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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



Case No. 21-0902
(Circuit Court of Kanawha County, West Virginia
Civil Action No. 16-C-844

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

v.

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

PETITIONERS' BRIEF

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Valley Pain Management Clinic*

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I. ASSIGNMENTS OF ERROR

1. **The Circuit Court of Kanawha County erred in granting Defendants West Virginia Board of Osteopathic Medicine and Diana Shepard's Motion for Summary Judgment.**

The Circuit Court of Kanawha County erred in finding there were no genuine issues of material fact relative to Chalifoux' claims against the West Virginia Board of Osteopathic Medicine ("WVBOM") and Diana Shepard's (collectively referred to as the "WVBOM Respondents") Motion for Summary Judgment based on the doctrine of *res judicata*.

The Circuit Court relied upon a previous Circuit Court Order entered November 27, 2016 by the late Honorable Charles E. King, Jr. in Civil Action No. 14-C-1504 filed by Chalifoux against only WVBOM (not Shepard) upon a Verified Petition for Permanent Injunction and Motion for Temporary Restraining Order and Injunctive Relief. Said Order dismissed said Petition, nothing more.

Civil Action No. 14-C-1504 was not a Complaint for damages. It was not a Complaint against Shepard as the Circuit Court erroneously asserted at paragraph 8 of its Order. The Circuit Court further erred at paragraph 11 of its Order referring to a Motion to Dismiss Civil Action No. 14-C-1504 filed by Chalifoux whereas the Order specifically references a motion by the parties. Nothing in that Order dismissed any

claims at all against Shepard and said Order only dismissed the Verified Petition for Permanent Injunction and Motion for Temporary Restraining Order and Injunctive Relief contained in Civil Action No. 14-C-1504, not Chalifoux' claims for damages in this action.

Civil Action No. 14-C-1504 was not a final adjudication on the merits of Chalifoux' claim for damages asserted in this Civil Action, as no damages were asserted by Chalifoux in 14-C-1504, only injunctive relief. Chalifoux could not present a claim for damages in 14-C-1504, filed only weeks after his illegal summary suspension by WVBOM, because at that time, he had not yet suffered any damages. Thus, the standards of *Syl. Pt. 4 of Blake v. Charleston Area Med. Ctr.*, 498 S.E.2d 41 (W.Va. 1997) have not been met. Moreover, the instant civil action was filed on June 3, 2016, prior to the dismissal of Civil Action No. 14-C-1504 on November 27, 2016 which Order makes no reference whatsoever to the instant civil action.

Thus, *res judicata* was not established and the Circuit Court erred in relying on this doctrine as the sole basis for granting the WVBOM Defendants' Motion for Summary Judgment.

2. The Circuit Court of Kanawha County erred in granting Defendants West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health and Letitia Tierney, MD, JD's Motion for Summary Judgment.

The Circuit Court of Kanawha County erred in finding there were no genuine issues of material fact relative to Chalifoux' claims against the West Virginia Department of Health and Human Resources ("WVDHHR"), West Virginia Bureau for Public Health ("WVBPH") and Letitia Tierney, MD, JD's (collectively referred to as the "WVDHHR Respondents") Motion for Summary Judgment based on their assertion of qualified immunity. Qualified immunity only applies, if at all, to discretionary decisions. *W. Virginia Reg'l Jail and Corr. Facility Auth. v. A.B.*, 766 S.E.2d 751 (W.Va. 2014) and *Clark v. Dunn*, 465 S.E.2d 374 (W.Va. 1995).

Chalifoux maintained a claim under 64 CSR 7-7.7 which required the WVBPH and Tierney to maintain the confidentiality of any clinic that is under investigation, as was the case with Chalifoux. A Press Release by WVBPH and Tierney breached that non-discretionary duty of confidentiality.

As the Supreme Court of Appeals of West Virginia has acknowledged, "qualified immunity, as opposed to absolute immunity, is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by

public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages." *Hutchison v. City of Huntington*, 479 S.E.2d 649, 658 (W.Va. 1996). "[W]hether qualified immunity bars recovery in a civil action **turns on the objective legal reasonableness of the action assessed**, in light of the legal rules that were clearly established at the time it was taken." *Id.* at 658-9 (citing *State v. Chase Securities, Inc.* 424 S.E.2d 591 (W.Va. 1992); *Bennett v. Coffman*, 361 S.E.2d 465 (W.Va. 1987) (emphasis added)).

There are two important facts which trigger liability on the part of Defendants WVDHHR, WVBPH and Tierney despite qualified immunity. First, on March 7, 2014, a meeting occurred between WVBPH, its Ohio counterpart and the Center for Disease Control ("CDC") pertaining to the investigation of Chalifoux. WVBPH concluded that "...there is no evidence of transmission of hepatitis B, hepatitis C, or HIV in this subset of WV patients attending..." Chalifoux' clinic. The report went on to conclude that "On the basis of these findings, WV is recommending that no further action is necessary." Nevertheless, four months later, a press release was made and Tierney filed a Complaint against Dr. Chalifoux with the West Virginia Board of Osteopathic Medicine ("WVBOM"), violating her

non-discretionary duty of confidentiality. Thus, the WVDHHR Defendants were not entitled to qualified immunity and summary judgment. The Circuit Court erred in granting their Motion for Summary Judgment.

II. STATEMENT OF THE CASE

Petitioner Chalifoux is a licensed health care provider in the state of West Virginia and has been so licensed by Respondent West Virginia Board of Osteopathic Medicine ("WVBOM") since September 1, 2004. App. 6. On October 22, 2013, a patient of Petitioners underwent a Right L5 Nerve Root Adhesiolysis with an Epidurogram at Valley Pain Management in McMechen, West Virginia. App. 532, 787. Essentially, Dr. Chalifoux performs an epidural steroid injection, but also utilizes saline administered through a catheter to break up scar tissue in the subject space during the procedure. App. 787. Dr. Chalifoux testified at deposition that, during Ms. Schmidt's procedure, he wore a surgical mask as it was his customary practice to always wear a mask when performing an adhesiolysis procedure. App. 787.

