IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0902

ROLAND F. CHALIFOUX, JR., D.O., individually and ROLAND F. CHALIFOUX, JR., D.O., PLLC d/b/a VALLEY PAIN MANAGEMENT CLINIC,

Plaintiffs below, **Petitioners,**

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES WEST VIRGINIA BUREAU OF PUBLIC HEALTH, LETITIA TIERNEY, M.D., J.D., individually and in her former capacity as 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 below, **Respondents.**

RESPONDENTS', WEST VIRGINIA BOARD OF OSTEOPATHIC MEDICINE AND DIANA SHEPARD, RESPONSE BRIEF

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STATEMENT OF THE CASE

The Respondents, the West Virginia Board of Osteopathic Medicine and Diana Shepherd (hereinafter collectively referred to as "Respondents"), set forth the following Statement of the Case. Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, the Respondents are providing the following State of the Case Section to address omissions in the Petitioners' Statement of the Case section in the Petitioners' Brief.

This case arises from a decision by the West Virginia Board of Osteopathic Medicine (hereinafter sometimes referred to as the "Board") to summarily suspend Roland F. Chalifoux, Jr., D.O.'s (hereinafter sometimes referred to as "Dr. Chalifoux") license to practice osteopathic medicine upon receiving a Complaint from Letitia Tierney, M.D., J.D., the Commissioner of the West Virginia Bureau of Public Health (hereinafter collectively referred to as the "BPH"). *See* Petitioners' Appendix at 862-865 (hereinafter "App."). On July 17, 2014, the Board received a Complaint from Dr. Tierney, who indicated that a Press Release had been issued pertaining to Dr. Chalifoux's treatment of his patients and the possible exposure of serious diseases. *Id.*

On July 25, 2014, 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 Dr. Chalifoux and issued a Determination of Probable Cause and Order for Summary Suspension. *See* Supplemental Appendix at 1-4 (hereinafter "Supp. App.").[1] *See also*, App. 844, 866-867, 1018-1021. This vote was based on the belief and determination that Dr. Chalifoux posed

[1]Although the parties had previously agreed that the Respondents' Motion for Summary Judgment and Memorandum of Law in the court below and all exhibits attached thereto would be included in the Appendix herein, it appears that there are some inadvertent omissions to the Appendix with respect to the Exhibits attached to the Respondents' Memorandum of Law in Support of the Motion for Summary Judgment. Specifically, the Petitioners have omitted Exhibits B and H, and the first page of Exhibit G, to said Memorandum of Law filed in the case below. Accordingly, the Respondents have filed a Motion for Leave to submit a supplemental appendix contemporaneously herewith.

"an immediate danger to the public if [his] practices were to continue." *See* App. 866-867, 868-881, 883-905.

Dr. Tierney also filed a Complaint before the Board on the basis that Dr. Chalifoux's practice posed a risk to the safety and welfare of his patients. App. 907-920. Upon the issuance of the summary suspension of Dr. Chalifoux'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* Supp. App. 5-8; App. 844. Upon meeting with Ms. Akers on August 7, 2014, Mr. Jones informed her that Dr. Chalifoux wished to waive his right to a hearing within 15 days of the issuance of the summary suspension, and instead desired an informal resolution to the matter. *Id.* 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.*

Dr. Chalifoux then filed a Verified Complaint and Petition for Permanent Injunction on August 21, 2014 before the Circuit Court of Kanawha County, WV (Civil Action No. 14-C-1504). *See* App. 1301-1312. A hearing on the same was held before Judge King on August 27, 2014. *See* App. 1026-1036. On August 28, 2014, Judge King granted a temporary injunction enjoining the Board from suspending Dr. Chalifoux's license and entered an Order lifting the summary suspension of his license, as if it had not occurred. *See* Supp. App. 9-19; App. 923, 1026-1036. Based upon the language of this Order, the Board believed it was barred from proceeding with an administrative hearing on the underlying Complaint filed by the BPH. *See id.*

On June 27, 2016, the Petitioners filed their Complaint before Circuit Court of Kanawha County, WV (Civil Action No. 16-C-844) in the case below against the Board, Ms. Shepard, and the Co-Defendants in this matter. App. 6-20. With respect to the Petitioners' claims against the Respondents, the Petitioners 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.

