

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 24-163

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LOGAN COUNTY BOARD OF EDUCATION,

Defendant Below, Petitioner,

v.

ELIZABETH VESTAL,

Plaintiff Below, Respondent

RESPONDENT'S BRIEF

Counsel for Respondent

Teresa C. Toriseva, Esq. #6947
Joshua D. Miller, Esq. #12439
Andrew A. Carpenter, Esq. #14542
TORISEVA LAW
1446 National Road
Wheeling, WV 26003
304-238-0066
304-238-0149
justice@torisevalaw.com

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I. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

This case involves severe sexual abuse and exploitation of a high school student, Respondent Elizabeth Vestal, by her former teacher, Defendant Brandon Willard (hereafter “Defendant Willard”). For most of her high school career at Logan High School, the Respondent was sexually abused and brutally raped by Defendant Willard. Defendant Willard was the then-band teacher and band director of Logan High School during the Respondent’s high school career. (Am. Compl. ¶ 7, App. 31-60). At all times material hereto, Defendant Willard was an employee of the Petitioner. (Am. Compl. ¶ 8). Beginning in May 2003, when the Respondent was a sophomore, Defendant Willard began to sexually assault the Respondent. (Am. Compl. ¶ 10). During her sophomore, Defendant Willard exposed his penis to the Respondent and grabbed her breasts while the two were alone in his office. (Am. Compl. ¶¶ 11-20). While attending the high school band camp in the summer of 2003, Defendant Willard sexually assaulted the Respondent by forcing her up against a wall and digitally penetrating her vagina. (Am. Compl. ¶¶ 21-29). Also, while at band camp that year, Defendant Willard forced the Respondent to grab his penis and masturbate him until he ejaculated. (Am. Compl. ¶¶ 30-35). Defendant Willard threatened to get the Respondent in trouble if she told anyone what he did to her. (Am. Compl. ¶ 36).

Defendant Willard continued to sexually assault the Respondent into her junior year of high school. (Am. Compl. ¶ 50). During her junior year, Defendant Willard isolated her in his office and exposed himself to her while asking her to perform stretches. (Am. Compl. ¶¶ 51-57). When the Respondent refused to perform the stretches, he physically assaulted her. (Am. Compl. ¶¶ 57-59). In October of her Junior year, Defendant Willard isolated the Respondent in the second-floor concession storage room and he forced the Respondent on her back on a table,

removed her clothes, and performed oral sex on her, with digital penetration. (Am. Compl. ¶¶ 66-73). In the Spring of 2004, during the auditions for drum major, Defendant Willard offered the Respondent the position of drum major if she would “suck his dick.” (Am. Compl. ¶¶ 80-65). The Respondent refused. During the final week of her junior year, Defendant Willard trapped the Respondent in a band room and forced her to perform oral sex on him. (Am. Compl. ¶¶ 88-94).

When the Respondent attended band camp during the summer before her senior year, Defendant Willard sexually assaulted the Respondent one time while riding a golf cart. (Am. Compl. ¶¶ 95-100). During the Respondent’s senior year, Defendant Willard repeatedly assaulted the Respondent. (Am. Compl. ¶¶ 101-107). In March 2005, Defendant Willard raped the Respondent at a basketball game. (Am. Compl. ¶¶ 108-112). Defendant Willard waited for the Respondent to enter a room to get a drink of water and then he attacked her from behind. (Am. Compl. ¶¶ 108-112). Defendant Willard ejaculated on her back when he finished raping her. (Am. Compl. ¶ 111). After the violent rape, the Respondent felt depressed and contemplated suicide. (Am. Compl. ¶ 114.). Unfortunately, that was not the last assault by Defendant Willard.

In April 2005, the Respondent went to Disney World with the school band. (Am. Compl. ¶ 117). On the bus ride to Florida, Defendant Willard assaulted the Respondent by grabbing her breasts while she was asleep, and later by forcing her to manually stimulate his penis with her hand. (Am. Compl. ¶¶ 117-121). While in Florida, Defendant Willard again sexually assaulted the Respondent while in the hotel’s hot tub. (Am. Compl. ¶¶ 122-123). Defendant Willard threatened to harm the Respondent if she ever told anyone about the sexual assaults. Specifically, at the end of her senior year, Defendant Willard grabbed the Respondent by throat and told her if, “she ever told anyone he would ruin her.” (Am. Compl. ¶ 125). The Respondent believed that Defendant Willard would kill her if she ever told anyone about the assaults. (Am. Compl. ¶ 126).

After the Respondent graduated from High School, she taught at the Cedar Lakes Band Camp in the summer of 2005. (Am. Compl. ¶¶ 127-130). While at band camp in the summer of 2005, Defendant Willard entered the Respondent's room while she was asleep and forcibly raped and strangled the Respondent until she lost consciousness. (Am. Compl. ¶¶ 131-136).

Defendant Willard continued to target the Plaintiff while she was in college. The Respondent went to Lee University as a freshman. (Am. Compl. ¶ 139). Meanwhile, Defendant Willard got a job at the University of Charleston. (Am. Compl. ¶ 140). Defendant Willard began to solicit the Respondent to attend the University of Charleston and offered her a job as his office assistant. (Am. Compl. ¶ 141). Initially, the Respondent's parents pressured the Respondent to consider the offer, but the Respondent broke down and told her parents of the repeated sexual assaults and rapes that she endured at the hands of Defendant Willard. (Am. Compl. ¶¶ 142-147).

The actions of Defendant Willard spanned several years of the Respondent's life and most of her high school career. Defendant Willard sexually abused and sexually assaulted the Respondent both on and off the Petitioner's property. The behavior of Defendant Willard was so ubiquitous that no reasonable school administrator could have failed to miss his behavior. The Respondent brings this civil action to seek redress for, among other things, the brutality she endured during her time in the care, custody, and control of the Petitioner and its employees.

B. PROCEDURAL HISTORY

1. On October 5, 2022, the Respondent filed a civil action against the Petitioner and Defendant Willard in the Circuit Court of Kanawha County, West Virginia.

2. On October 6, 2022, the Respondent filed an Amended Complaint against the Petitioner and Defendant Willard. The Amended Complaint contained the following 12 counts:

- Count I: Violation of West Virginia Code § 61-8D-5: Petitioner and Defendant Willard;
- Count 2: Sexual Assault and Harassment at School and School Related Events: Petitioner

and Defendant Willard;

- Count 3: Intentional Infliction of Emotional Distress: Petitioner and Defendant Willard;
- Count 4: Sexual Battery: Petitioner and Defendant Willard;
- Count 5: False Imprisonment: Petitioner and Defendant Willard;
- Count 6: Violation of West Virginia Code § 61-8b-7 (Sexual Abuse in the First Degree): Petitioner and Defendant Willard;
- Count 7: Violation of West Virginia Code § 61-8b-4 (Sexual Assault in the Second Degree): Petitioner and Defendant Willard;
- Count 8: Violation of West Virginia Code § 61-8D-5 Sexual Abuse by a Parent, Guardian, Custodial or Person in a Position of Trust to a Child: Petitioner and Defendant Willard;
- Count 9: Negligent Hiring: Petitioner;
- Count 10: Negligent Retention: Petitioner;
- Count 11: Negligent Supervision: Petitioner; and
- Count 12 Negligence *per se*: Petitioner.

3. On October 11, 2022, the Petitioner and Defendant Willard were served with the Amended Complaint.

4. Also on October 11, 2022, both the Petitioner and Defendant Willard were served with the Plaintiff's First Set of Discovery Requests, which included interrogatories, requests for production of documents, and requests for admissions.

5. On October 27, 2022, the Petitioner filed, pursuant to W. Va. R. Civ. P. 12(b)(3) a Motion to Dismiss or Transfer Venue ("MTD No. 1). The sole argument raised in the 6 paragraphs of MTD No. 1 was that under the West Virginia Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.* ("Tort Claims Act") the proper venue for this civil action was the Circuit Court of Logan County, West Virginia.

6. On October 31, 2022, Defendant Willard filed a Notice of Bona Fide Defense.

7. On November 9, 2022, Defendant Willard filed his Motion to Dismiss and Memorandum of Law in Support in response to the Respondent's Amended Complaint.

8. Also on November 9, 2022, The Circuit Court of Kanawha County entered an Order stating, in part, "[t]he Court hereby **ORDERS** any responsive briefing be filed on or before November 23, 2022. Reply briefing shall be filed on or before December 2, 2022. . . The parties

shall provide the Court with proposed final orders with appropriate findings of fact and conclusions of law no later than December 5, 2022.”

9. On November 17, 2022, (after the Court’s Briefing Order of November 9, 2022) the Petitioner filed, without seeking leave of Court, “Defendants’ [*sic.*] Motion to Dismiss Claim for Punitive Damages” with a Memorandum of Law. (“MTD No. 2”). MTD No. 2 was filed pursuant to W. Va. R. Civ. P. 12(b)(6). The Respondent did not assert any claim for punitive damages.

