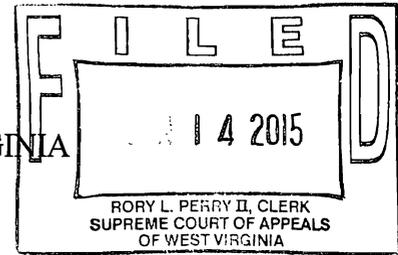


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MARTHA KNOTTS,

Plaintiff below, Petitioner,

v.

Docket No. 14-0752
(Taylor County Circuit Court
Civil Action No. 12-C-66)

GRAFTON CITY HOSPITAL,

Defendant below, Respondent.

PETITIONER'S REPLY BRIEF

Submitted by:

Allan N. Karlin, WV Bar No. 1953
Jane E. Peak, WV Bar No. 7213
Allan N. Karlin & Associates
174 Chancery Row
Morgantown, WV 26505
304-296-8266
ank@wvjustice.com
jep@wvjustice.com
Counsel for Petitioner

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Respondent Grafton City Hospital's Brief is premised on disputed facts which must be resolved by a jury and on a serious misreading of the cases upon which it purports to rely. In short, nothing in Respondent's Brief rebuts petitioner's arguments that the circuit court erred in granting summary judgment and that this Court should reexamine and overturn *Young v. Bellofram*, 227 W. Va. 53, 705 S.E.2d 560 (2010), and formally adopt the substantially younger test articulated in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996).

I. REPLY TO COUNTER-STATEMENT OF THE CASE

Grafton City Hospital's ("GCH") has confused the standard for summary judgment with the standard applicable to defending a jury verdict. Its error is evident from its persistent reliance on its version of disputed facts despite the well established rule requiring a court deciding a summary judgment motion to rely on undisputed material facts and mandating that "any permissible inferences from the underlying facts must be drawn in the light most favorable to the party opposing the motion." *Appalachian Leasing, Inc. v. Mack Trucks, Inc.*, ___ W. Va. ___, 765 S.E.2d 223 (2014). This is an appeal of a decision granting summary judgment. As a result, GCH's reliance on disputed facts in its Counter-Statement of the Case should be rejected in resolving this appeal.

For example, GCH claims that Rebecca Green "had no desire for Ms. Knotts to know about her condition, and complained in no uncertain terms about prior tension between with [sic] Ms. Knotts." Respondent Grafton City Hospital's Brief ("Response"), 2. Green's testimony, however, contradicts GCH's version of the facts. Green testified that, if she had been asked "would you like Ms. Knotts to come back with you" in the Emergency Department, she would have responded "Sure." App II, 0378 (p. 29, lines 1-4);¹ see also Petitioner's Brief, 4, n. 3. Green unequivocally denied GCH's version of the conversations in the hospital and testified that it was "okay for her [Knotts] to ask me [about being in the hospital] because, like I said, she's like a mother to me" and that she told one of the nurses that it was "okay that she [Knotts] talked to my son." App. II, 0377 (p. 22, lines 12-16, 22-23). As for the alleged tension between Green and Knotts, Green

¹ Each page of the deposition transcripts includes four (4) actual pages from the deposition. To facilitate the Court's review of the Appendix, Knotts will provide the citation to the Appendix page followed, in parentheses, by a pinpoint cite to the deposition transcript page(s) and line(s).

described how Knotts helped her when her home burned down, and Green testified that Knotts is “like family to me.” App. II, 0378 (p. 26, line 2); 0379 (p. 30, line 8 - p. 31, line 12).

GCH claims that Knotts had “multiple trainings on patient confidentiality and HIPAA. . . .” and that she “acknowledged signing a Confidentiality Statement when she was first employed.” Response, 3. GCH adds that Angela Rinck, Knotts’ supervisor, had posted a memo on confidentiality in the lunchroom two weeks prior to the events that led to Knotts’ discharge. *Id.*, 4. However, the evidence actually demonstrates that none of the training or memos addressed the alleged misconduct. Even supervisor Rinck had no idea that Knotts’ conduct violated GCH policies.² *See* discussion *infra*.

GCH claims that the reason Rinck did not agree with the decision to fire Knotts was that Knotts was a good employee and that she, Rinck, did not “want to be short-staffed.” Response, 5. Yet, Rinck was not opposed to firing Knotts because she would be short staffed. To the contrary, Rinck opposed the firing because she did not think it was fair to fire Knotts for what happened: “I didn’t think what she did was a – was – warranted termination. I didn’t think it was that egregious.” App. II, 0466 (p. 39, lines 19-21). Rinck explained that she disagreed that Knotts had the training claimed by GCH. App. II, 0466 (p. 40, lines 17-18). She testified “I didn’t recall that part being in the in-service.” *Id.* (p. 41, lines 7-8). In fact, Rinck, although a supervisor, did not know that what Knotts did violated any GCH policy:

I have always told my staff that if you have learned something by virtue of the fact that you are employed here, you are not to share it. That is my impression of violating. You don’t go out and share it.

She wasn’t sharing anything, and my assumption was she wasn’t violating it.

² GCH suggests that Rinck’s participation in the grievance meant she agreed with GCH’s firing decision. Response, 5. Once again, GCH misconstrues the record. Under GCH policies, Rinck had to prepare the response to Knotts’ grievance because she was Knotts’ supervisor, not because she concurred in the decision. App. II, 0471 (p. 59, lines 5-12). Rinck only wrote “the first paragraph and the last – the first sentence and the last sentence” because she did not know “the exact reason to put down for her [Knotts’] termination.” *Id.* (p. 58, lines 11-14 and p. 60, lines 2-5). Rinck asked for Missy Kimbrew’s help, *id.* (p. 59, line 13 - p. 60, line 7), because “I did not know how to respond to this by virtue of the fact that I did not agree with it.” *Id.* (p. 58, lines 16-17). Rinck did not agree with the reasons for the firing and did not think Knotts should be fired. *Id.* (p. 60, line 21 - p. 61, line 3). She understood that the reasons in the letter were GCH’s reasons, but they were not hers. *Id.* GCH’s suggestion that Rinck’s participation in the grievance denial aids GCH’s version of events is contrary to the facts of the case.

App. II, 0467 (p. 42, lines 13-20). Rinck added, “[b]ut I just did not think this was fair.” App. II, 0466 (p. 39, lines 23-24). She explained “Jeannie was, in my opinion, an employee that was dedicated to at least my department, if not the entire facility, and I just didn’t agree with their ultimate decision.” *Id.* (p. 40, lines 1-4).

