IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

ROLAND F. CHALIFOUX, JR., D.O. and
ROLAND F. CHALIFOUX, JR., D.O., PLLC,
D.B.A. VALLEY PAIN MANAGEMENT CLINIC,

Plaintiffs,

v.

CIVIL ACTION NO. 16-C-844
Judge Jennifer Bailey

WEST VIRGINIA BOARD OF OSTEOPATHIC MEDICINE,
and DIANA SHEPARD, individually and in her capacity
as Executive Director for the West Virginia Board of Osteopathic Medicine.

Defendants.

ORDER

On October 1, 2018, came the Plaintiffs, Roland F. Chalifoux, Jr., D.O., and Roland F. Chalifoux, Jr., D.O., P.L.L.C. d/b/a Valley Pain Management Clinic, by and through counsel, Scott H. Kaminski, and Defendants, West Virginia Board of Osteopathic Medicine and Diana Shepard, by and through counsel, Perry W. Oxley, Esq. for a hearing regarding "*Defendants, West Virginia Board of Osteopathic Medicine and Diana Shepard's Motion for Summary Judgment.*"

Having reviewed the Motion for Summary Judgment, the Plaintiffs' Response, the Defendants' Reply, and all other documents relevant to the matter, and being otherwise sufficiently advised during the hearing, the Court hereby **GRANTS** Defendant's *Motion for Summary Judgment* and sets forth the following findings of fact and conclusions of law in support of the Court's decision:

FINDINGS OF FACT

1. This case arises from a decision by the West Virginia Board of Osteopathic Medicine ("the Board") to summarily suspend Plaintiff, Roland F. Chalifoux, Jr., D.O.'s ("Plaintiff") license to practice osteopathic medicine upon receiving a Complaint from Letitia Tierney, M.D., JD, the Commissioner of the West Virginia Bureau of Public Health ("BPH").

2. On July 25, 2014, after receiving the complaint from Ms. Tierney, the Board conducted an emergency meeting, and based upon the allegations contained in the Complaint filed by the BPH, the Board voted to summarily suspend the license of Plaintiff, issuing a Determination of Probable Cause and Order for Summary Suspension. *See* Determination of Probable Cause and Order for Summary Suspension dated July 25, 2014. *See* West Virginia Board of Osteopathic Medicine Conference Call Board Meeting Minutes, July 25, 2014, p. 2; *see also* Deposition Transcript of Diana Shepard; *see also* Deposition Transcript of Ernest Miller, D.O.

3. The Board's vote was based on the belief and determination that Plaintiff posed "an immediate danger to the public if [his] practices were to continue." *Id.*

4. Upon the issuance of the summary suspension of Plaintiff's license, his then-counsel, Richard Jones, called the Board's then-counsel, Jennifer Akers, requesting a meeting with her to discuss the summary suspension. *See Amended Affidavit of Jennifer K. Akers*. During this conversation, Mr. Jones also requested a private meeting with the members of the Board or for the Board to conduct a special meeting to discuss the summary suspension. *Id.*

5. Fourteen days after his summary suspension was issued, the Plaintiff authored a letter that was sent via U.S. Mail to the Board and stated in pertinent part, as follows, with regard to conducting a hearing related to his summary suspension:

> . . . I would like to request a hearing before the Board as soon as possible. My lawyer and I are happy to work with the Board to schedule a hearing for a mutually agreeable date. In the meantime, I request that the Board address my suspension at an informal meeting. I would like an opportunity to provide a verbal statement to the Board.

See Dr. Chalifoux Letter to the Board Dated August 8, 2014.

6. Plaintiff's counsel, Mr. Jones, testified at various points throughout his discovery deposition in this case that it was his belief that the matter should be resolved informally. A formal hearing was never held by the Board.

7. On August 21, 2014, Plaintiff filed Civil Action No. 14-C-1504, which was a Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief. A hearing on Plaintiff's Petition for Injunctive Relief was held before the Circuit Court of Kanawha County, WV (Judge King) on August 27, 2014.

8. On August 28, 2014, Judge King entered an order granting a temporary injunction, lifting the summary suspension of Plaintiff's license, as if it had not occurred.

9. On October 26, 2015, the Board issued an Order of Dismissal which found that there was no probable cause to believe that Dr. Chalifoux acted unprofessionally or that he demonstrated a lack of professional competence to practice medicine.

10. On June 27, 2016, the Plaintiffs filed their Complaint in this matter against the Board, Ms. Shepard, the West Virginia Department of Health and Human Resources, the West Virginia Bureau of Public Health, and Letitia Tierney, M.D., JD, in this matter. The claim asserted in the Complaint against the Board and Ms. Shepard was alleged as follows:

> 94. BOM and Shepard had a duty to afford Plaintiffs due process including notice of any complaint against it and an opportunity to be heard prior to any suspension of his license.
>
> 95. BOM and Shepard breached said duty by summarily suspending Dr. Chalifoux's license without ever conducting a hearing.

96. As a direct and proximate result of BOM and Shepard's breach of said duty, Plaintiffs suffered damages, including, but not limited to, lost wages and earning capacity, attorneys' fees and expenses, loss of reputation, increased medical malpractice insurance premiums, emotional distress, aggravation, annoyance, and inconvenience and such other damages as will come to light through discovery.

See, Complaint at ¶¶ 94-96.

11. Co-Defendants West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health, and Letitia Tierney, M.D., JD, were granted summary judgment on February 6, 2018, and dismissed with prejudice from this matter.

12. On July 27, 2018, the Board and Ms. Shepard moved for summary judgment on four grounds: (1) qualified immunity; (2) collateral estoppel and/or res judicata; (3) quasi-judicial immunity; and (4) negligence claim fails as a matter of law.

CONCLUSIONS OF LAW

1. Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment "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 judgment as a matter of law." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 878-879 (W. Va. 1996). "Summary judgment is not a remedy to be exercised at the Circuit Court's option: it *must be granted when there is no genuine disputed issue of material fact.*" *Id.* at 878 (emphasis added).

2. "In other words, the circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a

genuine issue for trial." *Mack-Evans v. Hilltop Healthcare Ctr.*, 700 S.E.2d 317, 321 (W. Va. 2010) (quoting Syl. Pt. 3, *Painter v. Peavy*, 451 S.E.2d 755 (1994)).

