IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 24-163

(Underlying Logan County Civil Action No. 23-C-10*)*

LOGAN COUNTY BOARD OF EDUCATION,

Petitioner,

v.

ELIZABETH VESTAL,

Respondent,

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

A. The Circuit Court clearly erred when it concluded that Petitioner failed to timely raise immunity and unconstitutionality of the savings statute because, under West Virginia law, Petitioner could have raised these issues at trial or on appeal, respectively.

B. The Circuit Court clearly erred when it failed to rule on Petitioner's immunity, and its failure to rule on Petitioner's immunity constitutes a denial of said immunity, which is immediately reviewable in this Honorable Court.

C. The Circuit Court clearly erred in denying Petitioner's immunity because the Tort Claims Act prohibits claims based on intentional and/or malicious conduct and prohibits claims based on acts performed outside the scope of employment.

D. The Circuit Court clearly erred in denying Petitioner's immunity because respondent failed to plead any negligence claim specified in the Tort Claims Act.

E. The Circuit Court clearly erred because the Petitioner is entitled to immunity from the claims provided for in the savings statute, W. Va. Code § 55-2-15.

QUESTION PRESENTED

F. Whether the Circuit Court was clearly erroneous, exceeded its jurisdiction, exceeded its legitimate powers, and stripped the Petitioner Board of its vested property right in repose, thereby violating its due process rights, when it failed to find that the savings statute is unconstitutional as applied to the Petitioner.

II. STATEMENT OF THE CASE

A. RESPONDENT'S ALLEGATIONS

In her *Amended Complaint*, Respondent Vestal alleges that Defendant Willard, a former band teacher at Logan High School, sexually harassed, sexually assaulted, sexually battered, sexually assaulted, and sexually abused her from her sophomore year in high school in 2003, through her senior year in high school in 2005, and into the summer after her senior year in 2005. Am. Compl. ¶¶ 10–150. Respondent alleges that at times pertinent to the *Amended Complaint*, Defendant Willard "worked at Logan High School" and was "employed by the Defendant Logan County Board of Education" as a band teacher. *Id.* at ¶¶ 7–9. Respondent states that she was under Defendant Willard's care, custody, and control, and on school property when the alleged conduct occurred *Id.* at ¶ 9. Respondent alleges that Willard was the Board's agent, representative, and employee and is thus "liable to Elizabeth for the injuries caused to her." *Id.* at ¶¶ 153, 154, 160, 161, 163, 157 [sic 167; Respondent repeats paragraph numbers], 159 [sic], 160 [sic], 162 [sic], 170 [sic], 171 [sic], 180 [sic], 189 [sic], 198 [sic], 207 [sic].

B. PROCEDURAL HISTORY

Respondent Plaintiff filed a *Complaint* and an *Amended Complaint* on October 5, 2022, and October 11, 2022, respectively, in the Circuit Court of Kanawha County, West Virginia, asserting the following counts against Petitioner/Defendant Logan County Board of Education and/or Defendant Brandon Willard:

1. violation of W. Va. Code § 61-8D-5 (sexual abuse by a parent, guardian, custodian or person in a position of trust) against both Defendants;
2. sexual assault and harassment against both Defendants;
3. intentional infliction of emotional distress against both Defendants;
4. sexual battery against both Defendants;
5. false imprisonment against both Defendants;
6. violation of W. Va. Code § 61-8b-7 (sexual abuse in the first degree) against both Defendants;
7. violation of W. Va. Code § 61-8b-4 (sexual assault in the second degree) against both Defendants;
8. violation of W. Va. Code § 61-8D-5 (sexual abuse by a parent, guardian, custodian or person in a position of trust) against both Defendants;

9. negligent hiring against the Petitioner Board;
10. negligent retention against the Petitioner Board;
11. negligent supervision against the Petitioner Board;
12. negligence per se against the Petitioner Board.

App. 1–61.

Petitioner was served on October 11, 2022. Petitioner moved to dismiss for improper venue on October 24, 2022, and moved to dismiss on November 14, 2022, for numerous reasons, including immunity under the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 et seq. (Tort Claims Act) and including the unconstitutionality of the savings statute, as applied to the Petitioner Board, on which Respondent's claims rely. App. 84–123.[1] Venue was transferred to Logan County sometime at the end of January 2023.[2] The matter was transferred from Judge Joshua Butcher to Judge Kelly Codispoti on February 3, 2023. App. 267. Petitioner's motions to dismiss were fully briefed: Respondent Plaintiff submitted responses, a surresponse, and a supplemental response; and Petitioner submitted replies thereto. App. 126–138, 179–219, 238–261, 323–331, 335–339. The Logan County Circuit Court heard argument on Petitioner's motion to dismiss on May 22, 2023. The parties soon thereafter submitted proposed orders. App. 341–349, 364–392.

After Petitioner, by counsel, telephoned the Circuit Court numerous times inquiring into the status of the motions and even requesting status conferences with the Circuit Court to prompt a ruling to no avail, Petitioner and Defendant Willard filed a *Petition for Writ of Mandamus* on January 3, 2024, seeking a ruling on Petitioner's immunity. Case No. 24-8. On February 6, 2023,

[1] Petitioner's original motion to dismiss was mis-named *Motion to Dismiss Claim for Punitive Damages*. App. 84. However, said *Motion* and supporting *Memorandum* moved to dismiss all claims. App. 84–110. The *Motion* stated "Defendant . . . moves under Rule 12(b)(6) of the West Virgnia Rules of Civil Procedure and that this Honorable Court dismiss Plaintiff's causes of action . . . ." App. 84. The *Memorandum* methodically and specifically sought dismissal of all claims against the Board. App. 88–110. Nonetheless, out of caution, on November 17, 2022, Petitioner filed an *Amended Motion to Dismiss* to correct the misnomer and adopted by reference its November 14, 2022, *Memorandum of Law In Support*. App. 120.

[2] The respective circuit courts' docket sheets are unclear as to when the case was actually transferred. App. 410, 418.

the Circuit Court signed and entered "Plaintiff's Proposed Order Denying Defendant Logan County West Virginia Board of Education's Motions to Dismiss," finding that Petitioner Board's "three" motions were untimely filed. App. 400–409, ¶ 64.

III. SUMMARY OF ARGUMENT

The Circuit Court failed to rule on Petitioner's immunity. The Circuit Court failed to address the application of the savings statute to the Board, which application violates the Board's substantive due process rights and impinges on immunity to which the Petitioner Board is entitled. The Circuit Court erroneously found that the Petitioner's motion to dismiss, which raised immunity and due process (among other grounds), was untimely, yet, under West Virginia law, immunity can be raised as late as trial and unconstitutionality of a statute can be raised for the first time on appeal. Moreover, Petitioner timely responded to the Respondent's complaint by moving to dismiss or transfer venue based on improper venue. This is not a case where a defendant failed to answer or otherwise respond to a complaint. Petitioner timely raised immunity and due process violations after raising improper venue.

The Circuit Court's failure to rule on immunity is a denial of immunity, which is immediately appealable. The Board is entitled to immunity under the Tort Claims Act because (1) it cannot be liable for the intentional, criminal acts of Defendant Willard, and it cannot be liable because Defendant Willard committed said acts outside the scope of his employment, (2) Petitioner failed to state a cognizable negligence claim against the Board, and (3) actions based on sexual assault and sexual abuse—actions allowed under the current savings statute—are not actions permitted under the Tort Claims Act. Likewise, the Circuit Court's failure to address the unconstitutionality of the retroactive savings statute, as applied to the Board, is a denial of the Board's substantive due process right, that is, the right to repose.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument. This matter involves assignments of error in the application of settled law, but also involves a matter of first impression, of fundamental public importance, and involves constitutional questions regarding the validity of a statute as applied to Petitioner. It is undersigned's understanding that the substantive due process implications of the retroactive 2020 amendments to the savings statute, W. Va. Code § 55-2-15, have not been addressed by the Court.

