CONTAINS CONFIDENTIAL INFORMATION

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-0174

RONALD C. AYERSMAN and RONALD C. "MACKEY" AYERSMAN, ASSISTANT STATE FIRE MARSHAL,

Defendants Below, Petitioners,

v.

TAMMY S. WRATCHFORD and MICHAEL W. WRATCHFORD,

Plaintiffs Below, Respondents.

FROM THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA
CIVIL ACTION NO. CC-16-2018-C-3
HONORABLE H. CHARLES CARL, III, JUDGE

PETITIONER'S BRIEF OF RONALD C. AYERSMAN AND RONALD C. "MACKEY" AYERSMAN, ASSISTANT STATE FIRE MARSHAL

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I. ASSIGNMENTS OF ERROR

The Circuit Court of Hardy County erred when it denied Ronald Ayersman's[1] Motion for Summary Judgment, in which Ayersman demonstrated that he is protected by qualified immunity on Counts II, V, VI, VII, and XI contained in the Amended Complaint filed by Respondents Tammy S. Wratchford and Michael W. Wratchford, plaintiffs below. Ayersman is a State employee who investigated a fire at the Wratchfords' residence and determined that the fire was incendiary in nature. After Ayersman completed his investigation, with the approval of and at the direction of his supervisors with the State, Ayersman filed criminal complaints against Ms. Wratchford. Ayersman brings the following two assignments of error:

Assignment of Error No. 1 – The circuit court erred when it denied Ayersman's motion for summary judgment on Counts II and XI of the Amended Complaint, in which counts the Wratchfords allege that Ayersman acted with negligence in investigating the fire. The doctrine of qualified immunity "bars a claim of mere negligence against a State agency . . . and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer." Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 273, 465 S.E.2d 374, 375 (1995).

Assignment of Error No. 2 – The circuit court erred when it denied Ayersman's motion for summary judgment on Counts V, VI, VII, and XI of the Amended Complaint, in which the Wratchfords allege intentional acts. The crux of the Wratchfords' claims is their allegation that Ayersman acted maliciously in investigating the fire, finding it to be incendiary, and charging Ms. Wratchford with arson. However, Ayersman had probable cause to file charges against Ms.

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[1] Mr. Ayersman is named as a defendant twice in the underlying action, once as Ronald C. Ayersman, individually; and again as Ronald C. "Mackey" Ayersman, Assistant State Fire Marshal ("ASFM"). He brings this appeal in both capacities in which he was named a defendant; however, Ayersman's involvement in the circumstances underlying this civil action were all undertaken in his official capacity as an ASFM.

Wratchford; he did not engage in conduct that violated any clearly established statutory or constitutional right or law that a reasonable person would have known about; and he did not engage in conduct that was fraudulent, malicious, or oppressive.

The Court should therefore reverse the February 9, 2021 decision of the circuit court, which in error denied Ayersman's summary judgment motion on the basis of qualified immunity, and render judgment in Ayersman's favor on Counts II, V, VI, VII, and XI of the Amended Complaint.

II. STATEMENT OF THE CASE

A. Ayersman's Employment.

Petitioner Ayersman has been employed by the W. Va. State Fire Marshal's Office ("WVSFMO") as an Assistant State Fire Marshal ("ASFM") since 1994. (JA 00279.) In his role as an ASFM, his work is limited to issues that arise within the State of West Virginia. (*Id.*) In January 2010, Ayersman began working, on a part-time basis, for Fire Safety Investigations ("FSI") as a fire investigator.[2] (*Id.*) While FSI performs work in West Virginia, Maryland, and Pennsylvania, Ayersman does not investigate any fires for FSI that occurred in West Virginia. (*Id.*) On January 30, 2010, Ayersman completed a "Request for Determination Regarding Secondary Employment or Volunteer Activity" form and provided the form to the WVSFMO. (JA 00282-85.) As indicated on the form, Ayersman advised the WVSFMO about his secondary employment with FSI and that, for FSI, he would investigate fires only outside of the State of West Virginia. (*Id.*) Ayersman's supervisor and the WVSFMO determined that there was no conflict. (*Id.*) Additionally, as indicated by a stamp on the form, Ayersman believes that the WVSFMO also sent the form to the W. Va. Ethics Commission ("Ethics Commission"). (JA 00285.)

For years, Ayersman worked in his role as a West Virginia ASFM in investigating fires

[2] Fire Safety Investigations later changed its name to Fire & Safety Investigation Consulting Services, LLC.

that occurred in-state, and in his secondary employment for FSI in investigating fires that occurred outside West Virginia. (JA 00279.) The WVSFMO was aware of this arrangement, and it never advised Ayersman there was any issue with his secondary employment with FSI. (*Id.*) Indeed, the Ethics Commission has examined this issue twice: initially at the request of the WVSFMO, and again after Ms. Wratchford filed an ethics complaint against Ayersman. On October 11, 2017, Andrew Herrick, Staff Attorney for the Ethics Commission, advised the WVSFMO that none of the information presented indicated that Ayersman's public employment and secondary employment violated the W. Va. Ethics Act ("Ethics Act"). (JA 00286-88.) Similarly, after investigating Ms. Wratchford's ethics complaint, the Probable Cause Review Board for the Ethics Commission dismissed the complaint, concluding that there was no probable cause to show that Ayersman violated the Ethics Act. (JA 00289.)

B. The Investigation of the Fire at the Wratchfords' Home.

1. The Fire.

On February 20, 2017, the stairs caught fire at the Wratchfords' home, which is insured by Erie Insurance Property & Casualty Company ("Erie"). That same day, Chad Tuttoilmondo, a Property Claims Specialist for Erie, emailed Brent Harris, the owner of FSI, about the fire and cc'd Ayersman at his personal email address. (JA 00290-93.) At the time of the email, Mr. Harris was out of the country on vacation. (JA 00279-80.) On receiving the email, Ayersman contacted Mr. Harris, who advised that he would be returning to the office the next day. (*Id.*) Ayersman then emailed Mr. Tuttoilmondo to advise that Mr. Harris would be returning to the office tomorrow, and to advise that Mr. Harris would need to handle any fires in West Virginia. (*Id.*; JA 00291.)

2. FSI's Investigation of the Fire.

On February 23, 2017, Mr. Harris, on behalf of FSI, traveled to the Wratchfords' residence to conduct an origin and cause examination of the fire. (*See* JA 00294-302.) Mr. Harris determined

that the area of origin of the fire was in the lower-level stairwell, and he looked for potential ignition sources in this area. (*Id.*) While there were two electrical circuits in the area, "[a] visual examination of these circuits showed no indications consistent with a failure which would cause a fire." (*Id.* (chiefly JA 00297).) After conducting his initial origin and cause investigation, Mr. Harris recommended to Mr. Tuttoilmondo that Dr. Bert Davis, an Electrical Engineer with Romualdi Davidson & Associates ("RDA"), examine the electrical system. (*Id.* (chiefly JA 00297).) Mr. Harris further advised Mr. Tuttoilmondo that he "was contacting the West Virginia State Fire Marshal's Office and requesting they investigate the fire." (*Id.* (chiefly JA 00297).)

3. Referral to the WVSFMO.

On February 23, 2017, Mr. Harris spoke separately with George Harms, Assistant State Fire Marshal III (Field Supervisor), and Ayersman about the fire at the Wratchfords' home. (JA 00280; JA 00303-04.) Additionally, after speaking with Mr. Harms and Ayersman, Mr. Harris called the WVSFMO's Arson Hotline to report the fire. (JA 00305.) Because of Mr. Harms' workload at the time, Mr. Harms, as Ayersman's immediate supervisor, assigned Ayersman to investigate the fire that occurred at the Wratchfords' home. (JA 00280; JA 00303.) Moreover, February 23, 2017 was Ayersman's first day back to work for the WVSFMO after being off on leave for several months. (JA 00280.) As a result, at the time of the assignment, his workload was significantly less than Mr. Harms' workload. (*Id.*) Ayersman did not ask to be assigned to the case. (*Id.;* JA 00303.)

At the time he made the assignment, Mr. Harms knew of Ayersman's secondary, part-time employment with FSI, and he knew that Ayersman had previously conducted fire investigations for FSI in Maryland and Pennsylvania. (JA 00303.) Mr. Harms, however, had no concerns with assigning the investigation to Ayersman or regarding Ayersman's ability to conduct a fair and impartial investigation of Plaintiffs' case. (*Id.*)

4. Aversman's Investigation.

a. Aversman's Inspection of the Wratchfords' Residence.