3. A party moving for summary judgment "must make a preliminary showing that no genuine issue of material fact exists." *Powderidge Unit Owners Ass'n.* at 878-879. "The movant does not need to negate the elements of the claims on which the non-moving party will bear the burden at trial." *Id.* at 879 (citation omitted). Rather, the movant's burden is "only [to] point to the absence of evidence supporting the non-moving party's apparent case." *Id.* (citation omitted). If the non-moving party meets this burden, "the non-movant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a jury worthy issue." *Id.* (emphasis added). "To meet the burden, the non-moving party must identify specific facts in the record and articulate the precise manner in which that evidence supports its claim." *Id.*

4. Further, "[s]ummary judgment is appropriate where the record as a whole could not lead a rational trier of fact to find for the nonmoving party such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has a burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

A. Res Judicata

5. With regard to the doctrine of *res judicata*, the Supreme Court of Appeals of West Virginia has established the following standard:

> [a]n adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject matter of the action.

Lloyd's, Inc. v. Lloyd, 225 W. Va. 377, 384, 693 S.E.2d 451, 458 (2010) (quoting Syl. Pt. 1, *Conley v. Spillers*, 171 W, Va, 584, 301 S.Ed. 216 (1983)).

6. Claims are barred under this doctrine when there was a prior final adjudication on the merits, both actions involved the same parties, and "the cause of action identified for resolution in the subsequent proceeding [was] either . . . identical to the cause of action determined in the prior action or [was] such that it could have been resolved, had it been presented, in the prior action." *Lloyd's, Inc.*, 225 W.Va. at 384 (quoting Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997)).

7. Further:

> An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but *as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action.* It is not essential that the matter should have been formally put in issue in a former suit, but *it is sufficient that* the *status* of the suit was such that *the parties might have had the matter disposed of on its merits.* An erroneous ruling of the court will not prevent the matter from being *res judicata.*

Point 1, Syllabus, *Sayre's Adm'r v. Harpold*, 33 W.Va. 553 [11 S.E. 16 (1890)]; Syllabus Point 1, *In re Estate of McIntosh*, 144 W.Va. 583, 109 S.E.2d 153 (1959).

8. Here, the Plaintiff asserted a claim against the Board and Ms. Shepard for not conducting a hearing prior to the summary suspension and thereafter. *See generally*, Complaint. Plaintiff previously filed Civil Action 14-C-1504, which was a Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief on August 21, 2014, which sought to enjoin the enforcement of the Board's summary suspension of July 25, 2014. In part, the Plaintiff asserted that he was not afforded a hearing prior to his summary suspension and thereafter.

9. On August 27, 2014, the Court held a hearing in Civil Action 14-C-1504 on the Plaintiff's Petition, and the issue of a hearing related to the summary suspension was addressed by the Circuit Court. *See* Plaintiffs' Response to Defendants, West Virginia Board of Osteopathic

Medicine and Diana Shepard's Motion for Summary Judgment; *see* also Defendants' Reply to Plaintiffs' Response to Defendants, West Virginia Board of Osteopathic Medicine and Diana Shepard's Motion for Summary Judgment. The Circuit Court of Kanawha County (Judge King) granted preliminary injunctive relief on or about August 28, 2014, restoring his license to practice osteopathic medicine.

10. Throughout the litigation before Judge King, facts regarding the harm Dr. Chalifoux suffered in regard to losing his Medicaid provider status, his increased insurance costs, and various other harms were raised and discussed, though no formal cause of action in regard to those damages was brought.

11. Thereafter, the Circuit Court dismissed, with prejudice, any and all claims between the parties. *See* Circuit Court's Order Dated November 27, 2016. Notably, the November 27, 2016 Order was based on Dr. Chalifoux's own motion to dismiss filed on November 9, 2015, and the subsequent hearing on the motion. The Order specifically noted that the parties represented to the Court that all claims between the parties had been compromised and settled.

12. Applying the applicable law to the case at hand, it is clear that largely the same evidence Dr. Chalifoux used in the matter before Judge King would support his action in this matter. Further, both the matter before Judge King and the matter before this Court relate to the same time period and the same dealings between the same parties. Thus, the claims before this Court are based upon the claims before Judge King that were pursued to a final order and not appealed. This is exactly what the doctrine of res judicata prohibits. Therefore, the Court concludes as a matter of law that any cause of action based on providing a hearing regarding the summary suspension of the Plaintiff's license was raised by the Plaintiff in Civil Action 14-C-1504 and such an issue was adjudicated on the merits by Judge King's November 27, 2016 Order dismissing the

case with prejudice. Simply put, even though Dr. Chalifoux now puts forth an additional cause of action for damages that was not asserted before Judge King, the Court concludes that the Plaintiff in this matter is precluded from re-litigating the issues and claims that could have been asserted and litigated in Civil Action 14-C-1504, had they been presented, and the Defendants are entitled to summary judgment on the basis that the Plaintiff's claims in this case are barred by the doctrine of *res judicata*.

13. Though the Court finds and concludes that the doctrine of *res judicata* bars Plaintiffs claims and is dispositive, the Court will nevertheless address the remaining grounds for summary judgment put forth by the Defendants.

B. Qualified Immunity

14. "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all." *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). Issues of immunity are ultimately issues for the Court to determine. *Id.* at Syl. Pt. 1.

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

16. "If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform act 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. 6, *W. Va. Reg'l Jail and Correctional Facility Auth. V. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (quoting Syl. Pt. 4, *Clark v. Dunn, supra.*) (additional citation omitted).

17. 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 accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992).

18. Qualified immunity is "justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." We have further explained that "[t]he purpose of such official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make officials unduly timid in carrying out their official duties." *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699, 701 (2018).

19. In light of these standards, qualified immunity determinations often center upon whether a decision was discretionary or nondiscretionary. *Markham v. W. Virginia Dep't of Health & Hum. Res.*, No. 19-0163, 2020 WL 2735435, at *5 (W. Va. May 26, 2020) (internal citation omitted).

20. In this case, there are two actions by the Board that must be analyzed. The first is the Board's decision to summarily suspend Dr. Chalifoux's license. The second is the Board's failure to conduct a hearing within 15 days as required by West Virginia Code of State Rules § 24-6-5.17, which states that upon the decision to summarily suspend the license of an osteopathic

physician, "[t]he Board shall provide a hearing on the necessity for the summary action within fifteen (15) days after the suspension. The Board shall render its decision within five (5) days of the conclusion of a hearing under this section."

21. The Court starts its analysis with the inquiry whether the Board (1) acted within its discretion in summarily suspending Plaintiff's license; and (2) whether that discretionary decision violated any clearly established law of which a reasonable Board member would have known, or otherwise acted fraudulently, maliciously, or oppressively.[1] In absence of such a showing by Plaintiffs, both the Board and its officials or members charged with such act or omission are immune from liability. *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B., supra.* at 507.

