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 REPLY BRIEF OF RONALD C. AYERSMAN AND RONALD C. "MACKEY" AYERSMAN, ASSISTANT STATE FIRE MARSHAL

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I. 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.

II. STATEMENT OF THE CASE

Petitioner Ronald Ayersman strongly urges the Court to review the evidence itself rather than taking Respondents Tammy S. Wratchford and Michael W. Wratchford's response brief at its word. The evidence in the record, often contrary to positions taken in the Wratchfords' response brief, clearly shows that, at the conclusion of his investigation into the Wratchfords' fire, Ayersman certainly had objective evidence to think that the Wratchfords' fire was intentionally set and that Ms. Wratchford had both attempted and committed arson, among other crimes. In addition to the Statement of the Case set forth in Ayersman's Petitioner's Brief, the evidence set forth in the following subsections contradicts the claims made in the Wratchfords' response brief.

A. Ms. Wratchford Admitted That Two Weeks Prior To The February 20, 2017 Fire, She Attempted To Set Fire To Her House

Tammy Wratchford has absolutely not consistently taken the position of denying attempted arson. While she has taken that self-serving position at times, she also admitted to Ayersman, following the polygraph examination conducted by Mr. Kevin Pansch, a civilian W. Va. State Police ("WVSP") Polygraph Examiner, that approximately 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. (JA 00311-13, 00324, 00326, 00328-29.) Ayersman's Origin and Cause Report states that Tammy Wratchford "stated that approximately two weeks prior to the fire she placed a candle under a tree located in her living room. Tammy clearly stated that she placed the candle specifically so that it would catch the tree on fire. She clearly stated that she tried to burn the house because they had serious financial problem[s]. Tammy would not admit at that time that she set fire to the home on 20FEB17, but that she did try to burn it down two weeks prior." (JA 00311-12.)

Ms. Wratchford then made a similar confession in a recorded statement, which is in the record for the Court to hear. (JA 00313; JA 00330 (*this page is a CD of Ms. Wratchford's recorded statement with the relevant portion at ~6:56 to 10:25*).) Specifically, Ayersman reminded Ms. Wratchford that she had admitted that she left a candle under the tree because she thought that it would catch the tree on fire, and he asked Ms. Wratchford if that was true; Ms. Wratchford answered, "yes." (JA 00330 (*Ms. Wratchford's recorded statement, with the relevant portion at ~7:52 to 8:24*).) At the end of the recording, Ms. Wratchford confirmed that her statement was given of her own free will. (JA 00330 (*Ms. Wratchford's recorded statement, with the relevant portion at ~12:03 to 12:34*).) Thus, objective evidence supports Ayersman's conclusion that Ms. Wratchford committed crimes, including but not limited to, attempted arson.

Furthermore, the polygraph examiner, Mr. Pansch, stated in his Polygraph Report that "Ms. Wratchford further advised that when her son found the candle, it was because she had intentionally left the candle burning, in hopes that it would burn the house down about two weeks prior to the President's Day fire. She had placed it under a tree in the living room [so] that it would burn the house." (JA 00320, 00324.) Mr. Pansch further testified that Ms. Wratchford made

admissions to him and Ayersman during the post-test interview regarding setting a candle underneath a "Christmas tree about a week or two prior to this fire." (JA 00328-29.)

Following the polygraph examination he administered to Ms. Wratchford, Mr. Pansch also concluded, "I would strongly suggest verification of all information offered in any statement by this examinee [Tammy Wratchford], before you accept it for truth." (JA 00324.) Mr. Pansch further noted that the polygraph examination results indicated deception and that Ms. Wratchford made a "pre-post test admission." (JA 00320.)

While the Wratchfords have claimed, without citing any evidence, that Ayersman conducted "an abusive interrogation" of Ms. Wratchford following the polygraph test (Brief of Respondents, at 31), Mr. Pansch testified that, in his opinion, Ayersman was professional at the post-test interview and Ayersman's questions were appropriate. (JA 00579.) In fact, Mr. Pansch testified that he "would have excused" Ayersman "had he not been." (JA 00579.) Furthermore, Ms. Wratchford confirmed at the end of her recorded statement (following her polygraph test) that she had not been pressured or threatened into giving her statement. (JA 00330 (*Ms. Wratchford's recorded statement, with the relevant portion at 12:03- 12:35*); JA 00313.)

Therefore, contrary to Respondents' assertion, it is of no consequence that the candle and Christmas tree were still on an end table after the actual fire on February 20, 2017; Ms. Wratchford admitted to trying to burn her house using those items approximately two weeks before the actual fire. The actual fire started elsewhere, in a stairwell. There is no reason to think that Ms. Wratchford would not have attempted arson using a method other than placing a candle under a tree after her initial attempt using that method failed. For these reasons, there was an admission of criminal activity by Ms. Wratchford, and there was objective evidence to support a charge of attempted arson.

B. While Ayersman Considered The Wratchfords' Statements And Whether The Fire Could Have Been Accidental, The Evidence He Diligently Uncovered Supported Only The Conclusion That Their Fire Was Incendiary In Nature

Ayersman did not ignore or discount evidence of wiring located under the floor and under the steps that burned, and he did not ignore evidence that the Wratchfords claimed to have smelled an electrical/wire burning odor days before the fire. (*See* JA 00308-10.) To the contrary, he, a second investigator, and an electrical engineer considered and investigated whether the wiring could have caused the fire but were able to rule out any electrical cause (i.e., wiring) of the fire.

Specifically, Ayersman examined the "electrical wiring, stairwell ceiling light, and other potential electrical sources" and was able to rule them out as potential causes of the fire. (*Id.* (chiefly JA 00318).) Ayersman conducted a "[c]lose[] examination of the electrical wiring located underneath the stairs," which "revealed signs of minor electrical arcing. This electrical activity was a clear result of external flame impingement from the fire." (JA 00318.) Ayersman also found that "[s]ome of the wiring showed signs of external or secondary damage as a result of the fire. Damage to this area is not consistent with the fire originating underneath the stairwell where the wiring was located, but is consistent with secondary exposure." (JA 00318.) Ayersman concluded that "[t]here are no indications that the fire originated at the wiring and it is clear that it was damaged as a result of the fire." (JA 00318).) Thus, Ayersman found that the wiring did not cause the fire but that it had been damaged *by* the fire.

Ayersman also closely inspected "the wall mounted light located in the stairwell," which "revealed very little secondary heat exposure to the fixture itself. Closer inspection of its junction box and electrical wiring shows that it sustained only secondary heat damage." (JA 00318.) Ayersman concluded that there were "no indications that the fire originated at the wall-mounted

light fixture, and he "easily eliminated [it] as a potential cause for this fire." (*Id.* (chiefly JA 00318).)

During his investigation, Ayersman determined that the fire had originated on the top portion of a stairwell. (*See* JA 00306-19.) Ayersman found that damage to the "'riser' found amongst the debris clearly showed signs of isolated fire damage to the top of the stairs." (JA 00318; *see also* JA 00431 (The report from Brent Harris of Fire & Safety Investigation Consulting Services, LLC ("FSI") similarly notes that charring on a stair tread and a stringer found in the debris showed that "the fire was located on top of the steps" and the "[d]irect fire damage was isolated to the ceiling level directly above the burned-out stairwell").) It is thus not true, as the Wratchfords claim in their brief, that "Jones of Erie, Ayersman, Harris, and Davis" found that "the most significant fire damage occurred under the steps and under the kitchen floor where the shorted wiring was located." (Brief of Respondents, at 14 (citing only to several photographs).) Additionally, Ayersman found that the damage to the stairs was consistent with the presence of an ignitable liquid or other combustible material, and his hydrocarbon detector alerted to the possible presence of an ignitable liquid on both the landing and the bottom of the stairs. (JA 00306-19 (chiefly JA 00318).)[1]

While Joseph Lofton, one of the firefighters who fought the Wratchfords' fire, saw flames coming from beneath the floor, this is not evidence that the fire originated under the steps; by the time he arrived, the top stairs (which went down into a basement) were already gone because they had been damaged by the fire. Thus, any fire that had been on top of the steps was, by that time,

[1] While testing performed by the West Virginia State Police Forensic Laboratory and by Great Lakes Analytical, Inc. did not identify ignitable liquids on samples of wood debris and carpeting from the stairway in the Wratchfords' home where the fire occurred, the report from Great Lakes Analytical, Inc. also states that "[t]hese results do not eliminate the possibility that an ignitable liquid was present at the incident in question." (JA 00669-70.)

under the floor. (*See* JA 00933, 00555; *see also* JA 00315.) In fact, Mr. Lofton also testified that the bottom of the walls along the top portion of the staircase had been burned, (JA 00556-57), indicating that the top of the steps is what burned. Ayersman noticed the same thing during his investigation. (JA 00317.) As a result, Ayersman's conclusion is consistent with what he learned from Mr. Lofton. (*See* JA 00315.)