Later that same evening, the patient presented to the Emergency Department at Ohio Valley Medical Center and was diagnosed and treated for bacterial meningitis. App. 532, 787-788. On or about October 24, 2013, a report regarding this patient's condition was made to Respondent West Virginia Bureau for Public Health ("WVBPH"). App. 532, 788. Following the

patient's diagnosis of bacterial meningitis and the subsequent notice to Respondent WVBPH, WVBPH conducted an investigation into this reported case of *potential* healthcare associated bacterial infection (not blood borne) and the potential for an outbreak or cluster of disease in the community. App. 532-534, 788.

On October 29, 2013, Respondent WVBPH conducted a site inspection at Petitioners' facility (the "first site inspection") and made several recommendations concerning Petitioners' practices. App. 532. Following this first site inspection, Respondent WVBPH did not conclude that Petitioners' should be closed or that any licensure action be initiated against either, but rather certain recommendations were made. App. 532. On October 28, 2013, Somu Chatterjee, M.D., MPH (a regional epidemiologist employed by the Wheeling-Ohio County Health Department) interviewed Dr. Chalifoux regarding the patient's procedure. Nowhere in his e-mail correspondence concerning that interview to the BPH, or in notes, did Dr. Chatterjee record that Dr. Chalifoux admitted that he did not wear a mask during Ms. Schmidt's procedure. App. 788.

The day after learning that the bacteria involved was *streptococcus intermedius*, Dr. Bixler (the Director of the Respondent's WVBPH's Division of Infectious Disease Epidemiology, who was charged with leading the investigation of Dr. Chalifoux)

concluded that the patient's infection was "possibly related to not wearing a mask during procedures." App. 788,807. Dr. Bixler's conclusion was apparently based upon her belief that this particular type of bacteria was commonly transmitted in healthcare settings via respiratory droplets from healthcare providers. App. 807.

On October 29, 2013, Dr. Bixler and Sherif Ibrahim, M.D. ("Dr. Ibrahim") led a site inspection (the "first site inspection") of Valley Pain Management. Dr. Bixler and Dr. Ibrahim interviewed Dr. Chalifoux. Nurses employed by the BPH and the Marshall County Health Department interviewed a nurse/office manager employed by Valley Pain Management - Ann Goas, RN. No other employees of Valley Pain Management were interviewed or questioned. App. 788.

As documented in Respondent WVBPH's December 11, 2013 report summarizing this site inspection, Dr. Bixler and Dr. Ibrahim concluded that Dr. Chalifoux did not wear a surgical mask during the patient's adhesiolysis procedure. App. 789. Dr. Chalifoux denies that he informed Dr. Bixler or Dr. Ibrahim that he did not wear a mask during the patient's procedure specifically or any adhesiolysis procedure. App. 789.

Through the entire course of Respondent WVBPH's investigation, and after notifying numerous area healthcare providers and facilities, Respondent WVBPH never identified another case of bacterial meningitis in Dr. Chalifoux's patient

population. App. 789. In cooperation with Respondent WVBPH's investigatory efforts in this regard, Dr. Chalifoux timely and without argument provided Respondent WVBPH with access to all of his patient charts for those patients who had undergone procedures in the month of October 2013. App. 789. After reviewing those charts, contacting patients, and communicating with area hospitals, Respondent WVBPH was not able to identify any other patient of Dr. Chalifoux's who had developed a bacterial infection. App. 789. In fact, in her deposition, Dr. Bixler commended Dr. Chalifoux for his initial cooperation in the investigation and explained that all communication between her division and Dr. Chalifoux ceased after his counsel responded to a letter from Respondent Tierney questioning Respondent WVBPH's rationale and authority for requesting more and more patient information from Dr. Chalifoux:

[Q:] . . . Was there anything that you asked for during the course of that first site inspection that you wanted to see while you were on site that you were not given the opportunity to see?

[A:] I have stated and will state again that Dr. - that the physician was very open and very - communicated with us completely. It was a very collegial part of the investigation. Every question we asked we got an answer to. When we asked to see vials, bags, and talk [sic] pictures of them, we were allowed to do that. It was - there was - in that - in that early phase of the investigation, there was complete

collaboration between the investigators and the physician staff.

. . .

[Q:] . . . Now, during the course of the second site inspection, did you find Dr. Chalifoux to be cooperative?

[A:] Yes.

. . .

[Q:] So with respect to the information that you needed for your crossmatch, did you receive all that information?

[A:] Yes.

[Q:] And did you receive it in a timely fashion?

[A:] Yes.

. . .

[Q:] . . . Up through the time that Dr. Chalifoux completed and returned this questionnaire to you, was Dr. Chalifoux open and cooperative with you?

[A:] He was very open and cooperative through the completion of the crossmatch. During the conversations in April, it was increasingly difficult to talk to him, and he was not as responsive.

App. 789-790, 808-814 (from Deposition of Dr.

Bixler taken in a related matter styled *Williams v. Chalifoux*).

Having found no other cases of bacterial meningitis potentially related to Dr. Chalifoux's practice during their investigation, Dr. Bixler and Dr. Ibrahim began to focus on an entirely different concern - the risk of blood borne diseases such

as hepatitis and HIV despite the fact that the initial patient did not have a blood borne disease. App. 790. Dr. Bixler claims that Dr. Chalifoux told them that he "double-dipped", i.e., that he re-used syringes to access medication vials used for more than one patient. App. 790. It is important to note that there is not a single note or other document from either Dr. Bixler or Dr. Ibrahim from their first site inspection to support this claim of double-dipping, which Dr. Chalifoux denies. App. 790-791.

