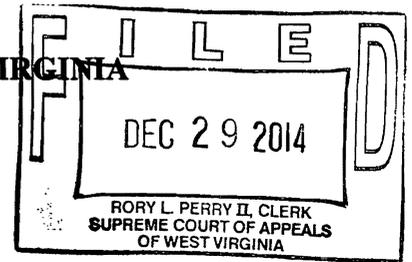


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



MARTHA KNOTTS,

Petitioner (Plaintiff below)

v.

GRAFTON CITY HOSPITAL,

Respondent (Defendant below).

Docket #: 14-0752

(Circuit Court of Taylor County –  
Civil Action No. 12-C-66)

**RESPONDENT GRAFTON CITY HOSPITAL'S BRIEF**

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## COUNTER-STATEMENT OF THE CASE

The Petitioner, Martha (Jeannie) Knotts, was hired as a housekeeper for Grafton City Hospital in 2005. (App. I, 0165). She was well into the protected age class at 58 years old when she was hired. (App. I, 0165). On April 2, 2012, Mrs. Knotts and a fellow housekeeper, Shane Ball, were working near the Emergency Department (“ED”) when a nurse’s aide, Debbie Hickman, brought a patient, Rebecca Green, over to the ED in a wheelchair from the Hospital’s adjoining clinic. (App. I, 0181). At that time, Ms. Knotts – nearby with her linen cart – recognized Mrs. Green. (App. I, 0181; App. II, 0403). Mrs. Green is distantly related to Ms. Knotts by marriage: Knotts’ son-in-law is the nephew of Mrs. Green’s husband. (App. I, 0177).

Upon seeing Mrs. Green, Ms. Knotts asked her, “Are you okay? What’s the problem?” (App. I, 0180). Nurse Brooke Davis was standing two feet away from Ms. Knotts when she heard her ask Mrs. Green those questions. (App. I, 0209; App. II, 0347). Nurse Davis immediately made direct eye contact with Ms. Knotts and admonished her, telling Ms. Knotts that she was not allowed to ask a patient those things and should know better.<sup>1</sup> (App. II, 0347). According to Nurse Davis, because Ms. Knotts was not involved in patient care, soliciting

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<sup>1</sup> According to Ms. Knotts, Mr. Ball – the Plaintiff’s fellow housekeeper – heard Nurse Davis admonish her (he told her later). (App. I, 0204-0205). Even Mrs. Green testified that she heard Nurse Davis admonish Ms. Knotts. (App. II, 0377). However, even though both Mrs. Green and Mr. Ball heard Nurse Davis’s warning, Ms. Knotts claims she did not. Despite Ms. Knotts’ contention, records of her pre-employment medical testing demonstrated that she had “normal” hearing, and a New Employee Health Questionnaire which she filled out as she was hired failed to indicate that she had any hearing problem. (App. I, 0261 & 0262, respectively). Ms. Knotts also clearly testified there was never a time when she felt that she was not able to do her job because of any claimed hearing issue. (App. I, 0164). Ms. Knotts calls the credibility of the Hospital’s contention that it was unaware of Ms. Knotts’ supposed hearing issue into question by suggesting in her brief that the person who conducted the investigation into the incident asked Nurse Davis questions about how close she was to Ms. Knotts when she gave the warning because the investigator knew about Ms. Knotts condition. This suggestion misguidedly overlooks the fact that the investigator simply was trying to be certain Ms. Knotts heard the warning in the normal course and may not instead have been distracted or otherwise unable to hear because of commotion going on at the time in the area.

protected health information in that context was a violation of the Hospital's confidentiality policy. (App. II, 0353).

After she warned Ms. Knotts, Nurse Davis escorted Mrs. Green into the ED and left her momentarily with Aide Debbie Hickman. (App. II, 0347). While in the ED, Mrs. Green told Aide Hickman using very choice language that she had no desire for Ms. Knotts to know about her condition, and complained in no uncertain terms about prior tension between with Ms. Knotts. (App. II, 0404-0405). As she left the ED, Aide Hickman pulled Nurse Davis aside and informed her that Mrs. Green did not want Ms. Knotts with her. (App. II, 0405-0406; App. II, 0347). Meanwhile, notwithstanding the warning she had just been given by Nurse Davis, Ms. Knotts then promptly approached Mrs. Green's son, Cordale, in the public hallway with housekeeper Ball nearby and asked Mrs. Green's son what his mom was doing there. (App. I, 0181-0182; App. II, 0347). Ms. Knotts admitted doing this, and Nurse Davis heard it, too. (App. I, 0181-0182; App. II, 0347).<sup>2</sup>

In light of everything that happened, Nurse Davis felt she needed to memorialize everything in an incident report, which she did and thereafter hand-delivered to her boss, the Director of Nursing, Violet Shaw. (App. II, 0354-0355; App. I, 0240-0241). At the time Nurse Davis turned in the report, the Hospital's Director of Patient Safety and Quality – and its HIPAA compliance officer – Tammy Barcus happened to be in the room with Mrs. Shaw and learned of the report. (App. II, 0356).

