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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.

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(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 REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO THE
WEST VIRGINIA STATE FIRE MARSHAL AND RESPONDENTS' CROSS PETITION**

LOU ANN S. CYRUS
W.Va. State Bar # 6558
Shuman McCuskey Slicer PLLC
1411 Virginia Street, East, Suite 200
Charleston, WV 25301
(304) 345-1400
lcyrus@shumanlaw.com

MICHAEL D. DUNHAM
W.Va. State Bar # 12533
Shuman McCuskey Slicer PLLC
116 South Stewart Street, First Floor
Winchester, VA 22601
(540) 486-4195
mdunham@shumanlaw.com

*Counsel for Petitioner West Virginia State
Fire Marshal's Office*

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116 South Stewart Street, First Floor
Winchester, VA 22601
(540) 486-4195
mdunham@shumanlaw.com

*Counsel for Petitioner West Virginia State
Fire Marshal's Office*

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I. INTRODUCTION

The sole issue before this Court is whether the West Virginia State Fire Marshal's Office ("WVSFMO") is immune from liability and suit in this matter under the doctrine of qualified immunity. Although Tammy Wratchford and Michael Wratchford's amended complaint is not a model of clarity, it appears the Wratchfords attempt to establish the WVSFMO's liability in two ways: (1) through the doctrine of *respondeat superior*, or vicarious liability, by establishing that WVSFMO employees failed to train, supervise, and/or oversee Assistant State Fire Marshal Ronald C. "Mackey" Ayersman during his investigation into the origin and cause of the February 20, 2017, house fire at the Wratchford residence, which permitted Ayersman to commit the actions alleged in the amended complaint; and (2) through the doctrine of *respondeat superior* for Ayersman's alleged actions.¹

II. 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.

III. ARGUMENT --PETITIONER WVSFMO'S ASSIGNMENTS OF ERROR

A. **The WVSFMO did not violate a clearly established right or otherwise act in a fraudulent, malicious, or oppressive manner during its training, supervision, or oversight of Ayersman.**

In order to survive summary judgment on their claim for failure to train, supervise, and oversee Ayersman, the Wratchfords must demonstrate that the WVSFMO violated a "clearly

¹ The Wratchfords' arguments in their response brief appear to concede that the WVSFMO is not vicariously liable for Ayersman's alleged criminal conduct. Instead, the Wratchfords appear to argue that the WVSFMO "condoned" Ayersman's alleged conduct. Resp. Br., 13, 18, 21, 28, 30, 36-37.

established" right or law with respect to its training, supervision, or oversight of Ayersman. *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 515, 766 S.E.2d 751, 774 (2014). The circuit court aptly recognized that the Wratchfords failed to do so. Nevertheless, the Wratchfords may still establish vicarious liability against the WVSFMO for failure to train, supervise, and oversee if the Wratchfords are able to establish that WVSFMO employees acted fraudulently, maliciously, or oppressively ***in their training, supervision, or oversight*** of Ayersman. *See id.* The Wratchfords likewise fail to do so.

The Wratchfords contend that the WVSFMO “failed to properly train, supervise and oversee the actions of its employees and officials” and therefore “violated statutory law and [the Wratchfords’] constitutional rights. . .” Resp. Br., 2-3. The Wratchfords argue that the WVSFMO’s “lack of supervision, oversight, and training . . . allowed the abuses by Ayersman to occur . . .” Resp. Br., 19. The Wratchfords do not, however, address how any WVSFMO employee’s conduct was fraudulent, malicious, or oppressive in their training, supervision, or oversight of Ayersman. Instead, the Wratchfords assert that the circuit court committed error in its order denying the WVSFMO summary judgment when the circuit court concluded that the Wratchfords have not identified a clearly established right that the WVSFMO violated. JA 01366. The Wratchfords focus on purported violations of the West Virginia Ethics Act (“Ethics Act”) allegedly committed by Ayersman to argue that a clearly established right was violated.²

The Wratchfords do not identify how the WVSFMO violated any provision of the Ethics Act in its training, supervision, or oversight of Ayersman and instead, argue that the WVSFMO allowed Ayersman to engage in “dual employment” with the WVSFMO and Fire & Safety

² The Wratchfords contend that Ayersman’s “dual employment [was] allowed by the West Virginia State Fire Marshal’s Office in violation of West Virginia Code § 6B-2-5(e).” Resp. Br., 4.

Investigation Consulting Services, LLC (“FSI”). Resp. Br., 4, 31. Although Ayersman did have secondary employment with FSI investigating fires outside of West Virginia, there is no evidence in the record that Ayersman investigated the origin and cause of the Wratchford house fire for FSI while at the same time investigating the origin and cause of the Wratchford house fire for the WVSFMO. There is certainly no evidence in the record that the WVSFMO “condoned” Ayersman or any other employee simultaneously investigating a fire on behalf of the WVSFMO and a private investigation company.

1. The WVSFMO did not violate any statute, rule, regulation or other policy or procedure in its training, supervision, or oversight of Ayersman.

