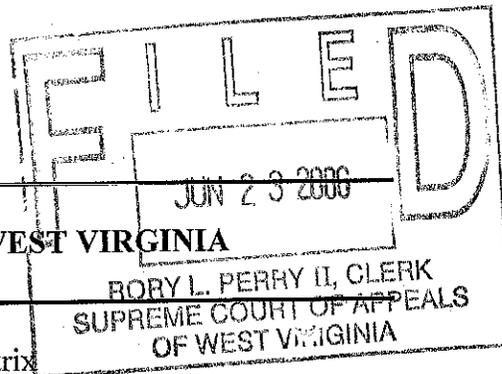


No. 33038



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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SUSAN M. JACKSON, Administratrix  
of the Estate of Timothy J. Jackson,

*Appellant and  
Plaintiff below,*

v.

THE PUTNAM COUNTY BOARD OF EDUCATION,

*Appellee and  
Defendant below.*

From Putnam County Circuit Court  
No. 03-C-310

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**APPELLEE'S BRIEF**

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THE PUTNAM COUNTY BOARD OF EDUCATION,

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From Putnam County Circuit Court  
No. 03-C-310

---

**APPELLEE'S BRIEF**

---

TO: THE HONORABLE JUSTICES OF THE SUPREME  
COURT OF APPEALS OF WEST VIRGINIA

Appellee and Defendant below, The Putnam County Board of Education, by counsel, Stephen M. Fowler, Julie M. Meeks, Travis A. Griffith, and the law firm of Pullin, Fowler & Flanagan, PLLC, respectfully represent unto this Court that the Circuit Court of Putnam County, West Virginia, ruled appropriately and lawfully, and committed no reversible error in the underlying action by granting summary judgment for the claims filed against Defendant.

## **I. The Kind of Proceedings and Nature of the Rulings in the Lower Tribunal**

Susan M. Jackson (hereinafter referred to as “appellant”), Administratrix of the Estate of Timothy J. Jackson (hereinafter referred to as “decedent”), is seeking a review of an order entered in the Circuit Court of Putnam County granting the Putnam County Board of Education (hereinafter referred to as “appellee”) summary judgment in a wrongful death action. The decedent, her son, was killed in a single vehicle accident on September 30, 2001 while a passenger, with his father’s, Larry Jackson’s, knowledge and permission, in a vehicle driven by classmate Brian Ramsburg (hereinafter referred to as “Ramsburg”).

At the time of the accident, the decedent and Ramsburg were returning home after being dismissed from the Winfield High School show choir retreat. As a result, appellant is seeking to hold the appellee, Putnam County Board of Education, liable for the death of her son.

After the accident, the appellant filed a civil action against the appellee asserting that it had a duty to provide the decedent transportation to the retreat, that it breached this duty and thereby proximately caused the decedent’s death.

## **II. Statement of Facts**

Timothy Jackson, Appellee’s decedent, was killed while riding as a passenger in a vehicle operated by Brian Ramsburg, an eighteen year-old licensed to drive by the State of West Virginia. *Record at 126-27*. The deceased had Larry Jackson’s parental permission to ride with Ramsburg at the time of the accident. *Record at 115-16*. At all relevant times Larry and Susan Jackson had the right to exercise their parental duties, rights and obligations as to their son. *Record at 600*.

At the time of the accident, the decedent had been a member of the Winfield High School show choir (hereinafter referred to as “choir”) for three years. *Record at 108*. Choir is an

elective cocurricular class which takes precedence over extra-curricular activities such as sports and cheerleading. *Record at 158.* By agreement posted at the end of the choir's manual, the student electing to enroll in choir and his or her parent(s) makes a year long commitment and agrees to abide by the choir's handbook of policies and procedures. *Id.*

The choir's handbook of policies and procedures contained a detailed review of the choir's expectation for the student during the course of the academic year. *Record at 151-184.* Specifically, the manual details that students must participate in rehearsals as scheduled and the student is graded on attendance and participation. *Record at 157-60.* Furthermore, the manual explains that:

Upon notarization of the Health and Insurance Form, the member's parents agree to indemnify the Director, appointed Chaperones, Appointed health care officials, Winfield High School, its administration, Putnam County Schools and its administration from any liability resulting from illness or injury, and/or any attempt to provide immediate care of said illness or injury.

*Record at 177.* The manual informed choir members and their parents that Winfield High School will not always provide transportation. The manual further elaborates that, in the event it does not provide transportation, the choir, the director's and the school's liability is limited to the period from the member's arrival at the event site to the time he or she is dismissed. *Record at 178.* Additionally, the manual explains that "the child's safety is of the utmost importance, and parents should exercise their wisdom, good judgment and discretion when planning travel arrangements." *Id.* At the time of the accident which gives rise to the underlying action, Larry Jackson was responsible for the decedent. *Record at 115-16.* Furthermore, Larry Jackson signed an additional release agreeing to abide by the terms and conditions contained within the choir's handbook of policies and procedures while his child was enrolled in the show choir class. *Record at 186.*

On September 28, 2001, Ramsburg picked the decedent up at Larry Jackson's house to travel to the retreat. *Record at 115*. At that time, Larry Jackson signed the choir's permission slip assenting to the terms and conditions of his child's membership in choir and the release agreeing to abide by the terms and conditions within the show choir's handbook of policies and procedures.<sup>1</sup> *Id.* Larry Jackson then permitted the decedent to ride with Ramsburg. *Record at 115-116*

The students were dismissed at approximately 6:00 p.m. on Sunday, September 30, 2001. *Record at 193*. Once the students were dismissed, Jeffrey Haught, the choir director, ceased supervising them. *Record at 178; 197*. After being dismissed, the decedent again rode with Ramsburg. While returning home Ramsburg was traveling at an excessive speed, left the roadway and was involved in a single vehicle accident. *Record at 210-13; 227; 248-51*. The decedent, who was an unrestrained passenger, was ejected from the vehicle and killed. *Record at 248*.

After the subject motor vehicle accident, Appellant, as Administratrix of the Estate, settled claims against Brian Ramsburg's insurance carrier, her own underinsurance carrier, and the underinsurance carrier for Larry Jackson. *Record at 589-90*. The Estate received \$100,000 pursuant to the liability policy of Richard L. Ramsburg, \$250,000 pursuant to the underinsurance coverage of Susan M. Jackson, and \$100,000 pursuant to the underinsurance coverage of Larry J. Jackson. *Id.* This settlement was approved by the Honorable Irene C. Berger in the Circuit Court of Kanawha County on January 24, 2002. *Record at 590*.

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<sup>1</sup> Petitioner has expressed the fact that the Health and Insurance Form signed by Larry Jackson is not notarized. The purpose of notarizing documents is to verify that the signature on the document is, in fact, the signature of the named individual. This is a moot point as Larry Jackson testified that the signature on the release is his. *Record at 115*.

