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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-0181

WEST VIRGINIA STATE FIRE MARSHAL'S OFFICE,

Defendants Below, Petitioners,

FILE COPY

v.

TAMMY S. WRATCHFORD and MICHAEL W. WRATCHFORD,

Plaintiffs Below, Respondents.

(Appeal from the Circuit Court of Hardy County, West Virginia; Civil Action No. CC-16-2018-C-3; The Honorable H. Charles Carl, III)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- (1) The circuit court erred by failing to find that the West Virginia Office of the State Fire Marshal is entitled to qualified immunity for liability from the Wratchfords' claims for negligent training, supervision, and oversight because there is no genuine issue as to any material fact on whether an Office of the State Fire Marshal employee acted maliciously, fraudulently, or oppressively in their supervision, training, or oversight of Ayersman.
- (2) The circuit court erred by failing to find that the West Virginia Office of the State Fire Marshal is entitled to qualified immunity for its employees' discretionary acts related to the Wratchford house fire investigation.
- (3) The circuit court erred by failing to find that the West Virginia Office of the State Fire Marshal is entitled to qualified immunity for alleged conduct beyond the scope of an employee's employment.

STATEMENT OF THE CASE

This is an appeal of a February 9, 2021, order by the Circuit Court of Hardy County denying the West Virginia Office of the State Fire Marshal (hereinafter "WVSFMO") summary judgment on qualified immunity grounds. The circuit court denied the WVSFMO's motion because it determined that genuine issues of material fact existed regarding whether the actions of the WVSFMO and Assistant State Fire Marshal Ronald C. "Mackey" Ayersman were fraudulent, malicious, or oppressive. This Court should now reverse the circuit court and remand this case with instructions to the circuit court to grant the WVSFMO's motion for summary judgment because the WVSFMO is entitled to qualified immunity from liability for all claims because Plaintiffs-appellees, Tammy Wratchford and Michael Wratchford, fail to demonstrate a material issue of fact as to whether any WVSFMO employee, acting within the scope of his or her employment, violated a clearly established right or were fraudulent, malicious, or oppressive in their acts or omissions.

Qualified immunity is a deliberately set high bar to overcome and is "necessarily broad and protects all but the plainly incompetent or those who knowingly violate the law." *Maston v.*

Wagner, 236 W. Va. 488, 500, 781 S.E.2d 936, 948 (2015) (internal quotation and citation omitted). To defeat qualified immunity, a plaintiff must show that a government official violated “a clearly established right of which a reasonable person would have known” or committed a fraudulent, malicious, or oppressive act or omission. *W. Va. Div. of Nat. Res. v. Dawson*, 242 W. Va. 176, 184, 832 S.E.2d 102, 110 (2019). Even if a plaintiff shows a government official’s acts or omissions did violate a clearly established right or were otherwise fraudulent, malicious, or oppressive, the government agency is nonetheless entitled to qualified immunity if the official is not acting within the scope of their employment. *Id.* at 184-85.

The Wratchfords’ claims arise from an origin and cause investigation into a February 20, 2017, house fire at the Wratchfords’ residence. Ayersman conducted the investigation on behalf of the WVSFMO in his capacity as an Assistant State Fire Marshal. The Wratchfords contend that Ayersman used his position as Assistant State Fire Marshal to conclude that Ms. Wratchford intentionally caused the fire to be set so Ayersman and several other entities unrelated to the WVSFMO could benefit financially.¹ The Wratchfords claim that the WVSFMO “failed to properly train, supervise and oversee actions, investigations and conduct” of Ayersman, and Ayersman “unlawfully conducted an investigation in concert with the other Defendants named in this action without regard to the requirements of his official duties and protocol of his public office.” JA 00136. A fair reading of the Wratchfords’ amended complaint indicates that the

¹ In addition to his job as an Assistant State Fire Marshal, Ayersman has secondary employment with a private fire investigation company, Fire & Safety Investigation Consulting Services, LLC (“FSI”). JA 00279. Ayersman’s secondary employment with FSI is limited to investigating fires that have occurred outside of West Virginia. *Id.* FSI was retained by the Wratchfords’ insurer, Erie Insurance Property & Casualty Company, to investigate the origin and cause of the Wratchford house fire. The Wratchfords contend that Ayersman charged Ms. Wratchford with arson so Erie could avoid paying an insurance claim and Ayersman, FSI, and FSI’s principal, Christopher Brent Harris, could benefit financially. JA 00128. FSI, Erie, and Harris were all named as defendants in the underlying civil action.

Wratchfords seek to hold the WVSFMO vicariously liable for the acts or omissions of employees responsible for training, supervising, and overseeing Ayersman and for Ayersman's alleged conduct during his investigation into the Wratchford house fire.

The doctrine of qualified immunity insulates the WVSFMO from the claims asserted by the Wratchfords in this lawsuit. After having an opportunity to conduct discovery,² the Wratchfords are unable to identify any evidence that any WVSFMO employee engaged in fraudulent, malicious, or oppressive acts or omissions during their training, supervision, or oversight of Ayersman. Nor can the Wratchfords identify any evidence creating a triable issue of fact that Ayersman engaged in fraudulent, malicious, or oppressive acts or omissions during his investigation into the origin and cause of the Wratchford house fire.³ Finally, the Wratchfords allege that Ayersman engaged in criminal conduct to benefit himself and individuals and entities other than the WVSFMO. Even if the Wratchfords have evidence creating a triable issue of fact with regard to such allegations, the WVSFMO is still entitled to qualified immunity because the conduct the Wratchfords allege occurred places Ayersman outside of the scope of his employment.