Ayersman conducted a thorough and complete investigation of the fire that occurred at the Wratchfords' residence. On February 24, 2017, Ayersman traveled to the Wratchfords' residence to begin his origin and cause examination of the fire. (*See* JA 00306-19.) That day, he inspected both the outside and inside of the residence, and he interviewed both Mr. and Ms. Wratchford about the fire. (*Id.*) His examination determined that the area of origin was in a stairwell and that the fire originated on the top portion of the stairs. (*Id.*) Ayersman found that that the damage to the stairs was consistent with the presence of an ignitable liquid or other combustible material. (*Id.*) That day, Ayersman's hydrocarbon detector alerted to the possible presence of an ignitable liquid.[3] (*Id.*) At the conclusion of his initial examination, Ayersman believed that the fire was incendiary in nature and that he could eliminate all accidental/electrical causes in the area of origin. (*Id.*)

Ayersman returned to the Wratchfords' residence on February 27, 2017 with Mr. Harris of FSI and Dr. Bert Davis of RDA. (*Id.* (chiefly JA 00308).) FSI had retained Dr. Davis to examine the electrical system. (JA 00297.) At the conclusion of his investigation, Dr. Davis was able to eliminate the electrical service as being involved in the initiation of the fire. (JA 00306-19 (chiefly JA 00308).) Dr. Davis, Mr. Harris, and Ayersman agreed at that time that this was a was slow/long burning fire that was clearly oxygen-deprived. (*Id.*) Ayersman also understood that they all concurred that the fire was incendiary in nature. (*Id.*)

b. Polygraph Examination and Interview of Ms. Wratchford.

On March 9, 2017, after Tammy Wratchford consented to be interviewed and waived her

[3] Subsequent lab tests by the West Virginia State Police Forensic Lab of materials removed from the residence, however, did not confirm the presence of an ignitable liquid. (JA 00318.)

Miranda[4] rights, Kevin Pansch, a civilian W. Va. State Police ("WVSP") Polygraph Examiner, conducted a polygraph examination of her. (JA 00311-13; JA 00320-25.) During this examination, the only two individuals in the room were Mr. Pansch and Ms. Wratchford. (JA 00326-27.) Mr. Pansch asked the following relevant questions: whether Ms. Wratchford set the fire at her house; whether she saw the fire start at her house; and whether she planned with anyone to set the fire at her house. (JA 00323.) Based on her overall score, Mr. Pansch concluded that Ms. Wratchford's responses to the relevant questions indicated deception. (*Id.*) As a result, Mr. Pansch found that Ms. Wratchford "was not truthful and unresolved deception remained at the conclusion of [the] examination[,]" and he concluded his report with the following statement: "I would strongly suggest verification of all information offered in any statement by this examinee, before you accept it for the truth." (JA 00323-24.)

After the polygraph examination, Ayersman and Mr. Pansch interviewed Ms. Wratchford about the polygraph results and the arson allegations. (*Id.*) During this interview, Ms. Wratchford admitted to both men that, two weeks prior to the February 20, 2017 fire, she had intentionally left a candle burning under a Christmas tree inside the living room of the house in hopes that it would burn the house down. (*Id.*; JA 00311-13; JA 00324, JA 00326, 00328-29.)

At the conclusion of the interview, Ayersman took a recorded statement from Ms. Wratchford. (JA 00312-13.) When Ayersman asked about Ms. Wratchford's admission that she had placed the candle under the tree with hopes that it would catch the house on fire, she initially back-peddled by stating that she had left the candle on without blowing it out when she left the house. (*Id.*) However, when Ms. Wratchford was reminded that she had previously told them several times that she had left the candle on because she thought it would catch the tree on fire,

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

she agreed that she had made that statement. (*Id.;* JA 00330 (*this page is a CD of Ms. Wratchford's recorded statement with the relevant portion at ~6:56 to 10:25*).) Ms. Wratchford further admitted that she had purposefully left the lit candle under the tree. (*Id.*)

c. <u>The Wratchfords' Dire Financial Situation.</u>

Subsequent to the polygraph examination, Ayersman obtained various information related to the Wratchfords' dire financial situation at the time of the fire. For instance, Ayersman learned that, prior to and at the time of the February 20, 2017 fire, the Wratchfords were more than $6,000 behind on their mortgage payments. (JA 00331-33.) Furthermore, Ayersman learned that in June 2016, over six months before the fire, the bank had given the Wratchfords notice that they were over 87 days past due on their mortgage; that the mortgage was being accelerated; that the entire balance was being declared due; and that the bank may initiate foreclosure proceedings if the entire delinquent mortgage payments were not made. (JA 00334.)

Ayersman further learned that despite being warned in June 2016 of potential foreclosure proceedings being initiated, the Wratchfords continued to fail to make their mortgage payments. (JA 00335.) To give them another chance, the bank had placed the Wratchfords on a payment plan in September 2016 to address the delinquent mortgage payments, which were still over $6,000 past due. (*Id.*) In a letter, Tina Martin of Summit Community Bank stated, "I cannot stress more the importance of you being able to maintain this payment arrangement. It is imperative that these payments be paid as agreed to avoid further action and/or a foreclosure proceeding." (*Id.*)

Ayersman also obtained correspondence between Summit Community Bank and the Wratchfords showing that, despite this second chance, the Wratchfords failed to make the payments set forth in the payment plan, and they remained over $6,000 behind in their mortgage payment up until the time of the February 20, 2017 fire. On December 28, 2016, Ms. Wratchford

sent an email to Ms. Martin indicating that they would not be able to catch up the back payments owed by the end of December. (JA 00336.) Ms. Wratchford advised Ms. Martin that she understood that Ms. Martin may have to "begin the proceedings." (*Id.*) On January 26, 2017, Ms. Wratchford sent another email asking Ms. Martin to work with them a little longer on their efforts to pay the past due amounts on the mortgage. (JA 00332-33.) Ms. Martin responded, advising that the bank could not enter into another payment arrangement and that she had been instructed to send the Wratchfords' account to an attorney. (*Id.*) Ms. Martin also stated, "You have the right to pay it current **out of foreclosure** by paying the total past due payments plus attorney fees. You will receive notification from the attorney within the next week or so." (*Id.* (emphasis added)).

On February 1, 2017 – 19 days before the fire – Ms. Wratchford replied to Ms. Martin, again asking for more time to pay the past due amount. (JA 00331-32.) That same day, Ms. Martin responded via email to advise that a complete refinance was performed in September 2014 to avoid foreclosure; the loan had consistently been past due for two years; the bank had entered into a payment arrangement in September 2016 to avoid foreclosure; and the loan, as of February 1, 2017, was past due in the amount of $6,218.50, plus late fees. (JA 00331.) Ms. Martin concluded the email by stating "You have the right to pay the loan current **out of foreclosure** by paying the amount past due at the **time of foreclosure** including any associated fees up to 5 days prior to the **foreclosure date**." (*Id.* (emphasis added); *see also* JA 00337.)

In addition to obtaining these correspondences, Ayersman also spoke with the agent at Summit Community Bank who was assigned to provide all documents requested in the subpoena Ayersman sent to the bank. (JA 00280.) Ayersman specifically asked the employee if foreclosure proceedings were in place. (*Id.*) The employee said "Yes" and stated that the Wratchfords were aware of the foreclosure proceedings. (*Id.*)

As part of his investigation, Ayersman also obtained the Wratchfords' bank records. While the Wratchfords take issue with Ayersman citing in the criminal complaints to an amount that was in only one of the bank accounts, i.e., $0.26, the total amounts in the other bank accounts show that the Wratchfords lacked sufficient funds to pay the over $6,000 past due for their mortgage. For instance, the Wratchfords had a total of approximately $1,500 in all their bank accounts, combined (they had, as of February 15, 2017, $0.26 in a joint checking account at Summit Community Bank, (JA 00338); as of February 21, 2017, $103.70 in another checking account at Summit Community Bank, (JA 00339); as of February 17, 2017, $1,330.54 in a checking account at Pendleton Community Bank, (JA 00341);[5] and as of February 17, 2017, $66.13 in a joint checking account at Pendleton Community Bank (JA 00343)).

Therefore, at the time of the February 20, 2017 fire, the Wratchfords were over $6,000 behind in their mortgage payments and had been informed that foreclosure proceedings had begun, but they had only approximately $1,500 in all of their bank accounts, well short of the required funds to pay the loan out of foreclosure. Ayersman knew that, due to these significant financial issues, Ms. Wratchford had a clear motive to attempt to burn down the house.

d. Ayersman's Conclusions.

Based on the information gathered during his investigation, Ayersman, in his discretion as an ASFM, found that the fire was isolated to the stairwell area in the home. (JA 00317.) Moreover, Ayersman found that the ignition source of the fire was an open flame, lighter or match; and that the fire was intentionally set. (JA 00306-19 (chiefly JA 00316-19).) Ayersman further determined that the fire originated on top of the stairs as opposed to underneath the stairs. (*Id.*) While there

[5] Prior to a tax refund deposit into this account on February 15, 2017, the account only had a balance of $0.10. (JA 00341.) While the balance increased on February 21, 2017, that was due to a $5,000 payment Erie made to the Wratchfords after the fire. (*See* JA 00340-41.)

was electrical wiring underneath of the stairs, Ayersman concluded that there was no indication that the fire originated in the electrical wiring. (*Id.*) Rather, some of the wiring showed signs of external or secondary damage due to the fire, which was not consistent with the wiring being the fire's point of origin. (*Id.*) Furthermore, while closer examination of the electrical wiring underneath the stairs revealed signs of minor electrical arcing, this arcing was due to the fire affecting the wires, not from the electrical wires causing the fire. (*Id.*) Dr. Davis' findings corroborated that the fire was not caused by electrical service at the house. (*Id.*)

C. Ms. Wratchford's Criminal Prosecution.

Prior to filing criminal charges against Ms. Wratchford, Ayersman sent the case file to Deputy State Fire Marshal Jason Baltic and Mr. Harms, ASFM III (Field Supervisor), for their review and approval. (JA 00280.) After reviewing this information, both supervisors indicated that charges were appropriate against Ms. Wratchford. (*Id.*) At their direction and approval, Ayersman submitted five criminal complaints against Ms. Wratchford[6] to the Hardy County Magistrate (*id.*), including charges for (a) first degree arson; (b) burning, or attempting to burn, insured property; (c) insurance fraud; (d) attempt to commit arson; and (e) burning, or attempting to burn, insured property.[7] After reviewing the criminal complaints, the Hardy County magistrate found probable cause as to each charge, and issued an arrest warrant for Ms. Wratchford. (JA 00344-55.)