22. Under West Virginia Code § 30-1-8(e), the Court concludes that the Defendants are statutorily authorized to take action upon the license of an osteopathic physician. Moreover, Defendants have specific statutory authorization and authority pursuant to West Virginia Code § 30-1-8(e)(1) to summarily suspend an osteopathic physician's license without a hearing if the Board believes that the continued practice of the physician constitutes an immediate danger to the public.

23. Under West Virginia Code of State Rules § 24-6-5.17, the Court concludes as a matter of law that "[t]he Board may suspend or refuse to renew a license pending a hearing if the health, safety or welfare of the public necessitates such summary action."

24. The Court concludes Plaintiff has provided no evidence that the Defendants were acting outside the scope of their jurisdiction. In fact, Plaintiff admitted that the Board is tasked

[1] The Court concludes that Plaintiff has neither alleged nor provided any evidence showing fraudulent, malicious, or oppressive conduct by Defendants.

with the duty of protecting the public health as part of their rules. *See* Plaintiff's Deposition Transcript at p. 809, ln. 15-19.

25. Therefore, the Court concludes as a matter of law that Defendants were acting within their discretion when they issued the summary suspension.

26. The next step is to determine whether Defendants violated any clearly established law of which a reasonable Board member or official of the Board would have known, which would negate the application of qualified immunity in this case. To determine this, the Court must consider, whether there was a clearly established law or right.

27. The failure to identify a violation of a clearly established law by Defendants is "a fatal flaw" to Plaintiffs' claims. *See e.g. W. Va. State Police v. Hughes*, 238 W. Va. 406, 796 S.E.2d 193 (2017) (qualified immunity served as a bar to liability for negligent acts of state agency, officers, and/or employees in the absence of the identification of violations of clear legal or constitutional rights); *W. Va. Bd. Of Educ. V. Marple*, 236 W. Va. 654, 667, 783 S.E.2d 75, 88 (failure to identify violations of clearly established statutory or constitutional right in an action for defamation, false light, and breach of contract, such that qualified immunity barred the claims); *A.B., supra.* at 755 (failure to identify a clearly established law, statute, or right that the state agency violated through its training, supervision, and retention of an employee was fatal to the claim).

28. A "clearly established" law is one which defines a "clearly established right." *A. B.*, 234 W. Va. at 492. A right is considered "'clearly established' when its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (additional citations omitted). Critically, sources of law that are too vague or abstract will not suffice to defeat qualified

immunity. In the absence of such a showing, both the Board and its members or officials charged with such acts or omissions are immune from liability. *A.B., supra.* at 507.

29. The Court concludes as a matter of law that the Defendants did not violate any clearly established law of which a reasonable Board member would have known in regard to summarily suspending Dr. Chalifoux's license. While Dr. Chalifoux argues that his right to due process is a clearly established right, as discussed below, West Virginia Code of State Rules § 24-6-5.17 established that a hearing be provided to a doctor whose license is summarily suspended within 15 days. Such a rule strikes a balance between Dr. Chalifoux's due process rights to notice and a hearing while protecting the ability of the Board to act swiftly when it decides the public is at risk.

30. Turning to the Board's failure to provide Plaintiff with a hearing within 15 days after the summary suspension, West Virginia Code of State Rules § 24-6-5.17, as discussed previously, states that upon the decision to summarily suspend the license of an osteopathic physician, "[t]he Board shall provide a hearing on the necessity for the summary action within fifteen (15) days after the suspension. The Board shall render its decision within five (5) days of the conclusion of a hearing under this section."

31. The Court must first determine whether the decision by the Board to not hold a hearing within 15 days after issuing the summary suspension was a discretionary decision by the Board. A plain reading of West Virginia Code of State Rules § 24-6-5.17, including the use of the word "shall" instead of "may" clearly indicates that the Board had a non-discretionary duty to provide a hearing within 15 days following the summary suspension of Dr. Chalifoux's license. Such an interpretation of the rule strikes a balance between Dr. Chalifoux's due process rights to

notice and a hearing while protecting the ability of the Board to act swiftly when it decides the public is at risk.

32. The Board makes much of the fact that Dr. Chalifoux's attorney desired to resolve the matter informally and did not provide the Board with dates for a hearing. However, the Court in not persuaded that those issues overcome the affirmative duty of the Board to, at the very least, schedule a hearing within 15 days after the summary suspension pursuant to § 24-6-5.17. The Board has not established that Dr. Chalifoux or his counsel waived their right to a hearing within 15 days.

33. Further, Dr. Chalifoux has alleged that because of the Board's failure to provide him a hearing within 15 days, he was damaged in that once his license was suspended for 30 days, the Board was obligated to report his suspension to the National Practitioner's Data Bank. In fact, 33 days passed between the time of the issuance of the summary suspension and the time that Judge King ultimately reinstated Dr. Chalifoux license. Such a reporting had an adverse impact on Dr. Chalifoux's ability to obtain privileges, malpractice insurance, and bill Medicaid. Had the Board conducted the hearing within 15 days as required and found, as it ultimately did in its October 26, 2015 Order dismissing the Complaint against Dr. Chalifoux, that there was no probable cause as to the allegations against Dr. Chalifoux, such an adverse impact would not have occurred.

34. Accordingly, while the Board is shielded by qualified immunity for its discretionary decision to summarily suspend Dr. Chalifoux's license, the Board is not shielded by qualified immunity for its failure to perform its non-discretionary duty to hold a hearing within 15 days of the summary suspension.

C. **Quasi-Judicial Immunity**

35. The Supreme Court of the United States has held that the special functions of some governmental officials require that they be exempted completely from such liability. *See Butz v. Economou*, 438 U.S. 478, 508, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978) (recognizing "that there are some officials whose special functions require a full exemption from liability"). Such officials include judges performing judicial acts within their jurisdiction, *see Pierson v. Ray*, 386 U.S. 547, 553-54, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967), prosecutors performing acts "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), and "quasi-judicial" agency officials whose duties are comparable to those of judges or prosecutors when adequate procedural safeguards exist, *see Butz*, 438 U.S. at 511-17.

36. There is no decision on point from the Supreme Court of Appeals of West Virginia that specifically applies the doctrine of quasi-judicial immunity to a medical licensure board in this State.

37. The judicial function test is used to determine quasi-judicial immunity from liability. Quasi-judicial agencies and their officers are entitled to quasi-judicial immunity in one of two ways:

> first, immunity might apply when they are sued for engaging in quasi-judicial functions, that is, functions that are similar to those a judge performs, and the touchstone of this analysis is whether the officer is engaged in discretionary functions, such as resolving disputes between parties, or authoritatively adjudicating private rights, and the second way of obtaining quasi-judicial immunity is engaging in a nondiscretionary or administrative function, but at the explicit direction of a judicial officer.

