

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 24-0167

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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**

Petitioners.

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.

PETITIONERS' REPLY BRIEF

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In Reply to Respondent J. Edward Estep's Brief, the Petitioners, the West Virginia Real Estate Appraiser Licensing and Certification Board (individually referred to as "the Board" or "Petitioner Board") and Dean E. Dawson (individually referred to as "Mr. Dawson" or "Petitioner Dawson"), submits the following:

I. REPLY ARGUMENT

A. The case record below shows no cognizable evidence of malice, and the Respondent's argument to the contrary relies principally on unsupported proffers and undue speculation.

Respondent's "Summary Response" takes the position that the record below contains evidence sufficient to support a genuine issue of fact as to whether Petitioner Dawson acted with malice, and that he was the primary mover in the suspension of the Respondent's real estate appraiser license prior to a hearing. See *Summary Response* at Pgs. 1-6. He argues that there is evidence that Petitioner Dawson was motivated to cause this suspension due to having been an expert witness retained by an opposing party to the party who retained Respondent in two prior litigation matters. See *Summary Response* at Pgs. 2-3. However, two load-bearing columns supporting this contention are the unsupported assertion that there is evidence on the record that Petitioner Dawson had this motivation, or that Petitioner Dawson caused these matters to be brought before the Board – there is not.

The record as it actually exists spins a much different tale. While it appears that serving as an expert witness in those two cases is the vector by which Petitioner Dawson learned of two of the three instances at issue of Respondent's substandard appraisal work, there is no evidence that he harbored any personal ill will merely by virtue of that expert work. Petitioner Dawson has served as an expert witness in many cases. (JA 1773). There is no evidence of any pattern of professional disciplinary proceedings toward any other appraisers retained by parties adverse to

Petitioner Dawson's client, and no evidence that Petitioner Dawson was particularly aggrieved by the Respondent working as an expert on the same case.¹

Rather, the uncontroverted testimony of Petitioner Dawson is that he discussed the matter with fellow Board member Joe Chico due to his concerns over the peculiarly slapdash and unsupported nature of Respondent's work in those matters. (JA 1772). When he provided the Respondent's report from at least one of those cases, Mr. Chico shared his concerns and brought the complaint before the Standards Committee. (JA 1772, 1774-1775). Consulting expert Robert Pratt was retained to evaluate Respondent's work and to provide an opinion to the Standards Committee. (JA 1778-1779). The discussions of the standards committee members as recorded in detail in the meeting minutes clearly show that both Mr. Pratt and the unanimous membership of the committee believed Respondent's work to be lacking in support, below professional standards, and ethically concerning. (JA 1813-1819). The meeting minutes are available on record for the Court's review, and do not show the committee being strong-armed into taking action by Petitioner Dawson. All committee members expressed that professional discipline against Respondent was appropriate. (JA 1813-1819).

Furthermore, the assertion that Petitioner Dawson "lied" about his reason for initially becoming concerned and discussing the matter with Mr. Chico is based on a single quote taken out of context in his deposition. See *Summary Response* at Pg. 4. A review the full discussion in the

¹ When questioned about his work as an expert retained by a party adverse to the party which had retained Mr. Estep, Petitioner Dawson testified as follows:

Q. Are you the proper party to bring this -- are you the proper person to bring this pseudo allegation before the standards board when you're the actual competing 21 expert witness in litigation?

A. I don't view the opposing person as somebody competing. I render my opinion of value and let the court decide which opinion is correct.

(JA 1773). This testimony is un rebutted and the Respondent has produced no contrary evidence which would suggest any personal animus against Respondent.

deposition of Petitioner Dawson from which Respondent pulls the cited quote shows no such thing. (JA 1771-1772). He testified plainly that based on his review of Respondent's expert report, he did not find the report credible, believed that insufficient documentation was produced to support Respondent's conclusions, and believed that Respondent's work had violated the USPAP – the applicable professional standards. (JA 1771-1772). When the Standards Committee reviewed Respondent's work, it determined that he did not have a work file at all for this project. (JA 1771).

Mr. Pratt considered this to be a “gross violation” and concluded that Respondent was “not fit to be an appraiser.” (JA 1813-1814). Mr. Chico and Robert “Tyke” Wilson initially stated that they believed Respondent's ethical violations were serious enough to warrant revocation. (JA 1813). In fact, it was Mr. Chico who first suggested that “we can decide he's a menace to the appraisal community” and that “we don't owe him a meeting.” (JA 1816). At the conclusion of these discussions, the Board voted unanimously to suspend the Respondent's license prior to a hearing, and Petitioner Dawson did not vote in either. (JA 1703). Respondent's suggestion that this entire proceeding was cooked up by Petitioner Dawson and pressed on the rest of the committee is completely contradicted by the record.