GCH claims that Nurse Brooke Davis had previously spoken with Knotts about soliciting protected health information. Response, 3. Yet, this is a highly disputed fact.³ See discussion *infra*.

GCH claims, with regard to the video of long-term care residents in rather unflattering images while CEO Shaw and other GCH employees dance and sing, that it opposed the submission of the video because the Rules of Civil Procedure “do not allow for a party to keep submitting evidence indefinitely. . . .” Response, 6, n. 6. In general, Knotts agrees. However, the video is totally inconsistent with GCH’s hyper-concern about Knotts’ conduct. Making and posting a video of GCH long-term residents on the internet certainly raises an inference that GCH’s strict interpretation of the rules against Knotts had more to do with Knotts than with GCH policies. Moreover, the video could not have been submitted earlier because it was not posted on the internet until after the circuit’s court’s decision granting summary judgment (but before the court adopted GCH’s Findings of Fact). GCH also claims there is no proof that the residents did not consent to the video. *Id.* Yet, in its response to Plaintiff’s Motion to Alter or Amend the May 7, 2014 Order, GCH failed to provide any evidence that the long-term care residents did, in fact, consent to the making or posting of the video. Certainly, if the residents consented, it would have been easy for GCH to say so in its response to Knotts’ motion. App. I, 0105-0111. Its failure to do so supports an inference that there were no valid consents.

GCH questions whether Knotts has a hearing problem that prevented her from hearing Davis’ alleged admonishment. Response, 1, fn. 1. Yet, there is undisputed medical evidence that Knotts did, in fact, have a hearing problem and that Green, Rinck, and Davis were aware that Knotts’ had

³ Likewise, GCH suggests that Knotts is nosy or spoke in a nosy tone of voice. Response, 3. As with so many of GCH’s arguments, this allegation is, at best, an argument for the jury, not a reason to grant summary judgment. Certainly, as discussed *supra*, Green did not consider Knotts to have been “nosy” and had no problem with Knotts’ concern about her, Green’s, health.

problems hearing. See discussion, Petitioner’s Appeal Brief (“Petitioner’s Brief”) at 4, n. 2 including App. I, 0263-0265 (hearing impairment records).

II. ARGUMENT

A. The Circuit Court Erred in Concluding That Knotts Failed to Establish the Third Element of Her *Prima Facie* Case

Much of the GCH Response is predicated on a fundamental misunderstanding of the relevant law. As noted *supra*, GCH ignores the law requiring that, in a summary judgment motion, it rely on *undisputed* facts. As discussed *infra*, GCH’s arguments muddle and, in some cases, attempt to rewrite federal and state discrimination law. GCH’s discussion of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996); the cases relied upon by Knotts and the AARP; and the cases that GCH cites at pages 25-26 of its Response are based on mistaken – often grossly mistaken – representations as to what the various courts actually held. For example, GCH begins by referencing the “but for” language in *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986), without mentioning that the *Conaway* language was qualified in *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995), an opinion authored by Justice Cleckley explaining that the “but for” language only requires that the plaintiff show an inference of discrimination.⁴ As Justice Cleckley explained:

[u]se of the “but for” language in that test [*Conaway*] may have been unfortunate, at least if it connotes that a plaintiff must establish anything more than an inference of discrimination to make out a *prima facie* case. But the *Conaway* decision itself disavowed any desire to require more: “What is required of the plaintiff is to show some evidence which would sufficiently link the employer’s decision and the plaintiff’s status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion.”

⁴ The words “but for” have a different significance in *Gross* than under Justice Cleckley’s opinion in *Barefoot*. In *Gross*, the words “but for” rule out a burden-shifting analysis in a federal age discrimination case. However, under West Virginia law, “but for” as used in *Conaway* does not negate a mixed motive/burden-shifting analysis in any discrimination cases under the Human Rights Act, including age discrimination cases. See, e.g., *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 74, 479 S.E.2d 561, 584 (1996) (“‘Mixed motive’ refers to cases in which a discriminatory motive combines with some legitimate motive to produce an adverse action against the plaintiff. ‘Disparate treatment’ refers to cases in which a discriminatory motive produces an adverse employment action against the plaintiff. As a technical matter, then, mixed motive cases form a subcategory of disparate treatment cases.”); *Bailey v. Norfolk & W. Ry.*, 206 W. Va. 654, 674, 527 S.E.2d 516, 536 (1999) (applying the mixed-motive analysis to an age discrimination case under the Human Rights Act).

193 W. Va. at 484, 457 S.E.2d at 161. Moreover, “[t]o further clarify, we now hold the ‘but for’ test of discriminatory motive in *Conaway* is merely a threshold inquiry requiring only that a plaintiff show an inference of discrimination.” *Id.* For the reasons set forth in Petitioner’s Brief, Knotts has met that burden through evidence of the age of replacement workers, comparators, changing reasons and pretext.⁵

1. Contrary to GCH’s assertions, Knotts established her *prima facie* case.

GCH asserts that “a wealth of undisputed facts” support the basis for its decision. Response, 10-11. However, it then relies on facts that are either very much in dispute or, in some cases, undisputed in favor of the plaintiff. These have already been discussed in some detail in the Petitioner’s Brief at pages 2 through 11 and in the Reply to the Counter-Statement of Facts, *supra*. Nonetheless, to ensure that there is no confusion as to the substance of the detailed evidentiary record, Knotts will address more of GCH’s alleged “undisputed facts.”

GCH contends that Knotts violated the GCH policy at least twice, claiming these were violations subject to immediate discharge. Response, 11-12. Yet, as discussed *infra*, even Knotts’ supervisor did not know that Knotts’ conduct violated any GCH policies and, as for the alleged requirement of immediate termination, no hospital employee had ever before been terminated or, for that matter, disciplined by GCH for any violation of the policy at issue.

GCH contends that it had a policy that prohibited Knotts from accessing or discussing protected health information. Response, 11. Yet, the GCH policy, as set forth at page 11 of the Response, fails to directly address what Knotts is actually accused of doing, *i.e.*, asking a long time close friend and family member and her son what was wrong when she was surprised to see them in the Emergency Department. *See* discussion, Petitioner’s Brief, 3-5. GCH continues to contend that this conduct not only violated GCH policy but it also required immediate discharge, even though Rinck testified that she did not think Knotts had violated any policy that she, Rinck, had ever learned at the hospital. *See* discussion at Petitioner’s Brief, 6 referencing App. II, 0466-0467.

