

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

**TAMMY S. WRATCHFORD and
MICHAEL W. WRATCHFORD,
PLAINTIFFS,
*Plaintiffs,***

v.

**Civil Action No. CC-16-2018-C-3
H. Charles Carl, III, Judge**

**ERIE INSURANCE PROPERTY &
CASUALTY COMPANY;
CHAD TUTTOILMONDO, ADJUSTER;
PHILLIP JONES, INVESTIGATOR;
FIRE & SAFETY INVESTIGATION
CONSULTING SERVICES, LLC;
CHRISTOPHER BRENT HARRIS;
FORENSIC CONSULTANTS & ENGINEERS, INC.
D/B/A ROMUALDI DAVIDSON & ASSOCIATES, INC.;
BDA ENGINEERING, INC.;
BERT N. DAVIS;
RONALD C. AYERSMAN, Individually;
WEST VIRGINIA STATE FIRE MARSHAL; and
RONALD C. "MACKEY" AYERSMAN, ASSISTANT STATE
FIRE MARSHAL,
*Defendants.***

Order Denying West Virginia State Fire Marshal's Office's Motion for Summary Judgment

This matter came before the Court upon *West Virginia State Fire Marshal's Office's Motion for Summary Judgment* filed by Lou Ann S. Cyrus, Michael D. Dunham, and Shuman McCuskey & Slicer, pllc, counsel for Defendant West Virginia State Fire Marshal's Office, on February 21, 2020; upon *Plaintiffs' Response to Motion for Summary Judgment of the West Virginia State Fire Marshal's Office* filed by J. David Judy, III, counsel for Plaintiffs, on March 5, 2020; upon *West Virginia State Fire Marshal's Office's Reply to Plaintiffs' Response to the Fire Marshal's Office's Motion for Summary Judgment* filed on March 13, 2020; upon *Administrative Orders* entered by the Supreme Court of Appeals of West Virginia on March 22, 2020, April 3, 2020, and April 22, 2020, declaring a Judicial Emergency due to COVID-19; upon a telephonic

hearing held on March 17, 2020; upon an *Amended Administrative Order Staying Court Hearings Until May 1, 2020*, entered on April 8, 2020; upon email correspondence sent from the Court to counsel on July 24, 2020, indicating the Court would rule on pending motions without further hearing or oral argument, to which counsel had no objection; and upon proposed Orders filed by counsel on August 25, 2020.

The Court has carefully considered the Motion, the Response, the Reply, the entire record of this case, proposed Orders submitted by counsel, and pertinent legal authority. The Court finds that no further pleadings or oral argument are necessary for it to render appropriate rulings herein, as it deems the record sufficiently developed otherwise. In support of its decision, the Court makes the following findings of fact and conclusions of law:

1. On February 20, 2017, a fire occurred at Plaintiffs' home.
2. With regard to the investigation of the fire, the West Virginia State Fire Marshal's Office ("WVSFMO") alleges the following occurred:

- a. On February 20, 2017, Mr. Tuttoilmondo emailed Mr. Harris about the fire and cc'd Mr. Ayersman. Mr. Harris was out of the country on vacation so Mr. Ayersman contacted Mr. Harris and then emailed Mr. Tuttoilmondo to advise that Mr. Harris would return to the office the next day and that Mr. Harris would need to handle any fires in West Virginia.
- b. On February 23, 2017, Mr. Harris contacted the Fire Marshal Office's Arson Hotline and requested that the Office investigate the cause of the fire. Mr. Ayersman was assigned the investigation in accordance with The State Fire Commission Office of the State Fire Marshal's Policy and Procedure Manual.
- c. On February 24, 2017, Mr. Ayersman began his investigation. The origin of the fire was the top portion of the stairs and damage was consistent with an ignitable liquid or other combustible material. The hydrocarbon detector alerted to the possible presence of an ignitable liquid, although subsequent lab tests did not confirm such a presence. At the end of his initial exam, he believed the fire was incendiary and he could eliminate all accidental/electrical causes in the area of origin.