Contrary to the Wratchfords' assertions, Doug Mongold, Chief of the Moorefield Volunteer Fire Company, did *not* identify electrical wiring as the cause of the Wratchfords' fire. Rather, he suspected that the fire was electrical in nature, but he is not an expert and did not conduct an origin and cause analysis of the fire. (*See* Petitioner's Brief, at 28-29; JA 1340-42.) As Ayersman's Origin and Cause Report states, "Chief Mongold . . . suspected it was just electrical in nature. He further advised that he did not closely examine the electrical wiring in the area, nor did he pinpoint an actual cause for the fire." (JA 00307-08.) At his deposition, Chief Mongold did not dispute this portion of Ayersman's report. (JA 01341.)

Moreover, other investigators came to the same conclusion that Ayersman did. For example, Mr. Harris of FSI, who also investigated the fire, similarly found no visual indication of any failure that could cause a fire in the two electrical circuits that were in the area of the stairwell where the fire originated. (JA 00294-302 (chiefly JA 00296-97).) Mr. Harris found "no signs of accidental causes" in the debris. (JA 00294-302 (chiefly JA 00296).) He examined the light fixture in the stairwell, which "showed no visible signs of electrical failure." (JA 00294-302 (chiefly JA 00297).) Like Ayersman, he concluded from a visual examination of one of the steps from the stairwell that "the fire was located on top of the steps," as the underside of the step was "partially uncharred," whereas the top of it was "heavily charred." (JA 00294-302 (chiefly JA 00297).) Like Ayersman, Mr. Harris, having eliminated "all potential accidental causes such as electrical circuits

and light fixtures," concluded that the fire was incendiary in nature, and that the carpeting on the steps had been intentionally ignited. (JA 00294-302 (chiefly JA 00300).)

Dr. Bert Davis, an Electrical Engineer with Romualdi Davidson & Associates ("RDA"), went to the Wratchfords' home to examine the electrical system. (JA 00306-19 (chiefly JA 00308); JA 01113.) Dr. Davis eliminated the electrical service as being involved in the fire's initiation and, like Mr. Harris and Ayersman, concluded that the fire had been intentionally set. (JA 00306-19 (chiefly JA 00308); JA 01113.) Moreover, Ayersman understood that he, Mr. Harris, and Dr. Davis all concurred that the fire was incendiary in nature. (JA 00307, 00318.)

Furthermore, Ayersman learned from the Wratchfords that no one besides them had keys to the residence or remotes for the garage doors, that there appeared to be nothing missing from the home and that there was no forced entry into the home (aside from the firefighters' forced entry into one section of the home to extinguish the fire). (JA 00309, 00316.) Given this information, as well as Ms. Wratchford's admission to having attempted to set a fire at her house shortly before the actual fire and the fact that a polygraph examination indicated that she was being deceptive, the logical conclusion was that Ms. Wratchford had twice attempted to set fire to her house. The second time, she was successful. Ayersman gained even more evidence that Ms. Wratchford was the culprit when he learned about the Wratchfords' dire financial situation and the fact that foreclosure proceedings had begun on their house.

C. The Wratchfords Had A Clear Financial Motive To Attempt To Burn Their House

Despite the position taken in the Wratchfords' response brief, Ms. Wratchford certainly knew that Summit Community Bank was going to begin foreclosure proceedings on her home at the time of the fire at her home. While, as the Wratchfords point out, one letter addressing foreclosure proceedings was not addressed to the Wratchfords (JA 00337), Ms. Wratchford was

well aware of the proceedings from other communications with Summit Community Bank. As Ayersman testified in Magistrate Court at the Preliminary Hearing on the criminal charges against Ms. Wratchford, emails between Summit Community Bank and Ms. Wratchford clearly demonstrate that she knew her home was going into foreclosure. (JA 00331-37, 00787.) Those emails unequivocally discuss foreclosure proceedings. (*Id.*; Petitioner's Brief, at 7-9.) The latest of those emails is dated February 1, 2017, just 19 days before the Wratchfords' fire – and thus occurred shortly before the time Ms. Wratchford admittedly attempted to set fire to the house by placing or leaving a candle under a Christmas tree. (JA 00311-12; JA 00330 (*Ms. Wratchford's recorded statement, with the relevant portion at ~7:00–10:25*).) Furthermore, Ayersman also spoke with an agent at Summit Community Bank who confirmed that the Wratchfords knew that foreclosure proceedings were in place. (JA 00280.)

Whether the Wratchfords were able to pay their past-due mortgage payments and associated fees in order to pay their home out of foreclosure *after* the fire, in March 2017, is inapposite.[2] The important fact remains that, at of the time of their fire on February 20, 2017, the Wratchfords' past due mortgage amount was over $6,000, and the Wratchfords were far from having adequate funds to pay the past due amount (plus associated fees); in their combined accounts, they had only approximately $1,500, placing them in a dire financial situation. (Brief of Petitioner, at 7-9; JA 00331-43.) Ms. Wratchford's email of February 1, 2017 (19 days before the fire) shows that she knew about this situation, as she pled with the bank for more time to make mortgage payments in lieu of the bank "evict[ing] us from our home" and having to "find a buyer and take us to court." (JA 00331-32.)

[2] Indeed, part of the funds used to pay their mortgage ***after*** the fire came from a $5,000 payment that the Wratchfords received from Erie Insurance Property & Casualty Company ("Erie"). Ironically, this payment was insurance proceeds that was provided to Respondents by Erie as a result of the February 20th fire.

Therefore, on February 20, 2017, the date of the fire, Ms. Wratchford had a clear motive to attempt to burn her home, and Ayersman discovered that motive through his due diligence, by obtaining documents and speaking with a bank agent who was informed as to the status of the Wratchfords' mortgage.

D. Ayersman Did Not Violate Any Rules, Protocols, Or NFPA 921 Provisions

Ayersman did not violate any rules or protocols by sharing any information related to his investigation of the Wratchfords' fire. As stated in Petitioner's Brief, the Wratchfords' expert's opinion on this issue is purely unreliable speculation. Their "expert" is Steven Dawson, who has opined that Ayersman improperly disclosed confidential information during his investigation. (*See* JA 01322.) However, Mr. Dawson can point to no authority stating that any information Ayersman disclosed was confidential to begin with, and he can point to no authority stating that confidential information cannot be disclosed. (*Id.*) Instead, he rests his entire opinion on a sentence that Ayersman, on his own, decided to place in his investigation reports (JA 01321). That sentence, however, does not reflect W. Va. State Fire Marshal Office ("WVSFMO") policy or procedure. (JA 01323, 01324-25.) Indeed, the WVSFMO has no policy precluding Ayersman and other Assistant State Fire Marshals ("ASFM") from sharing with third parties, including insurance companies, information related to an investigation. (JA 01324-25.)[3]

Additionally, contrary to the position taken by the Wratchfords, in the letter from the W. Va. Ethics Commission opining that Ayersman had not violated the Ethics Act, nothing indicates that the Ethics Commission was told that Ayersman had not communicated with anyone with FSI or Erie. (JA 00286-88.) Rather, the Ethics Commission's letter indicates that the State Fire Marshal

[3] The Wratchfords, in their Brief of Respondents, take issue with the fact that Ayersman and the WVSFMO have treated some of their documents in this case as confidential and thus subject to a protective order. Ayersman and the WVSFMO are within their rights to insist on proper protection of sensitive documents through the use of a protective order. Regardless, that issue is not before the Court and is inapposite here.

informed the Ethics Commission that Ayersman had investigated a fire that his private employer had also investigated, that Ayersman "did not perform the investigation on behalf of the private company," that Ayersman worked for the private company only in Maryland and Pennsylvania, and that Ayersman "did not collaborate on this investigation on behalf of the State Fire Marshal's Office with anybody with his private employer." (JA 00286.) Indeed, Ayersman did his own investigation, and he created his own report and came to his own conclusions based on the evidence he diligently obtained.