⁵ GCH focuses on whether Knotts’ conduct violated GCH policies without addressing whether, even if that were so, why it would fire an otherwise respected employee when its own expert does not even claim that HIPAA or any other GCH policy required firing Knotts. *See, e.g.*, App. II 0572 (p.189 line 15 - p. 190, line 21).

GCH contends that “[i]t is undisputed that Knotts had been trained extensively - *and fairly recently* prior to her separation - on privacy, HIPAA and the Hospital’s Confidentiality Policy. Specifically, she attended several in-service trainings on patient confidentiality and HIPAA at the Hospital within the year prior to the date in question.” Response, 12. GCH puts this forth as an undisputed fact even though its own supervisor, Rinck, did not believe that Knotts had ever been trained that HIPAA or related policies prohibited her from the conduct at issue. *See discussion supra* and in Petitioner’s Brief, 6. In fact, as discussed *supra*, Rinck was not even aware that Knotts’ conduct with Green and her son violated any GCH policies and protested her firing for that exact reason. Moreover, when asked to review the training materials that she had received from the hospital, GCH expert Catherine Heindel had difficulty identifying any training materials that would have placed Knotts on notice that approaching and attempting to speak with a close family friend and her son in the Emergency Department would have violated any GCH policy. *See discussion at* Petitioner’s Brief, 6, and App. II, 0537-0539.

GCH claims “it is also undisputed” that Knotts read a memo posted in the housekeeping lunchroom “reminding her and the other housekeepers of the importance of patient confidentiality.” Response, 12. Yet, that memo, found at App. I, 0269, discusses the importance of not sharing information one learns inside the hospital with anyone outside of the hospital. It does not place anyone on notice that the policy prohibits approaching a family friend in the hospital to ask what is wrong with her. Moreover, the notice was posted by Rinck whose testimony is clear: Knotts had not violated any hospital policy known to Rinck. App. II, 0466, 0467 (p. 40, lines 17-22; p. 42, lines 5-23). In fact, GCH management knew that Knotts had not been trained that on a GCH policy that prohibited approaching Green or her son because Rinck told them so when she spoke against the decision to fire Knotts. App. II, 0467 (p. 42, lines 5-23).

GCH argues that Knotts’ interpretation of the policy is “nearly inexplicable” because it is “at odds with the plain language of the policy.” Response, 13. Yet, supervisor Rinck, who has been pursuing an associates degree in occupational safety environmental management, did not understand the policy any differently than did Knotts. App. II, 0458 (p. 8, lines 1-7).

GCH argues that factual disputes about Knotts' hearing problem or about whether Green's testimony supports GCH or Knotts is somehow not relevant to the decision in this case. Response, 13. Yet, credibility is always an issue in a summary judgment case. *See, e.g., Mt. Lodge Ass'n v. Crum & Forster Indem. Co.*, 210 W. Va. 536, 543, 558 S.E.2d 336, 349 (2001) (noting that credibility determinations are jury functions). "Summary judgment is often imprudent in discrimination cases that present issues of motive or intent because . . . 'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]'" *W. Va. Human Rights Comm'n v. Wilson Estates Inc.*, 202 W. Va. 152, 160, 503 S.E.2d 6, 14 (1998) (internal citations omitted).

Credibility issues have a particularly important role to play in the circumstantial and inferential proof on which most discrimination cases depend. Pretext, the focus of evidence in discrimination cases, most often turns on credibility. To the extent that GCH's explanations as to what Knotts did, what GCH requires, what training occurred and other matters are not credible, a fact finder is permitted to draw inferences of pretext. Where the employer appears to be untruthful about its version of events and its explanation for the firing, the fact finder may infer that the proffered reason for the firing is a pretext. *See, e.g., Mayflower Vehicle Sys. v. Cheeks*, 218 W. Va. 703, 714, 629 S.E.2d 762, 773 (2006) ("A proffered reason is a pretext if it was not 'the true reason for the decision[.]'"). And, "once it is shown that an employer's reason for an action was pretextual, discrimination may be inferred from the employer's action." 218 W. Va. at 716, 629 S.E.2d at 775. Thus, the extent to which a fact finder concludes that an employer's explanations for the firing are not credible, it may draw adverse inferences regarding the employer's motives.

Green's testimony is particularly compelling evidence of pretext. In an attempt to justify the firing, GCH claims that Green was hostile to Knotts' presence. A displeased patient complaining about staff might elevate Knotts' conduct to some level of discipline, but there was no displeased patient in this case. *See* discussion *infra* and in Petitioner's Brief, 4, n. 3. As with much of GCH's alleged "wealth of undisputed facts" (Response, 11), its allegations concerning what Green said about Knotts are facts that are very much in dispute.

GCH claims that Knotts had previously been warned about these policies. Response, 3, n. 3. Yet, once again, GCH relies on disputed facts. Davis' testimony was not credible. Knotts denied that she had been warned by Davis or others about soliciting protected health information. App. I, 0188 (p. 119, lines 6-10). Davis conceded that she had never made any written notes about these allegedly important violations of GCH policy. App. II, 0350 (p. 35, line 23 - p. 36, line 1; p. 37, lines 4-7). Nor had she ever discussed these purported transgressions with Knotts' supervisor. App. II, 0350 (p. 36, lines 2-7; p. 37, lines 8-13). Most important, GCH did not contend, at the time of the discharge, that Knotts had engaged in prior offenses. The Employee Management record, signed by GCH management including CEO Shaw, on April 4, 2012, states that Knotts' contact with Green, her son and the EMS workers "are severe enough to warrant immediate termination *for the first offense.*" App. I, 0244. Knotts was not, by GCH's admission, fired for anything other than the allegedly unforgivable conduct of April 2, 2012. Davis' *post hoc* claim that there were prior incidents is very much in dispute.

2. The Opinion of the GCH expert witness is neither unrebutted nor otherwise sufficient to defeat Knotts' *prima facie* case.