V. STANDARD OF REVIEW

This Honorable Court reviews a circuit court's denial of a motion to dismiss *de novo*. *See* Syl. Pt. 4, in part, *Ewing v. Bd. of Educ.*, 202 W. Va. 228, 503 S.E.2d 541 (1998). "For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff [ ], and its allegations are to be taken as true." *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015) (citation omitted). "[D]ismissal for failure to state a claim is only proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint." *Id.* (citation omitted). But a plaintiff's complaint must "at a minimum ... set forth sufficient information to outline the elements of his [or her] claim," and "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Id.* (citations omitted); *Mercer Cnty. Bd. of Educ. v. Ruskauff*, No. 18-0711, 2019 WL 5692295, at *2 (W. Va. Nov. 4, 2019).

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

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

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1; *see also* syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In that regard, this Honorable Court, speaking through Justice Cleckley, has held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1)Whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impressions.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199, W. Va. 12, 483 S. E. 2d 12 (1996); syl. pt. 2, *State ex rel. State v. Sims*, 240 W. Va. 18, 807 S.E.2d 266 (2017). "These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue." Syl. pt. 4, *Hoover*, 199, W. Va. 12, 483 S.E.2d 12; syl. pt. 2, *Sims*, 240 W. Va. 18, 268, 807 S.E.2d 266.

The party seeking the writ is not required to satisfy all five factors but "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. pt. 4, *Hoover*, 199, W. Va. 12, 483 S. E. 2d 12; syl. pt. 2, *Sims*, 240 W. Va. 18, 268, 807 S.E.2d 266. Although "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court," in situations where a trial court has exceeded its legitimate powers and there is "no plain, speedy, and adequate remedy in the ordinary course of law" then "the remedy by appeal is usually deemed inadequate" and "prohibition is allowed." *See* syl. pt. 1, *State ex rel. Thrasher*

Eng'g, Inc. v. Fox, 218 W. Va. 134, 624 S.E.2d 481 (2005)(holding: "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court."); *see also Hoover,* 199 W. Va. at 21, 483 S.E.2d at 21 (holding prohibition appropriate where "petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.").

VI. ARGUMENT

A. THE CIRCUIT COURT CLEARLY ERRED WHEN IT CONCLUDED THAT PETITIONER FAILED TO TIMELY RAISE IMMUNITY AND UNCONSTITUTIONALITY OF THE SAVINGS STATUTE BECAUSE, UNDER WEST VIRGINIA LAW, PETITIONER COULD HAVE RAISED THESE ISSUES AT TRIAL OR ON APPEAL, RESPECTIVELY.

i. THE CIRCUIT COURT'S FINDINGS AND CONCLUSIONS WERE CLEARLY ERRONEOUS

In its signed-and-entered February 6, 2023, *Proposed Order*, the Logan County Circuit Court erroneously concluded that Petitioner's November 14, 2022, mistakenly-titled *Motion to Dismiss Claim for Punitive Damages*[3] and supportive *Memorandum of Law*[4] were untimely. The Circuit Court erroneously reasoned that, because the Circuit Court of Kanawha County had, on November 9, 2022, entered a briefing *Order* on Defendant's October 24, 2022, *Motion to Dismiss or Transfer Venue*, which raised improper venue, no other motions to dismiss could be filed without leave of court. In other words, the Logan County Circuit Court misconstrued the Kanawha County Circuit Court's briefing *Order* to curtail any other grounds for dismissal, unless Petitioner sought leave of Court. App. 406, ¶¶ 39–40, 64 (noting that the Board failed to seek leave of court to file its November 14, 2022, *Motion* and *Memorandum* and its November 17, 2022,[5] *Amended Motion to Dismiss*).[6] Further, the Circuit Court's February 6 *Proposed Order* found that the Board

[3] Again, the express language in said Motion and Memorandum sought dismissal of all claims based on immunity, due process, and other grounds.
[4] The Motion and Memorandum were served on November 14 and filed on November 17, 2022.
[5] The Amended Motion to Dismiss is dated November 17, 2022, as it was served on November 17; the Circuit Court's Order identifies it by its filing date. Of note, E-filing was not yet available in Kanawha County in November 2022.
[6] The February 6 Proposed Order also takes issue with there being no separate memorandum accompanying the November 17 Amended Motion to Dismiss. Any memorandum additional to the November 14 would have been

was required to seek leave to file its December 1, 2022, *Renewed Motion to Dismiss or Transfer Venue*, which the Board filed after Respondent Vestal failed to timely oppose Petitioner's October 24, 2022, *Motion*. App. 406, ¶¶ 41, 64; *see* App. 139–141, 125–129. However, the Kanawha County Circuit Court never found the *Renewed Motion* improper; in fact, the Kanawha County Circuit Court granted the relief sought in the October 24 *Motion* and in the December 1, 2022, *Renewed Motion* and transferred the case to Logan County Circuit Court in January 2023. App. 177–178.

The Circuit Court's clear error abounds. Mistaking the procedural posture, the Court found that the none of Petitioner's "three subsequent Motions to Dismiss were timely filed, and none were filed with leave of Court." App. 408, ¶ 64. Here, Circuit Court's reference to "three subsequent Motions to Dismiss" highlights the Court's clear error; the Circuit Court failed to acknowledge, or was unaware, that the December 1, 2022, *Renewed Motion* had already been resolved by the Kanawha County Circuit Court when it transferred the case. There were not "three" subsequent motions dismiss even counting the *Renewed Motion*; the *Amended Motion* was not a standalone motion but only corrected the mistakenly titled November 14 *Motion to Dismiss Claim for Punitive Damages*.

Even if there were three motions, nothing in the West Virginia Rules of Civil Procedure limits the number of motions a party can file. Rather, the Rules contemplate and provide for more than one motion. Under Rule 12(g), "A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party." W. Va. R. Civ. P. 12. Under Rule 10(c), "(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion." W. Va.

superfluous. The November 17 Amended Motion to Dismiss expressly relied on the November 14 Memorandum, which Rule 10(c) of the West Virginia Rules of Civil Procedure allows.

R. Civ. P. 10. It is broadly recognized in West Virginia that "[t]he general philosophy behind Rule 12 militates against placing parties in procedural straitjackets by requiring them to possibly forego valid defenses by hurried and premature pleading." Louis J. Palmer, Jr., Robin Jean Davis, and Franklin D. Cleckley, Handbook on West Virginia Rules of Civil Procedure § 12(a) at 316 (4th ed. 2012).

Not only do the Rules provide for more than one motion, but also, neither the Kanawha County Circuit Court nor the Logan County Circuit Court placed a limit on motions. As explained *infra*, West Virginia law expressly allows a defendant to raise immunity and constitutional deprivations before trial. In any event, nothing in the Kanawha County Circuit Court's November 9, 2022, *Order* setting a briefing schedule on Petitioner's original *Motion to Dismiss or Transfer Venue* prohibited Petitioner from moving to dismiss on immunity, due process, and other grounds. The November 9 *Order* merely set a briefing schedule. Contrary to the Court's mistaken *Proposed Order*, one motion pended before it—the motion seeking dismissal on immunity grounds, due process grounds, and other grounds—and no rule or order required Petitioner to seek leave to file it.

ii. THE CIRCUIT COURT WAS CLEARLY ERRONEOUS BECAUSE THE RULES OF CIVIL PROCEDURE EXPRESSLY ALLOWED PETITIONER TO RAISE THE DEFENSE OF FAILURE TO STATE A CLAIM

Importantly, as addressed in *Petitioner's Response to Respondent's Motion to Dismiss Petitioner's Appeal for Lack of an Appealable Order, Ruling, Or Judgment Pursuant to W. Va. R. App. P., Rule 31* previously filed before this Court, the West Virginia Rules of Civil Procedure expressly state that the failure-to-state-a-claim defense is not waived and can be raised as late as trial, unlike failure to raise improper venue:

> (h) Waiver or Preservation of Certain Defenses.

