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.

PETITIONERS' REPLY BRIEF

Scott H. Kaminski, Esq. (WVSB #6338)
Ray, Winton & Kelley, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
T: 304-342-1141
F: 304-342-0691
ScottKaminski@rwk-law.com
Counsel for Petitioners Roland F. Chalifoux, Jr., D.O., individually and Roland F. Chalifoux, Jr., D.O., PLLC, D.B.A. Valley Pain Management Clinic

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. STATEMENT OF THE CASE 1

1. Factual Errors Contained in Respondents', West Virginia Board of Osteopathic Medicine and Diana Shepard, Response Brief 1

2. Factual Errors Contained in Respondents', West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health, and Letitia Tierney, M.D., J.D.'s, Response Brief 4

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 12

III. ARGUMENT 13

1. The Circuit Court of Kanawha County Misapplied the doctrine of *res judicata* in granting Defendants West Virginia Board of Osteopathic Medicine and Diana Shepard's Motion for Summary Judgment 13

2. The Circuit Court of Kanawha County misapplied state regulations 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 16

VI. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Addair v. Bryant, 284 S.E.2d 374 (W.Va. 1981)	16
Bison Interest, LLC v. Antero Res. Corp., 854 S.E.2d 211 (W.Va. 2020)	13, 14, 15
Blake v. Charleston Area Med. Ctr., 498 S.E.2d 41 (W.Va. 1997)	13, 15
Lloyd's, Inc. v. Lloyd, 693 S.E.2d 451 (W.Va. 2010)	13
State v. Simmons, 185 S.E.2d 417 (W.Va. 1936)	4
State ex rel. Farmer v. Trent, 523 S.E.2d 547 (W.Va. 1999)	16

Statutes

Other Authorities

West Virginia Code of State Regulations §24-6-5.17	1, 2, 3
West Virginia Code of State Regulations §64-7-7.8	17
West Virginia Rule of Appellate Procedure 20(a)	12
West Virginia Rule of Civil Procedure 42(a)	16

I. STATEMENT OF THE CASE

1. Factual Errors Contained in Respondents', West Virginia Board of Osteopathic Medicine and Diana Shepard, Response Brief

It is indeed unfortunate that Respondents West Virginia Board of Osteopathic Medicine and Diana Shepard (collectively referred to herein as "Respondent WVBOM") resort to distortion of the facts of record in order to justify the Circuit Court's error in granting their motion for summary judgment. Petitioners must address these factual distortions here.

Most importantly, Respondent WVBOM clings to its assertion that Petitioners' prior counsel waived Petitioners' right to a hearing within fifteen days of his summary suspension. Nothing could be further from the truth. Respondent WVBOM's former attorney, Jennifer Akers' affidavit is the sole source of this assertion that Petitioners' prior counsel waived his right to a hearing within fifteen days. However, the Circuit Court was not persuaded by Akers' affidavit as it concluded that:

> "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(sic) 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 his right to a hearing within 15 days."

App. 1427.

Respondent WVBOM, no matter how hard it tries, cannot avoid this finding by the Circuit Court. It is established in this matter that Petitioner did not waive his right to a hearing within fifteen days as required by WVCSR § 24-6-5.17. Any attempt by Respondent WVBOM to assert otherwise ignores the record in this case.

It is equally unreasonable for Respondent WVBOM in its Response Brief to assert that Petitioners "....made no claim for failure to provide a hearing within 15 days of the Board's Order for Summary Suspension of Dr. Chalifoux's license." WVBOM Resp. Brief at P. 3. Respondent WVBOM cites to paragraphs 94-96 of the Complaint as thought the rest of the Complaint did not exist. App. 6-20. But a liberal reading of those paragraphs gives notice that such a claim is being made. Paragraph 94 refers to Petitioners' due process rights including his opportunity to be heard. Paragraph 95 asserts that Respondent WVBOM summarily suspended Dr. Chalifoux's license without ever conducting a hearing. Paragraph 96 asserts damages proximately resulting therefrom. App. 19. So, a fair reading of those paragraphs gave Respondent WVBOM notice that Petitioners were

claiming damages resulting from Respondent WVBOM's failure to provide him with a hearing within 15 days.