I. Factual Background

A. The Investigation

The basement stairs in the Wratchfords' home caught fire on February 20, 2017. JA 00104; JA 00318. The Wratchfords communicated the fire loss to their homeowner's insurer, Erie

² Plaintiffs are not automatically entitled to discovery when a state agency asserts qualified immunity as a defense. *See W. Va. State Police v. J.H.*, 2021 W. Va. LEXIS 149, *15, 856 S.E.2d 679 (2021). In this case, the circuit court denied the WVSFMO's motion to dismiss on qualified immunity grounds and allowed the Wratchfords an opportunity to further develop the record in discovery. JA 00016.

³ The circuit court agrees with the WVSFMO that the Wratchfords fail to identify a clearly established law or right violated by a WVSFMO employee acting within the scope of their employment. JA 01366.

Insurance Property & Casualty Company. JA 00104. Erie hired Fire & Safety Investigation Consulting Services, LLC ("FSI") to conduct an origin and cause examination of the fire loss scene. JA 00294; JA 00428. On February 23, 2017, Brent Harris of FSI called Assistant State Fire Marshal III, George Harms, regarding the Wratchford house fire and told Harms that the WVSFMO needed to investigate the fire. JA 00303. Because of his workload, Harms assigned Ayersman to investigate the fire. JA 00280; 00303.

Ayersman spoke with Harris on February 23, 2017. JA 00307. Harris advised that he conducted an origin and cause investigation and was able to eliminate all potential accidental causes. *Id.* Harris told Ayersman that Harris believed that the fire was intentionally set, but an electrical engineer was going to be retained to examine the loss scene. *Id.* Ayersman inspected the fire loss scene the next day. First, he examined the exterior of the home and noted smoke and heat damage through windows but noted that the fire did not breach the exterior of the residence and was "isolated to the stairwell leading from the laundry room to the kitchen." JA 00317. Next, Ayersman examined the interior of the Wratchford home and observed heavy smoke damage and fire isolated to the stairwell leading up from the basement to the kitchen area. *Id.* "Damage was concentrated to the steps and lower levels of the walls in that area." *Id.* Ayersman observed that the damage to the stairwell "was consistent with the presence of an ignitable liquid or other combustible material." JA 00318. Ayersman noted the following:

I later utilized my "hydrocarbon sniffer" which alerted on the landing and bottom of the stairs. Samples taken from this area did not alert to the presence of an ignitable liquid. Mr. Wratchford stated that the burn patterns located against the wall (landing) were most likely do [sic] to the work clothes he had thrown there. I was unable to locate the clothing and Mike [Wratchford] was uncertain where they were at that time. The electrical wiring, stairwell ceiling light, and other potential electrical sources were examined and ruled out. Some of the wiring showed signs of external or secondary damage as 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. A thorough examination of the

electrical service was later completed by Dr. Bert Davis who was able to eliminate it as a potential cause for the fire. Close inspection of the wall mounted light located in the stairwell 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. There are no indications that the fire originated at the wallmounted light fixture and it was easily eliminated as a potential cause for this fire. Closer examination of the electrical wiring located underneath the stairs revealed signs of minor electrical arcing. This electrical activity was a clear result of external flame impingement from the fire. There are no indications that the fire originated at the wiring and it is clear that it was damaged as a result of the fire. Damage to the "riser" found amongst the debris clearly showed signs of isolated fire damage to the top of the stairs.

Id. At the conclusion of his inspection, Ayersman was able to eliminate accidental causes and believed “the fire was incendiary in nature.” JA 00308. Over the next several weeks, Ayersman continued to interview witnesses, including the Wratchfords, Moorefield fire fighters who responded to the fire scene, and neighbors. See JA 00307-19.

On March 9, 2017, after waiving her *Miranda* rights, Ms. Wratchford submitted to a polygraph examination conducted by Kevin Pansch, a Polygraph Examiner for the West Virginia State Police. Pansch advised that Ms. Wratchford was “not truthful” during the examination. JA 00323. Ayersman was not present in the room with Pansch and Ms. Wratchford during the examination. JA 00327. Following the examination, Ayersman and Pansch met with Ms. Wratchford, and Pansch discussed the results of the examination and informed Ms. Wratchford of his opinions. During this interview, Ms. Wratchford admitted that a few weeks prior to the February 20, 2017 fire, she intentionally left a candle burning under a tree in the living room in hopes that it would catch fire and burn her home. JA 00328-29. *See also* JA 00330.⁴

⁴ JA 330 is a blank page in the paper joint appendix produced to this Court because the actual “document” is an audio recording. An audio of a portion of the recorded statement given by Ms. Wratchford, from approximately 6:56 to 10:25, is being produced on a CD and is designated as JA 330.

Based upon his investigation, and documents he received via subpoena, Ayersman deduced that Ms. Wratchford's motivation for setting her home on fire was to collect insurance money for the home due to her financial situation and inability to make mortgage payments. At the time of the fire, the Wratchfords' mortgage loan had been "consistently and seriously past due for . . . two years." JA 00331. The Wratchfords were over \$6,000 behind on their mortgage, and Ms. Wratchford had recently learned that the bank was about to initiate foreclosure proceedings on her home. JA 00331-32. The Wratchfords had approximately \$1,500.00 in their bank accounts at the time of the fire. JA 00338-343.

B. The Criminal Prosecution

Ayersman submitted five criminal complaints against Ms. Wratchford to the Hardy County Magistrate. JA 00346-55. The charges included first degree arson; burning, or attempting to burn, insured property; insurance fraud; attempt to commit arson; and burning, or attempting to burn, insured property. *Id.* The Hardy County Magistrate determined probable cause existed that Ms. Wratchford committed each of the offenses and issued an arrest warrant. JA 00344. The Hardy County Magistrate conducted a preliminary hearing regarding the criminal charges pending against Ms. Wratchford and found probable cause existed to bound over the criminal charges to the grand jury. JA 01361.