10. On November 21, 2022, (after the Court’s Briefing Order of November 9, 2022) the Petitioner filed, without seeking leave of Court, “Defendant’s Amended Motion to Dismiss” (“MTD No. 3”). MTD No. 3 was filed pursuant to W. Va. R. Civ. P. 12(b)(6). No memorandum of law was filed at that time. MTD No. 3 simply stated that the Petitioner moves to dismiss Respondent’s causes of action “on grounds of immunity, failure to state a claim, statute of limitations, constitutional grounds, and judicial estoppel.” The Petitioner also stated that “In support of this Amended Motion, [Petitioner] relies upon its Memorandum of Law previously filed on November 14, 2022.” However, no memorandum of law was filed on November 14, 2022.

11. On December 5, 2022, (after the Court’s Briefing Order of November 9, 2022) the Petitioner filed, without seeking leave of Court, its “Renewed Motion to Dismiss or Transfer Venue” (“MTD No. 4”). MTD No. 4 does not cite any West Virginia Rule of Civil Procedure. Again, the Petitioner requested in MTD No. 4 that this case either be dismissed or transferred.

12. On December 6, 2022, the Respondent filed a Motion for Leave to File her Response to MTD No. 1 Out of Time and attached her response to MTD No. 1 as an exhibit.

13. On December 6, 2022, the Circuit Court of Kanawha County entered an Order granting the Respondent’s Motion for Leave to File her Response Out of Time and ordered that the Respondent’s responsive motion be filed.

14. On December 12, 2022, the Petitioner filed and served its Response to the Respondent's First Set of Combined Discovery Requests¹.

15. On December 27, 2022, the Petitioner filed its Reply to Respondent's Response to MTD No. 1.

16. On January 5, 2023, the Respondent filed her Response to MTD. No. 2, 3, and 4.

17. Also on January 5, 2023, the Respondent filed her Response to Defendant Willard's Motion to Dismiss.

18. On January 9, 2023, Defendant Willard filed his Reply to the Respondent's Response to his Motion to Dismiss.

19. Also on January 9, 2023, the Petitioner filed its Reply to the Respondent's Response to MTD. No. 2, 3, and 4.

20. On January 10, 2023, Plaintiff filed both a Motion for Leave to File Sur Reply to Defendant Willard's Reply to the Respondent's Response, and the Respondent filed her Sur Reply to Defendant Willard's Reply to the Respondent's Response.

21. On January 11, 2023, the parties appeared before the Circuit Court of Kanawha County for a hearing on the MTD No. 1 and MTD No. 4, and Defendant Willard's Motion to Dismiss as only those motions were noticed by the Petitioner and Defendant Willard.

22. On January 24, 2023, the Circuit Court of Kanawha County entered an Order granting MTD No. 1 and ordered that the case be transferred to the Circuit Court of Logan County, West Virginia.

23. On or about January 31, 2024, this case was transferred to Logan County.

¹ On December 12, 2022, the Petitioner filed its Motion to Stay Discovery. On December 19, 2022, the Respondent filed her response to the Petitioner's Motion to Stay Discovery. To date, the Petitioner's Motion to Stay Discovery has not been decided.

24. On February 28, 2023, the Petitioner filed its Answer and raised its defenses against the Respondent's Amended Complaint.

25. On April 13, 2023, the Petitioner filed a Notice of Hearing for MTD No. 1 and 4, despite those motions being granted by the Circuit Court of Kanawha County in January of 2023.

26. On April 18, 2023, Defendant Willard filed a Notice of Hearing for his Motion to Dismiss for the same time.

27. On May 18, 2023, the Respondent filed a Supplemental Response to the Petitioner's numerous Motions to Dismiss.

28. On May 19, 2023, the Petitioner filed an Amended Notice of Hearing noticing only its "Amended Motion to Dismiss", MTD No. 3.

29. Also on May 19, 2023, the Petitioner filed its Reply to the Respondent's Supplemental Response.

30. On May 22, 2023, the parties appeared before the Circuit Court of Logan County for oral argument on the Petitioner's and Defendant Willard's Motions to Dismiss.

31. On June 26, 2023, Defendant Willard filed and served his First Set of Discovery Requests to the Respondent. Those discovery requests included interrogatories and request for production of documents.

32. On September 5, 2023, the Respondent filed and served her responses to Defendant Willard's First Set of Discovery Requests.

33. On December 21, 2023, the Respondent filed a Motion to Compel the Deposition of Defendant Willard and a Motion to Compel the Petitioner's Discovery Responses.

34. On January 3, 2024, the Petitioner and Defendant Willard filed with this Court a Petition for Writ of Mandamus against the Circuit Court of Logan County and the Respondent Elizabeth Vestal, Docket No. 24-8.²

35. On February 2, 2024, the Respondent filed her Notice of Hearing for the Motions to Compel filed against the Petitioner and Defendant Willard. The hearing was set for April 8, 2024.

36. On February 6, 2024, the Circuit Court of Logan County entered her orders denying the Petitioner's Motions to Dismiss and Defendant Willard's Motion to Dismiss³.

37. Also on February 6, 2024, the Circuit Court of Logan County filed her response to the Petition for Writ of Mandamus.

38. On February 26, 2024, the Petitioner filed its Notice of Appeal from the Circuit Court of Logan County February 6, 2024 denial of its Motions to Dismiss.⁴

39. On February 28, 2024, this Appeals Court dismissed the Petitioner's and Defendant Willard's Petition for Writ of Mandamus as moot.

40. On February 26, 2024, the Petitioner filed its Notice of Appeal.

II. SUMMARY OF ARGUMENT

This appeal largely originates from the procedural irregularities caused entirely by the Petitioner. In response to the Respondent's Amended Complaint, the Petitioner filed not one, not two, not three, but filed four separate motions to dismiss. Only the arguments asserted in the Petitioner's first motion to dismiss, MTD No. 1, were timely raised. The Petitioner did not seek

² The Respondent was never served with the Petitioner's and Defendant Willard's Petition for Writ of Mandamus.

³ Defendant Willard did not appeal the denial of his Motion to Dismiss.

⁴ Respondent's counsel was first notified of the Petitioner's Notice of Appeal on March 26, 2024, by this Court's Scheduling Order. Respondent's counsel did not receive any notice from the Petitioner, neither by mail, facsimile nor electronic mail.

leave of court before it filed the three subsequent motions to dismiss. Under the plain language of Rule 12 of the West Virginia Rules of Civil Procedure, the arguments that were contained in MTD No. 2, 3, and 4 were not timely, and the Petitioner intentionally omitted those arguments from its first motion to dismiss, MTD No. 1. As a result of those procedural irregularities, none of the omitted arguments, including whether the Petitioner is entitled to immunity and whether the applicable statute of limitations is unconstitutional were timely raised to the Circuit Court in the motion to dismiss. Therefore, none of the untimely arguments are properly before this Court.

The Respondent's Amended Complaint alleged egregious sexually abusive behavior against Defendant Willard. The Amended Complaint alleged that the Petitioner, acting by and through its agents and employees, was negligent. The Tort Claims Act specifically provides that political subdivisions are liable for the negligent acts of their employees. *See* W. Va. Code § 29-12A-4(c). The Respondent asserted, among other things, the Petitioner negligently hired, negligently retained, and negligently supervised its employees, including Defendant Willard. Those causes of action are permitted regardless of whether Defendant Willard's actions were negligent, intentional, malicious, or were done within or outside the course and scope of his employment. The Respondent's allegations are factually sufficient to assert viable causes of action, based in negligence, against the Petitioner. Therefore, the Tort Claims Act affords no protections to the Petitioner for the Respondent's assertions.

The applicable statute of limitations, W. Va. Code § 55-2-15(a), provides that minors who are victims of sexual assault or sexual abuse may bring a personal action for damages resulting from the assault or abuse against the perpetrator and any person or entity which aided, abetted, or concealed the assault or abuse within 18 years after the victim reaches the age of majority. In 2020, the relevant statute was amended to increase the amount of time that victims of childhood sexual

abuse could file, even if a prior statute had expired. W.Va. Code § 55-2-15(c). The Respondent was a minor when Defendant Willard repeatedly sexually abused and sexually assaulted her during her high school career. The Respondent had until her 36th birthday, October 24, 2022, to file her personal action for damages. She filed her Original Complaint on October 5, 2022, and her Amended Complaint on October 6, 2022. The Plaintiff timely filed her Complaint and the Amended Complaint under W. Va. Code § 55-2-15. The Petitioner is civilly liable for knowing about, facilitating, and/or covering up the sexual abuse of the Respondent.

The legislature's extension of time for the filing of a civil action by a minor who was the victim of sexual assault under W. Va. Code § 55-2-15 is not unconstitutional. For nearly 150 years, the United States Supreme Court has consistently held that the passing of time under a statute of limitations does not vest any recognizable property right to a defending party asserting that defense. For 45 years, this Court has recognized that West Virginia recognizes that asserting the defense of a statute of limitations is not a vested property right recognized by the Constitution's substantive due process clause. The Petitioner's arguments fail as a matter of law.

For all of the foregoing reasons, the Respondent respectfully requests that this Court affirm the Circuit Court's February 6, 2023, Order, App. 400-09, find that the Petitioner is not entitled to immunity under the Tort Claims Act, and rule that W. Va. Code § 55-2-15 is constitutional.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this case, pursuant to W. Va. R. App. P. 20, as this case involves assignments of error in the application of settled law. Each assignment of error asserted by the Petitioner is one that has been reviewed and decided previously with published opinions or memorandum decisions upon which all can rely. Furthermore, this case involves issues of first impression and involves issues of fundamental public importance.