Moreover, Ayersman faithfully followed National Fire Protection Association 921 ("NFPA 921") when concluding that the Wratchfords' fire was incendiary. *See Layton v. Whirlpool Corp.*, No. CIV.A. 3:05-0473, 2007 WL 4792438, at *3 (S.D.W. Va. Feb. 9, 2007) ("NFPA 921 is authoritative in the fire investigation industry and NFPA 921 is the national guide for standards in fire investigations." (citations omitted)) (not reported). NFPA 921 states that "the ignition source for a fire" should be determined based on "data or logical inferences drawn from that data"; the ignition source should not be determined only from elimination of other possible sources where no "supporting evidence" exists. (JA 00779.) NFPA 921 provides that a fire is classified as "incendiary" when it "is intentionally ignited in an area or under circumstances where and when there should not be a fire." (JA 00779.)

Here, Ayersman had supporting evidence to support his conclusion that the Wratchfords' fire was incendiary; for example, he and an electrical engineer determined that there was no electrical cause for the fire; he found that wiring in the area had been damaged by the fire, not that it had caused the fire; he determined that the fire originated on the top of the steps based on the damage from the fire; he noted that no fuel load explained the damage to the top of the steps; he found that the "[d]amage to the stairs was consistent with the presence of an ignitable liquid or

other combustible material"; his hydrocarbon detector alerted to the presence of an ignitable liquid in two places on the stairs; he found that the fire was oxygen-deprived and had burned for hours before firefighters arrived (and thus it was of no consequence that Ms. Wratchford had not been in the house for hours); he obtained a recorded admission from Ms. Wratchford that she had very recently attempted to set fire to the house; and he learned that the Wratchfords were woefully behind on their mortgage payments and lacked sufficient funds to pay their home out of the foreclosure proceedings that Ms. Wratchford knew had already begun. (JA 00308, 00311-13, 00316-18.)

Ayersman also conducted witness interviews pursuant to NFPA 921, which specifies that interviewees should be positively identified and that interviews should be documented, for example, with written notes or audio or visual recordings. (JA 00776.) The information Ayersman gleaned from his interviews is written in his report, with separate entries for each witness, who are all identified by name and who are variously identified by date of interview, phone number, employer/association, date of birth, and/or address. (JA 00307-16.) Furthermore, Ayersman fully documented his interview of Ms. Wratchford after her polygraph test in his report, and he took an audio recording of part of the interview. (JA 00311-13.)

It is also worth noting that Mr. Pansch, who witnessed the interview after the polygraph test, testified that he did not see Ayersman do anything "that stood out of line" and that Ayersman did not threaten Ms. Wratchford. (JA 00580.) To the extent that Ayersman was "accusatory," Mr. Pansch testified that interrogations are, by their nature, accusatory, and being accusatory is not inappropriate or outside of standard practices. (JA 00579-80.)

Additionally, Ayersman did not hide, withhold or lose evidence from the Wratchfords' fire. As their paid expert admitted, the wiring that was removed from the home for testing was furnished

to the Wratchfords' experts at MSES. (JA 00363.) While the Wratchfords claim that a staple which was used to secure the wiring at issue is missing, there is no evidence showing that Ayersman lost the staple or showing that Ayersman collected the wiring or staple as physical evidence. (Brief of Respondents, at 35.) In fact, the evidence shows that it was Dr. Davis, not Ayersman, who tagged and collected electrical items for evidentiary purposes. (JA 01014.) Furthermore, Ayersman (and others) did photograph the scene, including the wire with a staple attached, and Ayersman documented what he saw. (*See* JA 00316-18, 00640-47.) Accordingly, the Wratchfords have no evidence that Ayersman failed to follow NFPA 921 regarding the collection of electrical components. (*See* JA 00777-78.)

Finally, the Wratchfords have adduced no evidence that any samples or evidence were improperly or unlawfully removed from their home. Their citations in support of this allegation do not actually support their claim. For example, they cite to (a) the deposition of prosecuting attorney Lucas See and a portion of Mr. Harris's cause determination, neither of which addresses whether evidence was removed from the Wratchfords' home, (JA 00584-616, 01019); (b) file notes from a Claims Management System and an email indicating that Ayersman collected two samples that were forwarded to the State Police Lab for hydrocarbon testing (but nothing indicating that such an action was unlawful or improper), (JA 01013, 01017); (c) more file notes from a Claims Management system indicating that Dr. Davis tagged and collected electrical items for evidentiary purposes (but nothing indicating that such an action was unlawful or improper or that Ayersman was involved with that collection of evidence), (JA 01014); and (d) an opinion from a Staff Attorney at the W. Va. Ethics Commission finding that Ayersman had not violated the Ethics Act (JA 01024-26). (*See* Brief of Respondents, at 9.)

Accordingly, the Wratchfords have no evidence that Ayersman violated any applicable rule, protocol, law, regulation, or NFPA 921 provision.

E. Ayersman Did Not Abuse His Position With The WVSFMO

The Wratchfords' claim that Ayersman essentially rushed to the doctor to be released to work before his FMLA leave was completed, just so that he could be assigned to investigate the cause and origin of the Wratchfords' fire, is unsupported by the evidence. Both Ayersman and his supervisor at the WVSFMO, George Harms, have sworn under oath that Ayersman did not ask to be assigned to the Wratchfords' case. (JA 00280, 00303.) Rather, Mr. Harms assigned Ayersman to investigate the Wratchfords' fire because Mr. Harms was busy investigating two cases, including a double-murder arson case, and Ayersman's workload was significantly lighter. (JA 00280, 00303.) Ayersman's workload was light because he had been off of work for several months on FMLA leave.[4] When Ayersman felt good enough to work again, he ended his FMLA leave. Whereas FSI did not require a physician to release Ayersman to return to work, the WVSFMO required such a release and had to approve Ayersman's return to work for the WVSFMO. Therefore, Ayersman had already resumed working for FSI before February 23, 2017, when he was assigned to investigate the Wratchfords' fire by the WVSFMO. (*See, e.g.*, JA 01169-71.)[5] The timing of the Wratchfords' fire was merely coincidental.

Furthermore, Ayersman did not use his public employment for private purposes in any way. The Wratchfords have been pursuing a theory that Ayersman and Harris were in on a

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[4] There is no question that Ayersman was on FMLA leave. In one filing in the underlying action, he accidentally referred to his leave as Workers' Compensation leave, but he corrected that misstatement in a later filing.

[5] Evidence about Ayersman's FMLA leave and return to work was filed under seal with the circuit court on February 1, 2021 in the document titled "Reply Brief in Support of Ronald C. Ayersman's Motion to Produce Documents to the West Virginia Ethics Commission Per this Court's Order of November 2020 Recognizing it as a "Qualified Person" Under the Agreed Protective Order."

conspiracy to accuse the Wratchfords of arson in order to relieve Erie from having to pay the Wratchfords' claim. In support of their far-fetched theory, they are reduced to grasping at straws. They have pointed to no benefit to Ayersman that could have stemmed from his involvement in the alleged conspiracy. As evidence of the alleged conspiracy, they point to the fact that Ayersman and Mr. Harris had some communications before Mr. Harris reported the fire to the arson hotline, as well as an unofficial transcript of a telephone conversation in which Ayersman allegedly told Mr. Wratchford that his boss, "George has been slammed. I have been off for two months with my back, so I told him to give it to me . . . ." (Brief of Respondents, at 15; JA 01118-19.)

