

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,

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.

**SUMMARY RESPONSE OF RESPONDENT J.
EDWARD ESTEP, L.R.A. NO. 0606**

Comes now Respondent J. Edward Estep by counsel, O. Gay Elmore, Jr., and prays that this Honorable Court deny the appeal of Petitioner because the circuit court was absolutely correct with its rulings that: (1) Appellant Dean E. Dawson is not entitled to absolute statutory immunity pursuant to W.Va. Code § 30-38-10(a) and (2) Appellants are not entitled to qualified immunity pursuant to state common law.

DISCUSSION

West Virginia Code § 30-38-10

Petitioner asserts that “the Circuit Court erred in denying absolute statutory immunity to Appellant Dean E. Dawson pursuant to W. Va. Code § 30-38-10 (a) as there

is no evidence of malice” *Petition for Appeal*, Pg. 5. Petitioner argue that Dean Dawson has immunity under the Real Estate Appraiser Licensing and Certification Act which states, “[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). Petitioner also erroneously asserts that the “denial of statutory immunity was in error, as the record below contains no cognizable evidence of malice.” *Petition for Appeal*, Pg. 11. Petitioner’s assertions are factually inaccurate as the Circuit Court found cognizable evidence of malice in denying immunity to Appellant Dawson. The Circuit Court correctly concluded that legitimate questions of fact remained as to whether Mr. Dawson acted with malice in the course of the proceedings which resulted in the immediate suspension of Mr. Estep’s License without a hearing. A cursory examination of the record reveals that Respondent has established evidence supporting malice on the part of Appellant Dawson.

Black’s Law Dictionary 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.” Black’s Law Dictionary 956 (6th Ed. 1990). Black’s further defines ‘malicious’ as being “characterized by, or involving malice; having, or done with . . . mischievous intentions or motives.” *Id.* This Court has previously defined malice as “an action flowing from a wicked and corrupt motive” and that “malice is implied from any deliberate and cruel act.” *State v. Douglass*, 28 W.Va. 297, 299 (1886).

Petitioner claims that “[appellant] Dawson did not bring any of the three complaints.” *Petition for Appeal*, Pg. 14. However, Respondent has produced evidence

establishing Plaintiff's suspension was initiated by Mr. Dawson himself and came immediately after serving as an expert witness in two (2) civil cases opposite/ against Mr. Dawson. Mr. Dawson admitted during deposition that it was he himself who made Board Members, more specifically Joe Chico, aware of Mr. Estep's work as a competing expert witness in the two (2) Columbia Gas civil cases; again, cases in which Mr. Dawson served as Columbia's competing expert witness opposite Mr. Estep. Mr. Dawson stated, "I discussed [Mr. Estep's report] outside of the Board meeting with Joe Chico, who was a board member. . . He [Mr. Chico] brought the conversation that **the two of us shared** between each other to the committee" *Dawson Depo.*, Pg. 38:9-14, J.A. 001770. In addition to bringing Mr. Estep's matter before the Board through Mr. Dawson's conversations with Mr. Chico, Mr. Dawson further admitted during his deposition that "the allegation would have been developed and created by the Standards Committee" of which Mr. Dawson was present and participated "because I'm the chair of the Standards Committee by code." *Dawson Depo.*, Pg. 40:7 – Pg. 41:4, J.A. 001770.

Mr. Dawson also claimed during his deposition that he brought the matter to Mr. Chico because "I have a duty as an officer or a representative of the state and the public." Furthermore, Dean Dawson stated during his deposition that he did not believe that the legal reports of Mr. Estep were credible and that was one of his reasons for reporting Mr. Estep to a fellow Board Member. Mr. Dawson further expounded that he did not believe the reports lacked credibility due to the dollar (\$) amount reported¹, but because "there was no support." *Dawson Depo.*, Pg. 44, J.A. 001771. Mr. Dawson later stated that this