IV. STANDARD OF REVIEW

This Court reviews *de novo* a circuit court's order granting a motion to dismiss a complaint. Syl. pt 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); *Albright v. White*, 202 W. Va. 292, 503 S.E.2d 860 (1998). When ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the complaint should be construed in the light most favorable to the plaintiff, and the allegations in the complaint should be taken as true. *Lodge Distrib. Co., Inc., v. Texaco, Inc.* 161 W.Va. 603, 605, 245 S.Ed. 2d 157, 158 (1978). Where “the information contained in the pleadings is sufficient to justify the case proceeding further,” the motion to dismiss should be denied and the case remanded for further proceedings. *Hutchison v. City of Huntington*, 198 W. Va. at 150, 479 S.E.2d at 660.

V. ARGUMENT

A. THE CIRCUIT COURT CORRECTLY RULED THAT THE PETITIONER FAILED TO TIMELY RAISE ITS ARGUMENTS CONCERNING STATUTORY IMMUNITY AND THE ALLEGED UNCONSTITUTIONALITY OF THE SAVINGS STATUTE BECAUSE THE PETITIONER INTENTIONALLY OMITTED THOSE ARGUMENTS FROM ITS FIRST MOTION TO DISMISS.

- i. **Rule 12 of the West Virginia Rules of Civil Procedure specifically states that a party shall not file multiple motions to dismiss.**

The Circuit Court found that the Petitioner “failed to file [] MTD No. 2, [] MTD No. 3, or [] MTD No. 4 in a timely manner.” (Order, App. 400-09, ¶67). The Circuit Court denied those motions as untimely and noted that the Petitioner failed to seek leave of Court in order to file its additional motions to dismiss. The Petitioner’s four Motions to Dismiss⁵, MTD Nos. 1, 2, 3, and

⁵ The Petitioner has failed to cite to which motion to dismiss it filed was improperly denied by the Circuit Court and has failed to acknowledge that it filed four motions to dismiss. Rather, the Petitioner misstates that its “original motion to dismiss was mis-named *Motion to Dismiss Claim for Punitive Damages*.” (Brief, fn. 2) The Petitioner’s original Motion to Dismiss, MTD No. 1, was named “Motion to Dismiss or Transfer Venue.” The Petitioner also incorrectly stated that “There were not ‘three’ subsequent motions [sic.] dismiss

4, are governed by Rule 12 of the West Virginia Rules of Civil Procedure. Rule 12 sets a limit on the number of motions to dismiss that can be filed in response to a pleading. Rule 12 of the West Virginia Rules of Civil Procedure prohibits parties from filing multiple motions to dismiss. It states:

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. If a party makes a motion under this rule but *omits therefrom any defense or objection then available* to the party which this rule permits to be raised by motion, the party **shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2)** hereof on any of the grounds there stated.

W. Va. Civ. P. 12(g) (Emphasis added).

The use of the term “shall not” is crucial. The word “shall” affords litigants no leeway or discretion. This Court has stated that “It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded mandatory connotation.” Syl. Pt. 1, *Nelson v. West Va. Pub. Employees Ins. Bd.*, 171 W.Va. 445, 300 S.E.2d 86 (1982). The exception referenced in Rule 12(g) provides no justification for the Petitioner’s filing of four motions to dismiss. Rule 12(h)(2) reads:

A defense of failure to state a claim upon which relief can be granted, or 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.

W. Va. Civ. P. 12(h)(2) (Emphasis added).

Simply put, if any then available defense or objection is omitted from a motion to dismiss, the defending party shall not make a motion based on the defense so omitted; except, the defendant

but only corrected the mistakenly titled November 14 *Motion to Dismiss Claim for Punitive Damages.*” (Brief, Pg. 8).

may assert that defense in any pleading⁶ permitted, motion for judgment on the pleadings, or at trial. There is no indication, and no argument has been raised, that the Petitioner's claimed defenses of statutory immunity or its arguments concerning the constitutionality of the savings statute were not available to it on October 27, 2022 when it filed MTD No. 1. The Petitioner intentionally omitted those arguments from its original motion to dismiss, MTD No. 1. The Circuit Court correctly ruled that MTD Nos. 2, 3, and 4 were not timely. *Contra W. Virginia Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 95, 807 S.E.2d 760, 766 (2017) (holding that the defendant did not waive its right to assert the defense of immunity in its second motion to dismiss because, even though it omitted immunity from its first motion to dismiss, it "explicitly reserved the right to assert those immunities in a footnote.") MTD Nos. 2, 3, and 4 were all filed more than twenty days after the Amended Complaint was served on the Petitioner and the Petitioner did not seek leave of Court to file those motions after the expiration of its time to respond.

The Circuit Court did not rule that the Petitioner waived its ability to ever raise arguments of immunity or of the savings statute's constitutionality. Rather, as Rule 12 clearly states, the Petitioner could have raised those arguments in any pleading permitted under Rule 7(a)⁷, in a motion for judgment on the pleadings, or at trial. The Circuit Court's February 6, 2024 Order did not prohibit or prevent the Petitioner from asserting those arguments. The Petitioner decided to omit those arguments from its original motion to dismiss and now seeks to ignore that fact.

⁶ On Page 8 of its *Brief*, the Petitioner attempts to assert that its "Defendant's Amended Motion to Dismiss", MTD No. 3, could have been filed under W. Va. R. Civ. P. 10(c). Rule 10(c) permits "pleadings" to adopt statements made in the same pleading, another pleading or in a motion. Under W. V. R. Civ. P. 7(a), Fn. 6, *supra*, a motion to dismiss is not a pleading.

⁷ Rule 7(a) of the West Virginia Rules of Civil Procedure states:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

For all of the foregoing reasons, the Circuit Court’s February 6, 2024 Order, App. 400-09, must be affirmed and this matter must be remanded back to the Circuit Court for further proceedings.

ii. The Petitioner’s outstanding Motions to Dismiss were rendered moot by its filing of its Answer on February 28, 2023.

In addition to the four separate Motions to Dismiss filed by the Petitioner, on February 28, 2023, it filed its “Answer to Plaintiff’s Amended Complaint.” App. 271-311. On January 24, 2023, the Circuit Court of Kanawha County entered an Order granting MTD No. 1 and transferred the case to the Circuit Court of Logan County, West Virginia. The Court ordered the relief sought by the Petitioner in its MTD No. 1. Once the Petitioner filed its Answer to the Amended Complaint, all of the Petitioner’s then-outstanding Motions to Dismiss were rendered moot.

West Virginia Rule of Civil Procedure 12 governs how a party must respond to a complaint. Specifically, Rule 12(b) provides:

How presented. — Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in *the responsive pleading* thereto if one is required, except that the following defenses may at the option of the pleader be made by *motion*:

- (1) lack of jurisdiction over the subject matter,
- (2) lack of jurisdiction over the person,
- (3) improper venue,
- (4) insufficiency of process,
- (5) insufficiency of service of process,
- (6) failure to state a claim upon which relief can be granted,
- (7) failure to join a party under Rule 19. *A motion making any of these defenses shall be made before pleading* if a further pleading is permitted....

W. Va. R. Civ. P. 12(b) (Emphasis added).

As relevant to this action, a “pleading” under Rule 7(a) includes a “complaint and an answer” and a few other filings not applicable to this matter. In a case such as this, a defendant

wishing to raise a defense under Rule 12(b) through a singular motion to dismiss shall do so *before* filing an answer. A defense raised under Rule 12(b) may be raised by either a motion or by an answer, not both. The West Virginia Rules of Civil Procedure do not permit a defendant to raise defenses through a motion *and* an answer. A defending party must file its motion to dismiss and present it to the court for resolution before it files its answer to the complaint.

Rule 12 of the West Virginia Rules of Civil Procedure also directs the timing of an answer after a motion to dismiss has been disposed of; its states “if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action.” W. Va. R. Civ. P. 12(a)(3)(A). Therefore, all of the Petitioners outstanding Motions to Dismiss that were not adjudicated before the filing of its Answer on February 28, 2023, were rendered moot. The Petitioner has failed to follow Rule 12 of the West Virginia Rules of Civil Procedure and failed to raise the defenses of statutory immunity and the constitutionality of the savings clause through a timely filed motion to dismiss.

For all of the foregoing reasons, the Circuit Court’s February 6, 2023, Order, App. 400-09, must be affirmed and this matter must be remanded back to the Circuit Court for further proceedings.

B. THIS COURT SHOULD NOT HEAR THE PETITIONER’S ARGUMENTS CONCERNING WHETHER IT IS ENTITLED TO IMMUNITY, BECAUSE THAT ARGUMENT WAS INTENTIONALLY OMITTED FROM IT’S ORIGINAL MOTION TO DISMISS, AND THEREFOR IS NOT RIPE FOR THIS COURT’S CONSIDERATION

The Petitioner’s argument that it is entitled to immunity was not timely raised to the Circuit Court in its only properly filed Motion to Dismiss, MTD No. 1. *See* Section V.A, *supra*. Under Rule 12 of the West Virginia Rules of Civil Procedure, the Circuit Court was within its right to deny the Petitioners Motions to Dismiss, MTD Nos 2, 3, and 4, as untimely. To date, no Circuit

Court judge has ruled that the Petitioner is not entitled to immunity. This Court does not hear issues not properly raised before the Circuit Court.