On June 26, 2017, the Hardy County Magistrate Court conducted a preliminary hearing regarding these criminal charges. The Wratchfords' counsel in this civil action represented Ms. Wratchford during the hearing and questioned Ayersman regarding the investigation. The Hardy County magistrate found probable cause to bind over the criminal charges to the Grand Jury. (*Id.*;

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[6] Mr. Ayersman did not file any criminal complaints against Mr. Wratchford because he found no evidence that Mr. Wratchford was involved in any attempt to commit arson or insurance fraud.

[7] This second "burning, or attempting to burn, insured property" charge concerned the occasion when Ms. Wratchford purposefully left a candle burning in her house two weeks before the February 20, 2017 fire.

JA 00385, 00395.)

On February 6, 2018, Ms. Wratchford's criminal charges were presented to a Grand Jury by Hardy County Prosecuting Attorney Lucas See. Ultimately, the Grand Jury returned a no true bill on the charges. (JA 00356.) However, the Grand Jury hearing transcript shows Mr. See's improprieties and why this happened. First, although Ayersman was the officer who both investigated the fire at the Wratchfords' residence and presented the charges against Ms. Wratchford, Mr. See did not call Ayersman to present testimony to the Grand Jury. Rather, Mr. See called Paul Alloway, another ASFM, to testify before the Grand Jury. Mr. Alloway, however, was not involved in any aspect of the investigation. (JA 00358-59.)

Additionally, Mr. See suggested to the Grand Jury that Ayersman had an alleged "conflict of interest" in investigating the Wratchfords' fire.[8] (JA 00360-61.) And, notwithstanding Mr. See's sworn duty to establish probable cause and to present the State's evidence to the Grand Jury, he called Ms. Wratchford's paid expert witness, Larry Rine from MSES Consultants, Inc. ("MSES"), to present exculpatory testimony regarding the cause of the fire at the Wratchfords' residence. (JA 00362.)[9] Indeed, Mr. See subpoenaed Mr. Rine to testify before the Grand Jury before he received a copy of Mr. Rine's report as to the cause of the fire. (JA 00393.) Mr. See did not disclose to Ayersman or the WVSFMO that he had received a conflicting report from MSES, and he never talked to Ayersman about the report so that Ayersman could rebut the information in it. (JA 00388.) Moreover, Mr. See never told Ayersman, Mr. Alloway, or anyone from the WVSFMO that he planned to call Mr. Rine as a witness. (JA 00389.)

On calling Mr. Rine, Mr. See asked whether Mr. Rine believed that the fire was arson, and

[8] In this civil action, Plaintiffs have asserted the same "conflict of interest" theory to support their claims against Ayersman, and Mr. See's file contained an unfiled draft of the Complaint.

[9] Mr. Rine not only was the expert witness Ms. Wratchford offered in her criminal case, but also already had been retained as one of the expert witnesses for the Wratchfords in this civil action.

Mr. Rine responded in the negative. (JA 00363-64.) Ayersman was not permitted to testify to refute Mr. Rine's opinion as to the cause of the fire. As with Mr. Alloway, Mr. See also asked Mr. Rine questions related to an alleged conflict of interest by Ayersman due to an alleged relationship with Erie. (JA 00365-66.) When one of the members of the Grand Jury asked Mr. Rine who hired him, Mr. See falsely suggested to the Grand Jury that Mr. Rine was an independent expert rather than one paid for by Ms. Wratchford. (JA 00367.) Indeed, during his deposition, Mr. See admitted that neither he nor the State of West Virginia hired Mr. Rine. (JA 00394.) Rather, Mr. Rine was retained by Ms. Wratchford's attorney's law firm. (*Id.*) Moreover, Mr. See admitted that when he called Mr. Rine to testify, Mr. See was aware that Mr. Rine was "Mr. Judy's expert." (JA 00386.) (Mr. Judy is legal counsel for the Wratchfords in this civil action.)

Furthermore, although he did not advise Ms. Wratchford of her *Miranda* rights or offer her any immunity for her testimony, Mr. See called Ms. Wratchford to testify before the Grand Jury. (JA 00368, JA 00387.) During his questioning of Ms. Wratchford, Mr. See asked her various questions designed solely to elicit sympathy for her, rather than to provide evidence supporting probable cause. For example, he asked her "And, Tammy, could you tell the grand jury a little bit about how this has personally affected you...."; "Do you have anything else you want to tell the grand jury?"; and "So you lost just about everything?" (JA 00372-74.) Mr. See allowed Ms. Wratchford to provide an unrebutted, exculpatory summary of her version of the events on the date of the fire. (JA 00368-83.) After asking these questions, Mr. See did not call Mr. Alloway to rebut Ms. Wratchford's testimony concerning Ayersman's investigation. (*Id.*) Furthermore, while Mr. See asked Ms. Wratchford a series of questions that erroneously suggested that Ayersman had made inaccurate claims about the Wratchfords' financial condition, Mr. See did not elicit for the Grand Jury any testimony related to their mortgage being significantly in arrears or about notice

from Summit Community Bank regarding the possibility that the Wratchfords would be placed in foreclosure. (JA 00376-77; JA 00390-92.) After the Grand Jury returned a no true bill, the criminal charges against Ms. Wratchford were dismissed, without prejudice.

D. Relevant Procedural History

While the overall procedural history in this civil action is complex, the procedural history relevant to the present appeal is straightforward. The Wratchfords filed the underlying civil action on February 13, 2018, naming as a defendant (among other entities and individuals) Ayersman, after which the circuit court determined that Ayersman had been sued only in his individual capacity. On July 5, 2018, the Wratchfords filed their Amended Complaint, naming Ayersman as a defendant again, now in his official capacity as an ASFM. In their Amended Complaint, the Wratchfords asserted a number of claims against Ayersman, including negligence, intentional violations with malice, intentional infliction of emotional distress, civil conspiracy, malicious prosecution/abuse of process, and violation of civil rights. (JA 00101-42.)

On February 21, 2020, Ayersman filed his Motion for Summary Judgment, asserting (as well as other defenses) that qualified immunity protected him from liability on the Wratchfords' claims for negligence (Count II and Count XI); intentional infliction of emotional distress (Count V); civil conspiracy (Count VI); malicious prosecution/abuse of process (Count VII); and violation of Civil Rights (Count XI). (JA 00242-277, JA 01289-1309.) In its February 9, 2021 "Order Granting in Part and Denying in Part Defendant Ronald C. Ayersman's Motion for Summary Judgment," the Order Ayersman appeals from, the Circuit Court of Hardy County denied Ayersman's motion to the extent that it was predicated on qualified immunity. (JA 01369-91.) Ayersman seeks the reversal of the February 9, 2021 Order, and he seeks the dismissal of Counts II, V, VI, VII, and XI because qualified immunity protects him from liability on those claims.

III. SUMMARY OF ARGUMENT

Ayersman is a State employee, and qualified immunity protects him from liability for the Wratchfords' claims. Those claims arise from Ayersman's discretionary decisions made in his capacity as an ASFM working for the WVSFMO, such as his conclusions regarding the origin and cause of the fire and any decision to present criminal charges, which were reasonably rendered in good faith and entirely within Ayersman's authority/scope of employment, without violating any of the Wratchfords' clearly established statutory or constitutional rights. Qualified immunity bars claims of negligence, and so Ayersman is not liable for the negligence claims in Counts II and XI of the Amended Complaint. Qualified immunity also protects Ayersman from liability on the claims asserting intentional conduct contained in Counts V, VI, VII, and XI. Ayersman had probable cause to file criminal charges against Ms. Wratchford, and indeed the WVSFMO directed him to file the charges, and thus he did not violate any clearly established statutory or constitutional right or law or engage in fraudulent, malicious, or oppressive conduct when he did so.

Accordingly, qualified immunity protects Ayersman from liability on Counts II, V, VI, VII, and XI of the Amended Complaint, and he should be shielded from having to continue to litigate this civil action. The decision of the circuit court denying Ayersman's motion for summary judgment on the basis of qualified immunity was in error and should be reversed, and Ayersman should be granted summary judgment on the claims at issue in this appeal.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the provisions of Rule 18 of the W. Va. Rules of Appellate Procedure, oral argument under Rule 19 is appropriate in this case because it involves assignments of error in the application of settled law. The facts and circumstances underlying this civil action are complex, and oral argument can assist the Court in its understanding of the factual basis giving rise to the

claims and qualified immunity defense. A memorandum decision is not appropriate in this case, which presents an important question about the circumstances under which qualified immunity protects an Assistant State Fire Marshal on concluding that a fire was intentionally set and on taking appropriate action –as he was directed to do by his supervisors – based on that conclusion.