But also, paragraph 63 of the Complaint alleges that Petitioners requested a hearing to which he was entitled pursuant to W.Va. CSR §24-6-5.17, cited above, which is the regulation requiring Respondent WVBOM to schedule a hearing within 15 days of a summary suspension. App. 14.

In addition, Respondent WVBOM waived its right to assert that Petitioners failed to make a claim for Respondent WVBOM's failure to schedule a hearing within 15 days of the summary suspension. Nowhere in its Motion for Summary Judgment did Respondent WVBOM raise this issue. App. 840-1006. Respondent WVBOM asserted it was entitled to summary judgment based on qualified immunity, collateral estoppel, res judicata, lack of duty and quasi-judicial immunity. Nowhere in its Motion for Summary Judgment did Respondent WVBOM argue that Petitioners had failed to make a claim for violation of W.Va. CSR §24-6-5.17 for violating his due process rights by failing to provide a hearing within 15 days of his summary suspension because he clearly did. In fact, substantial argument was devoted at the Circuit Court hearing on Respondent WVBOM's Motion for Summary Judgment to the very issue of Respondent WVBOM's failure to provide a hearing with 15 days of the summary suspension. App. 1204-1290. At no time during that hearing did Respondent WVBOM

argue that Petitioners had failed to raise this issue in his Complaint, because he did not.

Respondent WVBOM's failure to raise the issue at summary judgment is a waiver of the argument and it cannot raise it here as it has in its Response Brief. An issue not raised prior to appeal is deemed to have been waived. *State v. Simmons,* 185 S.E.2d 417 (W.Va. 1936). Respondent WVBOM's argument is meritless now as it clearly knew at the summary judgment stage that Petitioners were making exactly this argument.

2. Factual Errors Contained in Respondents', West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health, and Letitia Tierney, M.D., J.D.'s, Response Brief

Likewise, Respondents West Virginia Department of Health and Human Resources, West Virginia Bureau For Public Health, and Letitia Tierney, M.D., J.D. (collectively referred to as "Respondent DHHR"), filed a brief in this matter containing factual errors in need of correction.

First, at page 1 of their brief, Respondent DHHR asserts as a factual finding that a press release was necessary to notify "...the public of a risk of transmission of blood-borne pathogens due to unsafe injection practices discovered at the Petitioners' clinic." Respondents DHHR Brief at p. 1. Yet, no party ever made a specific finding of "unsafe injection practices" at Petitioners'

clinic. Rather, Respondents DHHR filed the Complaint against Petitioners to Respondent WVBOM when Petitioners challenged Respondent DHHR's right to obtain additional patient information from Petitioner. Remember, 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. Respondent DHHR contends Dr. Bixler changed her mind.

What changed her mind? The next step to further evaluate the injection practices employed by Dr. Chalifoux was a "Physician Questionaire" developed by Dr. Bixler and Dr. Ibrahim which was then sent 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. Yet, at page 3 of their Response Brief, Respondent DHHR contends that Dr. Chalifoux admitted in the questionnaire that he engaged in unsafe practices. If the questionnaire was admittedly poorly designed by one of the

very authors of the questionnaire, how could that author conclude that a response to any of its questions constituted an admission of an unsafe practice.

Specifically, the "unsafe practice" that Respondent DHHR now relies upon is the allegation that Petitioner told investigators that he "double-dipped," inserting a syringe and needle into a vial of isohexol for more than one patient. Respondent DHHR's Brief at P. 4, citing J.A. 351-352 and P. 9, citing J.A. 352. There, Dr. Bixler testified that Petitioner admitted to double-dipping. But Respondent DHHR cites to no part of the record wherein Petitioner testified under oath or responded to any question on a questionnaire wherein he admitted that he "double-dipped." That is because he made no such admission because he did not double-dip.