¹ It is important for the Court to understand that Mr. Estep opined to a Five Hundred Dollar (\$500.00) "diminution in value" for each Plaintiff in the Columbia Gas civil cases; less and more conservative than Mr. Dawson.

lack of a support was, “a lack of documentation within the work file.” *Dawson Depo.*, Pg. 57:2-3, J.A. 001774. However, when later asked, **“you brought this to Mr. Chico’s attention without knowing whether Mr. Estep had the most extensive work file in the history of man or not, correct,”** Mr. Dawson answered, “correct” (emphasis added) *Dawson Depo.*, Pg 59:3-6, J.A. 001775. Respondent would like this Court to note, that Mr. Dawson could not have known and did not know about Appellee’s work file before lodging the complaint with the board. This post rationalization evidences that Mr. Dawson lied about his reasoning for bringing the complaint before the Board, and a jury could properly adduce that he was using his position on the Board to carry out a personal vendetta against Mr. Estep, a competing expert witness.

Mr. Dawson’s participation in the allegations, investigation and suspension of Mr. Estep posed a glaring conflict of interest. Counsel for Defendants has admitted that Mr. Dawson possessed a conflict of interest in the suspension of Mr. Estep. Defendant Dawson’s Response to Plaintiff’s First Set of Interrogatories Pg. 2, J.A. 000109. Because of this textbook conflict of interest, Appellant Dawson should not have been involved in any matters related to Mr. Estep, and the record evidences that Mr. Dawson knew this as well. In the minutes of the Standards Committee’s meeting regarding Mr. Estep, Mr. Dawson is quoted as saying when discussing Mr. Estep, “I don’t know some of this stuff might be better on a report and what part is discoverable. We will need to check with Anthony. Some of this stuff we may not want produced.” *Dawson Depo.*, Ex. 2, Pg. 2, J.A. 001814. If this was a noble crusade and everything was above board, why would Appellant Dawson be concerned about what is discoverable. This is a reasonable question that jurors could ask when examining evidence presented in this case.

Mr. Dawson further posited to the Standard Committee that, “we can have a hearing or if we feel he is an immediate danger to the public we can go ahead and suspend.” *Dawson Depo.*, Ex. 2, Pg. 4, J.A. 001816. In response to this, one member of the committee responded that “in order to do due diligence and in order to be fair I think we do require a hearing and he wanted one” to which another Standards Committee member responded, “well I make a motion that we give him a hearing.” *Id.* Other members of the Standards Committee were for giving Mr. Estep a hearing, but Appellant Dawson pushed the suspension without a hearing, “well we have an outside reviewer saying he’s a danger to the community so I think we can act on that today.” *Dawson Depo.*, Ex. 2, Pg. 6, J.A. 001818. The expert, Robert Pratt, neither in the Standards Meeting nor his report ever asserted that Mr. Estep was a danger to the community. As an aside Mr. Pratt mentioned that he had reviewed, “three preliminary reports and one deposition by the appraiser (Mr. Estep).” *Dawson Depo.*, Ex. 2, Page 1, J.A. 001813. Defendant Dawson provided Mr. Pratt with a copy of a deposition given by Mr. Estep from the civil case in which they were competing parties. Mr. Dawson was using the Board and its resources (expert witnesses) to try and discredit Mr. Estep’s given testimony during the deposition. Finally, the minutes evidence that Mr. Dawson recommended suspension and a harsh punishment of Mr. Estep while simultaneously trying to weasel out of being the force behind the suspension when stating, “I don’t want to make the motion but I’m leaning toward . . . suspension but the education part to be as strong as what we could possibly make it.” *Dawson Depo.*, Ex. 2, Pg. 5, J.A. 001817.

The Circuit Court correctly found that the record is replete with evidence that Appellant Dawson spearheaded this entire vendetta against Mr. Estep out of malice. From

the record it can be determined that Mr. Dawson had mischievous intentions as a result of ill will due to the fact that Mr. Estep was a competing expert witness. The record also demonstrates that Mr. Dawson tried to make the punishment as harsh as he could make it, which evidences his intent to inflict injury, to which the law can imply an evil intent. The record evidences that malice can be inferred, as a reasonable jury could conclude from these facts that the actions of Mr. Dawson flowed from a wicked and corrupt motive. Further, these acts could be deemed cruel by the finders of fact which implicitly implies malice according to previous decisions made by this Honorable Court.