Thereafter, Appellant filed the underlying wrongful death civil action asserting that the Appellee failed to provide safe transportation to students attending Appellee approved, mandatory, extracurricular activities in violation of West Virginia Code §18-5-13(6)(a). *Record at 1-3*. Additionally, Appellant asserted that the Board breached its duty to ensure that its policies were implemented and followed without exception and that its breach proximately caused the decedent's death.<sup>2</sup>

Both Appellant and Appellee had an ample opportunity to conduct discovery and the facts of the case became well developed. Depositions of all key witnesses were taken and both parties had an opportunity to perfect the record below. After discovery concluded, Appellee moved for Summary Judgment demonstrating that no genuine issue of material fact existed that would clarify the application of the law to this case. *Record at 85-215*. Specifically, the Appellee asserted that, as a matter of law, West Virginia Code §18-5-13(6)(a) does not create a duty to provide transportation to and from the retreat; that choir is not an extracurricular activity; that students are permitted to provide their own transportation to and from school; and, that, at the time of the accident, the decedent was not under the Appellee's supervision. *Id.* Furthermore, the Appellee argued that it was not liable as a matter of law as its negligence, if any, was not the proximate cause of the decedent's death. Finally, the Appellee demonstrated that, even if it were negligent, Ramsburg's negligent operation of his vehicle on September 30, 2001 was an intervening/superseding cause which broke the chain of causation.

### **III. Standard of Review**

Petitioner has erroneously asserted that this Court must apply two separate standards of review to the questions presented in this case citing this Court's opinion in *Miller v. Whitworth*,

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<sup>2</sup> Ramsburg was not a party in the underlying action, although at the time of the court's ruling of summary judgment, Appellee's motion to amend its answer and file a third-party complaint was pending.

193 W.Va. 262, 455 S.E.2d 821 (1995). See Appellant's Brief, pp. 8-9. On the contrary, the "... circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, the Court applies the same standard utilized in the circuit court. This Court has held that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992). Syl. pt. 2, *Painter*. Finally, this Court has explained that "[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of the fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, [192] W.Va. [189], [451] S.E.2d [755] (1994)." Syl. Pt. 3, *Cannelton Industries, Inc. v. Aetna Casualty & Surety Company of America*, 194 W.Va. 203, 460 S.E.2d 18 (1994).

#### IV. Law and Argument

##### A. The Underlying Circuit Court Properly Found that the Putnam County Board of Education Owed Decedent No Duty to Provide Transportation to and from the General Admission Show Choir's Class Retreat.

The Appellant has asserted that the circuit court erred in finding that Appellee owed no legal duty to provide transportation to and from the retreat. This Court has long held that "[i]n an action founded on negligence the plaintiff must show affirmatively the defendant's failure to perform a duty owed to the former proximately resulting in injury." *Moore v. Wood County Board of Education*, 200 W.Va. 247, 251-52, 489 S.E.2d 1, 5-6 (1997) (citing Syl. Pt. 1, in part, *Keirn v. McLaughlin*, 121 W.Va. 30, 1 S.E.2d 176 (1939)). Furthermore, this Court has held that

“[t]he determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” Syl. pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000).

In the matter at bar, the Putman County Board of Education had no duty which would give rise to a negligence action against it as the decedent was under the supervision and control of his parent at the time of his death. Furthermore, the Appellant failed to demonstrate, as a matter of law, that the Appellee owed a duty to provide buses to the show choir’s bi-annual class retreat. Finally, no duty exists on the part of the Board as the law does not establish any foreseeability of harm which would create such a duty. To the extent that Appellant has argued that a duty is created through the Putnam County Board of Education’s Policy Manual created a duty, this manual is not a part of the record below and cannot be properly considered in this appeal. Furthermore, the Appellant’s use of Jeffrey Haught’s statement in her brief has also been deemed improper and cannot be considered on appeal.

**1. The Underlying Circuit Court Properly Found that the Putnam County Board of Education Cannot Be Held Liable for Negligence for the Decedent’s Death when the Decedent was Under the Supervision and Control of His Parent at the Time of His Death.**

The decedent was under the supervision and control of his father, Larry Jackson, at the time of the accident which gave rise to this action. *Record at 115-16*. Consequently, as a matter of law, the Putnam County Board of Education cannot be held liable for the decedent’s death.

West Virginia Code §18A-5-1(a) provides as follows:

The teacher shall stand in the place of the parent(s), guardian(s) or custodian(s) in exercising authority over the school and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes, except that where transportation of pupils is provided, the driver in charge of the

school bus or other mode of transportation shall exercise such authority and control over the children while they are in transit to and from the school.

In other words, the Legislature has declared that a teacher stands *in loco parentis*<sup>3</sup> while a child is in the school's custody and control. However, this Court has previously elaborated on the historical doctrine of *in loco parentis* and found that "[a] teacher's custody of children does not derive from any voluntary act on the part of the parents, but arises from our compulsory school attendance law, W.Va.Code, 18-8-1, which, in relevant part, provides: 'Compulsory school attendance shall begin with the seventh birthday and continue to the sixteenth birthday.'" *W.Va. Dept. of Human Services v. Boley*, 178 W.Va. 179, 181, 358 S.E.2d 438, 440 (1987).

Moreover, this Court has noted that "[i]t is our opinion that the statutory provision invests *authority* in public school teachers; it does not impose a *duty* upon them. It has been held that Section 1317 of the Code was 'never intended' to invest in teachers all the authority of parents over their children but rather only such authority as is necessary to maintain discipline in the schools. *Id.* (quoting *Axtell v. LaPenna*, 323 F.Supp. 1077 (W.D.Pa.1971)) (emphasis in original). Consequently, a teacher, school, or board of education can never have the authority and control over a child that the parent enjoys. This right to have, raise and control ones children has been recognized as one of the most fundamental rights protected by the United States Constitution. *See Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) ("... we have recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children.") (citations omitted). The right to have and raise children is the right of the parent to be free from unwarranted governmental intrusion into matters so fundamentally affecting the child's well-being and the parents' autonomy in this regard.

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<sup>3</sup> *In loco parentis* is defined as "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." *Black's Law Dictionary*, Sixth Ed.

Regardless of any statute, rule, or policy, the Putnam County Board of Education never has the authority to override parental decisions. Moreover, the doctrine of *in loco parentis* does not create a duty on the part of the board but merely provides it with authority over children while in the school's custody concurrent to education. In this case, the decedent was in the custody and control of Larry Jackson, his father, at the time of the accident. *Record at 115-16, 178, 186.* Larry Jackson had exercised his parental authority over his child and determined that the decedent could be transported by Ramsburg. *Record at 115-16.* In this instance, Mr. Jackson delegated no duty to the board, but instead exercised his parental authority.