Again, both Ayersman and Mr. Harms have sworn under oath that Ayersman was assigned to the case simply because his workload was lighter than Mr. Harms', and that Ayersman did not specifically ask to be assigned to investigate the Wratchfords' fire. (JA 00280, 00303.) Ayersman's off-the-cuff comment to Mr. Wratchford on the telephone simply confirmed that the case was given to Ayersman due to the different workloads that Ayersman and Mr. Harms' had at the time the fire was reported to the WVSFMO. The comment is not evidence that Ayersman specifically asked to be assigned to the Wratchfords' fire so that he could engage in an alleged conspiracy with others.

Moreover, it is of no consequence that Ayersman and Mr. Harris communicated before Mr. Harris called the arson hotline; they work together at FSI and so they have a reason to communicate on numerous matters on an ongoing basis. Moreover, while Mr. Harris called both Mr. Harms and Ayersman before he called the arson hotline, this is not evidence of any wrongdoing. Furthermore, it is worth noting that the Wratchfords have cited to their own expert's report as evidence of the underlying facts of this matter, including communications between Mr. Harris and Ayersman. (*See, e.g.*, Brief of Respondents, at 22 n.18.) However, summaries of evidence, as well as partisan

and presumptive annotations drafted by the Wratchfords' expert in his report, is not evidence; rather, it is merely their expert's interpretation of evidence.

Furthermore, some of the communications the Wratchfords point to show simply that Erie assigned FSI to investigate the Wratchfords' fire and that Ayersman advised Erie that Mr. Harris would have to handle any fires in West Virginia. As a result, these communications show that Ayersman was conducting himself properly with regard to his secondary employment. (*See, e.g.*, JA 01085-86.) Other communications by Ayersman show that he was *not* sharing all details he knew (particularly details of the criminal investigation) with Erie, as the Wratchfords claim he was doing. (JA 00945-46.)

Thus, there is simply no evidence that Ayersman abused or misused his public employment. Rather, the evidence shows that he diligently and reasonably investigated the Wratchfords' fire as the WVSFMO assigned him to do upon his return from FMLA leave.

F. The Wratchfords' Remaining Claims Do Not Overcome The Fact That Ayersman Had Substantial Evidence To Support His Conclusion That The Fire Was Incendiary

In their response brief, the Wratchfords make three more claims about the evidence that are worth responding to. First, clearly, prosecuting attorney Lucas See did *not* present "fair and accurate information to the Hardy County Grand Jury" regarding Ms. Wratchford, with the result that the Grand Jury returned a no true bill. (*See* Petitioner's Brief, at 10-13.) As just one example, Mr. See knowingly suggested to the Grand Jury that an expert, whom he called to testify about the fire's cause, was an independent expert although he knew that the expert was not independent but, rather, had been retained by Ms. Wratchford's attorney's law firm. (JA 00367, 00386, 00394.) Ayersman addressed Mr. See's multiple, egregious improprieties in his Petitioner's Brief (chiefly on pp. 10-13).

Second, the Wratchfords' allegations that Erie's investigation began with mistakes in the Wratchfords' identities, which resulted in incorrect background checks, has nothing to do with Ayersman. Furthermore, in support of these allegations, the Wratchfords have cited to (a) portions of the record that have nothing to do with the allegations set forth in the Brief of Respondents, (b) documents that are not in the Appendix before the Court, and (c) their own Amended Complaint, which is not evidence. (Brief of Respondents, pp.21-22, 22 n.15.)

Third, the Wratchfords claim that "the determination of 'arson' and 'incendiary cause'" were made before "objective scientific testing" and "objective microscopic analysis" were conducted. (Brief of Respondents, at 33.) The Wratchfords cite to no evidence to support these allegations. Furthermore, the Wratchfords do not indicate which, or whose, determination was allegedly made before testing was performed. They may be referring to Mr. Harris's report to the Arson Hotline. At any rate, it is clear that Ayersman had probable cause to support the criminal complaints he filed against Ms. Wratchford, and he had more than sufficient objective evidence to support his conclusion that Ms. Wratchford had intentionally set the fire, including but certainly not limited to Dr. Davis's conclusion that the fire was not electrical in nature. (*See, e.g.*, JA 00346-55.)

In the end, the dramatic language and multitude of misrepresentations of the evidence in the Wratchfords' brief cannot change the facts that Ayersman diligently, reasonably, and appropriately performed his job of determining the cause and origin of the Wratchfords' fire, and that he is entitled to summary judgment on the basis of qualified immunity. In sum, by the time Ayersman filed criminal complaints against Ms. Wratchford on June 16, 2017:

1. Ayersman had personally inspected the Wratchfords' house inside and out. He determined that the fire originated on the top of the stairs, not underneath the stairs where wiring was located, and that the fire was consistent with the presence of an ignitable liquid or other combustible material, to which his

hydrocarbon detector alerted on two places on the stairs. (JA 00316-18.) He had also determined that the wiring at issue had been damaged by the fire but that it had not caused the fire. (JA 00318, 00346-55.)

2. He had learned that Dr. Davis, an electrical engineer, had concluded that the fire was not electrical in nature and that, instead, it was incendiary in nature. (JA 00308, 00318, 00346-55.) He had also learned that Mr. Harris concurred that the fire was incendiary in nature. (JA 00308, 00346-55.)

3. He had determined that the fire was oxygen-deprived and had burned for a long time before it was extinguished; in fact, one firefighter he interviewed told him that "'the fire had already burnt itself out'" by the time he arrived on the first engine to respond to the scene. (JA 00308, 00315, 00346-55.) Accordingly, Ms. Wratchford could have set the fire before she left the house in the morning.

4. He had learned that there was no evidence of forced entry or missing items and that no one other than the Wratchfords had keys to their house, and thus, there was no evidence that anyone else set the fire. (JA 00309, 00316.)

5. He had interviewed a number of people, including both of the Wratchfords (on multiple occasions) and the firefighters who responded to the fire, as well as some others. (JA 00307-16.)

6. He had obtained a voluntary admission, which was recorded, from Ms. Wratchford that, two weeks before the fire, she had left a candle burning underneath a small Christmas tree in the hope that it would burn the house down because of financial stress. (JA 00311-13, 00324, 00326, 00328-29, 00330, 00346-55.)

7. He knew that Ms. Wratchford's answers in a polygraph test indicated deception in response to questions about whether she had set fire to her home. (JA 00311.)

8. He knew that Mr. Wratchford had directed the firefighters who responded to the scene to the stairwell where the fire was located before Mr. Wratchford claimed to be able to know where the fire was located. (JA 00311.)

9. He knew that the Wratchfords were over $6,000 behind on their mortgage payments, that Ms. Wratchford was aware that their home was going into foreclosure, and that the Wratchfords had far less money in their accounts than was necessary to pay their house out of foreclosure. (JA 00280, 00316, 00331-43, 00346-55, 00787.)

10. He knew that the Wratchfords had insured their home and had coverage of around $221,500 for the structure and $166,125 for the contents, a total of $387,625. (JA 00347, 00346-55.)

11. Thus, Ayersman knew that the Wratchfords had a motive to attempt and commit arson in order to obtain insurance proceeds.