App. 19 (emphasis added). The Petitioners asserted no other claims against the Respondents in their Complaint. *See* App. 6-20. Importantly, the 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. *See id.* As a result, no such claim was alleged in the case below.

On July 30, 2018, the Respondents moved for summary judgment. App. 841-1006. On October 1, 2018, the Circuit Court in the case below held a hearing on the Respondents' Motion for Summary Judgment. App. 1204-1290. On October 4, 2021, the Circuit Court entered an order granting the Respondents' Motion for Summary Judgment and dismissed the Respondents from the case below with prejudice. App. 1415-1432.

SUMMARY OF ARGUMENT

The Circuit Court's decision to dismiss the Petitioners' claims against the Respondent with prejudice based upon *res judicata* was proper and thoroughly reasoned in the case below. Specifically, the Circuit Court's decision to grant summary judgment on the basis of *res judicata* was absolutely correct based upon the fact that the Petitioners had a full and fair opportunity to seek any and all relief they desired in Civil Action No. 14-C-1504. And, as a result, the Petitioners were precluded from filing yet another lawsuit premised upon the exact same set of facts.

Furthermore, although the Circuit Court did not grant summary judgment on the grounds of qualified immunity and quasi-judicial immunity, the Respondents will address those issues herein. Finally, the Respondents will also address the Circuit Court's decision to decline to grant summary judgment on the Petitioners' fundamentally flawed negligence claim.

STATEMENT REGARDING ORAL ARGUMENT

The Respondents assert that the issues in this case can be addressed by the Court via a Memorandum Decision affirming the Circuit Court's dismissal of the case below with prejudice. However, the Respondents do not object to oral argument in this matter if the Court believes that oral argument is necessary.

STANDARD OF REVIEW

In general, "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

ARGUMENT

In their Brief, the Petitioners argued that summary judgment should not have been granted by the Circuit Court in the case below because the Petitioners' claims for relief were distinguishable from the claims previously asserted by the Petitioners in a prior civil action (Civil Action No. 14-C-1504) which was premised on exactly the same set of facts. *See* Petitioners' Brief at p. 1-2. The Circuit Court committed no reversible error in this case, and its decision to grant the Respondents' Motion for Summary Judgment should be affirmed by this Court.

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, the Respondents will address Assignment of Error No. 1, which addresses the Petitioners' assertions that the Circuit Court committed reversible error with respect to granting summary judgment in favor of the Respondents in the case below. *See*, Petitioners' Brief at p. 1-2, 24-32. The Respondents will also

address that they were entitled to summary judgment on the additional grounds of qualified immunity and quasi-judicial immunity and on the Petitioners' negligence claim.

I. The Circuit Court Did Not Commit Reversible Error By Granting the Petitioners' Motion for Summary Judgment on the Issue of *Res Judicata*

In their brief, Petitioners erroneously assert that the Circuit Court committed reversible error by granting the Respondents' Motion for Summary Judgment in the case below on the issue of *res judicata*. *See* Petitioners' Brief at p. 1-2. For reasons set forth more fully herein, the Circuit Court's decision was well reasoned, and dismissal via summary judgment of Petitioners' claims against the Respondents was proper.

A. The *Miller* test does not apply in this matter because the barred claims were not actually litigated in Civil Action No. 14-C-1504.

In support of their argument against the application of *res judicata* in the case below, Petitioners mistakenly rely on the *Miller* test; however, the *Miller* test applies to collateral estoppel, not *res judicata*. *See* Petitioners' Brief at p. 25-26 (citing Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E. 2d 114 (1995)). In fact, the *Miller* test, as quoted by Petitioners, specifically begins as follows: "**[c]ollateral estoppel** will bar a claim if four conditions are met..." *See* Petitioners' Brief at p. 25. *See also Miller*, 194 W. Va. at 9, 459 S.E.2d at 120 (emphasis added).