46 Am. Jur. 2d Judges § 63 (internal citations omitted).

38. In *Parkulo v. West Virginia Bd. of Probation & Parole*, 199 W. Va. 161, 179, 583 S.E.2d 507, 525 (1996), the Supreme Court of Appeals of West Virginia held that the Board of Probation and Parole, being a quasi-judicial body, is entitled to absolute immunity from tort liability for acts or omissions in the exercise of its judicial function, unless such immunity is expressly waived by the applicable insurance contract. The Court reasoned that the function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administrator. It is essential to the proper administration of criminal justice that those who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit; in other words, that such official should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations. *Parkulo*, 199 W. Va. at 179, 583 S.E.2d at 525.

39. Under our facts, the Court concludes as a matter of law that the Board is a quasi-judicial agency created for the purpose regulating the practice of osteopathic medicine and surgery in the State of West Virginia. *W. Va. Code § 30-14-1, et seq.* Likewise, the Court concludes as a matter of law that Diana Shepard is a public official as the Executive Director of the Board.

40. Applying the factors established by the U.S. Supreme Court in *Butz*: (1) the Court concludes that the Board and Ms. Shepard were performing quasi-judicial functions in the summary suspension of the Plaintiff's license functions as they were engaging in a discretionary functions similar to those which a judge performs; (2) the Court concludes that there exists a strong need for the Board and its officials to be free from harassment and intimidation from private lawsuits while carrying out their quasi-judicial duties; and (3) the Court concludes there exists procedural

safeguards pursuant to the West Virginia Code of State Regulations that govern the regulation of osteopathic physicians in West Virginia.

41. However, there is still the issue of whether the Board's failure to provide a hearing to Dr. Chalifoux within 15 days as required West Virginia Code of State Rules § 24-6-5.17 is protected by quasi-judicial immunity.

42. The Court concludes that (1) the Board and Ms. Shepard were not performing a quasi-judicial function in the failure of the Board and its officials to provide Dr. Chalifoux with a hearing within 15 days after the summary suspension of his license as it was not engaging in a discretionary function that is similar to that which a judge performs; (2) the Court concludes that a strong need does exist to hold the Board and its officials accountable for their failure to carry out their non-discretionary duties, such as those found in § 24-6-5.17, which protect the due process rights of those over whom the board has authority; and (3) the Court concludes that procedural safeguards do not exist to adequately address such an issue as West Virginia Code of State Rules § 24-6-5.17 is itself a procedural safeguard of Dr. Chalifoux's due process rights.

43. Accordingly, while the Board and its officials are shielded by quasi-judicial immunity for exercising their discretion to summarily suspend Dr. Chalifoux's license, the Board and its officials are not protected by quasi-judicial immunity for their failure to perform their non-discretionary, non-judicial duty to provide Dr. Chalifoux with a hearing within 15 days after summarily suspending his license.

D. Negligence

44. The Supreme Court of Appeals of West Virginia has long held that "[i]n order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for

negligence will lie without a duty broken." *Aikens v. Debow*, 208 W. Va. 486, 490, 541 S.E.2d 576, 580 (2000). Critically, the determination of whether a defendant in a given case owes a duty to the plaintiff is not a factual question for the jury. *Id.* Instead, "the determination of whether a plaintiff is owed a duty of care by the defendant must be rendered as a matter of law by the court." *Id.*

45. Regarding whether the Board is permitted to summarily suspend the license of an osteopathic physician in this State, West Virginia Code § 30-1-8(e)(1) states as follows:

> (e) Notwithstanding any other provision of law to the contrary, no certificate, license, registration or authority issued under the provisions of this chapter may be suspended or revoked without a prior hearing before the board or court which issued the certificate, license, registration or authority, except:
>
> (1) A board is authorized to suspend or revoke a certificate, license, registration or authority ***prior to a hearing*** if the person's continuation in practice constitutes an immediate danger to the public;

West Virginia Code § 30-1-8(e)(1) (emphasis added).

46. Defendants assert that Plaintiff's claim is a negligence claim because the language of the Complaint references a duty, breach, and damages proximately caused by the alleged breach of a duty owed. *See* Complaint. In particular, the Plaintiff alleged that the Board and Ms. Shepard owed a duty to conduct a hearing prior to his license being summarily suspended. The Plaintiff further alleges that Defendant owed a duty to conduct a hearing within 15 days of his license being summarily suspended. The Plaintiff's claim in regard to the Defendants' duty to conduct a hearing prior to the summary suspension of his license conflicts with West Virginia Code § 30-1-8(e)(1), which clearly authorizes the Board to summarily suspend the Plaintiff's license *without* a hearing.

47. Based upon the plain language of West Virginia Code § 30-1-8(e)(1), the Court concludes as a matter of law that the Board and Ms. Shepard owed no duty of care to have a hearing

before the summary suspension of the Plaintiff's license after finding that Dr. Chalifoux's practice may be a danger to the public.

48. However, as discussed above, West Virginia Code of State Rules § 24-6-5.17 affirmatively places a duty on the Defendants to hold a hearing within 15 days of the suspension if the summary suspension mechanism is used.

49. Based upon the plain language of West Virginia Code of State Rules § 24-6-5.17, the Court concludes as a matter of law that the Board and Ms. Shepard owed a duty to Plaintiff to conduct a hearing within 15 days of the summary suspension.

50. Thus, the Court concludes that the Plaintiff's claim, as described by the Defendants, does not fail a matter of law, and the Defendants are not entitled to summary judgment on this basis.

RULING

WHEREFORE, for the reasons set forth herein, the Court **GRANTS** Defendants, West Virginia Board of Osteopathic Medicine and Diana Shepard's, Motion for Summary Judgment. The Court **ORDERS** that Defendants, West Virginia Board of Osteopathic Medicine and Diana Shepard be **DISMISSED WITH PREJUDICE** from this case and this matter be removed from the Court's docket.

The exceptions and objections of the Plaintiffs are hereby noted and preserved. This Order shall be considered a final appealable order.

The Clerk is ordered to forward a copy of this Order to all counsel of record.

Entered this 4th day of October, 2021.

Jennifer F. Bailey, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5 DAY OF October 2021
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROLAND F. CHALIFOUX, JR., D.O., individually and
ROLAND F. CHALIFOUX, JR., D.O., PLLC,
D.B.A Valley Pain Management Clinic,

Plaintiff,

v.