The Wratchfords assert that the “critical underlying issue in this matter” is the WVSFMO’s “failure . . . to require Ayersman and the other employees . . . to comply with known policies, procedures, protocol, and the statutory requirements of independent integrity and obligations to the public in avoiding conflicts of interests and in complying with statutory law to avoid the abuses of the constitutional rights” allegedly suffered by the Wratchfords. Resp. Br., 21. The Wratchfords do not identify what policies, procedures, protocols, or statutory requirements “of independent integrity” the WVSFMO failed to require Ayersman or any other employee to follow. This is because the Wratchfords’ retained expert, Steve Dawson, admitted during his deposition 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 further admitted he did not read the West Virginia Fire Commission Office of the State Fire Marshal Policy and Procedure Manual, which governed Ayersman’s investigation and the conduct of every individual who would have been charged with training, supervising, and overseeing Ayersman. JA 00488. Dawson acknowledged that, prior to his deposition, he did not know whether the WVSFMO even had governing policies

or procedures. *Id.* Rather, in offering his opinions related to this case, Dawson relied upon policies and procedures of the West Virginia State Police but admitted that the WVSFMO is not required to follow the West Virginia State Police’s policies and procedures. JA 00496-97. Other than Ayersman, Dawson was not critical of any of WVSFMO employee in their acts or omissions. JA 00510-11.

Next, the Wratchfords complain that Ayersman’s secondary employment with FSI “is critical in his investigation by his close association and communications with Erie and Harris and his reliance on initial information they generated rather than his own independent investigation.” Resp. Br., 23. The Wratchfords accuse Ayersman of “ignor[ing] the objective facts . . . [and] his duties of impartiality and integrity . . .” Resp. Br., 24. The Wratchfords claim the WVSFMO “was clearly aware of the conflict from the disclosure of Secondary Employment . . . yet did nothing to prevent these violations.” Resp. Br., 24. The Wratchfords then assert that the WVSFMO failed to enforce the “state policies and statutory mandates” that their own expert could not identify at deposition.

Focusing their argument generally on assertions that the WVSFMO condoned Ayersman’s purported violation of the Ethics Act,³ the Wratchfords do not explain how Ayersman purportedly violated the Ethics Act or how it was condoned by WVSFMO employees. Instead, the Wratchfords generally cite to the record directing this Court to the West Virginia Division of Personnel Secondary Employment/Certain Volunteer Activity policy and instructions for completing a

³ The Wratchfords’ Response brief includes a cross-assignment of error in which the Wratchfords argue that the Ethics Act can be used to show that WVSFMO employees violated a clearly established right. As discussed *infra*, the Ethics Act does not create a personal right that specifically applies to the Wratchfords and therefore, cannot be used to show that any WVSFMO employee violated a clearly established right specific to the Wratchfords. Moreover, the Wratchfords do not explain how any WVSFMO employee violated the Ethics Act in their training, supervision, or oversight of Ayersman.

request for determination regarding secondary employment (JA 01069-73), legislative rules regarding employment exemptions (JA 01074-78), and an informational packet regarding the Ethics Act (JA 01079-84). Resp. Br., 22-23. The Wratchfords cite several provisions contained in the Ethics Act but do not provide any analysis as to how any WVSFMO employee violated any of the provisions cited. The Wratchfords appear to rest their claims of failure to train, supervise, and oversee Ayersman on the assertion that the WVSFMO “condoned” Ayersman’s supposed violations of the Ethics Acts.⁴ The Wratchfords accuse Ayersman of sharing “confidential information” and are overall critical of the fact that Ayersman had secondary employment with FSI. Other than speculation and conjecture, the Wratchfords do not provide a factual basis as to how the WVSFMO allegedly “condoned” these purported actions.

The Ethics Act does not prevent (nor is it intended to prevent) Ayersman from procuring secondary employment. Nor does the Ethics Act prevent Ayersman from investigating a fire scene also being investigated by his secondary employer.⁵ The Wratchfords fail to identify language in the Ethics Act or its affiliated rules, regulations, or policies to the contrary. Indeed, a review of the language in the Ethics Act and the legislative rules derived therefrom make clear that neither

⁴ The Ethics Commission has now examined Ayersman’s investigation into the Wratchford house fire on several occasions. On October 11, 2017, a Staff Attorney for the Ethics Commission, advised the WVSFMO that Ayersman’s public employment and secondary employment did not violate the Ethics Act. JA 00286-88. Similarly, after investigating an ethics complaint made by Ms. Wratchford, the Probable Cause Review Board for the Ethics Commission dismissed the complaint, concluding that there was no probable cause to show that Ayersman violated the Ethics Act. JA 00289. A second complaint filed by Ms. Wratchford was recently dismissed by the Ethics Commission.