Clearly, the Wratchfords do not like the conclusion Ayersman (and, independently, Mr. Harris and Dr. Davis) came to, but that does not render Ayersman's conduct improper or unlawful. The Wratchfords' allegations amount to nothing but a house of cards that must fall because it has no foundation in the evidence. The record shows through positive evidence, countered by speculation alone, that Ayersman is entitled to qualified immunity. The Wratchfords have no evidence to support their claims against Ayersman, and so they repeatedly cite to portions of the record that do not support their wild accusations. Ayersman, on the other hand, has proved that he diligently did his job of investigating the Wratchfords' fire on behalf of the WVSFMO and that he based his conclusions on substantial objective evidence. He did not violate any of the Wratchfords' rights, and he is entitled to summary judgment on the basis of his qualified immunity.

G. Ms. Wratchford Admitted That She Obtained Registrations From The DMV For The Wratchfords' Vehicles Without First Submitting Proof Of Having Paid Personal Property Taxes

In their second cross-assignment of error, the Wratchfords argue that the circuit court erred when it granted summary judgment to Ayersman on their claim that Ayersman tortiously interfered with Ms. Wratchford's employment with the West Virginia Division of Motor Vehicles ("DMV"). (*See* JA 00124-26 (Count IV of the Amended Complaint).) Facts relevant to that assignment of error are contained in this section.

By the time of Ms. Wratchford's polygraph examination on March 9, 2017, Ayersman had learned that the Wratchfords were three to four years behind on their personal property taxes. (JA 00322.) He also knew that Ms. Wratchford was a supervisor at the DMV. (*Id.*) Because proof of paid property taxes is required to renew such registrations with the DMV, Ayersman questioned whether Ms. Wratchford had used her position at the DMV to obtain current registration for the

Wratchfords' vehicles. (*Id.*) After the polygraph examination, one of the subjects Mr. Pansch and Ayersman addressed with Ms. Wratchford was the issue of her registration renewals "to determine if she was capable of being forthright." (JA 00323-24.) According to Mr. Pansch's report, after giving explanations that Mr. Pansch and Ayersman knew to be implausible, "Ms. Wratchford later admitted that she had completed the back of the registration for[m] whereby confirming that the personal property taxes had been paid, which was not accurate, knowing it to be wrong." (JA 00324.)

Afterward, on March 17, 2017 and thereafter, Ayersman had communications with a WVSP Sergeant, W.M. Roden, who reached out to Ayersman because he had been assigned to look into a case against Ms. Wratchford "regarding her issues at the DMV." (JA 00958; *see* JA 00958-961.) The WVSP communicated the issue to the DMV, which addressed the situation with Ms. Wratchford.

On April 12, 2017, Ms. Wratchford admitted to the DMV in writing "that I renewed my vehicle tags for the past 3 years without having paid my personal property tax." (JA 00396.) She signed her statement, which was placed in her personnel file with the DMV. When the DMV learned of her admitted improper conduct from the WVSP, the DMV gave her the option of resigning from her position, which she did of her own free will and without any coercion. (JA 00397, 00401-02.) It was afterward, on April 19, 2017, that Ayersman stated in an email to Lucas See, the Hardy County Prosecuting Attorney, "I do feel building up the DMV case will only give us more to work with when discussing a plea." (JA 01203.)

Furthermore, at her deposition, Ms. Wratchford admitted that she had not paid her personal property taxes for several years; admitted that she knew that she was required to pay personal

property taxes in order to renew her registration; and admitted that, at times, she would provide a DMV employee the wrong tax receipt when renewing her registration. (JA 00398-402.)

III. ARGUMENT – PETITIONER AYERSMAN'S ASSIGNMENTS OF ERROR

A. Argument Relevant To Both Of Ayersman's Assignments Of Error: Ayersman Was Acting Within The Scope Of His Employment With The WVSFMO, And Therefore He Is Immune From Liability For Any Negligence And For Intentional Conduct.

The Wratchfords claim that a genuine issue of material facts exists regarding whether Ayersman was acting within the scope of his employment with the WVSFMO. Their claim is relevant to both of Ayersman's assignments of error, and therefore this section applies to both such assignments of error.

The question of whether an employee acted within the scope of his employment "'may or may not turn on disputed issues of material fact.'" *W. Va. Div. of Nat. Res. v. Dawson*, 242 W. Va. 176, 192, 832 S.E.2d 102, 118 (2019) (citation omitted). "When the facts relied upon to establish the existence of an agency are undisputed, and conflicting inferences can not be drawn from such facts, the question of the existence of the agency is one of law for the court[.]" *Laslo v. Griffith*, 143 W. Va. 469, 469, 102 S.E.2d 894 (1958). To determine whether an individual was acting within the scope of his or her employment, the surrounding circumstances are considered, "'including the character of the employment, the nature of the wrongful deed, the time and place of its commission and the purpose of the act.'" *Dawson*, 242 W. Va. at 193, 832 S.E.2d at 119 (citation omitted).

Here, there is no disputed issue of material fact for a jury; rather, it is clear from undisputed evidence that Ayersman was acting within the scope of his employment with the WVSFMO when he investigated the Wratchfords' fire and when he filed criminal complaints against Ms. Wratchford. The character of Ayersman's employment with the WVSFMO is undisputedly to

investigate fires. (JA 00279.) *See also* W. Va. Fire Commission, Office of the State Fire Marshal, "State Fire Marshal," *https://firemarshal.wv.gov/about/Pages/StateFireMarshal.aspx* (listing Ayersman as an Assistant State Fire Marshal in the Fire Investigation Division). That is precisely what he did here, indicating that he acted within the scope of his employment with the WVSFMO.

The nature of the alleged wrongful deed has to do with the manner in which Ayersman came to his conclusion that Ms. Wratchford had intentionally set the fire in her home and his filing of criminal complaints against Ms. Wratchford. All deeds Ayersman performed in these regards were performed within the scope of Ayersman's employment with the WVSFMO. As was set forth in "Petitioner's Brief" (pp. 25-26), Ayersman performed his duties reasonably and diligently. The Wratchfords' accusation that Ayersman simply accepted the conclusions of others and did not perform an independent, unbiased investigation is completely unsupported by the evidence. To the contrary, the evidence shows that Ayersman performed a diligent investigation by inspecting the home inside and out; interviewing witnesses, including (on multiple occasions) Mr. and Ms. Wratchford; using a hydrocarbon detector; sending samples to be tested by the WVSP Forensic Laboratory; independently eliminating accidental and electrical causes of the fire, which finding was corroborated by the (also independent) investigation of an electrical engineer; involving the WVSP to perform a polygraph test of Ms. Wratchford, which indicated deception in her responses about whether she set the fire, planned to set the fire, or saw the fire start at her house; obtaining a recorded admission from Ms. Wratchford that she had attempted to set fire to her home two weeks before the fire; and investigating the Wratchfords' financial situation and the status of their mortgage, leading him to learn that they knowingly faced foreclosure proceedings.

The Wratchfords argue that Ayersman's first impression was biased because Mr. Harris thought the fire was incendiary and communicated his belief to Ayersman before Ayersman began

his investigation. (Brief of Respondents, at 22-23.) The Wratchfords' argument reaches too far. The WVSFMO only started an investigation because Mr. Harris believed the fire was incendiary and made a report to the Arson Hotline. Indeed, WVSFMO Policy 10008 states that "requests for investigation shall be directed through the Arson Hotline." (JA 00455.) If the Wratchfords' theory about bias were correct, then every WVSFMO fire investigator would be deemed to be biased at the beginning of every investigation, which is clearly not the case. When he investigated the Wratchfords' fire because Mr. Harris made a report to the Arson Hotline, Ayersman was clearly working within the scope of his employment with the WVSFMO, and nothing about the circumstances indicates that he was biased.

Furthermore, the WVSFMO permitted Ayersman to have communications and to share information with third parties, and therefore he acted within the scope of his employment to the extent that he had communications and provided information to third parties about the investigation. He also acted in the scope of his employment when, at the direction and approval of his superiors at the WVSFMO, he filed well-supported criminal charges against Ms. Wratchford that provided probable cause for her arrest. (JA 00280, 00304.) Thus, there is no "wrongful deed" to begin with, and the nature of Ayersman's actions demonstrate that he was acting within the scope of his employment with the WVSFMO with regard to his investigation of the fire and his filing of criminal complaints against Ms. Wratchford at the conclusion of his investigation.