V. ARGUMENT

The Wratchfords' claims against Ayersman are based on a wildly speculative theory that is based in neither fact nor reality – nor is it supported by evidence. Specifically, they assert that Ayersman acted maliciously in his investigation of the fire at their residence by charging Ms. Wratchford with arson, ostensibly so that Erie could avoid paying an insurance claim and so that Ayersman, Erie, FSI, and Christopher Brent Harris could benefit from this arrangement. To the contrary, the evidence shows that, on behalf of the WVSFMO, Ayersman conducted a thorough and unbiased investigation into the origin and cause of the fire that occurred at the Wratchfords' residence. Based on the evidence he learned during his investigation, Ayersman, in his discretion and judgment as an ASFM, and at the direction of his supervisors, presented criminal charges against Ms. Wratchford to a Hardy County magistrate, who found probable cause existed. In doing so, Ayersman did not violate any clearly established statutory or constitutional right of the Wratchfords and did not act maliciously, fraudulently or oppressively. As a result, Ayersman is entitled to qualified immunity as to the Wratchfords' claims, and the circuit court's denial of Ayersman's summary judgment motion on qualified immunity grounds should be reversed.

A. Applicable Standard of Review and the Law of Qualified Immunity.

The W. Va. Rules of Civil Procedure require that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. VA. R. CIV. P. 56(c). " 'A circuit

court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.' " Syl. Pt. 2, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 755 (2014) (citation omitted). This Court recently wrote that it " ' "reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." ' " *W. Va. Div. of Nat. Res. v. Dawson*, 242 W. Va. 176, 832 S.E.2d 102 (2019) (citations omitted).

> Regarding the qualified immunity doctrine, the Court has written:
>
> > [t]he very heart of qualified immunity is that it spares the defendant from having to go forward with an inquiry into the merits of the case. Unless expressly limited by statute, qualified immunity is **necessarily broad** and protects "all but the plainly incompetent or those who knowingly violate the law."

Maston v. Wagner, 236 W. Va. 488, 500, 781 S.E.2d 936, 948 (2015) (citations omitted; emphasis added). Moreover,

> > "[g]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. **A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.**"

Maston, 236 W. Va. at 499-500, 781 S.E.2d at 947-48 (emphasis added) (quoting Syl., *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987)). "Qualified immunity strikes a balance between two competing interests: the 'need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Id.*, 236 W. Va. at 500, 781 S.E.2d at 948 (citation omitted).

Additionally, the qualified immunity doctrine examines whether the public officials' "actions are '**objectively reasonable**' in light of the facts and circumstances confronting them, **without regard to their underlying intent or motivation.**'" *Id.*, 236 W. Va. at 502, 781 S.E.2d at 950 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)) (emphasis added). Therefore, "'the

subjective motivations of a police officer are immaterial to a determination of whether qualified immunity exists[.]'" *Id.*, 236 W. Va. at 501, 781 S.E.2d at 949 (emphasis added; quoting *Robinson v. Pack*, 223 W. Va. 828, 834, 679 S.E.2d 660, 666 (2009)).

Based on the above, the Court has adopted a two-part test for determining when an officer acting within the scope of his authority is entitled to qualified immunity: in the absence of fraudulent, malicious, or intentional wrongdoing, "'(1) does the alleged conduct set out a constitutional or statutory violation, and (2) were the constitutional standards clearly established at the time in question?'" *Id.* (citation omitted). A necessary part of this test is determining whether "'the plaintiff has asserted a violation of a constitutional [or statutory] right at all.'" *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 n.12, 479 S.E.2d 649, 659 n.12 (1996).

The Wratchfords have argued that qualified immunity does not protect Ayersman based on their claim that he violated provisions of the Ethics Act (W. Va. Code § 6B-1-1, *et seq.*). However, for Ayersman to lose the protection of qualified immunity, he must have violated one of the Wratchfords' clearly established statutory or constitutional rights. As the Court has written,

> to establish whether public officials are entitled to qualified immunity, we ask whether an objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate **the plaintiff's constitutional rights**, in light of clearly established law and the information possessed by the defendant at the time of the allegedly wrongful conduct?

Hutchison, 198 W. Va. at 149, 479 S.E.2d at 659 (emphasis added). Moreover,

> [t]o prove that a clearly established right has been infringed upon, a **plaintiff must do more than allege that an abstract right** has been violated. Instead, the plaintiff must make a "**particularized showing**" that a "reasonable official would understand that what he is doing violated **that right**" or that "in the light of preexisting law the unlawfulness" of the action was "apparent."

Id., 198 W. Va. at 149 n.11, 479 S.E.2d at 659 n.11 (citation omitted; emphasis added); *see also Crouch v. Gillispie*, 240 W. Va. 229, 235, 809 S.E.2d 699, 705 (2018).

In discussing what is a "clearly established right" under qualified immunity, case law

discusses those rights that are specific to the individual plaintiffs. For instance, in *Dawson*, the clearly established individual right that was allegedly violated was an infringement on the plaintiff's liberty interest without appropriate procedural due process protections. 242 W. Va. 176, 832 S.E.2d at 111. Similarly, in *Maston*, the plaintiff alleged that the defendants "violated **the plaintiff's** clearly established right to be free from unlawful arrest, seizure and injury under the West Virginia Constitution." 236 W. Va. at 499, 781 S.E.2d at 947 (emphasis added). Even in situations where the "clearly established right" comes from a statute, the allegedly violated right must specifically apply to the plaintiff before qualified immunity can be lost. *W. Va. Dept. of Health and Human Resources v. V.P.*, 241 W. Va. 478, 485, 825 S.E.2d 806, 813 (2019).

" 'The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.' " Syl. Pt. 3, *A.B.*, 234 W. Va. at 766 S.E.2d at 755 (citation omitted). Indeed, very recently (after the circuit court denied Ayersman's summary judgment motion), the Court reversed the decision of a circuit court that denied a summary judgment motion brought on the basis of qualified immunity. *W. Va. Dep't of Env't Prot. v. Dotson*, 856 S.E.2d 213, 216 (W. Va. 2021). There, individuals who sustained damage due to flooding sued the W. Va. Department of Environmental Protection ("DEP") for causing their damages by negligently issuing permits to a mining company and failing to issue Notices of Violation to the mining company. *Id.*, at *3.

The Court determined that the DEP's acts at issue constituted discretionary functions and that no evidence showed that the DEP "turned a blind eye" to any "unmistakable evidence of a violation" by the mining company, merely that the plaintiffs, in hindsight, wished that the DEP

had issued additional Notices of Violation. *Id.*, at *8. The Court concluded:

> Because the record is devoid of any evidence which demonstrates that the DEP's alleged discretionary acts or omissions are in violation of "clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive[,]" the DEP is entitled to qualified immunity pursuant to our well-established law. . . . We therefore find that the circuit court erred in denying the DEP's motion for summary judgment on the basis of qualified immunity.

Id., 856 S.E.2d at 222 (citation omitted).

Here, too, the circuit court erred when it denied Ayersman's summary judgment motion. Ayersman, in his role as an ASFM, conducted an origin and cause investigation and made a discretionary decision in finding that the fire at the Wratchfords' house was intentionally set. After consulting with his superiors, and at their direction, Ayersman filed criminal complaints against Ms. Wratchford. There was nothing fraudulent, malicious, or oppressive about this act. It was based on the evidence that he found during the investigation and was further supported when, twice, a magistrate found (once with Ms. Wratchford's attorney challenging the evidence) that probable cause existed to file the charges and move forward with the criminal prosecution against Ms. Wratchford.

B. Assignment of Error No. 1: Ayersman Is Entitled to Qualified Immunity for the Wratchfords' Negligence Claims.[10]

Relevant to the Wratchfords' negligence claims against Ayersman in Counts II and XI of the Amended Complaint, the Court has stated:

> [i]f 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.

[10] In his summary judgment briefing, Ayersman briefed for the circuit court his defense to the negligence claims on the basis of qualified immunity. (*See* JA 00242-277, JA 01289-1310.)

Syl. Pt. 4, *Clark*, 195 W. Va. at 273, 465 S.E.2d at 375 (emphasis added). Moreover,

> [i]n the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity **bars a claim of mere negligence** against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.*, and **against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.**

Syl Pt. 6, *id.* (emphasis added).[11]

In *Clark*, the Court specifically addressed a law enforcement officer's right to qualified immunity for negligent conduct. In that case, a Conservation Officer for the W. Va. Department of Natural Resources who was investigating illegal doe hunting approached two hunters and asked them to lay down their guns and produce their hunting licenses. 195 W. Va. at 274, 465 S.E.2d at 376. One hunter, Clark, put down his gun, but the other hunter reached for his license without putting his gun down. *Id.* The Officer thus drew his revolver and attempted to remove the gun from the other hunter's lap, but the gun discharged and shot Clark in the leg. *Id.* The Court held that, in the absence of an insurance contract waiving the defense, qualified immunity barred the negligence claim against the Officer. *Id.*, 195 W. Va. at 278-79, 465 S.E.2d at 380-81. The Court found that the Officer's conduct occurred within the scope of his employment, and it involved his discretionary judgments, decisions, and actions. *Id.*, 195 W. Va. at 279, 465 S.E.2d at 381. It further found that in performing those discretionary duties, the Officer "should not be faced with the choice of either inaction and dereliction of duty or 'being mulcted in damages' for doing his duty." *Id.*, 195 W. Va. at 278, 465 S.E.2d at 380.