Qualified Immunity

Petitioners erroneously argue that, “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.” *Petition for Appeal*, Pg. 5. West Virginia law is clear, a public official or State agency may claim to be qualifiedly immune from suit only when “the acts or omissions which give rise to suit . . . involve . . . discretionary governmental functions.” *Parkulo v. W. Va. Bd. Of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996). Unfortunately for Petitioners, this qualified immunity has a “qualifier” (ie “may”) and is not absolute. Public officials and State agencies in West Virginia are 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.”** *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992). (Emphasis Added).

Respondent has sufficiently alleged and proven for the record that the Board's suspension of Mr. Estep's Appraisal License without first being given a hearing was a violation of Appellee's due process rights under Article III, 10 of the *Constitution of West Virginia*. In addition, Respondent has also adduced sufficient evidence to show that the acts taken by the Board were, "fraudulent, malicious, [and] oppressive."

Respondent will first address the violation of his Due Process Rights under Article III, 10 of the *Constitution of West Virginia*. Respondent alleged and Petitioners have acknowledged that Mr. Estep's appraisal license was suspended without first being given a hearing. Appellants try to explain away this violation by arguing that the Real Estate Appraiser and Licensing 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) (Emphasis Added). Respondent acknowledges the Board can suspend, without hearing, the appraisal licenses of those who constitute a danger to the public and/or adversely affect the public welfare (ie "extraordinary circumstances").

However, the record clearly demonstrates that in this case, there existed no "**extraordinary circumstances**" which would be required in order to suspend the license of Mr. Estep without a hearing as laid out in W. Va. Code § 30-38-14(c). To the contrary, it is disingenuous to argue that any such **extraordinary circumstances** existed. In the matter at hand, Mr. Estep's own clients did not even file a complaint before the Board. In fact, the Morrisons and the Chapmans were both satisfied with the work Mr. Estep performed for them in serving as an expert witness versus Columbia Gas and Mr. Dawson in their respective matters. Again, Mr. Estep's opinion of a diminution in value

(\$500.00) differed by only a few hundred dollars from the opinion given in the case by Mr. Dawson, and was actually more conservative. An amount so insignificant in no realm of possibility can be considered an “**extraordinary circumstance**”. Especially troubling is the fact that the Board knows that this did not rise to the level of **extraordinary circumstances**, yet knew the requirements of “extraordinary circumstances” were required in order to suspend Mr. Estep’s license without the hearing under the stated statutory authority.

The Standards Committee Meeting Minutes demonstrate that the Board itself knew Mr. Estep was not a danger to the Public. The first time that Mr. Estep was referred to as a danger to the public was by Mr. Dawson when he incorrectly stated that, “we have an outside reviewer saying he’s a danger to the community.” *Dawson Depo*, Ex. 2, Pg 6, J.A. 001818. Oddly enough, this referenced outside reviewer (Robert Pratt) never made mention that Mr. Estep was a “danger to the community” or posed any risk to anyone at all. Not only did Mr. Pratt not mention anything of the sort during the Standards Committee meeting, but Mr. Pratt’s Report never mentioned Mr. Estep constituting a danger to the public or anyone for that matter either. This language Mr. Dawson used is important because the minutes demonstrate that Mr. Dawson was informed by an attorney that they could, “have a hearing or if we feel he is an immediate danger to the public we can go ahead and suspend his license without a hearing.” *Dawson Depo*. Ex. 2, Pg. 4, J.A. 001816.

