

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 Granting In Part and Denying In Part Defendant Ronald C. Ayersman's Motion for
Summary Judgment**

This matter came before the Court upon *Defendant Ronald C. Ayersman's Motion for Summary Judgment* filed by Shawn A. Morgan, Susan L. Deniker, Jeffrey M. Cropp, and Steptoe & Johnson, pllc, counsel for Defendant Ronald C. Ayersman, on February 21, 2020; upon *Response of Plaintiffs to Motion for Summary Judgment of Ronald C. Ayersman* filed by J. David Judy, III, counsel for Plaintiffs, on March 5, 2020; upon *Plaintiffs' Response to Motions for Summary Judgment of Qualified Immunity of the West [Virginia] State Fire Marshal's Office and Ronald C. "Mackey" Ayersman, Assistant State Fire Marshal* filed by Mr. Judy on March 6, 2020; upon *Defendant Ronald C. Ayersman's Reply to Plaintiffs' Responses to His 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 Responses, 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. Since November 1, 1994, Mr. Ayersman asserts he has been employed by the West Virginia State Fire Marshal's Office ("WVSFMO") as an Assistant State Fire Marshal.

2. In January 2010, Mr. Ayersman asserts he began working for Fire Safety Investigations, which later changed its name to Fire & Safety Investigation Consulting Services, LLC ("FSI"). Mr. Ayersman asserts that he does not investigate any fires for FSI that occurred in West Virginia.

3. On January 30, 2010, Mr. Ayersman asserts that he completed a Request for Determination Regarding Secondary Employment or Volunteer Activity form, advising that he would be investigating fires outside of West Virginia for FSI. Mr. Ayersman alleges his supervisor and the Fire Marshal's Office determined there was no conflict.

4. On February 20, 2017, a fire occurred at Plaintiffs' home.

5. With regard to the investigation of the fire, Mr. Ayersman 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 spoke separately with George Harms, Field Supervisor for WVSFMO, and Mr. Ayersman about the fire. Mr. Harms, because of his workload, assigned the case to Mr. Ayersman.
 - 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 Mr. Davis investigated the home. Mr. 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.
6. 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. Mr. Ayersman points out that he did not file any criminal complaints against Mr. Wratchford because he found no evidence that Mr. Wratchford was involved in any attempt to commit arson or insurance fraud.

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

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

9. 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.

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

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

12. The *Amended Complaint* alleges the following claims against Mr. Ayersman: Count 2 Negligence; Count 3 Intentional Violations with Malice; Count 4 Tortious Interference; Count 5 Intentional Infliction of Emotional Distress; Count 6 Civil Conspiracy; Count 7 Malicious Prosecution and Abuse of Process; and Count 11 Violation of Civil Rights and Negligence.

Summary Judgment

13. 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.

14. 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).

15. 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)).

16. "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).

17. "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).

18. 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. *Hanton, id.*

Qualified Immunity

19. In his *Motion*, Mr. Ayersman argues he is entitled to qualified immunity because Plaintiffs' claims arise from discretionary decisions rendered within his authority and he did not violate any clearly established statutory or constitutional right by filing charges against Tammy Wretchford.

20. In response Plaintiffs argue:

- a. Mr. Ayersman violated West Virginia Code § 6B-1-1 et seq which sets forth the ethical standards for public employees.

- b. Mr. Ayersman put false information in the criminal complaint against Tammy Wratchford, which information is specifically set forth in the *Response to the Motion for Summary Judgment*. If Mr. Ayersman had put accurate info in the criminal complaint, it is "very highly unlikely" any judicial officer would have found probable cause.
- c. With regard to tortious interference, Mr. Ayersman repeatedly pressured Sgt. Roden of the West Virginia State Police to contact the DMV regarding "fraudulent conduct" of Mrs. Wratchford. Steve Dawson will testify that such pressure and claims of unlawful conduct were false and intentionally designed to injure and damage Mrs. Wratchford. Mr. Ayersman had full knowledge that the application for renewal of a registration did not require an oath or a claim that personal property taxes had been paid; the only requirement on the form is an affirmation that the applicant has existing liability insurance coverage. Mr. Ayersman himself obtained registration renewals while his personal property taxes in Marion County were unpaid.
- d. With regard to Mr. Ayerman's claim of qualified immunity, there is no immunity for an employee whose acts are fraudulent, malicious, or otherwise oppressive. There are genuine issues of material fact regarding whether the actions of Mr. Ayersman were malicious and oppressive. There are genuine issues of material fact as to whether Mr. Ayersman's acts were within his official conduct as an Assistant State Fire Marshal or within his private employment through FSI and Erie.