GCH argues that Knotts had no "privacy expert" and that, as a result, its expert "testimony stands credibly without any expert rebuttal." Response, 15, n. 9. However, Heindel's deposition demonstrated that her opinions were extremely limited and, in many cases, simply not credible.⁶ Although Heindel claimed that Knotts violated HIPAA (App. II, 0592-0593), she ultimately admitted that prohibiting Knotts from asking Green why she was in the hospital is "not technically required by the HIPAA law, no." App. II, 0544 (p. 80 at lines 1-13). Heindel was asked if, in her consulting work with focus groups of housekeeping staffs, she had "ever addressed the specific issue of, Look, if you see a friend coming into the hospital, you really shouldn't ask them – you should really – if you want to talk to them, you should wait until you are off duty and on visiting hours?" App. II, 0545 (p. 84, lines 10-15). Heindel responded "no" and then went on to explain that she has mostly discussed that they should not discuss with others what they learned while working at the hospital,

⁶ Although Heindel does consulting outside the litigation field, her litigation business is quite profitable. She charges \$275 for drafting a report, but \$575 per hour for all litigation related work including travel time. App. II, 0562-0563 (*see especially* p. 153, line 22 through p.154, line 19).

i.e., exactly what Rinck and Knotts understood the GCH policy to involve. *Id.* (p. 84 at lines 16-23).⁷

GCH represents that its expert opined that GCH “acted in accordance with best practices under HIPAA when enforcing its Confidentiality Policy with respect to Knotts’ termination [in] this case.” Response, 14. Yet, Heindel was not able to cite any authority from HIPAA for her opinion on this point, admitting that HIPAA did not address sanctions and, more important, that she was not opining that it was appropriate to fire Knotts. App. II, 0567 (p. 169-170, particularly p. 170, lines 12-14, “Q. Okay. Again, you are not saying that it was appropriate to fire her in this case? A. No.”). This is important because the issue is not just whether GCH discriminated in deciding to sanction Knotts, but whether age was a motive in the decision to turn what Rinck considered a minor event into a firing. Heindel refused to offer any opinions as to whether firing Knotts was the appropriate sanction for what Knotts was accused of doing. When asked if a warning letter rather than firing would have been appropriate, Heindel refused to answer insisting “that’s not what I was asked to opine on.” App. II, 0561 (p. 147, line 22 through 148, line 9). When pressed, Heindel admitted that nothing in HIPAA required that Knotts be suspended, let alone fired, from her job. App. II 0572 (p.189, line 15 through p. 190, line 21).

GCH cites its expert witness for her opinion that GCH was “**required to have and apply** appropriate sanctions against members of the workforce who fail to comply” with the relevant policies. Response, 14 (emphasis in original). Yet, as noted *supra*, Heindel admitted that this did not mean that the conduct at issue violated HIPAA or that Knotts should have been fired.

Heindel’s report suggests that Knotts violated GCH policy prohibiting the “[u]nauthorized disclosure of information.” App. II, 0593. Yet, at her deposition, Heindel admitted that Knotts had not disclosed information to anyone. App. II, 0566 (p. 166, line 20 through p. 167, line 1).

⁷ Heindel claimed that telling someone she should not share what she learned at the hospital communicated that an employee, on seeing a friend in the hospital, could not ask her what was wrong. App. II, 0546 (p. 86 at lines 9-25). It is questionable whether a juror would find Heindel credible after hearing this and other opinions offered by her. Heindel purportedly relied on Knotts’ training, but essentially ignored both the evidence regarding the actual wording of the GCH policies and supervisor Rinck’s testimony that Knotts was not, in fact, trained that asking a family friend what was wrong violated any GCH policy. Heindel was so careful not to say anything that might be construed to damage her client, GCH, that she even claimed she had no opinion on whether age discrimination occurs in the United States. App. II, 0572 (p. 192, lines 18-25). For these and other reasons, a jury could fairly conclude that Heindel’s testimony was neither objective, unbiased nor reliable.

Heindel opined that Knotts had training on the policies Knotts allegedly violated (App. II, 0593), but, at her deposition, Heindel admitted she “wasn’t opining on whether that training was adequate.” App. II, 0553 (p. 116, lines 15-23). Yet, Heindel had no real explanation for why Knotts was fired despite the fact that others were not even disciplined for confidentiality violations because Heindel did not review the evidence of confidentiality violations by other GCH employees. *See, e.g.*, App. II, 0554 (p. 118, line 21 through p. 120, line 5);

GCH argues that there is “undisputed evidence that Knotts had been trained on and reminded of the policy” Response, 16. Heindel appears to accept this representation from GCH despite the fact that, as discussed *supra*, GCH’s claim about Knotts’ training is very much in dispute, a dispute that Heindel conveniently ignores in her opinions.

GCH contends that there is “undisputed evidence that Knotts engaged in the conduct she did. . . .” Response, 16. Yet, that evidence is disputed. As discussed *supra*, GCH claims that Green was upset by Knotts’ questions, but Green insists that this is patently untrue.

Finally, even if, *arguendo*, there was undisputed evidence that Knotts had been trained on the policy and undisputed evidence that she violated it, that would not end the question in a discrimination case. In such a case, the ultimate issue is why she was fired. *In an environment where GCH has never before disciplined an employee for any kind of confidentiality violation, it is difficult to explain why an otherwise reliable 65 year old employee would be fired for asking a friend and her son what was wrong unless GCH management let conscious or stereotypic age bias enter into its decision.*⁸

B. The Circuit Court Erred in Concluding That Evidence of Comparators Over the Age of 40 is Insufficient to Support an Inference of Discrimination

1. This Court should reverse *Young v. Bellofram*.

GCH relies on *Young v. Bellofram*, 227 W. Va. 53, 705 S.E.2d 560 (2010) (*per curiam*), and asks this Court to affirm the circuit court on the basis of *stare decisis*. Plaintiff recognizes the general importance of *stare decisis*. However:

⁸ Note that, in relying on Heindel’s opinions, GCH fails to mention that even Heindel could not bring herself to claim that Knotts’ question to the EMS violated any GCH or HIPAA policy. App. II, 0573 (p. 194, line 2 through p. 195, line 24).

“[s]tare decisis is not a rule of law but is a matter of judicial policy. It is policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. However, stare decisis is not an inflexible policy.”

Faith United Methodist Church v. Morgan, 231 W. Va. 423, 437, 745 S.E.2d 461, 475 (2013) (footnote and internal citation omitted) (emphasis added). The argument for *stare decisis* is strongest where the issues were directly addressed by the court in the earlier precedent and where there has been significant reliance on that precedent over a period of many years. Neither justification for *stare decisis* exists in the present case. Most important, “[i]n the rare case when it clearly is apparent that an error has been made . . . deviation from that policy is warranted.” *Id.* (footnote and internal citation omitted).⁹ This case warrants a deviation from that policy.