Ms. Wratchford's criminal charges were presented to the grand jury by the Hardy County Prosecuting Attorney ("HCPA"). The HCPA testified at deposition that there was enough evidence against Ms. Wratchford that he would have been able to convince the Grand Jury to indict Ms. Wratchford had he desired. JA 00483. Despite the evidence, the HCPA chose not to call Ayersman as a witness during presentment to the Grand Jury. Instead, he called Paul Alloway, another Assistant State Fire Marshal, to testify. JA 00358. Alloway was not involved in any aspect of the

investigation. JA 00358-59. In addition to Alloway, the HCPA called Ms. Wratchford's paid expert to testify and rebut Ayersman's investigation and conclusion. JA 00362-67. Finally, the HCPA called Ms. Wratchford to testify before the Grand Jury and allowed her to offer an un rebutted exculpatory version of events. JA 00368-83. On February 12, 2018, the Grand Jury returned a no true bill, and the charges against Ms. Wratchford were dismissed.⁵

II. Procedural History

On February 13, 2018, the Wratchfords filed their original complaint and initiated the underlying civil action. The Wratchfords asserted various claims against Ayersman, all arising from actions he took while he investigated the origin and cause of the subject fire. The crux of the Wratchfords' allegations centered around assertions that Ayersman, who had secondary employment with FSI investigating fires outside of West Virginia, presented false evidence against Ms. Wratchford and charged her criminally so Ms. Wratchford's homeowner's insurer, Erie, could avoid paying any insurance claim related to the fire. The Wratchfords contend that Ayersman did this so Ayersman, FSI, and Harris could benefit financially. The Wratchfords did not name the WVSFMO as a defendant in their original complaint, but, on July 8, 2018, the Wratchfords filed their amended complaint and timely served the WVSFMO. The Wratchfords did not amend their initial claims against the originally named defendants but asserted that the WVSFMO failed to

⁵ There were numerous irregularities as to how the HCPA presented to the Grand Jury. *See* JA 00258-59. For example, when one of the Grand Jury members asked Ms. Wratchford's expert who hired him, the expert responded that he was being paid by Ms. Wratchford's attorney, but the HCPA interjected and said the expert was "an independent witness for the State." JA 00368. Yet, when deposed, the HCPA admitted he knew the expert was retained by Ms. Wratchford's attorney. JA 00386. Further, the HCPA falsely suggested that Ayersman misrepresented Ms. Wratchford's financial situation and failed to elicit any evidence that the Wratchfords were severely behind on their mortgage at the time of the fire. JA 00376-77.

properly train, supervise and oversee Ayersman, and the WVSFMO was responsible for Ayersman's alleged conduct.

A. The Claims Against WVSFMO

The amended complaint contains only one expressed "count" directed at the WVSFMO: "West Virginia State Fire Marshal's Office, West Virginia Department of Military Affairs and Public Safety, Ronald C. "Mackey" Ayersman, Assistant West Virginia State Fire Marshal." JA 00135. The majority of the factual allegations are directed at Ayersman, but the Wratchfords claim that the WVSFMO failed to properly train, supervise, and oversee Ayersman's conduct. JA 00136. Specifically, the Wratchfords allege that the WVSFMO "failed to properly supervise and train its officers, including the Defendant, Mackey Ayersman, in investigation procedures of police work, witness interview, treatment of witnesses, and protocol in handling information and evidence obtained during an official investigation[s]." JA 000137. The Wratchfords further claim 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 Ms. Wratchford would have an adverse impact for her. JA 00136-38.

In regard to Ayersman, the Wratchfords claim that he "failed to properly investigate the underlying circumstances" and "unlawfully conducted an investigation in concert with" FSI, Erie, and other defendants named in the underlying civil action. JA 00136. The Wratchfords allege that, during the investigation, Ayersman acted "without regard to the requirements of his official duties and protocol of his public office" and engaged in "unlawful conduct," which ultimately led to him using his position "to unlawfully prosecute the Plaintiff, Tammy Wratchford, without probable cause, upon false statements made within a Criminal Complaint, and upon false testimony during a felony proceeding as described within other paragraphs of this Complaint." *Id.* The Wratchfords

claim that Ayersman's actions were "intentionally calculated to benefit and further his own economic interests; the economic interests of the Defendant, Harris; and the Defendant, FSI[.]" JA 128.

B. Discovery

The WVSFMO initially filed a motion to dismiss and argued it was entitled to qualified immunity based upon the allegations in the amended complaint. JA 00013. The motion was denied as to the WVSFMO's qualified immunity arguments, and the Wratchfords were provided an opportunity to engage in discovery on their theories against the WVSFMO. JA 00016.

Despite claiming that the WVSFMO was negligent in its training, supervision, and oversight of Ayersman, the Wratchfords admitted in deposition that they are not aware of the specific training Ayersman received as an Assistant State Fire Marshal. JA 00484-86. The Wratchfords' retained expert, Steve Dawson,⁶ admitted in his deposition that he is not familiar with the training that Ayersman received as an Assistant State Fire Marshal. JA 00501. Dawson admitted that he is not aware of any WVSFMO employee who violated any statute, rule, or regulation, and he cannot identify any clearly established law or right that any employee violated in the training, supervision, and oversight of Ayersman. JA 00510-11.

Dawson testified that he did not even read the Fire Commission Office of the State Fire Marshal Policy and Procedure Manual which governed Ayersman's investigation. JA 00488. Dawson admits that, prior to his deposition, he did not know whether the WVSFMO even had governing policies or procedures. *Id.* In offering his opinions related to this case, Dawson relies

⁶ The Wratchfords disclosed Dawson as an expert to, *inter alia*, "evaluate the actions of Ayersman" and to identify violations of "State protocol and State policy" by the WVSFMO. JA 00525; 00998. During deposition, Dawson demonstrated a lack of awareness of policies and procedures applicable to the WVSFMO. *See generally* JA 00487-511. Ayersman and the WVSFMO moved to disqualify Dawson as an expert, but the circuit court denied the motion. *See* JA 00050; 00095.

upon policies and procedures of the West Virginia State Police but admits that the WVSFMO is not required to follow State Police policies and procedures. JA 00496-97. Dawson accuses Ayersman of revealing confidential information and not following the law “by not doing his investigation properly and by [submitting false information] on an application for a warrant.” JA 00510. Dawson otherwise is not critical of any of WVSFMO employee in their acts or omissions. 00510-11. Although discovery remained open for over a year, the Wratchfords chose not to depose any WVSFMO employee to determine who was responsible for training or supervising Ayersman and whether the person responsible for training or supervising Ayersman violated any policies or otherwise committed fraudulent, malicious, or oppressive acts or omissions.

