IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0902

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

Plaintiffs Below, Petitioners,

v.

Appeal from a Final Order of the Circuit Court of Kanawha County (No. 16-C-844)

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 DEPARTMENT OF HEALTH AND HUMAN RESOURCES, WEST VIRGINIA BUREAU FOR PUBLIC HEALTH, AND LETITIA TIERNEY, M.D., J.D.'S BRIEF

Natalie C. Schaefer, Esq. (WVSB #9103)
nschaefer@shumanlaw.com
Caleb B. David, Esq. (WVSB #12732)
cdavid@shumanlaw.com
Kimberly M. Bandy, Esq. (WVSB #10081)
kbandy@shumanlaw.com
Shannon M. Rogers, Esq. (WVSB #13920)
srogers@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
(304) 345-1400
Counsel for Respondents West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health, and Letitia Tierney, M.D., J.D.

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ASSIGNMENTS OF ERROR

Petitioners assert the following 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.

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[1], and Letitia Tierney, M.D., J.D.'s Motion for Summary Judgment.

Because Petitioners' first assignment of error does not pertain to these Respondents, these Respondents will only address Petitioners' second assignment of error.

STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, a brief statement of the case is being provided by these Respondents to correct inaccuracies and omissions in the Petitioners' statement of the case and to provide this Court with additional procedural history relevant to the issues before this Court.

A. Factual Background

This case involves an epidemiological investigation following a report of a diagnosis of bacterial meningitis in a patient at Petitioners' clinic the day after an epidural injection. Following more than seven months of investigation, these Respondents issued a press release notifying the public of a risk of transmission of blood-borne pathogens due to unsafe injection practices discovered at the Petitioners' clinic. Petitioners claim that this press release breached Petitioners'

[1] The Bureau for Public Health is a division of the Department of Health and Human Resources and, therefore, not a separate legal entity. *See* W. Va. Code § 16-1-2.

right to confidentiality. Petitioners appeal two orders from the Circuit Court of Kanawha County granting the Respondents summary judgment. The Circuit Court granted summary judgment to Respondents West Virginia Department of Health and Human Resources, Bureau for Public Health, and Letitia Tierney, M.D., J.D. (collectively referred to as "DHHR Respondents" or "the DHHR") on the basis of qualified immunity.

Petitioners' Brief focuses on two facts in a vacuum and summarily concludes that the DHHR Respondents acted maliciously toward the Petitioners by notifying the public of a risk of transmission of blood-borne pathogens. First, Petitioners' Brief relies upon a February 24, 2014, memorandum in which Danae "Dee" Bixler, M.D., MPH stated that, in the subset of patients involved in a cross-match, there was no evidence of transmission, and no further action was necessary. J.A. 815. This assertion boldly misstates the evidence by omitting the events that followed. Lead investigator (and now Centers for Disease Control and Prevention epidemiologist) Dr. Bixler testified that the statement was written before conferring with Centers for Disease Control and Prevention ("CDC") or the State of Ohio[2] about how to proceed. J.A. 566 – 567. As explained by Dr. Bixler, after conferring with the CDC and the State of Ohio, the consensus was that patient notification was necessary and required. J.A. 566 – 567. Specifically, the CDC recommended patient notification due to an ethical duty to warn patients of the risk of possible blood-borne pathogen transmissions. J.A. 566 – 567. Dr. Bixler agreed with that assessment and reconsidered her own position in light of that assessment. J.A. 566 – 567. This is the type of consultation and careful consideration that should inform decisions that impact public health.

[2] The majority of Chalifoux's patients are residents of West Virginia or Ohio, with approximately one half from Ohio and one half from West Virginia. J.A. 325.

Second, Petitioners' Brief relies upon the July 21, 2014, press release issued by the DHHR Respondents. J.A. 803. Petitioners' Brief intentionally omits the professional research, observations, and findings by DHHR and other public health agencies, including the CDC, that continued throughout this entire investigation. Petitioners' Brief further ignores that Chalifoux admitted in a questionnaire during the investigation that he engaged in the precise unsafe practices that caused the DHHR to issue the press release. Petitioners' Brief also ignores the undisputed evidence that DHHR attempted to work with Chalifoux to obtain patient information for targeted notification, but Chalifoux refused to cooperate, necessitating a public press release. It is clear from the evidence that Dr. Tierney and the DHHR made the professional decision to notify the public of the Petitioners' admitted safety breaches because an unknown number of patients were at risk for the transmission of blood-borne pathogens.

On October 22, 2013, a patient of Petitioners Valley Pain Management and Roland F. Chalifoux, Jr., D.O. (collectively referred to herein as "Chalifoux") underwent an epidural with an epidurogram. J.A. 322 – 342. The following day, that patient presented to the local hospital and was diagnosed with bacterial meningitis. J.A. 324. On October 24, 2013, the DHHR received a report regarding the patient's condition. J.A. 324. The DHHR conducted an investigation into the meningitis outbreak, which included an inspection of Chalifoux's facility. J.A. 325. The initial inspection occurred on October 29, 2013, during which Chalifoux was interviewed in person by investigators about his procedures. J.A. 328. Chalifoux told investigators that "he never uses any masks during almost all procedures. He confirmed that he only wears a mask if he places a permanent device in the spinal cord." J.A. 328. The investigators advised Chalifoux that masks are recommended for epidural procedures. J.A. 330. As a result of having been advised of the importance of wearing a mask, Chalifoux and his assistant wore masks during an epidural

procedure that was observed by the investigators during their visit on October 29, 2013. J.A. 329. The investigators concluded that "[t]he rapid onset of of [sic] meningitis with respiratory flora 24 hours after an epidural injection administered by a provider who routinely did not wear a mask is highly suspicious for iatrogenic transmission." J.A. 332.

In addition to the failure to mask, multiple unsafe injection and non-sterile techniques were identified by the DHHR. J.A. 329 – 332. During the clinic visit on October 29, 2013, Chalifoux told investigators that he "double-dipped" vials of isohexol, meaning that he reentered them using a used syringe. J.A. 351. He also advised that he used vials for more than one patient. J.A. 351-352. Before leaving the clinic, DHHR investigators warned Chalifoux not to use single-dose vials and single-dose saline bags as multi-dose medications and to use "one syringe and one needle only one time." J.A. 330. On October 31, 2013, investigators followed up with written recommendations and one investigator placed a phone call to Chalifoux to make certain he received and understood the recommendations. J.A. 330.

Chalifoux was again contacted by investigators on November 5, 2013, for a telephone interview, to determine how often Chalifoux re-used a syringe to enter a vial during a procedure. J.A. 330. During this call, Chalifoux also advised that he performed the same procedures at a local hospital, and that he had not previously worn a mask at that hospital for epidural procedures. J.A. 331. Chalifoux told the DHHR investigators that, following the inspection of Chalifoux's facility on October 29, 2013, when he was told that he should be wearing a mask, he shared that information with the staff at the local hospital and they started wearing masks thereafter. J.A. 331.

The DHHR reviewed records from six West Virginia hospitals to monitor for any additional infections potentially associated with the clinic, and none were identified. J.A. 331. Additionally, West Virginia patients who had procedures performed in the clinic between October

1, 2013, and October 31, 2013, were contacted, and no major issues were identified.[3] J.A. 331. A chart review of patients was also conducted. J.A. 332.