"Collateral estoppel is distinguishable from *res judicata* in that collateral estoppel bars litigation of matters ***which have actually been litigated***, whereas *res judicata* may apply to matters that ***could have been*** litigated." *Bison Ints., LLC v. Antero Res. Corp.*, 244 W. Va. 391, 397, 854 S.E.2d 211, 217, fn. 9 (2020) (citing Syl. Pt. 2, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983)) (emphasis added). Petitioners state that the barred claims herein were not pursued in Civil Action No. 14-C-1504 despite having a full and fair opportunity to do so. *See* Petitioners' Brief at p. 2, 32. In fact, Civil Action No. 14-1504 was originally filed by the Petitioner on August 21,

2014 and was not dismissed until the Circuit Court's November 27, 2016 Order (a total of two years, two months, and 13 days – or 805 days – later). *See* App. 1313-1314, 1421.

Accordingly, the collateral estoppel doctrine, including the *Miller* test, is completely inapplicable in this matter and Petitioners' arguments in regard to same should be wholly disregarded. Instead, as set forth below, *res judicata* bars Petitioners' claims in this matter because these claims *could have* been litigated in Civil Action No. 14-C-1504 during the two-plus years that said case was pending, but Petitioners clearly chose not to do so.

B. *Res judicata* bars Petitioners' claims in this matter because the November 27, 2016 Order in Civil Action No. 14-C-1504 satisfies the *Blake* test.

"This Court has consistently stated that '[t]he doctrine of *res judicata* is based on a recognized public policy to quiet litigation and on a desire that individuals should not be forced to litigate an issue more than once.'" *Baker v. Chemours Co. FC, LLC*, 244 W. Va. 553, 557, 855 S.E.2d 344, 348 (2021) (quoting *White v. SWCC*, 164 W. Va. 284, 289, 262 S.E.2d 752, 756 (1980). [*R*]*es judicata* seeks "to prevent a person from being 'twice vexed for one and the same cause[.]'"). *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 219 (1983) (quoting *State ex rel. Connellsville By-Product Coal Co. v. Cont'l Coal Co.*, 117 W. Va. 447, 449, 186 S.E. 119, 120 (1936) (disapproved on other grounds by *State Ex. Rel. Shenandoah Valley Nat. Bank*, 123 W.Va. 73917 S.E.2d 878 (1941)). *Res judicata* bars prosecution of a subsequent lawsuit when three elements are satisfied:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (1997). As set forth herein, the Circuit Court's Order dated November 27, 2016 in Civil Action No. 14-C-1504 satisfies the *Blake* test.

1. *Res judicata bars Petitioners' claims in this matter because the Circuit Court's November 27, 2016 Order in Civil Action No. 14-C-1504 was a final adjudication on the merits of that action.*

As the Circuit Court clearly and correctly articulated in its October 4, 2021 Order granting summary judgment in favor of the Respondents, this Court has established the following standard with regard to *res judicata*:

> 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*.

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.E.2d 216 (1983)) (internal citations omitted) (emphasis added). *See also* App. 1419-1420.

Petitioners incorrectly argue that "Civil Action No. 14-C-1504 was not a final adjudication on the merits of Chalifoux' claims for damages asserted in this Civil Action, as no damages were asserted by Chalifoux in Civil Action No. 14-C-1504, only injunctive relief." *See* Petitioners' Brief at p. 32. However, this is NOT the test for *res judicata*. *See Lloyd, supra*. As set forth below, Petitioners *could have* made a claim for damages based upon the exact same set of facts in Civil Action No. 14-C-1504 and, despite having well over two years in which to assert additional claims, the Petitioners simply chose not to do so in Civil Action No. 14-C-1504. The Petitioners' claims in the case below are based upon the same set of facts and involve the same parties and/or persons

in privity with those same parties. The case below is precisely the type of civil action that could have been pursued in Civil Action No. 14-C-1504, but the Respondents failed to do so and, instead, filed a subsequent duplicative civil action in the case below, which is barred by the doctrine of *res judicata*.