Notably, in presenting its argument, GCH fails to address the underlying substantive issue, *i.e.*, whether the logic of the *Young* over 40/under 40 limitation on age discrimination cases makes sense in light of the purpose of age discrimination statutes, the reasoning of the U.S. Supreme Court decision in *O’Connor*, and/or the general understanding of the protections afforded by age discrimination legislation in West Virginia, the federal courts and other states. In fact, GCH’s Response offers no discussion of the “substantially younger” standard or the effect of *Young*’s over 40/under 40 approach on older workers in West Virginia.¹⁰

⁹ This Court has also explained:

“Much has been written and many clichés have been formulated to demonstrate why, in a certain case, *stare decisis* should not apply. We think it is sufficient to say that a rule of principle of law should not be adhered to if the only reason therefor is that it has been sanctified by age.” [footnote including citation omitted]. “It has been well said that ‘it is better to be right than to be consistent with the errors of a hundred years.’” [footnote including citation omitted]. Put another way, **“No legal principle is ever settled until it is settled right.”**

231 W. Va. at 437, 745 S.E.2d at 475 (footnotes and internal citations omitted) (emphasis added).

¹⁰ GCH notes that neither Knotts nor *amici* referenced the unpublished decision in *Alderman v. Fola Coal Co.*, 2011 WL 5358717, 2011 U.S. Dist. LEXIS 128975 (S.D. W. Va. Nov. 7, 2011). However, *Alderman* cites *Young* without addressing any of the issues and without mentioning *O’Connor*. Nothing in the decision suggests that the district court was aware of or considered the fact that the *per curiam* decision in *Young* was at odds with federal and state age discrimination cases. Moreover, *Alderman* involved extraordinarily weak evidence from plaintiff Alderman which the district court dismissed with a passing reference to *Young*. The plaintiff had claimed that Mr. Rush filled his position after he was laid off, *i.e.*, that Rush was a replacement worker. 2011 U.S. Dist. LEXIS at 22. However, according to the district court, it was “unclear whether Rush is younger or older than Alderman” and, in any event, was within five years of Alderman’s age. *Id.* Thus, Alderman failed to establish that Rush was a valid comparator under either

2. **GCH is mistaken in its assertion that *O'Connor* is inapposite.**

GCH argues that *O'Connor*'s persuasiveness was based on a false premise. Response, 23. GCH's argument rests on the novel theory that the U.S. Supreme Court "rejected the appropriateness of the assumption upon which the decision in *O'Connor* was based" when it decided *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). This reasoning, however, is predicated on a **complete and total** misunderstanding of *Gross*. *Gross* does not, in any way, undermine the reasoning or holding of *O'Connor* and nothing in either decision suggests otherwise.

O'Connor addressed whether someone alleging age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, had to prove that he was replaced by someone outside the protected class of individuals over 40 in order to prevail in his case. *Gross* addressed an entirely different issue: whether the burden of persuasion in a case under the ADEA was the same as the burden in a case brought under Title VII, 42 U.S.C. § 2000e, *et seq.* 557 U.S. at 173 ("Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA."). The issue on appeal in *Gross* was the evidence necessary to obtain a "mixed motive/burden-shifting" instruction in an ADEA case.¹¹ 557 U.S. at 174 ("This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now."). Over the years, in applying the proof formulations from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the courts developed a mixed motive analysis including a shifting of the burden of persuasion where there was evidence that the employer had both lawful and unlawful motives for the discharge. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93-95 (2003). This approach was later adopted by the amendments to the

Young's over 40/under 40 or *O'Connor*'s substantially younger test. After noting Alderman's evidence, the district court referenced the language in *Young* regarding the need for Rush to be outside the protected class, but, given the evidence, that issue did not matter to the decision. *Alderman* is hardly an endorsement of *Young*.

¹¹ This shifts the burden of persuasion, not just the burden of producing evidence. 557 U.S. at 171 (explaining that, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), "[s]ix Justices ultimately agreed that if a Title VII plaintiff shows that discrimination was a 'motivating' or a 'substantial' factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration."). As noted at n. 4, this burden-shifting is already the law in Human Rights Act cases, including age discrimination cases. *See, e.g., Bailey supra*.

Civil Rights Act passed by Congress. *Id.* The issue in *Gross* was whether the mixed motive/burden-shifting analysis developed in Title VII cases applied equally to age discrimination since age discrimination was not a part of Title VII and was, instead, the subject of entirely separate statute, *i.e.*, the ADEA.

In reviewing this question, the U.S. Supreme Court concluded that, under federal law, the mixed motive analysis did not apply to cases brought under the ADEA. The Supreme Court reasoned that the ADEA differed from Title VII and, as a result, the mixed motive/burden-shifting analysis applicable to Title VII claims was not applicable to a claim under the ADEA and that “[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.” *Gross*, 557 U.S. at 180. Nothing in *Gross* remotely suggests that the U.S. Supreme Court was, in any way, overruling or limiting *O’Connor*. In fact, GCH fails to point to any language in *Gross* that supports its unique assertion that *Gross* somehow limits *O’Connor*. Moreover, the *O’Connor* case is barely mentioned in the *Gross* opinion.¹²

The two cases are, for lack of a better analogy, apples and oranges. *O’Connor* teaches that a plaintiff alleging age discrimination must prove that the replacement worker or comparator is substantially younger than the plaintiff. *Gross* does not alter that analysis.

Following the decision in *Gross*, courts have continued to cite *O’Connor* for the “substantially younger test.” *See, e.g., Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1116 (9th Cir. 2011) (“The proper inquiry is not whether the other recruiters are outside the protected class, but whether they are significantly younger than [the plaintiff]”); *Moser v. Driller’s Serv.*, 988 F. Supp. 2d 559, 567, n. 1 (W.D.N.C. 2013) (stating that the test is whether a plaintiff is replaced by a “substantially younger” worker, not by someone under 40); *Smith v. City of Marion*, 2013 U.S. Dist. LEXIS 141985, 29 (D.S.C. Aug. 8, 2013) (“the Supreme Court has held that ‘the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected

¹² *O’Connor* is mentioned in 557 U.S. at 175, n. 2, and in a dissent. However, neither reference to *O’Connor* supports GCH’s interpretation of *Gross*.

class.”); *EEOC v. Town of Elkton*, 2012 U.S. Dist. LEXIS 98193, 34, 49 (D. Md. July 13, 2012) (stating and applying the *O'Connor* substantially younger test).