Furthermore, the Board cannot be found to have breached a duty in this situation as the duty for providing transportation of each student to the retreat was left with each student's parents and/or legal guardians. *Record at 178.* This Court has analyzed the supervisory function of schools in the care and education of their pupils and determined that school personnel are only charged with providing reasonable care to protect students from harm when they are actually in custody of the children. *See Moore v. Wood County Board of Education*, 200, W.Va. 247, 252, 489 S.E.2d 1, 6 (1997) (“... school personnel have a duty to use reasonable care to protect students from harm while waiting on the school grounds for the school bus to take them home.”); *Yeager v. Morgan*, 189 W.Va. 174, 178, 429 S.E.2d 61, 65 (1993) (finding a duty exists to use reasonable care to insure a student's safe departure from a school bus). The Court has routinely concluded that the supervisory function of the school ceases at a point and the responsibility of the child's care returns to a parent. If West Virginia Code §18A-5-1(a) is strictly applied, then the portion of the statute stating that a teacher has control of his or her pupils “. . . from the time they reach the school until they have returned to their respective homes . . .” would impose liability on boards of education for any injury occurring after the school day ended prior to the

student stepping into his or her home regardless of his or her endeavors. W.Va. Code §18A-5-1(a). Moreover, even if a parent personally transported a child to or from school, a strict application of this provision would hold the board of education liable for injuries occurring prior to the child arriving at the intended destination. In this regard, if the parent was involved in an accident and the child was injured, the Board would be liable for that child's injury despite the fact the parent of the child was driving the vehicle. This is clearly not what the framers intended.

In this case, parents were responsible for providing their children transportation to the bi-annual retreat. *Record at 178*. Larry Jackson exercised his parental control and authority and chose to allow his son to travel with Ramsburg to and from the retreat. *Record at 115-16*. The choir's guidelines clearly established that "[i]n these instances, General Admission's, and the Director's liability, is limited to the period from the member's arrival at the event site until dismissed from the event. All other liability for child safety lies with the parent, or their designated drivers." *Record at 178*. Finally, Timothy Jackson's parents, not the Putnam County Board of Education, were the final authority that assented to Timothy traveling to the bi-annual class retreat with Brian Ramsburg. *Record at 116*. Consequently, it is clear that the Board's supervisory function ended when the bi-annual class retreat was dismissed. *Record at 178*. Thereafter, the teacher was no longer standing in the place of the parent as provided in West Virginia Code §18A-5-1; but, the parent's judgment in allowing his child to ride with Ramsburg resumed. "The supervisory duty obligation ceases once the . . . activity ends . . . [a]ny other rule would impose on our school systems an intolerable burden to achieve an unreasonable objective." *Elliott v. Schoolcraft*, 213 W.Va. 69, 79, 576 S.E.2d 796, 806 (2002) (Davis, J. concurring, in part, and dissenting, in part). Accordingly, the Putnam County Board of Education cannot be found to have breached a duty as Timothy Jackson was no longer under its

supervision and control. The right to have and raise children includes the right of the parent to be free from unwarranted governmental intrusion into matters affecting a child's well-being and the parents' autonomy in this regard. Here, Larry Jackson exercised this right without participation of the Putnam County Board of Education. As such, there can be no duty placed on the Board.

**2. The Underlying Circuit Court Properly Found that No Legal Duty Exists Requiring the Appellee to Provide Buses to the General Admission Show Choir's Bi-Annual Retreat.**

The underlying circuit court properly determined that no mandatory legal duty exists under West Virginia Code §18-5-13(6)(a) requiring the Appellant to provide transportation to students participating in curricular or extracurricular activities. Alternatively, the Appellant may provide transportation if it so chooses. Furthermore, the show choir's handbook of policies and procedures places no duty on the Appellant to provide students with transportation for the Rippling Waters retreat. Finally, there can be no duty placed on the Appellant due to a lack of foreseeability of harm, a prerequisite to a legal duty. As such, the underlying circuit court properly held that the Appellant cannot be held liable for plaintiff's decedent's accident.

**a. West Virginia Code §18-5-13(6)(a) Places No Mandatory Legal Duty on the Appellant to Provide Transportation to Students.**

The underlying circuit court properly found that West Virginia Code §18-5-13(6)(a) gives boards of education the authority to provide student transportation; but, does not mandate transportation. Specifically, the underlying court held as follows:

10. That West Virginia law, specifically West Virginia Code §18-5-13(6)(a), does not require that the Board **must** provide transportation to students participating in curricular or extracurricular activities; but, merely that the Board **may** provide transportation if it so chooses, (Emphasis added.);

*Record at 601.*

West Virginia Code §18-5-13(6)(a) provides that each County Board of Education has the “authority” to provide transportation to and from school events if it chooses. Specifically, West Virginia Code §18-5-13(6)(a) grants to Boards of Education authority as follows:

To provide at public expense adequate means of transportation, including transportation across county lines for students whose transfer from one district to another is agreed to by both county boards as reflected in the minutes of their respective meetings, for all children of school age who live more than two miles distance from school by the nearest available road; to provide at public expense, according to such rules as the board may establish, **adequate means of transportation for school children participating in county board-approved curricular and extracurricular activities . . . .**

*Id.* (emphasis added). The Code does not require boards to provide transportation to students participating in curricular or extracurricular activities; but, rather permits boards to provide transportation.

During the underlying proceedings, Appellant asserted in her response to Appellee’s motion for summary judgment that *Kennedy v. Board of Education of McDowell County, et. al.*, 175 W.Va. 668, 337 S.E.2d 905 (1985), “found that West Virginia Code Section 18-5-13(6)(a) is mandatory and therefore there is a duty for the school board to provide said types of transportation.” *Record at 379*. This assertion inaccurately interprets this Court’s findings in *Kennedy*.

In *Kennedy*, the Court was reviewing a case filed by the parents of a group of school-aged children in which a “. . . writ of mandamus to compel the McDowell County Board of Education to provide transportation to the petitioners’ children to and from public schools of the county . . .” with the Court. *Id.* at 668, 905. Although the board provided transportation within a mile of the petitioners’ homes, it refused to provide transportation directly to the petitioners’ homes as a result of the poor condition of their road. *Id.* at 669, 906. In finding that the board

was required to provide “adequate” transportation to the petitioners’ children, the Court stated as follows:

When a county board of education has provided a system for the transportation of school children by bus, pursuant to W.Va. Code, 18-5-13(6)(a), the refusal of the board to provide such transportation to certain children because the road on which they live is not safe for a large school bus, and the board would have to purchase a new vehicle to traverse the road, denies those children equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

*Id.* at 670, 907 (quoting Syl. Pt. 1, *Shrewsbury v. Board of Education*, 164 W.Va. 698, 265 S.E.2d767 (1980)). In *Kennedy*, the McDowell County Board of Education had elected to provide a system of transportation to and from county schools. However, the school refused to travel along the petitioners’ road due to its poor condition. The children in this case were handicapped and unable to walk to the school bus’ stopping point; thus, the transportation provided by the board was not “adequate.” *Id.* Consequently, the *Kennedy* opinion does not provide that West Virginia Code Section 18-5-13(6)(a) mandates that transportation must be provided to all children to and from school. Instead, this particular section of the code mandates that if a board of education elects to provide transportation, the transportation it provides must be “adequate.”