> (1) A defense of lack of jurisdiction over the person, **improper venue**, insufficiency of process, or insufficiency of service of process **is waived (A) if omitted from a motion** in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.
> (2) A defense of **failure to state a claim** upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim **may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.**
> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

W. Va. R. Civ. P. 12(h) (emphasis added). Under (h)(2), the Petitioner could raise its 12(b)(6) grounds for dismissal in any pleading permitted under Rule 7(a). Rule 7(a) allows a party to answer a complaint. Under Rule 12(b), the "failure to state a claim" ground may be raised in a motion, in lieu of an answer, which the Petitioner did. App. 84–117, 120–122. Per Rule 12(h)(2), Petitioner could have waited until trial to raise the failure to state a claim defense. Petitioner's November 14, *Motion* and *Memorandum* and November 17 *Amended Motion* moved to dismiss Respondent Vestal's claims for failure to state a claim. *Id.* The Circuit Court clearly erred in finding the motion untimely.

iii. THE CIRCUIT COURT WAS CLEARLY ERRONEOUS BECAUSE PETITIONER COULD RAISE IMMUNITY AND CONSTITUTIONAL DEPRIVATION OF RIGHTS AS LATE AS TRIAL OR APPEAL

The West Virginia Supreme Court has held:

> qualified immunity can be pled at various stages in a case. As one court noted, qualified immunity is a question of law that may be generally asserted (1) on a pretrial motion to dismiss under Rule 12(b)(6) for failure to state a claim; (2) as an affirmative defense in the request for judgment on the pleadings pursuant to Rule 12(c); (3) on a summary judgment motion pursuant to Rule 56(e); or (4) at trial.

W. Virginia Bd. of Educ. v. Marple, 236 W. Va. 654, 668, 783 S.E.2d 75, 89 (2015) (quotation marks and citation omitted). Likewise, this Court has held that immunity is not waived by failing to raise in an initial motion to dismiss. *W. Virginia Lottery v. A-1 Amusement, Inc*., 240 W. Va. 89, 94–95, 807 S.E.2d 760, 765–766 (2017); *W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 667–668, 783 S.E.2d 75, 88–89 (2015).

Petitioner was served with the *Amended Complaint* and *Complaint* on October 11, 2022. App. 417, lines 9–10. Petitioner raised immunity approximately one month and three days after it was served with the Complaint and just three weeks after Petitioner moved to dismiss for improper venue. *See* App. 62–6, 88–117. Petitioner could have waited much longer to raise immunity, yet Petitioner raised it early in the case, before engaging in discovery and even before any scheduling order,[7] because immunity is effectively lost if the case is allowed to proceed to discovery and trial.

Similarly, as stated by this Supreme Court, "we have repeatedly held that the unconstitutionality of a law need not be specially pleaded and may be raised for the first time in this court." *Almond v. Day*, 197 Va. 419, 430, 89 S.E.2d 851, 858–59 (1955). Petitioner Board timely raised its argument in a motion to dismiss that application of the savings statute to the Petitioner Board violates the Board's due process rights and is thus unconstitutional as applied. The Circuit Court clearly erred.

B. The Circuit Court Clearly Erred When It Failed To Rule On Petitioner's Immunity, And Its Failure To Rule On Petitioner's Immunity Is A Denial Of Said Immunity, Which Is Immediately Reviewable In This Honorable Court.

West Virginia law does not recognize "untimeliness" as a reason to refuse to rule on immunity when immunity is raised this early in the case. "Untimeliness" is certainly not a

[7] No scheduling order was entered and no discovery was conducted. *See* App. 410–415, 417–418.

legitimate reason to refuse immunity in this case as immunity was raised early and could have been raised much later, as late as trial, as explained above.

Once immunity is raised, "immunity should be determined at the earliest possible stage to shield officers from disruptive effects of broad-ranging discovery and effects of litigation." *W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W. Va. 273, 282, 852 S.E.2d 773, 782 (2020) (internal quotations and citations omitted) (citing and quoting *Xiao v. Rodriguez*, No. A18-0646, 2019 Minn. App. Unpub. LEXIS 389, 2019 WL 1983488, at *8 (Minn. Ct. App. May 6, 2019)). This Court has noted:

> "[t]he very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case." *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). As we previously have noted, "[t]he doctrine of qualified and statutory immunity was created to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Id*. (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)). Once the issue of immunity is raised, a court should, unless there is a genuine material dispute of facts regarding the underlying immunity determination, render a ruling on immunity as soon as practicable.

State ex rel. Mingo Cnty. Bd. of Educ. v. Thompson, No. 21-0311, 2021 WL 5326514, at *5 (W. Va. Nov. 16, 2021). Consequently,

> "a refusal to rule on a claim of immunity, like the explicit denial of a claim of immunity, is also immediately appealable under the collateral order doctrine." . . . "[L]ike an explicit denial of a claim of absolute or qualified immunity, the refusal to rule on a claim of immunity until trial is 'effectively unreviewable on appeal from a final judgment.' *Mitchell* [*v. Forsyth*], 472 U.S. [511, 526-27], 105 S. Ct. [2806, 2816, 86 L. Ed. 2d 411 (1985)]."
> . . .
> Because an objective of qualified immunity is to save specific individuals and agencies from suit and, when appropriate, from pre-trial discovery and litigation, deferring a ruling on qualified immunity acts as an effective denial of such protections.

W. Virginia State Police, Dep't of Mil. Affs. & Pub. Safety v. J.H. by & through L.D., 244 W. Va. 720, 729, 730–31, 856 S.E.2d 679, 688, 689–90 (2021) (quoting *Helton v. Clements*, 787 F.2d 1016 (5th Cir. 1986).

Here, the Circuit Court clearly erred when it failed to rule on Petitioner's immunity. The Circuit Court made no finding that there was any genuine material dispute of facts. Indeed, the Circuit Court could not have so found; like this *Brief*, Petitioner's motion took Respondent Vestal's allegations as true. The Circuit Court's refusal and failure to rule on immunity is a denial of immunity immediately appealable to this Honorable Court. For the reasons discussed in the proceeding sections, the Court should find that Petitioner is entitled to immunity.

C. THE CIRCUIT COURT CLEARLY ERRED IN DENYING PETITIONER'S IMMUNITY BECAUSE THE TORT CLAIMS ACT PROHIBITS CLAIMS BASED ON INTENTIONAL AND/OR MALICIOUS CONDUCT AND PROHIBITS CLAIMS BASED ON ACTS PERFORMED OUTSIDE THE SCOPE OF EMPLOYMENT.

Petitioner Logan County Board of Education is a political subdivision as defined in the West Virginia Tort Claims and Insurance Reform Act (Tort Claims Act). W. Va. Code § 29-12A-3. Statutory immunity of a political subdivision is "governed exclusively by the West Virginia Tort Claims and Insurance Reform Act." *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 51, 750 S.E.2d 263, 267 (2013); *See also* W.Va. Code § 29-12A-1 *et seq*. The Act provides that its "purposes are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability." W. Va. Code § 29-12A-1. Consistent therewith, the West Virginia Supreme Court has stated:

> The legislative decision to clothe certain actions of governmental agencies and employees in a cloak of immunity is not one that should be casually disregarded. Without that promise of immunity, it is probable that many critical governmental decisions would cease to be

> made and the services that most citizens expect their government to provide would consequently be unavailable.

State ex rel. City of Bridgeport v. Marks, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014). Accordingly, the Board is entitled to immunity under the Act, and the Respondent Vestal has the burden of showing by "specific allegations" that the immunity does not apply. *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649, 657–658 (1996).

Under the Tort Claims Act,

> Except as provided in subsection (c) of this section, a political subdivision **is not liable in damages in a civil action for injury**, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function[.]