1. Ayersman Does Not Lose the Protection of Qualified Immunity Based on the Wratchfords' Claim that He Violated the Ethics Act.

In the case *sub judice*, when discussing qualified immunity generally, the circuit court

[11] In the current civil action, insurance exists, but no insurance contract waives Ayersman's qualified immunity defense.

correctly found that the Ethics Act, including the Wratchfords' claim that Ayersman violated W. Va. Code § 6B-2-5(e), "cannot defeat the qualified immunity defense, because the statutory or constitutional right that was violated must be a right that specifically applies to the [Wratchfords]" and that the Wratchfords "have not articulated any other clearly established right." (JA 01377, ¶ 24.) Confoundingly, however, in the same Order, when it denied Ayersman's motion to dismiss the negligence claims against him, the circuit court found that the Wratchfords "have alleged Mr. Ayersman violated policies of the State Fire Marshal and violated West Virginia Code § 6B-2-5(e)." (JA 01381, ¶ 36.)

The Ethics Act states that "[n]o present or former public official or employee may **knowingly** and **improperly disclose** any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person." W. Va. Code § 6B-2-5(e) (emphasis added). As the circuit court initially correctly concluded, (JA 01377, ¶ 24), the Ethics Act cannot function to defeat the application of qualified immunity in this case because the Wratchfords have not shown that they had a right under Section 6B-2-5(e), much less that Ayersman violated it. *See Hutchison*, 198 W. Va. at 149 n.11, 479 S.E.2d at 659 n.11 (alleging the violation of an abstract right is insufficient; a plaintiff must make a "particularized showing" of a violation of the plaintiff's right). Section 6B-2-5(e) grants no right to the Wratchfords; rather, it provides only that a public official or employee may not knowingly, improperly disclose confidential information. Because the Wratchfords have no right under Section 6B-2-5(e), Ayersman's qualified immunity defense is not defeated based on an allegation that he violated it.

Furthermore, even if a violation of the Ethics Act (Section 6B-2-5(e)) could result in the loss of qualified immunity, no evidence presents a question of material fact preventing summary

judgment in this case. The Wratchfords have relied on the opinion of their designated expert, Steven Dawson, to support their claim that Ayersman improperly disclosed confidential information during his investigation. Mr. Dawson, however, could not cite to any WVSFMO policy or procedure stating that confidential information cannot be shared during an investigation. (JA 01322.) Indeed, as Mr. Dawson admitted, he has never even read the WVSFMO's policies and procedures. (*Id.*) Accordingly, his opinion is based entirely on speculation and conjecture, which is insufficient to support a jury verdict or to survive summary judgment.

To support his opinion, Mr. Dawson tried to rely on the following language, which appeared in some of Ayersman's past WVSFMO investigation reports: "Information related to any incendiary fire shall not be released to any person, firm, etc." (JA 01321.) However, as Ayersman confirmed, that language was his own language, which he placed on the investigation reports; it was not WVSFMO policy. (JA 1323.) The WVSFMO also confirmed that it had no policy precluding Assistant State Fire Marshals, like Ayersman, from sharing information related to an investigation with third parties, including insurance companies. (JA 01324-25.) Thus, contrary to Mr. Dawson's unsupported opinion, Ayersman did not improperly disclose confidential information during his investigation and thus did not violate Section 6B-2-5(e) of the Ethics Act.

Accordingly, the circuit court was correct when, in paragraph 24 of its Order, it stated that the Wratchfords' "alleged violations of the Ethics Act [§ 6B-2-5(e)] cannot defeat the qualified immunity defense." (JA 01377.) The circuit court erred when (or if) it contradicted itself in paragraph 36 of its Order (JA 01381), where it stated that the Wratchfords have alleged a violation of W. Va. Code § 6B-2-5(e), and apparently used that as a basis for denying Ayersman's summary judgment motion on the basis of qualified immunity. No evidence suggests that Ayersman violated any clearly established right or law of the Wratchfords or that any such right is located in the Ethics

Act, and thus the Ethics Act does not prevent the application of qualified immunity regarding the Wratchfords' negligence claims in Counts II and XI.

2. *The Evidence Shows that Ayersman Acted Reasonably, in Good Faith, and Within the Scope of His Authority, Duty, and Jurisdiction with the WVSFMO, and a Jury May Not Rest a Verdict on Mere Speculation to the Contrary.*

All evidence in this matter shows that Ayersman acted within the scope of his employment with the WVSFMO and that he did not act fraudulently, maliciously, or oppressively. To find otherwise, a jury would have to rely solely on speculation and conjecture, which are insufficient to support a jury verdict. The circuit court therefore erred when it found that a genuine question exists about whether Ayersman acted outside of the scope of his employment with WVSFMO and about whether he acted with malice, fraudulently, or oppressively because of (a) his dual employment, (b) his "conduct in conducting the investigation," (c) his "insistence" on criminal prosecution, (d) potential violations of WVSFMO policy and procedures, and (e) "general allegations of hostility." (JA 1378-80, ¶¶ 28, 31.)

As shown above, no evidence exists that Ayersman violated any WVSFMO policy or procedure. While Ayersman was investigating the fire, he did have some interactions with others who were also investigating the fire. However, there is no evidence that Ayersman violated any policy or procedure when he did so, and the Wratchfords' "expert" witness relied entirely on speculation in order to opine to the contrary. Therefore, no evidence of "potential violations of WVSFMO policy and procedures" exists to submit to the jury, which may not rest a verdict on unsupported speculation.

Furthermore, the circuit court is flatly wrong that Ayersman "insiste[d]" on criminal prosecution. To the contrary, Ayersman's superiors at WVSFMO directed him to submit criminal complaints against Ms. Wratchford after they reviewed the information in the case file. The

magistrate then found probable cause existed, even after a preliminary hearing at which Ms. Wratchford was represented by legal counsel. Additionally, it is undisputed that Ayersman did not submit any criminal complaint against Mr. Wratchford because, unlike with Ms. Wratchford, he did not have evidence to support such a complaint. It follows that Ayersman acted reasonably and within the scope of his authority based on the evidence available to him.

Certainly, the Wratchfords cannot overcome Ayersman's qualified immunity defense by bringing "general allegations of hostility." Qualified immunity is a broad doctrine protecting all but those who are plainly incompetent or knowingly violate the law – qualified immunity is not lost due to general hostility. Imagine the repercussions if every police officer lost his or her qualified immunity simply because an arrestee brought "general allegations of hostility." Moreover, qualified immunity exists if a public official's actions are objectively reasonable, without regard to intent or motivation. *Maston*, 236 W. Va. at 502, 781 S.E.2d at 950. Here, Ayersman's actions were all objectively reasonable, as shown throughout this brief.

Therefore, the circuit court erred when it denied Ayersman's qualified immunity-based motion for summary judgment on the basis that Ayersman might have violated a WVSFMO policy or procedure, that Ayersman "insiste[d]" on criminal prosecution, and that Ayersman faces allegations of general hostility. As shown below, the circuit court also erred to the extent that it rested its decision on Ayersman's dual employment and his conduct during the investigation.

a. Ayersman's Dual Employment Does Not Defeat Qualified Immunity.

Ayersman's dual employment does not give rise to any inference that he acted maliciously, fraudulently, oppressively, or outside the scope of his authority with the WVSFMO. Well before he investigated the Wratchfords' fire, Ayersman had followed the proper procedures for obtaining approval from the WVSFMO to work for FSI in a secondary capacity. Both Ayersman's supervisor

and the WVSFMO determined that no conflict existed, and Ayersman has worked both jobs for years. The WVSFMO never advised Ayersman there was any issue with his secondary employment with FSI, and Ayersman's WVSFMO supervisor had no concerns with assigning the Wratchford investigation to Ayersman or with his ability to conduct a fair and impartial investigation in the case. Moreover, Ms. Wratchford's ethics complaint against Ayersman was resolved in his favor; the Board found no probable cause to support her allegation that he had violated the Ethics Act.

Certainly, Ayersman does not lose the protection of qualified immunity simply because he worked for a secondary employer with the WVSFMO's approval, particularly given the multiple findings that Ayersman had no conflict and did not violate the Ethics Act. To find to the contrary would be to strip all ASFMs of their qualified immunity when they engaged in approved secondary employment (at least when their secondary employer is also involved in an investigation) – regardless of whether the ASFM violated a clearly established right or acted maliciously, fraudulently, or oppressively. The defense of qualified immunity is not so easily lost.

b. Ayersman's Conduct Does Not Defeat His Qualified Immunity Defense.