Decisions since *Gross* have also included discussions of both *Gross* and *O'Connor* without any suggestion that the former somehow modified, weakened or questioned the latter. *See, e.g., Moser v. Driller's Serv., supra.*, 988 F. Supp. at 561, 566; *Linkous v. Stellarone Bank*, (2013) U.S. Dist. LEXIS 78590, 8, 10 (W.D. Va. June 4, 2013); *Hartman v. Univ. of Md.*, 2012 U.S. Dist. LEXIS 115009, 40 (D. Md. Aug. 14, 2012).¹³

Part of GCH's confusion about the law may arise from its misunderstanding of the *McDonnell Douglas* proof formulation. The *McDonnell Douglas* formulation is not a statutory requirement. It was developed as a method of circumstantial proof of discrimination to help deal with the fact that direct evidence is rarely available in discrimination cases and, instead, victims of discrimination must rely on circumstantial and inferential proof of discrimination. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526-527 (1993) (noting that “we devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence” and that “[t]his framework has gained wide acceptance . . . in similar cases, such as those alleging age discrimination . . .”). Thus, there is nothing sacrosanct about modifying the protected class language of *McDonnell Douglas* to fit the differing concerns under age discrimination law.

3. GCH's other arguments on Knotts' comparator evidence have no merit.

GCH argues that Timothy Setler should not be considered a comparator because his situation is different from that of Knotts. Response, 18-19. Knotts is well aware of the differences between Setler and herself. However, the approaches to proof in a discrimination case are not limited to a few inflexible tests. What happened to Setler is relevant to the present case. Relying on its allegedly strict disciplinary policies, GCH contends that it had to fire Knotts, a rather harsh penalty for a good employee who, at worst, shared the same confusion about hospital policies as her own supervisor

¹³ GCH argues, in footnote 17 at page 22, that this Court must not have overlooked *O'Connor* when it decided *Young* because it mentioned *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), in the *Young* opinion and *Burdine* is “even older than *O'Connor*. . . .” With due respect to GCH, suggesting that this Court considered *O'Connor* because it referenced *Burdine* simply does not make any sense.

and who is the first person in the history of GCH to be disciplined for violating alleged confidentiality policies. One way of evaluating the credibility of this instance of strict and harsh discipline is to review how GCH treats others who violate its personnel policies. Certainly, a hospital would be expected to show some concern about an employee being arrested for illegal drugs, particularly where the police arrest the employee on hospital property. A personnel department that believed it had to fire Knotts – for reasons other than her age – would be expected to show some concern about Setler’s drug use and arrest while on the job. Yet, the personnel department that fired Knotts never even disciplined Setler even though he was charged with possession with intent to distribute. App. II, 0330 (p. 110, lines 10-14); 0331 (p. 111, lines 12-18); *see also* discussion at Petitioner’s Brief, 34-36. Certainly, a fact finder could draw an inference that, given the way GCH was willing to overlook the conduct of Setler, an employee 30 years younger than Knotts, it was not as serious or strict about enforcing its personnel policies as it claims it had to be with Knotts.

GCH argues that the other comparators are either “contract employees, held different positions, were supervised by others, or did not engage in conduct which the decision-makers with respect to Knotts were even aware of at the time of her offences.” Response, 19, n. 15. However, these comparators present fact questions for the jury. As Knotts noted, relying on *Mayflower Vehicle Systems, Inc. v. Cheeks*, 218 W. Va. 703, 715-716, 629 S.E.2d 762, 774-775 (2006), “[e]xact correlation between employees’ cases is not necessary; the proponent of the evidence must only show that the cases are ‘fair congeners.’”¹⁴ In most cases, there will not be exact congeners. Instead, the fact finder should evaluate the facts surrounding the other employees and ask a simple question: is it credible that an employer that looked the other way when an employee posted a patient’s death on Facebook (and a personnel officer “liked” the post) would have felt compelled to fire Knotts, particularly when Knotts own supervisor had no more understanding of the alleged hospital policy

¹⁴ Instead of relying on *Mayflower*, the leading West Virginia case on point, GCH asks the Court to adopt a test from two federal cases. Response, 19. However, *Mayflower* presents the proper test in West Virginia. When examining whether employees are similarly situated, a court must consider whether the employees were “engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” 218 W. Va. at 715, 629 S.E.2d at 774 (2006) (citations omitted).

than Knotts. Similarly, it seems unlikely that a hospital that took no internal action against a doctor who reviewed the medical records of his ex-wife without permission – an action that expert Heindel opined was most serious – would feel compelled to fire Knotts for asking a family friend what was wrong.¹⁵ The issue in each case is not whether the facts are exactly alike according to some inflexible test, but rather whether GCH’s treatment of other employees supports an inference that GCH’s explanation for its disparate treatment of Knotts is not credible.¹⁶

4. Rice and Nagy are relevant to the present case.

Contrary to GCH’s suggestion, *The Burkle-Parsons-Bowlby Corp. v. Rice*, 230 W. Va. 105, 736 S.E.2d 338 (2012), and *W. Va. Am. Water Co. v. Nagy*, 2011 W. Va. LEXIS 183 (June 15, 2011) (memorandum decision), are relevant. Although neither case is dispositive of the issues in this case, they demonstrate that there is uncertainty as to the *prima facie* case for age discrimination in West Virginia. This Court should resolve that uncertainty by adopting *O’Connor*.

5. The vast weight of authority supports Knotts.

GCH contends that the AARP *Amicus* Brief errs in stating that the courts it identified were the “highest courts in their respective states.” Response, 25. However, GCH has apparently misread the AARP *Amicus* Brief which cites 18 cases, but states that the highest appellate courts of *eleven* states have applied the “substantially younger” test and then identifies each of those states. AARP Brief, 7-10.¹⁷ Contrary to GCH’s allegation, the AARP Brief is correct.

¹⁵ App. II, 0520 (p. 23, lines 9-24). As discussed *supra*, Heindel testified that GCH had to sanction Knotts for a violation of its policies. If that is true, then GCH obviously should have done something to sanction a doctor who committed, as Heindel acknowledged, a serious violation of HIPAA. Its failure to actually sanction him at the hospital certainly allows a fact finder to question whether it should believe GCH when it contends its policies required it to fire Knotts.