C. Summary Judgment

After the completion of discovery, the WVSFMO filed its motion for summary judgment and renewed its argument that it should be dismissed from the lawsuit because it is entitled to qualified immunity. JA00404-05. On February 9, 2021, the circuit court entered its Order Denying West Virginia State Fire Marshal’s Office Motion for Summary Judgment. JA 01359-68.

The circuit court determined that the WVSFMO employee acts and omissions at issue were discretionary.⁷ JA 01366. Next, the circuit court determined that the Wratchfords cannot identify a clearly established right or law that any WVSFMO employee violated while acting within the scope of their employment. *Id.* Yet, the circuit court failed to grant summary judgment in favor of

⁷ The Wratchfords allege that the WVSFMO did not properly train, supervise, or oversee Ayersman. JA 00136-37. Although this appears to be a direct claim against the WVSFMO, it is based on vicarious liability because acts such as training, supervision, and oversight are performed by “public officer(s) or employee(s), from whose alleged negligence [the Wratchfords’] claim derives.” *See A. B.*, 234 W. Va. at 513. The same is true of the Wratchfords’ claim that the WVSFMO “ignored evidence of the lack of culpability of” Ms. Wratchford. JA 00137. Ayersman was the Assistant Fire Marshal who investigated the Wratchford house fire, and the Wratchfords are attempting to hold the WVSFMO vicariously liable for his alleged conduct.

the WVSFMO because it determined “there are allegations in the record that could lead a juror to infer a fraudulent, malicious, or oppressive motive.” JA 01367. Such allegations include: “(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.” *Id.* The circuit court held that the WVSFMO is not entitled to qualified immunity, and therefore, summary judgment is not proper, because it would be required to weigh evidence and make credibility determinations on whether the alleged conduct is considered fraudulent, malicious, or oppressive. *Id.*

Analyzing whether the alleged acts or omissions are within the scope of employment of an Assistant State Fire Marshal, the circuit court concluded that “the particular function being carried out by the WVSFMO employees was investigation of the fire,” which is within the scope of an Assistant State Fire Marshal’s employment. JA 01367. The circuit court added that “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.” *Id.* The circuit court did not address the allegations in the amended complaint, which the Wratchfords’ seek to prove at trial, that Ayersman’s acted “without regard to the requirements of his official duties and protocol of his public office” and whether the conduct alleged “is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment.” *See* JA 00137; *A. B.*, 234 W. Va. at 509.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rule 20 is appropriate because this appeal involves issues of fundamental public importance – whether a public agency is entitled to qualified immunity and therefore not forced to undergo an expensive and time-consuming trial.

SUMMARY OF ARGUMENT

The circuit court erred when it did not find the WVSFMO is entitled to qualified immunity from liability for the Wratchfords' claims. The circuit court should have granted the WVSFMO's motion for summary judgment because there is no genuine issue of material fact that any WVSFMO employee engaged in fraudulent, malicious, or oppressive conduct while acting within the scope of their employment, and the WVSFMO cannot be held vicariously liable for an employee's alleged conduct that occurs outside the scope of employment.

First, the circuit court erred by failing to find that qualified immunity protects the WVSFMO from the Wratchfords' claims for negligent training, supervision, and oversight of Ayersman. The Wratchfords lack knowledge of the training provided to Ayersman and have been unable to identify what act or omission by a WVSFMO employee was fraudulent, malicious, or oppressive in the training, supervision, or oversight of Ayersman. The Wratchfords and their expert are generally unaware of the policies and procedures that govern the WVSFMO and cannot identify whether any of those policies or procedures were violated by any WVSFMO employee during the training, supervision, or oversight of Ayersman. The Wratchfords fail to establish what any WVSFMO employee did (or failed to do) in the training, supervision, or oversight of Ayersman that may be characterized as fraudulent, malicious, or oppressive.

Second, the record confirms that Ms. Wratchford had motive and opportunity to set her home on fire. Ayersman's investigation established probable cause to arrest Ms. Wratchford for attempted arson and arson as the evidence revealed Ms. Wratchford was behind on her mortgage, did not have enough money in her bank accounts to bring her mortgage current, and she admitted she attempted to set her home on fire two weeks prior to the subject fire. Moreover, there is no

evidence in the record that creates a triable issue of fact that Ayersman engaged in the fraudulent, malicious, or oppressive conduct that the Wratchfords' claim.

Finally, the WVSFMO is not liable for an employee's conduct if the employee committed acts outside the scope of their employment. The circuit court erred by failing to find that the WVSFMO is entitled to qualified immunity from liability for the Wratchfords' claims that the WVSFMO is vicariously liable for Ayersman's alleged conduct. The Wratchfords allege that Ayersman engaged in self-serving conduct, designed to benefit himself, Erie, and FSI and not at all attenuated with his employment as an Assistant State Fire Marshal. Those allegations bring Ayersman outside the scope of his employment and entitle the WVSFMO to qualified immunity.