Ayersman's conduct during the investigation also does not permit any inference that he acted maliciously, fraudulently, oppressively, or outside of the scope of his WVSFMO authority Rather, Ayersman's conduct was reasonable and occurred within the scope of his ASFM duties. Indeed, his immediate WVSFMO supervisor, Mr. Harms, designated him; Ayersman did not request the assignment. He conducted an origin and cause investigation regarding the Wratchfords' fire, making discretionary judgments and decisions when investigating its origin and cause and when filing criminal charges – at the direction of the WVSFMO – against Ms. Wratchford.

In conducting his thorough and complete investigation for WVSFMO, Ayersman inspected

the inside and outside of the home; interviewed Mr. and Ms. Wratchford; determined the area of the fire's origin; found that the fire damage was consistent with the presence of an ignitable liquid, to which his hydrocarbon detector alerted; thought that he could eliminate all accidental/electrical causes of the fire; attended a second site inspection with FSI and an electrical engineer (Dr. Davis), who eliminated any electrical cause; asked the WVSP to conduct a polygraph examination of Ms. Wratchford; re-interviewed Ms. Wratchford after the polygraph test indicated deception in her answers regarding whether she set, planned to set, or saw the fire at her home and, during that re-interview, she admitted to having attempted arson at her house a couple of weeks before the fire; obtained email correspondence between Ms. Wratchford and Summit Community Bank warning the Wratchfords that it would begin foreclosure proceedings on their house; obtained the Wratchfords' mortgage records, showing that they were well behind on their mortgage payments and had been warned that foreclosure proceedings would be initiated; and obtained the Wratchfords' financial records, which showed that the Wratchfords had insufficient funds to pay the past due amount on their mortgage. Ayersman then consulted with his WVSFMO superiors and, at their direction and approval, he filed criminal charges against Ms. Wratchford. He also prepared an Origin and Cause Report finding, in his judgment and discretion, that the fire at the Wratchfords' residence was incendiary in nature. All of his conduct was clearly undertaken as part of his assignment from the WVSFMO to investigate the fire at the Wratchfords' house.

The Wratchfords allege that the criminal complaints filed against Ms. Wratchford contained false information and, had Ayersman put accurate information in the complaints, the magistrate would not have found probable cause. However, their allegation does not show that Ayersman acted outside of the scope of his authority with WVSFMO or that he acted maliciously, fraudulently, or oppressively. Officers are presumed to act in "good faith," and thus courts do not

invalidate a warrant unless the officer's reliance on it was not "objectively reasonable." *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984). One circumstance in which a court can find that an officer's reliance was not objectively reasonable is if "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for this reckless disregard of the truth." *Id.* at 923.

The burden rests on a criminal defendant to make an initial showing to the court by affidavit or otherwise of the deliberate falsity in an affidavit, in order even to secure a hearing challenging its validity. In doing so, a criminal defendant must establish (1) a subjective component—"that a false statement **knowingly and intentionally**, or **with reckless disregard for the truth**, was included by the affiant in the warrant affidavit"—and (2) an objective component—"the allegedly false statement is **necessary** to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978) (emphasis added); *see also State v. Walls*, 170 W. Va. 419, 294 S.E.2d 272 (1982). Applying this standard, West Virginia courts have held that:

> To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the defendant must establish by a preponderance of the evidence that the affiant, either knowingly and intentionally or with reckless disregard for the truth, included a false statement therein. The same analysis applies to omissions of fact. The [criminal] defendant must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading.

Syl. Pt. 1, *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995).

Importantly, the *Lilly* Court reiterated that "[u]nder *Franks/Walls*, a statement in a warrant is not false, however, merely because it summarizes facts in a particular way; **if a statement can be read as true, it is not a misrepresentation**." *Id.*, 194 W. Va. at 601, 461 S.E.2d at 107 (emphasis added). Indeed, "[a] search warrant affidavit is not invalid even if it contains a misrepresentation, if, after striking the misrepresentation, there remains sufficient content to support a finding of probable cause. Probable cause is evaluated in the totality of the

circumstances." *Id.* at Syl. Pt. 2. "Mere negligence or innocent mistake is insufficient to void a warrant." *Id.*, 194 W. Va. at 601, 461 S.E.2d at 107 (citing *Franks*, 438 U.S. at 171).

Here, application of the *Franks/Walls* test confirms that the Wratchfords cannot meet the high burden of establishing deliberate falsity to warrant a hearing on the validity of Ayersman's affidavit in the criminal complaints, let alone to be able to suggest that Ayersman's affidavit and testimony were "false" or "unlawful." The Wratchfords have cited to several alleged instances of Ayersman providing "false" information in the criminal complaints. None of these instances, however, show that Ayersman provided false information, acted outside the scope of his authority with the WVSFMO, or acted maliciously, fraudulently, or oppressively. Therefore, the instances that the Wratchfords have pointed to do not defeat Ayersman's qualified immunity defense.

First, the Wratchfords allege that the following statement was false: "firefighters suspected the fire was electrical, but found no specific evidence showing that it was." The Wratchfords counter this statement by asserting that Doug Mongold, Chief of the Moorefield Volunteer Fire Company, testified during his deposition, which occurred on July 23, 2019, almost two years after Ayersman filed the criminal complaints, that he believed the fire was caused by the electrical wiring due to the location of the fire and the fire patterns. However, as Chief Mongold testified, "the extent of [his] personal opinion" is that the fire started around the step area, and he "suspected it was a[n] electrical fire," but as he admitted in his deposition, he is not trained as an electrical engineer, is not an expert electrician, and does not hold himself out as an expert in determining whether a fire is electrical in nature. (JA 1340-41.) Moreover, he does not conduct origin and cause analyses of fires; rather, he calls the fire marshal to perform those analyses. (JA 1340.) While he has "some arson investigation certification," he testified that any personal opinion he has about the origin of the Wratchfords' fire is not based on science. (JA 01340, 01342.) Therefore,

Ayersman accurately stated in the criminal complaints that the firefighters "found no specific evidence showing that" the fire was electrical. Chief Mongold has no expert knowledge to provide any actual evidence to show that the cause of the fire was electrical.

Next, contrary to the Wratchfords' assertions, the statements regarding Ms. Wratchford's admission to attempted arson are true. Ms. Wratchford admitted to attempting arson by leaving a candle burning under a Christmas tree in hopes that it would burn down the house. This admission was confirmed in Investigator Pansch's Polygraph Report, in Mr. Pansch's deposition, and in the recording that Ayersman took of Ms. Wratchford. (JA 00330 (*~6:56 to 10:25 in the recording*); JA 01343-50.) The Wratchfords' allegations regarding this issue are flatly wrong and inconsistent with the record, and the circuit court erred to the extent it relied on those allegations.

Ayersman's statement that Ms. Wratchford told an investigator, Phil Jones, that she was the last person to leave the house is also not a false statement; Mr. Jones conveyed this information to Ayersman when they discussed the case. (*See* JA 00347-55.) The Wratchfords claim that no "objective evidence" exists that Mr. Jones made the statement and that deposition transcripts show that Ms. Wratchford was not the last one out of the house. (JA 01051-52.) However, based on the information that Ayersman received, his statement was not false. Even if Mr. Jones was mistaken regarding this issue, the mistake would not have voided the probable cause for Ms. Wratchford's arrest warrant or the criminal complaint. "Mere negligence or innocent mistake is insufficient to void a warrant." *Lilly*, 194 W. Va. at 601, 461 S.E.2d at 107 (citing *Franks*, 438 U.S. at 171). Moreover, "[p]robable cause is evaluated in the totality of the circumstances." *Id.* at Syl. Pt. 2. Even if this statement was removed from the criminal complaint, there was still more than sufficient evidence to support a probable cause finding. Ayersman's inclusion of the statement simply is not evidence of malicious, fraudulent, or oppressive conduct.

Additionally, a statement regarding Ms. Wratchford's receipt of notice of the foreclosure on her residence was not false. Ms. Wratchford exchanged several emails with Tina Martin of Summit Community Bank that discussed and addressed foreclosure. (JA 1351-54.) Indeed, in one email, Ms. Wratchford wrote that she understood that "you may have to go ahead and begin the proceedings" (JA 1351); clearly, she was referring to foreclosure proceedings. Moreover, Ayersman spoke with the Summit Community Bank agent who was assigned to provide all documents requested in the subpoena Ayersman sent to the bank. (JA 1331.) Ayersman asked the employee if foreclosure proceedings were in place. (*Id.*) The employee said "yes" and stated that the Wratchfords were aware of those proceedings. (*Id.*) Therefore, Ayersman's statement that Ms. Wratchford had received notice of foreclosure was not a false statement.

Finally, regarding a statement concerning the bank checking account having only ".26 cents" the week prior to the fire, that statement can be read as, and is in fact, true: the Wratchfords' checking account balance during the week prior to the fire was ".26 cents." (JA 1355.) Thus, this information properly was considered by the magistrate in making her probable cause determination. Furthermore, the omission of information regarding the Wratchfords' Pendleton County Bank accounts was not "false" or "unlawful." The Wratchfords have failed to establish that the omission of this bank information was intentional or made in reckless disregard of whether its omission made the affidavit misleading. Nor could they. Inclusion of such information – that, on February 17, 2017 Mr. Wratchford held other accounts there with balances of $66.13 and $1,330.54 – would not defeat probable cause for the criminal complaints. As the complaints noted, the Wratchfords' mortgage was over six months in arrears and in arrearage was "over $6,000." Even if information regarding other bank accounts had been included in the complaints, that information would still have shown that the Wratchfords lacked sufficient funds to pay their past

due mortgage.[12] In sum, the Wratchfords cannot show that Ayersman made a false statement in the criminal complaints regarding any issue that would have impacted the magistrate's decision that probable cause existed and, as a result, the magistrate's finding of probable cause was proper.