- d. On March 6, 2017, Mr. Ayersman, Mr. Harris, and Dr. Davis investigated the home. Dr. Davis eliminated the electrical service as being involved in the initiation of the fire and all three agreed it was a slow/long burning fire that was oxygen deprived. All concurred the fire was incendiary in nature.
- e. On March 9, 2017, Kevin Pansch conducted a polygraph exam for Tammy Wratchford. After the polygraph, Mr. Pansch and Mr. Ayersman interviewed Mrs. Wratchford and she admitted that two weeks prior to the fire, she intentionally left a candle burning, under a tree in the living room, in hopes it would burn the house down. After the interview, Mr. Ayersman took a recorded statement from Mrs. Wratchford and after some initial back-peddling, she eventually agreed she had said she left the candle burning in hopes it would catch the tree on fire.
- f. After the polygraph examination, Mr. Ayersman obtained additional information related to Plaintiffs' dire financial situation.
- g. Prior to filing criminal charges against Mrs. Wratchford, Mr. Ayersman sent the entire file to Deputy State Fire Marshal Jason Baltic and Field Supervisor George Harms for their review and approval, and both indicated that charges were appropriate.

3. Thereafter, the State Fire Marshal's Office, by Mr. Ayersman, filed criminal charges against Mrs. Wratchford for: (1) Arson First Degree; (2) Burning Insured Property; (3) Insurance Fraud; (4) Attempted Arson; and (5) Attempt to Burn Insured Property. The Magistrate of Hardy County found probable cause and issued an arrest warrant.

4. On June 18, 2017, the Hardy County Sheriff's Department arrested Mrs. Wratchford.

5. On June 26, 2017, the Magistrate conducted a preliminary hearing and found probable cause.

6. On July 11, 2017, Erie denied coverage pursuant to a homeowner's Policy of insurance, designated Policy No. Q53 6501730. Erie asserts the denial of coverage was based on two principal reasons: (1) Erie's investigation concluded the fire was

intentionally set by Mrs. Wratchford and subject to exclusion based on the intentional acts exclusion of the Policy; and (2) Mrs. Wratchford had made material misrepresentations during the claim investigation.

7. On February 6, 2018, the Hardy County Grand Jury returned a “no true bill” on each of the charges made against Mrs. Wratchford.

8. On February 12, 2018, the criminal charges against Mrs. Wratchford were dismissed.

9. The *Amended Complaint* alleges only one express count directed at the WVSFMO: Count 11, involving alleged violation of civil rights and negligence. Plaintiffs allege that the WVSFMO failed to properly conduct its investigation into the subject fire, ignored exculpatory evidence, and had actual knowledge that allowing felony charges to pend against Tammy Wratchford would have an adverse impact for her. Plaintiffs also claim that the WVSFMO failed to properly train, supervise, and oversee Mr. Ayersman’s conduct.

Summary Judgment

10. Rule 56(c) of the West Virginia Rules of Civil Procedure provides, in pertinent part:

The judgment sought 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 a judgment as a matter of law.

11. A motion for summary judgment may be granted if the circuit court determines there is no genuine issue of material fact to be tried and the facts warrant judgment for the moving party as a matter of law. *See Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995). Moreover, if it appears that no genuine issue of material fact is involved, it is the duty of the court to grant the motion. *See Spangler v. Fisher*, 152 W.Va. 141, 150, 159 S.E.2d 903, 909 (1968).

12. The circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986)).

13. "A motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Williams id.* (quoting Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)). If the moving party makes a properly supported motion for summary judgment and establishes that there is no genuine issue of material fact, then the burden of production shifts to the non-moving party, who must then produce sufficient evidence for a reasonable jury to find in the non-moving party's favor. *See Painter v. Peavy*, 192 W.Va. 189, 193, 451 S.E.2d 755, 759 (1994).