2. *Res judicata bars Petitioners' claims in this matter because Petitioners could have made a claim for damages in Civil Action No. 14-C-1504.*

"'Claims that ***could have been raised*** by a prevailing party in the first action are merged into, and are thus barred by, the first judgment.'" *Baker*, 244 W. Va. at 558, 855 S.E.2d at 349 (citing *Bison Ints., LLC*, 244 W. Va. at 397, 854 S.E.2d at 218 (quoting *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. 2002)) (emphasis added).

Petitioners disingenuously and erroneously claim that they could not make a claim for damages when they filed their Complaint in Civil Action No. 14-C-1504 on August 21, 2014 "because at that time, he had not yet suffered any damages." *See,* Petitioners' Brief at p. 2, 32. As demonstrated below, this claim is in direct contradiction to the allegations set forth in Petitioners' Complaint in the case below. In the case below, Petitioners alleged, in pertinent part, as follows:

> 44. On July 25, 2014, BOM summarily suspended Dr. Chalifoux's license.
>
> *****
>
> 54. As a result of the summary suspension, Dr. Chalifoux has suffered lost earnings and lost earning capacity.
>
> 55. As a result of the summary suspension, Dr. Chalifoux has suffered a loss of his reputation.
>
> *****
>
> 66. On August 21, 2014, Dr. Chalifoux filed a Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief [in Civil Action No. 14-C-1504], requesting the Circuit Court of Kanawha County, West Virginia to prohibit the enforcement of BOM's July 25, 2014 Order for summary Suspension.

> 67. On August 27, 2014, the Honorable Charles E. King, Jr. conducted a hearing [in Civil Action No. 14-C-1504] on Dr. Chalifoux's Verified Complaint and Petition for Permanent Injunction and Motion for Temporary Restraining Order or Injunctive Relief.
>
> *****
>
> 74. Accordingly, [on August 28, 2014] the Court enjoined BOM's summary suspension allowing Dr. Chalifoux to resume his practice, ***but the damages set forth above had already been done.***

App. 12-13, 15-16 (emphasis added).

Moreover, on August 21, 2014, Petitioners averred in their complaint in Civil Action No. 14-C-1504 that "Dr. Chalifoux has already and will continue to suffer immeasurable and irreparable harm ... In fact, **Dr. Chalifoux has already experienced demonstratively irreparable harm ... From an economic standpoint**, Dr. Chalifoux has been unable to operate his business..." *See* App. 1307 at ¶ 29 (emphasis added). These allegations were sworn as true by Dr. Chalifoux himself in an affidavit. App. 1312. Clearly, Petitioners *could have* made a claim for any and all damages under the law in Civil Action No. 14-C-1504 because the Petitioners did allege they suffered damages due to the summary suspension. *Baker*, 244 W. Va. at 558, 855 S.E.2d at 349.

Again, the damages that Petitioners allege to have suffered, if any, certainly would have been present during the two-plus years that Civil Action No. 14-C-1504 was pending. Petitioners never sought leave to amend their Complaint in Civil Action No. 14-C-1504 to add additional claims for relief or seek additional damages. Accordingly, *res judicata* bars Petitioners' claim for damages in this matter.

3. Res judicata bars Petitioners' claims in this matter because Ms. Shepard is in privity with the Board and could have been a party to Civil Action No. 14-C-1504.

The second prong of the *Blake* test requires that "the two actions must involve either the same parties ***or persons in privity with those same parties***." *Baker v. Chemours Co. FC, LLC*, 244 W. Va. 553, 562, 855 S.E.2d 344, 353 (2021) (quoting *Blake*, 201 W. Va. at 471, 498 S.E.2d at 43, Syl. Pt. 4) (emphasis added). Here, Petitioners suggest that *res judicata* does not apply because the November 27, 2016 Order in Civil Action No. 14-C-1504 was against the Board only, not Ms. Shepard. *See* Petitioners' Brief at p. 25. However, as set forth in Paragraph 7 of Petitioners' Complaint in the case below, "Diana Shepard is and was at all relevant times the Executive Director of BOM." App. 7. Accordingly, Ms. Shepard was in privity with the Board and could have been a party to Civil Action No. 14-C-1504. *See generally Baker*, 244 W. Va. 553, 855 S.E.2d 344 (holding that supervisor named as defendant only in second action was in privity with employer, as required for application of *res judicata*). Thus, *res judicata* operates to bar Petitioners' claims in the case below against both the Board and Ms. Shepard in this matter.