⁵ The crux of the Wratchfords’ claim that Ayersman violated the Ethics Act appears to center around the fact that Ayersman, who had secondary employment with Fire & Safety Investigation Consulting Services, LLC (“FSI”) investigating fires outside of West Virginia, investigated the Wratchford house fire on behalf of the WVSFMO while FSI was retained to investigate the fire on behalf of the Wratchfords’ homeowner’s insurer, Erie Insurance Property & Casualty Company (“Erie”). There is no language in the Ethics Act that prohibits this conduct.

Ayersman nor any other WVSFMO employee violated the Ethics Act, either during the investigation into the Wratchford house fire or during the training, supervision, or oversight of Ayersman. Thus, the Ethics Act cannot be used to establish that the WVSFMO violated a clearly established right in its training, supervision, or oversight of Ayersman.

The Ethics Act precludes a public employee from seeking employment with or being employed by a private employer in three circumstances: (1) the public employee has taken regulatory action on a matter impacting the private employer within the preceding 12 months; (2) the private employer has a pending matter before the public employee's agency; or (3) the private employer is a vendor to the agency which the public employee is employed and the public employee exercises control over a public contract with the vendor. W. Va. Code § 6B-2-5(h)(1). The prohibitions contained in the Ethics Act are reiterated by the West Virginia Ethics Commission in its legislative rules. *See* W. Va. CSR § 158-11-1 et seq. Neither the Act nor the legislative rules operate to preclude Ayersman's employment with Fire & Safety Investigation Consulting Services, LLC ("FSI"). The WVSFMO did not have regulatory authority over FSI, and FSI was not a vendor used by the WVSFMO.

Moreover, neither the Ethics Act nor the legislative rules derived therefrom operate to prevent Ayersman from investigating a fire scene on behalf of the WVSFMO that FSI is investigating on behalf of another private person or entity. Although the Wratchfords offer speculation and conjecture from Dawson to attempt to establish that Ayersman had a conflict of interest, the written statutes, rules, regulations, and policies provide otherwise. There simply is no restriction on Ayersman's employment with FSI so long as FSI is not under the regulatory authority of the WVSFMO and/or is not a WVSFMO vendor. W. Va. Code § 6B-2-5(h)(1). Likewise, there is no restriction on Ayersman's ability to investigate fire scenes on behalf of the

State where FSI is also investigating the same scene on behalf of private individuals or entities. The Wratchfords fail to identify any statute, rule, regulation, or policy proclaiming otherwise. Nothing in the record or the law suggests that Ayersman's private employment with FSI investigating fires outside the State of West Virginia created a "conflict" in this case, or otherwise violated a clearly established law or right. Therefore, there was no "violation" for the WVSFMO to "prevent."

Finally, the Wratchfords accuse Ayersman of numerous contacts with FSI and Erie representatives in which Ayersman purportedly shared confidential information. Then, without evidence, the Wratchfords claim that Ayersman's supervisor with the WVSFMO, Assistant State Fire Marshal George Harms, was "clearly aware" of Ayersman's communications. The Wratchfords do not explain or cite to anywhere in the recording suggesting Harms had any knowledge regarding any communication between Ayersman and FSI or Erie, either prior to the WVSFMO receiving notice of the fire via its Arson Hotline or regarding disclosure of confidential information.⁶

In relevant part, the Ethics Act provides that "[n]o present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person." W. Va. Code § 6B-2-5(e). There is no

⁶ The Wratchfords make a half-hearted attempt to impart liability on the WVSFMO by claiming that Harms "also lacked independent integrity" because Harms was previously employed by FSI. Resp. Br., 33. The Wratchfords suggest that Harms lacked "impartiality required" under the Ethics Act. *See* W. Va. Code § 6B-1-2. It is true that the Ethics Act contains a legislative finding that "impartiality of public . . . employees [is] essential" in the operation of government; however, nowhere does the Ethics Act suggest that Harms, as a previous employee of FSI, would have been disqualified from being involved in and/or supervising Ayersman's investigation into the Wratchford house fire.

evidence in the record that Ayersman improperly disclosed confidential information during the pendency of his investigation into the Wratchford house fire. Ayersman was allowed to share information related to an investigation with third parties and insurers. JA 01324-25. And, even if the Wratchfords could identify a statute, rule, regulation, or policy stating it was not proper for Ayersman to share any information with third parties or insurers, there is no evidence in the record that WVSFMO employees responsible for Ayersman's training, supervision, and/or oversight were aware that Ayersman violated such statute, rule, regulation, or policy and condoned the same. In fact, the Wratchfords' own expert, Dawson, testified that he does not have any information available to him that any WVSFMO employee violated any statute, rule, regulation, or policy because such employee was aware that Ayersman was disclosing confidential information and failed to prevent it. JA 510-511.