14. "When a motion for summary judgment is mature for consideration and properly is documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists." *Williams*, 194 W.Va. at 58, 459 S.E.2d at 335. "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337 (quoting *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214).

15. Roughly stated, a "genuine issue" for summary judgment purposes, is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict

for that party. W.Va. R. Civ. P. 56(c); *Stephens v. W.Va. Coll. of Graduate Studies*, 203 W.Va. 81, 506 S.E.2d 336 (1998); *Sheely v. Pinion*, 200 W.Va. 472, 490 S.E.2d 291 (1997); *Fayette County Nat. Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997). In assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought. *Hanlon, id.*

Qualified Immunity

16. In its *Motion*, the WVSFMO argues it is entitled to qualified immunity because Plaintiffs fail to identify any clearly established law or right violated by any employee of the Fire Marshal's Office, acting within the scope of his or her employment, and Plaintiffs fail to show that any employee of the Fire Marshal's Office, acting within the scope of his or her employment, acted fraudulently, maliciously, or oppressively.

17. The WVSFMO further argues it is entitled to qualified immunity to the extent Plaintiffs seek to hold it vicariously liable for Mr. Ayersman's alleged conduct. WVSFMO argues Mr. Ayersman's investigatory duties as an Assistant State Fire Marshal were discretionary functions. Also, WVSFMO argues, to the extent that Plaintiffs allege Mr. Ayersman violated a clearly established law or right, or otherwise engaged in fraudulent or oppressive conduct, such actions were outside the scope of his duties and responsibilities as an Assistant Fire Marshal.

18. The WVSFMO argues Plaintiffs' claims that Mr. Ayersman threatened Tammy Wratchford and manufactured evidence are in no way an "ordinary and natural incident" of his duties as an Assistant State Fire Marshal.

19. In response Plaintiffs argue:

- a. Mr. Ayersman has repeatedly claimed his action were within his "official duties" as an Assistant Fire Marshal, but now WVSFMO claims his bad acts were outside the scope of his official duties.
- b. Steve Dawson's report demonstrates repeated violations of State

protocol and State policy.

- c. WVSFMO *Policy Directive Incident Assignments*: "All requests for investigations shall be directed through the Arson Hotline so that an incident number can be generated." Mr. Ayersman was in contact with Mr. Harris and Erie prior to any appointment by or through the WVSFMO.
- d. Mr. Harris documented in his report his personal contacts with Mr. Ayersman during Mr. Ayersman's purportedly official State investigation, and Mr. Ayersman shared confidential info with Mr. Harris. The Harris report is part of an official State investigation report on the Ayersman investigation CD; this information is imputed to the WVSFMO.
- e. Letter of October 11, 2017, from Andrew R. Herrick, staff attorney for the WV Ethics Commission, to Kenneth E. Tyree, Jr., WV State Fire Marshal: "You stated that Mr. Ayersman did not collaborate on his investigations on behalf of the State Fire Marshal's Office with anybody with his private employer." "So long as Mr. Ayersman follows the guidance provided here, does not reveal any confidential information to the private company, and does not simultaneously investigate a fire for both the State Fire Marshal's Office and private company, there should be no conflict with the Ethic's Act. See W.Va. Code § 6B-2-5(h)(6)." Plaintiffs argue Mr. Ayersman has violated these terms and Mr. Tyree has covered up and concealed them.

20. The doctrine of qualified immunity provides:

In 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...and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgment, decisions, and actions of the officer.

Sy. Pt. 6, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995).

21. Furthermore,

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such 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[.] In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.

Syl. pt. 11, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492 (2014) (emphasis added).

22. Here, the Court finds it is undisputed that the West Virginia State Fire Marshal's Office is a State agency. The Court further finds that the acts or omissions of the WVSFMO are discretionary. "[B]road categories of training, supervision, and employee retention . . . easily fall within the category of discretionary governmental functions" to which the immunity applies. *A.B.*, 234 W. Va. at 514, 766 S.E.2d at 773 (internal quotation marks omitted).