The reason Respondent DHHR does not specifically explain in its brief the questions contained in the questionnaire and Petitioner's responses and subsequent explanation is that those facts do not support a finding of double-dipping. Here is the relevant portion of the poorly worded questionnaire upon which Respondent DHHR wrongly insists that Petitioner admitted to double-dipping:

3. List all medications used prior to the BPH visit in October, 2013 for (procedure) Adhesiolysis. Clarify if vial was used for more than one patient. Clarify if vial was ever re-entered with a used syringe. A used syringe is defined as a syringe that was used to inject medication into a patient. For example, after a syringe has been used to inject a patient during the (procedure) _____ or any other procedure, the syringe is considered to be used.

Medication	How many cc in the vial?	Was the vial ever used for more than one patient? Indicate 'yes' or 'no.'	Was the vial ever entered with a used syringe? Indicate 'yes' or 'no.'
1. Depomedrol	1 cc	No	No
2. Omnipague	50 cc	Yes	Yes
3. Sterile H2O	20 cc	No	Yes
4.			
5.			

Risk Assessment Questionnaire, Clinic A, West Virginia, March 2014 Page 6

J.A. 426.

This question references the Adhesiolysis procedure performed by Petitioner. Specifically, Medication 2 is Omniopague. Petitioner answered "Yes" to the following two questions: "Was the vial ever used for more than one patient?" and "Was the vial ever entered with a used syringe?" At first blush, that would appear to be double-dipping.

But Petitioner attempted to explain the gap in the question during his deposition. Here was the question by counsel and answer by Petitioner:

> Q. All right. Now, for the Omniopague, for this particular questionnaire under the adhesiolysis, you advised Dr. Bixler and her team that for Omniopaque, medication administration during the adhesiolysis procedure, you do use the vials for more than one patient and you do enter them with used syringes, correct?
>
> A. No. That was a hypothetical one. If there was - if I needed more contrast and I needed more, then I would use a needle and syringe. If it wasn't , then I would not use a needle and syringe.
>
> So it's kind of a trick question because I did use the Omniopaque more than once, and I may have actually gone in a second time just because it was like a few more cc's left, I needed it, I might as well use it and throw the thing away, so that's what I was trying to say with her. But there's no place to really explain that."
>
> J.A. 433.

The question on the questionnaire is a very poor question. It pre-supposes that if the answer is "yes" to whether the vial was ever used for more than one patient **AND** the vial was ever entered with a used syringe, then there was double-dipping. However, if Petitioner entered a vial with a used syringe for the same patient, then discontinued use of the vial, there was no double-dipping. Think of it this way, if you are the only person eating the chips and dip, you can double-dip as long as you like. It is only when you are sharing the dip that you cannot double dip. The question does not ask the key question, that being whether Petitioner entered a vial with a used syringe then used

that same vial on a subsequent patient. Had that question been asked, Petitioner's answer would have been "**NO**."

Respondent DHHR also contends that Petitioners engaged in the unsafe practice of not wearing a mask during certain procedures. Respondent DHHR Response Brief at P. 4. However, Respondent DHHR concedes on that same page that following the inspection of his facility on October 29, 2013 and subsequent report, Petitioner and his staff started wearing masks thereafter. Respondent DHHR's Response Brief at P. 4, citing J.A. 331.

At Page 6 of its Response Brief, Respondent DHHR concedes that Petitioners indeed did supply "...a list of all patients he had seen in one year so the DHHR could perform a cross-match to the State's registry of Hepatitis B, Hepatitis C, and HIV documented cases. Citing J.A. 358-359. Petitioners had provided this list after Respondent DHHR's second inspection of his facility on December 19, 2013. J.A. 358. The cross-match revealed no patients had contracted bacterial meningitis as did the patient that triggered the initial investigation. When Dr. Bixler concluded on February 24, 2014 that no further action was necessary, she was aware from the cross-match that seven patients had been diagnosed with Hepatitis C and other patients had been diagnosed with HIV prior to becoming patients of Petitioner. J.A. 359.