Simply put, Ayersman's secondary employment with FSI did not violate the Ethics Act. The Wratchfords' bald assertions otherwise do not make it so. Moreover, no evidence exists that Ayersman improperly disclosed confidential information during the course of his investigation in violation of the Ethics Act. No evidence exists that any WVSFMO employee was aware that Ayersman allegedly violated the Ethics Act by improperly disclosing confidential information during the course of his investigation. The Wratchfords' contention that Ayersman violated the Ethics Act with the WVSFMO's knowledge is not supported by the factual record in this case. Finally, the Wratchfords do not identify a single statute, rule, regulation, policy, or other clearly established right that any WVSFMO employee violated while training, supervising, or overseeing Ayersman. Accordingly, the Wratchfords are unable to overcome the WVSFMO's entitlement to qualified immunity for those claims. The circuit court erred when it denied summary judgment to the WVSFMO, and this Court should reverse that decision.

2. The Wratchfords do not provide any argument that WVSFMO employees acted fraudulently, maliciously, or oppressively in their training, supervision, or oversight of Ayersman.

The Wratchfords fail to address the WVSFMO's argument that no WVSFMO employee engaged in fraudulent, malicious, or oppressive conduct during their training, supervision, or oversight of Ayersman. The Wratchfords do not identify any employee responsible for training, supervising, or overseeing Ayersman who engaged in fraudulent, malicious, or oppressive conduct, and like the circuit court, the Wratchfords fail to articulate what conduct potentially qualifies as fraudulent, malicious, or oppressive as it relates to the training, supervision, or oversight of Ayersman. Having knowledge of Ayersman's secondary employment with FSI does not rise to that level because Ayersman is not precluded from the secondary employment. To survive summary judgment, the Wratchfords were required to show that a material issue of fact existed as to whether a WVSFMO employee engaged in fraudulent, malicious, or oppressive conduct while training, supervising, or overseeing Ayersman. Absent evidence of such conduct, the WVSFMO is entitled to qualified immunity from liability for the Wratchfords' claim for failure to train, supervise, and oversee Ayersman.

B. There is no evidence that WVSFMO employees "condoned" alleged criminal conduct.

The Wratchfords continue to assert that Ayersman engaged in criminal conduct. Resp. Br., 13-14, 17, 27. Nevertheless, the Wratchfords seek to hold the WVSFMO vicariously liable for that alleged criminal conduct. However, it appears the Wratchfords have abandoned any argument that the WVSFMO is vicariously liable for Ayersman's alleged criminal conduct. Instead, the Wratchfords slightly shift their argument to claim, without any evidentiary support, that Ayersman's alleged criminal conduct was "condoned" by the WVSFMO. Resp. Br., 13, 18, 21, 28, 30, 36-37.

Whether the Wratchfords are seeking to hold the WVSFMO vicariously liable for Ayersman's conduct, or whether the Wratchfords are seeking to argue that Ayersman's superiors "condoned" Ayersman's alleged criminal conduct, the vicarious liability analysis does not change. "[W]hen an officer goes 'entirely beyond [the general scope of his official authority] and does an act that is not permitted at all by that duty, he is not acting in his capacity as a public officer or employee and he has no more immunity than a private citizen.'" *A. B.*, 234 W. Va. at 505 (citing Restatement (Second) of Torts § 895D, comment g). This Court has described its rationale for imposing personal liability upon a public official where his or her acts are beyond the scope of his or her authority in the following manner:

First, the harm resulting from such conduct is probably more easily avoided than the harm caused by simple negligence and is therefore a poorer candidate for consideration as an ordinary cost of government. Second, if the threat of personal liability serves some deterrent purpose, its imposition would seem particularly useful where willful or wanton misconduct is concerned. Finally, even if such conduct cannot readily be eliminated, it does not follow that the public should have to pay for its consequences. On the contrary, retributive justice would seem to demand that public officials answer personally for egregious conduct.

A.B., 234 W. Va. at 506 (citing George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1197 (1977)). In essence, there is "no stated public policy which 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 his authority or employment." *A.B.*, 234 W. Va. at 506.

To the extent the Wratchfords seek to assert that Ayersman and his supervisors were part of a grand conspiracy to falsely accuse Ms. Wratchford of burning down her home, the WVSFMO is still immune from liability, as such conduct is outside of the scope of their duties, authority, and/or employment. Although the Wratchfords argue strenuously that whether WVSFMO

employees acted within the scope of their employment are questions of fact for a jury, “this Court is in no way precluded from making a determination, as a matter of law, as to ‘scope of employment’ where there are no disputed facts . . .” *A. B.*, 234 W. Va. at 509. Here, the Wratchfords argue that Ayersman’s motivations in purportedly falsely accusing Ms. Wratchford were to benefit FSI and Erie, and his own pecuniary gain. If true, then it cannot be said that Ayersman was acting to serve the WVSFMO, and his actions would not be within the scope of his employment.