Civil Action No. 16-C-844
Honorable Jennifer Bailey

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES;
WEST VIRGINIA BUREAU FOR PUBLIC HEALTH;
LETITIA TIERNEY, MD, JD, individually and in her capacity as former WV Commissioner and State Health Officer; **WEST VIRGINIA BOARD OF OSTEOPATHIC MEDICINE; and DIANA SHEPARD,** individually and in her capacity as Executive Director for the West Virginia Board of Osteopathic Medicine,

Defendants.

ORDER GRANTING DEFENDANTS WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES, WEST VIRGINIA BUREAU FOR PUBLIC HEALTH, AND LETITIA TIERNEY'S MOTION FOR SUMMARY JUDGMENT

On November 3, 2017, came the Plaintiffs, Roland F. Chalifoux, Jr., D.O., and Roland F. Chalifoux, Jr., D.O., PLLC, in person and by counsel, Scott H. Kaminski and Kaminski Law, PLLC, and came the Defendants, the West Virginia Department of Health and Human Resources, the West Virginia Bureau for Public Health, and Letitia Tierney, MD, JD (hereinafter referred to collectively as "DHHR" unless otherwise stated), by counsel, Natalie C. Schaefer, Caleb B. David, and Shuman, McCuskey & Slicer, PLLC, and came the Defendants, the West Virginia Board of Osteopathic Medicine and Diana Shepard, by counsel, Perry W. Oxley, Brittany T. Harden, and Anspach Meeks Ellenberger, LLP, for a hearing upon the DHHR Defendants' Motion for Summary Judgment. The Court ordered the parties to submit supplemental briefs following the

conclusion of Plaintiff's and Shepard's depositions by January 31, 2018. All relevant parties have had the opportunity to submit Supplemental Briefs. After hearing the arguments of counsel, reviewing the DHHR Defendants' Motion for Summary Judgment, Plaintiffs' Response, the DHHR Defendants' Reply, the parties' Supplemental Briefs, and the pertinent legal authorities, and giving due consideration to the same, the Court does hereby **GRANT** the DHHR Defendants' Motion for Summary Judgment. The Court's decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On October 22, 2013, a patient of Plaintiffs Valley Pain Management and Dr. Roland F. Chalifoux, Jr., D.O. (collectively referred to herein as "Chalifoux") underwent an epidural with an epidurogram. The following day, that patient presented to the local hospital and was diagnosed with bacterial meningitis.

2. On October 24, 2013, the DHHR received a report regarding the patient's condition. The DHHR conducted an investigation into the meningitis outbreak, which included an inspection of Chalifoux's facility.

3. The initial inspection occurred on October 29, 2013. As a result of that inspection, the DHHR concluded that:

> The rapid onset of meningitis with respiratory flora 24 hours after an epidural injection administered by a provider who routinely did not wear a mask is highly suspicious for Iatrogenic transmission. In addition to failure to mask, Clinic A did not use safe injection practices; did not use adequate skin preparation technique; and the physician did not observe hand hygiene either before a sterile procedure or after completing the procedure ... Clinic A used preservative-free medication labeled as single-use for multiple patients ... The physician [Chalifoux] told investigators that single dose vials were often used up within one or two procedure days; however the 150 and 500 ml bags of saline were likely stored and used for a number of days. The syringe used for isohexol was a 5-ml syringe. The physician stated that he injects 5 ml into the spinal needle, and ***if he needs more than 5 ml of***

> ***isohexol, he re-enters the isohexol vial and withdraws more with the same 5 ml syringe and the same 18-gauge needle.*** In October, 2013, 7 (47%) of 15 patients undergoing epidural procedures received more than 5 ml of isohexol, suggesting the potential for blood-borne pathogen contamination of isohexol with possible transmission from one patient to another ... Nonetheless, the evidence linking the single case of meningitis with respiratory flora to infection control practices at Clinic A is very strong and a significant risk of bloodborne pathogen transmission cannot be excluded. . . . The next step for quantifying this risk is a cross match between a patient list from Clinic A and the hepatitis B, C and HIV registries for the state of West Virginia.

4. The DHHR also stated in its report that "[d]epending on the results of the cross-match, patient notification may be recommended so that patients are aware of the blood-borne pathogen exposure risk."

5. The DHHR made several recommendations as a result of the first inspection. The investigators warned Chalifoux to, among many other things, not use single-dose medications as multi-dose; use a face mask during any epidural procedures; and use "one syringe and one needle only one time."

6. DHHR conducted a second inspection on December 19, 2013. It was determined that, although Chalifoux still had several issues to correct at his clinic, he had complied with the most significant recommendations. Chalifoux provided DHHR a list of all patients he had seen in one year so that the DHHR could perform a cross match to the State's registry of Hepatitis B, Hepatitis C, and HIV documented cases.

7. The cross match was used to determine whether there were any individuals in Dr. Chalifoux's patient population that could have been the source of transmission of any blood-borne pathogens to other patients through unsafe injection practices. While there was no indication that any other patient contracted bacterial meningitis, it was confirmed that there were seven documented patients who had been diagnosed with Hepatitis C and an unknown number of confirmed patients who were diagnosed with HIV prior to becoming patients of Chalifoux.

8. After conferring with the Centers for Disease Control ("CDC"), the State of Ohio, and local health officials, the consensus was that patient notification was necessary and required. Deposition of Dr. Danae "Dee" Bixler, pp. 163, 340, 358-360; July 2, 2014 Report, p. 3. The CDC recommended patient notification due to an ethical duty to warn patients of the risk of possible blood-borne pathogen transmissions. Bixler Dep., pp. 353-354.

9. The DHHR offered Chalifoux the opportunity to provide input into the notification materials, as well as the opportunity to identify and narrow the scope of the notification to only those patients at risk. July 2, 2014 Report, p. 4. Chalifoux advised the DHHR that his attorney was concerned over liability issues and that he would not provide the requested patient information. July 2, 2014 Report, p. 4. His attorney responded to the written request for patient contact information by asserting that the patient information is confidential under HIPAA and that Chalifoux would not release that information to the DHHR. July 2, 2014 Report, p. 4; see also April 28, 2014 letters from Dr. Roland Chalifoux to Commissioner Letitia Tierney and Elgin McArdle to Commissioner Letitia Tierney.

10. Thereafter, the DHHR decided to issue a public press release in an effort to notify all possible patients of the risks. July 2, 2014 Report, p. 4; see also Bixler Dep., pp. 172, 187-188, 206-209. Several days before the issuance of the press release, the DHHR administration decided to issue an administrative subpoena to Dr. Chalifoux in an effort to obtain the contact information in lieu of a public release. Deposition of Dr. Letitia Tierney, pp. 9-10. Ultimately in that matter, the Court entered two separate Orders compelling Chalifoux to respond to the subpoena to produce patient data. Orders dated August 25, 2014, and August 10, 2015, Civil Action No. 14-C-53. Similar to the present action, Chalifoux argued that the DHHR's actions in seeking patient data was part of a personal vendetta and sought sanctions. In denying the request for sanctions, the

Court determined that, "[t]his Court does not find that the actions of the petitioner [DHHR] in pursuit of this objective have risen to the level of a patterned wrongdoing or a personal vendetta against the respondent [Chalifoux] to warrant an award of sanctions."