21. 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).

22. 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).

23. The Court finds it is undisputed that the West Virginia State Fire Marshal's Office ("WVSFMO") is a State agency. The Court further finds it is undisputed that Mr. Ayersman was a WVSFMO employee during the relevant time period. However, the Court further finds it is a genuine issue of material fact as to whether Mr. Ayersman was acting as an employee of the WVSFMO, as an employee of FSI and Mr. Harris, or both. The Court further finds it is undisputed that the acts or omissions of the WVSFMO and Mr. Ayersman were 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).

24. 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.

25. The two methods for establishing that a discretionary governmental act is subject to qualified immunity are stated in the alternative. Therefore, the Court must examine whether there are genuine issues of material fact concerning whether the acts

or omissions of the WVSFMO and its employees were otherwise fraudulent, malicious, or oppressive. “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)).

26. “Particularly in complex cases...where issues involving motive and intent are present, summary judgment should not be utilized as a method of resolution.” *W. Va. DNR v. Dawson*, 242 W.Va. 176, 191, 832 S.E.2d 102, 117 (2019) (quoting *Kelley v. City of Williamson, W. Va.*, 221 W.Va. 506, 510, 655 S.E.2d 528, 532 (2007)). Generally, the determination of whether a state actor’s conduct was malicious is a “question[] for the fact-finder.” *Id. Dawson* (citing *Maston v. Wagner*, 236 W.Va. 488, 508 n.15, 781 S.E.2d 936, 956 n.15 (2015)). *See also Taylor v. W. Va. Dept. 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.”).

27. 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.”).

28. Here, the Court finds the record contains evidence that could lead a jury to infer a malicious, oppressive, or fraudulent motive, including but not limited to: (1) allegations of Mr. Ayersman’s dual employment with a private entity and the WVSFMO;

(2) Mr. Ayersman's conduct in conducting the investigation; (3) Mr. Ayersman's insistence on criminal prosecution; (4) the potential violations of WVSFMO policy and procedures; and (5) 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.

29. 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.

30. 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).

31. 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.

32. Here, the Court finds the particular function being carried out by Mr. Ayersman i.e. the investigation of the fire was within the scope of his employment with the WVSFMO. However, the manner in which he carried out this function, including but not limited to, his dual employment and pre-investigation contact with Erie, 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 whether the actions of Mr. Ayersman was acting within the scope of employment.

Negligence Claims

33. Mr. Ayersman argues he is entitled to qualified immunity for Plaintiffs' negligence claims.

34. With regard to qualified immunity in negligence claims:

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

Syl. pt. 4, *Clark v. Dunn*, 195 W.Va. 272, 273, 465 S.E.2d 374, 375 (1995).

35. Furthermore,

In the absence of an insurance contract waiving the defense, the doctrine of qualified 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 judgments, decisions, and actions of the officer.

Id. syl. pt. 6.

36. The Court has resolved all ambiguities and drawn all factual inferences in favor of the party against whom summary judgment is sought, and finds that Plaintiffs have met the minimum standard for denying summary judgment. The Court finds that there is a genuine issue of material fact as to whether Mr. Ayersman was acting as a State employee and whether he was simultaneously acting as an employee of FSI and, ultimately, Erie. The Court further finds, construing the facts in the light most favorable to the Plaintiffs, that they have alleged Mr. Ayersman violated policies of the State Fire Marshal and violated West Virginia Code § 6B-2-5(e). The Court further finds there is a genuine issue of material fact as to whether Mr. Ayersman engaged in conduct that was otherwise fraudulent, malicious or oppressive. The Court further finds that the jury should hear testimony and consider evidence to resolve this issue. The Court further finds that the facts before the Court at this time do not warrant judgment for Defendant Ayersman as a matter of law.