Also prior to the press release and Complaint, Respondent DHHR sought additional patient records from Petitioners. Relative to this process, Respondent DHHR also misstates the facts at page 10 of its Response Brief. There, it asserts that Petitioner "...advised the DHHR that his attorney was concerned over liability issues and that he would not provide the requested information." Citing J.A. 397. A close inspection of Petitioners' letter at J.A. 397 makes no reference to Petitioners being concerned about liability. Respondent DHHR over broadly interprets Petitioners' letter to imply to this Court that Petitioners had a bad motive in seeking the advice of counsel. No such interpretation should be made, rather the letter should be taken on its face, which simply directed Respondent Tierney, herself a lawyer, to contact Petitioners' lawyer as of April 28, 2014. Rather, the response of Petitioners' lawyer cites concerns for the overly broad investigation as of April 28, 2014 and the federal privacy rights of Petitioners' patients. J.A. 398-399. Petitioners' lawyer cited no concerns about liability. This is a creation of the imagination of Respondent DHHR to suit its defense. Respondent DHHR asserts at footnote 5 at pages 10-11 of its Response Brief that Petitioners' lawyer incorrectly cited the applicable law, but Respondent presented no evidence to the Circuit Court and no citation to the record that it so informed Petitioners' lawyer of her alleged misinterpretation. Rather,

Respondent DHHR misinterpreted Petitioners' concerns being liability and rather began the administrative subpoena process on July 18, 2014; three days prior to the press release (before Petitioners could reasonably have responded to the subpoena) and one day **after** Respondent Tierney had filed her Complaint against Petitioner to Respondent WVBOM.

The salient point is that these issues were corrected by Petitioners shortly after October 29, 2013, and therefore he was not a public risk when the press release was made on July 21, 2014. App. 803. Nor was this issue a public risk when Respondent Tierney made her Complaint to Respondent WVBOM on July 17, 2014. App. 591, 864-865, 1029. Respondent DHHR's citation to these alleged and disputed allegations of a risk to public health were non-existent in July of 2014 when it made a press release and on July 17, 2014 when it made its WVBOM Complaint about Petitioner citing his practice as a public risk. Inasmuch as he was not then a public risk, Respondent DHHR's justification for the press release and WVBOM Complaint disappear requiring analysis and fact-finding by a jury as to the malicious motivation for its conduct. From the timing of events, it is obvious that Respondent Tierney was simply angry that Petitioner would not assent to her every whim and that he would retain a lawyer to advise him how best to proceed. Respondent Tierney reacted out of anger filing her WVBOM Complaint **before** she initiated the administrative subpoena process which

afforded Petitioners due process and an opportunity to be heard. Had Respondent Tierney allowed that process to play out, she would have obtained the desired records via Court Order and could have provided patient notifications as she desired without the vindictive need for a press release and a Complaint to Respondent WVBOM.

Moreover, the press release of July 21, 2014 was false. Respondent Tierney is quoted as having said "Valley Pain Management continues to refuse to provide DHHR with a patient list..." J.A. 418-419. Respondent Tierney made this misstatement knowing that the administrative subpoena procedure had not yet matured. Again, Respondent Tierney herself is a lawyer and could have no reasonable expectation that anyone would respond to a subpoena within three days.

II. 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.

III. ARGUMENT

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

The Circuit Court erred in its application of the doctrine of *res judicata* when it granted Respondent WVBOM's Motion for Summary Judgment in reliance on Petitioners ability to have litigated his claim for damages in another civil action; that being Civil Action No. 14-C-1504, that being Petitioners' Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief.

The Circuit Court relied on *Syl. Pt. 4 of Blake v. Charleston Area Med. Ctr.,* 498 S.E.2d 41 (W.Va. 1997) in making its decision. J.A. 1420. The Circuit Court erroneously found that Petitioners claims for damages could have been litigated in Civil Action No. 14-C-1504 relying on *Lloyd's, Inc. v. Lloyd,* 693 S.E.2d 451 (W.Va. 2010). The more recent case of *Bison Interest, LLC v. Antero Res. Corp.,* 854 S.E.2d 211 (W.Va. 2020) is perhaps more instructive.