11. Simultaneously with the administrative subpoena, Dr. Tierney filed a Complaint with the Board of Osteopathic Medicine. Tierney Dep., pp. 185-186. Dr. Tierney testified that she felt she had no discretion in doing so. Tierney Dep., pp. 185-186. She also testified that she would have preferred Chalifoux's compliance with the DHHR's request for patient information to avoid the public press release and Board Complaint. Tierney Dep., pp. 188-189.

12. Dr. Tierney testified that the State of Ohio agreed to delay the issuance of its press release. Tierney Dep., pp. 7-8. Despite previously agreeing to delay a public press release, the State of Ohio issued its own press release in the early morning on July 21, 2014. The identity of Chalifoux's clinic was publicly identified by the State of Ohio before the DHHR issued its press release. Because the information was in the public domain, the DHHR determined it was necessary to issue its own press release.

13. Thus, after the State of Ohio's press release was issued, Dr. Tierney, acting as Commissioner of the Bureau, issued a press release stating, in part:

> Prior to November 1, 2013, Valley Pain Management reused syringes to enter vials and saline bags used for more than one patient.
>
> Tierney said Valley Pain Management continues to refuse to provide DHHR with a patient list so specific patients may be properly notified of potential risk. DHHR has issued an administrative subpoena in an effort to obtain the clinic's patient list and is prepared to institute legal action if the clinic does not comply with the subpoena.
>
> "The West Virginia Bureau for Public Health has worked very hard with our local public health partners, Ohio, Pennsylvania and the CDC to understand the risk of hepatitis B, C, or HIV for patients at Valley Pain Management, which is why access to the patient list is critical," said Tierney.

14. Dr. Tierney testified that, in issuing the press release, her concern was the "health, welfare, and benefit of the people of West Virginia." Tierney Dep., pp. 183-184. Even Chalifoux admitted that if Dr. Tierney and the DHHR had a reason to believe the investigative conclusions were accurate, the DHHR "would have been responsible for doing something. What she would have to do I guess is based upon the regulation she wants to -- which one she wants to use." Chalifoux Dep., Vol. 2, p. 609. He also conceded that the decision to "do something" would be at Dr. Tierney's discretion. Chalifoux Dep., Vol. 2, p. 609.

15. Although Chalifoux alleges in the Complaint that this press release is false, it is undisputed that the DHHR investigators concluded that Chalifoux did, in fact, reuse syringes to enter vials and saline bags used for more than one patient. Bixler Dep., pp. 167, 223-224. According to the written findings of the DHHR, unsafe injection practice was one of the bases for concluding that patients had a risk of blood-borne pathogen transmission. There are no documented objections by Chalifoux regarding the DHHR's findings that Chalifoux re-entered medication vials used on multiple patients. Bixler Dep., pp. 343-345, 357.

16. Lead investigator Dr. Dee Bixler confirmed that the information contained in West Virginia's press release is factually accurate. Bixler Dep., pp. 351-352. This was further established by the written questionnaire completed by Dr. Chalifoux on April 10, 2014, in which he admittedly reused vials of omnipaque for more than one patient which were then entered with a used syringe. Chalifoux Questionnaire dated April 10, 2014.

17. Chalifoux admitted that he had no evidence that anyone willfully, deliberately, intentionally, or recklessly provided any false information to the public. Chalifoux Dep., Vol. 2, pp. 611-612. He also conceded that he had no evidence that Dr. Tierney's action in issuing the press release were fraudulent, malicious, or oppressive. Chalifoux Dep., Vol. 2, p. 613.

18. Dr. Chalifoux also admitted that he had no evidence that any DHHR official intentionally misrepresented any factual finding contained in its report:

> Q. Do you have any reason to believe that Dr. Bixler or her team intentionally misrepresented anything in this report?
>
> A. You know, I don't think I'm at liberty to really discuss any of that. It's really something you need to ask them. This looks like just possibly some clerical mistakes or maybe not fully understanding the procedure, and that's why we told her "Maybe we should mock this."
>
> ...
>
> Q. Do you have any evidence that Dr. Bixler or her team intentionally misrepresented any of the report findings?
>
> A. Misrepresented? I don't think she mis -- again, you'd have to ask her that but, I mean, from looking at this, one would think that after having conversations with me, she would have taken a step back and maybe come back and redo things. You know, "Let's go back and let's mock this. Let me get a better understanding for this stuff."
>
> Q. But you do not have any evidence that Dr. Bixler or her team intentionally misrepresented any facts in this report.
>
> A. Well, like I said, I don't know the answer to that. All I can say is if you read the report and you read -- look at my notes and all that, these two are not adding up.
>
> ...
>
> Q. Okay. So your answer is no, you are not aware of any evidence regarding her motive or intent or her team's motive or intent.
>
> A. Exactly.

Chalifoux Dep., Vol. 1, p. 349.

19. In fact, Chalifoux characterized the press release as simply "written poorly" but not intentionally misleading:

> Q: Do you have any evidence that anybody with BPH intentionally misled the public by making the statements in the press release?

A: Again, intentionally? I'm not going to make that -- about that intention. What I'm saying is it's just poor -- it's written poorly.

Q: Well, and my question is do you have any evidence that anybody at BPH intentionally made misstatements to mislead the public?

A: I have no evidence.

...

Q: Okay. Do you have any evidence that any agent or employee of BPH intentionally defamed you in issuing the press release?

...

A: I have no evidence. I just have suspicions.

Chalifoux Dep., Vol. 2, pp. 599-600, 602.

20. On the final day of his deposition, Chalifoux was again asked whether he had any evidence to show that any employee of the DHHR acted with malice in the issuance of the press release. Dr. Chalifoux responded,

> Well, my – I guess it's more the – the circumstances around it in terms of once you have a chance to actually, you know, kind of look at what happened. For example, you know, the complaint to the board occurring at a certain time, the press release, and then – what was the other one? Press release. Complaint to the board – and then obviously the medical board, you know, making it is decision to suspend my – my license. You know, I – I was kind of going back over that timeline, and it just seems rather interesting how all of this happened at one time as opposed to in more – what I would call in more a sequential way.