In conclusion, the Circuit Court correctly held that the Petitioners' claims were barred by the doctrine of *res judicata*, and dismissal of the case below on said basis was proper and supported by long-standing West Virginia case law. Accordingly, the Circuit Court's October 4, 2021 Order granting Respondents' Motion for Summary Judgment and dismissing Respondents from the case below, with prejudice, should be affirmed.

II. The Respondents Were Entitled To Summary Judgment On The Case Below On The Basis of Qualified Immunity

Although the Circuit Court did not grant the Respondents' Motion for Summary Judgment on the issue of qualified immunity, the Circuit Court ruled that qualified immunity applies to Respondents' decision to summarily suspend Dr. Chalifoux's license. App. 1424-1427. The Circuit Court indicated that Respondents had a non-discretionary duty to hold a hearing within 15 days of the summary suspension under W. Va. Code of State Rules § 24-6-5.17. *Id.* However, the

issue of whether a 15-day hearing should have been conducted after the summary suspension was **not** in issue in the case below. For the reasons set forth more fully below, Respondents' Motion for Summary Judgment should have also been granted on the basis of qualified immunity with respect to all actions of the Respondents.

The "determination of whether qualified or statutory immunity bars a civil action is one of law for the court; therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie immunity determination, ultimate questions of statutory or qualified immunity are ripe for summary disposition." Syl. Pt. 1, *Hutchinson v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). In fact, "[i]mmunities 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." *Id.* Furthermore, the Supreme Court of Appeals of West Virginia has held that claims of immunity should be summarily decided before trial. *Id.* "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).

The Court clarified its previous rulings on the issue of qualified immunity issue in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492 (2014). In *A.B.* at Syl. Pt. 10, the Court held that:

> [t]o determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are

> absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

The Court further held:

> 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 further 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). *A.B.* at Syl Pt. 12.

Id. at Syl. Pt. 11.

The failure to identify a violation of a clearly established law is a "fatal flaw" to all claims. *See W. Va. State. Police v. Hughes*, 238 W. Va. 406 (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). A "clearly established" law in this context is one which defines a "clearly established right." *A.B.*, 234 W. Va. 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 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. *A.B.*, 234 W. Va. At 507.

In the case below, the Circuit Court correctly held that the Respondents were entitled to qualified immunity for the summary suspension of Dr. Chalifoux's license. App. 1424-1427. As a result, the Circuit Court should have also dismissed the entirety of the case below against the Respondents on the basis of qualified immunity. The Circuit Court overlooked the fact that

Petitioners did not assert any breach of a duty in their Complaint regarding the alleged failure of Respondents to hold a 15-day hearing *after* the summary suspension. *See* App. 6-20. The 15-day hearing issue in the case below is wholly irrelevant and a red herring that Petitioners have attempted to utilize to confuse the issues in the case below. As a result, the Respondents were entitled to summary judgment and dismissal of the case below in its entirety on the basis of qualified immunity.

Assuming for the sake of argument, that the 15-day hearing issue is a part of the case below – which it is not – the Respondents are still entitled to qualified immunity in regard to same. As stated above, after the summary suspension of Dr. Chalifoux's license, Petitioners and their counsel actively sought an informal resolution of the summary suspension issue. Supp. App. 5-8, App. 844. Although Petitioners were entitled to a 15-day hearing after the summary suspension under W. Va. Code of State Rules § 24-6-5.17, Petitioners actively declined said 15-day hearing. Thereafter, Petitioners' then counsel sought to resolve the matter informally without a 15-day hearing. *See id.* The matter could not be resolved informally, and Petitioners subsequently filed suit in the Circuit Court of Kanawha County, WV, Civil Action No. 14-C-1504. *See* App. 845, 1301-1312.