First, none of the above cases addresses the precise issue here being the fact that two matters with simultaneously existing. The instant civil action was filed on June 3, 2016, prior to the dismissal or 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. The open question is whether Defendant can benefit from *res judicata* where it had the opportunity to consolidate pending civil actions to avoid the very circumstances which *res judicata* was designed to prevent. Respondent WVBOM, being party to both matters, cannot claim that it was unaware that Petitioners were claiming damages against it when Civil Action No. 14-C-1504 was dismissed.

Res judicata prevents a party from bringing a **subsequent** action for claims that could have been litigated. *Id.*, at 218. Here, this instant action was not a **subsequent** action but rather a contemporaneous action. The *Bison* Court was precise in its wording and that precision should be given meaning. The purpose is obvious. When a civil action concludes, the parties should be able rest easy knowing the claims adjudicated, as well as those that could have been adjudicated, are laid to rest. But here, when the instant Civil Action was filed, Civil Action No. 14-C-1504 had not been concluded. When Civil Action No. 14-C-1504 was dismissed, Respondent WVBOM knew that this Civil Action was still pending and that it sought monetary damages from it. It was not reasonable for Respondent WVBOM to believe that this Civil Action was resolved when Civil Action No. 14-C-1504 was resolved, otherwise it would have ceased litigating this matter and immediately moved for summary judgment citing *res judicata*.

Rather, conceding that it did not believe the *res judicata* applied, Respondent WVBOM litigated this Civil Action subsequent to the dismissal of Civil Action No. 14-C-1504 on November 27, 2016 and did not move for summary judgment on the grounds of *res judicata* until June 27, 2018, nearly two years later. Had Respondent WVBOM truly believed that *res judicata* applied, it would have moved for summary judgment shortly after November 27, 2016 and saved great judicial economy. It did not do so because *res judicata* applies to **subsequent** civil actions, not those ongoing simultaneously.

But also, the first prong of *res judicata* requires a final adjudication on the merits to apply. *Id.* Civil Action No. 14-C-1504 was not a final adjudication on the merits of Petitioners' claim for damages asserted in this Civil Action, as no damages were asserted by Petitioner in 14-C-1504, only injunctive relief. Petitioner 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.

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. *Res judicata*

only applies to **subsequent** actions, not simultaneous. The proper remedy for Respondent WVBOM would have been consolidation under WVRCP 42(a), not lying in wait for two years to file a Motion for Summary Judgment misciting *res judicata*.

Respondent WVBOM makes unnecessary arguments in its brief concerning the issues of qualified immunity, quasi-judicial immunity and negligence. Respondent WVBOM's Response Brief at p. 10-20. These issues were not the basis for the Circuit Court's Order granting summary judgment to Respondent WVBOM, and therefore not raised as assignments of error by Petitioners. Moreover, they were not raised as cross-assignments of error by Respondent WVBOM and therefore have been waived. Issue not assigned as error are deemed waived. *State ex rel. Farmer v. Trent,* 523 S.E.2d 547 (W.Va. 1999), at footnote 3, citing Syl. Pt. 6, *Addair v. Bryant,* 284 S.E.2d 374 (W.Va. 1981). Respondent WVBOM having failed to assign error to these issues has waived its right to now do so, and Petitioners need not address them here.

2. The Circuit Court of Kanawha County misapplied state regulations 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 agreed with Respondents DHHR's argument that Respondent Tierney was compelled to file her Complaint against Petitioner to Respondent WVBOM. Respondent

DHHR cites to W.Va. CSR §64-7-7.8 the states that the Commissioner (of the Bureau for Public Health) shall file a complaint if a health care facility fails to take appropriate corrective action within a reasonable period of time of notification by the Commissioner. Here, Respondent Tierney filed her complaint against Petitioners with Respondent WVBOM on July 17, 2014. It was April 25, 2014 when Respondent Tierney faxed a letter to Petitioners requesting additional patient records and April 28, 2014 when Petitioners lawyer responded to said request. Then, it was July 18, 2014, a day after her complaint, when Respondent Tierney initiated the administrative subpoena process. As the Complaint was filed before the administrative subpoena, Petitioners had not failed to take appropriate corrective action within a reasonable time (negative one day) triggering Respondent Tierney's "mandatory" duty to file a complaint. Respondent DHHR relies upon a regulation which had not yet been triggered to justify Respondent Tierney's complaint.