The time, place, and purpose of Ayersman's actions also demonstrate that he was acting within the scope of his employment with the WVSFMO. Ayersman timely investigated the Wratchfords' February 20, 2017 fire, as he was assigned to do by his immediate superior at the WVSFMO on February 23, 2017. (JA 00280, 00303, 00306-07.) On February 24, 2017, for example, he first examined the scene of the fire. (JA 00306.) The polygraph examination of Ms.

Wratchford and Ayersman's subsequent interview of Ms. Wratchford took place at the State Police, Moorefield Detachment. (JA 00311, 00482.) Thus, the time and place of his investigation demonstrate that he was acting within the scope of his assignment by the WVSFMO to investigate the Wratchfords' fire, and thus he was acting within the scope of his employment with the WVSFMO when he did the same.

Ayersman's purpose in investigating the fire on behalf of the WVSFMO was to determine its cause and origin given that a private investigator (Mr. Harris) thought that it had been intentionally set and made a request, via an Arson Hotline Incident Report, that the WVSFMO investigate. (JA 00303-05.) Ayersman's purpose in filing criminal complaints against Ms. Wratchford was also to fulfill his duties as an ASFM for the WVSFMO, one of whose missions is to enforce fire safety laws. W. Va. Fire Commission Office of the State Fire Marshal, "Our Mission" https://firemarshal.wv.gov/about/Pages/default.aspx. Moreover, Ayersman's superiors approved and directed Ayersman to file the criminal complaints, meaning that doing so was undisputedly undertaken within the scope of Ayersman's employment. (JA 00280, 00304.)

Therefore, with regard to both the Wratchfords' claims of negligent conduct and intentional conduct, it is clear that Ayersman is protected by qualified immunity because he was acting within the scope of his employment when he diligently and reasonably investigated the cause and origin of the Wratchfords' fire and when he filed criminal complaints against Ms. Wratchford.

B. Qualified Immunity Protects Ayersman From Liability For The Wratchfords' Negligence Claims

In his Petitioner's Brief, Ayersman has already shown that he is entitled to summary judgment on the Wratchfords' negligence claims on the basis that he is protected by qualified immunity. In their response, the Wratchfords have questioned whether Ayersman was working for the WVSFMO (as opposed to his secondary employer or Erie) at the time of the acts of which they

complain, and thus whether qualified immunity applies. However, as shown above, undisputed evidence shows that Ayersman was clearly working within the scope of his employment for the WVSFMO when he diligently investigated the cause and origin of the Wratchfords' fire and when, at the conclusion of his investigation, he filed criminal complaints against Ms. Wratchford. The Wratchfords also claim that Ayersman loses the protection of qualified immunity due to alleged violation(s) of the Ethics Act.

The Wratchfords' argument fails because they have not shown that they had a right under the Ethics Act, much less that Ayersman violated any such right. Instead, the Wratchfords point to the purpose of the Ethics Act, which is, generally speaking, to establish ethical standards for public officials and employees and to "eliminate actual conflicts of interest," as well as related purposes. W. Va. Code § 6B-1-2(b). One such related purpose is "to provide administrative and criminal penalties for specific ethical violations" – but *not* to provide for a civil cause of action for persons aggrieved by any such violations. *Id.* The Ethics Act's purpose thus does not give any specific right to the Wratchfords, nor have the Wratchfords cited to any other portion of the Ethics Act that gives them any specific rights, much less rights that Ayersman allegedly violated.

Ayersman's secondary employment, on its own, does not constitute a violation of the Ethics Act or of any statutory or constitutional right of the Wratchfords. That is, qualified immunity protects government officials and employees "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Maston v. Wagner*, 236 W. Va. 488, 499-500, 781 S.E.2d 936, 947-48 (2015). Ayersman's supervisor and the WVFSFMO determined that Ayersman's secondary employment with FSI presented no conflict in January 2010, after Ayersman requested a determination of the same on a form from the W. Va. Division of Personnel. (Petitioner's Brief, at 2; JA 282-85.) It

follows that, simply by engaging in secondary employment, which the W. Va. Division of Personnel contemplated, and which the WVSFMO and Ayersman's supervisor expressly permitted, Ayersman did not violate any clearly established right of the Wratchfords.

Ayersman also did not violate any clearly established right of the Wratchfords by engaging in communications with Mr. Harris and representatives/agents of Erie. Not only did Ayersman withhold certain information from Mr. Harris and Erie (*see, e.g.*, JA 00945-46), the Wratchfords have adduced no evidence that any information Ayersman did share with them was confidential or that he should not have shared it. Their argument relies on the opinion of their "expert," Steven Dawson, who has no knowledge or other expertise regarding the WVSFMO's policies and procedures – and who, prior to his deposition in this civil action, did not even know that the WVSFMO had policies and procedures. (JA 01322; *see* Petitioner's Brief, at 21-22.) In truth, the WVSFMO's policies and procedures permitted Ayersman, in his capacity as an ASFM working for the WVSFMO, to share information related to his investigation with third parties, including insurance companies. (JA 01324-25.)

Furthermore, even if the Wratchfords had a specific right under the Ethics Act, and even if Ayersman had violated it, he still could not be liable to the Wratchfords for any negligent violation of the Ethics Act. As shown above, Ayersman's discretionary decisions regarding the Wratchfords and the cause of their fire were made within the scope of his duty, authority, and jurisdiction with the WVSFMO. *See* Syl. Pt. 4, *Clark v. Dunn*, 195 W. Va. 272, 273, 465 S.E.2d 374, 375 (1995). Therefore, "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." Syl. Pts. 4, 6, *Clark*, 195 W. Va. at 273, 465 S.E.2d at 375.

Furthermore, there is no evidence that Ayersman committed false swearing or perjury; these are unsupported accusations by the Wratchfords (of intentional, not negligent, conduct). (*See* Brief of Respondents, at 27.) *See* W. Va. Code §§ 61-5-1, 61-5-2 (both crimes involve an element of willfulness). The Wratchfords' unsupported accusations amount to mere speculation, which is insufficient to overcome summary judgment. *See Allstate Wrecker Serv. v. Kanawha Cty. Sheriff's Dep't*, 212 W. Va. 226, 231, 569 S.E.2d 473, 478 (2002) (more than a scintilla of evidence is needed to defeat a summary judgment motion); Syl. Pt. 3, *Adams v. Sparacio*, 156 W. Va. 678, 679, 196 S.E.2d 647, 649 (1973) (jury may not base findings of fact on speculation).

The Wratchfords' arguments about alleged violation of the Ethics Act do not defeat Ayersman's qualified immunity defense, and he is entitled to summary judgment on the negligence claims asserted against him in Counts II and XI.

C. Qualified Immunity Protects Ayersman From Liability For The Wratchfords' Claims Of Intentional Acts

Ayersman demonstrated his entitlement to summary judgment on the claims of intentional conduct asserted against him in Counts V, VI, VII, and XI in his Petitioner's Brief. In their response, the Wratchfords claim that Ayersman is not entitled to summary judgment on the basis of qualified immunity because foundational and historical facts are in dispute. However, no genuine issue of material fact exists. The Wratchfords' claims are not based on evidence but on wildly conjectural accusations unsupported by even a scintilla of evidence. As shown above, Ayersman was clearly acting within the scope of his employment when he investigated the cause and origin of the Wratchfords' fire and when he filed criminal complaints against Ms. Wratchford. To the extent that the Wratchfords claim that some violation of the Ethics Act defeats Ayersman's qualified immunity defense, Ayersman hereby incorporates the argument he made regarding the

Ethics Act set forth above in Section III.B. of this reply brief and in his Petitioner's Brief (chiefly pp. 15-23).