W. Va. Code § 29-12A-4(b)(1) (emphasis added). Therefore, the Petitioner Board is immune from suit unless an exception provided in subsection (c) applies. Under subsection (c),

> (1) Except as otherwise provided in this article, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any vehicle by their employees when the employees are engaged within the scope of their employment and authority.
>
> (2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.
>
> (3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.
>
> (4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that

> are used by such political subdivisions, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility.
>
> (5) In addition to the circumstances described in subdivisions (1) to (4), subsection (c) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a provision of this code. Liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

W. Va. Code § 29-12A-4(c). Thus, under the Tort Claims Act, and because a political subdivision can only act through its employees, Respondent must prove that the employee acted negligently. To prove negligence, Respondent must establish that (1) Petitioner owed the Respondent a duty of care; (2) Petitioner breached said duty by failing to exercise ordinary care; (3) Petitioner's breach caused the Respondent to be injured; and (4) that Respondent suffered damages as a result of Petitioner's breach. *See Webb v. Brown & Williamson Tobacco Co*., 121 W. Va. 115, 2 S.E.2d 898, 898 (1939).

Here, Respondent consistently alleges throughout the *Amended Complaint* that the Board is liable because Defendant Willard was its employee. App. 47–55, Am. Compl. ¶¶ 153, 154, 160, 161, 163, 157 [sic 167; Respondent repeats paragraph numbers], 159 [sic], 160 [sic], 162 [sic], 170 [sic], 171 [sic], 180 [sic], 189 [sic], 198 [sic], 207 [sic]. Fatal to her claims, Respondent Vestal makes no allegation that Defendant Willard acted negligently. Rather, Respondent only asserts that Willard committed sexual crimes.

"The standard for liability set forth in W. Va. Code § 29-12A-4(c) is, by its plain terms, a negligence standard." *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 281, 787 S.E.2d 546, 552 (2016). The West Virginia Supreme Court has explained: "**intentional and malicious acts are included in the general grant of immunity in W.Va. Code, 29-12A-4(b)(1)**. Only claims of

negligence specified in W. Va. Code, 29-12A-4(c) can survive immunity from liability under the general grant of immunity in W. Va. Code, 29-12A-4(b)(1)." *Zirkle v. Elkins Rd. Pub. Serv. Dist*., 221 W. Va. 409, 414, 655 S.E.2d 155, 160 (2007) (emphasis added). "An action for a willful injury is not supported by a finding that the injury was the result of gross negligence." *Turk v. Norfolk & W. Ry. Co*., 75 W.Va. 623, 624, 84 S.E. 569, 570 (1915). "[A] mere allegation of negligence does not turn an intentional tort into negligent conduct." *Weigle v. Pifer*, 139 F. Supp. 3d 760, 780 (S.D.W. Va. 2015).

Here, Respondent's *Amended Complaint* pleads that Defendant Willard committed intentional, criminal acts of false imprisonment, sexual assault, sexual abuse, intentional infliction of emotional distress, and sexual battery. These are not negligence claims for which the Board can be liable. Respondent pleads in all counts that Petitioner Board is liable for these actions. Under West Virginia law, the Petitioner Board cannot be liable for Defendant Willard's intentional, criminal acts. Because Respondent makes no allegation that Defendant Willard or any other employee was negligent, Respondent's claims against the Board must be dismissed in their entirety, and the Circuit Court clearly erred by failing to do so.

Similarly, Petitioner cannot be liable and is entitled to immunity because Defendant Willard's criminal and intentional actions were not within the scope of his employment as a matter of law. In *West Virginia Regional Jail & Correctional. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014), this Court was presented with the question of whether a correctional officer was acting within the scope of his employment when allegedly sexually assaulted a female inmate.[8]

[8] *See also W. Virginia Div. of Corr. v. Jividen*, No. 14-0368, 2015 WL 1741483 (W. Va. Apr. 10, 2015) (finding officer's alleged sexual misconduct with prisoner was outside scope of his employment such that the Division of Corrections was not liable); *R.Q. v. W. Virginia Div. of Corr*., No. 13-1223, 2015 WL 1741635 (W. Va. Apr. 10, 2015) (same holding); *Searls v. W. Virginia Reg'l Jail*, No. CV 3:15-9133, 2016 WL 4698547, at *3 (S.D.W. Va. Sept. 7, 2016); *Radford v. Hammons*, No. CIV.A. 2:14-24854, 2015 WL 738062, at *10 (S.D.W. Va. Feb. 20, 2015) (dismissing negligent retention and supervision claims because employee's sexual misconduct was outside the scope of employment).

This Court in *A.B.* explained that the "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *West Virginia Regional Jail & Correctional. Facility Auth. v. A.B.*, 234 W. Va. 492, 510, 766 S.E.2d 751 (2014). The Court went on to find that the inmate "failed to adduce any evidence bringing these alleged criminal acts within the ambit of [the officer's] employment beyond merely suggesting that his job gave him the opportunity to commit them." *Id.* Additionally, "the mere proximity and opportunity that his job provided to commit such acts do not, alone, bring them within the scope of his employment." *Id.* The Court also reasoned that the officer's allegedly committed acts were so divergent from the scope of his duties they were made expressly felonious if committed by him in that context." *Id.* Finally, the *A.B.* holding noted that "[t]here is overwhelming majority support in other jurisdictions concluding that sexual assaults committed on the job are not within the employee's scope of employment." *Id.* at 510–511.

Here, like in *A.B.*, Defendant Willard's alleged sexual acts are not in the scope of his employment as a matter of law. The alleged intentional, criminal actions of Defendant Willard serve no purpose of the Petitioner Board. Petitioner Board cannot be liable for Defendant Willard's conduct, and the Petitioner is entitled to immunity.

Doe v. Cabell Cnty. Bd. of Educ., No. CV 3:21-0031, 2023 WL 6055504, at *7 (S.D.W. Va. Sept. 15, 2023) ("it cannot be said that the conduct which Plaintiffs seek to hold CCBOE liable for—Curry's alleged molestation of John Doe—was within the scope of his duties as a classroom aide.") (citing *A.B.*); *Montgomery Cnty. Bd. of Educ. v. Horace Mann Ins. Co*., 860 A.2d 909, 920 (Md. 2004) ("Apart from being malicious, sexual abuse of a minor is criminal conduct that is not within the scope of a teacher's employment or authority.") (internal citation omitted); *Duyser v. Sch. Bd. of Broward Cnty*., 573 So.2d 130, 131–32 (Fla. Dist. Ct. App. 1991) (finding school board was not liable where teacher's sexual abuse of a student was "clearly self-serving, in bad faith and outside any conceivable course and scope of employment").

D. THE CIRCUIT COURT CLEARLY ERRED IN DENYING PETITIONER'S IMMUNITY BECAUSE RESPONDENT FAILED TO PLEAD ANY NEGLIGENCE CLAIM SPECIFIED IN THE TORT CLAIMS ACT.

In *Amended Complaint* Counts 9, 10, 11, and 12, Respondent asserts claims for negligent hiring, retention, supervision, and negligence per se, respectively. App. 57–60. Despite filing a 234-paragraph, 30-page *Amended Complaint*, Respondent has pled no facts supporting these claims. *See* App. 34–61.

Regarding the negligent hiring claim in Count 9, West Virginia law requires that Respondent Vestal plead some facts regarding the Board's initial decision to hire Defendant Willard or any irregularities attendant to his hiring. *C.C. v. Harrison Cnty. Bd. of Educ*., 245 W. Va. 594, 605, 859 S.E.2d 762, 773 (2021) (affirming dismissal of negligent hiring claim for failing to allege any facts regarding the initial hire of a school board's employee). Here, Respondent has pled no facts pertaining to Defendant Willard's initial hiring, much less any facts showing that Defendant Board was negligent for hiring him. Respondent alleges no facts showing that Defendant Willard was not properly hired.

Regarding the negligent retention claim in Count 10, West Virginia law requires that Respondent plead facts sufficient to show that the employer could reasonably foresee the risk caused by retaining an unfit person. *See McCormick v. W. Va. Dep't of Pub. Safety*, 202 W. Va. 189, 193, 503 S.E.2d 502, 506 (1998) (per curiam). Respondent pleads no facts that the Petitioner Board had any knowledge whatsoever that Defendant Willard was sexually abusing or assaulting Respondent. Rather, Respondent pleads facts showing the lengths Defendant Willard went to conceal the alleged illegal conduct, including calling her into his office, going behind a cabin at night, telling her not to tell anyone, following her to a soundproof storage room, making sure there were no meetings scheduled after her meetings with him, closing and blocking the door behind

him, hiding between trees, exposing himself under a blanket in the back of the bus, touching her under the water in a hot tub, and entering her room at night. App. 31, Am. Compl. ¶¶ 12, 15, 19, 25, 36, 38, 39, 55, 70, 82, 90, 99, 106, 119–121, 122–123, 135. Absent from the *Amended Complaint* is any allegation that any Board employee was aware of or saw any of these instances. Accordingly, Respondent has failed to state a claim for negligent retention.

