions must be foreseeable.

B. Section 317 of the Restatement (Second) has never been adopted by this Court and does not apply to claims of pure economic loss.

Marietta tries to convince this Court that West Virginia's sensible formulation of negligent supervision is at odds with the Restatement of Torts.[21] Not so. West Virginia's law is consistent, if not in unison, with the Restatement.

Marietta argues that West Virginia "adopt[ed]" *Restatement (Second) of Torts* §§ 315 & 302B cmt. e in *Miller v. Whitworth*, 193 W. Va. 262, 455 S.E.2d 821 (1995).[22] *Miller* did not involve an employment relationship, a claim of negligent supervision, or a duty to supervise, yet Marietta argues that *Miller*'s reliance on Sections 315 and 302B is instructive here. Marietta makes yet another illogical leap to claim that because Section 315 incorporates Section 317, this Court

[21] Resp. Br. 12.
[22] Resp. Br. 15.

should rely on Section 317, which "*specifically* imposes an obligation on employers to protect others from the intentional misconduct of employees under specified circumstances."[23]

Marietta's logic in suggesting that *Miller* adopted Section 317 is dubious, at best. There is no syllabus point or even any dicta to support such a conclusion. Section 317 provides, in full:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965). Marietta surmises that this provision demonstrates that West Virginia "takes an adaptable approach to the duty to protect" and proves that "[e]mployers in West Virginia can therefore be directly liable for the *foreseeable* criminal, intentional, or reckless acts of their employees."[24]

West Virginia's current formula for negligent supervision (as set out in *Taylor* and *C.C.*) is not in conflict with Section 317. In fact, it is perfectly harmonious. In accord with general principles of negligence and the Restatement, West Virginia's limit of negligent supervision liability to that conduct which is more likely to be foreseeable by an employer and appropriately

[23] *Id.* (emphasis in original).
[24] Resp. Br. 15–16 (emphasis in original).

within an employer's control (*i.e.*, negligent conduct) ensures that properly stated claims are likely to allege conduct that could actually be found tortious. In addition to being well-supported by legal precedent and the natural development of common law, West Virginia's formula is in step with other jurisdictions and provides an effective mechanism for appropriate relief.

In *Semrad v. Edina Realty, Inc.*, 493 N.W. 2d 528 (Minn. 1992), a case cited by Marietta,[25] the Minnesota Supreme Court considered whether the liability for negligent supervision could be based on "application of Restatement (Second) of Torts § 317" where the only alleged damages were economic loss. *Id.* at 533–34. In ruling that Section 317 did not support the claim, the Minnesota court held:

> The placement of section 317 in the Restatement and the language of sections 315 and 317 [of the Restatement (Second) of Torts] unambiguously limit the scope of section 317 to a duty to prevent an employee from inflicting personal injury upon a third person on the master's premises or to prevent the infliction of bodily harm by use or misuse of the employer's chattels. In short, the entire thrust of section 317 is directed at the employer's duty to control his or her employee's physical conduct while on the employer's premises or while using the employer's chattels, even when the employee is acting outside the scope of employment, in order to prevent intentional or negligent infliction of personal injury. ***Nothing in section 317 calls for its application in a case involving only economic loss.***

Id. at 534 (emphasis added); *see also Moore Charitable Foundation v. PJT Partners, Inc.*, 217 N.E.3d 8, 17, 22 (N.Y. Ct. App. 2023) (Section 317 applies where the plaintiff alleges physical injuries or property damage).

Marietta's alleged damages here are limited to alleged economic loss,[26] and Section 317 should not control. But here, Marietta seeks to expand liability and encourage multiple lawsuits. Indeed, with this case, Marietta is on its second lawsuit arising from the same set of operative facts.

[25] Resp. Br. 12 n. 7.
[26] *See* J.A. 000063–J.A. 000096, Sec. Am. Compl.

V. Creating Employer Liability to Include Reckless and Intentional Actions of Employees Outside the Scope of Employment is Poor Policy.

Marietta responds to Camden-Clark/WVUHS's policy arguments by arguing that policy determinations should be left to the Legislature.[27] In doing so, Marietta misses the point. The existing precedent of this Court excludes employers from liability in negligent supervision for the intentional and reckless acts of their employees. This Court need not consider whether policy justifies a departure from the common law in this case, because the common law is already in Camden-Clark/WVUHS's favor.

Marietta also insists that an adverse holding would unfairly create a "special categorical carveout" for employers.[28] Again, the argument ignores two critical reasons why protecting employers from liability for intentional or reckless acts of their employees, committed outside the scope of employment, is both necessary and practical.

First, Camden-Clark/WVUHS do not seek special treatment—they ask the Court to continue to treat employers like any other person who owes no duty to protect a victim from intentional torts committed by third parties. A negligent supervision cause of action against employers is a carve *in*, cutting against the general rule that adults have no duty to supervise each other's conduct. Camden-Clark/WVUHS is not seeking special immunity for employers by artificially limiting their liability under general negligence law; rather, negligent supervision itself is a special category of liability that (at least when it comes to the supervisory relationship between adults) seems to apply *only* to employers. No matter how foreseeable the tortious conduct may be, adults connected only by an employment relationship do not have a duty to supervise each other.[29]

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[27] Resp. Br. at 25.
[28] Resp. Br. at 26 (citing *Aikens v. Debow*, 208 W. Va. 486, 502, 541 S.E.2d 576, 592 (2000)).
[29] As another example of "bad facts make bad law," in this case the key fact is not that Kruger was an employee; rather, it is that Kruger was General Counsel to Camden-Clark, with ethical duties owed to Camden-Clark, and Camden-Clark relied on him for legal counsel and risk management.