The Wratchfords' claim that Ayersman acted with bias simply because he did not blindly trust everything the Wratchfords said is simply not evidence that Ayersman acted in a way that defeats his qualified immunity defense. Ayersman, for example, noted several times in his report that the Wratchfords reported having smelled an electrical/wire burning smell before their fire. (JA 00308-10.) However, as part of his investigation, Ayersman was able to rule out an electrical cause of the fire (as was an electrical engineer); Ayersman determined that the fire was on the top of the steps, not beneath the steps where the wiring was located; he determined that the damage "was consistent with the presence of an ignitable liquid or other combustible material"; Ayersman's hydrocarbon detector alerted in two places on the stairwell; and Ayersman determined that the wiring at issue was damaged by the fire, and that it did not cause the fire. (JA 00318.) Additionally, Ayersman (and others) determined, based on the heavy smoke and heat damage inside the house, that the fire was oxygen-deprived and had burned slowly for several hours before firefighters arrived. (JA 00308, 00317; *see also* JA 00430-31.) Thus, Ms. Wratchford's claim that she had been absent from the home since morning, and she found her house on fire around 3:00 p.m., could not exonerate her. (*See* JA 00309-10.)

No inference that Ayersman committed some immunity-defeating intentional tort can be made from the fact that the Wratchfords have misinterpreted both Ayersman's time sheets[6] and

[6] The Wratchfords appear to have abandoned, and thus waived, an argument they previously made about Ayersman's time sheets, which, they alleged, showed that Ayersman was not properly billing his time to FSI and the WVSFMO. To the extent that it may be relevant to this appeal, Ayersman rebutted the Wratchfords' argument in its briefing to the circuit court, and Ayersman hereby incorporates that rebuttal here. (*See* JA 01297-98, 1335-38.) In sum, the Wratchfords made incorrect assumptions about how Ayersman's time sheets work and then failed to depose Ayersman to see if their assumptions were correct. (*See id.*) Furthermore, even if Ayersman's time sheet entries contained errors, those errors would not indicate any violation of the Wratchfords' rights and thus would not defeat his qualified immunity.

the reason he returned to work following his FMLA leave. As was shown above, Ayersman did not rush to the doctor to be released to work just so that he could be assigned to investigate the cause and origin of the Wratchfords' fire, as the Wratchfords have claimed. Ayersman had been off of work on FMLA leave for the several months preceding the Wratchfords' fire. Ayersman's physician had cleared him to work before the date of the Wratchfords' fire, and thus Ayersman had already resumed working for FSI by February 20, 2017. (JA 01169, 01172.) Ayersman did not resume working for the WVSFMO until February 23, 2017 because the State had to approve Ayersman's return to that work. (*See, e.g.*, JA 01171.)

Furthermore, both Ayersman and his supervisor at the WVSFMO, Mr. Harms, have sworn under oath that Ayersman did not ask to be assigned to the Wratchfords' case. (JA 00280, 00303.) Rather, Mr. Harms assigned Ayersman to investigate the fire because Mr. Harms was busy investigating a double-murder arson case and another case, and because Ayersman was just returning from leave, his workload was significantly lighter than Mr. Harms' workload. (JA 00280, 00303.) Therefore, the timing of Ayersman's return to work is not evidence that he acted maliciously, fraudulently, or intentionally wrongfully, and he is therefore protected from liability by qualified immunity.

Indeed, the Wratchfords' mere speculation that Ayersman cut his FMLA leave short so that he could return to work for the WVSFMO in time to investigate their fire is insufficient to sustain a jury verdict in light of Ayersman's positive evidence that he did not ask to be assigned to their case. *See Adams v. Sparacio*, 156 W. Va. 678, 685, 196 S.E.2d 647, 652-53 (1973) ("we are of the opinion that the evidence of negligence on the part of Miller was based entirely on speculation and conjecture and could not prevail over Miller's positive evidence; that to have allowed a verdict to stand against him would have constituted reversible error; and that the trial court correctly directed

the Millers out of the case"). Therefore, the timing of Ayersman's return to work for the WVSFMO does not change the fact that he is entitled to summary judgment based on qualified immunity.

The Wratchfords' incorrect claim that Ayersman did not follow NFPA 921 when investigating the cause and origin of their fire also do not defeat Ayersman's qualified immunity defense. As shown above, Ayersman faithfully followed NFPA 921 when concluding that the Wratchfords' fire was incendiary. He properly recorded his interviews, dutifully investigated the scene of the fire, chased down relevant evidence, used the scientific method, eliminated all potential accidental causes of the fire, and came to his conclusion that the fire was incendiary in nature based on substantial evidence.

Evidence supporting his conclusion includes, for example, the facts that both he and an electrical engineer determined that there was no electrical cause for the fire; he found that wiring in the area had been damaged by the fire, not that it had caused the fire; he determined that the fire originated on the top of the steps based on the damage from the fire; he noted that no fuel load explained the damage to the top of the steps; he found that the "[d]amage to the stairs was consistent with the presence of an ignitable liquid or other combustible material"; his hydrocarbon detector alerted to the presence of an ignitable liquid in two places on the stairs; he found that the fire was oxygen-deprived and had burned for hours before firefighters arrived (and thus it was of no consequence that Ms. Wratchford had not been in the house for hours); he obtained a recorded admission from Ms. Wratchford that she had recently attempted to set fire to the house; and he learned that the Wratchfords were woefully behind on their mortgage payments and lacked sufficient funds to pay their home out of the foreclosure proceedings that Ms. Wratchford knew had already begun, giving her a clear motive to attempt to burn the house. (JA 00308, 00311-13, 00316-18.)

Therefore, Ayersman conducted a reasonable and thorough investigation. Additionally, he presented the evidence he found to a Hardy County magistrate who independently determined that probable cause existed both to sign the criminal complaints and to permit the charges against Ms. Wratchford to be heard by the Grand Jury. (JA 00344-55; JA 00395.) The Hardy County prosecuting attorney also acknowledged during his deposition that the magistrate found probable cause twice before the case proceeded to the Grand Jury. (JA 00395).[7] Given the reasonableness and thorough nature of Ayersman's investigation, and given the several findings of probable cause, there is no basis to deny him summary judgment because qualified immunity protects him from liability on the Wratchfords' claims of intentional conduct, set forth in Counts V, VI, VII, and XI.

IV. RESPONDENT WRATCHFORDS' CROSS-ASSIGNMENTS OF ERROR

A. Respondent Wratchfords' Cross-Assignment of Error # 1

The circuit court was correct and thus made no error when, in paragraph 24 of its Order, it wrote:

> First, the Court has considered whether the alleged acts or omission could be in violation of a clearly established right of which a reasonable person would have known. The Court finds Plaintiffs have alleged violations of the West Virginia Ethics Act, as set forth in West Virginia Code § 6B-2-5(e). The Court finds that alleged violations of the Ethics Act cannot defeat the qualified immunity defense, because the statutory or constitutional right that was violated must be a right that specifically applies to the Plaintiffs. The Court further finds that Plaintiffs have not articulated any other clearly established right.

(JA 01377.) Because the Wratchfords make no new argument regarding the applicability of the Ethics Act, Ayersman hereby incorporates the arguments he has already made to the Court in his

[7] As set forth in greater detail in Petitioner's Brief, pages 33 to 37, the fact that Ayersman obtained probable cause findings for the charges against Ms. Wratchford show that Ayersman is entitled to qualified immunity on Respondents' claims.

Petitioner's Brief (chiefly pp. 15-23) and earlier in this Reply Brief, in Section III.B. For the reasons already supplied to the Court, the Wratchfords' first assignment of error should be denied.

B. Respondent Wratchfords' Cross-Assignment of Error # 2[8]

In their second cross-assignment of error, the Wratchfords claim that the circuit court erred when it granted summary judgment to Ayersman on their tortious interference claim, set forth in Count IV of the Amended Complaint. As a preliminary matter, the Wratchfords cite to no authority showing that the circuit court's grant of summary judgment on the tortious interference claim is reviewable on appeal at this procedural posture. Ayersman's defense to that claim was not based on qualified immunity but, rather, was that the claim clearly failed on its merits. The "category of orders that are subject to permissible interlocutory appeal" is "narrow." *Robinson v. Pack*, 223 W. Va. 828, 831, 679 S.E.2d 660, 663 (2009). Under W. Va. Code § 58-5-1, "appeals may be taken in civil actions from 'a final judgment of any circuit court or from an order of any circuit court constituting a final judgment.'" *Robinson*, 223 W. Va. at 832, 679 S.E.2d at 664 (citation omitted).