Regarding the negligent supervision claim in Count 11, this Court has recognized that "West Virginia does not recognize a claim for negligent training or supervision without an underlying claim for employee negligence." *C.C. v. Harrison Cnty. Bd. of Educ*., 245 W. Va. 594, 606, 859 S.E.2d 762, 774 (2021). In other words, "the claim of negligent supervision must rest upon a showing that the employer failed to properly supervise its employee and, as a result, the employee committed a negligent act which proximately caused the appellant's injury." *Id.* (citing *Taylor v. Cabell Huntington Hosp., Inc*., 208 W. Va. 128, 538 S.E.2d 719 (2000) (per curiam)) (brackets and ellipses omitted). This Court reasoned,

> under this Court's current construction of a negligent supervision cause of action, the circuit court correctly dismissed the Petitioners' cause of action for negligent supervision in Count 6 of their complaint because all of the allegedly wrongful conduct with which the Petitioners charge the Assistant Principal is intentional—false imprisonment, assault, sexual harassment, and intentional infliction of emotional distress—that, because it is not negligent, cannot form the basis of a negligent supervision claim. Thus, because 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 by the Board and that their claim in this regard should be dismissed. *See* W. Va. R. Civ. P. 12(b)(6).

Id. at 606–07, 774–75. Here, Respondent asserts that the Board failed to supervise Defendant Willard, but again, Respondent makes no allegation that Defendant Willard committed a negligent

act that proximately caused the injury. Accordingly, Respondent has failed to state a claim for negligent supervision.

Moreover, this Court has found that dismissal is appropriate when a plaintiff fails to demonstrate that a board of education has actual knowledge or notice of inappropriate behavior at a school. In *Glaspell v. Taylor Cnty. Bd. of Educ*., a student was injured while being choked in a choking game in a high school cafeteria and hallway. No. 14-0175, 2014 WL 5546480 (W. Va. Nov. 3, 2014). The plaintiffs contended that the choking game had been going on for decades amongst youth and there had even been nationally reported incidents of such games. The plaintiffs contended that the board of education and its employees should have known to look out for it. Plaintiffs contended that the board's negligent supervision resulted in injury. This Court affirmed that summary dismissal was appropriate, reasoning:

> Petitioners fail to cite to any evidence proving that respondent or its employees had actual knowledge or notice of the existence of this game in order to be on watch for the same. It is not feasible for school employees to be able to see what every student is doing in the cafeteria and hallways at every moment throughout a school day, particularly at the high school level.

Id. at *3. The Court's rationale especially applies to the case *sub judice* because, here, Defendant Willard took measures to conceal his alleged sexual crimes. Thus, the Board had less reason to know of Willard's wrongdoing than the teachers did in *Glaspell* where students were choking each other in a crowded cafeteria and in a hallway. Respondent's negligent supervision claim should be dismissed.

Regarding the negligence *per se* claim in Count 12, Respondent did not oppose dismissal of Count 12 below. *See* App. 179–202. In Count 12, Respondent alleges the Board is negligent for breaching of W. Va. Code §§ 61-8D-5, 61-8b-7(a), and 18-2-1. Sections 61-8D-5 and 61-8B-7 are criminal statutes that define the crimes of sexual abuse by a parent, guardian, custodian or person

in a position of trust and sexual abuse respectively. None of these crimes involve negligence, but only intentional, criminal acts. For reasons stated in the preceding section, under the Tort Claims Act, which governs Respondent's claims here, Petitioner Board can only be liable for negligent acts of its employees. "Only claims of negligence specified in W. Va. Code, 29-12A-4(c) can survive immunity from liability under the general grant of immunity in W. Va. Code, 29-12A-4(b)(1)." *Zirkle v. Elkins Rd. Pub. Serv. Dist*., 221 W. Va. 409, 414, 655 S.E.2d 155, 160 (2007). Thus, Petitioner Board cannot be liable under these statutes. Lastly, W. Va. Code § 18-2-1 in no way relates to this case; it defines the composition of the State Board of Education.

In addition, regarding the negligence per se claim, the Court has explained that "whenever a violation of a statute is the centerpiece of a theory of liability, the question arises whether the statute creates an implied private cause of action." *Arbaugh v. Bd. of Educ*., 214 W. Va. 677, 681, 591 S.E.2d 235, 239 (2003). West Virginia has not recognized a private cause of action based on these criminal statutes. The Legislature has expressed no intention of creating a private cause of action by enacting W. Va. Code §§ 61-8b-7 or 61-8D-5. Indeed, these sections are all contained in Chapter 61 of the West Virginia Code, titled "Crimes and Their Punishment." These code sections create no private causes of action. Accordingly, Respondent's claim that Petitioner is liable under these statutes fails as a matter of law. Petitioner is entitled to immunity.

E. THE CIRCUIT COURT CLEARLY ERRED BECAUSE THE PETITIONER IS ENTITLED TO IMMUNITY FROM THE CLAIMS PROVIDED FOR IN THE SAVINGS STATUTE

As discussed, only negligence claims are allowed against the Petitioner Logan County Board of Education. Negligence claims are governed by a two-year statute of limitations. W. Va. Code § 55-2-12 (the statute has not been amended since 1959); W. Va. Code § 29-12A-6. According to Respondent's *Amended Complaint*, Respondent's claims accrued in 2005 at the latest

because Defendant Willard's last alleged sexual assault occurred in Summer 2005. App. 15–17, ¶¶ 127–149.

At the time Respondent's claims accrued in 2005 (at the latest), the tolling statute applicable to infant minors stated:

> If any person to whom the right accrues to bring any such personal action, suit or scire facias, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is mentioned in section eight [§ 55-2-8] of this article, except that it shall in no case be brought after twenty years from the time when the right accrues.

W. Va. Code § 55-2-15 (2005); App. 111. In 2020, the Legislature amended W. Va. Code § 55-2-15 to include the above block-quoted language as subsection (b). The pertinent language quoted above did not change.

Under the 2005 savings statute and statute of limitations, Respondent, upon her 18th birthday, had two years to file suit. Respondent alleges she turned 17 years old in October 2003 of her junior year in high school. App. 37, ¶ 65; *see* App. 33, ¶ 22 (Summer 2003 was the summer before Respondent's junior year) App. 42, ¶ 108 (Respondent's was in her senior year in March 2005); App. 44, ¶ 128, 130 (Respondent had graduated by Summer 2005). By October 2004, Respondent turned 18 years old. Accordingly, Respondent had until her birthday in 2006 to file suit against the Petitioner Board for her pre-age-of-majority claims. Considering the conduct alleged in the summer of 2005, Respondent had until the summer of 2007 to file any claims based on the conduct alleged after she turned 18. Respondent filed suit on or about October 4, 2022—at least 15 years after the statute of limitations expired. Respondent's claims against the Board are

time-barred. As explained *infra*, once Respondent's claims expired in 2006 and 2007, the Petitioner Board possessed a vested interest in repose.