Moreover, the fact that Ayersman never filed criminal charges against Mr. Wratchford further shows that Ayersman did not act maliciously, fraudulently, or oppressively in his investigation. In fact, he did not seek charges against Mr. Wratchford because nothing in his investigation showed that Mr. Wratchford had anything to do with the fire. Rather, it is undisputed that Ayersman assumed that Erie would pay the insurance claim to Mr. Wratchford as an innocent spouse who did not cause the fire. (JA 01331-32.). This evidence shows that Ayersman did not have it "out" for the Wratchfords as alleged. Moreover, this undisputed fact completely undercuts the Wratchfords' entire wildly speculative theory that Ayersman found that the fire at the Wratchfords' house was incendiary and charged Ms. Wratchford with arson and other crimes so that Erie would not have to pay the insurance claim, and so that Erie would continue to send work to FSI.

Through various training he has received as a fire investigator, and based on his experience, Ayersman was aware of the innocent spouse doctrine and how it applies in arson cases. (JA 1331-32.) Generally, the innocent spouse doctrine "permits an innocent co-insured to recover policy proceeds even when a fellow insured engages in arson that destroys the insured property and premises." *Icenhour v. Cont'l. Ins. Co.*, 365 F. Supp. 2d 743, 751 (S.D.W. Va. 2004). Ayersman's investigation did not reveal that Mr. Wratchford was involved with the fire, and Mr. Wratchford was never charged with any criminal conduct regarding it. Beyond assuming that Erie would pay

[12] Furthermore, Ayersman left out of the criminal complaints information he had learned about other debts the Wratchfords faced, including that they were behind on their personal property taxes, a truck payment, phone bills, and their electric bill; they had student loan debt; and they faced several civil injunctions and numerous other outstanding debts. (JA 1345; *see* JA 00346-55.)

the insurance claim to Mr. Wratchford as an innocent spouse who did not cause the fire. (JA 1331-32.), Ayersman was not aware, and he had no communications with Erie indicating, that Erie would deny Mr. Wratchford's claim. (*Id.*)

While Ayersman never had any discussions with Erie about his belief, this evidence, which the Wratchfords cannot refute, goes directly to Ayersman's state of mind, intent, and motive. Given his belief that the innocent spouse doctrine applied to Mr. Wratchford, Ayersman's motivation for filing criminal complaints against Ms. Wratchford could not have been to give Erie a reason to deny the Wratchfords' insurance claim. Moreover, Ayersman's belief shows that filing criminal charges against Ms. Wratchford was not done maliciously, fraudulently, or oppressively. Rather, it was done based on a reasonable investigation and was supported by substantial evidence.

Given the substantial and undisputed evidence showing that (a) Ayersman was working in his capacity as an employee of the WVSFMO when he investigated the Wratchfords' fire, (b) Ayersman did not violate any clearly established constitutional or statutory right of the Wratchfords, and (c) no evidence exists that Ayersman acted maliciously, fraudulently, or oppressively, the circuit court erred when it found that a question of material fact exists regarding whether qualified immunity protects Ayersman from liability on the Wratchfords' negligence claims. To the extent that Ayersman was allegedly negligent in any aspect of the investigation, including how he conducted the investigation, came to his conclusions, or filled out the criminal complaints, as a matter of law, Ayersman is entitled to qualified immunity for that alleged negligent conduct. Syl. Pts. 4 and 6, *Clark*, 195 W. Va. at 273, 465 S.E.2d at 375. As a result, Ayersman is entitled to summary judgment as to the Wratchfords' claims for negligence in Count II and Count XI, and the circuit court erred when it denied Ayersman's summary judgment motion.

C. Assignment of Error No. 2: Ayersman Is Entitled to Summary Judgment as to Claims that Are Based on His Alleged Intentional Conduct.[13]

The Wratchfords have asserted the following intentional conduct claims against Ayersman, which are the subject of this appeal: (a) intentional infliction of emotional distress (Count V); (b) civil conspiracy (Count VI); (c) malicious prosecution/abuse of process (Count VII); and (d) violation of Civil Rights (Count XI). (JA 00126-31, 00135-40, ¶¶ 89-109, 124-38.) The crux of the Wratchfords' intentional conduct claims against Ayersman is their allegation that he acted maliciously in his investigation of the fire at the Wratchfords' residence, finding the fire to be incendiary and charging Ms. Wratchford with arson, ostensibly so that Erie could avoid paying an insurance claim and so that he, Erie, FSI, and Harris could benefit from this arrangement. (*Id.*) The Wratchfords, however, offer no evidence to support their bald assertions.

With regard to these intentional conduct claims, Ayersman is entitled to judgment as a matter of law because he had probable cause to file charges against Ms. Wratchford. To defeat Ayersman's qualified immunity defense, the Wratchfords have the burden of proving that Ayersman's conduct violated a clearly established statutory or constitutional right or law of which a reasonable person would have known or that he engaged in conduct that was otherwise fraudulent, malicious, or oppressive. Syl. Pt. 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014); *Maston*, 236 W. Va. at 501, 781 S.E.2d at 949. The Wratchfords, however, cannot meet this standard because Ayersman had probable cause to arrest and charge Ms. Wratchford with committing a crime.

In determining whether a law enforcement officer "is entitled to qualified immunity, the guiding principle is that '[o]nly where the warrant application is so lacking in indicia of probable

[13] In his summary judgment briefing, Ayersman briefed for the circuit court his defense to the intentional tort claims on the basis of qualified immunity. (JA 00242-277, JA 01289-1310.)

cause as to render official belief in its existence unreasonable will the shield of immunity be lost.'" *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986)). Indeed, "[t]he standard for probable cause . . . is more stringent than is the requirement for qualified immunity." *Id.* Thus, where probable cause exists, there is no showing of a constitutional violation, and the court "need not conduct further inquiry to determine if Defendant is entitled to qualified immunity." *Bennett v. Booth*, No. Civ. A. 3:04-1322, 2005 WL 2211371, at *3 (S.D.W. Va. Sept. 9, 2005).

While it is in the context of a federal Section 1983[14] claim against a police officer, the *Torchinsky* opinion provides persuasive guidance, which this Court should follow. In *Torchinsky*, the victim of an assault, while being interviewed by a police officer, identified the plaintiffs as his assailants. 942 F.2d at 259-60. The officer conferred with his supervisor, who expressed his belief that probable cause existed. *Id.*, 942 F.2d at 260. The officer therefore presented the evidence to a magistrate, who issued arrest warrants for the plaintiffs. *Id.* After the plaintiffs were arrested, the victim changed his statement and indicated that the plaintiffs were not the ones who assaulted him. *Id.* As a result, the criminal charges against the plaintiffs were dismissed. *Id.*

The Fourth Circuit held that the arresting officer had acted with objective reasonableness and was entitled to qualified immunity for arresting and charging the plaintiffs with assault. *Id.* at 259. In reaching its conclusion, the court noted that two judicial officers had determined that the police officer had demonstrated probable cause to support the arrest of the plaintiffs. *Id.* at 261. It noted that "[t]he federal district court reviewed the evidence and determined that summary judgment should be granted because [the officer] had indeed established probable cause." *Id.* According to the Fourth Circuit, "the decision of a detached district judge that [the officer] satisfied

[14] 42 U.S.C. § 1983.

the more stringent probable cause standard is plainly relevant to a showing that he met the lower standard of objective reasonableness required for qualified immunity." *Id.*

The Fourth Circuit further noted that "[a] second judicial officer, the North Carolina magistrate from whom [the police officer] sought the arrest warrants, also held that he had demonstrated probable cause." *Id.* at 262. As the Fourth Circuit explained,

> When a police officer protects a suspect's rights by obtaining a warrant from a neutral magistrate, the officer should, in turn, receive some protection from suit under 42 U.S.C. § 1983. Otherwise, the threat of liability would force officers to continuously second-guess the considered decisions of magistrates. This in turn would promote delay in the execution of warrants, and alter the proper allocation of law enforcement functions. . . . In our view then, [the police officer's] actions in seeking the arrest warrants and the magistrate's determination of probable cause provide additional support for his claim that he acted with objective reasonableness. *See, e.g., Massachusetts v. Sheppard*, 468 U.S. 981, 988-91, 104 S.Ct. 3424, 3427-29, 82 L.Ed.2d 737 (1984).

Id. (citation omitted).