23. First, the Court has considered whether the alleged acts or omissions could be in violation of a clearly established statutory or constitutional right or law 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.

24. The two methods for establishing that a discretionary governmental act is subject to qualified immunity are stated in the alternative and, therefore, the Court must examine whether the alleged acts or omissions were otherwise fraudulent, malicious, or oppressive. *W.Va. DNR v. Dawson*, 242 W.Va. 176, 832 S.E.2d 102 (2019).

"Malicious" conduct is conduct that is "willful or intentional wrongdoing." *Id.* (quoting *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996)).

25. As this matter is before the Court on a *Motion for Summary Judgment*, the Court declines to make findings regarding the merits of the underlying claims; rather, the Court's sole purpose at this stage is to determine whether there are genuine issues

of material fact that would preclude summary judgment. Generally, the determination of whether conduct was malicious is a “question for the fact-finder.” *Maston v. Wagner*, 236 W.Va. 488, 508 n.15, 781 S.E.2d 936, 956 n.15 (2015). *See also Taylor v. W. Virginia Dep’t of Health & Human Res.*, 237 W. Va. 549, 559, 788 S.E.2d 295, 305 (2016) (“[T]his case contains a pervasive factual dispute about each of the parties’ motivations, precluding entry of summary judgment on qualified immunity grounds.”).

26. Here, the Court finds there are allegations in the record that could lead a jury to infer a malicious, fraudulent, or oppressive motive, including but not limited to: (1) the failure to supervise the investigation conducted by Mr. Ayersman; (2) the potential violations of WVSFMO policy and procedures; and (3) general allegations of hostility toward the Plaintiffs. The Court further finds that it would be required to weigh the evidence and make credibility determinations to decide whether the conduct was malicious, fraudulent, or oppressive and it would be improper for the Court to do so at this time. *See e.g. Dawson*, 242 W.Va. at 191, 832 S.E.2d at 117. *See also Williams*, 194 W.Va. at 59, 459 S.E.2d at 336 (summary judgment should be denied “even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions [and inferences] to be drawn therefrom.”) Therefore, the Court concludes there are genuine issues of material fact regarding whether the actions of the WVSFMO and Mr. Ayersman were malicious, fraudulent, or oppressive, and these are questions of fact for the jury.

27. The Court has found that Plaintiffs’ claims may overcome the assertion of qualified immunity; therefore, the Court must examine whether a reasonable juror could find that the WVSFMO employees’ acts or omissions were outside of their official capacity as employees. *Dawson*, 242 W.Va. at 192, 832 S.E.2d at 118.

28. A State agency is entitled to immunity when an employee is determined to have acted outside his or her scope of employment. *W. Va. Reg’l Jail & Corr. Facility*

Auth. v. A.B., 234 W.Va. 492 (2014). Whether an employee acted within the scope of his or her employment becomes a question of law when "the facts are undisputed and no conflicting inferences are possible. *Id.* Generally, whether an employee is acting within the scope of employment is a question of fact for the jury. Syl. pt. 4, *Griffith v. George Transfer and Rigging, Inc.*, 157 W.Va. 316, 201 S.E.2d 281 (1973).

29. Here, the Court finds the particular function being carried out by the WVSFMO employees was investigation of the fire, which is within the scope of their employment. However, the Court finds the manner in which it was carried out raises conflicting inferences and questions of fact as to whether such conduct was within the scope of employment, such that a jury should determine this issue. Therefore, the Court concludes there are genuine issues of material fact regarding the scope of employment.

WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** that *West Virginia State Fire Marshal's Office's Motion for Summary Judgment* is **DENIED**.

It is further **ORDERED**:

❖ The Court notes the objections and exceptions of the parties to any adverse findings or rulings herein.

/s/ H. Charles Carl, III
Circuit Court Judge
22nd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.