The Supreme Court of Appeals of West Virginia has stated that “Generally, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.” *State ex rel. Johnson & Freedman, LLC v. McGraw*, 243 W. Va. 12, 18, 842 S.E.2d 216, 222 (2020) (internal quotations omitted). The justification for this rule is, in part, the “need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.” *Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). One exception to this rule, and the one claimed by the Petitioner in pages 32 through 34 of its *Brief*, is the collateral order doctrine. “Under the collateral order doctrine, an interlocutory order may be subject to immediate appeal 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.” *Erie Ins. Co. v. Dolly*, 240 W. Va. 345, 355, 811 S.E.2d 875, 885 (2018)

In *Kanawha Cnty. Bd. of Educ. v. S. D. by & through J. D.*, a minor student brought an action by and through her parents against a county board of education and school personnel for the harm that resulted from the minor being inappropriately touched by a fellow student. 249 W. Va. 401, 895 S.E.2d 485, 487 (2023). The board and personnel originally filed a motion to dismiss the claims against the individual school personnel and the claims for punitive damages under the Tort Claims Act. *Id.* at 488. The Circuit Court granted the motion to dismiss regarding the punitive damages claims only. After discovery, the board filed a motion for summary judgment against the minor students’ claims for negligent infliction of emotional distress and negligent supervision. The motion for summary judgment did not include arguments under the Tort Claims Act. *Id.* The

Circuit Court denied the motion for summary judgment. On appeal, the Supreme Court of Appeals of West Virginia analyzed whether the Circuit Court’s order denying summary judgment met the recognized limited exception to the finality requirement for interlocutory orders known as the collateral order doctrine. The Court concluded that the order denying the motion for summary judgment was interlocutory and not immediately appealable. The Court stated the “order denying [the board and school personnel]’s motion for summary judgment *on grounds other than immunity* does not qualify for immediate review under the collateral order doctrine.” *Id.* at 490 (Emphasis added). The rationale for this Court’s ruling was as follows:

[The order denying summary judgment] reflects no denial of [the board and school personnel’s] motion to dismiss—even in part—much less an immunity-predicated denial of their motion. [The board and school personnel] appear to require the Court’s assumption that by not expressly *granting* an overlooked immunity argument contained in their written motion to dismiss, the circuit court effectively *denied* it. However, at best, the order merely reflects that the circuit court did not rule on any immunity issues, since “[i]t is a paramount principle of jurisprudence that a court speaks only through its orders.” *Legg v. Felinton*, 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006).

As further evidence of this defect, [the board and school personnel] identify no “error” contained in the [] order, arguing only that a finding contained in that order entitles the individual [school personnel] to statutory immunity. However, [the board and school personnel] failed to subsequently seek a ruling on the implications of that finding, most notably failing to seek summary judgment on that basis. In short, [the board and school personnel] seek this Court’s review of a ruling they never obtained, ostensibly contained in an order in which they identify no “error.”

Id. at 491 (Emphasis in original).

Here, the Circuit Court’s February 6, 2024 Order, App. 400-09, denying the Petitioner’s Motions to Dismiss, MTD Nos. 2, 3, & 4, does not meet the limited exception of the collateral order doctrine and cannot be first decided on appeal to this Court. First, the Order did not

conclusively determine the disputed controversies in this case. The Circuit Court's Order did not resolve the merits of either the Petitioner's claims for statutory immunity or the constitutionality of W. Va. Code § 55-2-15. The Circuit Court's Order rested on sound grounds that were grounds other than immunity or constitutionality. *See* Syl Pt. 1 *Kent v. Sullivan*, 249 W. Va. 747, 901 S.E.2d 500, 501 (2024) ("Under Rule 12 of the West Virginia Rules of Civil Procedure, a circuit court's denial of a motion to dismiss a complaint that is *predicated on the statutory immunity* conferred by the [Tort Claims Act] is an interlocutory ruling that is subject to immediate appeal under the collateral order doctrine.") (Emphasis added).

Second, the Circuit Court's Order did not resolve an important issue completely separate from the merits of this action. The Circuit Court's Order disposed of the Petitioner's Motions to Dismiss as it found that those motions were untimely. Finally, there is nothing preventing the Petitioner from raising the defense of immunity later in this proceeding. *See* W. Va. R. Civ. P. 12(h)(2). Issues surrounding the Petitioner's claimed immunity and even the constitutionality of W. Va. Code § 55-2-15 are reviewable from a final judgment or later ruling from the Circuit Court. The Petitioner intentionally omitted the defenses that it now seeks to raise on appeal from its original Motion to Dismiss, MTD No. 1. While Petitioner was free to the defenses it saw fit in its original Motion to Dismiss, the Petitioner is not free to raise the issues it omitted therefrom now on appeal to this Court.

For all of the foregoing reasons, the Circuit Court's February 6, 2023, Order, App. 400-09, must be affirmed and this matter must be remanded back to the Circuit Court for further proceedings.

C. THE PETITIONER IS NOT ENTITLED TO IMMUNITY UNDER THE TORT CLAIMS ACT AS NO IMMUNITY IS AFFORDED TO POLITICAL SUBDIVISIONS WHOSE EMPLOYEES WERE NEGLIGENT.

- i. The only potentially applicable immunity in this case is statutory immunity under the Tort Claims Act.**

Assuming, *arguendo*, that the issue of whether the Petitioner is entitled to statutory immunity under the Tort Claims Act was properly raised in the Petitioner's original Motion to Dismiss, MTD No 1, and actually decided by the Circuit Court, the Petitioner is not entitled to immunity in this case as a matter of law. Several of the cases cited by the Petitioner involve sovereign and qualified immunity. *See Brief* Pg. 10-12. Neither of those immunities are applicable in this case. Recently, this Court clarified West Virginia's jurisprudence on governmental immunity. *Kent v. Sullivan*, 249 W. Va. at 747, 901 S.E.2d at 505 (stating "there are three sources of immunity in our jurisprudence: [1]) constitutional or sovereign immunity, [2]) common law qualified immunity, and [3]) statutory immunity as set forth in the Tort Claims Act.")

"Sovereign immunity is concerned with protecting the public fisc." *W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 661, 783 S.E.2d 75, 82 (2015) Sovereign immunity, also referred to as constitutional immunity, affords the state immunity from suits seeking recovery from public funds. *See* Section 35, Article VI, of the West Virginia Constitution (stating "The State of West Virginia shall never be made defendant in any court of law or equity...."); and *Clark v. Dunn*, 195 W. Va. 272, 276, 465 S.E.2d 374, 378 (1995) (noting that state actors, like state agencies are afforded sovereign immunity, whereas, political subdivisions are entitled to statutory immunity where applicable.) Common law qualified immunity on the other hand ensures that the State, state agencies, and employees of the state are immune from lawsuits so public officials can "do their jobs and to exercise judgment, wisdom, and sense without worry of being sued." *W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. at 661, 783 S.E.2d at 82. Neither qualified immunity, sovereign

immunity, nor constitutional immunity is applicable to the Petitioner as it is not the State, a state agency, or an employee of the state. *See W. Virginia Reg'l Jail & Corr. Facility Auth. V. Est. of Grove*, 244 W. Va. 273, 852 S.E.2d 773 (2020) (ruling that the first step to determine whether qualified immunity applies is “whether (1) a state agency or employee is involved.”); *see also* Pt. 10 syl. *Long v. City of Weirton*, 158 W. Va. 741, 742, 214 S.E.2d 832, 838 (1975) (abolishing qualified immunity for municipal governments.); *Ohio Valley Contractors v. The Board of Education of Wetzel County*, 170 W.Va. 240, 293 S.E.2d 437 (1982) (abolishing the common-law governmental immunity of county boards of education.); *Gooden v. County Commission of Webster County*, 171 W.Va. 130, 298 S.E.2d 103 (1982), (abolishing the governmental immunity of county commissions).

In 1986, the Tort Claims Act was enacted 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; *Randall v. Fairmont City Police Dep't*, 186 W. Va. 336, 341, 412 S.E.2d 737, 742 (1991). The Tort Claims Act affords immunity to “political subdivisions,” which includes county boards of education, like the Petitioner.⁸ Additionally, the Tort Claims Act expressly does not apply to civil claims made against the State. W. Va. Code § 29-12A-3(e) (defining “State” to “not include political subdivisions.”); *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 500, 766 S.E.2d 751, fn. 4 (2014) (stating “[t]he [Tort Claims Act] obviously however, does not apply to claims against the State.”) The Tort Claims Act governs immunity defenses for political subdivisions, including the Petitioner.⁹

⁸ Under the Tort Claims Act, a “political subdivision is defined as “any... county board of education ...” W. Va. Code § 29-12A-3(c).

⁹ There is one exception to this rule that is not applicable in this matter. Political subdivisions are entitled to qualified immunity only for civil claims brought under 42 U.S.C. § 1983. *Hutchison v. City of*

ii. The Tort Claims Act affords the Petitioner no immunity.