Ultimately, Petitioners did not seek a 15-day hearing after the summary suspension and requested informal resolution instead. Respondents accommodated Petitioners' request and did not immediately hold a 15-day hearing. As a result of this accommodation, Petitioners now claim that Respondents are liable for damages for accommodating Petitioners' request to seek an informal resolution of the summary suspension instead of holding a 15-day hearing after the summary suspension, which is both non-sensical and disingenuous.

The Respondents assert that they are entitled to qualified immunity for their action in permitting Petitioners, by counsel, to discuss the matter informally in lieu of holding a 15-day hearing after the summary suspension. Such a decision is precisely the type of discretionary act that qualified immunity protects under West Virginia's qualified immunity jurisprudence. *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992). Petitioners can point to no facts or evidence that demonstrate that Respondents' actions after the summary suspension were malicious, fraudulent, or oppressive in any respect, as to defeat qualified immunity.

In summary, the Respondents were also entitled to summary judgment and dismissal of the case below, with prejudice, on the basis of qualified immunity.

III. The Respondents Were Entitled To Summary Judgment On The Case Below On The Basis of Quasi-Judicial Immunity

Although the Circuit Court did not grant Respondents' Motion for Summary Judgment on the basis of quasi-judicial immunity, the Circuit Court did rule that quasi-judicial immunity applies to Respondents' decision to summarily suspend Dr. Chalifoux's license. App. 1429-1430. As discussed above, the issue of whether a 15-day hearing should have been conducted after the summary suspension of Dr. Chalifoux's license was not at issue in the case below. For the reasons set forth more fully below, Respondents' Motion for Summary Judgment in the case below should have also been granted on the basis of quasi-immunity with respect to all actions of Respondents.

The Supreme Court of the United States has also 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.

West Virginia has always subscribed to the common law rule that a judge is not civilly liable for any action taken in the exercise of her judicial duties, and thus, when acting in her judicial capacity, she is immune from civil liability for any and all official acts. *Fausler v. Parsons et als.*, 6 W.Va. 486, 492 (1873); *State ex rel. Payne v. Mitchell*, 152 W.Va. 448, 164 S.E.2d 201 (1968).

Regarding an analysis of the quasi-judicial immunity doctrine, the case law in West Virginia is limited. However, this Court has held that quasi-judicial entities are entitled to absolute immunity from liability from suit. *Parkulo* 199 W. Va. at 179, 583 S.E.2d at 525. In pertinent part, this Court held:

> [w]e turn now to the application of these principles to the case before us. First, contrary to appellant's contentions, we conclude that, in cases arising under W.Va. Code § 29-12-5, 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. In reaching this conclusion, we have reviewed and we now adopt the following rationale which was well stated in Pate v. Alabama Board of Pardons and Paroles, 409 F. Supp. 478 (1976):
>
> Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices than those met by the average administrative officer. 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. (emphasis added).