Respondent DHHR argues Respondent Tierney had a mandatory duty at page 25 of Respondent DHHR's Response Brief, then one page later at page 26 argues it was a discretionary duty. It is axiomatic that a duty cannot simultaneously be mandatory and discretionary.

Moreover, whether discretionary or mandatory, Respondent Tierney's complaint and press release were malicious. The timing of events speak for themselves. The complaint was filed one day before the administrative subpoena. The press release only three days after the administrative subpoena, and long before Petitioners had any reasonable opportunity to respond, or for that matter to be heard by a Court on the matter. Such haste is reasonable evidence of malice, fraudulent purpose and oppression barring summary judgment.

Respondent Tierney 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. Respondent DHHR argues at page 26 of its brief that the sole purpose of the email was to protect the public's health. The timing of events suggests otherwise. Respondent Tierney's email does not state her purpose, one way or the other. Respondent DHHR cites to no part of the record for its conclusion that Respondent Tierney's purpose in the email was to protect public health. That is

merely Respondent DHHR's wishful thinking without evidence of the same.

If Respondent DHHR is to be believed, that Respondent Tierney's sole concern was the public health, then several questions remain. Why then did Respondent Tierney upon receiving the letter of April 28, 2014 from Petitioner's lawyer (J.A. 398-399) did she wait until July 17, 2014 to file her complaint against Petitioners with Respondent WVBOM? Why did Respondent Tierney wait until July 18, 2014 to initiate the administrative subpoena process? And why did Respondent Tierney wait until July 21, 2014 to notify the public via press release? If Respondent Tierney was so concerned about the public health risk, it is staggering to think that she waited nearly three months to act upon it. Or, more likely, public health was not her concern at all. In either event, sufficient evidence existed such that summary judgment was in error.

IV. CONCLUSION

The Response Briefs of Respondents WVBOM and DHHR make no persuasive argument that the Circuit Court ruled correctly in granting both Motions for Summary Judgment. This Reply in conjunction with Petitioners' Brief make evident that issues of fact exist such that summary judgment was not appropriate. The Circuit Court erred in applying *res judicata* to a

contemporaneous action rather than a subsequent action when it granted summary judgment in favor of Respondent WVBOM.

The Circuit Court also erred in applying Respondent DHHR's duties under the Code of State Regulations in finding that qualified immunity existed and there was no evidence of Respondent's malice, fraudulent purpose or oppression. If Respondent Tierney's actions here are subject to immunity, then state actors have carte blanche to ignore the state's regulations and retaliate against those citizens who challenge their authority. It is particularly troubling when Respondent Tierney, an active member of the state bar, disregards due process and a Circuit Court excuses such conduct.

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.

Scott H. Kaminski, Esq. (WVSB # 6338)
Ray, Winton & Kelley, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
304-342-1141
304-342-0691 fax
ScottKaminski@rwk-law.com
Counsel of Record for the Petitioners, Roland F. Chalifoux, Jr., D.O., individually and Roland F. Chalifoux, Jr., D.O., PLLC, 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' Reply Brief"*** by U.S. Mail, postage prepaid on this 11th day of April, 2022:

Natalie C. Schaefer, Esq.
Caleb B. David, Esq.
Shuman, McCuskey & Slicer, PLLC
PO Box 3953
Charleston, West Virginia 25339
Counsel for West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health and Letitia Tierney, individually and in her official capacity as former WV Commissioner and State Health Officer

Perry W. Oxley, Esq.
L.R. Sammons, III, Esq.
Oxley, Rich, Sammons, PLLC
517 9th Street, Suite 1000
Huntington, West Virginia 25701
Counsel for Respondents 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

Scott H. Kaminski (WV Bar #6338)