Importantly, Dr. Bixler and Dr. Ibrahim never observed Dr. Chalifoux engage in this practice during either of Respondent WVBPH's two site inspections (and the associated observed procedures). App. 791. Respondent WVBPH returned to Dr. Chalifoux' office for a second site inspection on December 19, 2013 at which time Dr. Bixler observed Dr. Chalifoux perform an epidural steroid injection. App. 791. Nevertheless, Dr. Bixler and Dr. Ibrahim inexplicably developed the belief that this worrisome practice of double-dipping was regularly employed by Dr. Chalifoux. App. 791. Dr. Chalifoux denies engaging in this practice and contends that Dr. Bixler and Dr. Ibrahim's belief was mistaken. App. 791.

For reasons not completely understood by Dr. Chalifoux, Dr. Bixler and Dr. Ibrahim wrongly concluded that Dr. Chalifoux described injection practices whereby he routinely re-entered medication vials with syringes which had come into contact with

the patient's spine and then subsequently used those same vials for other patients' procedures. App. 791. Dr. Bixler and Dr. Ibrahim did not take a recorded statement from Dr. Chalifoux. App. 791. Moreover, despite the fact that several of Respondent WVBPH representatives took extensive notes during the October 29, 2013 site inspection, there is not a single contemporaneous note by Dr. Bixler, Dr. Ibrahim, or anyone else reflecting that Dr. Chalifoux admitted to this practice of double-dipping. App. 791. In fact, Respondent WVBPH's December 11, 2013 report describes a follow-up telephone interview with Dr. Chalifoux conducted by Dr. Bixler on November 5, 2013, wherein Dr. Chalifoux explained to Dr. Bixler that he did not re-enter vials and, instead, prepared additional amounts of solution before the procedure and stored them in a tub on his procedure tray so that he would not have to re-access the vial if additional solution was needed during the procedure. App. 791. Notwithstanding this clarification by Dr. Chalifoux, Respondent WVBPH wrongfully concluded that Dr. Chalifoux was re-entering medication vials during procedures with contaminated syringes and then subsequently re-using those vials for other patients' procedures. App. 791-792.

After completing its second site inspection at Petitioner Valley Pain Management on December 19, 2013, Respondent WVBPH issued a second report dated January 7, 2013 (the report was mistakenly dated January 7, 2013 rather than January 7, 2014.)

App. 792. While Respondent WVBPH continued to be concerned about the potential for blood borne disease transmission based upon its mistaken belief that Dr. Chalifoux had been re-using syringes, Respondent WVBPH commended Dr. Chalifoux for his rapid response to its recommendations after the first site inspection on October 29, 2013:

Additional Recommendations

- **We commend the physician and clinic team for rapid and complete response to the issues raised during the previous site visit.**
- **Clinic procedures are excellent. However we have a few suggestions as noted above in 'results.' We commend the clinic nurse for rapidly compiling a manual with 'best practices.'**
- **Infection control practices during the observed epidural procedure were markedly improved. However we offer a few suggestions:**
 - **Make sure a sufficient area of skin is disinfected to overlap with the aperture in the sterile drape.**
 - **Allow povidone iodine to fully dry before initiating the procedure.**
 - **Disinfect the diaphragm of all sterile vials including those newly opened with 70% alcohol before access with needles.**
 - **Continue to use single dose medications during invasive procedures.**
 - **There is some controversy in the literature surrounding use of glass ampules for injection. Some authorities recommend using a filter to avoid aspiration of glass shards into a syringe. Use of 70% alcohol on the neck before breaking the vial is also recommended by some. However, there is little recent data on this issue and CDC does not offer a specific recommendation. The clinic should evaluate this practice and determine if use of single-dose vials is a feasible resolution to this conundrum.**

App. 792 (emphasis added).

However, based upon its concerns that Dr. Chalifoux had previously reused syringes, Respondent WVBPH, in January 2014, requested additional medical records from Dr. Chalifoux - records that Dr. Bixler conceded were freely provided by Dr. Chalifoux. App. 793. Specifically, Respondent WVBPH requested

that Dr. Chalifoux provide it with the charts of all patients of Valley Pain Management who had been treated between July 1, 2012 and June 30, 2013. App. 793. Dr. Bixler and her team of investigators then used this information, which was admittedly timely provided by Dr. Chalifoux, to cross-reference the State's hepatitis and HIV registries in order to determine if any of those patients had been reported as having contracted hepatitis or HIV in order to further evaluate whether there was a risk to Dr. Chalifoux's patients of transmission of blood borne diseases. App. 793.

Respondent WVBPH's crossmatch analysis was completed in February 2014. App. 793. In its crossmatch, Respondent WVBPH identified seven Valley Pain Management patients who had chronic hepatitis C infections. App. 793. Importantly, Respondent WVBPH never concluded that any of these individuals contracted their hepatitis C infection from Dr. Chalifoux. App. 793. In fact, Respondent WVBPH's internal documents reveal that three of these patients had laboratory confirmed hepatitis C infections prior to undergoing a procedure with Dr. Chalifoux. App. 793, 815. Dr. Bixler expressly confirmed in her deposition that no Respondent WVBPH representative reached the conclusion that Dr. Chalifoux caused any of these individuals to contract hepatitis C. App. 793. Rather, Respondent WVBPH simply concluded that these patients with chronic hepatitis C infections could potentially

serve as source patients if Dr. Chalifoux engaged in the practices Respondent WVBPH mistakenly believed he did.

After completing the patient crossmatch and evaluating Respondent WVBPH's investigation, on February 24, 2014, Dr. Bixler authored a memorandum concluding that "there is no evidence of transmission of hepatitis B, hepatitis C, or HIV in this subset of patients...On the basis of these findings, **no further action is necessary...**". App. 793-794, 815.