Claims Based on Mr. Ayersman's Alleged Intentional Conduct

37. Mr. Ayersman argues he is entitled to summary judgment for Plaintiffs' claims based on his alleged intentional conduct: Count 3 Intentional Violations with Malice; Count V IIED; Count 6 Civil Conspiracy; Count 7 Malicious Prosecution and Abuse of Process; and Count 11 Violation of Civil Rights.

Intentional Violations with Malice

38. On May 18, 2018, the Court entered an *Order Granting in Part and Denying in Part Defendants Bert N. Davis and Romualdi Davidson & Associates Motion to Dismiss under Rule 12(b)(6)*. In the Order, the Court found, "there is no statutory or case law to support a claim for intentional violations with malice, but these allegations can be considered within the scope of other Counts contained in the *Complaint*. Therefore, the Court concludes the *Motion to Dismiss* with regard to this Count is granted and this Count is dismissed as a stand-alone claim." Based thereon, the Court

concludes Count 3 should be DISMISSED as to Mr. Ayersman, but to the extent appropriate, the allegations may be considered within the scope of other Counts in the *Complaint*.

Intentional Infliction of Emotional Distress

39. In West Virginia, the elements for a claim of intentional infliction of emotional distress are: (1) the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) defendant acted with the intent to inflict emotional distress or acted recklessly when it was certain or substantially certain emotional distress would result from his or her conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *Travis v. Alcon Lab., Inc.*, 504 S.E.2d 419, 425 (W.Va. 1998).

40. It is for the court to determine, in the first instance, whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Id.* Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination. *Id.* Therefore, under *Travis*, when the merits of the tort of outrage are presented to the trial court on a motion for summary judgment, the court has authority to decide as a matter of law whether a defendant's conduct may reasonably be construed as outrageous. *Loudin v. Nat. Liability & Fire Ins. Co.*, 716 S.E.2d 696, 705 (W.Va. 2011).

41. In *Johnson v. Hills Department Stores*, 200 W.Va. 196, 199, 488 S.E.2d 471, 474 (1997), and in *Tanner v. Rite Aid of W.Va.*, 194 W.Va. 643, 650-51, 461 S.E.2d 149, 156-57 (1995), the Supreme Court indicated that, "to support a claim of extreme and outrageous conduct, it is not enough that the defendant acted with a tortious intent or, as noted in *Tanner*, that the defendant's conduct could be

characterized as malicious. Rather, liability depends upon whether the conduct has been so extreme and outrageous 'as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Philyaw v. Eastern Associated Coal Corp.* 219 W.Va. 252, 258, 633 S.E.2d 8, 14 (2006).

42. Here, the Court has resolved all ambiguities and drawn all factual inferences in favor of the party against whom summary judgment is sought, and finds that Plaintiffs have met the minimum standard for denying summary judgment. The Court finds that Mr. Ayersman's conduct, construed in the light most favorable to Plaintiffs, can reasonably be construed as outrageous. The Court finds this claim is not focused solely on Mrs. Wratford's interrogation and subsequent suicide attempt, but also alleges "Each of the Defendants together orchestrated a sham investigation of origin and causation of the February 20, 2017, fire from the outset as demonstrated by the facts stated [the] Complaint[.]"

43. Specifically, the Court finds the following allegations, if established at trial, may reasonably be construed as outrageous: (1) Phillip Jones used an inaccurate credit report and when Plaintiffs denied the information in the credit report, Mr. Jones repeatedly called them "liars"; (2) Mr. Davis removed exculpatory evidence from the home; (3) Mr. Ayersman sought to use tax information to coerce a confession from Mrs. Wratford when he had full knowledge that obtaining a vehicle registration renewal without paying taxes is not a felony, and is not even a crime; (4) Mr. Ayersman pursued criminal felony charges against Mrs. Wratford, even though Erie was aware there was no objective evidence of the fire being intentionally set; (5) Mr. Ayersman subjected Mrs. Wratford to a 4 ½ hour polygraph examination and interrogation, without break, drink, or food, during which he made numerous threats against her; and (6) the alleged conduct by Mr. Ayersman and FSI/Harris was done to financially benefit Erie.

44. The Court further finds the complexity of the case and numerous factual

allegations are such that the facts before the Court at this time do not warrant judgment for Defendant Erie as a matter of law. Therefore, the Court concludes summary judgment should not be granted with regard to Plaintiffs' claim for intentional infliction of emotional distress. However, the Court would remind Plaintiffs that a "genuine issue of material fact" does not arise unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party. In assessing the record, as to that issue, the Court at this stage is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought, which the Court has done in ruling on this *Motion*. Notwithstanding the ruling of the Court at this time, depending on the evidence at trial, Defendant may make a proper motion as to the intentional infliction of emotional distress claim.

Civil Conspiracy

45. In West Virginia, "a civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means." *Syl. Pt. 1, Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009). "A civil conspiracy is not a *per se* stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrators." *Id.*, at 57. 269.

46. Additionally, "the proponent of a civil conspiracy claim must produce at least circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective and mutual agreement." *Ash v. Allstate Insurance Company*, 2013 WL 5676774 (W. Va. 2013) (memorandum opinion).

47. At the heart of any conspiracy claim is an agreement to engage in concerted action with the intent to cause harm to the plaintiff. In other words, there must be sufficient evidence upon which a jury could conclude that each of the

defendants in an alleged conspiracy joined into an agreement, whether written or otherwise, to take concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. *Id.*

48. The Court has resolved all ambiguities and drawn all factual inferences in favor of the party against whom summary judgment is sought, and finds that Plaintiffs have met the minimum standard for denying summary judgment. The Court finds that there is a genuine issue of material fact as to whether or not the Defendants acted jointly and with concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means, including, but not limited to: misleading the investigation, fabricating results of the investigation, and economically benefitting themselves. The Court further finds that Plaintiffs have shown genuine issues of material fact exist as to whether or not the Defendants were acting under the direction and control of Erie. The Court further finds that the jury should hear testimony and consider evidence to resolve this issue. The Court further finds that the facts before the Court at this time do not warrant judgment for Defendant Ayersman as a matter of law. Therefore, the Court concludes summary judgment should not be granted with regard to Plaintiffs' claim for civil conspiracy.

Malicious Prosecution Claim

49. For a malicious prosecution claim, a plaintiff must show (1) the prosecution was set on foot and conducted to its termination, resulting in a manner favorable to the plaintiff; (2) it was caused or procured by defendant; (3) it was without probable cause; and (4) it was malicious. *Truman v. Fid. & Cas. Co. of N.Y.*, 146 W.Va. 707 (1961). "Procurement" is a requisite element for establishing a prima facie case. *Norfolk S. Ry. Co. v. Higginbotham*, 228 W.Va. 522 (2011). Procurement requires more than just the submission of a case to the prosecutor; it requires a defendant assert control over the pursuit of the prosecution. *Id.*

50. The Court has resolved all ambiguities and drawn all factual inferences in favor of the party against whom summary judgment is sought. The Court finds that there is a genuine issue of material fact as to whether or not Mr. Ayersman caused or procured the prosecution of Mrs. Wretchford.

51. With regard to the absence of probable cause, the Court finds the Hardy County Magistrate found probable cause, both at the time the arrest warrants were issued and again at the conclusion of the preliminary hearing. However, the Court further finds that a finding of probable cause by a magistrate is not dispositive; rather, it is merely pertinent evidence. *Bennett v. R&L Carriers Shared Servs., LLC*, 744 F.Supp.2d 494 (2010). Similarly, the Court finds the issuance of an arrest warrant does not conclusively prove probable cause. *Niese v. Klos*, 216 Va. 701, 222 S.E.2d 798 (1976). The Court further finds that the refusal of the grand jury to indict is prima facie evidence of a want of probable cause, except where it appears that refusal to indict was after the hearing of the witnesses for the accused as well as for the prosecution. *Thomas v. Beckley Music & Elec. Co.*, 146 W.Va. 764, 123 S.E.2d 73 (1961).

52. The existence or nonexistence of probable cause is a mixed question of law and fact. *Hunter v. Beckley Newspapers Corp.*, 129 W.Va. 302, 40 S.E.2d 332 (1946). It is a question of law for the court when the facts are undisputed, or established by admissions or uncontradicted evidence. *Truman v. Fidelity & Cas. Co of N.Y.*, 146 W.Va. 707, 123 S.E.2d 59 (1961). Further, public policy supports a presumption in favor of there being probable cause to warrant the prosecution. *Id.*; see also *McNair v. Erwin*, 84 W.Va. 250, 99 S.E. 454 ("The public policy favors prosecution for crime, and requires the protection of a person who in good faith and upon reasonable grounds institutes proceedings upon a criminal charge. The legal presumption is that every prosecution for crime is founded upon probable cause, and is instituted for the purpose of justice[.]") The presumption of probable cause may be

rebutted by showing fraud, perjury, or falsified evidence in the procurement of the prosecution. *See e.g. Jarvis v. W. Va. State Police*, 227 W.Va. 472, 711 S.E.2d 542 (2010).

53. Here, the Court finds that Plaintiffs allege the probable cause findings by the Hardy County Magistrate were predicated on false and misleading information provided by Mr. Ayersman. The Court finds there is a genuine issue of material fact as to whether or not probable cause existed.

54. With regard to the element of "malice," the word has a legal and technical meaning, that is: "some motive other than a desire to secure the punishment of a person believed by the prosecutor to be guilty of the crime charged...or any other sinister or improper motive." *Thomas v. Beckley Music & Elec. Co.*, 146 W.Va. 764, 123 S.E.2d 73 (1961). Malice may be inferred from the lack of probable cause. *Id.* The question of malice is generally a question for the jury. *Hunter, id.*

55. Here, the Court finds there is a genuine issue of material fact as to whether or not the prosecution of Mrs. Wratford was malicious.

56. In sum, the Court concludes there are genuine issues of material fact regarding the elements for a malicious prosecution claim and, therefore, the *Motion* should be denied with regard to this ground.

Abuse of Process Claim

57. "Generally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process.' *Preiser v. MacQueen*, [177] W.Va. [273, 279], 352 S.E.2d 22, 28 (1985)." Syl. pt. 2, *Wayne County Bank v. Hodges*, 175 W.Va. 723, 338 S.E.2d 202 (1985).

58. For an abuse of process claim, the essential elements are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct

of the proceeding. *Preiser v. MacQueen*, 177 W.Va. 273 (1985). Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. *Id.* The claim must establish an abuse of process other than the filing of the process itself, and must occur after it is filed. *Williamson v. Harden*, 214 W.Va. 77 (2003). "Process" means legal process. "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement (Second) of Torts § 682 (1977). "An action for abuse of process differs from an action for malicious prosecution in that the latter is concerned with maliciously causing process to issue, while the former is concerned with the improper use of process after it had been issued." *Preiser*.

59. The Court has resolved all ambiguities and drawn all factual inferences in favor of the party against whom summary judgment is sought. The Court further finds there is a genuine issue of material fact regarding whether or not there was improper use of process after it was issued. Therefore, the Court concludes the *Motion* should be denied with regard to this ground.

Innocent Spouse Doctrine

60. Mr. Ayersman further argues that even if he is not entitled to qualified immunity, Plaintiffs' claims should be dismissed because he believed the Innocent Spouse Doctrine applied in this case.

61. The innocent spouse doctrine permits an innocent co-insured to recover policy proceeds even when a fellow insured engages in arson that destroys the insured property and premises. *Icenthour v. Cont'l. Ins. Co.*, 365 F.Supp.2d 743 (S.D. W.Va. 2004). Mr. Ayersman argues that because he believed Erie would pay Mr. Wretchford,

he did not maliciously or fraudulently charge Tammy Wrotchford so that Erie could reject Plaintiffs' insurance claim.

62. The Court there is a genuine issue of material fact regarding whether Mr. Ayersman acted maliciously or fraudulently, and the jury should hear testimony and consider evidence to resolve this issue.

Tortious Interference Claim

63. Mr. Ayersman further argues that because Tammy Wrotchford admitted she engaged in the conduct that led to her resignation from the DMV, he cannot be liable for Tortious Interference.

64. A prima facie case of tortious interference requires a plaintiff to prove (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. *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W.Va. 210 (1984). If a plaintiff can establish a prima facie case of tortious interference, a defendant may prove lawful justification or privilege as an affirmative defense. *Id.* One type of justification or privilege is the 'giving of honest, truthful requested advice.' *Id.* The provision of honest or truthful information to a third party, whether requested or not, is an absolute defense. *Tierman v. Charleston Area Medical Center, Inc.*, 203 W.Va. 135 (1998).

65. Mr. Ayersman argues that Mrs. Wrotchford signed a statement: "I Tammy Wrotchford admit that I renewed my vehicle tags for the past 3 years without having paid my personal property tax." Also, Mr. Ayersman argues that Mrs. Wrotchford admitted in her deposition that she had not paid her property taxes, she knew she was required to pay them 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. Mr. Ayersman argues that any harm sustained from losing her job was directly caused

by her own improper and wrongful conduct. Mr. Ayersman argues that he simply provided truthful information to the State Police, which he is obligated to do as a law enforcement officer.

66. The Court has resolved all ambiguities and drawn all factual inferences in favor of the party against whom summary judgment is sought. The Court finds that there is a genuine issue of material fact as to whether or not Mr. Ayersman was acting within the scope of his employment with FSI and Mr. Harris, who were retained by Erie to investigate the fire, which would cure Erie's contention that it did not provide the information to the DMV.

67. However, the Court does find that truthful and accurate information was provided to the DMV, as evidenced by Mrs. Wratchford's deposition and Plaintiffs have not refuted that truthful information was provided to the DMV. The Court further finds that even if Plaintiffs could establish a prima facie case of tortious interference, Defendants have proven the "absolute defense" of the provision of honest or truthful information to a third party. Therefore, the Court concludes there is no genuine issue of material fact regarding the claim for tortious interference, and summary judgment is proper.

Violation of Civil Rights

68. Mr. Ayersman argues that Plaintiffs' claim for violation of civil rights arises from the alleged improper arrest, charge, and prosecution of Mrs. Wratchford.

69. The Court finds there are genuine issues of material fact with regard to this Court and, therefore, summary judgment should not be granted.

Punitive Damages

70. Mr. Ayersman argues that because all of Plaintiffs' claims against him should be dismissed, so should the claim for punitive damages. Punitive damages cannot be pled as a stand-alone claim. *Games v. Chesapeake Appalachia, LLC*, 2017

WL 5297948 (N.D. W.Va. Nov. 13, 2017).

71. West Virginia Code § 55-7-29 governs claims for punitive damages in West Virginia. Under Section 55-7-29, a plaintiff must prove, by clear and convincing evidence, that the damages suffered “were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.”

72. With regard to the punitive damages claim, the Court finds it will hold this matter in abeyance until trial to determine if sufficient evidence exists to proceed with the claim for punitive damages.

WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** that *Defendant Ronald C. Ayersman's Motion for Summary Judgment* is **GRANTED in part and DENIED In part**.

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.courtswv.gov/e-file/ for more details.