Chalifoux Dep., Vol. IV, pp. 1061-62.

21. Dr. Chalifoux was also asked, "[a]ssuming that the investigation and the investigators ... were factually incorrect ... is there any other information that you are aware of, either by witness testimony or documentation, that suggests anybody with the DHHR, including Dr. Tierney, disregarded the facts, and nevertheless maliciously and purposefully intended to harm you by issuing the press release?" Dr. Chalifoux responded,

> Again, coming down the hypothesis, or whatever, my thought process at this point would be – one of the most I think documents that seems rather damning is the fact

> that on the letter – or on the complaint to the medical board, if you see that complaint to the medical board, there's no additional writing from Dr. Tierney. If you see apparently her form, there is some writing on her form.
>
> So it's a little bit confusing to me as to why should would write a bunch of little scribble notes about Ohio or whatever, when in reality, she was saying that Ohio and them were not going to do anything, but yet Ohio just all of a sudden out of the blue did a press release. I guess that – a little more research needs to go into that.

Chalifoux Dep., Vol. IV, pp. 1075-76.

22. In her deposition, Diana Shepard, the Executive Director of the West Virginia Board of Osteopathic Medicine, testified that she met with Dr. Tierney on July 16, 2014, regarding the investigation into Dr. Chalifoux's clinic. Deposition of Diana Shepard, pp. 212:10 – 13. Ms. Shepard testified that, at this meeting, it appeared to her that Dr. Tierney was very concerned for public safety. Shepard Dep., p. 213:5 – 10.

23. Ms. Shepard was asked, "[d]id Dr. Tierney at any time, whether it was at the meeting – the initial meeting you had on July 16th or anytime after that. Did she ever express to you any sort of ill feelings or dislike for Dr. Chalifoux personally?" Ms. Shepard answered, "[n]o." Shepard Dep., p. 214:21.

CONCLUSIONS OF LAW

1. The DHHR Defendants have moved this Court for summary judgment on two primary grounds: (1) they are entitled to qualified immunity; and (2) Plaintiffs' defamation claim fails as a matter of law.[1]

2. The Supreme Court of Appeals of West Virginia has held that "[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to

[1] Although the DHHR Defendants also asserted sovereign immunity for any liability for any amount in excess of its pro rata share of fault, this issue is not completely dispositive. Thus, because this Court is dismissing the case in its entirety, this issue does not need to be ruled upon at this time.

find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). This is particularly true when immunities are involved. "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all." *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). Issues of immunity are ultimately issues for the Court to determine. Syl. Pt. 1, *id.*

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

4. "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. 6, *W. Va. Reg'l Jail and Correctional Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014), *quoting* Syl. Pt. 4, *Clark v. Dunn*, *supra*.); Syl. Pt. 8, *WVDHHR v. Payne*, 231 W.Va. 563, 746 S.E.2d 554 (2013) (additional citation omitted).

5. If the complained-of actions fall within the discretionary functions of an agency or an official's duty, the inquiry does not end. There is no immunity if the discretionary actions violate clearly established laws of which a reasonable official would have known: "[a] public executive official who is acting within the scope of his authority and is not covered by the

provisions of [ ] [the West Virginia Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known[.]" Syllabus, *in part, State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992); Syl. Pt. 3, *in part, Clark v. Dunn, supra.*

6. Thus, the fundamental inquiry is whether the DHHR (1) acted within its discretion in issuing its Press Release; and (2) whether those discretionary decisions violated any clearly established law of which a reasonable DHHR employee would have known, or otherwise acted fraudulently, maliciously, or oppressively. In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 507, 766 S.E.2d 751, 766 (2014).

7. The Court must first determine whether the DHHR Defendants acted within their discretion in issuing the press release. The Court finds that the DHHR Defendants were acting within their discretion.

8. West Virginia Code of State Rules § 64-7-20.3 states that, "[i]n the case of a licensed facility, the Commissioner or a local health officer may release confidential information to the public **when there is a clear and convincing need to protect the public's health as determined necessary by the Commissioner**. W. Va. Code. St. R. § 64-7-20.3 (emphasis added).

9. Thus, it is clear that the DHHR Defendants were granted discretion to issue the press release. Dr. Tierney was exercising her discretion as Commissioner when she relied upon the findings from the Bureau for Public Health's investigation which concluded that Chalifoux's practices placed the health of the public at risk. In that role, Dr. Tierney concluded that patient notification was necessary to protect the public health. Dr. Tierney was likewise acting pursuant

to her discretion as the Public Health Officer because she believed Chalifoux's refusal to provide patient data (and thereby exposing members of the public to unknown risks of blood-borne pathogen transmission) placed the health of the public at risk.

10. Dr. Chalifoux has not provided any evidence to support the allegation that Dr. Tierney was acting outside the scope of her discretion. In fact, Dr. Chalifoux believed Dr. Tierney's decision to "do something" was within her discretion.

11. Therefore, the Court finds that the DHHR Defendants were acting within their discretion when they issued the press release.

12. The Court must next determine whether the DHHR Defendants violated any clearly established law of which a reasonable DHHR employee would have known. The Court finds that the DHHR Defendants did not violate any clearly established law of which a reasonable DHHR employee would have known. To the contrary, throughout the course of the underlying investigation, DHHR officials repeatedly relied upon the applicable regulations that authorized all actions taken.

13. The failure to identify a violation of a clearly established law by the DHHR Defendants is "a fatal flaw" to all claims. *See, e.g., West Virginia State Police v. Hughes*, ___W. Va.___, 796 S.E.2d 193 (2017) (qualified immunity served as bar to liability for negligent acts of state agency, officers, and/or employees in the absence of the identification of violations of clear legal or constitutional rights); *West Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 667, 783 S.E.2d 75, 88 (failure to identify violations of clearly established statutory or constitutional right in an action for defamation, false light, and breach of contract such that qualified immunity barred the claims); *A.B.*, 234 W. Va. at 516, 766 S.E.2d at 755 (failure to identify a clearly established law, statute, or right that the state agency violated through its training, supervision, and

retention of an employee was fatal to the claim); *West Virginia Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 574, 746 S.E.2d 554, 565 (2013) (state agencies entitled to qualified immunity regarding claims of negligent licensure, monitoring, and enforcement of a day habilitation center because no specific law, statute, or regulation was identified that was violated by the agencies); *W. Va. Bd. of Educ. v. Croaff*, 2017 W. Va. LEXIS 338 (May 17, 2017).

14. A "clearly established" law in this context is one which defines a "clearly established right." *A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 776. A right is considered "'clearly established' when its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.*, *quoting Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (additional citation omitted). Critically, sources of law that are too vague or abstract, or that do not establish a right, will not suffice to defeat qualified immunity. In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 507, 766 S.E.2d 751, 766 (2014).