¹⁶ GCH also notes at p. 8, n.14, that Knotts was hired when she was 58 suggesting, perhaps, that an employer who would hire a 58 year old would not discriminate against a 65 year old. Yet, Knotts was hired by Emma Taylor, not by any of those responsible for her firing. App. I, 0165-0166 (p. 29, lines 13 - p. 30, line 4). An employer might be open to hiring someone in her fifties, but nonetheless conclude that, by age 65, she had become too old.

¹⁷ The AARP list includes 18 states, noting that 11 are from the highest state courts. AARP Brief, 7-10. The 11 highest state courts are Indiana, Kentucky, Ohio, Connecticut, Massachusetts, Washington, California, New Jersey, Iowa, New Mexico and Michigan. As discussed at n. 20, *infra*, the correct citation for *Lytile v. Malady*, 566 N.W.2d 582 (Mich. 1997) (“*Lytile I*”), should include vacated, in part, on other grounds, *Lytile v. Malady*, 579 N.W.2d 906, 920 (Mich. 1998) (“*Lytile II*”). Knotts’ counsel apologizes for this error.

GCH claims that there are “a number of cases from other jurisdictions . . . which do not expressly adopt *O’Connor*. . . .” Response, 25 (emphasis in original). ***Yet, GCH has failed to identify a single federal or state case that suggests O’Connor was wrongly decided or that rejects O’Connor or its reasoning.***¹⁸ Instead, GCH provides a list of primarily unpublished opinions claiming that they undermine “the continued vitality of *O’Connor* in age discrimination cases.” *Id.*, 26. However, none of those cases mention *O’Connor*, its reasoning or the issues it raised and answered. Instead, the GCH cases reference, in passing, boilerplate language as to the generic “protected class” test without any discussion of whether that test is appropriate for an age discrimination case.¹⁹ Moreover, GCH mischaracterizes the substance of those cases, each of which was decided on issues which are entirely different from those addressed in *O’Connor*. For example, in *Spratt v. MDU Resources Group*, 797 N.W.2d 328 (N.D. 2011), the court mentioned the generic *McDonnell Douglas* test, but this test did not matter because the plaintiff in *Spratt* could not identify any replacement workers or comparators at all. 797 N.W.2d at 334. Thus, the difference between the over 40/under 40 and substantially younger tests simply did not matter in deciding the case.

The other cases which, according to GCH, undermine the continuing vitality of *O’Connor* offer GCH no more support than *Spratt*. None of the cases address the merits of the over 40/under 40 or substantially younger tests. Nor did any of the GCH cases rule against an employee based on the rationale in *Young*. The courts in these cases may have mentioned the generic *McDonnell Douglas* test in passing, but – in each case – that test had nothing to do with the outcome because the case was decided on other issues: *Johnson v. Crossroads Ford, Inc.*, 749 S.E.2d 102, 108-109 (Ct. App. N.C. 2013) (holding that plaintiff had established his *prima facie* case and created a genuine issue regarding pretext; comparators were not an issue in the case); *Zechman v. Pa. Human*

¹⁸ In fact, one case cited by GCH, *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111 (Ct. App. Ky. 2011), referenced the generic protected class test, but then seems to have applied a variant of the *O’Connor* “substantially younger” test. Although it did not mention *O’Connor*, the court found that the plaintiff had proved his *prima facie* case of age discrimination by showing the replacement employee was “significantly younger.” *Id.* at 11. However, the court ultimately held that the plaintiff failed to prove “pretext.”

¹⁹ “Generic test” refers to the language used in Title VII cases requiring a replacement worker or comparator to be outside the protected class. *See, e.g., O’Connor*, 517 U.S. at 310 (“following his discharge or demotion, he was replaced by someone of comparable qualifications outside the protected class.”).

Rel's. Comm'n, 2013 Pa. Commw. Unpub. LEXIS 284, 17, 2013 WL 3984637 (2013) (holding that the employee had failed to prove his claim for discrimination in promotions where the employer “placed the most weight upon the recommendations of the superior officers in a candidate’s chain of command”); *Villiger v. Caterpillar, Inc.*, 2013 Ill. App. Unpub. LEXIS 1110, 9-10, 2013 WL 2298474 (Ill. App. Ct. 3d Dist. 2013) (holding, in a case involving an alleged failure to offer a separation agreement to the plaintiff, that the employee had failed to prove that the employer took any adverse action against him and that “the separation agreement was offered to all qualified employees equally, regardless of whether they were younger or older than [the plaintiff]. . . .”); *Stillwell v. Halff Assocs.*, 2014 Tex. App. LEXIS 7646, 14-15, 2014 WL 3513213 (Tex. App. Dallas July 15, 2014) (reversing summary judgment in favor of the employer on age discrimination and retaliation claims where, with regard to the age discrimination case, there was conflicting evidence concerning the reasons the employee was terminated; also, comparators were not an issue); *Guild v. Dept. of Corrections*, 2014 Mich. App. LEXIS 2318, *6-7, 2014 WL 6679258 (Mich. App. 2014) (the plaintiff failed to provide any evidence of the ages of comparator employees and “did not establish that the other psychologists were younger but similarly situated to him”); *Drazin v. Binson’s Hosp. Supplies*, 2014 Mich. App. LEXIS 103, 9-10, 13, 2014 WL 231918 (Mich. Ct. App. Jan. 21, 2014) (plaintiff did show that he was replaced by a younger person but he “has not demonstrated any evidence to show that younger, similarly situated employees were treated more favorably, nor has he shown that the articulated justification for the termination was not the actual reason for the decision.”). In conclusion, none of the cases on which GCH purports to rely for the proposition that *O’Connor* is no longer viable support its position.