The Board was obviously aware of this “magic word” requirement and tried to shoehorn its Order of Suspension to meet the requirement. The Order states that the Board, “found there were **extraordinary circumstances** present that warranted the

immediate suspension of Petitioner's License pending a hearing; namely, **the alleged illegal acts taken by Petitioner.**" See the Order. Further, the Board, in the Order, stated the, "serious nature of the **allegations of unlawful conduct** therein, and the repetitive nature of such alleged **unlawful conduct**, which includes but not limited to Uniform Standards of Professional Appraisal Practice (USPAP) 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.**" *Id.*

These statements taken in light of the facts of the case are ludicrous. As aforementioned, Mr. Dawson admitted during his deposition that there was not one single allegation of unlawful activity (ie "illegal acts") levied against Mr. Estep, yet the Board cites "**illegal activity**" as a motivating factor for suspension. The Board later cited violation of USPAP as unlawful conduct, but not meeting a technical standard is not an illegal act. An allegation for lack of technical compliance with USPAP is a failure to meet an Appraisal Standard but in no way constitutes unlawful or illegal acts. The Board knew that a simple violation of a technical standard would not be sufficient to suspend Mr. Estep's license without a hearing, so they improperly crafted the "extraordinary circumstances", "illegal acts", and "unlawful" language to try to get the Order of Suspension to pass muster under W. Va. Code § 30-38-14(c). There were **no extraordinary circumstances, illegal acts, or unlawful conduct** present in the instant case. As aforementioned, the Board's own expert reviewer of Mr. Estep's case never once mentioned in the Meeting nor his expert Report any danger that Mr. Estep posed the public. Thus a suspension without a hearing cannot pass muster or be allowed to stand as the Board acted outside of its statutorily granted authority.

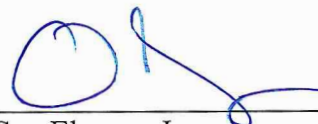
The Order of Suspension of Mr. Estep additionally shows that it was entered in a fraudulent, malicious, and oppressive manner. The Board knew that there was not one single alleged act of unlawful or illegal conduct by Mr. Estep. Mr. Dawson admitted as much during his deposition. It was with this knowledge, that the Board crafted their Order of Suspension citing illegalities committed by Mr. Estep. These illegalities and unlawful acts were necessary in order to create the extraordinary circumstances needed to suspend without a hearing. It was also this same language that was needed in order to paint Mr. Estep as a danger to the public and adverse to the public welfare. Allegations of violating a technical Appraisal Standard does not incite the same outrage or rise to the level of harm to the public welfare that the Board needed in order to suspend Mr. Estep's license without first having a hearing.

Clearly the record shows evidence that the acts of this named public official and the named State agency violated the Constitutional rights of Mr. Estep in addition to being fraudulent, malicious, and oppressive. This matter demonstrates the importance of the Checks and Balances of governmental branches, as Mr. Dawson has weaponized the Board, a state legislatively mandated body, against his rival. Mr. Dawson and the Board abused its granted authority and shoehorned the language of their order in an attempt to pass legal review.

Conclusion

The record is clear that the Circuit Court was correct in denying Petitioner Dawson's absolute statutory immunity as there exists an abundance of evidence in the record that a trier of fact could find to represent malice. The record further supports that

that Circuit Court was correct in denying qualified immunity to the Petitioners as the record contains evidence of a 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. This case is a textbook example for the reason why these immunities are not absolute and contain exceptions.



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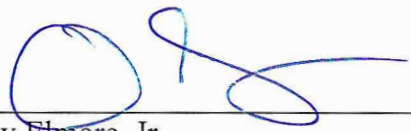
Respondent.

CERTIFICATE OF SERVICE

I, O. Gay Elmore, Jr., counsel for Respondent J. Edward Estep, L.R.A. No. 0606,
do hereby certify that service of the foregoing "*Summary Response of Respondent J.
Edward Estep, L.R.A. No. 0606*" was made upon the following via hand delivery a true
and exact copy thereof to:

William E. Murray
Adam K. Strider
Bailey & Wyant, PLLC
500 Virginia Street, East, Suite 600
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this 8th day of August, 2024.



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