Despite Respondent's claims being time-barred, the claims are being litigated under the current version of W. Va. Code § 55-2-15 (2020), which states:

> (a) A personal action for damages resulting from sexual assault or sexual abuse of a person who was an infant at the time of the act or acts alleged, shall be brought against the perpetrator of the sexual assault or sexual abuse, within 18 years after reaching the age of majority, or within four years after discovery of the sexual assault or sexual abuse, whichever is longer. A personal action for damages resulting from sexual assault or sexual abuse of a person who was an infant at the time of the act or acts alleged shall be brought against a person or entity which aided, abetted, or concealed the sexual assault or sexual abuse within 18 years after reaching the age of majority.
>
> (b) If any person to whom the right accrues to bring any personal action other than an action described in subsection (a) of this section, suit, or scire facias, or any bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his or her becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is mentioned in §55-2-8 of this code, except that it shall in no case be brought after 20 years from the time when the right accrues.
>
> (c) The amendments to this section enacted during the 2020 Regular Session of the Legislature are intended to extend the statute of limitations for all actions whether or not an earlier established period of limitation has expired.

The 2020 amendments expand the time frame within which claims based on sexual assault or sexual abuse can be brought.[9]

[9] Reviewing the legislative history of this savings statute, it appears the statute went unchanged from 1882 to 2016. In 2016, the statute was amended to allow sexual assault/abuse victims to file suit within four years after turning 18. In 2020, it was amended again to allow 18 years after turning 18.

However, as discussed, the Petitioner Board can only be liable for the negligence of its employees under the Tort Claims Act. Under the Tort Claims Act immunity framework, the Board cannot be liable for sexual assault or sexual abuse, directly or indirectly. To be clear, the Board cannot be liable for aiding, abetting, or concealing sexual abuse or sexual abuse because the Board can only be liable for negligence. As discussed *infra*, "aiding, abetting, or concealing" are not negligent acts. Because sexual assault, sexual abuse, and "aiding, abetting, or concealing" the same are not negligent acts, the Petitioner is entitled to immunity under the Tort Claims Act. Section 55-2-15(a) cannot apply to toll claims against the Board because the Board cannot be liable for the claims tolled.

Moreover, Respondent has alleged no facts showing that the Board aided, abetted, or concealed sexual abuse or assault. Neither Chapter 61 nor Chapter 55 of the West Virginia Code defines "concealing" or "aiding and abetting." As defined in Black's Law Dictionary, "aid and abet" means "[t]o assist or facilitate the commission of a crime, or to promote its accomplishment." AID AND ABET, Black's Law Dictionary (11th ed. 2019). "Concealment" means "The act of preventing disclosure or refraining from disclosing; esp., the injurious or intentional suppression or nondisclosure of facts that one is obliged to reveal; COVER-UP. 2. The act of removing from sight or notice; hiding." CONCEALMENT, Black's Law Dictionary (11th ed. 2019). As these definitions indicate, "aiding, abetting, or concealing" are not negligent actions for which the Board can be liable. In any event, Respondent has pled no facts that the Board knew of Defendant Willard's alleged criminal actions; thus, the Board could not have concealed what it did not know. Respondent has likewise pled no facts that the Board assisted, facilitated, or promoted Defendant Willard's alleged sexual crimes. Thus, for this reason too, subsection (a) cannot apply to the Board.

The claims allowed under the current savings statute are claims Respondent cannot pursue against the Board because the Board is entitled to immunity from such claims.

F. WHETHER THE CIRCUIT COURT WAS CLEARLY ERRONEOUS, EXCEEDED ITS JURISDICTION, EXCEEDED ITS LEGITIMATE POWERS, AND STRIPPED THE PETITIONER BOARD OF ITS VESTED PROPERTY RIGHT IN REPOSE, THEREBY VIOLATING ITS DUE PROCESS RIGHTS, WHEN IT FAILED TO FIND THAT THE SAVINGS STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE PETITIONER.

Assuming again for the sake of argument that the current version of W. Va. Code § 55-2-15 could apply to the Board here, the statute violates the Board's substantive due process rights.

Under West Virginia law, the determination of a statute's constitutionality is traditionally within the province of the Court. *See Kanawha County Pub. Library v. County Court of Kanawha County*, 143 W.Va. 385, 391, 102 S.E.2d 712, 716 (1958) ("[T]he principle was long ago established that the determination of whether a legislative act was in conflict with a constitutional provision was a question to be determined by the judicial branch of the government.") (citing *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803)). "[T]he Court is charged with the solemn duty of determining what acts of the Legislature are constitutional, and what acts have been passed by the Legislature in conformity with the demands of the Constitution, when such questions are properly presented to the Court." *See also State ex rel. Armbrecht v. Thornburg*, 137 W.Va. 60, 72, 70 S.E.2d 73, 80 (1952) "The Constitution of this State . . . imposes on the judiciary the duty of deciding the constitutionality of a law." *Price v. City of Moundsville*, 43 W.Va. 523, 525, 27 S.E. 218, 219 (1897).

Under West Virginia law,

> substantive due process remains a viable concept under West Virginia Constitution, Art. III, § 10, and in evaluating whether statutes meet substantive due process requirements, a West Virginia court must adhere to the following basic standard: to satisfy the requirements of due process of law, legislative acts must bear a

> reasonable relationship to a proper legislative purpose and be neither arbitrary or discriminatory.

State ex rel. Harris v. Calendine, 160 W. Va. 172, 179 n.4, 233 S.E.2d 318, 324 (1977) (citing Syllabus Point 1, *State v. Wender*, 149 W. Va. 413, 141 S.E.2d 359 (1965). "This Court has repeatedly held that a statute may be constitutional on its face but may be applied in an unconstitutional manner." *State ex rel. Haden v. Calco Awning & Window Corp*., 153 W. Va. 524, 530, 170 S.E.2d 362, 366 (1969).

Here, the retroactivity provision in W. Va. Code § 55-2-15(c) violates Article III, section 10 of the West Virginia Constitution by stripping Petitioner Board of a vested right in the long-expired statute of limitations that was in effect when the Respondent's claims accrued. The savings statute violates substantive due process by stripping the Board of a vested statute of limitations defense, forcing the Board to litigate an action otherwise prohibited by the Tort Claims Act and progeny, and otherwise forcing the Board to defend against an expired, 17-year-old claim.

Typically, actions are governed by statutes of limitations in effect when a cause of action accrues. *Kisner v. Fiori*, 151 W. Va. 850, 853, 157 S.E.2d 238, 240 (1967); *United States v. St. Louis, S. F. & T. R. Co*., 270 U.S. 1, 2, 46 S. Ct. 182, 182 (1926) (refusing to apply statute of limitations that was not in effect when the cause of action accrued). "[A] cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs." Syl. pt. 1, in part, *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992), *overruled in part on other grounds by Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009).

Here, Respondent's causes of action accrued in 2005 at the latest. App. 44–45, ¶¶ 130–135. Generally, while the legislature may explicitly make a statute retroactive, it may not violate the State Constitution by doing so, as discussed *infra*. Under the current W. Va. Code § 55-2-15(c), "[t]he amendments to this section enacted during the 2020 Regular Session of the Legislature are

intended to extend the statute of limitations for all actions whether or not an earlier established period of limitation has expired." As described in legislative history, the 2020 amendments:

> extend[ed] the limitation on civil actions against the perpetrator of sexual assault or sexual abuse upon a minor; add[ed] any person or organization which aided, abetted, or concealed the sexual assault or abuse to the extended statute of limitations; allow[ed] victims to initiate actions for sexual assault or sexual abuse against perpetrators only within four years of discovery regardless of age; and clarif[ied] effect of 2020 amendments as to possible actions.

2020 W.V. HB 4559, 2020 W. Va. Acts 2, 2020 W.V. Ch. 2, 2020 W.V. ALS 2, 2020 W.V. HB 4559, 2020 W. Va. Acts 2, 2020 W.V. Ch. 2, 2020 W.V. ALS 2 (brackets added). The full text of the statute is quoted *supra*. None of these new provisions were in the statute that was in effect when the cause of action accrued in 2005.

Unlike the 2020 amendments, the 2005 version of W. Va. Code § 55-2-15 did not extend the normal two-year limitations period and did not carve out longer tolling for sexual abuse or sexual claims or claims for "aiding, abetting, or concealing" the same. Again, the entirety of the 2005 version states:

> If any person to whom the right accrues to bring any such personal action, suit or scire facias, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is mentioned in section eight [§ 55-2-8] of this article, except that it shall in no case be brought after twenty years from the time when the right accrues.