This so-called "rule of finality" "'is designed to prohibit "piecemeal appellate review of trial court decisions which do not terminate the litigation[.]"'" *Id.* (quoting *James M.B. v. Carolyn M.*, 193 W.Va. 289, 292, 456 S.E.2d 16, 19 (1995) (quoting *U.S. v. Hollywood Motor Car Co.*, 458 U.S. 263, 265, 102 S. Ct. 3081, 73 L.Ed.2d 754 (1982))). There are exceptions to the rule of finality, including one applicable when a circuit court denies a summary judgment motion predicated on qualified immunity – therefore, such rulings may be immediately appealed. *Robinson*, 223 W. Va. at 833, 679 S.E.2d at 665.

Here, however, the circuit court did not deny summary judgment to Ayersman on the Wratchfords' tortious interference claim; rather, it granted summary judgment to him. Moreover,

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[8] Ayersman briefed the argument contained in this section to the circuit court, as well. (JA 00271-74, 01304-06.)

the circuit court's decision on that claim was on the merits; it was not predicated on qualified immunity. (JA 01389-90.) Therefore, the exception to the rule of finality recognized in *Robinson* does not apply to the Wratchfords' second assignment of error. The Wratchfords have pointed to no other exception to the rule of finality that would make the circuit court's ruling on the tortious interference claim in Count IV reviewable by this Court on appeal at this time. Therefore, Ayersman believes that the Wratchfords' second cross-assignment of error is not reviewable by this Court at this time.

Moreover, it is plain to see that the circuit court did not err; rather, it based its holding on clear, unambiguous precedent from this Court. Indeed, the Wratchfords have cited to no authority that is contrary to, or that sets forth any exception to, the mandatory precedent that the circuit court relied on. No genuine issue of material fact exists, the tortious interference claim fails as a matter of law, and the circuit court did not err when it granted summary judgment to Ayersman on that claim.

In their tortious interference claim, the Wratchfords attempt to place liability on Ayersman for providing true information to the WVSP, which information the WVSP relayed to Ms. Wratchford's employer, the DMV, regarding the fact that Ms. Wratchford had secured renewals of her vehicle registration even though the Wratchfords had not paid their property taxes.

To establish prima facie proof of tortious interference with a contract or business relationship, the Wratchfords must show the following:

> "(1) [the] existence of a contractual or business relationship or expectancy;
>
> (2) an intentional act of interference by a party outside that relationship or expectancy;
>
> (3) proof that the interference caused the harm sustained; and

(4) damages."

Hatfield v. Health Mgt. Assocs. of W. Va., 223 W. Va. 259, 267, 672 S.E.2d 395, 403 (2008) (quoting Syl. Pt. 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983)).

If the Wratchfords are able to make their prima facie case, then Ayersman has the opportunity to prove the affirmative defenses of justification or privilege, including the complete defense that the information provided was truthful:

> "[i]f a plaintiff makes a prima facie case, a defendant may prove justification or privilege, affirmative defenses. Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper."

Id. Furthermore,

> [i]n the context of tortious interference with a business relationship, one who intentionally causes a third person not to perform a contract or not to enter into a prospective business relation with another does not interfere improperly with the other's business relation, by giving the third person (a) **truthful information**, or (b) honest advice within the scope of a request for the advice.

Syl. Pt. 5, *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 137, 506 S.E.2d 578, 580 (1998) (citing Restatement (Second) of Torts § 772 (1979)) (emphasis added).[9] The Court has further clarified "that ***truthful information is an absolute bar to a claim of tortious interference 'whether or not the information is requested.***'" *Tiernan*, 203 W. Va. at 150, 506 S.E.2d at 593 (emphasis added) (quoting Restatement (Second) of Torts, § 772 (1979)).

[9] In its opinion in *Tiernan*, the Court at times incorrectly cites to § 722 of the Restatement (Second) of Torts and at other times cites to the correct section, which is § 772 of the Restatement (Second) of Torts.

On appeal, the Wratchfords claim that the circuit court erred when it applied this mandatory precedent. However, the Wratchfords cite to no authority that is either contrary to or that provides an exception to tortious interference law, as it was set forth in *Tiernan*. Therefore, their challenge to the circuit court's grant of summary judgment to Ayersman must fail because the Wratchfords failed to make a prima facie case and because it is not disputed that any information Ayersman provided to the WVSP, which was relayed to the DMV, was truthful, and its provision was justified.

Ms. Wratchford cannot satisfy her prima facie case because any alleged interference by Ayersman did not cause Ms. Wratchford to lose her job. Rather, Ms. Wratchford lost her job as a supervisor at the DMV because of her own improper conduct, *i.e.*, she admittedly renewed her vehicle registration tags at the DMV for three years without having paid her personal property taxes. In handing another DMV employee tax receipts that Ms. Wratchford knew to be incorrect, Ms. Wratchford engaged in deceptive behavior because she created the appearance to the employee that she was providing the correct tax receipt, which would allow her to renew her vehicle registrations. Therefore, the loss of her DMV job and any related harm that Ms. Wratchford sustained was directly caused by her own improper and wrongful conduct. Thus, Ms. Wratchford cannot satisfy an essential element of her prima facie case.

Furthermore, even if Ms. Wratchford could satisfy her prima facie case, Ayersman is still entitled to summary judgment because he provided only truthful information to the WVSP regarding Ms. Wratchford's conduct. That is, Ayersman informed the WVSP of truthful information that even Ms. Wratchford has admitted, under oath, was accurate and correct. (JA 00396, 00398-402.) The fact that the information that Ayersman provided was truthful creates an

absolute bar to Ms. Wratchford's tortious interference with employment and business relationship claim.

Ayersman was further justified to provide this information to the WVSP because it involved a possible crime by Ms. Wratchford. If Ms. Wratchford was fraudulently renewing her vehicle registration, investigation of this criminal conduct was warranted. *See* W. VA. CODE § 61-3-24 (Obtaining money, property and services by false pretenses). While Ayersman lacked jurisdiction to investigate this issue, as a law enforcement officer he was obligated to report this potential criminal activity to the WVSP, which had such jurisdiction. Ayersman thus had a legitimate reason for reporting, and he cannot be liable for tortiously interfering with Ms. Wratchford's employment.

For these reasons, the circuit court did not err when it granted summary judgment to Ayersman on the Wratchfords' tortious interference claim. (*See* JA 01389-90.) The circuit court quoted and then properly applied *Tiernan*, which provides that the provision of truthful information "is an absolute defense" to the claim. (JA 01389.) The circuit court then found that Ms. Wratchford's deposition evidenced the fact that the information Ayersman shared was truthful and thus that Ayersman had an "'absolute defense'" to the claim. (JA 01390.) There is no error in the circuit court's decision. Therefore, if the Court determines that it may review this issue on appeal at this time, it should affirm the circuit court's grant of summary judgment to Ayersman on the tortious interference claim set forth in Count IV of the Amended Complaint.

V. 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 was in error and 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. Furthermore, the Wratchfords' two assignments of error should be denied. The circuit court did not err when it determined that alleged violations of the Ethics Act cannot defeat Ayersman's qualified immunity defense, and it did not err when it granted summary judgment to Ayersman on the Wratchfords' tortious interference claim (which ruling appears not to be appealable at this procedural posture). If the Court reviews the circuit court's ruling on Count IV (tortious interference), it should affirm the circuit court's grant of summary judgment to Ayersman on that claim.

Respectfully submitted this 12th day of August, 2021.

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CERTIFICATE OF SERVICE

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