ARGUMENT

I. Standard

This Court reviews de novo the denial of a motion for summary judgment. Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002). A denial of summary judgment predicated on qualified immunity is subject to immediate appeal under the collateral order doctrine. Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). Additionally, the appeal is guided by this Court's principles regarding immunity:

[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

II. Qualified Immunity

Unless an insurance contract waives the defense, qualified immunity bars a claim of negligence against State agencies, and public officials or employees acting within the scope of

their employment, with respect to discretionary judgments, decisions, and actions. Syl. pt. 11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 766 S.E.2d 751. *See also* Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). Qualified immunity is designed to protect all but those who knowingly violate the law. *Maston*, 236 W. Va. at 500. But “[t]here is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.” Syllabus, in part, *State v. Chase Sec., Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992). If a plaintiff is able identify fraudulent, malicious, or oppressive acts or omissions by a public official or employee, then a court must determine whether the acts or omissions are within the scope of the public employee's duties, authority, or employment. Syl. pt. 3, *Clark*, 195 W. Va. 272.

The circuit court committed error when it failed to find that the WVSFMO is entitled to qualified immunity from liability for the Wratchfords’ claims. The Wratchfords fail to identify evidence creating a material issue of fact that the training, supervision, or oversight of Ayersman was fraudulent, malicious, or oppressive. Other than the Wratchfords’ allegations based on their own conjecture, there is no actual evidence creating a triable issue of fact that Ayersman engaged in fraudulent, malicious, or oppressive conduct during the course of his investigation. Notwithstanding the Wratchfords’ allegations regarding Ayersman’s motivations and conduct, there is no bona fide dispute between the facts the Wratchfords seek to establish and the facts necessary to determine whether the WVSFMO is entitled to qualified immunity for Ayersman’s alleged conduct. Based upon the Wratchfords’ own allegations, the WVSFMO is entitled to qualified immunity from liability for the Wratchfords’ vicarious liability claim for Ayersman’s alleged conduct. The alleged conduct was designed to benefit entities and individuals other than the WVSFMO and is not within the scope of an Assistant State Fire Marshal’s employment. This Court should reverse the circuit court’s order denying summary judgment and remand this case

with instructions to the circuit court to enter an order finding that the WVSFMO is entitled to qualified immunity from liability for all of the Wratchfords' claims against it.

A. The WVSFMO is entitled to qualified immunity from liability for the Wratchfords' failure to train, supervise and oversee claim.

The doctrine of qualified immunity is designed to shield public officials and employees from liability for negligence in the performance of their discretionary duties:

If a public officer, other than a judicial officer, is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Syl. Pt. 4, *Clark*, 195 W. Va. 272. “[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 (internal quotation marks omitted). Public officials or employees acting within the scope of their employment are entitled to qualified immunity for discretionary acts so long as their acts or omissions do not violate clearly established laws or are otherwise fraudulent, malicious, or otherwise oppressive.

The circuit court acknowledged that the Wratchfords cannot identify a clearly established law or right that a WVSFMO employee violated while training, supervising, or overseeing Ayersman. JA 01366. The circuit court denied the WVSFMO summary judgment because it contended that a question of fact exists as to whether WVSFMO employees' acts or omissions were otherwise fraudulent, malicious, or oppressive. JA 01367. *See also Dawson*, 242 W.Va. at 191. This is clear legal error because the Wratchfords do not identify (or even allege) any fact creating a triable issue that a WVSFMO employee engaged in fraudulent, malicious, or oppressive acts or omissions while training, supervising, or overseeing Ayersman.

1. No WVSFMO employee engaged in fraudulent, malicious, or oppressive conduct during their training, supervision, or oversight of Ayersman.

The circuit court denied the WVSFMO summary judgment because it concluded that the WVSFMO's alleged failure to supervise the investigation conducted by Ayersman could lead a reasonable juror to infer a fraudulent, malicious, or oppressive motive. JA 01367. The circuit court also cites "potential violations of WVSFMO policy and procedures" and "general allegations of hostility" toward the Wratchfords as additional "allegations in the record" precluding summary judgment. *Id.* The circuit court does not identify specific acts or omissions by WVSFMO employees during their supervision of Ayersman that qualify as fraudulent, malicious, or oppressive. Nor does the circuit court identify what policy or procedure WVSFMO employees did not follow or potentially violated in their training, supervision, or oversight of Ayersman. Finally, the circuit court does not elaborate on the "general allegations of hostility" toward the Wratchfords or how the alleged hostility rises to the level of fraudulent, malicious, or oppressive, or how it even relates to the WVSFMO's training, supervision, or oversight of Ayersman.

Allegations alone are not enough to overcome qualified immunity at the summary judgment stage. *See* W. Va. R.C.P., Rule 56(c). *See also Miller v. City Hosp.*, 197 W. Va. 403, 412, 475 S.E.2d 495, 504 (1996) ("Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial."). Circuit courts are required enter summary judgment when "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." W. Va. R.C.P., Rule 56(c).

The Wratchfords' allegations aside, there is no actual evidence in the record which identifies any WVSFMO employee as having engaged in fraudulent, malicious, or oppressive

conduct during their training, supervision, or oversight of Ayersman. The Wratchfords themselves admit they do not have personal knowledge of the training Ayersman received from the WVSFMO. JA 00484-86. Dawson, the Wratchfords' expert hired to opine on policy and procedure violations and the adequacy of the training and supervision of Ayersman, is also unaware of training Ayersman received from the WVSFMO. Dawson admits that he has no knowledge of any training received by any Assistant State Fire Marshal. *Id.*

The circuit court relied on the alleged “failure to supervise the investigation” conducted by Ayersman to deny the WVSFMO summary judgment. However, neither the Wratchfords nor the circuit court are able to identify the specific act or omission by a WVSFMO employee in their supervision of Ayersman that qualifies as fraudulent, malicious, or oppressive.⁸ This is because the Wratchfords do not allege – not in their original complaint, notice of claim, amended complaint, deposition, or any other paper filed in connection with this lawsuit – that any employee of the WVSFMO engaged in any wrongful conduct rising to the level of fraudulent, malicious, or oppressive during their supervision of Ayersman in relation to the investigation into the Wratchford house fire. Absent such conduct, “*qualified or official immunity bars a claim of mere negligence against a State agency*” when a public official engages in a discretionary function such as supervision of an employee. *A.B.*, 234 W. Va. at 514 (emphasis in original).