Upon Dr. Bixler and her team's determination that there was no evidence of transmission or need for further action, Respondent WVBPH shared this conclusion with the State of Ohio and informed Ohio that it was prepared to close its investigation of Dr. Chalifoux:

From: Thomas, Carrie A [mailto:Carrie.A.Thomas@wv.gov]
Sent: Wednesday, February 26, 2014 1:13 PM
To: Mohr, Marika
Cc: File, Sarah E
Subject: FW: Pain clinic cross-match results

Hi Marika,

Below is a summary of our findings from a cross-match of our Hepatitis and HIV registries with WV residents seen at the pain clinic we have been investigating after an OH resident was diagnosed with meningitis following an epidural injection. We have not yet shared this information with the clinic. We wanted to share it with you first and see whether or not you wanted to do your own cross-match with OH residents seen at the clinic? We have the name and date of birth information for Ohio residents seen by the clinic from 7/1/12 - 6/30/13, which we can share with you if needed.

If you would please let me know how Ohio would like to proceed, I'd appreciate it. I believe we are ready to close the investigation on our end, but we will wait to do so if you want to do your own cross-match.

Thanks again for all your assistance with this investigation.

Regards,
Carrie

App. 794, 816 (emphasis added).

In her deposition, Dr. Bixler testified that she later changed her decision about closing the investigation and determined to pursue additional information. App. 795. Accordingly, in March 2014, Respondent WVBPH began requesting that Dr. Chalifoux provide it with additional information about his practices so that it could try to identify which patients should be notified about a potential risk of disease transmission. App. 795. Specifically, in order to further evaluate the injection practices employed by Dr. Chalifoux, Dr. Bixler and Dr. Ibrahim developed a "Physician Questionnaire" to be provided to Dr. Chalifoux. App. 795. Dr. Chalifoux cooperated with Respondent WVBPH's requests and completed the Physician Questionnaire. App. 795. That questionnaire, however, was admittedly poorly designed - Dr. Bixler conceded at her deposition that the questionnaire did not ask the appropriate questions to establish that Dr. Chalifoux did in fact "double dip" by reusing medication vials on other patients after they had been re-entered during a procedure. App. 795, 811-812.

On April 10, 2014, Dr. Chalifoux provided a completed copy of the questionnaire to Dr. Bixler. App. 795. Dr. Bixler then used that information to confirm her mistaken belief that Dr. Chalifoux had, in fact, been routinely re-entering medication vials with contaminated syringes and then subsequently reusing

those vials for other patients' procedures thereby subjecting them to a risk of blood borne disease transmission. App. 795-796.

However, at her deposition, Dr. Bixler conceded that there is nothing in her notes, or any of Respondent WVBPH's notes, or any Respondent WVBPH report, the Physician Questionnaire, or other documentation explicitly noting that Dr. Chalifoux either was observed or admitted reusing medication vials on other patients after having re-entered them during a procedure:

[Q:] [W]here does [the BPH's December 11, 2013 report] say...that Dr. Chalifoux reentered the vial for one patient and then used that same vial on a subsequent patient?

[A:] It does not specifically make that statement.

...

[Q:] Now, where does it say that he uses that same vial then on a subsequent patient?

[A:] It does not specifically say that.

[Q:] Wouldn't that be important? I mean, that would be the means of transmitting or raising the risk of transmission of disease, wouldn't it?

[A:] Yes.

[Q:] Is there anywhere in the report you can find that says Dr. Chalifoux after reentering a vial for one patient used that same vial on a subsequent patient?

[A:] I don't think it - I'm not sure if it explicitly says that anywhere.

...

[Q:] And I think you've indicated that there's nothing in [the BPH's representatives'] notes that indicates that Dr. Chalifoux reentered a vial and then subsequently used that same vial in another patient; correct?

[A:] Correct.

...

[A:] There is no explicit statement that he double-dipped into a vial and then that vial was thrown away, and there is no documentation that he double-dipped into a vial and that specific vial was preserved. We just have the documentation that there was double-dipping and that vials were treated as multi-use.

App. 812-813.

Dr. Bixler also conceded as follows:

[Q:] And can we agree that if a vial was reentered by Dr. Chalifoux and that vial was discarded that there was no risk of any blood-borne pathogen being passed to another patient?

[A:] If the vial is discarded, there's no risk.

[Q:] You never witnessed the reuse of a vial, did you?

[A:] No.

...

[Q:] Tell me the basis upon which you made the determination that public notification was necessary.

[A:] We had the communications with Ohio and CDC about that...The basis for the recommendation is the practice of double-dipping. That is accessing a vial with a used

syringe and then using that vial for medication for other patients.

[Q:] What if the vial is reentered and used only for the same patient?

[A:] If it's used only for the same patient and then it is discarded, then that's not an ideal practice, but it's - if everything is thrown away at the end of a procedure, then there's no risk to other patients.

...

[Q:] And you would agree with me that if a vial is used with one patient with a clean needle and the same vial is used with a second patient with a clean needle and syringe that that is different and doesn't pose the risk to that second patient?

[A:] It - it does not pose the risk of blood-borne pathogen transmission to that second patient.

App. 811, 814.

There are two important facts which trigger liability on the part of Respondents WVDHHR, BPH and Tierney. First, Respondent WVBPH concluded that "...there is no evidence of transmission of hepatitis B, hepatitis C, or HIV in this subset of WV patients attending..." Dr. Chalifoux' clinic. App. 534. The report went on to conclude that "On the basis of these findings, WV is recommending that no further action is necessary." App. 534.

Respondent Tierney testified that she considered a press release concerning Dr. Chalifoux but decided to pull it back. App. 536. Nevertheless, four months later, Ohio made a press release and Tierney filed a Complaint against Dr. Chalifoux with the West

Virginia Board of Osteopathic Medicine ("WVBOM"). Respondent Tierney does not know why Ohio went forward with the press release on July 21, 2014. App. 800-801. Respondent WVBPH, under the direction of Respondent Tierney, issued its own press release on July 21, 2014. App. 803. Both press releases specifically identify Petitioners and reference alleged unsafe practices that potentially lead to infectious diseases such as Hepatitis B and C and HIV. App. 801, 803. Respondent Tierney also filed a complaint against Dr. Chalifoux with Respondent WVBOM on July 17, 2014. App. 591, 864-865, 1029. These facts simply don't add up and are evidence of a malicious purpose on the part of Respondent Tierney.