Although there is no decision on point from this Court that specifically applies the doctrine of quasi-judicial immunity to a medical licensure board in this State, there are many persuasive and illustrative cases from other courts throughout the United States, which have specifically held that quasi-judicial immunity bars a plaintiff's claims for damages against a medical licensure board or public official who performs quasi-judicial functions. In fact, many federal courts of appeals that have addressed the issue has concluded that members of a state medical disciplinary board are entitled to absolute quasi-judicial immunity for performing judicial or prosecutorial functions. *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999); *O'Neal v. Mississippi Bd. of Nursing*, 113 F.3d 62, 65-67 (5th Cir. 1997); *Wang v. New Hampshire Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995); *Serven v. Health Question Chiropractic, Inc.*, 319 Mich. App. 245, 255-256 (MI Ct. of App. 2017) (quasi-judicial immunity is frequently extended to a medical licensing board charged with hearing license suspension and revocation matters); *Watts v. Burkhart*, 978 F.2d 269, 272-78 (6th Cir. 1992) (en banc) (the act of revoking a physician's license . . . is likely to stimulate a litigious reaction from the disappointed physician, making the need for absolute immunity apparent); *Quatkemeyer v. Ky Bd. of Med. Licensure*, 506 Fed. Appx. 342, 346 2012 U.S. App. LEXIS 24197 (6th Cir. 2012); *Bettencourt v. Board of Registration in Med.*, 904 F.2d 772, 782-84 (1st Cir. 1990); *Olsen v. Idaho St. Bd. of Med.*, 363 F.3d 916, 925-926, 2004 U.S. App. LEXIS 6670 (9th Cir. 2004); *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1512-16 (10th Cir. 1987); and *Serven v. Health Quest Chiropractic, Inc.*, 319 Mich. App. 245, 255-256 (2017).

The rationale underlying the decisions from these various jurisdictions is that medical disciplinary boards satisfy the criteria established by the United States Supreme Court in *Butz* and

receive absolute immunity because: (1) the boards perform essentially judicial and prosecutorial functions; (2) there exists a strong need to ensure that individual board members perform their functions for the public good without harassment and intimidation; and (3) there exist adequate procedural safeguards under state law to protect against unconstitutional conduct by board members without reliance on private damages lawsuits. *See,* e.g., *O'Neal,* 113 F.3d at 66; *Bettencourt*, 904 F.2d at 783.

Under our facts, it is without dispute that the Board is a quasi-judicial agency created for the purpose of regulating the practice of osteopathic medicine and surgery in the state of West Virginia. W. Va. Code § 30-14-1, *et seq*. Likewise, Diana Shepard, as the Executive Director of the Board, is a public official whose duties include overseeing the licensing of new applicants and ensuring that they meet competency requirements, as well as collecting information regarding licensed physicians for any potential disciplinary action by the board. *See* App. 868-882. Accordingly, the Board and Ms. Shepard, at all times relevant to this proceeding, were simply acting consistently with their statutory quasi-judicial duties. And, as discussed herein, there is no evidence in this case that establishes that either the Board or Ms. Shepard acted maliciously, vexatiously, or fraudulently in any way.

First, under the standard established by *Butz*, the Board and Ms. Shepard were performing quasi-judicial functions when summarily suspending Dr. Chalifoux's license without a hearing. Certainly, the act of summary suspension of an osteopathic physician's license is quasi-judicial in nature and invokes the necessary protections of absolute immunity via the quasi-judicial immunity doctrine. Likewise, Respondents' decision to allow Petitioners – at Petitioners' own request – to seek an informal resolution and not immediately hold a hearing within 15 days of the summary suspension is also a discretionary decision that is subject to quasi-judicial immunity.

Second, there exists a strong need to ensure that the Respondents, via the individual board members and employees, such as Ms. Shepard, be able to perform their respective functions for the public good, without harassment and intimidation from lawsuits or claimants who are disgruntled, or have criticisms of the Board's decision because their medical license was subject to discipline, suspension, or revocation.

Finally, there exist adequate procedural safeguards under West Virginia law to protect against unconstitutional conduct by board members without reliance on private damages lawsuits. The Board is governed by West Virginia statutory schemes and the West Virginia Code of State Rules that govern procedures associated with the regulation of osteopathic physicians in West Virginia. Critically, Petitioners did not object to informal resolution, but instead actively sought out informal resolution after the summary suspension of the Petitioner's license.

In summary, the Respondents were at all times exercising their quasi-judicial functions in this case. The decision by the Board to summarily suspend Dr. Chalifoux's license was a quasi-judicial act and Respondents were entitled to summary judgment on the basis of quasi-judicial immunity. Further, the issue of a 15-day hearing after the summary suspension was not asserted by Petitioners in the case below and therefore, the Respondents were entitled to summary judgment and dismissal with prejudice on this basis as well.