The Tort Claims Act “limits the liability of political subdivisions and provides immunity to political subdivisions in certain instances.” *C.C. v. Harrison Cnty. Bd. of Educ.*, 245 W. Va. 594, 600, 859 S.E.2d 762, 768 (2021) (citing W. Va. Code § 29-12A-1). For the purposes of the Tort Claims Act, a county board of education is a political subdivision. *Id.*; W. Va. Code § 29-12A-3(c). There are, however, several exceptions to a political subdivision’s immunity. This Court has recognized these broad exceptions for tort liability for “acts or omissions”. *Kent v. Sullivan*, 249 W. Va. at 901 S.E.2d at 508. The broad exceptions relevant in this action include:

(c) Subject to sections five and six of this article, *a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:*

...

(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.*

...

(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.*

...

W. Va. Code § 29-12A-4(c) (Emphasis added).

For the purposes of the Tort Claims Act, an “employee” is defined to mean:

[A]n officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is authorized to act and is acting within the scope of his or her employment for a political subdivision.

Huntington, 198 W. Va. 139, 147-48, 479 S.E.2d 649, 657-58 (1996) (stating “[p]ublic officials and local government units should be entitled to qualified immunity *from suits under § 1983, or* statutory immunity under [the Tort Claims Act], unless it is shown by specific allegations that the immunity does not apply.”) (Emphasis added); *Id.* at fn. 17 (stating “state immunity laws are not applicable to § 1983 actions.”).

“Employee” includes any elected or appointed official of a political subdivision. “Employee” does not include an independent contractor of a political subdivision.

Kent v. Sullivan, 249 W. Va. at 901 S.E.2d at 506.

The Petitioner admits that “a political subdivision can only act through its employees...” *See Brief*, Pg. 15. The Tort Claims Act does “not automatically preclude [a student who is the victim of sexual harassment]’s recovery.” *C.C. v. Harrison Cnty. Bd. of Educ.*, 245 W. Va. at 601–02, 859 S.E.2d at 769–70 (permitting negligence claims against a county board of education resulting from the sexual harassment by a high school assistant principal).

This Court recently addressed a nearly identical complaint and claimed immunity defense as exists in this matter. In *Doe v. Logan County Board of Education*, Jane Doe, a minor high school student, was sexually assaulted by a male school teacher in 2014 and 2015. The male school teacher made in appropriate comments, showed the student his genitalia, forcibly removed the student’s clothes, forced her to perform oral sex, and he even digitally penetrated her vagina. 242 W. Va. 45, 47, 829 S.E.2d 45, 47 (2019). The male teacher also threatened the student if she disclosed the abuse. *Id.* The student filed a complaint against the school board alleging that it and its employees were negligent. *Id.* The student only named the school board as a defendant and did not specifically name its negligent employees as defendants or identify what employees were negligent in the body of the complaint. The school board moved to dismiss the complaint on grounds of immunity under the Tort Claims Act. The circuit court granted the motion.

On appeal, this Court reviewed the student’s negligent supervision, negligent hiring, negligent retention, negligent training, negligent monitoring, and negligent discipline claims. The student alleged in her complaint that the school board’s “employees knew, or should have known, of [the male teacher]’s misconduct against her, but those employees failed to intervene, report the

misconduct, or take any other action. Moreover, she contends that the specifics of what the Board's employees knew, and when they knew it, require further investigation through discovery.” *Id.* at 48. This Court noted that under Rule 9(b) of the West Virginia Rules of Civil Procedure negligence may be averred generally. *Id.* at 49. This Court reversed the circuit court’s order stating that the complaint “contain[ed] some factual allegations to support aspects of the alleged negligence.” *Id.* 50. Justice Workman wrote a concurring opinion and stated “[a] central purpose of law is to protect the weak from the strong and to compensate victims for injuries caused by carelessness and neglect. Unfortunately, when confronted by child abuse in the schools, courts often fail to fashion effective remedies.” *Id.* at 51. (citing Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: a Lens for Viewing the Sexual Abuse of Students*, 2002 *BYU Educ. & L.J.* 17, 17 (2002)). This Court unanimously agreed that the circuit court’s dismissal of the student’s complaint against Logan County Board of Education was an error. The Court reversed the dismissal of the student’s complaint.

As for this case, “[a] plaintiff is not required to anticipate the defense of immunity in his complaint.” *Judy v. E. W. Virginia Cmty. & Tech. Coll.*, 246 W. Va. 483, 488, 874 S.E.2d 285, 290 (2022). A plaintiff who is sexually harassed or abused in school by a teacher or administrator is only required to aver negligence generally and does not have to either name specific negligent actors as a party to the action or specifically make allegations against them in the body of the complaint. *See. C.C. v. Harrison Cnty. Bd. of Educ.*, 245 W. Va. at 594; *Doe v. Logan County Board of Education*, 242 W. Va. 45.

The Respondent filed this action alleging that the Petitioner’s employees were negligent and that those employees’ negligence caused her severe and permanent injuries and damages. *See Sec. V.D, infra.* The employees that were negligent were acting within the course and scope of

their employment. Additionally, much of the harm that the Respondent endured during her high school career occurred on and within the grounds of the Petitioner. The Petitioner knew or should have known of the harm that the Respondent was enduring. Therefore, the Petitioner is not entitled to immunity under the Tort Claims Act. For all of the foregoing reasons, the Circuit Court's February 6, 2023, Order, App. 400-09, must be affirmed and this matter must be remanded back to the Circuit Court for further proceedings.

D. THE RESPONDENT'S AMENDED COMPLAINT IS REplete WITH ALLEGATIONS OF NEGLIGENCE AGAINST THE PETITIONER.

The Petitioner inaccurately characterizes the Respondent's allegations against the Petitioner in her Complaint. The Petitioner incorrectly contends that it is immune from the Respondent's action because Defendant Willards actions were intentional and malicious. *See Brief*, Pg. 15. Those are not the allegations contained in the Amended Complaint against the Petitioner.

The Respondent filed several viable causes of action against the Respondent grounded in negligence. “[F]or a plaintiff to prevail in a claim brought against a political subdivision under W. Va. Code § 29-12A-4(c), the plaintiff ... must prove the elements of negligence.” *Wheeling Park Comm’ v. Dattoli*, 237 W.Va. 275, 281, 787 S.E.2d 546, 552 (2016). “Negligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstance of time, place, manner, or person.” Syl. Pt. 3, *Jones v. Logan Cnty. Bd. of Educ.*, 247 W. Va. 463, 881 S.E.2d 374, 376 (2022) (concluding that Logan County Board of Education was not immune to a negligence claim from a former student who was severely bullied by his classmates.) The basic elements of negligence are: 1) a legal duty owed to the complaining party, 2) a breach of that legal duty, 3) the breach of that duty caused an injury to the complaining party, and 4) the injured party suffered damage. In a lawsuit alleging negligence, it is incumbent upon the plaintiff to plead and prove that “the defendant owed the plaintiff some duty of care; that

by some act or omission the defendant breached that duty; and that the act or omission proximately caused some injury to the plaintiff that is compensable by damages.” *C.C. v. Harrison Cnty. Bd. of Educ.*, 245 W. Va. at 603, 859 S.E.2d at 771. Under Rule 9 of the West Virginia Rules of Civil Procedure, a plaintiff is permitted to aver negligence generally. W. Va. R. Civ. P. 9(b) (stating “Negligence may also be averred generally.”)

The Respondent, consistent with West Virginia jurisprudence, has alleged numerous counts of negligence against the Petitioner. In Counts 9 through 12 of her Amended Complaint¹⁰, the Respondent alleged that the Petitioner, acting by and through its employees and agents, was negligent. Regarding the Petitioner’s negligent hiring of Defendant Willard, the Respondent alleged that the Petitioner “neglected to conduct a reasonable investigation into Defendant Willard prior to his initial employment that would have made board aware of any prior misconduct by assistant principal.... In the alternative, if [Petitioner] did conduct an investigation into Defendant Willard’s background contemporaneously with his hiring, then the results of the said investigation and the facts obtained by [Petitioner] through that investigation would have lead a reasonable school district in [Petitioner]’s position to reasonably know, or should have known, that Defendant Willard was unfit to serve as a teacher within the Logan County School District.” (*Am. Compl.*, ¶¶ 219-220); *See C.C. v. Harrison Cnty. Bd. of Educ.*, 245 W. Va. at 605, 859 S.E.2d at 773 (affirming the dismissal of a negligent hiring claim where the plaintiff failed to allege that a school board neglected to conduct a reasonable investigation prior to the initial employment of an administrator which would have made the school board aware of prior misconduct.)

¹⁰ In the Amended Complaint, the Respondent asserted a claim for negligent hiring, Count 9, negligent retention, Count 10, negligent supervision, Count 11, and negligence *per se*, Count 12, against the Petitioner.