6. GCH’s out of jurisdiction cases are neither authoritative nor reliable.

GCH suggests that the citations in the AARP *Amicus* Brief are unreliable because some of the cases cited by GCH are from the same states that are listed as authorities in the AARP Brief. Once again, GCH is mistaken. For example, GCH mistakenly suggests that *dicta* in a 2011 state appellate court case from Kentucky, *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111 (Ct. App. Ky. 2011), somehow overrules a decision of the Kentucky Supreme Court which specifically adopted *O’Connor* and its “substantially younger” test. See *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d

492 (Ky. 2005). Nor does anything in *Drazin v. Binson's Hosp. Supplies, Inc.*, *supra*, a decision of an intermediate appellate court, suggest that *Lytle II*, is no longer good law in Michigan.²⁰

7. Knotts was replaced by a substantially younger employee.

At page 28, GCH argues it is entitled to summary judgment on the issue of replacement workers because Rinck “couldn’t tell you” who replaced Ms. Knotts, relying on App. II, 0473. GCH, once again, relies on an incomplete statement of the relevant facts. Immediately after making the quoted statement, Ms. Rinck identified the two individuals who were hired after Knotts was fired. App. II, 0473 (p. 69, lines 9-11). Those hires were identified as Mary (Spring) and Sherry (Lepka). App. II, 0473 (p. 69, lines 9-11). Although Rinck could not identify whether Spring or Lepka replaced Knotts, she identified these two individuals as those hired to do housekeeping work after Knotts was fired.²¹ GCH confirmed Rinck’s memory, in part, in a discovery response found at Appendix II, 666. The discovery response confirms that Spring and another woman, Janet Cox, were hired in the month following Knotts’ firing and both were substantially younger than Knotts: Spring was 12 ½ years younger and Cox was 20 years younger than Knotts. *Id.* Thus, based on Rinck’s testimony and GCH’s records, Knotts was replaced by Lepka, who returned to work and/or by the hiring of Spring or Cox. In each case, she was replaced by someone substantially younger, thereby establishing a *prima facie* case.

C. Knotts Presented Sufficient Evidence of Pretext to Survive Summary Judgment

²⁰ In the briefs submitted by and on behalf of Knotts, there is a citation to *Lytle I*. The Supreme Court of Michigan reheard *Lytle I*, vacating it on other grounds in *Lytle II*, 579 N.W.2d at 906, but Michigan still follows the substantially younger test. Although *Lytle II* does not mention *O’Connor* by name, it recognizes the *O’Connor* test for a *prima facie* case of age discrimination, *i.e.*, the plaintiff “was replaced by a younger person.” 579 N.W.2d at 916. It does not require that person be under 40. In *Lytle II*, the parties agreed that the plaintiff had established a *prima facie* case, but the Court concluded that the plaintiff failed to provide evidence of pretext. 579 N.W.2d at 908, 916. *See also id.* at 915, n. 19, which references *Lytle I*. Finally, *Lytle II* did not vacate *Lytle I* in its entirety. Instead, *Lytle II* only vacated *Lytle I* “insofar as it is inconsistent with our discussion and decision in this case.” *Id.*, 920. Nothing in *Lytle II* is inconsistent with the discussion and adoption of *O’Connor* in *Lytle I*. Thus, the Supreme Court of Michigan has adopted a “substantially younger” test, not an over 40/under 40 test.

²¹ Lepka had been hired earlier, left GCH and returned after Knotts was fired. App. II, 0478 (p. 88, lines 5-15).

GCH continues to argue that there is a wealth of evidence supporting its case when, in fact, the “wealth of evidence” supports a conclusion of pretext. Knotts has presented evidence that she was replaced by substantially younger workers, that GCH never before disciplined anyone for violating alleged confidentiality policies despite instances where substantially younger employees did, in fact, violate HIPAA, that GCH’s non-discriminatory reasons are pretextual and unworthy of belief, and that there are other reasons to question the credibility of GCH in firing a loyal and good employee for simply asking a family friend and her son what was wrong. GCH has the right to argue to a jury that the real reason for Knotts’ firing was not her age, but that is a matter for trial, not for summary judgment on a record where there are genuine issues of material fact.²²

III. CONCLUSION

This Court should overturn *Young v. Bellofram*, 227 W. Va. 53, 705 S.E.2d 560 (2010), reverse the decision of the circuit court and remand this case for trial.

Respectfully Submitted,

Allan M Karlin

ALLAN N. KARLIN, WV BAR # 1953
JANE E. PEAK, WV BAR # 7213
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266

²² As the AARP noted in its Brief at pages 10-14, the circuit court’s order is inconsistent with West Virginia and federal case law on the relevant burdens of proving a discrimination case. GCH confuses the issues when it argues, at Response 29 and n. 30, that the employer is “not required to persuade the Court that the proffered reason was the actual motivation for its decision.” (Emphasis in original). As noted in Petitioner’s Brief, meeting the *prima facie* case and showing pretext are sufficient to support a case of discrimination and to defeat summary judgment; nothing more is required. See, e.g., Syl. pt. 1, *Skaggs, supra*. (“In disparate treatment cases under the West Virginia Human Rights Act, ... proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination....”). The inference of discrimination arises from the evidence of pretext and the *prima facie* case; it does not, as AARP notes, require additional evidence of the employer’s intent. In *Barlow v. Hester Indus.*, 198 W. Va. 118, 137, 479 S.E.2d 628, 647 (1996), Justice Cleckley explained, “if the plaintiff proves the proffered reason was pretextual, then that proof combined with the *prima facie* case is sufficient, standing alone, to justify (though not compel) a judgment for the plaintiff.” See also *Bailey*, 206 W. Va. at 669, 527 S.E.2d at 531 (“The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination.”) (quoting *St. Mary’s Honor Center*, 509 U.S. at 511. To the extent that GCH intends to suggest that anything more is required to defeat summary judgment, GCH is simply wrong.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARTHA KNOTTS,

Plaintiff below, Petitioner,

vs.

Docket No. 14-0752
(Taylor County Circuit Court
Civil Act. No. 12-C-66)

GRAFTON CITY HOSPITAL,

Defendant below, Respondent.

CERTIFICATE OF SERVICE

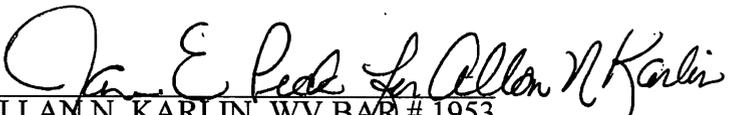
I, ALLAN N. KARLIN, attorney for the plaintiff, do hereby certify that service of the within and foregoing "Petitioner's Reply Brief" was made upon the party hereinbelow listed addressed as follows:

Mario R. Bordogna
Julie A. Arbore
Steptoe & Johnson
PO Box 1616
Morgantown, WV 26507

Walt Auvil
Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101

Kathryn R. Bayless
Bayless Law Firm, PLLC
1607 W. Main Street
Princeton, WV 24740

all of which was done on the 13th day of January, 2015.


ALLAN N. KARLIN, WV BAR # 1953
JANE E. PEAK, WV BAR # 7213
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266