⁸ Fraudulent conduct is generally understood to be an intentional act that is material and false, relied upon, and causes damage. Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981). Malicious conduct is understood to be a willful or intentional wrongdoing. *Dawson*, 242 W. Va. at 190. Oppressive conduct is best described as burdensome, harsh, and wrongful conduct to the prejudice of others. See *Masinter v. WEBCO Co.*, 164 W. Va. 241, 251, 262 S.E.2d 433, 440 (1980). Fraudulent, malicious, or oppressive conduct rises above conduct necessary for mere negligence and requires an intentional wrongdoing done by an actor.

The circuit court determined that “potential violations of WVSFMO policy and procedures” precludes summary judgment, but the circuit court did not identify what policies and procedures were violated or not followed by WVSFMO employees in their training, supervision, or oversight of Ayersman. The circuit cannot identify policies and procedures that were not followed by WVSFMO employees because the Wratchfords have been unable to identify any such violations and their hired expert is not familiar with policies and procedures applicable to the WVSFMO. JA 00488. Dawson testified that he is not aware of any WVSFMO employee who violated any statute, rule, or regulation, and he cannot identify any clearly established law or right that any employee violated in their training, supervision, or oversight of Ayersman. JA 00511. The Wratchfords deposed no one from the WVSFMO in this matter and have been unable to produce any evidence suggesting any WVSFMO employee violated any policy or procedure while training, supervising, or overseeing Ayersman. There is no genuine issue as to any material fact that any WVSFMO employee disregarded any applicable policy or procedure in their training, supervision, or oversight of Ayersman in such a manner that would rise to fraudulent, malicious, or oppressive conduct.

The circuit court’s final justification for denying summary judgment was “general allegations of hostility toward” the Wratchfords. JA 01367. But the record does not contain a single allegation that any WVSFMO employee treated the Wratchfords with hostility in their training, supervision, or oversight of Ayersman, nor would such an allegation be logical. Here, the circuit court seemingly conflated the analysis between the Wratchfords seeking to hold the WVSFMO vicariously liable for its employees’ wrongful conduct in training, supervision, and oversight of Ayersman, and the Wratchfords seeking to hold the WVSFMO vicariously liable for Ayersman’s alleged conduct. The circuit court did not identify any other employee – responsible for the

training, supervision, or oversight of Ayersman – who acted “hostile” toward the Wratchfords, let alone acted in manner that qualifies as fraudulent, malicious, or oppressive. For purposes of the Wratchfords’ claims for negligent training, supervision, and oversight, it is of no consequence that Wratchfords allege specific conduct attributable to Ayersman. *See A. B.*, 234 W. Va. at 517. Rather, the inquiry is whether the WVSFMO, “in the course of its supervision” of Ayersman, which necessarily would have been by an employee other than Ayersman, engaged in conduct that qualifies as fraudulent, malicious, or oppressive. *Id.* Despite extensive discovery in this case, the Wratchfords fail to identify any such act or omission.

The Wratchfords’ failure to identify a WVSFMO employee who acted fraudulent, malicious, or oppressive during the training, supervision, or oversight of Ayersman is fatal to their failure to train, supervise, and oversee claim. *See A. B.*, 234 W. Va. at 516 (“As such, we find that respondent’s failure to identify a ‘clearly established’ right which the WVRJCFA violated through its training, supervision, and retention of D. H. is likewise fatal to her claim.”). *See also W. Va. Dep’t of Health & Human Res. v. Payne*, 231 W. Va. 563, 574, 746 S.E.2d 554, 565 (2013) (“[A]t no time do respondents identify a specific law, statute, or regulation which the DHHR defendants violated.”). The circuit court erred when it did not grant summary judgment to the WVSFMO because there is no evidence in the record that any WVSFMO employee engaged in intentional wrongful conduct in their training, supervision, or oversight of Ayersman. Absent such conduct, the WVSFMO is entitled to qualified immunity from liability for the Wratchfords’ claim for failure to train, supervise, and oversee.

B. There is no evidence creating a triable issue of fact that Ayersman engaged in fraudulent, malicious, or oppressive conduct.

The WVSFMO is entitled to qualified immunity for Ayersman’s alleged conduct if Ayersman is entitled to qualified immunity for his alleged conduct. *See Syllabus Point 9, Parkulo*

v. W. Va. Bd. of Probation and Parole, 199 W. Va. 161, 483 S.E.2d 507 (1996) ("the immunity of the State is coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case").

In order to defeat qualified immunity, the burden is on the Wratchfords to produce evidence that Ayersman's conduct was fraudulent, malicious, or oppressive and occurred while he was acting within the scope of his employment. Additionally, the qualified immunity doctrine examines whether a public officials' "actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Maston* 236 W. Va. at 504 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). Subjective motivations are not relevant to a determination of whether qualified immunity exists. *Id.* at 501.