In 1996, this Court specifically found that “. . . the language of . . . W.Va. Code, 18-5-13(6)(a) (1996) . . . is without ambiguity and that the legislature has not . . . mandated that county boards of education provide school bus transportation services.” *State ex rel. Cooper v. Board of Education of Summers County*, 197 W.Va. 668, 672, 478 S.E.2d 341, 344, n. 9 (1996). In *Cooper*, the original jurisdiction of the Court was invoked by a parent seeking a writ of mandamus to compel the Summers County Board of Education to provide school bus transportation, or a stipend in lieu thereof, for his children to attend a private religious school in a nearby county. *Id.* at 669, 342. During oral arguments, the petitioner argued that the board had a

nondiscretionary duty to provide bus transportation to students. *Id.* at 672, 344, n. 9.

Consequently, the Court examined the language of West Virginia Code Section 18-5-13(6)(a), and specifically found the Legislature had not mandated that boards of education provide school bus transportation services.

The Legislature and this Court have clearly established that county boards of education have *authority* to provide students with busing services. Whether county boards of education choose to exercise this authority is completely discretionary. In the instance currently before the Court, the Appellee had no duty to provide buses for the choir's bi-annual retreat. Instead, the Board had the *authority* to provide such transportation, but chose not to exercise that authority. Due to Appellant's failure to demonstrate that the Board had a mandatory legal duty in this case, the court found as follows:

That in viewing the aforementioned Findings of Fact and Conclusions of Law in the light most favorable to the Plaintiff, the nonmoving party has failed to offer any concrete evidence from which a reasonable finder of fact could return a verdict in her favor. Williams v. Precision Coil, Inc., 459 S.E.2d 329, 337 (W. Va. 1995), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), quoting First National Bank of Arizona v. Cities Service, Inc., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

*Record* at 603. Consequently, based on the theories of liability asserted by the Appellant, coupled with the record created in the court below, the court properly found that West Virginia Code §18-5-13(6)(a) does not place a duty on the Appellant to provide buses to all curricular and extracurricular activities.

**b. Under General Admission Show Choir Handbook of Policies and Procedures, the Duty to Provide Transportation to and from the Rippling Waters Retreat is the Responsibility of the Parent.**

The court below properly found that no duty is placed on the Appellant to provide bus transportation to the Rippling Waters retreat through the show choir's handbook of policies and

procedures. Instead, the handbook to which the decedent and Larry Jackson assented clearly establishes that transportation to certain activities, such as the retreat, is the responsibility of the parent. *Record at 178.*

Prior to enrolling in the show choir, each student and their parent or legal guardian was required to read and assent to the handbook of policies and procedures established by the general admission show choir. *Record at 186.* The choir's handbook explained that students would be required to travel to retreats twice a year. On the subject of travel, the Handbook explains as follows:

From time to time, GA members will travel individually to an event. This usually occurs when the distance is small enough to allow day trips, when GA is performing in the immediate area, or when the cost of renting a bus is prohibitive.

Members will present to the Director IN WRITING PRIOR TO THE TRIP how they will arrive at the event, who will be driving and who will be riding with them. (This is done to insure that every member's travel arrangements are accounted for, and so that the Director and parents are aware of who their child is riding with.)

In these instances, **General Admission's, and the Director's liability, is limited to the period from the member's arrival at the event site until dismissal from the event.** All other liability for the child's safety lies with the parent, or their designated drivers.

Parents are **STRONGLY** discouraged from allowing students to drive to events unaccompanied by parents.

As stated above, members are to remain on site until dismissal from the event. Again, **the child's safety is of the utmost importance, and parents should exercise their wisdom, good judgment and discretion when planning travel arrangements.**

*Record at 178.* (emphasis added).

It was clear when the decedent enrolled in choir that at times parents were responsible for arranging transportation to and from practices and events. *Id.* Furthermore, 2001 was the decedent's third year as a member of the choir. *Record at 108.* He had been transported by his

parents to the retreat on four previous occasions with no objections. *Record at 113.* Larry Jackson acknowledged that he signed the "Permission Statement" required for his son to enroll in the choir. *Record at 115.* This permission statement specifically provides as follows:

**I hereby attest that I have read and understand the Handbook of Policies of General Admission and agree to be held accountable for the policies therein, as befits membership in General Admission.**

I further understand that I (my child) will be held accountable to the rules, regulations, and policies of General Admission, Winfield High School, the Putnam County Board of Education and the State of West Virginia. I understand that violation of these rules, regulations and policies may result in several consequences, including my (my child's) dismissal from the activity.

*Record at 185.* (emphasis added).

The show choir's handbook of policies and procedures which would create a duty to provide buses in this situation contains no ambiguities. *Record at 151-84.* The choir's handbook clearly establishes that parents were to provide their children with transportation in certain situations including the mandatory weekend practices at Rippling Waters. *Record at 178.* Appellant agreed to provide the decedent's transportation. *Record at 185-86.* In fact, the court below specifically found *sua sponte* as follows:

16. That the record indicates that Larry Jackson had agreed to transport Timothy J. Jackson to and from the Show Choir Retreat. However, unknown to the school officials, Larry Jackson passed the responsibility to transport Timothy J. Jackson to Brian Ramsburg. In doing so, Larry Jackson made Brian Ramsburg his agent;

17. That Larry Jackson, the decedent's father, was negligent in knowingly directing Timothy J. Jackson to ride with a fellow student to and from the General Admission Show Choir retreat despite full knowledge of the purported rules and regulations set forth by the Show Choir[.]

*Record at 602; see also "Order Granting Defendant, Putnam County Board of Education's Motion for Summary Judgment[,]" attached hereto as Exhibit A.* Consequently, the record clearly establishes that the Board owed the decedent no duty. Instead, the duty to provide

transportation for the decedent was left solely in the hands of parental authority. As parental authority was exercised in this case, there can be liability on the part of the Appellee.