The Wratchfords have failed to address the points raised in the WVSFMO’s Petition that, by the very allegations contained in the amended complaint, Ayersman’s alleged conduct was motivated by his desire to serve and benefit Erie and FSI, not the WVSFMO. *Id.* at 510. (“The ‘purpose’ of the act is of critical importance and this element echoes throughout our jurisprudence.”) The Wratchfords claim Ayersman committed false swearing and perjured himself so he could benefit Erie and FSI. The Wratchfords fail to adduce any evidence bringing these alleged criminal acts within the ambit of Ayersman’s employment with the WVSFMO beyond merely suggesting that his job gave him the opportunity to commit them. *See id.*

There is also no disputed material fact that any of Ayersman’s supervisors condoned his alleged criminal conduct. The Wratchfords attempt to impute liability on Fire Marshal Tyree and Assistant State Fire Marshal Harms by accusing each of them of being “complicit” in Ayersman’s alleged actions. Resp. Br., 29. Without evidence, the Wratchfords suggest that Harms allowed Ayersman to engage in the alleged conduct because Harms was a previous FSI employee. Resp. Br., 29. The Wratchfords accuse Tyree of providing “false information to the Ethics Commission to protect the unlawful actions of Ayersman.” Resp. Br., 29. First, the Wratchfords cite to nowhere in the record to support their baseless allegation that Harms was complicit in alleged criminal

conduct because his former employer was involved. Stating it in their response brief without evidence does not make it so, and it certainly does not create a triable issue of fact on any of the Wratchfords' claims against the WVSFMO. Second, there is no evidence in the record that Tyree provided false information to the Ethics Commission. In making this argument, the Wratchfords rely on an October 11, 2017 correspondence Tyree received from a Staff Attorney with the Ethics Commission. Notably, Tyree prepared the letter because he sought guidance from the Ethics Commission as to whether it was a conflict to allow Ayersman to investigate a fire on behalf of the WVSFMO that Ayersman's secondary employer investigated on behalf of an insurance company.⁷ JA 01024-26. The Staff Attorney informed Tyree that it was not. *Id.*

The Wratchfords appear to take issue with the correspondence because Tyree indicated that Ayersman did not share confidential information with FSI and did not simultaneously investigate the house fire for both the WVSFMO and FSI. *See* Resp. Br., 29-30. As discussed, Ayersman was allowed to share information related to an investigation with third parties and insurers. JA 01324-25. The Wratchfords do not identify what confidential information Ayersman purportedly shared (and Tyree knew about). This is because there is no evidence in the record that Ayersman improperly disclosed confidential information during the pendency of his investigation into the Wratchford house fire. Further, there is no evidence in the record that Ayersman was retained by FSI to investigate the origin and cause of the Wratchford house fire while at the same time investigating the origin and cause of the fire on behalf of the WVSFMO. To the extent the Wratchfords continue to maintain that Ayersman engaged in conduct to help Erie "avoid payment

⁷ This letter was authored, and Tyree communicated with the Ethics Commission, after the investigation into the origin and cause of the Wratchford house fire and after Wratchford had already been criminally charged. Thus, the communication had nothing to do with Ayersman's investigation into the house fire – it had concluded – and it had nothing to do with the training, supervision, or oversight of Ayersman during his investigation into the Wratchford house fire.

of the proceeds of the Homeowner's 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," there is no evidence in the record that Tyree was aware of or condoned any such actions. JA 00126.

There is no evidence that Harms, Tyree, or any other person responsible for supervising Ayersman condoned, accepted, or directed Ayersman to engage in "unlawful and abusive actions." Resp. Br., 6. Although they may have been aware of his secondary employment with FSI, such employment was not "unlawful." JA 01024-26. There is no evidence in the record that Ayersman was "abusive" toward the Wratchfords or that his supervisors were aware of such alleged abusive actions.⁸ Accordingly, the WVSFMO is entitled to qualified immunity from liability for the Wratchfords' claim for vicarious liability for Ayersman's actions and/or vicarious liability for claims that Ayersman's supervisors "condoned" Ayersman's actions.

C. The alleged violations of the West Virginia Ethics Act do not defeat qualified immunity.

The Wratchfords' contention that "violations of the Ethics Act . . . can defeat qualified immunity" is contrary to this Court's jurisprudence. The Ethics Act does not confer specific rights to the Wratchfords nor is there any evidence in the record that Ayersman or any other WVSFMO employee failed to comply with any provision of the Ethics Act.⁹

⁸ In responding to the WVSFMO's arguments, the Wratchfords appear to contend that Ms. Wratchford is above the law. The Wratchfords are critical of Ayersman for contacting the West Virginia State Police to report that Ms. Wratchford used her position with the West Virginia Division of Motor Vehicles to renew her vehicle registration although she did not pay personal property taxes. It is unclear how reporting a potential violation of the law to the police would qualify as abusive behavior.