Second, Marietta fails to acknowledge that employers are already subject to liability, under the doctrine of *respondeat superior*, for intentional wrongdoing of their employees committed within the scope of employment. *Dunn v. Rockwell*, 225 W. Va. 43, 62, 689 S.E.2d 255, 274 (2009); *see also Travis v. Alcon Lab, Inc.*, 2020 W. Va. 369, 381, 504 S.E. 2d 419, 431 (1998); *Barath v. Performance Trucking Co., Inc.,* 188 W. Va. 367, 370, 424 S.E. 2d 602, 605 (1992); *see also Holliday v. Gilkeson*, 178 W. Va. 546, 547–48, 363 S.E. 2d 133, 134–35 (1987). As this Court has noted, intentional employee misconduct "is notable for being driven by personal motives . . . [and] is [not] reasonably incident to the official or agent's duties." *W. Va. Reg. Jail and Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 506, 766 S.E.2d 751, 765 (2014). Where an employee commits an intentional tort within the scope of employment, vicarious liability serves as the means to recover *vis-á-vis* the employer. Indeed, Marietta, alleging that Kruger acted *within the scope of his employment* in pursuing the *Qui Tam*, asserts a cause of action for vicarious liability against Camden-Clark/WVUHS.[30] Marietta's argument that supervisory liability is justifiable by the "degree of control" between employer and employee is justification for the already well-established theory of *respondeat superior*. The Court need go no further.

Marietta seeks an expansion of an employer's liability to make room for the narrow sliver of cases not already covered by vicarious liability claims or the existing law of negligent supervision—that is, negligence claims based on an employee's reckless or intentional conduct *outside* the scope of employment. Those plaintiffs who are injured by an employee's reckless or intentional conduct outside the scope of employment are not without remedy; plaintiffs can simply sue the underlying alleged tortfeasor. That is precisely what Marietta did in *Marietta I*, when it

[30] *See* J.A. 000072, J.A. 000094–J.A. 000095, Sec. Am. Compl. at ¶ ¶ 43, 143–147.

sued Relators and Kruger for damages it supposedly suffered when it had to comply with the DOJ's investigation of the *Qui Tam*.

The *Anicich* decision is an example of why the Court should maintain the *status quo*, holding that employers—like other third parties—are not responsible for preventing the intentional torts of others. *See Anicich v. Home Depot*, 852 F.3d 643 (7th Cir. 2017). Marietta paints *Anicich* in broad strokes in order to prove a point, but in doing so fails to recognize the key facts of the case. Marietta's claim that the employer in *Anicich* had "full knowledge of the supervisor's behavior" is simply untrue. In fact, the employer had essentially no knowledge of the supervisor's propensity to violence, which is the reason the Seventh Circuit's decision allowing the negligent supervision claim to go forward is so disturbing. The supervisor in *Anicich* "never physically harmed anyone" before his attack on the victim; at most, he intimidated others by "throwing and slamming things." 852 F.3d 643, 647. The prior decisions of this Court and the public policy of this State establish that the employer has no duty to supervise to prevent such wildly unpredictable, aberrant, and brutal behavior on the part of its supervisor outside of work.

In seeking a new rule imposing employer liability for their employees' reckless and intentional conduct outside the scope of employment, Marietta asks this Court to create a duty for employers to supervise that exceeds the breadth of the duty borne by teachers to supervise teenage schoolchildren. *See Goodwin v. Bd. of Educ.*, 242 W. Va. 322, 331, 835 S.E.2d 566, 575 (2019) (board of education owed no duty to supervise eighteen-year-old student once he left the school building and injured his arm at a nearby soccer field); *see also* W.Va. Code § 18A-5-1(g)(1) ("[I]n the case of adults, the student-teacher relationship shall terminate when the student leaves the school or other place of instruction or activity."). Except when an employee acts foreseeably

negligently *within* or *outside* the scope of employment, the Court should reemphasize that employers have the same duty as everyone else to supervise their employees: none whatsoever.

CONCLUSION

In sum, this matter is not the proper vehicle for revising West Virginia's treatment of a negligent supervision claim. Marietta's pleadings allege only intentional, not negligent conduct by Camden-Clark/WVUHS and it would be poor policy to amend the state of this law in a situation involving an employee who is expressly alleged to have acted recklessly and intentionally. Additionally, *stare decisis* dictates that the Court should follow the existing precedent for such a claim. For these reasons, the Court should answer the certified questions as follows:

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

   ANSWER: Yes.

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

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

   ANSWER: No.

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CERTIFICATE OF SERVICE

Pursuant to W. Va. R. App. P. 38A, I certify that on February 9, 2024, true and accurate copies of the foregoing Reply of Petitioners were served on all counsel of record via the Court's E-Filing system.

Respectfully submitted,

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