**3. The Putman County Board of Education had No Legal Duty Due to a Lack of Foreseeability of Harm.**

No legal duty exists which would give rise to a negligence action against the Putnam County Board of Education due to a lack of foreseeability of harm. The West Virginia Supreme Court has found that “[f]oreseeability of risk is an important consideration” in defining the parameters for creating a legal duty. *Miller v. Whitworth*, 193 W.Va. 262, 266, 455 S.E.2d 821, 825 (1995) (citing *Robertson v. LeMaster*, 171 W.Va. 607, 611-12, 301 S.E.2d 563, 567-568 (1983)); see also *Elliott v. Schoolcraft*, 213 W.Va. 69, 78, 576 S.E.2d 796, 805 (2002) (Davis, J., concurring, in part, and dissenting, in part). Moreover, the West Virginia Supreme Court of Appeals “acknowledged that courts should consider the ‘likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.’” *Id.* (citing *Id.* at 612, 568); see also *Id.*

To illustrate, in *Elliott v. Schoolcraft*, 213 W.Va. 69, 576 S.E.2d 796, this Court reviewed the circuit court’s granting of summary judgment in favor of the Putnam County Board of Education. In that case, a student was severely beaten by two fellow students at a “victory party” held in a private residence following the high school football state championship game. The Court found the circuit court’s ruling pre-mature as the plaintiff was not given an opportunity to conduct sufficient discovery. *Id.* at 74, 801. However, in a concurring opinion, Justice Starcher explained that there might have been a legal duty created if it was found that members of the school’s faculty had actively encouraged or supported the “victory party.” *Id.* at 76, 803. Moreover, Justice Davis, joined by J. Maynard, submitted an opinion concurring, in part, and dissenting, in part, expressing their opinion that the board of education owed the students no

legal duty whatsoever and that summary judgment was proper as the board's supervisory function had ceased when the football game ended. *Id.* at 79, 806. In her opinion, Justice Davis noted that "[i]f school boards are compelled to eliminate underage drinking during private, non-school related activities occurring on private property *after* school events end, **boards would have to divert finite resources away from educational programs and usurp the primary responsibility of parents in supervising their children. Schools do not have such a duty.**" *Id.* (emphasis added).

In the instant action, the decedent was traveling in an automobile driven by Brian Ramsburg. Ramsburg was licensed by the State of West Virginia to operate a vehicle, and had the required permit from Winfield High School to transport himself to and from school. *Record at* 127-28. Most importantly, the decedent's father placed him in Ramsburg's vehicle. *Record at* 115-16. The Board had no information which would lead it to believe that a passenger in Ramsburg's automobile was any more or less likely to be injured traveling from the retreat than with any other licensed driver on a public highway at any other time for any other reason, including a bus driver. The magnitude of the burden which would be placed on all County Boards of Education in the State of West Virginia if each were found to owe a legal duty to every student traveling to or from school regardless of by what means or with whom is limitless. Moreover, guarding against injuries in this situation would be impossible as the burden would appear to remain with the Board of Education until each individual child set foot inside his or her home. In effect, a finding that this accident was the result of breach in a duty owed by the Board would establish that Boards of Education are required to regulate private conduct, include parental conduct. The Putnam County Board of Education owed no legal duty to provide any form of transportation to the bi-annual class retreat, nor does the law contemplate such a duty.

Furthermore, although West Virginia has no case law exactly on point, other jurisdictions have analyzed similar facts and concluded no duty exists. The Indiana Court of Appeals and the New York Supreme Court have found no legal duty on behalf of the Board of Education based on an absence of foreseeability of harm. *See generally Wickey v. Sparks*, 642 N.E.2d 262 (Ind. Ct. App. 1995); *Thompson v. Ange*, 83 A.D.2d 193, 443 N.Y.S.2d 918 (1981). In *Thompson*, a student who was traveling from a high school to a vocational training school during school hours was involved in a multiple-car accident. 83 A.D.2d at 194, 443 N.Y.S.2d at 919. The student was driving himself to the vocational school in direct violation of various rules providing that absent parental permission, students were required to travel on a regularly scheduled bus to the vocational training center. *Id.* at 195, 920. Moreover, the court determined that both the high school and the vocational training center were on notice that the student was violating the rules. Nevertheless, the court determined that “a finding that the schools were negligent in enforcing their rules would not establish legal liability on the part of [the] defendants.” *Id.* Additionally, the court found as follows:

The uncontroverted proof was that [the student] was a licensed driver. The schools’ awareness of reckless driving by some students and their concern for student safety is not sufficient to show that [the student] was anything but the average 17-year old whom the Legislature has determined may be licensed to driver[sic]. There is no claim that the schools had notice that [the student] was an incompetent driver. **The risk that [the student] would be involved in an automobile accident was no greater than the risk incurred by the operation of an automobile by any average 17-year old driver.** Violation of the no-driving rule did not increase the risk of accident in any way; that risk existed regardless of the rule.

*Id.* at 197, 921 (emphasis added). In so ruling, the court explained that “[i]t would be extending the legal consequences of wrongs beyond a controllable degree to hold that the use of an automobile by a licensed operator under these circumstances constitutes an unreasonable risk to others for which [the] schools may be liable.” *Id.*

Thereafter, in 1995, the Court of Appeals of Indiana, relying on the rulings in *Thompson*, also found that no foreseeability of harm exists when a student is transporting himself or herself from his or her high school to a vocational training school during school hours. *Wickey v. Sparks*, 642 N.E.2d at 267. In that case, the court explained the public policy concerns with holding a school responsible for injuries caused by their students' negligent acts occurring off school property. In so doing, the court noted that "[i]t should be emphasized . . . that schools are not intended to be insurers of the safety of their pupils, nor are they strictly liable for any injuries that may occur to them." *Id.* (quoting *Miller v. Griesel*, 308 N.E.2d 701 (Ind. 1974)).

In the case at bar, Appellant has failed to demonstrate that the Board was more likely to foresee this accident than any other accident that occurs on our nation's roadways. Moreover, Appellant has failed to even address how the Board has a duty to foresee this accident when the parent of the decedent obviously did not. Legal foreseeability has been said to encompass "[t]hat which is objectively reasonable to expect, not merely what might conceivably occur." *Black's Law Dictionary*, Sixth Edition (citing *Augenstine v. Dico Co., Inc.*, 135 Ill.App.3d 273, 90 Ill.Dec. 314, 317, 481 N.E.2d 1225, 1228 (1985)). By applying Appellant's analysis, the Board should foresee all accidents that occur on all roads in the State of West Virginia. Consequently, under Appellant's assertions every accident that occurred with any school aged child would be foreseeable by the Board and place a duty on the child's safety. This would also necessarily include those times when a student was transported by a fellow student at the end of the school day, but the students did not go directly home. It would also include those circumstances where a child was being transported by his or her parent. It would even include those times when a student who normally traveled on a school bus at the end of the day decided instead to ride with a fellow classmate. Taken to the extreme, under Appellant's claims, even third-parties involved

in automobile accidents with school-aged children would have a cause of action against the Board of Education.