⁹ As discussed, the Wratchfords are unable to identify any evidence in the record that Ayersman or any other WVSFMO employee failed to comply with the provisions of the Ethics Act. *See* WVSFMO Resp. Br., Section IA, *supra*, pp. 4-8. The Ethics Act did not prohibit Ayersman's secondary employment with FSI nor did Ayersman improperly disclose confidential information. *See id.*

The Wratchfords argue that, as a public employee, Ayersman “owes an undivided duty of loyalty to the public” and cannot “place himself in a situation that will subject him to conflicting duties or expose him to temptation.” Resp. Br., 26. The Wratchfords claim that the Ethics Act is “clearly designed . . . to protect the public,” and “Ayersman is guilty as sin of violations of the Ethics Act.” Resp. Br., 26, 28. Without support, the Wratchfords claim that Ayersman’s superiors at the WVSFMO “condoned each and every action by Ayersman” that constitutes a violation of the Ethics Act. Resp. Br., 30. The Wratchfords claim that because they are citizens of West Virginia, “each of these protections ‘specifically apply’” to them. Resp. Br., 28. The Wratchfords rely on this Court’s decision in *Graf v. Frame*, 177 W. Va. 282, 352 S.E.2d 31 (1986), to seemingly support their argument that Ayersman owed a duty of loyalty to the public and Ayersman’s participation in the Wratchford house fire investigation breached that duty, leading to a violation of the Ethics Act. Resp. Br., 26-27.

The Wratchfords’ arguments fail for several reasons. First, the Ethics Act does not confer specific rights to the Wratchfords and therefore, cannot be used to show that Ayersman or any other WVSFMO employee violated a clearly established right that specifically applied to the Wratchfords. Second, even if the Wratchfords were able to use the Ethics Act to establish that a clearly established right was violated, neither Ayersman nor any other WVSFMO employee violated the Ethics Act.¹⁰ Third, there is no causal relationship between the alleged violation of the Ethics Act and the Wratchfords’ alleged injuries. Finally, the Wratchfords’ reliance on *Graf* is misguided. The facts and circumstances of that case are completely different than the facts and circumstances presented to the Court in this case, and *Graf* in no way stands for the proposition

¹⁰ This argument is addressed in an earlier portion of this brief. *See* WVSFMO Resp. Br., Section IA, *supra*, pp. 4-8.

that an alleged breach of the duty of loyalty under the Ethics Act can be used to establish a violation of a clearly established right or law to defeat qualified immunity.

1. The Ethics Act does not specifically apply to the Wratchfords.

In order to defeat qualified immunity, a plaintiff must show that a government official's conduct violated a clearly established law or right. *A.B.*, 234 W. Va. at 508. Moreover, the right or law must be explicitly defined and must specifically apply to the plaintiff. It cannot be a general right or duty owed to the public at large. That is why, in establishing whether public officials are entitled to qualified immunity, this Court asks whether an "objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate **the plaintiff's constitutional rights . . .**" *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996) (emphasis added). The rights are specific to the plaintiff in the case, not to the general public.

Thus, in order to prove that a clearly established right has been violated, "**a plaintiff must do more than allege that an abstract right has been violated.**" *Id.* at 149, n. 11 (emphasis added). To defeat qualified immunity, a plaintiff "must make a '**particularized showing**' that a 'reasonable official would understand that what he is doing violated **that right**' . . ." *Id.* (internal quotation omitted). Indeed, the Supreme Court of the United States has held that "the clearly established right must be defined with specificity," and it has "has repeatedly told courts not to define clearly established law at a high level of generality." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503, 202 L. Ed. 2d 455 (2019).

Personal rights are not conferred to individuals under the Ethics Act. Its focus and purpose are to prevent public officials from exercising the powers of their employment for personal gain "at the expense of the **public at large**" because it "undermines **public confidence** in the integrity

of a democratic government.” W. Va. Code § 6B-1-2(a) (emphasis added). The Ethics Act does not create a private right of action that an individual can bring based on its alleged violations. Instead, the Ethics Act permits for “administrative and criminal penalties for specific ethical violations . . . found to be unlawful.” W. Va. Code § 6B-1-2. Violations of the Ethics Act are addressed by the West Virginia Ethics Commission and the Probable Cause Review Board, which investigates an ethics complaint to determine if probable cause exists to believe the Ethics Act was violated. W. Va. Code §§ 6B-2-2a(a); 6B-2-3a(a). There is not a specifically established right conferred to the Wratchfords or any other one individual under the Ethics Act.

In reality, what the Wratchfords are attempting to do in this case is to establish liability against the WVSFMO and its employees by claiming that Ayersman owed the public a nondiscretionary duty of loyalty under the Ethics Act, and he violated that duty. The Wratchfords’ contentions are not that Ayersman or the WVSFMO violated a right specific to the Wratchfords – because the Ethics Act contains no rights specific to the Wratchfords – but instead, the WVSFMO and its employees violated a duty owed to the general public. But, as this Court recently explained in *West Virginia State Police v. Hughes*, 238 W.Va. 406, 796 S.E.2d 193 (2017), a government entity or official is not liable for breaking a general duty owed to the public as a whole:

Under the public duty doctrine, a government entity or officer cannot be held liable for breaching a general, non-discretionary duty owed to the public as a whole. "Often referred to as the 'duty to all, duty to no one' doctrine, the public duty doctrine provides that since government owes a duty to the public in general, it does not owe a duty to any individual citizen."