All other actions of the Respondents following the summary suspension of Dr. Chalifoux's license fall within that quasi-judicial role and are likewise protected by absolute immunity. Therefore, the Respondents are absolutely immune from liability under the doctrine of quasi-judicial immunity and were entitled to summary judgment and dismissal of the case below, with prejudice, on the basis of the same.

IV. The Respondents Were Entitled To Summary Judgment In The Case Below Regarding Petitioners' Negligence Claim

The Circuit Court did not grant Respondents' Motion for Summary Judgment on Petitioners' negligence claim. *See* App. 1430-1432. In its Order, the Circuit Court stated that the Petitioners' alleged "that Defendant owed a duty to conduct a hearing within 15 days of his license being summarily suspended." *Id.* at 1431. However, no such allegation was made in Petitioners' Complaint in the case below as it pertains to their claims against the Respondents. *See* App. 6-20. For the reasons set forth more fully below, Respondents were entitled to summary judgment on Petitioners' negligence claim because they did not owe a duty of care to the Petitioners with respect to providing a hearing *before* the summary suspension of Dr. Chalifoux's license.

This Court 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.* (emphasis added).

With regard to whether Respondents can 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).

As set forth above, the entirety of Petitioners' claims against the Respondents in the case below were 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.

Id. (emphasis added).

Petitioners' claims relate to the alleged duty of care owed by the Respondents to provide Dr. Chalifoux notice of any complaint against him *prior* to suspension of his medical license. As set forth in the Circuit Court's Order in the case below, no such duty of care was owed. App. 1430-1432. The Circuit Court's holding in this regard was correct. However, because Petitioners did not allege in their Complaint in the case below that they were entitled to a 15-day hearing after the summary suspension, they are precluded from seeking the same. Even if the Petitioners alleged in the Complaint in the case below they were damaged by a lack of a 15-day hearing after the summary suspension (which they did not), the Respondents were still entitled to summary judgment because the 15-day hearing was waived an informal resolution was sought by the Petitioners. In summary, the Respondents were entitled to summary judgment on the Petitioners' fatally flawed negligence claim.

CONCLUSION

In summary, with respect to the issue of *res judicata*, the Circuit Court reasonably and correctly held that the Respondents were entitled to summary judgment and dismissal from the case below with prejudice. The Circuit Court decision on this basis was premised upon long standing West Virginia law and should be affirmed by this Court. Therefore, the Court should affirm the Circuit Court's ruling in the case below on said issue via a Memorandum Decision.

Furthermore, the Respondents also request this Court enter a Memorandum Decision holding that the Respondents were also entitled to qualified immunity and quasi-judicial immunity in the case below. Finally, Respondents request this Court also rule that the Respondents were entitled to summary judgment on Petitioners' negligence claim.

WHEREFORE, the Respondents, the West Virginia Board of Osteopathic Medicine and Diana Shepard, by the undersigned counsel, move this Honorable Court for a Memorandum Decision affirming the Order of the Circuit Court of Kanawha County, West Virginia, dated October 4, 2021 with respect to the issue of *res judicata* and hold that the Respondents were also entitled to summary judgment on all other issues set forth herein.

WEST VIRGINIA BOARD OF OSTEOPATHIC MEDICINE AND DIANA SHEPARD

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0902

ROLAND F. CHALIFOUX, JR., D.O., individually and ROLAND F. CHALIFOUX, JR., D.O., PLLC d/b/a VALLEY PAIN MANAGEMENT CLINIC,

Plaintiffs below, **Petitioners,**

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES WEST VIRGINIA BUREAU OF PUBLIC HEALTH, LETITIA TIERNEY, M.D., J.D., individually and in her former capacity as 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 below, **Respondents.**

CERTIFICATE OF SERVICE

I, Perry W. Oxley, Esq., counsel for Respondents, West Virginia Board of Osteopathic Medicine and Diana Shepard, served the foregoing "**Respondents', West Virginia Board of Osteopathic Medicine and Diana Shepard Response Brief**" by U. S. Mail on this **21st day** of **March, 2022,** upon the following counsel of record:

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