The DHHR concluded that:

> Clinic A did not use safe injection practices; did not use adequate skin preparation technique; and the physician did not observe hand hygiene either before a sterile procedure or after completing the procedure. . . . Clinic A used preservative-free medication labeled as single-use for multiple patients. . . .The physician told investigators that single dose vials were often used up within one or two procedure days; however the 150 and 500 ml bags of saline were likely stored and used for a number of days. The syringe used for isohexol was a 5-ml syringe. The physician stated that he injects 5 ml into the spinal needle, and ***if he needs more than 5 ml of isohexol, he re-enters the isohexol vial and withdraws more with the same 5 ml syringe and the same 18-gauge needle***. In October, 2013, 7 (47%) of 15 patients undergoing epidural procedures received more than 5 ml of isohexol, suggesting the potential for blood-borne pathogen contamination of isohexol with possible transmission from one patient to another.
>
> * * *
>
> Nonetheless, the evidence linking the single case of meningitis with respiratory flora to infection control practices at Clinic A is very strong and a significant risk of bloodborne pathogen transmission cannot be excluded. . . . The next step for quantifying this risk is a cross match between a patient list from Clinic A and the hepatitis B, C and HIV registries for the state of West Virginia.

J.A. 332 – 334 (emphasis added). DHHR also stated in its report that, "[d]epending on the results of the cross-match, patient notification may be recommended so that patients are aware of the blood-borne pathogen exposure risk."[4] J.A. 335.

The DHHR made several recommendations as a result of the first inspection. The investigators warned Chalifoux to, among many other things, not use single-dose medications as multi-dose; use a face mask during any epidural procedures; and use "one syringe and one needle only one time." J.A. 334, 345. These recommendations were critical to patient safety because the

[3] About half of the patients who had procedures during this time period were West Virginia residents, and about half were Ohio residents. J.A. 325.

[4] The risk of exposure is created when a syringe that has come into contact with a patient is used to re-enter a medication vial, which vial is then used on a subsequent patient.

reuse of contaminated medication vials risked the transmission of blood-borne pathogens such as Hepatitis B, Hepatitis C, and HIV. J.A. 345.

To assess whether such recommendations were instituted, the DHHR conducted a second inspection on December 19, 2013. J.A. 358. Chalifoux provided 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. J.A. 358 – 359. The cross-match was completed to determine whether there were any individuals in Chalifoux's patient population that could have been the source of transmission of any blood-borne pathogens to other patients through unsafe injection practices. J.A. 358 – 359.

While there was no indication that any other patient contracted bacterial meningitis, it was confirmed that there were seven documented patients who had been diagnosed with Hepatitis C and an unknown number of confirmed patients who were diagnosed with HIV prior to becoming patients of Chalifoux's. J.A. 359. Initially, Dr. Bixler concluded that no further action was necessary, and included this statement in a memorandum dated February 24, 2014. J.A. 815. However, this was written before Dr. Bixler conferred with CDC or the State of Ohio about how to proceed. J.A. 566, 567. Dr. Bixler testified,

> Q At this point in time, in February and into March, I saw a lot of documents – memos or emails – that show interaction between West Virginia folks, like yourself, Ohio, and the CDC, which indicated to me that there was really a collaborative effort at that point in time on what to do next with respect to the risk of transmission of blood-borne pathogens. Is that fair?
>
> A That's fair.
>
> Q And then I saw a note somewhere – and it may have been from you or somebody from West Virginia – about potentially closing the investigation. Do you recall that?

A Yes, I do. We initially entertained that possibility because I felt that the risk of transmission was low. However, we discussed this with Ohio and with CDC, and I was convinced that that was not the correct course of action to take because –

Q That being closure?

A Closure.

Q Okay. I'm sorry.

A I was convinced that that was not the correct action to take, and I was convinced that a notification had to happen because we had evidence from our investigation that double-dipping had occurred. That is what is referred to in the literature as a Category A breach, meaning that it is – that has been associated with transmission in other outbreak investigations.

And therefore we – after CDC talked to us and told us that a notification was needed and we thought about it, we recognized that they were – that they were correct and that we needed to proceed.

J.A. 566. When asked specifically about the memorandum from February 24, 2014, stating "no further action is necessary," upon which Petitioners rely so heavily, Dr. Bixler testified:

A That is a memo that I drafted before we consulted with Ohio and CDC. And I think in the earlier testimony we talked about how they strongly recommended that we proceed with notification for reasons that we've already outlined, and therefore that – I believe that it – at that point I believed that it was unwise to close the investigation, as I had initially proposed to do, and I believed that the better course of action was to proceed with the notification.

Q But initially, at least as of February 24, you felt the investigation should be –

A Yes.

Q -- concluded?

A And that is – that's – that's my – my fault, I should have – I agree with the argument that CDC put forward that a notification was required. I think their argument was good and my initial thoughts on this, I think, were wrong.

J.A. 567. Thus, after consulting with other public health professionals, Dr. Bixler agreed with the CDC's recommendation that patient notification was needed due to an ethical duty to warn patients of the risk of possible blood-borne pathogen transmissions that had been identified. J.A. 353 – 354.

The consensus was that patient notification was necessary and required. J.A. 346, 351, 353 – 355, 359. Dr. Bixler explained that the purpose of patient notification is to notify patients who may have been exposed to a blood-borne pathogen "so that they can be tested if they choose to be tested and so that they can then receive treatment if there is evidence of any active infection." J.A. 353. Dr. Bixler explained that, even though they believed the risk to be low, "[p]atients will only know that they're infected if they're tested." J.A. 354. Otherwise, infections could be "silent," untreated, and could be spread to others. J.A. 354.

Following the determination that patient notification was necessary due to Chalifoux's admissions, CDC's guidance, and observations during the course of the investigation, DHHR focused its efforts on determining which patients were at risk for the transmission of blood-borne pathogens so notification could be accomplished in a targeted manner. J.A. 387 – 388. The DHHR advised Chalifoux that it preferred to work with him directly to notify only those patients possibly exposed to blood-borne pathogens. J.A. 387 – 388. Specifically, the DHHR offered Chalifoux the opportunity to provide input into the notification materials, as well as the opportunity to identify and narrow the scope of the notification to only those patients at risk. J.A. 387 – 388.

On March 19, 2014, Dr. Bixler sent email correspondence to Chalifoux in follow up to a phone conversation. J.A. 346. The email references "the guidelines used by CDC to recommend patient notification under these circumstances" and states, "[t]hey consider syringe reuse and [sic] access single-dose vials that are subsequently used for other patients to be a Category A breach, and notification is recommended." J.A. 347. The email included peer-reviewed literature explaining the basis for the need for patient notification as well as a draft letter to a patient to provide targeted notification of the possibility of exposure to hepatitis B, hepatitis C, and HIV. J.A. 347.