Under the 2005 version of this statute and the statute of limitations governing Respondent's claims against the Board, Respondent's pre-age-of-majority claims expired on Respondent's birthday in October 2006. As a matter of law, once the limitations period in effect at the time expired, Petitioner possessed a vested right in not being subject to suit.

Under West Virginia law, "there is a presumption of constitutionality with regard to legislation. However, when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 is implicated." *See Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 225, 406 S.E.2d 440, 451 (1991), *holding modified on other grounds by Neal v. Marion*, 222 W. Va. 380, 664 S.E.2d 721 (2008). Likewise, stripping a vested right violates due process. "[T]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. However, this unmatched power does not allow the legislature to retroactively change statutes so as to sweep away vested property rights." *Gribben v. Kirk*, 197 W. Va. 20, 26, 475 S.E.2d 20, 26 (1996); *see Goldstein v. Peacemaker Props., Ltd. Liab. Co*., 241 W. Va. 720, 729-30, 828 S.E.2d 276, 285-86 (2019). "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Landgraf v. Usi Film Prods*., 511 U.S. 244, 266, 114 S. Ct. 1483, 1497 (1994).

This Court stated in *Lester v. State Workmen's Comp. Com'r*, "[i]t is clear that a person has no vested right in the running of a statute of limitations **unless it has completely run and barred the action**." *Lester v. State Workmen's Comp. Com'r*, 161 W. Va. 299, 315, 242 S.E.2d 443, 452 (1978) (emphasis added). The Court in *Lester* was deciding questions of substantive due process. This Court has explained elsewhere that "[w]hile the Legislature's unmatched powers allow it to sweep away settled expectations suddenly, it may not retroactively change statutes so as to sweep away vested property right." *Goldstein v. Peacemaker Properties, LLC*, 241 W. Va. 720, 729–30, 828 S.E.2d 276, 285–86 (2019) (internal brackets omitted).

Applying *Lester*, here, the Petitioner Board has a vested right in the running and expiration of W. Va. Code §§ 55-2-12, 55-2-15, and 29-12A-6 because the statutes completely ran in October 2006—approximately two years after Respondent turned 18. Thus, the Board's right vested in October 2006. By stripping the Board of its vested right in repose, W. Va. Code § 55-2-15 violates the Board's substantive due process rights.

That a legislature cannot sweep away vested property rights is a principle widely accepted across the country:

> just as a judgment is a vested right which cannot be impaired by a subsequent legislative act, so, too, is immunity granted by a completed statutory bar, and that the immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin.

Norwest Bank Neb., N.A. v. W.R. Grace & Co., 960 F.2d 754, 759 (8th Cir. 1992) (internal quotation marks and ellipses omitted). Within our Fourth Circuit, it has been explained that "once a statute of limitations has run, the party relying on the statute has a vested property right in the statute of limitations defense, and changes to the period of limitations cannot be applied retroactively to extinguish that right." *Stokes v. JPMorgan Chase Bank, NA*, No. JFM 8: 11-cv-02620, 2012 U.S. Dist. LEXIS 19575, at *22 n.4 (D. Md. Feb. 16, 2012) (brackets omitted). Courts across the country have held likewise.[10] Specifically, at least 24 states support the position that

[10] *Harris v. DiMattina*, 250 Va. 306, 315, 462 S.E.2d 338, 342 (1995) (holding that defendant had acquired a vested property right in the two-year statute of limitations when the two-year limitations period expired); *Sopha v. Owens-Corning Fiberglas Corp*., 230 Wis. 2d 212, 239, 601 N.W.2d 627, 639 (1999) ("clearly, once a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense, and new law which changes the period of limitations cannot be applied retroactively to extinguish the right."); *Morgan v. Hartford Hosp*., No. X03CV075009731S, 2008 Conn. Super. LEXIS 1827, at *4 (Super. Ct. July 22, 2008) (recognizing vested right to repose after expiration of statute of limitations); *Harding v. K.C. Wall Products, Inc*., 250 Kan. 655, 669, 831 P.2d 958 (1992) (holding that Legislature cannot revive legal claim barred by statute of repose because doing so would take defendant' vested property right without due process); *Haase v. Sawicki*, 20 Wis. 2d 308, 312-13, 121 N.W.2d 876, 878-79 (1963) ('The bar created by the statute of limitations is as effectual as payment or any other defense, and when once vested cannot be taken away even by the legislature."); *Betthauser v. Med. Protective Co*., 172 Wis. 2d 141, 149, 493 N.W.2d 40, 42-43 (1992) ("The limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is as of high dignity as regards judicial remedies as any other

legislation that retroactively amends a statute of limitations in a way that revives time-barred claims is per se invalid and/or amounts to a violation of substantive due process. These states are Alabama,[11] Colorado,[12] Missouri,[13] New Hampshire,[14] Oklahoma,[15] Tennessee,[16] Texas,[17] Vermont,[18] Indiana,[19] Kentucky,[20] Maine,[21] Oregon,[22] Pennsylvania,[23] Arkansas,[24] Florida,[25]

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right and it is a right which enjoys constitutional protection."); *State v. Haines*, 2003 WI 39, ¶13, 261 Wis. 2d 139, 147, 661 N.W.2d 72, 75 ("once a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense, and new law which changes the period of limitations cannot be applied retroactively to extinguish that right."); *State by Parsons v. United States Steel Corp*., 22 N.J. 341, 346, 126 A.2d 168, 170 (1956) ("under New Jersey law the expiration of a time limitation upon a right of action not only bars the remedy but bestows upon the debtor a vested property right immune from legislative impairment."); *Robinson v. Crown Cork & Seal Co*., 335 S.W.3d 126, 156 (Tex. 2010) ("once a statute of limitations has run or a cause of action has accrued, retroactive legislation that either revives an extinguished claim, or bars an existing one, affects a vested property right."); *Wang v. Palmisano*, 157 F. Supp. 3d 306, 319 n.13 (S.D.N.Y. 2016)"[O]nce a statute of limitations has run, the party relying on the statute has a vested property right in the statute of limitations defense, and changes to the period of limitations cannot be applied retroactively to extinguish that right."); *Reeves v. State*, 374 Ark. 415, 420, 288 S.W.3d 577, 581 (2008) ("no one has any vested right in a statute of limitations until the bar of the statute has become effective."); *Thomas v. Roberts*, 47411 (La. App. 2 Cir 09/26/12), 106 So. 3d 557, 559 ("Once a statute of limitations has run, the party relying on the statute has a vested property right in the statute of limitations defense, and changes to or repeal of the period of limitations cannot be applied retroactively to extinguish that right."); *Citgo Petroleum Corp. v. Bulk Petroleum Corp*., No. 08-CV-654-TCK-PJC, 2010 U.S. Dist. LEXIS 82277, at *8-9 n.4 (N.D. Okla. Aug. 12, 2010) ("once a statute of limitations has run, the party relying on the statute has a vested property right in the statute of limitations defense, and changes to the period of limitations cannot be applied retroactively to extinguish that right"); *Starnes v. Cayouette*, 244 Va. 202, 208, 419 S.E.2d 669, 672 (1992) ("the right to set up the bar of a statute of limitations as a defence [sic] to a cause of action after the statute has run is a vested right, and cannot be taken away by legislation.").

[11] *Johnson v. Garlock*, Inc., 682 So. 2d 25, 28 (Ala. 1996).

[12] *Jefferson County Dept. of Social Services v. D.A.G*., 199 Colo. 315, 317-18, 607 P.2d 1004 (1980).

[13] *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341-42 (Mo. 1993); *Walker v. Barrett*, No. 08-3426-CV-S-REL, 2010 U.S. Dist. LEXIS 93865, at *6 (W.D. Mo. Sep. 9, 2010) (finding it unconstitutional to apply new limitations period after expiration of limitations period in effect at the time of the sexual abuse).

[14] *Gould v. Concord Hospital*, 126 N.H. 405, 408, 493 A.2d 1193 (1985).