Subsequently, Tierney testified that after filing said complaint, she'd had a change of heart and decided to pursue an administrative subpoena in order to obtain from Dr. Chalifoux further records. However, Tierney made no effort whatsoever to withdraw her premature complaint or otherwise inform WVBOM of her decision in that regard. App. 536. It is undisputed that from there, WVBOM summarily suspended Dr. Chalifoux' license and that no other complaint was made to Respondent WVBOM concerning Dr. Chalifoux at that time which lead to his summary suspension.

On July 25, 2014, Respondent WVBOM, summarily suspended Dr. Chalifoux' license. App. 1018-1021. Dr. Chalifoux was not provided notice of any complaint against him, was not provided notice of any hearing, and was not provided an

opportunity to be heard prior to suspension of his license. Indeed, to this day, Respondent WVBOM has never conducted a hearing relative to Dr. Chalifoux. App. 1023.

On August 21, 2014, Dr. Chalifoux filed a Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief, requesting the Circuit Court of Kanawha County, West Virginia to prohibit the enforcement of Defendant WVBOM's July 25, 2014 Order for Summary Suspension. App. 1030. On August 27, 2014, the Honorable Charles E. King, Jr. conducted a hearing on Dr. Chalifoux' Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief. App. 1026. At a subsequent hearing on December 15, 2014, the Circuit Court of Kanawha County directed Respondent WVBOM to provide Dr. Chalifoux with a hearing on its summary suspension of his license. App. 1040-1049. Respondent WVBOM never did.

The Court concluded that Respondent WVBOM "...failed to show that Dr. Chalifoux engaged in practices which may pose a risk to the public." App. 1026-1036. Accordingly, the Court enjoined Respondent WVBOM's summary suspension allowing Dr. Chalifoux to resume his practice. App. 1035. Respondent WVBOM thereafter conducted no hearing relative to the Complaint against Dr. Chalifoux' license. On October 26, 2015, Defendant WVBOM finally issued an Order Dismissing Defendant Tierney's

Complaint against Dr. Chalifoux finding "...that there is **NO PROBABLE CAUSE** to believe that Roland Chalifoux, D.O., acted unprofessionally or that he has demonstrated a lack of professional competence to practice medicine." App. 1037-1039.

Without question, Respondent WVBOM suspended Dr. Chalifoux' license without hearing and has never conducted a hearing to this day. Dr. Chalifoux alleges damages resulting from said failure to conduct a hearing as required within 15 days of the summary suspension.

Procedurally, the Circuit Court granted summary judgment in favor of WVDHHR Respondents by Order dated February 6, 2018. App. 820-835. Subsequently, by Order dated October 4, 2021, the Circuit Court granted summary judgment in favor of the WVBOM Respondents making this matter ripe for appeal. App. 1415-1432.

III. SUMMARY OF ARGUMENT

The Circuit Court erred in dismissing Petitioners' claims against the WVBOM Respondents finding they were barred by *res judicata*. The Circuit Court wrongly reasoned that Petitioners had failed to raise a claim for damages in a prior civil action (Civil Action No. 14-C-1504) and thus, when the prior action was dismissed, the Circuit Court wrongly reasoned it was a final decision on the merits barring Petitioners from making this claim.

Civil Action No. 14-C-1504 ("the prior action") was brought by Petitioners' insurance defense counsel on the heels of Respondent WVBOM's wrongful summary suspension and sought only injunctive relief. Petitioners did not seek damages there, only injunctive relief in the form of restoring his medical license as Respondents had violated the provisions of WVCSR §24-6-5 which required Respondents to conduct a hearing within 15 days of the summary suspension which they failed to do. The Circuit Court in the original action agreed, reinstated Dr. Chalifoux' license and the matter was subsequently dismissed after issues of attorney's fees for the injunctive relief was resolved. There was no consideration or claim for monetary damages therein by Petitioners and therefore, *res judicata* does not apply.

With respect to the WVDHHR Respondents, the Circuit Court also erred in applying the doctrine of qualified immunity and dismissing Petitioners' claims against these Respondents. Qualified immunity only applies, if at all, to discretionary decisions. *W. Virginia Reg'l Jail and Corr. Facility Auth. V. A.B.*, 766 S.E.2d 751 (W.Va. 2014) and *Clark v. Dunn*, 465 S.E.2d 374 (W.Va. 1995).

Chalifoux maintained a claim under 64 CSR 7-7.7 which required the WVBPH and Tierney to maintain the confidentiality of any clinic that is under investigation, as was the case with

Dr. Chalifoux. A Press Release by Respondents WVBPH and Tierney breached that non-discretionary duty of confidentiality.

"[W]hether qualified immunity bars recovery in a civil action **turns on the objective legal reasonableness of the action assessed**, in light of the legal rules that were clearly established at the time it was taken." *Hutchison v. City of Huntington*, 479 S.E.2d 649, at 658-9 (W.Va. 1996) (citing *State v. Chase Securities, Inc.* 424 S.E.2d 591 (W.Va. 1992); *Bennett v. Coffman*, 361 S.E.2d 465 (W.Va. 1987) (emphasis added).