The Wratchfords allege that Ayersman's conduct was motivated by his desire to benefit himself, FSI, and Erie. Without evidence, the Wratchfords assert a conspiracy between Ayersman, Harris and Erie wherein Ayersman determined the cause of the fire to be incendiary and arrested Ms. Wratchford for arson to save Erie the cost of paying an insurance claim for the fire damaged property. Despite these extraordinary allegations – which are not supported by evidence in the record – discovery confirmed that the Ayersman had probable cause to arrest and charge Ms. Wratchford with committing the crimes of which she was accused. The Wratchfords were over \$6,000 behind on their mortgage and did not have funds to bring the mortgage current, and the bank was in the process of foreclosing on her home. JA 00331-32. Ms. Wratchford admitted to attempting to burn down her home prior to the subject fire. JA 00328-30. The HCPA testified that he believes there was enough evidence submitted in the case against Ms. Wratchford to support a finding of probable cause, and he could have obtained an indictment if he desired. JA 00483. The allegations of Ayersman's subject motivations are immaterial. Objectively, there was enough

evidence to establish probable cause to arrest Ms. Wratchford. Absent the Wratchfords' speculation, there is no evidence that Ayersman engaged in fraudulent, malicious, or oppressive conduct. Accordingly, Ayersman and the WVSFMO are entitled to qualified immunity from liability based upon his conduct in investigating the Wratchford house fire.

C. The WVSFMO is entitled to qualified immunity from liability for Ayersman's alleged conduct because that conduct is outside the scope of Ayersman's employment.

The Wratchfords allege that Ayersman acted "without regard to the requirements of his official duties" and engaged in "unlawful conduct" during his investigation into the Wratchford house fire. JA 00136. The Wratchfords claim that Ayersman "unlawfully prosecuted" Ms. Wratchford to "benefit further his own economic interests; the economic interests of the Defendant, Harris; and the Defendant, FSI[.]" *Id.* Here, there is not a bona fide dispute: the actions the Wratchfords attribute to Ayersman are not designed to serve any purpose of the WVSFMO and are beyond the scope of an Assistant State Fire Marshal's employment. The WVSFMO is entitled to qualified immunity for an employee's acts or omissions that are outside the scope of the employee's employment.

1. The WVSFMO is not vicariously liable for an employee's conduct that is outside the scope of his or her employment.

This Court has held that "no stated public policy [] is justifiably advanced by allocating to the citizens of West Virginia the cost of wanton official or employee misconduct by making the State and its agencies vicariously liable for such acts which are found to be manifestly outside of the scope of [an employee's] authority or employment." *A.B.*, 234 W. Va. at 505. Consequently, if a public official or employee "is determined to have been acting outside of the scope of his duties, authority, and/or employment, the State and/or its agencies are immune from vicarious liability" under the doctrine of qualified immunity. *Id.* at 508.

Relying on the Restatement (Second) of Agency § 228 (1958), this Court held that an employee is within the scope of employment if the conduct is:

1) *of the kind he is employed to perform*; 2) occurs within the authorized time and space limits; 3) it is actuated, at least in part, by a *purpose to serve the master*, and; 4) if force is used, the use of force is not unexpected by the master.

Id. at 510 (emphasis in the original). This Court recognized that “[c]onduct of a servant is not within the scope of employment if it is *different in kind from that authorized*, far beyond the authorized time or space limits, *or too little actuated by a purpose to serve the master.*” *Id.* (citing the Restatement (Second) of Agency § 228 (1958)) (emphasis in original). This Court held:

The theme of “purpose” permeates our caselaw regarding scope of employment and is nowhere more apparent than in the litany of cases cited by the amici. *See Travis v. Alcon Laboratories, Inc.*, 202 W. Va. 369, 381, 504 S.E.2d 419, 431 (1998) (“[A]n employer may be liable for the conduct of an employee, even if the specific conduct is unauthorized or contrary to express orders, so long as the employee is acting within his general authority *and for the benefit of the employer*” (emphasis added)); *Barath v. Performance Trucking Co., Inc.*, 188 W. Va. 367, 424 S.E.2d 602 (1992) (conflicting facts suggesting dad told son to assault plaintiff because of union activity that affected business); *Holliday v. Gilkeson*, 178 W. Va. 546, 363 S.E.2d 133 (1987) (conflicting facts presented suggesting shooter was protecting employer’s business property); *Porter v. South Penn Oil Co.*, 125 W. Va. 361, 366, 24 S.E.2d 330, 333 (1943) (employee assault was not in course of employment because the “acts in committing this assault grew out of his personal grievance, real or assumed, with which, by no reasonable rule of law, can the South Penn Oil Company be connected.”); Syl. Pt. 1, *Meadows v. Corinne Coal & Land Co.*, 115 W. Va. 522, 177 S.E. 281 (1934) (“A corporation is liable for a malicious prosecution by its agent, acting within the scope of his employment and *in furtherance of his company’s business*, notwithstanding the company may not have expressly authorized or ratified his act.” (emphasis added)); Syl. Pt. 1, *Nees v. Julian Goldman Stores, Inc.*, 109 W. Va. 329, 154 S.E. 769 (1930) (finding respondeat superior “[i]f [employee’s] act be done within the scope of authority, and in furtherance of the principal’s business[.]”).

Id. (emphasis in original). The circuit court committed error when it failed to find that the WVSFMO is entitled to qualified immunity for Ayersman's alleged conduct because the allegations in the Wratchfords' amended complaint make clear that Ayersman's alleged conduct was motivated by his own personal desires to profit himself, FSI, and Erie but was in no way designed to benefit the WVSFMO.

2. The Wratchfords assert facts that, if true, bring Ayersman's conduct outside the scope of his employment.

Rather than evaluate the factors outlined in *A.B.* to determine whether Ayersman's alleged conduct falls outside the scope of his employment and duties as an Assistant State Fire Marshal, which would entitle the WVSFMO to qualified immunity, the circuit court summarily concluded that the "investigation of the fire is within the scope of [Ayersman's] employment . . . [but] 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." JA 01368. The circuit court erroneously concluded that a question of fact exists as to whether the Wratchfords assert Ayersman engaged in conduct within the scope of his employment. *See* Syl. Pt. 1, in part, *Hutchison* 198 W. Va. 139. ("The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine.") A circuit court is required to grant summary judgment on qualified immunity grounds "unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination." *Id.* Here, there is no "bona fide dispute" that the facts the Wratchfords assert in their amended complaint bring Ayersman outside the scope of his employment.