Id. at 412 (citation omitted).¹¹ The Wratchfords admit that the Ethics Act provisions Ayersman allegedly violated do not specifically and individually apply to them. Indeed, the overall purpose

¹¹ Although the public duty doctrine is invoked to determine whether a duty exists in a negligence claim, the principle articulated by the Court is applicable to this case. Just as a duty must be owed to an individual plaintiff, a clearly established right must be specific to a particular individual.

of the Ethics Act is to address public trust in government officials. *See* W. Va. Code § 6B-1-2(a), (“The Legislature hereby finds that the holding of a public office or public employment is a public trust. Independence and impartiality of public officials and public employees are essential for the maintenance of the confidence of our citizens in the operation of a democratic government.”). Thus, the Wratchfords cannot use the Ethics Act to show that a clearly established right specific to them was violated by any WVSFMO employee. The Wratchfords cannot identify any duty allegedly breached other than a duty owed to the general public. Thus, the Wratchfords cannot hold the WVSFMO or its employees liable for any violation that would defeat their entitlement to qualified immunity. As such, the WVSFMO is entitled to qualified immunity.

2. There is no causal relationship between the alleged violation of the Ethics Act and the Wratchfords’ alleged harm.

Recently, this Court reversed a lower court’s order denying a state agency qualified immunity when the guideline the agency allegedly violated did not bear a “causal relation to the ultimate injury.” *Crouch v. Gillispie*, 240 W. Va. 229, 237, 809 S.E.2d 699, 707 (2018). Even if this Court did find a question of fact existed that Ayersman violated the Ethics Act in a manner that rose to the level of a violation of a clearly established right, and the violation was “condoned” by his supervisors, the Wratchfords have failed to demonstrate how Ayersman’s alleged violation had any causal connection to the injuries allegedly sustained by the Wratchfords. Under this Court’s jurisprudence,

the thrust of any attempt to establish liability against a public official is the violation of some duty attendant to the official's office and a resulting harm to the plaintiff. This analysis essentially adopts the common law tort concept that liability results from the violation of a duty owed which was a proximate cause of the plaintiff's injury.

Crouch, 240 W. Va. at 237 (emphasis in original) (citing *State v. Chase Sec.*, 188 W. Va. 356, 364, 424 S.E.2d 591, 599 (1992)).

The Wratchfords do not clearly articulate how the WVSFMO's alleged toleration of Ayersman's violation of the Ethics Act caused the Wratchfords' alleged injuries. Indeed, the Wratchfords are not claiming that *per se* "violations" of the Ethics Act led to their injuries. Instead, the Wratchfords are claiming that Ayersman is engaged in certain conduct – separate and apart from any alleged violation for dual employment or sharing confidential information – to falsely accuse Ms. Wratchford of setting fire to her home. The alleged violations of the Ethics Act in no way relate to the harm that the Wratchfords claim Ayersman and the WVSFMO inflicted upon them. This Court has stated that it is "wary of allowing a party to overcome qualified immunity by cherry-picking . . . violation[s] . . . irrespective of whether the alleged violation bears any causal relation to the ultimate injury." *Crouch*, 240 W. Va. at 237.

There is no causal relationship between the alleged violation of the Ethics Act and the Wratchfords' alleged harm. Accordingly, the circuit court did not err when it determined that alleged violations of the Ethics Act cannot be used to show that WVSFMO employees violated a clearly established right.

3. *Graf v. Frame* does not create a clearly established individual right.

The Wratchfords rely on this Court's decision in *Graf v. Frame*, 177 W. Va. 282, 352 S.E.2d 31 (1986) to argue that Ayersman owed a duty of loyalty to the public and Ayersman's participation in the Wratchford house fire investigation breached that duty, leading to a violation of the Ethics Act. Resp. Br., 26-27. The Wratchfords argue that the Ethics Act is "clearly designed to protect the citizens of West Virginia from conflicts of interests" and to protect the public from the alleged actions taken by Ayersman and the WVSFMO.¹² Resp. Br., 27.

¹² The Wratchfords do not explain what actions were taken by the WVSFMO that did not comply with the Ethics Act, but based upon the entirety of the Wratchfords' Response brief, it appears that the Wratchfords are arguing that WVSFMO employees were aware that Ayersman had a "conflict" and disregarded the conflict. The Wratchfords ignore the fact that they reported Ayersman's

The Wratchfords' reliance on *Graf* is not applicable to the facts of this case. *Graf* involved a member of West Virginia University's Board of Regents, who was also an attorney, bringing a lawsuit against current and former employees of West Virginia University. *Graf*, 177 W. Va. at 284-85. In that case, the attorney was acting in his private capacity as a lawyer in a manner that conflicted with his public duties. *Id.* at 288. As a member of the Board of Regents, the attorney had supervisory authority over the same West Virginia University employees he brought a lawsuit against. *Id.* Thus, the *Graf* Court concluded that the attorney's "private agency (representation of clients) conflicts or would conflict with his public duties (to oversee higher education in this State, including ruling on appeals by probationary faculty members who have been denied tenure and whom he has sued on behalf of clients)."¹³ *Id.*