There are two important facts which trigger liability on the part of Respondents WVDHHR, WVBPH and Tierney despite qualified immunity. First, Respondent WVBPH concluded that "...there is no evidence of transmission of hepatitis B, hepatitis C, or HIV in this subset of WV patients attending..." Chalifoux' clinic. App. 793-794, 815. The report went on to conclude that "On the basis of these findings, WV is recommending that no further action is necessary." App. 793-794, 815. Nevertheless, four months later, a press release was made and Tierney filed a Complaint against Dr. Chalifoux with the West Virginia Board of Osteopathic Medicine ("WVBOM"), violating her non-discretionary duty of confidentiality. App. 536, 803. Thus, the WVDHHR Defendants were not entitled to qualified immunity and summary the Circuit Court erred in granting their Motion for Summary Judgment.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners believe that this matter presents issues of fundamental public importance relative to the important issues of *res judicata* and qualified immunity as well as the actions of state agencies and actors and therefore requests oral argument pursuant to Rule 20(a) of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

1. Standard of Review

Both Orders which Petitioners seek review by this Court involve granting motions for summary judgment. Therefore, the standard of review is the same with respect to both the Circuit Court's Orders February 6, 2018 and October 4, 2021. That standard of review is *de novo*. See, *Cox v. Amick*, 466 S.E.2d 459 (W.Va. 1995) citing *Syl. Pt. 1, Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). Petitioners are entitled here to *de novo* review of the Circuit Court's Orders.

2. The Circuit Court of Kanawha County erred in granting Defendants West Virginia Board of Osteopathic Medicine and Diana Shepard's Motion for Summary Judgment.

The Circuit Court of Kanawha County erred in finding there were no genuine issues of material fact relative to Chalifoux' claims against Respondents West Virginia Board of Osteopathic Medicine ("WVBOM") and Diana Shepard's (collectively

referred to as the "WVBOM Respondents") Motion for Summary Judgment based on the doctrine of *res judicata*.

The Circuit Court relied upon a previous Circuit Court Order entered November 27, 2016 by the late Honorable Charles E. King, Jr. in Civil Action No. 14-C-1504 filed by Chalifoux against only Respondent WVBOM (not Shepard) upon a Verified Petition for Permanent Injunction and Motion for Temporary Restraining Order and Injunctive Relief. App. 1026-1036. The Final Order dismissed said Petition, nothing more. App. 1313-1314.

The instant Complaint was filed June 3, 2016. App. 6-20. This Complaint was filed more than five months before the Final Order in Civil Action No. 14-C-1504. App. 1313-1314. At no time during those five plus months did the WVBOM Respondents seek consolidation of Civil Action No. 14-C-1504 with this Civil Action asserting that the issues were the same and that *res judicata* should apply.

"1. Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

Syl. Pt. 1, *State v. Miller*, 459 S.E.2d 114 (W. Va. 1995) (emphasis added).

Here, the fourth prong of the *Miller* test fails.

Petitioner did not have a full and fair opportunity to raise and litigate all issues including damages in the prior action as it merely pertained to his claim for injunctive relief.

Petitioners' counsel in the prior Civil Action, Richard D. Jones, sole purpose was to secure the return of Dr. Chalifoux' medical license. App. 1073. Indeed, the prior Civil Action sought only the following relief:

A. Issue a temporary restraining order or preliminary injunction vacating or prohibiting the enforcement of the West Virginia Board of Osteopathic Medicine's July 25, 2014 Order for Summary Suspension;

B. Set the matter for further hearing regarding a permanent injunction;

C. Permanently enjoin enforcement of the Order;

D. Award Plaintiff his attorney's fees and costs expended herein; and

E. Award such other and further relief as the Court may deem proper. App. 1311.

In fact, nowhere in his Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief did Petitioners seek

damages against the WVBOM Respondents for wrongfully suspending his medical license in violation of WVSCR §24-6-5.17. App. 1301-1312. That is precisely why a separate action was filed on behalf of Petitioners employing separate counsel. The prior Civil Action by prior counsel was not for the purpose of seeking damages, only injunctive relief. Therefore, its dismissal was not a full adjudication on all of the merits and Petitioners did not have a full and fair opportunity in that action to litigate the issue of their damages. This point was brought home to the Circuit Court during the hearing on the WVBOM Respondents Motion for Summary Judgment on October 1, 2018 when it was asserted the Judge King did not consider the merits of the summary suspension by Respondent WVBOM, but rather only whether or not a hearing should have been provided to Dr. Chalifoux by Respondent WVBOM. App. 1229.

In fact, during the October 1, 2018 hearing on the WVBOM Respondents Motion for Summary Judgment, the only time the issues of *Res Judicata* and collateral estoppel is even raised by the Court or the WVBOM Respondents is near the end of the hearing and barely in passing. In reference to Judge King's Final Order on the prior Civil Action, the WVBOM Respondents argued that the injunction was dissolved. App. 1288-1289. The entirety of the hearing focused on the issues of qualified immunity and quasi-judicial immunity, on which the Circuit Court

found in favor of Petitioners. App. 1204-1290, 1415-1432. The issues of *Res Judicata* and collateral estoppel were virtually ignored at the hearing by the WVBOM Respondents and the Circuit Court, yet three years later the Circuit Court entered an Order granting summary judgment solely on those issues. The Circuit Court erred dismissing this action based on *Res Judicata* and collateral estoppel.

"2. Relitigation of an issue is not precluded when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in two courts. Where the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims, a compelling reason exists not to apply collateral estoppel."

Syl. Pt. 2, *State v. Miller*, 459 S.E.2d 114 (W. Va. 1995).

This Syllabus Point of *Miller* is directly on point with the analysis that the Circuit Court should have applied here in denying the WVBOM Respondents' Motion for Summary Judgment. The prior Civil Action for injunctive relief was not nearly as extensive as this litigation. There were no depositions in the prior Civil Action. In this case, there were numerous depositions including Dr. Chalifoux, Timothy Gibbons (Petitioners' damages expert), Respondent Shepard, Jennifer K. Akers (former counsel for Respondent WVBOM), Richard D. Jones

(former counsel for Dr. Chalifoux) and Ernest Miller, D.O. (former Board Member of Respondent WVBOM). Indeed, discovery in this matter was extensive. Discovery in the prior Civil Action was virtually non-existent.