In the current action, in effect, the decedent was being transported by his father as his father delegated how his son would be transported to the class's practice. *Record at 115-16.* Moreover, to find that the Board foresaw this accident would place a higher duty on the Board than on the parent as it would require the Board foresee an accident that the parent obviously did not. The Board of Education cannot be held liable for every single accident and injury that occurs to a school aged child. Here, the accident in question was at best subjectively conceivable, rather than objectively expected.

**B. The Liability Releases Signed by Larry Jackson are Valid Releases for Appellant's Negligence Claim.**

Even if this Court finds the Appellee owed the decedent a legal duty, the Putnam County Circuit Court properly found that the release and indemnity agreement signed by Larry Jackson was a valid release of any and all claims of negligence. This Court has found that “[g]enerally, in the absence of an applicable safety statute, a plaintiff who *expressly* and, under the circumstances, *clearly* agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct may not recover for such harm, unless the agreement is invalid as contrary to public policy.” *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 314-15, 412 S.E.2d 504, 508-09 (1991). Furthermore, “[a] release ordinarily covers only such matter as may fairly be said to have been within the contemplation of the parties at the time of its execution.” *Id.* at 316-17, 510-11 (*quoting* Syl. pt. 2, *Conley v. Hill*, 115 W.Va. 175, 174 S.E. 883 (1934), *overruled on another point in* syl. pt. 4, *Thornton v. Charleston Area Medical Center*, 158 W.Va. 504, 213 S.E.2d 102 (1975). *Accord*, syl. pt. 2, *Cassella v. Weirton Construction Co.*, 161 W.Va. 317, 241 S.E.2d 924 (1978)). Finally, this Court has established that “[a] release is construed

from the standpoint of the parties at the time of its execution. Extrinsic evidence is admissible to show both the relation of the parties and the circumstances which surrounded the transaction.”

Syl. Pt. 3, *Murphy*, *supra* (quoting Syl. Pt. 1, *Casella*, *supra*).

In *Murphy*, this Court reviewed an order granting summary judgment in a personal injury action in favor of a defendant on the grounds that an anticipatory release executed by the plaintiff was a complete bar to any action for personal injuries. On appeal, this Court reversed and remanded the case finding that a “. . . [a] general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant’s intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff’s intention.” *Id.* at 318, 512. Nevertheless, this Court did hold that follows:

This Court agrees with the view that **language in a pre-injury exculpatory agreement or anticipatory release stating that a defendant is relieved in effect from all liability for any future loss or damage is sufficiently clear to waive a common-law negligence action**, even though the language does not include explicitly the words "negligence" or "negligent acts or omissions"; these "magic words" are not essential to a clear waiver of the right to bring a common-law negligence action, if the contract as a whole and the circumstances at the time of its execution indicate that both parties intended that waiver.

*Id.* at 317, 511 (citing *Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163, 166 (4th Cir.1989))

(emphasis added).

In this matter, appellant has not alleged that the Board engaged in reckless conduct. In fact, appellant has clearly argued that this matter is best framed as negligence. See Appellant’s Brief, p. 24. The Health and Insurance Form clearly states that the signing party releases and indemnifies all parties “. . . for any and all claims or responsibilities of my child while rehearsing, performing, or traveling with the Winfield High School show choir, general

admission.” *Record at 185; see also* “Health and Insurance Information” form, attached hereto as Exhibit B. Under the Court’s findings in *Murphy*, this language supports the circuit court’s order of summary judgment. Moreover, as addressed above, Larry and Susan Jackson had been involved with the choir boosters’ organization for three years and were well aware of the choir policies and procedures. Finally, Larry Jackson specifically agreed to these policies and procedures by signing his son’s “Permission Statement.” *Record at 186; see also* “Permission Statement” form, attached hereto as Exhibit C. Consequently, the record reflects that Larry Jackson signed the Health and Insurance Information form *and* the Permission Statement. The Health and Insurance Information form states that the signing party agrees to “**release and indemnify** [the appellee] from any and all claims or responsibilities.” *Record at 185, Exhibit B.* (emphasis added). This alone under the Court’s ruling in *Murphy* is sufficient to absolve the appellee from negligence even though the term “negligence” appears no where in the form. *Id.* at 317, 511. Nevertheless, Larry Jackson also signed another release agreeing that he would be responsible for his own child when the child was released from show choir activities. *Record at 186, 151-84, Exhibit C.*

The releases signed by Larry Jackson elaborate on the duties and responsibilities of the show choir and the Putnam County Board of Education. Larry Jackson signed his son’s Permission Statement which states as follows:

I hereby attest that **I have read and understand the Handbook of Policies of General Admission and agree to be held accountable for the policies therein**, as befits membership in General Admission.

*Record at 186, Exhibit C.* (emphasis added). The General Admission Handbook of Policies and Procedures is an over thirty page booklet explaining the duties and responsibilities in enrollment in the show choir. *Record at 151-84.* The handbook explains that General Admission is an

elective class and that students will be required to attend retreats at the Rippling Waters Campgrounds. *Record at 158-59.* Finally, the handbook clearly explains as follows:

From time to time, GA members will travel individually to an event. This usually occurs when the distance is small enough to allow day trips, when GA is performing in the immediate area, or when the cost of renting a bus is prohibitive.

**In these instances, General Admission's, and the Director's liability, is limited to the period from the member's arrival at the event site until dismissal from the event. All other liability for the child's safety lies with the parent, or their designated drivers.**

*Record at 178.* (emphasis added). Larry Jackson was made aware of his responsibilities as a parent whose son was enrolled in show choir. *Record at 151-86.* He accepted these responsibilities as is evidenced by the above-referenced releases. Consequently, he knew and accepted that the Board had no responsibility to the decedent at the time of the accident.

The parties do not dispute the facts of this case. This case poses the clearly legal questions of duty, proximate cause, and the effect of a release signed by a parent. In this matter, Larry Jackson signed an agreement to release and indemnify the appellee, as well as an additional release agreeing to abide by the terms and conditions of the General Admission. Consequently, the court below properly found as follows:

20. That Larry Jackson signed a release prior to his son being transported to the General Admission Show Choir Retreat;

21. That the release, regardless of whether or not it was notarized, had been signed by Timothy J. Jackson's father, Larry Jackson, and Larry Jackson acknowledged the same.