Regarding the Respondent's allegations of negligent retention, the facts plead in the Amended Complaint show that Defendant Willard's sexually abusive behavior was so severe and pervasive, lasting for years and occurring in classrooms, at band camp, on band trips, and during sporting events, that no reasonable administrator of Logan high School could have failed to notice his conduct. (*Am. Compl.*, ¶¶ 223-224). A minor who is a sexual assault victim in high school at the hands of his or her own teachers is not required to specifically allege the names and identities of exactly who knew what was happening and when it happened. *Doe v. Logan Cnty. Bd. of Educ.*, 242 W. Va. at 50, 829 S.E.2d at 50 (reversing the dismissal of a complaint and stating that a minor high school student "may not have known the names or the jobs of the people who observed the interactions.") Similarly, the Petitioner negligently supervised its employees, including Defendant Willard and others, to ensure that no teacher, band director, or administrator was sexually abusing high school students at Logan High School. (*Am. Compl.*, ¶¶ 227-228). Finally, the Petitioner is negligent *per se* for aiding, abetting, and, concealing Defendant Willard's criminal wrongdoings under W. Va. Code §§ 61-8D-5; 61-8B-7(a); 61-8D-5. (*Am. Compl.*, ¶ 232). Additionally, the Petitioner is negligent *per se* for violating W. Va. Code § 18-2-1, *et seq.* (*Am. Compl.*, ¶ 232¹¹). The Petitioner is on notice of the Respondent's claims of negligence as stated in her Amended Complaint. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (noting that "[c]omplaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure.") The Respondent's Amended Complaint states several causes of action for negligence upon which relief can be granted.

¹¹ The "*et seq.*" was inadvertently omitted from Paragraph 232 of the Amended Complaint.

Therefore, the Tort Claims Act neither affords any immunity to the Petitioner nor does it preclude the Respondent's action against it. For all of the foregoing reasons, the Circuit Court's February 6, 2023, Order, App. 400-09, must be affirmed and this matter must be remanded back to the Circuit Court for further proceedings.

E. THE RESPONDENT'S PERSONAL ACTION FOR DAMAGES RESULTING FROM SEXUAL ASSAULT AND SEXUAL ABUSE WAS TIMELY FILED AS THE PETITIONER AIDED, ABETTED, AND CONCEALED THE SEXUAL ABUSE AND ASSAULT OF THE RESPONDENT.

i. The Respondent's personal action for damages resulting from sexual assault and sexual abuse is not barred by the statute of limitations.

As a general rule, civil actions filed in West Virginia are governed by a two-year statute of limitations, unless a "limitation is otherwise prescribed." W. Va. Code § 55-2-12. The West Virginia legislature, however, recently amended the statute of limitations for minors who are the victims of sexual assault or sexual abuse. The applicable statute of limitations in this matter is W. Va. Code § 55-2-15. Section 55-2-15 provides:

(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.

(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.

W. Va. Code § 55-2-15(a), (c) (Emphasis added).

This amended statute of limitations became effective on June 1, 2020. The amended statute of limitations gives victims of childhood sexual assault and sexual abuse until they reach the age of 36 to file a personal action¹² for damages. The Respondent filed her Complaint and Amended Complaint before she reached the age of 36. As such, her action was timely.

Contrary to the Petitioner's arguments, W. Va. Code § 55-2-15(b) does not apply to this matter because the Respondent has brought this personal action under Section (a), not Section (b), as she was a minor when she was sexual abused and sexual assaulted by Defendant Willard. *See Brief*, Pg. 23-24. West Virginia Code § 55-2-15(a) specifically applies to actions brought by individuals like the Respondent in this matter. West Virginia Code § 55-2-15(b) applies to "any personal action other than an action described in subsection (a)."

On Page 24 of its *Brief*, the Petitioner argued that W. Va. Code § 55-2-15(a) does not apply to it because (1) it "can only be liable for the negligence of its employees under the Tort Claims Act" and (2) the Petitioner "cannot be liable for aiding, abetting, or concealing sexual abuse or sexual abuse because the [Petitioner] can only be liable for negligence." *Brief*, Pg. 24. First, under the Tort Claims Act, the Petitioner is responsible for the negligent acts or omissions that both it made and is liable for the negligent acts or omissions that its employees, including any negligent teacher or administrator. *See Sec.V.C-D, supra*. Such liability exists regardless of the degree of culpability of Defendant Willard's conduct, whether it be intentional, criminal, negligent or otherwise.

¹² Section 55-2-15(a) applies to "[a] *personal action* for damages resulting from sexual assault or sexual abuse." An "action" is defined "[a] civil or criminal judicial proceeding." ACTION, Black's Law Dictionary (11th ed. 2019). Within the definition of "action" lies the Black's Law Dictionary term of "personal action;" which is "[a]n action brought to recover debts, personal property, or damages arising from any cause." *Id.*

Second, Petitioner’s liability is not limited to only instances where it “aided, abetted, or concealed sexual assault or abuse.” West Virginia Code § 55-2-15(a) permits a personal action against the perpetrator of the act as well as the person(s) or entity(ies) that “aided, abetted, or concealed the sexual assault or sexual abuse.” The code does not define what a “perpetrator of the sexual assault or abuse” means, nor does it define what “aided, abetted, or concealed sexual assault or abuse” means either. The Petitioner contends that the terms “aid and abet” mean “to assist *or facilitate* the commission of a crime, or to promote its accomplishment.” *See Brief*, Pg. 24 (Emphasis added).

The factual circumstances in this case concerning the repeated sexual abuse and sexual assault of the Respondent is analogous to the sexual abuse committed by Dr. Richard Strauss, the physician for the Ohio State University (hereinafter referred to as “OSU”). *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686 (6th Cir. 2022), cert. denied sub nom. *The Ohio State Univ. v. Steve Snyder-Hill*, 143 S. Ct. 2659, 216 L. Ed. 2d 1237 (2023). From 1978 through 1996, Strauss worked for OSU. For much of that time, he served as the school’s team physician. In July of 2018 and June of 2021, 110 men, in two separate cases, sued OSU for the sexual abuse perpetrated by Strauss. Those plaintiffs allege that Strauss abused them from 1979 through 2000. *Id.* at 691. During his employment, Strauss “regularly abused male students during medical examinations, committing at least 1,429 sexual assaults, and 47 rapes. He groped and fondled students’ genitalia; performed unnecessary rectal examinations and digitally penetrated students’ anuses; pressed his erect penis against students’ bodies; drugged and anally raped students; masturbated during or after the exams; and engaged in other sexually abusive behavior.” *Id.* at 690-91 (Internal quotations omitted). While some of the abuse occurred in private examination rooms, other abuse occurred in front of other students and other adults. *Id.* at 696.

Regarding the allegations against OSU, the 110 male plaintiffs alleged that OSU knew of the abuse, facilitated the abuse, and covered up Strauss's wrongdoing. *Id.* at 691. The allegations against OSU also included that it "[hid] what it knew, falsif[ied] evaluations, and destroy[ed] records." *Id.* at 695. The plaintiffs alleged that they did not know they were abused by Strauss until 2018 when OSU publicized its investigations into Strauss. *Id.* at 716 (J. Guy dissenting). The District Court granted OSU's motion to dismiss and dismissed the plaintiffs' cases. On appeal, the Sixth Circuit Court of Appeals reversed the dismissal and held that it was a question of fact as to when the plaintiffs' claim accrues. The Court stated that "a claim accrues when a plaintiff knows or has reason to know that the defendant injured them: in other words, they must discover both their injury and its cause." *Id.* at 701. The Court concluded that the victims of the sexual abuse and assaults stated claims upon which relief could be granted because OSU, among other things, knew of and facilitated the sexual assaults and abuse for years.

The same rationale is applicable here. A West Virginia county board of education can facilitate the sexual abuse and sexual assault of a minor student, and/or can conceal the sexual abuse and assault of that student. For the purposes of W. Va. Code § 55-2-15(a), the Petitioner is considered to be an aider, abettor, and, possibly, a concealer of the sexual abuse and sexual assault of the Respondent. Section 55-2-15(a) permits a personal action against the perpetrator of the act as well as the person(s) or entity(ies) that "aided, abetted, or concealed the sexual assault or sexual abuse." Therefore, the Respondent's action for damages resulting from sexual abuse and sexual assault is governed by the applicable statute of limitations found in W. Va. Code § 55-2-15(a).

F. WEST VIRGINIA CODE SECTION 55-2-15(a) IS CONSTITUTIONAL AS THE PETITIONER HAS NO CONSTITUTIONALLY PROTECTED VESTED PROPERTY RIGHT AND RATIONAL BASIS SCRUTINY APPLIES

The Petitioner argued that W. Va. Code § 55-2-15(a) is unconstitutional for violating its substantive due process rights as it “strip[s] th[e] Respondent of a vested right to repose.” *See Brief*, Pg. 25-31. This Court has long held that the party challenging the constitutionality of a statute has a high burden. This Court stated that:

When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment. Point 3, Syllabus, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967). Syllabus Point 1, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (1969).

Syl. pt. 1, *U.S. Steel Mining Co., LLC v. Helton*, 219 W.Va. 1, 631 S.E.2d 559 (2005), *cert. denied*, 547 U.S. 1179, 126 S.Ct. 2355, 165 L.Ed.2d 279 (2006).

Furthermore “a facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully. The challenger must establish that *no set of circumstances exists under which the legislation would be valid*; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 726, 414 S.E.2d 877, 883 (1991) (Emphasis added).

The West Virginia State Constitution affords its citizens the right that “No person shall be deprived of life, liberty, or property, without due process of law . . .” W. Va. Const. art. 3, s 10. This Court has stated “In order for a statute to withstand constitutional scrutiny under the substantive due process standard, it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary

or discriminatory.” *Thorne v. Roush*, 164 W. Va. 165, 168, 261 S.E.2d 72, 74 (1979) (citing *State ex rel. Harris v. Calendine*, W.Va., 233 S.E.2d 318 (1977)). This is what is known as the rational basis test for constitutional scrutiny. “To survive under that standard, a state law need only be rationally related to legitimate government interests.” *Washington v. Glucksberg*, 521 U. S. 702, 728, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

The Petitioner’s argument regarding the constitutionality of W. Va. Code § 55-2-15 is directly in conflict with binding and controlling law from the Supreme Court of the United States and this Court. It is well established that the West Virginia Legislature is permitted to extend the time period for a statute of limitations for lawsuits for civil damages, even if it removes a defense to an action that would have otherwise been barred by the statute of limitations. The leading case on this issue is *Campbell v. Holt*, 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885). In that case, the Supreme Court of the United States held that the repeal of a statute of limitations for an action on contract was valid under the Constitution. In so holding, the Court stated:

It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the fourteenth amendment. It is to be observed that the words ‘vested right’ are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution. We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy,-are arbitrary enactments by the law-making power. Tioga R. R. v. Blossburg & C. R. R., 20 Wall. 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from

that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.

...

We are unable to see how a man can be said to have property in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the use of the word 'property' to choses in action, to incorporeal rights, it is new to call the defense of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law. We can understand a right to enforce the payment of a lawful debt. The constitution says that no state shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law because its effect is to make him fulfill his honest obligations.

Id. at 628-29. (Emphasis added).

Campbell v. Holt is the commanding case that clearly illustrates that a state legislature may eliminate a statute of limitation on an action for contract and that the retroactive application of the change in law to an action that would have been barred but for the change in the limitations period is perfectly constitutional as the defendant has no “vested right,” or even a “property right,” in a statute of limitations defense. The United States Supreme Court, and other courts across the nation, follow *Campbell*. In *Chase Securities Corp v. Donaldson*, the Supreme Court of the United States analyzed whether a new Minnesota law amending a statute of limitation for certain tort claims that “had the effect of lifting any pre-existing bar of the general limitation statute...” 325 U.S. 304, 309, 65 S. Ct. 1137, 1140, 89 L. Ed. 1628 (1945). The Court affirmed and followed its prior precedent. The Court in *Chase Securities Corp* concluded:

The essential holding in *Campbell v. Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is

taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.

Chase Sec. Corp. v. Donaldson, 325 U.S. at 315–16, 65 S. Ct. at 1143.

Recently, in 2015, the Supreme Court of Connecticut examined its own statute of limitations regarding child victims of sexual abuse. *Doe v. Hartford Roman Cath. Diocesan Corp.*, 317 Conn. 357, 428, 119 A.3d 462, 509 (2015). In *Doe*, a minor referred to as Jacob Doe, was sexually abused by a drunkard Roman Catholic priest, Ivan Ferguson, from 1981 through 1983. Jacob Doe sued the Hartford Roman Catholic Diocesan Corp. alleging that it acted negligently and recklessly in permitting the sexual abuse of a minor. The complaint alleged negligent assignment and supervision of Ivan Ferguson. *Doe v. Hartford Roman Cath. Diocesan Corp.*, 317 Conn. at 368, 119 A.3d at 475. The jury returned a verdict in favor of the victim.

Much like the case *sub judice*, the case of *Doe v. Hartford Roman Cath. Diocesan Corp.* involved the state legislature’s decision to amend a statute of limitations and provide minors who are the victims of sexual abuse longer time periods to assert a civil action. In 1986, the Connecticut Legislature first enacted the applicable statute of limitations, General Statutes Section 52-577. The original version of the statute of limitations read that “ no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than two years from the date such person attains the age of majority, except that no such action may be brought more than seven years from the date of the act complained of.” *Id.* at fn. 37. In 1991, the Connecticut Legislature amended Section

52-577 to “extended the two year limitations period to seventeen years and struck the seven year repose period.” *Id.* The amended statute applied retroactively. Additionally, in 2002, “the legislature amended [Section] 52–577d [from] the seventeen year limitations period to thirty years... The legislature explicitly stated that the 2002 amendment was ‘effective from passage and applicable to any cause of action arising from an incident committed prior to, on or after said date....’” *Id.*

The Hartford Roman Catholic Diocesan Corp. challenged the constitutionality of Section 52-577d and claimed that the legislature violated its substantive due process rights. On appeal, the Supreme Court of Connecticut thoroughly and methodically analyzed the constitutional question of whether the amendment of a statute of limitations that extends the time period to file a tort claim is unconstitutional as violative of the due process clause. On appeal, the Court stated:

The courts of the forty-four states that have considered the issue presented in this appeal take divergent approaches to whether an extended statute of limitations may constitutionally be applied retroactively to revive otherwise time barred claims. Because of the sheer volume of case law addressing this issue, this [*State v.*] *Geisler*[, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992)] factor in particular calls for a more rigorous analysis than simply tallying holdings, but rather, requires us to determine which sister state courts' approaches provide a genuinely persuasive framework for resolving this state constitutional question. See, e.g., *Kerrigan v. Commissioner of Public Health*, supra, 289 Conn. at 240–41, 957 A.2d 407; see also *id.*, at 246, 957 A.2d 407 (“[a]lthough the decision of the California Supreme Court and the dissenting opinion of Chief Judge Kaye reflect the minority position, we believe that they nevertheless represent the most persuasive sister state precedent”). Although both parties can claim support from the sister state factor, we conclude that the more persuasive cases ultimately favor the position of the plaintiff.

The courts of eighteen states follow the federal approach embodied in *Campbell v. Holt*, [] and *Chase Securities Corp. v. Donaldson*, [] and allow the retroactive expansion of the statute of limitations to revive otherwise time-lapsed claims—seemingly without limitation.

Of those states, three, namely, Iowa, **West Virginia**¹³, and New Mexico, do not squarely ground their decisions in any particular state or federal constitutional provision. One, Georgia, grounds its leading decision, *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 105, 317 S.E.2d 189 (1984), in an interpretation of that state's constitutional provision prohibiting retroactive legislation.⁵⁰ Finally, fourteen states, namely, Arizona, California, Delaware, Hawaii, Idaho, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Dakota, Washington, and Wyoming, hold that the retroactive expansion of the statute of limitations to revive time barred claims is not a violation of a defendant's substantive due process rights because there is no vested right to a statute of limitations defense as a matter of state constitutional law. See *Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431, 440, 641 P.2d 1275 (1982); *20th Century Ins. Co. v. Superior Court*, 90 Cal.App.4th 1247, 1263–64, 109 Cal.Rptr.2d 611 (2001), *cert. denied*, 535 U.S. 1033, 122 S.Ct. 1788, 152 L.Ed.2d 648 (2002); *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1258–59 (Del.2011); *Roe v. Doe*, 59 Haw. 259, 263, 268–69, 581 P.2d 310 (1978); *Peterson v. Peterson*, 156 Idaho 85, 91, 320 P.3d 1244 (2014); *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 668–69, 831 P.2d 958 (1992); *Boston v. Keene Corp.*, 406 Mass. 301, 312–13, 547 N.E.2d 328 (1989); *Pryber v. Marriott Corp.*, 98 Mich.App. 50, 56–57, 296 N.W.2d 597 (1980), *aff'd*, 411 Mich. 887, 307 N.W.2d 333 (1981) (per curiam); *In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 830–31 (Minn.2011); *Cosgriffe v. Cosgriffe*, 262 Mont. 175, 180, 864 P.2d 776 (1993); *Panzino v. Continental Can Co.*, 71 N.J. 298, 304–305, 364 A.2d 1043 (1976); *In re Interest of W.M.V.*, 268 N.W.2d 781, 786 (N.D.1978); *Lane v. Dept. of Labor & Industries*, 21 Wash.2d 420, 426, 151 P.2d 440 (1944); *Vigil v. Tafoya*, 600 P.2d 721, 724–25 (Wyo.1979).