The prior Civil Action was filed August 21, 2014 and concluded on November 30, 2016. App. 1301, 1313. This matter was filed on June 3, 2016 and has yet to be concluded by Summary Judgment was not entered in favor of the WVBOM Respondents until October 4, 2021. App. 6, 1415. The prior Civil Action lasted only two years while the current one has yet to resolve in over five and a half years. As *Miller* indicates, compelling reasons exist not to apply collateral estoppel here and the Circuit Court erred in so doing.

At the hearing conducted by Judge King, on August 28, 2014 on Petitioners' Verified Petition for Permanent Injunction and Motion for Temporary Restraining Order and Injunctive Relief, the Circuit Court did not consider fully the merits of whether the summary suspension should have been entered against Dr. Chalifoux by Respondent WVBOM as the issue then before the Court was merely a Temporary Restraining Order. App. 1026-1036. Rather, the sole issue before the Circuit Court at that time was whether a hearing should have been provided within 15 days as required by WVCSR §24-6-5.17. This regulation states:

"The 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. The 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." (emphasis added).

The requirement that a hearing be provided within 15 days of a summary suspension was non-discretionary as the regulation uses the word "shall." The issue before the Circuit Court in the prior civil action was solely that: did Respondent WVBOM fail to provide a hearing within fifteen days such that the summary suspension should be enjoined. The Circuit Court said "yes" and enjoined Respondent WVBOM's Order. It subsequently dismissed the Complaint, all issues regarding the injunctive relief sought having been resolved. Specifically, the Final Order in the prior Civil Action states that "...all claims asserted by Dr. Chalifoux against the Board in the above-styled action have been compromised and settled." App. 1313(emphasis added). Indeed, the Final Order only refers to Dr. Chalifoux when in fact, in this matter, both Dr. Chalifoux and his business are parties. Therefore, the prior Civil Action could not have adjudicated any matter, much less fully and fairly, as it pertained to Dr. Chalifoux' business, a party Petitioner herein. Further, as set forth previously herein, Dr. Chalifoux

did not raise a claim for damages in the prior Civil Action and the Final Order only pertains to those claims raised "...in the above-styled action..." App. 1313.

Indeed, the Circuit Court in this matter concluded that the Circuit Court in Civil Action No. 14-C-1504 did not conduct a hearing on the merits of whether Respondent WVBOM should have suspended Dr. Chalifoux' license. Rather, the Circuit Court correctly concluded that the Circuit Court in Civil Action No. 14-C-1504 conducted a hearing and ruled that Respondent WVBOM's procedures were flawed and reinstated Dr. Chalifoux' license. App. 1279-1281. At the hearing on October 1, 2018, the Circuit Court recognized that the prior civil action was not a hearing on the merits of Dr. Chalifoux' case nor was there ever consideration of his damages. Thus, the Circuit Court erred when, three years after the hearing, it ruled that *res judicata* applied, Dr. Chalifoux had had his day in court as to damages in the prior action and dismissed this case.

Civil Action No. 14-C-1504 was not a Complaint for damages. It was not a Complaint against Shepard as the Circuit Court erroneously asserted at paragraph 8 of its Order. The Circuit Court further erred at paragraph 11 of its Order referring to a Motion to Dismiss Civil Action No. 14-C-1504 filed by Chalifoux whereas the Order specifically references a

motion by the parties. Nothing in that Order dismissed any claims at all against Shepard and said Order only dismissed the Verified Petition for Permanent Injunction and Motion for Temporary Restraining Order and Injunctive Relief contained in Civil Action No. 14-C-1504, not Chalifoux' claims for damages in this action. App. 1313-1314.

Civil Action No. 14-C-1504 was not a final adjudication on the merits of Chalifoux' claim for damages asserted in this Civil Action, as no damages were asserted by Chalifoux in 14-C-1504, only injunctive relief. Chalifoux could not present a claim for damages in 14-C-1504, filed only weeks after his illegal summary suspension by WVBOM, because at that time, he had not yet suffered any damages. Thus, the standards of *Syl. Pt. 4 of Blake v. Charleston Area Med. Ctr.*, 498 S.E.2d 41 (W.Va. 1997) have not been met. Moreover, the instant civil action was filed on June 3, 2016, prior to the dismissal of Civil Action No. 14-C-1504 on November 27, 2016 which Order makes no reference whatsoever to the instant civil action. App. 6-20, 1313-1314.

Thus, *res judicata* was not established and the Circuit Court erred in relying on this doctrine as the sole basis for granting the WVBOM Defendants' Motion for Summary Judgment.

3. **The Circuit Court of Kanawha County erred in granting Defendants West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health and Letitia Tierney, MD, JD's Motion for Summary Judgment.**

The Circuit Court of Kanawha County erred in finding there were no genuine issues of material fact relative to Chalifoux' claims against the West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health and Letitia Tierney, MD, JD's (collectively referred to as the "WVDHHR Respondents") Motion for Summary Judgment based on their assertion of qualified immunity. Qualified immunity only applies, if at all, to discretionary decisions. *W. Virginia Reg'l Jail and Corr. Facility Auth. V. A.B.*, 766 S.E.2d 751 (W.Va. 2014) and *Clark v. Dunn*, 465 S.E.2d 374 (W.Va. 1995).

As the West Virginia Supreme Court of Appeals has acknowledged, "qualified immunity, as opposed to absolute immunity, is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages." *Hutchison v. City of Huntington*, 479 S.E.2d 649, 658 (W.Va. 1996). "[W]hether qualified immunity bars recovery in a civil action **turns on the objective legal reasonableness of the**

action assessed, in light of the legal rules that were clearly established at the time it was taken.” *Id.* at 658-9 (citing *State v. Chase Securities, Inc.* 424 S.E.2d 591 (W.Va. 1992); *Bennett v. Coffman*, 361 S.E.2d 465 (W.Va. 1987) (emphasis added)).