The facts in this case are not at all similar to the facts presented in *Graf*. Here, Ayersman initially became involved in the investigation of the Wratchford house fire in his capacity as an Assistant State Fire Marshal. At no time prior, during, or after the investigation into the subject fire did Ayersman or the WVSFMO have any regulatory or supervisory authority over FSI, which investigated the fire for the Wratchfords' insurer, Erie. Although Ayersman was also privately employed by FSI to investigate the origin and cause of fires *outside* of the State of West Virginia, Ayersman did not investigate the origin and cause of fires on behalf of FSI within the State of West Virginia. Thus, at no point did Ayersman's private duties with FSI overlap with his official duties with the WVSFMO.

supposed "conflict" twice to the Ethics Commission via a formal complaint, and each time the complaint was summarily dismissed.

¹³ Moreover, the exact holding in *Graf* was that the West Virginia Constitution "imposes a duty upon a public officer who is an attorney to refrain from representing persons who allegedly have claims against the public agency of which he is a member or against those agencies or employees thereof subject to the supervision of the public agency of which he is a member." *Graf*, 177 W. Va. at 289.

The relief sought in *Graf* was also different than the relief the Wratchfords seek in this case. *Graf* does not create a private cause of action for money damages for a plaintiff to bring when a public official has a conflict of interest. Instead, *Graf* simply holds that the attorney in that case had a conflict of interest because he was suing individuals he had supervisory authority over in his official capacity. *Id.* at 289-90. Thus, the attorney in *Graf* was precluded from representing the clients who were suing the West Virginia University employees. *Id.* No individual right of action was created, and money damages were not awarded. *Id.* Accordingly, the Wratchfords' reliance on *Graf* is misplaced.

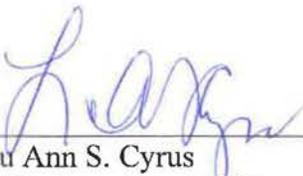
D. RESPONDENT WRATCHFORDS' CROSS-ASSIGNMENTS OF ERROR

For the reasons discussed in Section III, *supra*, The Wratchfords' alleged violations of the West Virginia Ethics Act in their cross-assignment of error do not defeat qualified immunity.

E. CONCLUSION

The circuit court erred when it did not grant summary judgment to the WVSFMO. 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.

**WEST VIRGINIA STATE FIRE
MARSHAL'S OFFICE**
By Counsel



Lou Ann S. Cyrus
W.Va. State Bar # 6558
Shuman McCuskey Slicer PLLC
1411 Virginia Street, East, Suite 200

Charleston, WV 25301
(304) 345-1400
lcyrus@shumanlaw.com

Michael D. Dunham
W.Va. State Bar # 12533
Shuman McCuskey Slicer PLLC
116 South Stewart Street, First Floor
Winchester, VA 22601
(540) 486-4195
mdunham@shumanlaw.com

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 13th day of August 2021, I served the foregoing *“Petitioner’s Reply to Brief of Respondents in Opposition to the West Virginia State Fire Marshal and Respondents’ Cross Petition”* on the following counsel of record via email, and via United States mail, in an envelope addressed as follows:

J. David Judy, III, Esquire
Judy & Judy
PO Box 636
Moorefield WV 26836
Counsel for Respondents

Matthew J. Perry, Esquire
Jill E. Lansden, Esquire
Lamp Bartram Levy Trautwein & Perry, PLLC
PO Box 2488
Huntington WV 25725-2488
*Counsel for Defendants Erie Insurance
Property & Casualty Company,
Chad Tuttoilmondo, and Phillip Jones*

David S. Givens, Esquire
Luke T. Schmitt, Esquire
Flaherty Sensabaugh Bonasso PLLC
1225 Market St
PO Box 6545
Wheeling WV 26003-0814

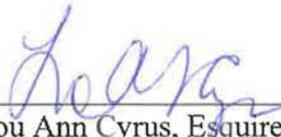
*Counsel for Defendants Fire & Safety
Investigation Consulting Services, LLC
and Christopher Brent Harris*

Susan L. Deniker , Esquire
Shawn A. Morgan, Esquire
Jeffrey M. Cropp, Esquire
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330

*Counsel for Petitioner Ronald C. Ayersman
And Ronald C. "Mackey" Ayersman,
Assistant State Fire Marshal*

Paul M. Mannix, Esquire
Marcus & Shapira LLP
One Oxford Centre FL 35
301 Grant St
Pittsburgh PA 15219-1407

*Counsel for Defendants Forensic Consultants &
Engineers, Inc., d/b/a Romualdi, Davidson &
Associates and Bert N. Davis*



Lou Ann Cyrus, Esquire
Michael D. Dunham, Esquire
*Counsel for Petitioner West Virginia State
Fire Marshal's Office*