In contrast, the courts of twenty-four¹⁴ states support the position that legislation that retroactively amends a statute of limitations in a way that revives time barred claims is *per se* invalid. Of those states, seven, namely, Alabama, Colorado, Missouri, New Hampshire, Oklahoma, Tennessee, and Texas, ground their holdings in independent state constitutional provisions prohibiting retroactive legislation. One, Vermont, grounds that holding in a state statute prohibiting retroactive legislation. Five, namely, Indiana, Kentucky, Maine, Oregon, and Pennsylvania, do not cite a source for the vested

¹³ In *Doe*, the Court cites to *Pnakovich v. SWCC*, 163 W.Va. 583, 589–91, 259 S.E.2d 127 (1979) when it states that West Virginia is one of the sister states that follows the opinions of *Campbell* and *Chase Securities Corp.*

¹⁴ In the Petitioner's *Brief*, it relies on the exact same twenty-four states as the Court in *Doe v. Hartford Roman Cath. Diocesan Corp.* addressed.

right or otherwise perform a constitutional analysis in support of this holding. This leaves eleven states, Arkansas, Florida, Illinois, Louisiana, Nebraska, North Carolina, Rhode Island, South Carolina, South Dakota, Utah, and Virginia, which have rejected the United States Supreme Court's approach to this issue in *Campbell v. Holt*, [], and *Chase Securities Corp. v. Donaldson*, [], and held, as a matter of state constitutional law, that the retroactive expansion of the statute of limitations, which revives an otherwise time-lapsed claim, is an incursion on a vested property right that amounts to a *per se* violation of substantive due process. See *Johnson v. Lilly*, 308 Ark. 201, 203–204, 823 S.W.2d 883 (1992); *Wiley v. Roof*, 641 So.2d 66, 68–69 (Fla.1994); *Doe A. v. Diocese of Dallas*, 234 Ill.2d 393, 409, 334 Ill.Dec. 649, 917 N.E.2d 475 (2009); *Henry v. SBA Shipyard, Inc.*, 24 So.3d 956, 960–61 (La.App.2009) (en banc), writ denied, 27 So.3d 853 (La.2010); *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 571–72, 466 N.W.2d 771 (1991); *Colony Hill Condominium Assn. v. Colony Co.*, 70 N.C.App. 390, 394, 320 S.E.2d 273 (1984); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I.1996); *Doe v. Crooks*, 364 S.C. 349, 351–52, 613 S.E.2d 536 (2005); *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 370 (S.D.1993); *Roark v. Crabtree*, 893 P.2d 1058, 1062–63 (Utah 1995); *Starnes v. Cayouette*, 244 Va. 202, 212, 419 S.E.2d 669 (1992).[¹⁵]

Finally, the courts of Wisconsin and New York navigate between the poles of the broadly permissive federal approach embodied in *Campbell v. Holt*, [] and *Chase Securities Corp. v. Donaldson*, [] and the absolute bar analysis followed by those state courts that have rejected the Supreme Court's reasoning in those cases. The New York Court of Appeals has held that the legislature “may constitutionally revive a personal cause of action” if it reasonably determines that “the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the [l]egislature were not effectuated.” *Gallewski v. Hentz & Co.*, 301 N.Y. 164, 174–75, 93 N.E.2d 620 (1950). The Wisconsin Supreme Court recognizes that there is a vested right in the lapse of statutes of limitations, but nevertheless has utilized the rational basis standard to analyze the constitutionality of a revival statute amending the workers' compensation statute of limitations by balancing (1) “the private interests overturned by this retroactive legislation, including any

¹⁵ The Petitioner cites to all of these exact same cases in footnotes 24 through 33 of its *Brief*. The sole exception is Virginia, footnote 34. In its *Brief*, it cites *Bailey v. Ethicon, Inc.*, No. 7:20-CV-622, *not reported in Fed. Supp.*, but available at 2021 WL 2345357 (W.D. Va. June 8, 2021). In *Bailey*, the court affirmed the dismissal of tort claims based on *Starnes v. Cayouette*, 244 Va. 202, 212, 419 S.E.2d 669 (1992). In 2018, however, the Supreme Court of Virginia overturned *Starnes* in *Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 151, 818 S.E.2d 779, 780 (2018). *Bailey v. Ethicon, Inc.* is no longer good law.

unfairness inherent in its application”; and (2) “the public interest served by retroactive application” of the statutes at issue. *Society Ins. v. Labor & Industry Review Commission*, 326 Wis.2d 444, 472–76, 786 N.W.2d 385 (2010); cf. *In re Individual 35W Bridge Litigation*, supra, 806 N.W.2d at 833 (recognizing constitutionally protected property right in statute of repose, but applying rational basis review to uphold revival statute authorizing state to seek indemnity from third parties for compensation it had paid to victims of major bridge collapse because “protectable property right” is “not absolute and must be balanced against the [s]tate's legitimate interest in addressing ... a ‘catastrophe of historic proportions’ ”).

Although both parties can claim some support from the sister state case law factor, we conclude that, on balance, it ultimately favors the position of the plaintiff. The decisions that follow the federal approach embodied in *Campbell v. Holt*, [] and *Chase Securities Corp. v. Donaldson*, [] are most consistent with our own body of case law in this area; ... and our constitutional history.

Doe v. Hartford Roman Cath. Diocesan Corp., 317 Conn. at 426–35, 119 A.3d at 508–14.

As noted above, part of the Supreme Court of Connecticut’s decision in affirming its own amended statute of limitations was this Court’s own prior precedent in *Pnakovich v. SWCC*, 163 W.Va. 583, 259 S.E.2d 127 (1979).¹⁶ In *Pnakovich*, this Court addressed “whether a claimant qualifies for a twenty week award for occupational pneumoconiosis without measurable pulmonary impairment under W. Va. Code, 23-4-6a when the date of injury (date of last exposure) predated the effective date of the amended statute.” *Id.*, 163 W. Va. at 584, 259 S.E.2d at 127. This Court concluded that the amendment of the relevant statute of limitations to provide for a greater time period to claim benefits for certain workers’ compensation claims did not deny any vested right. *Id.*, 163 W. Va. at 590, 259 S.E.2d at 131 (relying on *Campbell v. Holt*, 115 U.S. 620)

The West Virginia Legislature was free to amend the statute of limitations for personal actions for damages resulting from minors were sexually assaulted or sexually abused. In 2020, our Legislature amended that statute of limitations and permitted victims to file civil actions within

¹⁶ The Petitioner did not cite to or address this opinion in its *Brief*.

18 years after reaching the age of majority. W. Va. Code § 55-2-15(a). That amendment applied to claims previously expired.¹⁷ That law is only reviewed under the rational basis test. Under the Supreme Court of the United State’s precedent, this Court’s own *stare decisis*, and the West Virginia State Constitution, the Legislature was permitted to increase the Respondent’s applicable statute of limitations without running afoul of any constitutional right or denying any recognized vested property right of the Petitioner. For all of the foregoing reasons, the Circuit Court’s February 6, 2023, Order, App. 400-09, must be affirmed and this matter must be remanded back to the Circuit Court for further proceedings.

G. THE PETITIONER IS NOT ENTITLED TO A WRIT OF PROHIBITION AND ITS PRAYER MUST BE REFUSED BY THIS COURT.

On Pages 31 through 32 of the *Brief*, the Petitioner requests that this Court issue a Writ of Prohibition against the Circuit Court because, according to the Petitioner, the Respondent’s claims are barred by the statute of limitations. A Writ of Prohibition is not freely given as a matter of course. “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1.” Syl Pt. 1, *State ex rel. W. Virginia Reg’l Jail Auth. v. Webster*, 242 W. Va. 543, 836 S.E.2d 510, 512 (2019) (citing Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)).

The Petitioner is not entitled to a Writ of Prohibition as its arguments have no merit. The Circuit Court did not rule that the Petitioner is not entitled to immunity. Rather, it ruled that it failed to timely raise immunity in a motion to dismiss. The Petitioner has other viable avenues to assert immunity claims. There is no prejudice to the Petitioner as, as a matter of law, the Petitioner

¹⁷ 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.” W.Va. Code § 55-2-15(c).

is not entitled to immunity under the Tort Claims Act and the relevant statute of limitations is constitutional. Additionally, the Circuit Court judge in this matter made no ruling that was clearly erroneous as a matter of law and its ruling was consistent with both procedural and substantive law of this State. Finally, while the issues raised in this appeal are important, no issue is an issue of first impression. West Virginia law is well settled concerning immunity under the Tort Claims Act and the constitutionality of statute of limitations. For all of the foregoing reasons, this Court must deny the Petitioner's request for a Writ of Prohibition.

VI. CONCLUSION

The Respondent filed a civil action for damages resulting from years of repeated sexual abuse and sexual assault she received from Defendant Willard during her high school career. She advanced numerous claims against the Petitioner, a county board of education, grounded in negligence. The Petitioner failed to raise its arguments concerning immunity and the constitutionality of the applicable statute of limitations. The Petitioner, as a political subdivision under the Tort Claims Act, is not entitled to immunity from the Respondent's claims. Further, West Virginia law and controlling case law from the Supreme Court of the United States permits state legislatures to amend statute of limitations and increase the deadline for filing civil tort claims. For all of the foregoing reasons, the Circuit Court's February 6, 2023, Order, App. 400-09, must be affirmed and this matter must be remanded back to the Circuit Court for further proceedings.

**ELIZABETH VESTAL
BY COUNSEL**

/s/ Teresa C. Toriseva

Teresa C. Toriseva, Esq. #6947

Joshua D. Miller, Esq. #12439

Andrew A. Carpenter, Esq. # 14542

TORISEVA LAW

1446 National Road
Wheeling, WV 26003
Telephone: 304-238-0066
Facsimile: 304-238-0149
justice@torisevalaw.com

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Respondent's Brief was served to the individual listed below via electronic mail on this 5th day of September 2024:

Duane J. Ruggier, II, Esq.
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
James Mark Building
901 Quarrier Street
Charleston, WV 25301
(*Counsel for Petitioner*)

Honorable Kelly Codispoti
Logan County Courthouse
300 Stratton Street
Logan, WV 25601

/s/ Teresa C. Toriseva
Teresa C. Toriseva, Esq. #6947
Joshua D. Miller, Esq. #12439
Andrew A. Carpenter, Esq. # 14542
TORISEVA LAW
1446 National Road
Wheeling, WV 26003
Telephone: 304-238-0066
Facsimile: 304-238-0149
justice@torisevalaw.com