Notably, in communications with DHHR investigators throughout the investigation, Chalifoux never challenged or objected to the findings regarding his practices, and never said that the doctors had reached an incorrect conclusion about his practices. J.A. 347, 352. Instead, Chalifoux asked whether the DHHR had ever done similar notifications in the past, and the DHHR responded that it had, and provided information in response to his inquiry. J.A. 348. During one particular discussion about which of Chalifoux's patients would be at risk, Chalifoux mentioned patients who received saline. J.A. 348. Dr. Bixler agreed and pointed out that the patients who received contrast would also be at risk. J.A. 348. This was in an effort to help identify a potential patient population for which to provide notice of potential risk. J.A. 348. Again, on March 25, 2014, Chalifoux had an opportunity to explain, discuss, or clarify his practices or make objections to the information that had been exchanged. J.A. 352. Chalifoux did not object to the characterization of him "double-dipping." J.A. 352. Dr. Bixler confirmed that Chalifoux "clearly told us that he double-dipped, and he clearly told us that he used vials as multi-dose." J.A. 352.

On April 1, 2014, a DHHR investigator sent Chalifoux an email that included a questionnaire for Chalifoux to complete. J.A. 352. Chalifoux submitted a completed questionnaire on April 10, 2014. J.A. 359. The questionnaire completed by Chalifoux specifically disclosed its purpose: "The purpose of the questionnaire is to clarify which procedures might be associated with syringe re-use; or re-use of vials (single-dose or multi-dose) for more than one patient after contamination by syringe re-use." J.A. 422. During his deposition, Chalifoux admitted that he answered the questionnaire as follows:

Q. Then you were asked "Was the vial ever used for more than one patient?" And you marked "Yes," correct?

A. Correct.

Q. And then you were asked "Was the vial ever entered with a used syringe?" And you marked "Yes," correct?

A. Correct.

J.A. 426, 433. Chalifoux was contacted by phone for an interview to clarify questions on the questionnaire, but he refused to answer any further questions and referred the DHHR to his attorney. J.A. 360.

DHHR requested patient names and addresses so that patients could be notified. J.A. 360. Dr. Tierney sent Chalifoux a letter on April 25, 2014, requesting additional patient information and informing him of the following:

> We are taking this step because you have declined the follow-up interview we requested in order to clarify the risk associated with peripheral joint injections, trigger point injections, spinal nerve stimulation and radiofrequency ablation. We also need to determine if you place or fill intrathecal pumps in the clinic. Understanding this risk would be the best thing for patients **and allow us to target notification and education appropriately to your patient population.** However, your lack of cooperation limits the choices available to us.
>
> We find any further and indefinite delay of patient notification to be unreasonable and unacceptable. **While we would strongly prefer to be able to limit patient notifications in this matter to an appropriately targeted group of your patients** based upon the additional information we had sought from you, we cannot permit your lack of timely cooperation in this regard to affect patients' ability to take appropriate preventive action under these circumstances even if it means that that burden is also placed on patients who need not have been included if targeting had been possible.

J.A. 387 – 388 (emphasis added). Chalifoux refused to cooperate in this effort and advised the DHHR that his attorney was concerned over liability issues and that he would not provide the requested patient information. J.A. 397. In fact, his attorney responded to the final written request for patient contact information by asserting that the patient information is confidential under HIPAA and that Chalifoux would not release that information to the DHHR.[5] J.A. 398 – 399.

[5] This explanation appears pretextual inasmuch as Chalifoux had no objection to providing patient information for the cross-match. It was only when patients were going to be notified of possible

The various federal, state, and local health officials worked together for months on the notification documentation while awaiting the patient information from Chalifoux. J.A. 347 – 349, 360. When DHHR was advised that Chalifoux would not produce the patient information, the DHHR initially decided to issue a public press release in an effort to notify all possible patients of the risks; however, several days before the issuance of the press release, the DHHR administration decided to issue an administrative subpoena, in lieu of a public press release, in a final effort to obtain the contact information. J.A. 402 – 403. Accordingly, the DHHR filed a miscellaneous action to subpoena patient information. J.A. 407 – 408. Simultaneous with the administrative subpoena, Dr. Tierney filed a Complaint with the Board of Osteopathic Medicine. J.A. 404. She admittedly would have preferred Chalifoux's compliance with DHHR's request for patient information to avoid the public press release and Board Complaint; however, Chalifoux left the DHHR with few options. J.A. 404 – 405.

Petitioners allege that Dr. Tierney "had a change of heart" after filing the complaint against Chalifoux with the West Virginia Board of Osteopathic Medicine but did not withdraw the complaint. Pet'r's Br., 19. This is inaccurate. Dr. Tierney's "change of heart" involved pursuing an administrative subpoena to obtain patient information instead of issuing a press release. J.A. 402-403. She did not waver from her determination that she was compelled to file a complaint under the Reportable Disease regulations. J.A. 404, 536.

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transmission that he balked and refused to cooperate. Furthermore, this explanation is legally incorrect. HIPAA specifically permits a healthcare provider to disclose protected health information to "[a] public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, ... and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority...." 45 CFR § 164.512(b)(1)(i). This clearly includes DHHR and its officials who are charged with protecting the public health and who were actively investigating Chalifoux's clinic for the purpose of preventing and controlling disease.

As part of the ongoing discussions between West Virginia and Ohio public health officials, Ohio had expressed agreement not to issue a press release. J.A. 402-403, 760. Despite this agreement to delay a public press release, the State of Ohio issued its own press release in the early morning on July 21, 2014. J.A. 402 – 403, 412, 416. Ohio's press release was titled "W. Va. Bureau for Public Health Finds Unsafe Injection Practices at Valley Pain Management Clinic in McMechen." J.A. 416. Ohio's press release identified Valley Pain Management as the offending clinic five additional times. J.A. 416. Because the State of Ohio identified Chalifoux's clinic and its unsafe conduct in its press release, the DHHR determined it was necessary to issue its own press release because the DHHR and local West Virginia agencies were being inundated with concerned patients who had read the Ohio press release. J.A. 666 – 667. It is undisputed that the DHHR's publication of the press release occurred after the State of Ohio had already issued a press release. J.A. 741, 757. Chalifoux acknowledged that the first press release was issued by Ohio. J.A. 741. Dr. Tierney testified that the Ohio press release was the first press release. J.A. 757.

Chalifoux conceded that, if Dr. Tierney and the DHHR had a reason to believe the investigative conclusions were accurate, DHHR "would have been responsible for doing something. What she would have to do I guess is based upon the regulation she wants to -- which one she wants to use." J.A. 413. He also conceded that the decision to "do something" would be at Dr. Tierney's discretion. J.A. 414. Thus, after the State of Ohio's press release was issued, Dr. Tierney, acting as Commissioner of the Bureau for Public Health, issued a press release stating:

* * *

> Prior to November 1, 2013, Valley Pain Management reused syringes to enter vials and saline bags used for more than one patient.
>
> Tierney said Valley Pain Management continues to refuse to provide DHHR with a patient list so specific patients may be properly notified of potential risk. DHHR has issued an administrative subpoena in an effort to obtain the clinic's patient list

> and is prepared to institute legal action if the clinic does not comply with the subpoena.
>
> "The West Virginia Bureau for Public Health has worked very hard with our local public health partners, Ohio, Pennsylvania and the CDC to understand the risk of hepatitis B, C, or HIV for patients at Valley Pain Management, which is why access to the patient list is critical," said Tierney.
>
> * * *

J.A. 418 – 419. In issuing the press release, Dr. Tierney unequivocally stated that her concern was the "health, welfare, and benefit of the people of West Virginia." J.A. 404.