[15] *Wright v. Keiser*, 1977 OK 121, 568 P.2d 1262, 1267 (Okla. 1977).

[16] *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696-97 (Tenn.), cert. denied, 419 U.S. 870, 95 S. Ct. 129, 42 L. Ed. 2d 109 (1974).

[17] *Baker Hughes, Inc. v. Keco R. & D., Inc*., 12 S.W.3d 1, 4 (Tex. 1999).

[18] *Capron v. Romeyn*, 137 Vt. 553, 555-56, 409 A.2d 565 (1979); *Murray v. Luzenac Corp*., 175 Vt. 529, 530-31, 830 A.2d 1 (2003).

[19] *Green v. Karol*, 168 Ind. App. 467, 477, 344 N.E.2d 106 (1976).

[20] *Johnson v. Gans Furniture Industries, Inc*., 114 S.W.3d 850, 854-55 (Ky. 2003).

[21] *Dobson v. Quinn Freight Lines, Inc*., 415 A.2d 814, 816 (Me. 1980).

[22] *Nichols v. Wilbur*, 256 Or. 418, 419-20, 473 P.2d 1022 (1970).

[23] *Maycock v. Gravely Corp*., 352 Pa. Super. 421, 427, 508 A.2d 330 (1986), appeal denied, 514 Pa. 618, 521 A.2d 932 (1987).

[24] *Johnson v. Lilly*, 308 Ark. 201, 203-204, 823 S.W.2d 883 (1992).

[25] *Wiley v. Roof*, 641 So. 2d 66, 68-69 (Fla. 1994).

Illinois,[26] Louisiana,[27] Nebraska,[28] North Carolina,[29] Rhode Island,[30] South Carolina,[31] South Dakota,[32] Utah,[33] and Virginia.[34]

Here, when the Legislature amended W. Va. Code § 55-2-15, broadening its application, extending the tolling/limitations period, and making the same retroactive, it revived an already-expired claim and stripped this Respondent of a vested right to repose. The statute of limitations in effect when the pre-age-of-majority claims accrued expired approximately 18 years ago in 2006. The retroactivity provision and amendments to W. Va. Code 55-2-15 violate our State Constitution and this Defendant's substantive due process rights under it. Accordingly, the current statute cannot revive Respondent Vestal's expired claims against this Petitioner. Respondent's claims thus fail as a matter of law, and the Circuit Court clearly erred and exceeded its powers by failing to find the same.

The Court should issue a writ of prohibition ordering dismissal because requiring Petitioner to defend against stale, expired claims violates Petitioner's due process rights, an injury that a later appeal will not redress. Requiring a defendant to litigate expired claims defeats the purpose of repose. "Statutes of limitations embody a policy of repose, designed to protect defendants, . . . and foster the elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 134 S. Ct. 1224, 1227, 188 L. Ed. 2d 200 (2014) (internal quotations and citation omitted). Limitations periods serve to

[26] *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 409, 917 N.E.2d 475, 334 Ill. Dec. 649 (2009).
[27] *Henry v. SBA Shipyard, Inc*., 24 So. 3d 956, 960-61 (La. App. 2009) (en banc), writ denied, 27 So. 3d 853 (La. 2010).
[28] *Givens v. Anchor Packing, Inc*., 237 Neb. 565, 571-72, 466 N.W.2d 771 (1991).
[29] *Colony Hill Condominium Assn. v. Colony Co*., 70 N.C. App. 390, 394, 320 S.E.2d 273 (1984).
[30] *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996).
[31] *Doe v. Crooks*, 364 S.C. 349, 351-52, 613 S.E.2d 536 (2005).
[32] *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 370 (S.D. 1993).
[33] *Roark v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995).
[34] *Bailey v. Ethicon, Inc*., No. 7:20-cv-622, 2021 U.S. Dist. LEXIS 106763, at *11 (W.D. Va. June 7, 2021).

"protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 357, 62 L. Ed. 2d 259 (1979).

Applying the five *Hoover* factors, a writ of prohibition should issue because (1) Petitioner has no other adequate means to obtain relief, (2) requiring Petitioner to defend against expired claims violates Petitioner's due process rights and right to repose, which is itself an injury not correctable on appeal, (3) the Circuit Court clearly erred by allowing these claims to proceed despite Petitioner's demonstrable constitutional injury, (4) the Circuit Court's *Proposed Order* was only entered after Petitioner sought relief in mandamus and the Circuit Court persists in disregarding Petitioner's substantive due process rights, and (5) applying the savings statute to the Petitioner Board, a political subdivision, violates Petitioner's due process rights and strips Petitioner of the immunity to which it is entitled, which are new and important problems and/or legal issues of first impression. Relief in prohibition is proper to correct substantial, clear constitutional violations. *State ex rel. Grant Cnty. Comm'n v. Nelson*, 244 W. Va. 649, 654, 856 S.E.2d 608, 613 (2021). A writ should issue.

The collateral order doctrine also militates in favor of appellate review and dismissal of Respondent's claims. "An interlocutory order would be subject to appeal under the [collateral order] doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 248 W. Va. 11, 16, 886 S.E.2d 346, 351 (2023) (quoting *Durm v. Heck's, Inc*., 184 W. Va. 562, 566 n.2, 401 S.E.2d 908, 912 n.2 (1991)).

Regarding the first collateral order doctrine factor, like its failure to rule on immunity, the Circuit Court's failure to address the due process issues before it, and its decision to require Petitioner to defend against stale claims, strips Petitioner of its due process right, i.e., its vested right in repose. Accordingly, the Circuit Court has, by omission, effectively and conclusively determined that the Board had no vested right in repose, determined that the savings statute is constitutional as applied to the Board, and determined that the claims saved under the statute are actionable against the Board.

Regarding the second collateral order doctrine factor, the constitutionality of the statute and its applicability to the Petitioner Board are separate from the merits of Respondent's allegations; like immunity, the expired statute of limitations does not pertain to the merits of Petitioner's claims, but rather, pertains to whether Petitioner can be subject to suit at all.

Regarding the third factor, like immunity, stripping the Board of its vested right is not reviewable from a final judgment because, if litigation is allowed to proceed, the purpose of repose is lost and cannot be restored post-judgment. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 134 S. Ct. 1224, 1227, 188 L. Ed. 2d 200 (2014) (quoted above); *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 357, 62 L. Ed. 2d 259 (1979) (quoted above); *Robinson v. Pack*, 223 W. Va. 828, 832–833, 679 S.E.2d 660, 664–665 (2009) (applying collateral order doctrine and finding that "[p]ostponing review of a ruling denying immunity to the post-trial stage is fruitless, as the United States Supreme Court reasoned in *Mitchell*, because the underlying objective in any immunity determination (absolute or qualified) is immunity from suit."). Requiring Petitioner to litigate claims barred by limitations and immunity defeats the purposes of the same and are thus unreviewable on appeal. Under either the writ of prohibition framework or the collateral order

doctrine framework, Petitioner respectfully requests that this Court order that Respondent's claims against the Board be dismissed with prejudice.

VII. CONCLUSION

For the foregoing reasons, Petitioner Logan County Board of Education requests that this Court reverse the Circuit Court's *Proposed Order*; conclude that Petitioner is entitled to immunity; issue a writ of prohibition prohibiting the Circuit Court from enforcing its February 6, 2024, *Proposed Order* because the savings statute, W. Va. Code § 55-2-15, violates Petitioner's substantive due process rights and is thus unconstitutional as applied to the Petitioner Board and otherwise cannot apply to the Petitioner Board in light of the Board's immunity; and, finally, conclude that Respondent Vestal's claims against the Board are consequently time-barred.

/s/ Evan S. Olds

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VERIFICATION

I, Evan S. Olds, being first duly sworn, state that I have read the foregoing PETITIONER'S BRIEF; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

/s/ Evan S. Olds
Duane J. Ruggier II (WVSB # 7787)
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CERTIFICATE OF SERVICE

The undersigned counsel of record does hereby certify that the foregoing "***Petitioner's Brief***" was served on the below via File & ServeXpress on this 6th day of June, 2024.

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