A State agency is entitled to immunity when an employee is determined to have acted outside his or her scope of employment. *A.B.* 234 W. Va. at 508. The Wratchfords assert that Ayersman engaged in acts specifically designed to intimidate and harass Ms. Wratchford such as

charging her with arson without probable cause, threatening her, and lying about certain evidence related to the Wratchford house fire. JA 00123-24; 00126; 00136-37. Threatening acts and manufacturing evidence are in no way an "ordinary and natural incident" of the duties with which Ayersman was charged as an Assistant State Fire Marshal. *See A.B.* 234 W. Va. at 509. W. Va. Code § 29-3-12 outlines the duties and responsibilities of the State Fire Marshal and other persons authorized to investigate fires in West Virginia. Nowhere is an Assistant State Fire Marshall permitted to lie about or manufacture evidence or act in a threatening manner.

The Wratchfords allege that Ayersman's sole motivation for his alleged conduct was his own economic gain and the economic gain of his secondary employer, FSI. The Wratchfords are clear in their allegations: Ayersman *"failed to perform an investigation and testing, intentionally, for his own economic benefit and that of the Defendant, Erie, and to support his friend and employer, the Defendants, Brent Harris and FSI."* JA 00122 (emphasis added). The Wratchfords claim that Ayersman "acted for his own economic interests" when he "falsely" accused Ms. Wratchford of arson. JA 00123-24. The Wratchfords claim that Ayersman engaged in this alleged conduct to help Erie "avoid payment of the proceeds of the Homeowners policy and damages to the home and personal property of the Plaintiffs by the Erie Insurance Company, and with the intent to secure future employment and economic benefit to each of the Defendants." JA 00126. The Wratchfords claim that Ayersman "acted in furtherance of his own personal relationships and in furtherance of his secondary employer [FSI] . . . to maliciously prosecute [Wratchford], using false information, misleading information, and by abuse of process to intentionally damage . . . [Ms.] Wratchford." JA 00130.

"Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose

to serve the master." *A.B.*, 234 W. Va. at 510. Circuit courts are required to examine the purpose of an employee's conduct to determine if the employee, with their acts or omissions, is acting to benefit the agency. *Id.* Here, the circuit court failed to evaluate the alleged purposed of Ayersman's purported actions. But the Wratchfords' contentions in the amended complaint cannot be ignored: the Wratchfords claim that Ayersman determined the Wratchford house fire to be arson and charged Ms. Wratchford with arson so Erie could avoid paying an insurance claim and so Ayersman and FSI could benefit from this arrangement. The Wratchfords concede – via their own allegations – that the purpose of Ayersman's alleged conduct was to benefit other entities and was in no way designed to serve the WVSFMO.

Moreover, the Wratchfords allege that Ayersman engaged in acts that are no way an "ordinary and natural incident" of the duties with which he was charged as an Assistant State Fire Marshal. Not only do the Wratchfords contend that Ayersman acted to serve his own personal interest, but they contend that Ayersman's alleged acts were criminal in nature. *See e.g.* W. Va. Code § 61-5-1 and W. Va. Code § 61-5-3 (defining perjury and false swearing and outlining the penalties for each); W. Va. Code § 61-5-28 (making it a misdemeanor for a person holding a State office to fail or refuse to perform any duty required of him or her by law). The *A.B.* decision makes it clear that an employee is not within the scope of his or her employment if he or she does not engage in conduct with at least some purpose to serve his or her employer. Although Ayersman's employment made it possible for him to engage in the conduct Plaintiffs allege occurred, that is not dispositive when determining whether a state official acted within the scope of his employment. *A.B.*, 234 W. Va. at 510. ("[T]he mere proximity and opportunity that his job provided to commit such acts do not, alone, bring them within the scope of his employment.") The Wratchfords make abundantly clear in their amended complaint their contention that Ayersman in

no way furthered the purposes of the WVSFMO. The Wratchfords go as far as to assert in their amended complaint that Ayersman acted “without regard” to his employment as an Assistant State Fire Marshal and his actions were “intentionally calculated to benefit and further his own economic interests; the economic interests of the Defendant, Harris; and the Defendant, FSI[.]” JA 00128; 00136. The circuit court completely overlooked these allegations and does not consider the alleged purpose behind Ayersman’s actions.

Had the circuit court evaluated the *A.B.* scope of employment factors, it could have reached only a single determination: the WVSFMO is entitled to qualified immunity because the Wratchfords allege Ayersman engaged in conduct that, if true, is outside the scope of his employment. 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.* at 509. “In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment.” *Id.* The Wratchfords assert that Ayersman’s alleged acts were not within the scope of his employment with the WVSFMO. Therefore, the WVSFMO is entitled to qualified immunity from liability for the Wratchfords’ claims based on vicarious liability for Ayersman’s alleged acts. It was reversible error for the circuit court to fail to evaluate the *A.B.* scope of employment factors and to deny the WVSFMO summary judgment based upon the doctrine of qualified immunity.

CONCLUSION

The circuit court erred when it did not grant summary judgment to the WVSFMO. Accordingly, this Court should reverse the circuit court’s order denying summary judgment and remand this case with instructions to the circuit court to enter an order finding that the WVSFMO

is entitled to qualified immunity from liability for all of the Wratchfords' claims against it and granting the WVSFMO summary judgment.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-0181

WEST VIRGINIA STATE FIRE MARSHAL'S OFFICE,

Defendants Below, Petitioners,

v.

TAMMY S. WRATCHFORD and MICHAEL W. WRATCHFORD,

Plaintiffs Below, Respondents.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of June 2021, I served the foregoing
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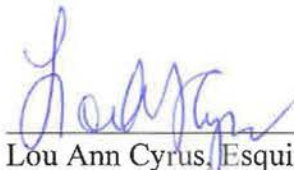
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