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IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018

*IN RE: The Matter of Impeachment Proceedings
Against Respondent Justice Margaret Workman*

**BOARD OF MANAGERS OF THE WEST VIRGINIA HOUSE OF DELEGATES'
CONSOLIDATED RESPONSE TO RESPONDENT CHIEF JUSTICE MARGARET
WORKMAN'S MOTIONS TO DISMISS ARTICLE XIV AS BARRED BY THE PRINCIPLES OF
AGENCY**

Comes Now, the Board of Managers of the West Virginia House of Delegates (hereinafter "Board of Managers") and requests the Court to reject the Motion of the Respondent to dismiss Article XIV as barred by the principles of agency.

In support of its Response, the Board of Managers states as follows:

It is entirely proper to try the Respondent for her alleged failures and for the alleged failures of her subordinates. The West Virginia Senate must be allowed to fulfill its Constitutional duty to hear the evidence against the Respondent and to judge the weight of that evidence.

The Respondent asserts that she is protected by the principles of agency law. We believe, contrarily, that an application of the principles of agency law compels her to be tried for the near total absence of managerial oversight of the Court. At the outset, we reiterate as we have noted in prior pleadings, that an impeachment proceeding for a Justice of the Supreme Court of Appeals is not a civil action, but wholly a political one, and if convicted by the West Virginia Senate, the Respondent will not be liable in tort to an identifiable plaintiff but will simply be removed from the privilege of serving the people of West Virginia as a Justice. However, we confess there are

parallels in tort law and in the law of agency which are constructively useful in understanding the actions of the Respondent and her culpability.

It is undisputed that an agent is a person or entity who acts for or on behalf of and subject to the control of another, and a principal is the person or entity for whom the agent acts. Generally, a principal is liable, in matters of third-party liability, for the negligent actions of its agent. However, a principal is only liable if the principal exercises a certain degree of control over the agent.

In *Griffith v. George Transfer & Rigging, Inc.* 157 W.Va. 316, 201 S.E.2d 281 (1973), the West Virginia Supreme Court, articulating the *respondeat superior* doctrine, held that “[t]he universally recognized rule is that an employer is liable to a third person for any injury to his person or property which results proximately from tortious conduct of an employee acting within the scope of his employment. The negligent or tortious act may be imputed to the employer if the act of the employee was done in accordance with the expressed or implied authority of the employer.” 157 W. Va. at 324-25, 201 S.E.2d at 287. Additionally, our Court has adhered to the rule that “[b]ecause the *respondeat superior* doctrine combines in its support both principles of natural justice and public policy, it should be liberally applied in favor of those who invoke it. It is always incumbent upon one who asserts vicarious *respondeat superior* liability to make *prima facie* showing of the existence of the relation of master and servant or principal and agent or employer and employee.” *Zirkle v. Winkler*, 214 W. Va. 19 *, 585 S.E.2d 19 (2003).

In the case at hand, the Respondent’s control over the Administrative Director is nearly total. According the Constitution of the State of West Virginia in Article VIII, Section 3:

“The court shall have general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts. The chief justice shall be the administrative head of all the court.”

“The court shall appoint an administrative director to serve at its pleasure at a salary to be fixed by the court. The administrative director shall, under the direction of the chief justice, prepare and submit a budget for the court. The officers and employees of the supreme court of appeals, including the clerk and the law librarian, shall be appointed and may be removed by the court. Their duties and compensation shall be prescribed by the court.”

(emphasis added)

Thus, on its face, the West Virginia Constitution grants the Respondent prima facie control over the Administrative Director, as both a Justice, and during her various times while serving as Chief Justice. Moreover, the Respondent herself authored an opinion in a relevant case of *Rice v. Underwood*, 205 W.Va. 274, 517 S.E. 2d 751 (1998), wherein the Court allowed a “quasi-judicial officer” of the West Virginia Racing Commission to be terminated at the “will and pleasure” of the sitting Governor under the West Virginia Constitution despite arguments that the officer enjoyed certain statutory and common law protections to his position.

Certainly, the Administrative Director can be removed at the pleasure of the Court for negligent, feckless, or incompetent performance when there are no statutory protections and the text of the Constitution expressly authorizes the control and removal of that officer. In accordance with the clear text of the Constitution and relevant West Virginia case law, the Respondent has had near total control over Administrative Directors, both past and present, throughout her terms on the Court, and as such may be held accountable, not only for her own negligent acts and omissions, but for those of the Administrative Director, and should not be allowed to use the Administrative Director, a subordinate officer, as a scapegoat for her own failures to supervise him as a superior officer.

The Respondent erroneously asserts twice that Article XIV should be dismissed under the principles of agency law because the article does not allege she “caused the acts or omissions by supervising or controlling the person appointed to that position.” Not only is this assertion completely irrelevant, because she is responsible under agency law for the negligence of her subordinates, but Article XIV alleges exactly that the Respondent failed to exercise needed or necessary supervisory control. After an extensive list of her failures to supervise and control her subordinates it avows:

“That the said Chief Justice Margaret Workman, ... of the Supreme Court of Appeals of West Virginia, ...did, in the absence of any policy to prevent or control

expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending ... **did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court** and the subordinate courts **by failing to carry out one or more of the following necessary and proper administrative activities...**"
(emphasis added)

That Article concludes by noting the acts complained of constitute a "failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities". We do agree with the Respondent when her Motion states that it can be presumed that the position of Administrative Director entails additional duties beyond budget preparation and many of those duties are in, some fashion or another implicated in Article XIV. However, this in no way relieves the Respondent from her Constitutional duties and her duties under the Judicial Cannons to supervise and control the activities of the court system, including its Administrative Director and other subordinate employees.