Although Chalifoux asserts that this press release is false, it is undisputed that the DHHR investigators concluded that Chalifoux did, in fact, reuse syringes to enter vials and saline bags used for more than one patient. J.A. 346, 350 – 351. Unsafe practice was one of the primary bases for concluding that patients had a risk of blood-borne pathogen transmission. J.A. 332 – 333. Though Chalifoux self-servingly testified in his deposition that he verbally told Dr. Bixler that he did not reuse vials on other patients, there are absolutely no documented objections by Chalifoux to the multiple written communications between the DHHR and Chalifoux regarding the investigation and the DHHR's findings that concluded Chalifoux re-entered medication vials used on multiple patients. J.A. 352, 354. Indeed, Chalifoux admitted in his questionnaire and in his deposition to entering at least one type of medication with used syringes and reusing that medication on subsequent patients. J.A. 426, 433.

Chalifoux admitted that he had no evidence that anyone willfully, deliberately, intentionally, or recklessly provided any false information to the public. J.A. 414. He also conceded that he had no evidence that Dr. Tierney's actions in issuing the press release were fraudulent, malicious, or oppressive. J.A. 414. Indeed, lead investigator Dr. Dee Bixler confirmed that the factual information contained in West Virginia's press release is factually accurate. J.A.

351. This was underscored by the written questionnaire completed by Chalifoux on April 10, 2014, that confirmed he reused vials of omnipaque for more than one patient and that vials of omnipaque were entered with a used syringe. J.A. 421 – 428.

As noted above, as a result of Chalifoux's failure to comply with the aforesaid request for patient data, the DHHR instituted a civil action to compel the requested patient data. In that matter, the Circuit Court entered two separate Orders compelling Chalifoux to respond to the subpoena to produce patient data. J.A. 435 – 437. Similar to the present action, Chalifoux alleged that the DHHR's actions in seeking patient data was part of a personal vendetta and sought sanctions. J.A. 439 – 440. The Court disagreed and denied the request for sanctions, finding no patterned wrongdoing or vendetta. J.A. 439 – 440.

During the discovery of this matter, Dr. Chalifoux admitted that he had no evidence that any DHHR official intentionally misrepresented any factual finding contained in its report:

> Q. Do you have any reason to believe that Dr. Bixler or her team intentionally misrepresented anything in this report?
>
> A. You know, I don't think I'm at liberty to really discuss any of that. It's really something you need to ask them. This looks like just possibly some clerical mistakes or maybe not fully understanding the procedure, and that's why we told her "Maybe we should mock this."

J.A. 431. Chalifoux admitted he had no evidence of intentional misrepresentation by the DHHR:

> Q. Do you have any evidence that Dr. Bixler or her team intentionally misrepresented any of the report findings?
>
> A. Misrepresented? I don't think she mis -- again, you'd have to ask her that but, I mean, from looking at this, one would think that after having conversations with me, she would have taken a step back and maybe come back and redo things. You know, "Let's go back and let's mock this. Let me get a better understanding for this stuff."
>
> Q. But you do not have any evidence that Dr. Bixler or her team intentionally misrepresented any facts in this report.

A. Well, like I said, I don't know the answer to that. All I can say is if you read the report and you read -- look at my notes and all that, these two are not adding up.

. . .

Q. Okay. So your answer is no, you are not aware of any evidence regarding her motive or intent or her team's motive or intent.

A. Exactly.

J.A. 349. In fact, Chalifoux characterized the press release as simply "written poorly" but not intentionally misleading:

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

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

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

A: I have no evidence.

. . .

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

. . .

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

J.A. 411 – 412. Chalifoux attempted to explain his "suspicions" at his deposition:

> Well, my – I guess it's more the – the circumstances around it in terms of once you have a chance to actually, you know, kind of look at what happened. For example, you know, the complaint to the board occurring at a certain time, the press release, and then – what was the other one? Press release. Complaint to the board – and then obviously the medical board, you know, making it is decision to suspend my – my license.

> You know, I – I was kind of going back over that timeline, and it just seems rather interesting how all of this happened at one time as opposed to in more – what I would call in more a sequential way.

J.A. 744 – 745. Chalifoux was also asked, "[a]ssuming that the investigation and the investigators ... were factually incorrect ... is there any other information that you are aware of, either by witness testimony or documentation, that suggests anybody with the DHHR, including Dr. Tierney, disregarded the facts, and nevertheless maliciously and purposefully intended to harm you by issuing the press release?" J.A. 746. Chalifoux responded,

> Again, coming down the hypothesis, or whatever, my thought process at this point would be – one of the most I think documents that seems rather damning is the fact that on the letter – or on the complaint to the medical board, if you see that complaint to the medical board, there's no additional writing from Dr. Tierney. If you see apparently her form, there is some writing on her form. So it's a little bit confusing to me as to why she would write a bunch of little scribble notes about Ohio or whatever, when in reality, she was saying that Ohio and them were not going to do anything, but yet Ohio just all of a sudden out of the blue did a press release. I guess that – a little more research needs to go into that.

J.A. 746 – 747.

B. Procedural History

Petitioners' Complaint alleges a single cause of action[6] against the DHHR Respondents for alleged violation of Petitioners' right to confidentiality in the investigation of a healthcare-associated disease outbreak. J.A. 16 – 17. On September 1, 2017, the DHHR Respondents filed their Motion for Summary Judgment. J.A. 300 – 320. Following briefing, a hearing was held on November 3, 2017. J.A. 656 – 722. At the November 3, 2017, hearing on the DHHR's Motion for Summary Judgment, the Court instructed the parties to complete the depositions of Dr. Chalifoux and Diana Shepard to determine whether either deposition would reveal evidence of malice. J.A.

[6] Petitioners' Complaint also vaguely asserts that the press release was false and defamatory. J.A. 12. The underlying Court dismissed any potential defamation claim. J.A. 834 – 835. Because Petitioners fail to identify this issue as an assignment of error, it will not be addressed herein.

714 – 721. On December 21, 2017, the Circuit Court entered an Order requiring Petitioners and the DHHR Respondents to submit supplemental briefs following the completion of Chalifoux's deposition. J.A. 723 – 725. On January 31, 2018, the parties submitted their supplemental briefs. J.A. 726 – 784, 785 – 819. Despite the Circuit Court's instruction, and despite having more than ample time to complete discovery, Chalifoux remained unable to produce any evidence of malice. J.A. 834. Chalifoux's only "evidence" of malice continued to be his personal theory that the sequence and timing of events seemed "rather interesting" and that Dr. Tierney's Complaint to the West Virginia Board of Osteopathic Medicine did not contain the same "scribble notes" as the Complaint received via a FOIA request. J.A. 744 – 747. This was simply not sufficient to overcome qualified immunity.

On February 6, 2018, the Circuit Court entered its Order granting the DHHR Respondents' Motion for Summary Judgment. J.A. 820 – 835. On March 23, 2018, the Circuit Court amended its Order to alter the final paragraph of the Order, which had erroneously removed the civil action from the Circuit Court's docket while Petitioners' claims against Respondents West Virginia Board of Osteopathic Medicine and Diana Shepard remained. J.A. 836 – 837.

Several years later, on October 4, 2021, the Circuit Court entered an Order granting Respondents West Virginia Board of Osteopathic Medicine and Diana Shepard's Motion for Summary Judgment. J.A. 1415 – 1432. On November 3, 2021, Petitioners filed their Notice of Appeal purporting to appeal not only the Circuit Court's Order granting Respondents West Virginia Board of Osteopathic Medicine and Diana Shepard's Motion for Summary Judgment but also the Circuit Court's Order granting the DHHR Respondents' Motion for Summary Judgment, which had been entered on February 6, 2018. On December 21, 2021, the DHHR Respondents

filed a Motion to Dismiss the appeal on the grounds that it is untimely. This Motion is currently pending before this Court.

SUMMARY OF ARGUMENT

The Circuit Court did not err in granting summary judgment to the DHHR Respondents. The Circuit Court properly determined that the DHHR Respondents were entitled to qualified immunity. Qualified immunity bars claims against a State agency and its officials with respect to discretionary decisions and actions. The plain language of the Reportable Disease regulations, West Virginia Code of State Rules § 64-7-1, *et seq.*, grants the DHHR Respondents significant discretion in the investigation of, and public notification of, disease outbreaks. The DHHR Respondents acted, at all times, within their discretion. The investigative team conducted several site inspections, repeatedly interviewed Chalifoux and his employees, conducted a cross-match, and issued a report identifying Chalifoux's unsafe injection practices. In his questionnaire, Chalifoux admitted to double-dipping needles and syringes into at least one medication that was later used for subsequent patients. This unsafe practice posed a risk of blood-borne pathogen transmission and placed patients at risk of contracting hepatitis B, hepatitis C, and HIV. Following consultation with CDC and the State of Ohio, the investigative team determined that patient notification was necessary to protect the public health by notifying patients of the risk of blood-borne pathogen transmission. The DHHR Respondents attempted to work with Chalifoux to target patient notification to only those patients who were at risk as a result of Chalifoux's unsafe injection practices; however, Chalifoux refused to cooperate, which necessitated public notification through the press release issued on July 21, 2014. The DHHR Respondents acted within the discretion provided to them by the Reportable Disease regulations in their investigation and in their issuance of the press release.

Additionally, the DHHR Respondents did not act maliciously, fraudulently, or oppressively in the issuance of the Press Release or in the filing of the Board Complaint. Petitioners have presented no evidence of malice, fraud, or oppression. Indeed, Chalifoux admitted in his deposition that he has no such evidence. On the contrary, the undisputed evidence demonstrates that the actions of the DHHR Respondents were carried out for the sole purpose of protecting the public health, which is their statutory purpose. Therefore, the Circuit Court correctly granted summary judgment.

Finally, the Circuit Court properly granted summary judgment because Petitioners failed to identify any clearly established law or right violated by the DHHR Respondents. Indeed, the actions of the DHHR Respondents were directly in line with the Reportable Disease regulations. If the Commissioner determines, in her discretion, that patient notification is necessary to protect the public health, then she may issue notification and identify the offending facility. Additionally, the Reportable Disease regulations require the Commissioner to file a Board Complaint with the appropriate licensing authority if a healthcare provider fails to take corrective action to protect the public health. Chalifoux refused to cooperate with the patient notification process, which continued to place the public health at risk. Thus, Dr. Tierney appropriately complied with the Reportable Disease regulations when she filed the Board Complaint. Therefore, the Circuit Court properly granted the DHHR Respondents' Motion for Summary Judgment.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will not significantly aid the Court in its decision process; therefore, these Respondents do not request oral argument.

ARGUMENT

A. LEGAL STANDARD OF REVIEW

Petitioners appeal two orders from the Circuit Court of Kanawha County granting summary judgment to Respondents. This Court has long held that "[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).

When reviewing a Circuit Court's decision regarding summary judgment, this Court applies the same standard required of the Circuit Court. *Carr v. Michael Motors*, 210 W. Va. 240, 244, 557 S.E.2d 294, 298 (2001) (citation omitted); *see also Williams v. Precision Coil*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995). This Court has held that "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 1, *Williams*, *supra* (citing Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York*, 148 W. Va. 160,133 S.E.2d 770 (1963)). A motion for summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c).

In Syllabus Point 4 of *Painter*, *supra*, the Supreme Court of Appeals of West Virginia stated that "[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *id.* This is particularly true when immunities are involved. "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all." *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996).

This Court has also held that,

> "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either: (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) or the West Virginia Rules of Civil Procedure."

Syl. Pt. 3, *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000) (quoting Syl. Pt. 3, *Williams*, *supra*).

Thus, the non-moving party "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter v. Peavy*, 192 W. Va. 189, 192 – 93, 451 S.E.2d 755, 758 – 59 (1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). "[W]hile the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some 'concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor' or other 'significant probative evidence tending to support the complaint.'" *Id.* at 193, 451 S.E.2d at 759 (quoting *Liberty Lobby*, 477 U.S. at 256, 106 S. Ct. 2514, 91 L. Ed. 2d at 217 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569, 593 (1968))) (internal quotation marks omitted) (internal citation omitted).

B. THE CIRCUIT COURT PROPERLY GRANTED THE DHHR RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE DHHR RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY.

The DHHR acts in accordance with its statutory authority. The DHHR Respondents are protected from suits by qualified immunity:

> 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). This is true for both State agencies and their officials. Moreover, "[i]f a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby." Syl. Pt. 6, *W. Va. Reg'l Jail and Correctional Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (quoting Syl. Pt. 4, *Clark v. Dunn*, *supra*)); Syl. Pt. 8, *WVDHHR v. Payne*, 231 W. Va. 563, 746 S.E.2d 554 (2013) (additional citation omitted).[7]

If the complained-of actions fall within the discretionary functions of an agency or an official's duty, the inquiry does not end. There is no immunity if the discretionary actions violate clearly established laws of which a reasonable official would have known: "[a] public executive official who is acting within the scope of his authority and is not covered by the provisions of [ ] [the West Virginia Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known[.]" Syllabus, *in part*, *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992); Syl. Pt. 3, *in part*, *Clark v. Dunn, supra*. Thus, the fundamental inquiry is whether the DHHR (1) acted within its discretion, and (2)

[7]The applicable insurance policy does not waive or alter the defense of qualified immunity. The Certificate of Liability Insurance to the policy expressly states that "the additional insured [WVDHHR] does not waive any statutory or common law immunities conferred upon it." J.A. 442.

whether those discretionary decisions violated any clearly established law of which a reasonable DHHR employee would have known. In the 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, 766 S.E.2d at 766.

1. The Acts of the DHHR Respondents Were Discretionary in Nature.

Qualified immunity is designed to protect public officials and agencies from the threat of litigation resulting from difficult decisions made in the course of their employment. *See, e.g., Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). In order to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. Syl. Pt. 8, *Parkulo v. W. Va. Bd. of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996); Syl. Pt. 11, *A.B.*, 234 W. Va. 492, 766 S.E.2d 751. "Qualified immunity preserves the freedom of the State, its agencies, and its employees to deliberate, act, and carry out their legal responsibilities within the limits of the law and constitution." *W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 197, 800 S.E.2d 230, 235 (2017).

This Court adopted the standard of the Supreme Court of the United States, holding that "[g]overnment officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *State v. Chase Securities*, 188 W. Va. at 362, 424 S.E.2d at 597 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 396, 410 (1982)). This Court has also noted that "[t]he purpose of such official immunity is not to protect an erring official, but to insulate the decision-making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make [ ] officials unduly timid in carrying out their official duties[.]" *Payne,* 231 W. Va. at

577, 746 S.E.2d at 568 (quoting *Westfall v. Erwin*, 484 U.S. 292, 295, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988)).

When the DHHR Respondents determined public notification was necessary, in reliance on the findings from the Bureau for Public Health's investigation concluding that Chalifoux's practices placed the health of the public at risk, they were exercising their discretion as public health officers. Specifically, Dr. Tierney, in her discretion as the Commissioner of the Bureau for Public Health, concluded that patient notification was necessary to protect the public health. The applicable regulations expressly permit such a public health notification under circumstances such as those in the case *sub judice*:

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

W. Va. Code St. R. §§ 64-7-7 and 64-7-20 (emphasis added).

Following their investigation, the DHHR Respondents determined, in their discretion, that disclosure of the identity of the offending healthcare facility was necessary to inform the public to take preventative action to stop the spread of disease. The precise language of the Reportable Disease regulations defines this action as discretionary as determined by the Commissioner.

Additionally, Dr. Tierney felt compelled by the legislative rules to file the Board Complaint against Chalifoux. The decision to file the Board Complaint was made in her discretion as the State's Public Health Officer because she determined Chalifoux's refusal to provide patient data, thereby exposing members of the public to unknown risks of blood-borne pathogen transmission, placed the health of the public at risk. Once Dr. Tierney made that discretionary determination, she believed she was required to file a Board Complaint pursuant to the Reportable Disease regulations. West Virginia Code of State Rules § 64-7-7.8 states:

> If the Commissioner becomes aware of an ongoing risk to public health through investigation of an outbreak in a health care facility and the health care facility fails to take appropriate corrective action within a reasonable period of time after notification by the Commissioner, the Commissioner shall file a complaint with the Office of Health Facilities Licensure and Certification. If the Commissioner becomes aware that a licensed practitioner is practicing in such a way as to place the health of the public at risk and the licensed practitioner fails to take appropriate corrective action within a reasonable period of time after notification by the Commissioner, the Commissioner **shall** file a complaint with the practitioner's licensing board.

W. Va. Code St. R. § 64-7-7.8 (emphasis added). These decisions are the precise types of decisions that are shielded by qualified immunity. The immunity is designed to ensure that individuals like Dr. Tierney and Dr. Bixler, charged with protecting the public health, can make decisions and act on those decisions without the threat of suit by private individuals.

2. There is No Evidence that the DHHR Respondents Acted Fraudulently, Maliciously, or Oppressively, and, Thus, the Circuit Court Properly Granted Summary Judgment on the Basis of Qualified Immunity.

Chalifoux argues that the issuance of a press release notifying Chalifoux's patients of a health risk is evidence of malice. Pet'r's Br., pp. 35 – 36. Chalifoux also argues that the filing of a Board complaint was evidence of malice. Pet'r's Br., pp. 35 – 36. Chalifoux's arguments fail as a matter of law because DHHR had the discretion to disclose Chalifoux's name to the public, because DHHR had the discretion to file a Board complaint, and because those discretionary decisions were made for the sole purpose of protecting the public's health. Although Petitioners casually allege that "Defendant Tierney's action in issuing the Press Release were fraudulent, malicious, and oppressive" (J.A. 18), Petitioners must establish evidence revealing fraud, malice, or oppression. *McGraw*, 800 S.E.2d 230, 239 W. Va. 192, 202, 240. Speculation or opinion does not suffice.

Petitioners claim that Dr. Tierney breached Petitioners' confidentiality provided by West Virginia Code of State Rules § 64-7-7.7. Petitioners claim that Dr. Tierney's actions were "for the malicious, fraudulent and oppressive purpose of obtaining further patient records from Petitioner." Pet'r's Br., p. 35. Petitioners further claim that Dr. Tierney's actions were malicious because, to gain Petitioners' compliance and allow DHHR to notify patients of a risk of blood-borne pathogen transmission, Dr. Tierney could have utilized the administrative subpoena process. Pet'r's Br., p. 35. Petitioners characterize an April 18, 2014, email from Dr. Tierney to another DHHR employee as a "threat" to file a Board Complaint against Chalifoux and to "put ads in the paper to notify" Petitioners' patients of the health risk caused by Chalifoux's unsafe injection practices. Pet'r's Br., p. 35. Petitioners' arguments are mere conjecture and are not evidence of a malicious intent. Instead, the undisputed evidence demonstrates that the DHHR Respondents' sole purpose was to protect the public's health.

"Malice" is defined as "[t]he intent, without justification or excuse, to commit a wrongful act." BLACK'S LAW DICTIONARY 976 (Deluxe 8th ed. 2004). "[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 – 18, 102 S. Ct. 2727, 2738, 73 L. Ed. 396, 410 (1982). Petitioners had the benefit of years of discovery and still relied upon bare allegations of malice. This was clear from the first day of Chalifoux's deposition. At that time, he testified that the DHHR's investigative team may have made some "clerical mistakes" in their investigation, but he had no evidence of an intentional misrepresentation:

> Q. Do you have any reason to believe that Dr. Bixler or her team intentionally misrepresented anything in this report?
>
> A. You know, I don't think I'm at liberty to really discuss any of that. It's really something you need to ask them. This looks like just possibly some clerical mistakes or maybe not fully understanding the procedure, and that's why we told her "Maybe we should mock this."

J.A. 738. Chalifoux repeatedly testified that he believed the investigative team did not understand the procedures he performed but that he had *no evidence* of intent to misrepresent:

> Q. Do you have any evidence that Dr. Bixler or her team intentionally misrepresented any of the report findings?
>
> A. Misrepresented? I don't think she mis -- again, you'd have to ask her that but, I mean, from looking at this, one would think that after having conversations with me, she would have taken a step back and maybe come back and redo things. You know, "Let's go back and let's mock this. Let me get a better understanding for this stuff."
>
> Q. But you do not have any evidence that Dr. Bixler or her team intentionally misrepresented any facts in this report.
>
> A. Well, like I said, I don't know the answer to that. All I can say is if you read the report and you read -- look at my notes and all that, these two are not adding up.
>
> . . .

Q. Okay. So your answer is no, you are not aware of any evidence regarding her motive or intent or her team's motive or intent.

A. Exactly.

J.A. 739. Seven months later, on the final day of his deposition, Chalifoux's only "evidence" of malice was that the sequence and timing of events seemed "rather interesting" and that Dr. Tierney's Complaint to the West Virginia Board of Osteopathic Medicine did not contain the same "scribble notes" as the Complaint received via a FOIA request. J.A. 744 – 747. Neither of these bare allegations creates a genuine issue of material fact as to whether the DHHR acted with malice. Therefore, the Circuit Court properly granted the DHHR Respondents summary judgment.

Furthermore, Petitioners argue that Dr. Tierney's filing of a complaint with the Board of Osteopathic Medicine is evidence of malice. Pet'r's Br., p. 37. Petitioners' argument fails as a matter of law. The West Virginia Legislature has provided the Commissioner the authority to:

> [E]nforce all laws of this state concerning public health: to that end, the commissioner shall make, or cause to be made, investigations and inquiries respecting the cause of disease, especially of epidemics and endemic conditions, and the means of prevention, suppression or control of those conditions; the source of sickness and morality, and the effects of environment, employment, habits and circumstances of life on the public health.

W. Va. Code § 16-1-6(b). Moreover, the Commissioner shall "make complaint or cause proceedings to be instituted against any person, corporation or other entity for the violation of any public health law before any court or agency, without being required to give security for costs; the action may be taken without the sanction of the prosecuting attorney of the county in which the proceedings are instituted or to which the proceedings relate." W. Va. Code § 16-1-6. Thus, it is clear the Commissioner has a duty to ensure appropriate actions are taken to ensure the public health and welfare of West Virginia citizens. Perhaps most significantly, the regulations governing the Board of Osteopathic Medicine protect complainants from liability for making complaints.

"All communications with the Board charging a licensee with violations are conditionally privileged and ***a person making a communication is privileged from liability based upon the communication unless the person makes the communication in bad faith or for a malicious reason***." W. Va. Code St. R. § 24-6-5.3 (emphasis added). Thus, Dr. Tierney's Board Complaint cannot be a basis for liability unless it was made in bad faith or for a malicious reason.

Dr. Tierney was required, however, to file the subject Board Complaint. West Virginia Code of State Rules § 64-7-7.8 states:

> If the Commissioner becomes aware of an ongoing risk to public health through investigation of an outbreak in a health care facility and the health care facility fails to take appropriate corrective action within a reasonable period of time after notification by the Commissioner, the Commissioner shall file a complaint with the Office of Health Facilities Licensure and Certification. **If the Commissioner becomes aware that a licensed practitioner is practicing in such a way as to place the health of the public at risk** ***and the licensed practitioner fails to take appropriate corrective action within a reasonable period of time after notification by the Commissioner***, the Commissioner **shall** file a complaint with the practitioner's licensing board.

W. Va. Code St. R. § 64-7-7.8 (emphasis added).

Here, Dr. Tierney became aware that Chalifoux was putting the public at risk. For several months, the DHHR Respondents investigated Chalifoux and came to the conclusion that he used unsafe injection practices, which put patients at risk of transmission of blood-borne pathogens. On April 25, 2014, Dr. Tierney sent Chalifoux a letter explaining that patient notification was necessary, that Chalifoux's practices put patients at risk, and that Chalifoux's refusal to cooperate with the investigation and notification process continued to put patients at risk. J.A. 387 – 388. Chalifoux continued to refuse to cooperate and advised the DHHR that his attorney was concerned over liability issues and that he would not provide the requested patient information. J.A. 397. In fact, his attorney responded to the final written request for patient contact information by asserting

that the patient information is confidential under HIPAA and that Chalifoux would not release that information to the DHHR. J.A. 398 – 399.

As a result of Chalifoux's continued refusal to cooperate, Dr. Tierney determined that Chalifoux was failing to take corrective action within a reasonable time, and, therefore, she felt compelled and required under the Reportable Disease regulations to file a Complaint with the Board of Osteopathic Medicine. J.A. 404. She admittedly would have preferred Chalifoux's compliance with DHHR's request for patient information to avoid the public press release and Board Complaint; however, Chalifoux left the DHHR with few options. J.A. 404 – 405. Thus, because Dr. Tierney was required to file a Board Complaint, the action of doing so cannot be evidence of malice. Therefore, the Circuit Court properly granted Respondents summary judgment.

Petitioners' final argument that Dr. Tierney's actions were malicious is based upon unsupported speculation. Without any citation to the record, Petitioners argue that Dr. Tierney "simply did not like Dr. Chalifoux and was intent on teaching him a lesson." Pet'r's Br., p. 37. Not only is this allegation unsupported, but it is also contrary to the undisputed evidence in the record. First, Dr. Tierney did not perform the site inspection at Chalifoux's clinic in October 2013 and did not author the December 11, 2013, report that found that Chalifoux had engaged in unsafe injection practices thereby placing patients at risk for transmission of blood-borne pathogens. J.A. 322 – 342. Second, the need for patient notification was determined by the lead investigator, Dr. Bixler, in consultation with CDC and the State of Ohio. J.A. 566 – 567. Third, neither the public press release nor the Board Complaint would have been necessary if Chalifoux had complied with the investigative team's request for additional patient information. Indeed, on the only page of the Board Complaint that is in the record, Dr. Tierney stated, "[a]s a result, Dr. Chalifoux's failure to

cooperate in this regard will necessitate the placement of a general announcement in the local newspaper and issue [sic] a press release to the media in an effort to notify his patients of their possible exposure. This is not a step taken lightly nor one BPH would wish to take at all but in safeguarding the public health, one BPH must take." J.A. 650. Fourth, it is undisputed that DHHR decided to temporarily forgo a public press release in favor of an administrative subpoena but that its hand was forced by the issuance of Ohio's press release. J.A. 402 – 403, 412, 416, 760. Finally, in her deposition, Diana Shepard, the executive director of the West Virginia Board of Osteopathic Medicine, testified that, in a meeting with Dr. Tierney on July 16, 2014, Dr. Tierney appeared to be very concerned for public safety and did not express any ill feelings or dislike for Chalifoux personally. J.A. 753 – 754.

Thus, the undisputed evidence demonstrates that Dr. Tierney was required to file a Board Complaint due to Chalifoux's refusal to take action to notify patients of his unsafe practices. The undisputed evidence further demonstrates that Dr. Tierney's actions in filing the Board Complaint and issuing the Press Release were done out of concern for public safety. Petitioners have failed to identify any evidence suggesting that Dr. Tierney harbored any malice or ill feelings towards Chalifoux. Therefore, the Circuit Court properly granted the DHHR Respondents summary judgment.

3. Petitioners Have Failed to Establish that the DHHR Respondents Violated Any Clearly Established Right or Law; Therefore, the Circuit Court Properly Granted Summary Judgment on the Basis of Qualified Immunity.

The DHHR Respondents did not violate any clearly established right or law. The failure to identify a violation of a clearly established law by the DHHR Respondents is "a fatal flaw" to all claims. *See, e.g., W. Va. State Police v. Hughes*, 238 W. Va. 406, 796 S.E.2d 193 (2017) (qualified immunity served as bar to liability for negligent acts of state agency, officers, and/or

employees in the absence of the identification of violations of clear legal or constitutional rights); *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 667, 783 S.E.2d 75, 88 (2015) (failure to identify violations of clearly established statutory or constitutional right in an action for defamation, false light, and breach of contract such that qualified immunity barred the claims); *A.B.*, 234 W. Va. at 516, 766 S.E.2d at 755 (failure to identify a clearly established law, statute, or right that the state agency violated through its training, supervision, and retention of an employee was fatal to the claim); *West Virginia Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 574, 746 S.E.2d 554, 565 (2013) (state agencies entitled to qualified immunity regarding claims of negligent licensure, monitoring, and enforcement of a day habilitation center because no specific law, statute, or regulation was identified that was violated by the agencies); *W. Va. Bd. of Educ. v. Croaff*, No. 16-0532, 2017 W. Va. LEXIS 338 (W. Va. May 17, 2017). Not only is there no violation of a clearly established right or law but the subject regulations also expressly *authorize* the actions taken by the DHHR Respondents.