Like the police officer in *Torchinsky*, Ayersman sought and obtained criminal complaints from a neutral and independent Hardy County magistrate. As was shown above in the discussion of Assignment of Error No. 1, the information Ayersman included in the criminal complaint was accurate and/or, at the least, if it had been excluded, probable cause would still have existed. After reviewing the information provided in the criminal complaints, the Hardy County magistrate independently determined that probable cause existed to sign the criminal complaints and to issue a warrant to arrest Ms. Wratchford. (JA 00344-55; JA 00395.) At the preliminary hearing, the magistrate again found that probable cause existed for the criminal charges to proceed against Ms. Wratchford, to be heard by the Grand Jury. (JA 00395.) Indeed, the magistrate reached this probable cause decision despite the Wratchfords' counsel's challenges to probable cause asserted at the preliminary hearing. Furthermore, the Hardy County prosecuting attorney also acknowledged during his deposition testimony that the magistrate found probable cause twice

before the case proceeded to the Grand Jury. (JA 00395.)

When issuing the warrant arising from the criminal complaints, the magistrate established probable cause for arresting, charging, and prosecuting Ms. Wratchford for the charges. Ayersman did not violate any constitutional or statutory right of Ms. Wratchford and did not engage in any malicious, fraudulent, or oppressive conduct, as evidenced by the fact that probable cause existed at the time when Ayersman filed the criminal charges. As shown above in Section V.B.2.b, Ayersman did not put false statements in the criminal complaints, and probable cause would have existed even in the absence of those statements with which the Wratchfords take issue.

The Wratchfords' claims for intentional infliction of emotional distress (Count V); civil conspiracy (Count VI); and violation of Civil Rights (Count XI) arise from the alleged improper arrest, charge, and prosecution of Ms. Wratchford. Because these claims derive from Ayersman's conduct in investigating, charging, and presenting evidence regarding the prosecution of Ms. Wratchford, and because probable cause existed to investigate and charge her for the fire, the Wratchfords have failed to show that Ms. Wratchford's constitutional or statutory rights were violated. Further, the Wratchfords have failed to show that Ayersman's conduct was fraudulent, malicious, or oppressive. Therefore, the circuit court erred when it denied Ayersman's motion for summary judgment on the basis of qualified immunity for each of these claims.

The law also affords Ayersman qualified immunity for Ms. Wratchford's claim for malicious prosecution/abuse of process (Count VII) because such a claim similarly requires a showing by the Wratchfords that there was no probable cause for the prosecution of Ms. Wratchford. *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005). In other words, the absence of probable cause is an element of any such claim. *Hartman*, 547 U.S. at 265-66; Syl. Pts. 1 and 3, *Truman v. Fidelity & Cas. Co. of NY*, 146 W. Va.

707, 123 S.E.2d 59 (1961) (failure to establish absence of probable cause "is fatal to the plaintiff's claim" of malicious prosecution) (citations and internal quotations omitted). As noted above, probable cause was established by virtue of the magistrate's issuance of the criminal complaints and again by virtue of the magistrate's finding of probable cause at the preliminary hearing, which bound over the proceedings for Grand Jury consideration. Given the probable cause findings, it follows that Ayersman did not violate any constitutional or statutory rights of the Wratchfords or engage in any fraudulent, malicious, or oppressive conduct when he pursued criminal charges against Ms. Wratchford. Because qualified immunity therefore protects Ayersman from liability, the Wratchfords cannot prevail on their malicious prosecution/abuse of process claim (Count VII), and the circuit court erred when it did not dismiss that claim.

Finally, law enforcement officers, like Ayersman, are not held "to standards of perfection." *Torchinsky*, 942 F.2d at 264. Rather, they are only held "to standards of reasonableness[.]" *Id.* While Ms. Wratchford was not ultimately indicted for her criminal charges, that fact alone does not mean that Ayersman violated any constitutional or statutory right by charging Ms. Wratchford with criminal conduct. As explained above, no indictments were obtained because of the improper conduct of the Hardy County prosecuting attorney. Not only did the prosecuting attorney instruct Ayersman to send a different WVSFMO employee to testify, but he also called Ms. Wratchford's own retained expert witness, falsely told the Grand Jury that her expert witness was "independent," and permitted Ms. Wratchford to provide unrebutted exculpatory testimony, without challenging Ms. Wratchford on the inculpatory evidence that led to her arrest. Ayersman's right to qualified immunity should not be lost because the prosecutor thwarted the Grand Jury proceedings.

Indeed, even in a situation where a law enforcement officer mistakenly arrests or charges the wrong person, qualified immunity can still apply. As the Fourth Circuit noted in *Torchinsky*,

> The police must be held to standards of reasonableness, not to standards of perfection. A society that expects police officers to provide protection must afford them in turn some protection from lawsuits. If immunity is lost in every case of mistaken arrest, then many a perpetrator of violent crime will go unapprehended.
>
> Here the police officer investigated the crime scene, interviewed acquaintances of the victim, interviewed and reinterviewed the victim, and acted upon the victim's specific identification of his assailants—an identification consistent with the facts of the case as a reasonable officer might perceive them. The officer also requested the advice and judgment of his supervisor, sought and obtained arrest warrants from a neutral magistrate—warrants which a federal district judge subsequently determined satisfied probable cause. We hold that these actions satisfy the requirements of objective reasonableness on which qualified immunity rests.

Id. at 264–65.

Therefore, while Ayersman disputes the notion that Ms. Wratchford should not have been charged, even if a mistake was made regarding the decision to charge Ms. Wratchford, Ayersman would still be entitled to qualified immunity for that conduct. As a law enforcement officer, Ayersman, like the officer in *Torchinsky*, conducted a thorough investigation prior to charging Ms. Wratchford. His thorough investigation included traveling to the Wratchfords' residence to inspect and determine the origin and cause of the fire; interviewing the Wratchfords and other witnesses; attending a second site inspection with an electrical engineer, who determined that there was no electrical cause to the fire; asking the WVSP to conduct a polygraph examination, during which Ms. Wratchford confessed to attempted arson; obtaining and reviewing the Wratchfords' mortgage and financial records, which showed that the Wratchfords were over $6,000 behind in their mortgage payments and lacked funds to pay back their mortgage arrears; and obtaining advice, approval and direction from his supervisors to file criminal charges against Ms. Wratchford. Like in *Torchinsky*, Ayersman is not held to a standard of perfection. Rather, his conduct in investigating and charging Ms. Wratchford must be only "'objectively reasonable.'" *Maston*, 236 W. Va. at 502, 781 S.E.2d at 950 (quoting *Graham*, 490 U.S. at 397). Based on the evidence that Ayersman relied on to seek approval to file charges against Ms. Wratchford, Ayersman's conduct was objectively

reasonable, and he is entitled to qualified immunity as to the above-listed claims.

The circuit court erred when it denied Ayersman's motion for summary judgment on Counts V, VI, VII, and XI on the basis of qualified immunity. Indeed, the circuit court did not analyze the qualified immunity defense in the context of the individual counts but, rather, addressed that defense in a standalone portion of the Order. (JA 01375-80, 1382-88, 1390.) The circuit court erroneously found that a question of fact exists regarding whether Ayersman was acting outside of the scope of his employment with the WVSFMO. (JA 01377, ¶ 23.) The circuit court also erroneously found that a jury could infer that Ayersman had a malicious, oppressive, or fraudulent motive based on his dual employment, his "conduct in conducting the investigation," his "insistence on criminal prosecution," "potential violations of WVSFMO policy and procedures," and "general allegations of hostility toward the [Wratchfords]." (JA 01378-79.)

As was shown in Sections V.B.1-2 above, the circuit court's finding was clearly in error. Ayersman does not lose the protection of qualified immunity simply because he holds secondary employment, particularly considering that he obtained approval of that employment from the WVSFMO, which assigned him to investigate the Wratchfords' fire, and Ms. Wratchford's ethics complaint against Ayersman was dismissed because the Ethics Commission found no probable cause that he violated the Ethics Act. Ayersman conducted a thorough investigation and, at the direction of his WVSFMO supervisors, filled out criminal complaints containing true information that more than provided probable cause, such that if one or more of the statements had been omitted, probable cause would still have existed. Ayersman thus acted reasonably and within the scope of his WVSFMO employment when he investigated and filed criminal complaints against Ms. Wratchford. Ayersman filed no charges against Mr. Wratchford, indicating that he was acting reasonably and in good faith, as he believed Erie would pay Mr. Wratchford for his loss under the

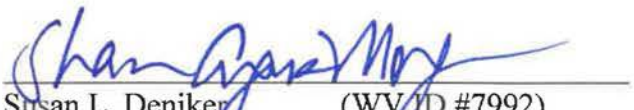
innocent spouse doctrine. The allegation that Ayersman violated a WVSFMO policy or procedure is based on pure speculation; no evidence supports it. Finally, "general allegations of hostility" fall far short of showing that qualified immunity has been lost.

Therefore, Ayersman should have been granted summary judgment on Counts V, VI, VII, and XI on the basis of qualified immunity, and the circuit court erred when it denied his summary judgment motion on that basis.

VI. CONCLUSION

For all of the foregoing reasons, the decision of the circuit court to deny Ayersman's motion for summary judgment on the basis of qualified immunity should be reversed, and summary judgment should be entered in Ayersman's favor on Counts II, V, VI, VII, and XI on the basis that qualified immunity immunizes him from liability on those claims.

Respectfully submitted this 8th day of June, 2021.



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CERTIFICATE OF SERVICE

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