Upon review of the portions of the case record relied on by Respondent to suggest evidence of malice, read in their context, the conclusion is inescapable that the record contains no cognizable evidence of malice on the part of Petitioners. The minutes of the Standards Committee proceeding, report of Mr. Pratt, and deposition testimony of Petitioner Dawson show nothing but a universally-shared good-faith concern regarding the quality and professional compliance of Respondent's work. (JA 1771-1775, 1813-1819,). Petitioners were therefore entitled to the immunities addressed in the Petition for Appeal, and the circuit court erred in denying them summary judgment on those bases.

B. Any argument of whether extraordinary circumstances existed is moot for purposes of Respondent's due process claim regarding his license suspension, as the statute vests the Board with unadulterated discretion to determine whether extraordinary circumstances exist.

Apart from the argument addressed above that questions of fact exist as to whether the Petitioners acted with "malice," Respondent's argument against the Petitioners' entitlement to qualified immunity rests principally on his claim that they violated his due process rights under Article III, Section 10 of the West Virginia Constitution when it briefly suspended his real estate appraiser license without first conducting a hearing. See *Summary Response* at Pgs. 6-10. Respondent concedes in his Summary Response that the Board has the authority under W. Va. Code § 30-38-14(c) to suspend a real estate appraiser's license without notice or a hearing "[i]f the board finds that extraordinary circumstances exist which require immediate action[.]" See *Summary Response* at Pg. 7. Because it is undisputed that the Board so found, that alone should be dispositive against that argument.

Nonetheless, Respondent spends a significant portion of his Response arguing that this Court should disagree with the Board's determination that "extraordinary circumstances" existed, and that either a Court or a jury should sit as an appellate body over the Board, effectively reversing that administrative determination. See *Summary Response* at Pgs. 6-10. However, this is not called for by statute. The Statute does not define "extraordinary circumstances... which require immediate action." It does not set limitations on the Board's discretion as to what it may determine to be such extraordinary circumstances. It merely states that in order for the Board to suspend a real estate appraiser's license without notice or a hearing "*[i]f the board finds* that extraordinary circumstances exist which require immediate action[.]" W. Va. Code § 30-38-14(c) (Emphasis added). It is undisputed that the Board found such circumstances to exist in an order issued by a unanimous vote of the Board – in which Petitioner Dawson did not vote. (JA 1703). Therefore,

all statutory prerequisites to suspend the Respondent's license without notice or a hearing were met, and he was not deprived of any process to which he was entitled.

However, even if the Court were to read limitations as to what the Board may determine to constitute the requisite extraordinary circumstances and determine that there were questions of fact existed as to whether these circumstances were sufficient in this instance, this would still be inadequate to overcome qualified immunity. For purposes of overcoming qualified immunity, it is insufficient to show that a constitutional or statutory right was violated – the right must be clearly established, not just in the abstract but in its particular application. However, neither Respondent nor the circuit court identified any pre-existing source of authority which would establish a due process right that the Board's determination that extraordinary circumstances exist must meet certain specifications, or defines what those specifications must be. In the absence of such, any right which the Court may find to have been violated would not be clearly established.

“To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a ‘particularized showing’ that a ‘reasonable official would understand that what he is doing violated that right’ or that ‘in the light of preexisting law the unlawfulness’ of the action was ‘apparent.’” *Hutchison v. City of Huntington*, 198 W.Va. 139, 149 n.11, 479 S.E.2d 649, 659 n.11 (1996) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). “[T]he question of whether the constitutional or statutory right was clearly established is one of law for the court.” *Id.* “A right is ‘clearly established’ when its contours are ‘sufficiently clear that a reasonable official would understand that what he is doing violates that right.’” *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 517, 766 S.E.2d 751, 776 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). It is not sufficient that a

right be clearly established in an abstract sense; it must be clearly established in its particularized application.

[O]ur cases establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless that very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992) (quoting *Anderson v. Creighton*, 483 U.S. 639-640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)).

As addressed above, the black and white text of the statute at issue enables the Board to suspend the license of a real estate appraiser in prior to notice and a hearing “*if the board finds* that extraordinary circumstances exist[.]” Neither Respondent nor the circuit court’s order identify any pre-existing authority which would place a definition or constraint on what the Board may consider to be “extraordinary circumstances” for this purpose. Without such guidance, any due process right of Respondent which could have been violated by the Board’s suspension of his license could not have been clearly-established, and the circuit court erred in denying the Respondents qualified immunity on this basis.

II. CONCLUSIONS

WHEREFORE, based on the foregoing, as well as those arguments raised in these Petitioners’ Petition for Appeal, the Petitioners 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.
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By Counsel,

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CERTIFICATE OF SERVICE

I, William E. Murray, Counsel for Petitioners, 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 “*Petitioners’ Reply Brief*” upon the following counsel for record via electronic means through File & ServeXpress on this the 28th day of August 2024:

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