22. That the release signed by Larry Jackson releases the Putnam County Board of Education from any and all negligence were it to be determined that the Board owed a legal duty to Timothy J. Jackson under West Virginia law

**WHEREAS**, the father, Larry Jackson, executed a release to the benefit of the Board and thereafter ratified and acknowledged said act, the Board is released from said negligence associated with the Board's alleged failure to provide transportation to the show choir retreat[.]

Record at 602-04, Exhibit A. Larry Jackson clearly accepted responsibility for his child when he was dismissed from the retreat. Consequently, the court below properly held that the release signed by Larry Jackson would absolve the Appellee from any negligence associated with the alleged failure to provide transportation to the decedent.

**C. The Putnam County Circuit Court Properly Found that Even if a Duty did Exist on the Part of the Board, the Negligence of Brian Ramsburg is a Superseding/Intervening Act Which Breaks Any Chain of Causation.**

The Putnam County Circuit Court properly held that the Appellee is not liable, as a matter of law, as its negligence, if any, was not the proximate cause of the decedent's death. This Court has consistently held that "[t]o be actionable, negligence must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury." *Wehner v. Weinstein*, 191 W.Va. 149, 153, 444 S.E.2d 27, 31 (1994) (quoting Syl. Pt. 11, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990) (citation omitted).

In *Wehner*, a pizza delivery vehicle was making a routine delivery to a college fraternity house situated on a steep sloping driveway. *Id.* The driver of the vehicle parked the car blocking the driveway, initiated the parking brake and removed the key. Thereafter, a member of the fraternity attempting to exit the driveway disengaged the brake in order to move the pizza delivery vehicle. The pizza delivery vehicle rolled down the hill into a student-housing area killing one student and injuring two others. A verdict was returned in favor of the plaintiffs and the pizza delivery company appealed claiming "it was not reasonably foreseeable that after the car was parked with the brake on and the ignition key removed, that someone would enter the car, disengage the brake, put the car in neutral, and cause it to roll." *Id.* Nevertheless, the Court found that there was sufficient evidence of proximate cause as the driver of the delivery vehicle had made deliveries to the fraternity house in the past and was aware of the topography of the

area. Moreover, the driver “was aware that there was a parking lot adjacent to the house and used it on other occasions.” *Id.* at 154, 32. Finally, the driver was aware that if the car moved, for whatever reason, it would proceed down the hill toward the student housing area.

In *Wehner*, this Court found that the appellant’s arguments asserted were actually an attempt to argue that the actions of the individuals who released the hand brake were an intervening cause to the accident. *Id.* However, the Court found that the release of the hand brake was not independent of any other act. On the contrary, the Court found that a combination of the pizza delivery person’s location of parking near the steep driveway and blocking ingress and egress all contributed to the ultimate cause of the accident. *Id.* at 155, 33. In this case, the decedent’s death was not the result of a combination of acts which include the Appellee’s acts; but the result of individual acts of an independent third party.

Appellant claims that proximate cause issues are purely fact questions for a jury. However, in *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983) this Court held that when evidence is conflicting, or the facts are such that reasonable men may draw different conclusions from them, such evidence should be reviewed by the jury. In the instant action, the record contains no conflicting evidence, nor facts which would lead reasonable men to draw different conclusions. Consequently, in this matter proximate cause is an issue of law for the courts.

Furthermore, appellant relies on this Court’s opinion in *Moore v. Wood County Board of Education*, 200 W.Va. 247, 489 S.E.2d 1 (1997), to assert that the appellee owed a duty because children “must be expected to act on childish instincts and impulses . . .”<sup>4</sup> *Id.* at 253, 6.

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<sup>4</sup> It should be noted that in the cases cited by plaintiff for this proposition are *Moore v. Wood County Board of Education*, *supra*, which involved a 13 year-old boy waiting at a bus stop and *Deputy v. Limmell*, 80 S.E. 919 (W.Va. 1914), which involved a 10 year-old boy crossing the street. In this matter, the driver of the vehicle was 18 years old and licensed to operate a motor vehicle by the State of West Virginia.

However, this duty would also necessarily extend to the parents of children. Consequently, under Appellant's argument, Larry Jackson had a duty to anticipate that children "must be expected to act on childish instincts and impulses . . ." *Id.* Again, the record reflects that Larry Jackson placed the decedent in Ramsburg's vehicle. *Record at 115-16.* Moreover, under appellant's theory, the Legislature would also be liable for this accident for allowing school-aged children to obtain driver's licenses to drive automobiles. Consequently, appellant's citation to this proposition is without merit.

The decedent's death was the result of a single-vehicle accident occurring on a dry road on a sunny day. This Court has determined that an intervening cause "must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." *Wehner*, 191 W.Va. at 154-55, 444 S.E.2d at 32-33 (*quoting* Syl. Pt. 1, *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982) (citation omitted)).

Ramsburg admitted that he lost control of the vehicle when the driver's-side rear wheel left the interstate. *Record at 227.* The West Virginia Supreme Court has held that "violation of a statute is prima facie evidence of negligence." *Gillingham v. Stephenson*, 209 W.Va. 741, 776, 551 S.E.2d 663, 668 (2001) (*quoting* Syl. Pt. 1, in part, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990)). West Virginia Code §17C-7-9(a)(1) provides that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane . . ." In this case, Ramsburg has admitted to violating this statute as he stated his rear driver's-side wheel left the roadway. *Record at 227.* Additionally, West Virginia Code §17C-7-11 provides that no motor vehicle may travel "over, across or within" the median area. Again, Ramsburg admitted that his vehicle traveled in this area. Finally, according to the Kanawha Sheriff's Department independent accident

reconstructionist and Ramsburg's own testimony, the vehicle was exceeding the posted speed limit at the time of the accident in violation of West Virginia Code § 17C-6-1, *et seq.* *Record at* 248-51. In failing to maintain a single lane of traffic, speeding and leaving the established roadway, Ramsburg breached at least three applicable sections of the West Virginia Code.

Consequently, the court below properly found as follows:

24. That Brian Ramsburg, the driver of the automobile in which Timothy J. Jackson was riding, was negligent in the operation of his motor vehicle while transporting Timothy J. Jackson.

*Record at* 603, Exhibit A.

Ramsburg's willful and criminal violations of the West Virginia Code clearly break any chain of causation of the alleged negligence of the Board. It is clear under the case law cited by appellant that "generally, a willful, malicious, or criminal act breaks the chain of causation."

*Harbaugh v. Coffinbarger*, 209 W.Va. 57, 65, 543 S.E.2d 338, 345 (2000) (*quoting Yourtee v. Hubbard*, 196 W.Va. 683, 690, 474 S.E.2d 613, 620 (1996)). Therefore, the court below properly held as follows:

23. That Brian Ramsburg's negligent operation of his motor vehicle is a subsequent superseding/intervening act which also breaks the chain of causation not only with Larry Jackson's negligence, but also to that of the Board (if it would be determined that a legal duty was imposed by statute or by the Board's own rules and regulations).

*Record at* 603, Exhibit A. Consequently, the negligent, willful, and criminal operation of the motor vehicle by Ramsburg is intervening cause thereby breaking the chain of causation of any negligence of the appellee.

**D. The Putnam County Circuit Court Properly Found that the Even if a Duty Existed on the Part of the Board to Provide Busing to All Curricular and Extracurricular Activities, that the Only Method Available to Enforce Such a Duty Would be through a Writ of Mandamus.**

The Putnam County Circuit Court properly held if the Appellee owes a duty to provide buses to all curricular and extracurricular activities, the only method available to enforce such a duty is through a writ of mandamus. This Court has determined that “[t]he function of a writ of mandamus is to enforce the performance of official duties from the discharge of some public function, or imposed by statute.” Syl. Pt. 1, *State ex rel. Cooper v. Board of Education of Summers County*, 197 W.Va. 668, 478 S.E.2d 341 (1996); *see also* Syl. Pt. 2, *Hickman v. Epstein*, 192 W.Va. 42, 450 S.E.2d 406 (1994). This Court has also held that “a writ of mandamus will not issue unless three elements co-exist: (1) The existence of a clear right in the Petitioner to the relief sought; (2) The existence of a legal duty on the part of the Respondent to do the thing which the Petitioner seeks to compel; and (3) The absence of another adequate remedy.” Syl Pt. 1, *State ex rel. Billings v. City of Point Pleasant*, 194 W.Va. 301, 460 S.E.2d 436 (1995); *see also* Syl. Pt. 2, *Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Appellant’s Complaint specifically requested the remedy of “[t]he institution of a countywide, irrevocable policy by the Board that bus service be provided for ALL curricular and extra-curricular groups (including, but not limited to, show choir, all boys sports, all girls sports, bands, etc.) to all Board approved events.” *Record at 2*. According to this Court, “. . . a writ of mandamus is appropriate when a board oversteps, or fails to meet, its clear legal duties.” *McComas v. Board of Education of Fayette County*, 197 W.Va. 188, 475 S.E.2d 280, 285 (1996); *see also* *Petition for Appeal*, p. 24. In numerous instances, the writ of mandamus has been found to be the appropriate method of petitioning the courts to compel boards of education

to take different actions with regard to school transportation. See *Sigmon v. Board of Educ. of Roane County*, 174 W.Va. 210, 324 S.E.2d 352 (1984); *Kennedy v. Board of Educ. of McDowell County*, 175 W.Va. 668, 337 S.E.2d 905 (1985); and *State ex rel. Cooper v. Board of Educ. of Summers County*, 197 W.Va. 668, 478 S.E.2d 341 (1996). Consequently, the court below properly held as follows:

15. That the West Virginia Code creates no legal duty on the part of the Board to provide transportation to students to or from the retreat. However, if an obligation to provide transportation for the students to and from the retreat [were to exist], it would be an obligation which could only be enforced by way of a writ of mandamus as a violation of civil rights and not as a cause of action in tort. *Sigmon v. Bd. of Ed. for Roane Co.*, 324 S.E.2d 352 (1984); *Kennedy v. Bd. of Ed. of McDowell Co.*, 337 S.E.2d 905 (W.Va. 1985); *State ex rel. Cooper v. Bd. of Ed. of Summers Co.*, 478 S.E.2d 668 (W.Va. 1996).

*Record at 602, Exhibit A.*

As the Appellant brought the underlying suit partially for the purpose of compelling the Appellee to fulfill an alleged duty, the circuit court did not err when it held that the proper method of requesting this relief is through a writ of mandamus.

## V. Conclusion

The Circuit Court of Putnam County, West Virginia, ruled appropriately and lawfully, and committed no reversible error in granting summary judgment in favor of the defendant in the underlying action. The court below properly found that the Appellee owed the decedent no statutory duty to provide transportation to and from the choir's class retreat pursuant to West Virginia Code §18-5-13(6)(a). Furthermore, the choir's handbook of policies and procedures placed the duty of transporting the student with the parents of the decedent. When a parent resumes their parental functions by taking custody and control of the child's actions the school no longer stands *in loco parentis*. Additionally, no legal duty exists in this situation as the Appellee could not foresee the harm the decedent ultimately suffered. Foreseeability is a

necessary element in defining the parameters of creating a legal duty. Ramsburg was licensed to drive by the State of West Virginia and the decedent had parental consent to travel with him. Consequently, no duty can be placed on the Appellee in this matter.

Nevertheless, even if this Court were to find that the Appellee owed the decedent a legal duty, the court below properly held that the release and indemnity agreement signed by Larry Jackson was a valid release of any and all claims of negligence. Moreover, the record reflects that Larry Jackson also signed the decedent's "Permission Statement" agreeing to the terms and conditions of membership in the choir contained within the choir's handbook of policies and procedures which placed the duty of providing transportation to choir students in the hands of the parents. Also, the court below properly held that even if the Appellee did owe the decedent a duty, Brian Ramsburg's willful, negligent and criminal conduct in violating at least three sections of the West Virginia Code constitutes a superseding/intervening cause that broke the chain of causation of any alleged negligence on the part of the Board.

Finally, Appellant's underlying complaint specifically requested the court below order the institution of a countywide, irrevocable policy that bus transportation be provided by the Appellee for all curricular and extracurricular activities. Such a remedy seeks the enforcement of an alleged duty. Consequently, the court below properly found that such a remedy can only be obtained through a writ of mandamus, rather than Appellant's tort action sounding in negligence.

## **VI. Relief Requested**

The Circuit Court of Putnam County, West Virginia, ruled appropriately and lawfully, and committed no reversible error in granting summary judgment in favor of the defendant in the underlying action.

Wherefore, this Court should affirm and let stand the rulings of the Putnam County Circuit Court.

PUTNAM COUNTY BOARD OF EDUCATION,

Appellee/Defendant,

Respectfully Submitted:



STEPHEN M. FOWLER (*WV bar No. 5113*)

JULIE M. MEEKS (*WV bar No. 7484*)

TRAVIS A. GRIFFITH (*WV bar No. 9343*)

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON

SUSAN M. JACKSON, Administratrix  
of the Estate of Timothy J. Jackson,  
*Appellant and  
Plaintiff below,*

v.

No. 33038

THE PUTNAM COUNTY BOARD OF EDUCATION,  
*Appellee and  
Defendant below.*

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee, Putnam County Board of Education, does hereby certify that on this 23<sup>rd</sup> day of June, 2006, a true copy of the foregoing "**APPELLEE'S BRIEF**" has been served via hand delivery and United States Mail, postage properly paid, to the following counsel of record:

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