To the extent that the Administrative Director resisted or refused to perform his duties as directed, the Respondent was well within her right to attempt to remove him, which she did not, until after an over ten-year tenure in that position. She could have attempted to demote the Administrative Director or lower his pay, which she did not; she could have prepared or proposed the needed policies herself, which she, as a learned and experienced attorney, could, which she did not; or she could have encouraged the hiring of competent staff, which she did not, or, as Chief Justice she could have mandated the hiring of such staff or, even, if necessary, outside consultants who could prepare the necessary policies for Court approval, which she did not.

A careful review of the Court's Administrative Minutes and other testimony will clearly demonstrate that the Respondent made no attempts to exercise needed control over the allegedly rogue Administrative Director and made no attempts herself to prepare or oversee the preparation of needed policies. Evidence will show that the Respondent's single half-hearted effort to have a purchasing card policy prepared was never followed-up on by the Respondent. The argument that the negligence of the court and of its Administrative Director to prepare and implement

effective policies is somehow “manifestly outside the scope of [their] employment” is preposterous on its face and is directly contradicted by the text of Article VIII, Section 3 of the West Virginia Constitution:

“The court shall have **general supervisory control** ...The chief justice shall be the **administrative head** of all the court...The court **shall appoint** an administrative director **to serve at its pleasure** ... The administrative director shall, **under the direction** of the chief justice, **prepare and submit a budget** for the court.

The officers and employees of the supreme court of appeals, including the clerk and the law librarian, **shall be appointed and may be removed** by the court.

Their duties and compensation shall be prescribed by the court.”

(Emphasis added)

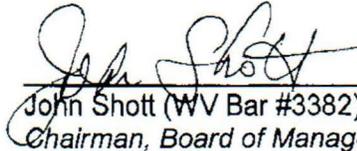
All aspects of the control and operation of the judicial branch of government under the plain text of the West Virginia Constitution rested in and was shared by the six officers named in the Constitution, the Justices and the Administrative Director; the last and the lesser of these who served solely at the pleasure of the Court of which the Respondent was a part. The “scope of [their] employment” as Constitutional Officers, both as individuals and as a collective group, was to manage the court system and act as fiduciaries of the public trust. The Respondent’s failure to even attempt to control an agent or to perform her Constitutional, judicial, and fiduciary duties to the people of West Virginia not only makes the Respondent subject to the Constitutional remedy of removal from office, but the said failures and breaches of duty are the very thing that compels this Legislature to take such action.

The Respondent’s argument that somehow governmental immunity can protect her from impeachment is without legal merit. All case law cited by her deals with employees who were acting outside of the scope of their duty, either by undertaking *ultra vires* acts or by having omitted to fulfill some duty. We rely upon a case Respondent herself cited as Syllabus Point 6 of her opinion in *W.Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 234 WVa. 492, 766 S.E.2d 751 (2014) for the premise that immunity is a legal construct designed to protect the government and its officials from **tort** liability and does not trump the Respondent’s Constitutional, judicial, and

fiduciary duties to the citizens of West Virginia in this, a political proceeding. See Syl Pt. 4, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). "If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby." To hold otherwise would lessen or render the Constitutional power of impeachment meaningless in cases of maladministration, corruption, neglect of duty, and incompetence, all of which are expressly included as grounds for removal from office. The Respondent's argument might have merit if a citizen of West Virginia attempted to file a tort action in a court of law to recover damages from wasted funds brought about by alleged negligent management of the judicial branch of government, but such governmental immunity has no applicability here.

The Administrative Director's actions or inactions, including his manifest refusal to implement the Respondent's attempt to develop one of but many neglected policy initiatives, were not outside his scope of authority and clearly not illegal. The Administrative Director's decision may have exercised bad judgement or poor discretion by waiting for additional guidance. His failure to act on her request may amount to insubordination, if it were proven to be intentional and proven to be flagrant enough, but that failure is not a violation of law and in no way alters the scope of his duties as the Respondent suggests. Article XIV contains numerous other failures regarding the implementation or failure of implementation of additional policies within the Judiciary, all contributing to maladministration, corruption, incompetency, and neglect of duty, other than the issues surrounding the Purchasing Card policy.

Accordingly, for these and other good and sufficient reasons, we respectfully request this Presiding Officer deny the requested Motion to Dismiss and provide us with all appropriate and consistent relief.



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CERTIFICATE OF SERVICE

I, JOHN H. SHOTT, on behalf of the Board of Managers, do hereby certify that the foregoing "*Board of Managers of the West Virginia House of Delegates' Response to Chief Justice Workman's Motion to Dismiss Article XIV as barred by the Principles of Agency*" has been upon the following individuals this 5th day of October 2018, by delivering a true and exact copy thereof as follows:

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