15. The "clearly established law" relied upon must also have a causal connection to the ultimate harm in order to defeat qualified immunity. *A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 776. "Clearly established law" that is too remote to the underlying harm will not suffice. *Id.*

16. Here, the applicable regulations expressly authorize the DHHR's actions under circumstances such as those in the case *sub judice*:

W. VA. CODE ST. R. § 64-7-7. OTHER REPORTABLE EVENTS: DISEASE OUTBREAKS OR CLUSTERS

7.4. An appropriate investigation generally includes:

7.4.d. Case-finding, to include:

> 7.4.d.3. Public notification to identify and report additional cases, only if other means of case-finding are not feasible;
>
> 7.7. The Commissioner or the local health officer shall not disclose the identity of the community, school, camp, daycare, health care facility, restaurant or food establishment or other setting where an outbreak or cluster of disease occurs, unless the release is necessary to inform the public to take preventive action to stop the spread of disease or to notify providers or laboratories to identify additional cases of disease. Data on community outbreaks and clusters may be released by the Commissioner in aggregate on a regular basis, identifying the county of occurrence of the outbreak or cluster. Data on healthcare-associated outbreaks and clusters may be released by the Commissioner in aggregate on a regular basis, identifying the surveillance region of occurrence of the outbreak or cluster.
>
> W. VA. CODE ST. R. § 64-7-20. CONFIDENTIALITY.
>
> 20.3. In the case of a licensed facility, the Commissioner or a local health officer may release confidential information to the public when there is a clear and convincing need to protect the public's health as determined necessary by the Commissioner.

17. An "outbreak" is defined as "[t]he occurrence of more cases of disease than expected in a given area among a specific group of people over a particular period of time or an epidemic." W. Va. CSR § 64-7-2. The DHHR officials were clear that this single case of bacterial meningitis qualified as an outbreak. Bixler Dep., p. 258; Tierney Dep., pp. 190-194; Deposition of Melissa Scott, p.102.

18. It is evident from the above regulations that the DHHR Defendants were acting well within the applicable regulations when issuing the public health notification. Indeed, the Commissioner is expressly permitted to "release confidential information to the public when there is a clear and convincing need to protect the public's health ***as determined necessary*** by the Commissioner." W. Va. Code St. R. § 64-7-20 (emphasis added). The precise language of the applicable regulation defines this conduct as discretionary as determined by the Commissioner. Accordingly, the Court finds that the DHHR Defendants did not violate any clearly established law of which a reasonable DHHR employee would have known.

19. Thus, to avoid qualified immunity, Plaintiffs must show sufficient evidence to establish that the DHHR Defendants' actions in issuing the press release were fraudulent, malicious, or oppressive. *W. Va. Dep't of Educ. v. McGraw*, 800 S.E.2d 230, 240, 2017 W. Va. LEXIS 336 (W. Va. May 17, 2017).

20. Chalifoux admitted that he had no evidence that Dr. Tierney or any DHHR official acted fraudulently, maliciously, or oppressively. Chalifoux Dep., Vol. 2, p. 602. He stated that he only had "suspicions." Chalifoux Dep., Vol. 2, p. 602. Speculation or opinion is insufficient to overcome qualified immunity.

21. On the final day of his deposition, Dr. Chalifoux testified that the only "evidence" of malice was that the sequence and timing of events seemed "rather interesting" and that Dr. Tierney's Complaint to the West Virginia Board of Osteopathic Medicine did not contain the same "scribble notes" as the Complaint received via a FOIA request. Again, neither of these assertions is evidence of malice.

22. Therefore, the Court finds that the DHHR Defendants are protected from suit by qualified immunity and, therefore, are entitled to summary judgment.

23. The Court will also address the DHHR Defendants' second argument: that Plaintiffs' defamation claim fails as a matter of law.

24. The elements for a defamation action by a private individual are: (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury. Syl. Pt. 1, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983).

25. In *Giles v. Kanawha Cnty. Bd. of Educ.*, 2018 W. Va. LEXIS 20, Civ. Action No. 17-0139 (W. Va. Jan. 5, 2018), the plaintiff alleged false light, invasion of privacy, and defamation

against the defendants after a school board member commented about the plaintiff's involvement in a criminal investigation. *Id.* at *1 – 2. The Giles' Complaint specifically mentioned that the news media had covered the story of the criminal charges prior to the board member's comments. *Id.* at *6. In affirming dismissal of the Complaint, the Court stated that "it would be disingenuous to conclude that [defendant's] statements ... somehow 'gave publicity' to these already widely publicized facts." *Id.* at *6.

26. Similarly, in the instant case, it is undisputed that the DHHR's publication of its press release occurred after the State of Ohio had already issued a press release. Dr. Chalifoux admitted that the first press release was actually issued by Ohio. Chalifoux Dep., Vol. 2, p. 605. Dr. Tierney also testified that the Ohio press release was the first press release. Tierney Dep., pp. 7-8. Dr. Bixler, the lead investigator for the Bureau for Public Health, testified that the DHHR and the State of Ohio had agreed not to issue a press release, but Ohio issued its press release anyway.

27. The Ohio press release identified Valley Pain Management. Chalifoux Dep., Vol. 2, pp. 605-607. It also stated that Dr. Chalifoux's clinic was the subject of an investigation. Chalifoux Dep., Vol. 2, pp. 605-607. Ohio's press release stated that Dr. Chalifoux's clinic "re-used needles/syringes to administer pain medications and saline solutions, and used the same pain medication vial for multiple patients." Chalifoux Dep., Vol. 2, pp. 605-607; see also State of Ohio Press Release. While the DHHR used different—and more precise—language in its press release, the DHHR's press release did not give publicity to any facts not already in the public domain. Thus, it would be disingenuous to conclude that the DHHR's statements somehow gave publicity to the already widely publicized facts contained in Ohio's press release.

28. Therefore, Plaintiffs' defamation claim fails as a matter of law, and the DHHR is entitled to summary judgment.

29. Accordingly, the Court does hereby **GRANT** the DHHR Defendants' Motion for Summary Judgment and **ORDERS** this matter dismissed from the Court's docket as to all the DHHR Defendants.

The exceptions and objections of any party aggrieved by this Order are noted and preserved.

The Court further directs the Clerk to forward a certified copy of this Order to counsel of record at the addresses listed below and remove this case from the active docket of the Court.

ENTER this 5th day of February, 2018.

Jennifer F. Bailey
THE HONORABLE JENNIFER BAILEY

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS:
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 7 DAY OF February, 2018
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA