

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**West Virginia Real Estate Appraiser Licensing
and Certification Board, and Dean E. Dawson,
Individually and as Chair of the West Virginia
Real Estate Appraiser Licensing and Certification
Board, Defendants Below**

Petitioner.

v.

**Appeal from an order of the
Circuit Court of Kanawha County
(22-C-268)**

**J. Edward Estep, L.R.A. NO. 0606
Plaintiff Below,**

Respondent.

PETITION FOR APPEAL

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 24-0167**

**WEST VIRGINIA REAL ESTATE APPRAISER
LICENSING AND CERTIFICATION BOARD and
DEAN E. DAWSON, Individually and as Chair of the
West Virginia Real Estate Appraiser Licensing and
Certification Board,**

Cir. Ct./C.A. No. 22-P-268

Appellants and Defendants below,

v.

J. EDWARD ESTEP, L.R.A. NO. 0606

Appellee and Plaintiff below.

PETITION FOR APPEAL

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in denying absolute statutory immunity to Appellant Dean Dawson pursuant to W. Va. Code § 30-38-10(a) as there is no evidence of malice.
2. The Circuit Court erred in denying qualified immunity to Appellants pursuant to state common law as there were no genuine issues of fact that Appellants violated clearly established law.

II. STATEMENT OF THE RECORD BELOW

This case originates in a petition for writ of mandamus, motion for preliminary and/or permanent injunction, and a Complaint (hereinafter, “Petition/Motion/Complaint”) filed by Appellee J. Edward Estep (hereinafter, “Estep” or “Appellee”). Appellee is a licensed Real Estate Appraiser with license number LR0606. J.A. 000027 at ¶ 2. Appellants are the West Virginia Real Estate Appraiser Licensing and Certification Board (individually referred to as “the Board” or

“Appellant Board”) and Dean E. Dawson (individually referred to as “Mr. Dawson” or “Appellant Dawson”). J.A. 000027 at ¶¶ 3, 4. As identified by Appellee, the Board is a state entity created by W. Va. Code § 30-38-1, *et seq.* and Mr. Dawson is a member and the Chair for the Board. J.A. 000027 at ¶ 3.

Appellee filed this action seeking to have the Circuit Court “command [Appellant], West Virginia Real Estate Appraiser Licensing and Certification Board to immediately dismiss the three (3) pending complaints against [Appellee], and expunge all record of the allegations and wrongful suspension of his license thereon,” to have the Court enter an Order enjoining “[Appellant] Dawson from serving upon the West Virginia Real Estate Appraiser Licensing and Certification Board in any future matter related to [Appellee],” and for judgment in favor of Appellee on the claims presented in the Complaint. J.A. 000026-0000027. Specifically, as to the claims asserted against Appellants, Appellee brings forth claims for violation of Appellee’s due process rights under the Article III, 10 of the *Constitution of West Virginia*, defamation, tortious interference with a contract, and the tort of outrageous conduct. J.A. 000026-000038.

At all relevant times alleged in the Petition/Motion/Complaint, Mr. Dawson served as an independent appraiser and the Chair for the Board. J.A. 000027, 000044. Appellee has alleged that there are three (3) complaints against Appellee pending before Appellant Board and “should have been summarily dismissed by the Standards Committed of the Board at the allegation/inquiry stage.” J.A. 000027 at ¶¶ 5, 6. The three complaints are (1) Complaint No. S21-005; (2) S21-007; and (3) S20-13. J.A. 000028-000029 at ¶¶ 7 – 17. Appellee alleges that Complaint No. S21-005 and S21-007 pertains to expert testimony Appellee offered that “were not in fact ‘appraisals’ and merely his written expert opinion.” J.A. 000028 at ¶ 9. Appellee contends that the Board applied the Uniform Standards of Professional Appraisal Practice (hereinafter, “USPAP”) standards when

reviewing Appellee’s expert reports and that the USPAP standard should have led the Board to dismiss Complaint No. S21-005 and S21-007 at the allegation/inquiry stage. J.A. 000028 at ¶ 12 – 14. With respect to Complaint No. S20-13, Appellee alleges that it deals with a disagreement over the value of the property between the property owner and the appraiser, which, by the Board’s own website, is something the Board cannot assist with. J.A. 000029 at ¶¶ 15 – 17. Thus, Appellee contends that the Board should have dismissed S20-013 at the allegation/inquiry stage as well but failed to do so. J.A. 000029.

Ultimately, on November 12, 2021, the Board issued an Order suspending the license of Appellee. J.A. 000031 at ¶ 24. Appellee alleges that the Order suspending his license was without a “Notice Hearing” and was signed by Mr. Dawson, the Chair for the Board. J.A. 000031 at ¶ 25. Appellee contends that there is no legal or equitable basis for suspending his license without hearing “since there exists no ‘extraordinary circumstances’ and ‘an immediate danger to the public.’” J.A. 000032 at ¶ 32. It is Appellee’s contention that the Board had no “extraordinary circumstances” or “immediate danger to the public” for which it could use as grounds for issuing a suspension of Appellee’s license “without Notice of Hearing.” *Id.*, ¶¶ 33 – 39. Thus, Appellee claims his due process rights under Article III, 10 of the *Constitution of West Virginia* were violated. J.A. 000031-000034.

Appellee goes on to additionally claim that the publication of the suspension of his appraisal license constitutes a defamatory statement under West Virginia law, constitutes tortious interference with Appellee’s business relationships under West Virginia law, and that Appellants’ actions were so atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency and that Appellants’ actions were done with the intent to inflict emotional distress or acted

so recklessly when it was certain that that emotional distress would result from the Appellants' actions. J.A. 000034-000037.

Discovery in this matter failed to yield any improper motivation by Mr. Dawson or the Board in suspending Appellee's license. Appellant Dawson offered unopposed and unequivocal testimony that Appellee's license was suspended pending a hearing because the Board had a duty to immediately take action and protect the public. *Dawson Depo.*, 123:12 – 125:7, J.A. 001791. Mr. Dawson has offered further, unopposed testimony that the Board found that extraordinary circumstances were present to justify the suspension of Appellee's license pending a hearing on the complaints due to Appellee's "total neglect of the minimum requirements that are set forth within licensing, including USPAP and law violations." *Dawson Depo.*, 127:9 – 129:14, J.A. 001792. Thus, the Board decided to immediately act as they are statutorily allowed to do in situations such as this one where Appellee's actions harmed the public and the credibility of the appraisal licensing profession. *Dawson Depo.*, 127:9 – 129:14, J.A. 001792.

Crucially, in addition to the unopposed testimony of Mr. Dawson, the Order suspending Appellee's license is dispositive of Appellee's claims. The Order makes clear that, pursuant to the authority vested in the Board by W. Va. Code §§ 30-38-14(c) and 30-1-8(e)(1), the Board suspended Appellee's license and "the Board has determined *that extraordinary circumstances exist* wherein the continued licensure of [Appellee] will adversely affect the public welfare and integrity of the profession" J.A. 001707-001702 [emphasis added]. The Order specifically provides the precise basis for the extraordinary circumstances for Appellee's suspension without a hearing: Appellee engaged in alleged unlawful behavior, repeatedly, which the Board "determined that the continued practice of real estate appraising by [Appellee] in the State of West Virginia would constitute a danger to the public and/or adversely affect the public welfare." J.A.

001703 at ¶ 5. Thus, “the Board voted unanimously to immediately suspend [Appellee’s] real estate appraiser license in the State of West Virginia, License LR0606, pending a hearing.” J.A. 001703 at ¶ 6. Although the Board voted unanimously to suspend Appellee’s license, Mr. Dawson did not vote. As Chairman, Mr. Dawson only votes in the event of a tie, and there was no tie vote in this case. In fact, Mr. Dawson has never had to vote on a license suspension or revocation. *Dawson Depo.*, 112:9 – 112:15, J.A. 001788.

As further evidence that the decision to suspend the Appellee’s real estate appraiser’s license was not done maliciously, in bad faith, or with any other improper motivation, the Appellants sought and received an independent review as to the quality of Appellee’s work as an appraiser. J.A. 001170-001209. The Appraisal Review Report, prepared by Robert M. Pratt, was for the purpose of “develop[ing] and report[ing] a credible opinion as to the quality of another appraiser’s work” J.A. 001172. Mr. Pratt’s Appraisal Review Report ultimately concluded that the Appellee’s work “contain[s] serious errors and violations of pertinent laws and the [USPAP] 2020-2021 Edition and therefore, are not acceptable and have a substantial lack of credibility.” J.A. 000180.

Thus, the evidentiary record establishes in un rebutted manner that the Board acted only pursuant to the authority granted to the Board under the West Virginia Code, and because it felt that extraordinary circumstances were present that necessitated the immediate suspension of Petitioner’s license. Because there is no evidence that Mr. Dawson, nor the Board, took any wrongful action that they were not entitled to take or that any action on the part of Mr. Dawson or the Board were not taken in good faith or was taken with malice, Appellants filed their Motion for Summary Judgment and contemporaneously filed Memorandum of Law in support thereof with the Circuit Court. J.A. 001662-001703. In its Order Granting in Part and Denying in Part the

Appellants' Motion for Summary Judgment, the Circuit Court dismissed Appellee's claims for tortious interference with contract and outrageous conduct. J.A. 001758. The Circuit Court, however, denied summary judgment as to the Appellee's constitutional claims, finding questions of material fact as to 1) whether there was evidence of malice as it pertains to Appellants' statutory immunity defense, and 2) whether suspending Appellee's license violated clearly established law as it pertains to Appellants' qualified immunity defense. J.A. 001757-001758. On March 21, 2024, Appellants filed their Notice of Appeal from the Circuit Court's interlocutory Order based on the doctrines of absolute statutory immunity and qualified immunity, which are subject to immediate appeal under the collateral order doctrine.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Appellants aver that the legal matters addressed herein have been previously conclusively decided by this Court, and that this Appeal raises no novel issues requiring oral argument. Thus, the Appellants do not request oral argument, and request that any oral argument which the Court does deem necessary be conducted under Rule 19 of the *West Virginia Rules of Appellate Procedure*.

IV. SUMMARY OF THE ARGUMENT

The Appellants seek reversal of the circuit court's denial of summary judgment on the basis of two separate immunities. First, Appellant Dawson should have been afforded the absolute statutory immunity granted to members of the Board under W. Va. Code § 30-38-10(a) for "actions taken in good faith and without malice, within the scope of their duties as board members." The circuit court's denial of this immunity was premised upon the existence of alleged questions of fact regarding whether Appellant Dawson acted with malice in the course of his alleged acts and omissions underlying the Appellee's complaint below. However, this denial of statutory immunity

was in error, as the record below contains no cognizable evidence of malice.

Second, both Appellants should have received summary judgment on the basis of governmental qualified immunity afforded to state actors and agencies. State agencies and officials are entitled to qualified immunity in the performance of discretionary government functions unless the plaintiff demonstrates that such acts or omissions are in violation of clearly established statutory or constitutional rights of which a reasonable person would have known, or are otherwise fraudulent, malicious, or oppressive. There can be no violation of a clearly established right by the temporary suspension of the Appellee's license without notice of a hearing, because the applicable statutes governing the Board's functioning provide precisely for this remedy if the Board, in its discretion, finds extraordinary circumstances or a danger to the public exists. Because the Board expressly found this to be the case by unanimous vote, no violation of any right occurred. Further, as addressed with respect to Appellant Dawson's statutory immunity, there is simply no evidence in the case record to support a conclusion of malicious action.

Based on the foregoing, the circuit court erred in failing to grant the Appellants the immunities discussed herein. Reversal with an order directing the entry of summary judgment on the basis of these immunities is therefore warranted.

V. ARGUMENT

A. Standard of Review

On appeal, the standard of review for a trial court's decision on a motion for summary judgment is *de novo*. Syl. Pt. 2, *L&D Invs., Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 818 S.E.2d 872 (2018) (*citing* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). In regard to defeating a Motion for Summary Judgment, this Court holds:

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 a 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) of the West Virginia Rules of Civil Procedure.

Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The Court further noted that “[t]he evidence illustrating the factual controversy cannot be conjectural or problematic.” *Williams*, 194 W.Va. at 60. To avoid summary judgment the plaintiff must offer concrete evidence upon which a reasonable finder of fact could return a favorable verdict. *Id.* Here, there was never a genuine issue of material fact regarding the whether the Appellants violated clearly established law or acted with malice. Furthermore, “[a] circuit court’s denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the ‘collateral order’ doctrine.” Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). Denials of a motion for summary judgment are immediately appealable when the denied motion was premised upon governmental statutory or qualified immunity. See Syl. Pt. 1, *W. Va. Bd. of Ed. v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015); *State ex rel. Grant Cty. Comm’n v. Nelson*, 244 W. Va. 649, 659-660, 856 S.E.2d 608, 618-619 (2021).

B. The circuit court erred in denying Appellant Dawson the absolute statutory immunity to which he is entitled under W. Va. Code § 30-38-10.

The Real Estate Appraiser Licensing and Certification Act makes clear that “[m]embers of the board will be immune from individual civil liability for actions taken in good faith and without malice, within the scope of their duties as board members.” W. Va. Code § 30-38-10(a). The circuit court denied this immunity to Appellant Dawson on the basis that it concluded questions of fact remained as to whether he acted with malice in the course of the proceedings discussed herein which resulted in the temporary suspension of the Appellee’s license. As expressed in the above

review of the factual record, this is not the case. The error raised with respect to the circuit court's denial of this absolute statutory immunity is straightforward: there is simply no evidence on the record that Appellant Dawson acted with malice.

This Court discoursed at length on the nature and conception of malice in *State v. Burgess*, 205 W. Va. 87, 516 S.E.2d 491 (1999):

'[M]alice' is not easy to define. In *State v. Michael*, 74 W. Va. 613, 620, 82 S.E. 611, 613 (1914), this Court noted that 'malice is a well-known legal term, but one not easy to define in the abstract.' This Court also recognized in *State v. Starkey*, 161 W. Va. 517, 524, 244 S.E.2d 219, 223 (1978), *overruled on other grounds*, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), that 'the term malice has been frequently used, but not extensively defined, by this Court.' We therefore begin with a definition from Black's Law Dictionary 956 (6th ed. 1990), which defines malice as 'the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. . . . A condition of the mind showing a heart regardless of social duty and fatally bent on mischief.' 'Malicious' means 'characterized by, or involving, malice; having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will.' Black's Law Dictionary 958 (6th ed. 1990).

Michael and *Starkey* both refer to an old criminal case, *State v. Douglass*, 28 W. Va. 297, 299 (1886), where this Court discussed malice by stating:

the source of . . . malice is not only confined to a particular ill will to the deceased, but is intended to denote . . . an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate cruel act[.]

"Perhaps the definition of malice most often quoted is that stated in *State v. Doig*, 31 S.C. L. 179, 2 Rich. 179, which is as follows: 'In law, malice is a term of art, importing wickedness and excluding a just cause or excuse.'" *State v. Harvey*, 220 S.C. 506, 514, 68 S.E.2d 409, 412 (1951), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Most definitions include one or more terms such as wicked, evil, depraved or cruel.

Id. at 89-90.

On the record before this Court, there is absolutely no evidence that any action on the part of Appellant Dawson was not undertaken in good faith, or that he acted with malice. There were no genuine issues of material fact with respect to the fact that three (3) complaints were filed against Petitioner which the Board found by unanimous vote constituted as an extraordinary circumstance requiring an immediate response to protect the public welfare and integrity of the appraisal profession. Further, Appellant Dawson did not bring any of the three complaints, and did not vote in the Board's decision to suspend his license. The record shows nothing other than that Appellant Dawson acted normally as Board Chairman in a proceeding in which the Board took an action it is expressly authorized by statute to take.

Case law from both this Court and United States Supreme Court hold that where a motion for summary judgment is based on a lack of evidence to support a claim, a moving party need only raise the absence of evidence with the Court in order to meet their initial burden. "The movant's burden is 'only [to] point to the absence of evidence supporting the nonmoving party's case.'" *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996) (quoting *Latimer v. Smith Kline & French Laboratories*, 919 F.2d 301, 303 (5th Cir. 1990); see also *Dickens v. Sahley Realty Co.*, 233 W. Va. 150, 156, 756 S.E.2d 484, 490 (2014) ("As we have previously explained, '[t]he movant's burden is only [to] point to the absence of evidence supporting the nonmoving party's case.'") (internal citations omitted). Thereafter, once this absence of evidence has been raised with the Court:

the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a "trialworthy" issue. To meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary

judgment must be granted. See *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 1694, 123 L. Ed. 2d 317, ____ (1993); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884, 110 S. Ct. 3177, 3186, 111 L. Ed. 2d 695, ____ (1990).

Id. The United States Supreme Court agrees, holding that “the burden on the moving party may be discharged by “showing” -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This follows logically, as it is impossible to produce evidence of an absence of evidence – to prove a negative.

As addressed in the statement of the record below, detailed above, Appellant Dawson adequately raised with the circuit court the absence of evidence supporting a contention that he acted with malice. The Appellee failed to provide any cognizable evidence supporting a conclusion that Appellant Dawson’s motives were wicked, evil, depraved or cruel. In fact, the Appellee failed to provide any cognizable evidence supporting a conclusion that Appellant Dawson was motivated by anything other than what was in the best interest of both the public welfare and the real estate appraiser industry. Accordingly, summary judgment was appropriate based on the statutory immunity provided to Appellant Dawson by W. Va. Code § 30-38-10(a), and the circuit court erred in failing to grant the same.

C. The circuit court erred by denying qualified immunity to the both Appellants.

The circuit court further erred in failing to grant qualified immunity to both Appellants based on the factual record herein, as all alleged acts and omissions on their part were discretionary government function of which the record does not show any clearly established statutory or constitutional right. Further, as addressed above, there is no evidence in the record below of malicious or oppressive motivations for the Board taking an action expressly provided-for by statute.

Under West Virginia law, immunities “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.” *Hutchingson v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). A State agency or public official is denied that right irrevocably if required to try a claim from which the agency or official is immune; “[t]he very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.” *Id.* Due to that strong public policy, this Court has advised that “[p]ublic officials . . . should be entitled to qualified immunity from suit . . . unless it is shown by specific allegations that the immunity does not apply.” *Id.* at 147-48, 479 S.E.2d at 657-58.

Qualified immunity is an immunity from suit afforded to public officials and State agencies under certain conditions. *See* Syl. Pt. 10, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014). A public official or State agency may claim to be qualifiedly immune from suit only when “the acts or omissions which give rise to the suit . . . involve . . . discretionary governmental functions.” *Id.* (citing Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996)). If they do, then the public official or State agency is entitled to qualified immunity *unless* “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).” *Id.* at Syl. Pt. 11. If the plaintiff cannot show this, “both the State and its officials or employees charged with such acts or omissions are immune from liability.” *Id.*; *see also* Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 274, 465 S.E.2d 374, 376 (1995) (“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 not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, 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.”).

West Virginia’s qualified immunity jurisprudence mirrors federal law. *See State v. Chase Sec.*, 188 W. Va. 356, 365, 424 S.E.2d 591, 600 (1992) (stating that West Virginia’s “immunity test is designed to parallel the Supreme Court’s standard of qualified immunity for public officials in Section 1983 actions because in such actions we cannot extend a broader immunity”); see also *City of Saint Albans v. Botkins*, 228 W. Va. 393, 398, 719 S.E.2d 863, 868 (2011) (“Our approach to matters concerning immunity historically has followed federal law . . .”). In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court of the United States addressed qualified immunity, holding that “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.*, 818, 102 S.Ct. 2727. The Supreme Court has crafted a two-part test for courts to apply in ruling on a qualified immunity issue. The first inquiry is, when “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If answered in the affirmative, then the second inquiry is “whether the right was clearly established[?]” *Ballard v. Delgado*, 241 W. Va. 495, 504, 826 S.E.2d 620, 629 (2019) (quoting *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)).

Here, there can be no reasonable dispute regarding the Board’s status as an entity of the State. *See* W. Va. Code § 30-38-1, *et seq.* Additionally, there is no meaningful argument against

the position that the decision to issue, revoke, or suspend a real estate appraisal license, with or without a hearing, is a discretionary function of the Board. Thus, qualified immunity applies to both Appellants unless Appellee can establish that they violated one of Appellee's clearly established statutory or constitutional rights. The circuit court plainly erred in finding an issue of fact as to whether this was the case.

Appellee alleged below that a violation of his due process rights under Article III, 10 of the *West Virginia Constitution* occurred when the Board suspended his real estate appraisal license without first having a hearing noticed and conducted. J.A. 000007-000008. However, this is an express statutory power of the Board which is entrusted to its discretion. The Real Estate Appraiser Licensing and Certification Act specifically provides that “[i]f the board finds that extraordinary circumstances exist which require immediate action, it may without notice or hearing enter an order taking any action permitted by this article.” W. Va. Code § 30-38-14(c). The enumerated list of actions permitted to the Board by the Real Estate Appraiser Licensing and Certification Act is the suspension of a real estate appraisal license. *See* W. Va. Code § 30-38-12.

This Court has previously held that the “notice element of due process requires that administrative boards follow their own rules and statutes.” Syl. Pt. 2, *Tasker v. Mohn*, 165 W. Va. 55, 56, 267 S.E.2d 183, 185 (1980). As cited to in the preceding paragraph, the Board may validly suspend a real estate appraisal license, without noticing a hearing, if the Board, in its discretion, finds that extraordinary circumstances exist. *See* W. Va. Code §§ 30-38-12, 14(c). The statute contains no limitation on what the Board may consider to be extraordinary circumstances, or any other processes the Board must satisfy in order to so conclude. In the instant matter, those were found to be present upon the unanimous vote of the Board.

Based on the above, even if these actions had been undertaken negligently, immunity

would still be the required result. As this Court recently opined in *W. Va. Dep't of Health, Off. of the Chief Med. Exam'r v. Cipoletti*, No. 23-135, 2024 W. Va. LEXIS 233 (W. Va. May 21, 2024):

This Court has held that both a public officer and a State agency are entitled to qualified immunity from a negligence claim under such circumstances. *See* Syl. Pt. 4, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (“If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, *he is not liable for negligence or other error in the making of that decision*, at the suit of a private individual claiming to have been damaged thereby.”) (Emphasis added); Syl. Pt. 6, in part, *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.*”) (Emphasis added).

Based on the foregoing, we find that Petitioners alleged negligent actions were discretionary and not in violation of any “clearly established statutory or constitutional rights or laws” and are not “otherwise fraudulent, malicious, or oppressive.” *W. Va. Reg'l Jail & Corr. Facility Auth. v. Est. of Grove*, 244 W. Va. at 283, 852 S.E.2d at 783. Therefore, Petitioners are entitled to qualified immunity from Respondent's lawsuit.

Id. at *20-21.

The circuit court's denial of qualified immunity to the Appellants was based on a holding that issues of fact remained as to whether the act of suspension violated a clearly established constitutional or statutory right. J.A. 001757-001758. The order does not specify what “clearly established statutory or constitutional right” the circuit court found to have issues of fact remaining regarding whether it was violated. The order further does not engage with the fact that the remedy of licensure suspension, with or without notice of a hearing, is a power expressly provided to the board where it finds extraordinary circumstances, which it did here. There could therefore be no violation of due process as the statutory requirement was followed, and, as addressed in the foregoing section, there is no evidence on the record that this action was undertaken with malice or other improper motivation.

Accordingly, the circuit court erred in finding issues of fact as to whether the acts of the Appellants as addressed herein violated a clearly established statutory or constitutional right, as the record shows none. The Appellants should have been granted qualified immunity, and reversal of that erroneous conclusion is warranted.

IV. CONCLUSIONS

WHEREFORE, based on the foregoing, the Appellants respectfully pray this Honorable Court **REVERSE** the circuit court's order denying their motion for summary judgment as pertains to the issues raised in the Assignments of Error, order that summary judgment be entered in the matter below on the basis of absolute statutory and qualified immunity as articulated herein, and grant them such other relief as the Court deems just and proper.

**THE WEST VIRGINIA REAL ESTATE
APPRAISER LICENSING AND
CERTIFICATION BOARD and DEAN E.
DAWSON,**

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 24-0167

West Virginia Real Estate Appraiser Licensing
and Certification Board, and Dean E. Dawson,
Individually and as Chair of the West Virginia
Real Estate Appraiser Licensing and Certification
Board, Defendants Below

Petitioner.

v.

Appeal from an order of the
Circuit Court of Kanawha County
(22-C-268)

J. Edward Estep, L.R.A. NO. 0606
Plaintiff Below,

Respondent.

CERTIFICATE OF SERVICE

I, William E. Murray, Counsel for Petitioner, West Virginia Real Estate Appraiser Licensing and Certification Board, and Dean E. Dawson, do hereby certify that I have served a true and accurate copy of the foregoing “**Petitioner’s Brief**” upon the following counsel for record via electronic means through File & ServeXpress on this the 24th day of June 2024:

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