Indeed, Petitioners' claim for breach of "confidentiality" fails on its face. Petitioners have not identified any facts to show that any clearly established laws were violated by the DHHR or its employees with respect to the decision to issue a public press release that is expressly permitted under the applicable regulations. The *A.B.* decision makes it clear that not every law, statute, rule, policy, procedure, or enactment will be considered "clearly established law" for purposes of defeating qualified immunity. A "clearly established" law is one which defines a "clearly established right." *A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 776. A right is considered "'clearly established' when its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (additional citation omitted). Critically, sources of law that are too vague or abstract, or that do

not establish a right, will not suffice to defeat qualified immunity. In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. *A.B.*, 234 W. Va. at 507, 766 S.E.2d at 766. The "clearly established law" relied upon must also have a causal connection to the ultimate harm in order to defeat qualified immunity. *Id.* "Clearly established law" that is too remote to the underlying harm will not suffice.

Here, Chalifoux's selective reliance on cherry-picked portions of regulations, coupled with Petitioners' failure to rely on explicit regulations authorizing the DHHR's conduct, is insufficient to overcome qualified immunity. In fact, the very regulations alleged to have been violated expressly permit such a public health notification under the circumstances of this case. Petitioners allege that their claim arises under West Virginia Code of State Rules § 64-7-7.7. Pet'r's Br., p. 34. That specific regulation permits disclosure of the identity of a health care facility when necessary to stop the spread of disease:

> The Commissioner or the local health officer shall not disclose the identity of the community, school, camp, daycare, health care facility, restaurant or food establishment or other setting where an outbreak or cluster of disease occurs, ***unless the release is necessary to inform the public to take preventive action to stop the spread of disease*** or to notify providers or laboratories to identify additional cases of disease. Data on community outbreaks and clusters may be released by the Commissioner in aggregate on a regular basis, identifying the county of occurrence of the outbreak or cluster. Data on healthcare-associated outbreaks and clusters may be released by the Commissioner in aggregate on a regular basis, identifying the surveillance region of occurrence of the outbreak or cluster.

W. Va. Code St. R. § 64-7-7.7 (emphasis added). If Chalifoux had complied with DHHR's requests for patient information for targeted notification, then, under the same regulations, DHHR would have been required to notify the patients of the risk of infection anyway, and, in its discretion, could have disclosed Chalifoux's name:

> During the course of an outbreak or exposure investigation, **if the Commissioner learns of patient who may have been exposed to a serious infectious condition, *such as, but not limited to, hepatitis B or C or human immunodeficiency virus***

> ***(HIV)*, and the health of the patient or their family members or close contacts may be at risk, the Commissioner shall notify the patient of the nature of the exposure or possible exposure and action that may be taken by the patient to prevent further risk to their health or the health of their family members or close contacts.** In the course of notification of the patient, the Commissioner ***may*** identify a health care provider or health care facility to the extent necessary to inform the patient of the nature of the exposure or possible exposure.

W. Va. Code St. R. § 64-7-7.9 (emphasis added).

Yet another section of the Reportable Disease regulations permits disclosure of confidential information when, in her discretion, the Commissioner determines it to be necessary to protect the public health: "In the case of a licensed facility, ***the Commissioner*** or a local health officer ***may release confidential information to the public when there is a clear and convincing need to protect the public's health as determined necessary by the Commissioner***." W. Va. Code St. R. § 64-7-20.3 (emphasis added).

It is evident from the Reportable Disease regulations that the DHHR Respondents acted well within "clearly established law" when they issued the public health notification and when Dr. Tierney made her Board Complaint. The precise language of the applicable regulations permits action when the Commissioner, in her discretion, determines it is necessary. It is abundantly clear that the Commissioner had discretion to determine that action was necessary, and she did in fact make that determination. Accordingly, the Circuit Court properly granted the DHHR Respondents summary judgment.

CONCLUSION

As stated herein, the DHHR Respondents are entitled to qualified immunity because they acted within their expressly authorized discretion, did not violate any clearly established right or law, and did not act maliciously, fraudulently, or oppressively. To the contrary, the DHHR Respondents acted in accordance with the applicable Reportable Disease regulations for the sole

purpose of protecting the public health. Therefore, the Circuit Court properly granted the DHHR Respondents' Motion for Summary Judgment.

WHEREFORE, Respondents West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health, and Letitia Tierney, M.D., J.D. respectfully request that this Honorable Court deny Petitioners' Petition for Appeal and affirm the Circuit Court's Order Granting Respondents' Motion for Summary Judgment.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, WEST VIRGINIA BUREAU FOR PUBLIC HEALTH, and LETITIA TIERNEY, M.D., J.D.,
By Counsel,

Natalie C. Schaefer, Esq. (WVSB #9103)
nschaefer@shumanlaw.com
Caleb B. David, Esq. (WVSB #12732)
cdavid@shumanlaw.com
Kimberly M. Bandy, Esq. (WVSB #10081)
kbandy@shumanlaw.com
Shannon M. Rogers, Esq. (WVSB #13920)
srogers@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
(304) 345-1400

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0902

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

Plaintiffs Below, Petitioners,

v.

Appeal from a Final Order of the Circuit Court of Kanawha County (No. 16-C-844)

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;

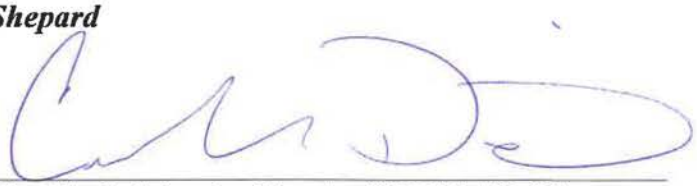
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, Caleb B. David, counsel for Respondents West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health, and Letitia Tierney, M.D., J.D., individually and in her official capacity as former West Virginia Commissioner and State Health Officer, hereby certify that I have served a true and accurate copy of the foregoing "Respondents West Virginia Department of Health and Human Resources, West Virginia Bureau for Public Health, and Letitia Tierney, J.D., M.D.'s Brief" upon counsel of record by placing said copies in the United States mail, with first-class postage prepaid, on this day, March 21, 2022, addressed as follows:

Scott H. Kaminski, Esq.
Ray, Winton & Kelley PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
Counsel for Petitioners

Perry W. Oxley, Esq.
L.R. Sammons, III, Esq.
Oxley Rich Sammons, PLLC
517 9th Street
Suite 1000
Huntington, WV 25701
Counsel for Respondents
West Virginia Board of
Osteopathic Medicine and
Diana Shepard



Natalie C. Schaefer, Esquire (WVSB #9103)
Caleb B. David, Esquire (WVSB #12732)
Kimberly M. Bandy, Esquire (WVSB #10081)
Shannon M. Rogers, Esq. (WVSB #13920)