Qualified immunity does not apply in situations where a state actor has knowingly violated a clearly established law or acted maliciously, fraudulently or oppressively. See, *W. Va. Reg’l Jail & Corr. Facility Auth. V. Grove*, 852 S.E.2d 773 (W.Va. 2020) citing *W. Va. Reg’l Jail & Corr. Facility Auth. V. A.B.*, 766 S.E.2d 751 (W.Va. 2014). Here, strong evidence was ignored by the Circuit Court that the WVDHHR Respondents knowingly violated clearly established law and acted maliciously, fraudulently or oppressively towards Dr. Chalifoux. Here, because the standard of review is *de novo*, this Court must review the facts established by Petitioners.

Chalifoux maintained a claim under 64 CSR 7-7.7 which required Respondents WVBPH and Tierney to maintain the confidentiality of any clinic that is under investigation, as was the case with Chalifoux. App. 11. A Press Release by Respondents WVBPH and Tierney breached that non-discretionary duty of confidentiality. App. 536. In particular, a press release that was made nine months after the initial

investigation of Petitioners' clinic is evidence of malice, fraud and oppression. App. 677.

But, Respondent Tierney admitted that the press release was for the malicious, fraudulent and oppressive purpose of obtaining further patient records from Petitioner. App. 536. At the same time, Respondent Tierney had available to her an administrative subpoena process to obtain those records without the widespread publicity of a press release. App. 536. The administrative subpoena process would have better upheld Respondent Tierney's duty of confidentiality to Petitioners under 64 CSR 7-7.7. Respondent Tierney further admitted in an email dated April 18, 2014 that her purpose was to threaten Petitioners into complying with her wishes for records after Dr. Bixler had determined that no further action was necessary. On April 18, 2014, Respondent Tierney sent an email to Anne Williams, Deputy Commissioner for Health Improvement with Respondent WVBPH threatening to send a "... letter to the board of medicine..." and "... put ads in the paper to notify his patients..." to get Petitioners to comply. App. 649.

The investigation of Petitioners' clinic by the WVDHHR Respondents began in October of 2013. App. 532-534. Dr. Dee Bixler was an epidemiologist employed by Respondent WVBPH who concluded in February of 2014 after two site visits to Petitioners' clinic and a cross-match of patients that there was

no evidence of transmission of Hepatitis B, Hepatitis C or HIV in that subset of patients. App. 532-534. Dr. Bixler went on to state "On the basis of these findings, no further action is necessary." App. 532-534. Dr. Bixler's report is dated March 7, 2014, a month before Respondent Tierney's email to Anne Williams. Where the state's expert epidemiologist states that "no further action is necessary" and a month later Respondent Tierney threatens and subsequently takes further action against Petitioners, common sense can only conclude a malicious, fraudulent and oppressive purpose by Respondent Tierney in violation of her duties of confidentiality to Petitioners. Therefore, she was not entitled to qualified immunity.

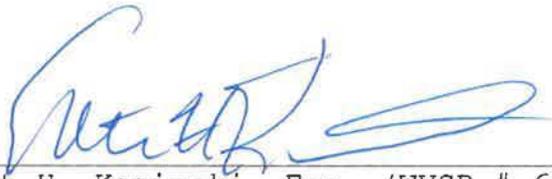
Yet, further action was undertaken by the WVDHHR Respondents, chief among them Respondent Tierney who set forth on a malicious, fraudulent and oppressive path to ruin Petitioners despite Dr. Bixler's epidemiological scientific conclusion that "...no further action is necessary." If no further action was necessary, then any and all further action must have been malicious, fraudulent and oppressive. And indeed, there was much further action by the WVDHHR Respondents.

Chief among those actions was a press release authorized by Respondent Tierney in her official capacity as Director for Respondent WVPPH. That press release went out four months after Dr. Bixler stated no further action was necessary.

But that was not enough for Respondent Tierney. She then filed a Complaint against Dr. Chalifoux with Respondent WVBOM kicking off the process that led to Petitioners' claims against the WVBOM Respondents. Both actions by Respondent Tierney, the press release and Complaint to Respondent WVBOM, violated her non-discretionary duty of confidentiality. Moreover, Respondent Tierney's actions were malicious, fraudulent and oppressive. They served no purpose in furtherance of her duties as the chief public health officer for the state of West Virginia. Dr. Chalifoux was never found to be the cause of any outbreak of any disease from his clinic. Respondent Tierney, in her official capacity as Director of Respondent WVBPH, under Respondent WVDHHR, simply did not like Dr. Chalifoux and was intent on teaching him a lesson. Therefore, the WVDHHR Respondents were not entitled to qualified immunity and summary judgment was in error.

VI. CONCLUSION

Petitioners respectfully request that this Court reverse the Orders of the Circuit Court of Kanawha County, West Virginia dated February 6, 2018 and October 4, 2021 and remand this action to the Circuit Court of Kanawha County for further proceedings consistent with this Court's Order.



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D.B.A. Valley Pain Management Clinic

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 21-0902
(Circuit Court of Kanawha County, West Virginia
Civil Action No. 16-C-844

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

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, Scott H. Kaminski, counsel for Roland F. Chalifoux,
Jr., D.O., individually and Roland F. Chalifoux, Jr., D.O.,
PLLC, D.B.A. Valley Pain Management Clinic, certify that I
served a true and correct copy of the foregoing "**Petitioners'**
Brief" by U.S. Mail, postage prepaid on this 4th day
of February, 2022:

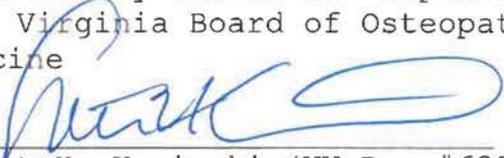
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