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<sup>2</sup> Also around this time, as Ms. Knotts remained in the public hallway outside the ED, several people with the Taylor County EMS department – one of which happened to be her grandson, Jeremy Knotts – went right by her with a patient. (App. I, 0183-0184). As the EMS wheeled the patient by her, Ms. Knotts said to her grandson, "What are you doing? Where you going, boy?" Jeremy responded "I don't know". (App. I, 0182). According to Ms. Knotts, Jeremy answered that way because he "knows what confidentiality is." (App. I, 0182).

In her position, Mrs. Barcus knew she had to undertake an investigation right away, so she took the occasion to personally speak with Nurse Davis about what happened while Davis was there. (App. II, 0311). In addition to the incident on April 2, 2012, Nurse Davis indicated to Mrs. Barcus that she had spoken with Ms. Knotts in the past about soliciting protected health information inappropriately from patients.<sup>3</sup> (App. II, 0312, 0349-0350). Mrs. Barcus also spoke with Aide Hickman, who said that the incident bothered her – specifically the “nosy” tone of Ms. Knotts’ voice when she asked Mrs. Green what was wrong. (App. II, 0407). Aide Hickman memorialized what happened in writing at Mrs. Barcus’ request. (App. II, 0407; *see also* App. I, 0243).

As a part of her investigation, Mrs. Barcus also considered the training Ms. Knotts had participated in at the Hospital related to patient confidentiality. (App. II, 0318). Indeed, Ms. Knotts received multiple trainings on patient confidentiality and HIPAA while employed by the Hospital, and sign-in sheets to several of those trainings specifically within only a year of the incident support that, as does Ms. Knotts’ admission that she participated in the training. (App. I, 0171-0175; *see also* App. I, 0267 & 0268, respectively). Moreover, Ms. Knotts acknowledged signing a Confidentiality Statement when she first was employed, pledging under the penalty of termination not to talk about or – as Ms. Knotts highlights in her own brief – “**discuss**” any

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<sup>3</sup> One example occurred within a year of these incidents where Ms. Knotts came to the ED stating that her daughter had just told her about an accident her daughter heard on the scanner and she (Knotts) wanted to know if the people had been brought there to the Hospital. (App. II, 0349). **When asked at her deposition why she has a scanner at home, Ms. Knotts said very plainly that it’s because she’s nosy.** (App. I, 0178)(emphasis added). In any event, in reference to this particular incident, Nurse Davis told Ms. Knotts in response that the Hospital could not disclose any information to her and that the question was inappropriate. (App. I, 0178). Another example Nurse Davis specifically recalled occurred approximately six months before this incident, where Ms. Knotts saw someone she recognized in the clinic, asked why they were there, and sat down to talk with that person. (App. II, 0350). Nurse Davis reported this incident to the staff in the Clinic – which Davis herself doesn’t supervise – and told them they should write it up. (App. II, 0350).

events of patient care with anyone, unless in the line of treatment. (App. I, 0169; *see also* App. I, 0266)(emphasis added). Further, Ms. Knotts' supervisor, Angela Rinck, had posted a memorandum in the housekeeping lunchroom on March 19, 2012 – *only two weeks prior to the incidents that lead to the Plaintiff's discharge* – which, among other things, reminded employees they had signed confidentiality statements stating they understood the Hospital's Confidentiality Policy and would not violate it. (App. I, 0269).

As an additional part of her investigation, Mrs. Barcus reviewed the language in the Hospital's confidentiality policy. (App. II, 0316-0317). GCH Policy 1-109.1 on Confidentiality of Patient Information provides: “As an employee, your job may allow you access to medical records or other pertinent patient information considered to be confidential. You must not **discuss patients or their visitors with anyone outside or inside the Hospital, other than in the course of the patient's care and treatment.**” (App. I, 0237)(emphasis added). Ms. Knotts admitted she had previously read this policy and understood that she could not discuss patient care issues unless she was involved in the provision of medical treatment. (App. I, 0170-0171).

Ultimately, because Aide Hickman's version of what happened that day corroborated Nurse Davis' version of what happened, because Ms. Knotts had been recently and repeatedly trained on Hospital confidentiality and HIPAA, and because she felt Ms. Knotts' repeated conduct on April 2, 2012 violated the Hospital's Confidentiality Policy, Mrs. Barcus recommended that Ms. Knotts be discharged. (App. II, 0317-0318). Not surprisingly for the setting, the Hospital's policy on discipline specifically stated that immediate termination is warranted for breaches of HIPAA/patient confidentiality. (App. I, 0238-0239).<sup>4</sup>

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<sup>4</sup> While the Hospital has the clear discretion to decide what penalty to impose for a given policy violation, Mrs. Barcus acknowledged that she did consider recommending lesser discipline for Ms. Knotts rather than jumping right to discharge: “I did tell them during the meeting that had – when Brooke said to

Thereafter, a meeting was held with the Hospital's Administrator, Pat Shaw, its Human Resources Manager, Missey Kimbrew, and Ms. Rinck, to discuss Mrs. Barcus' recommendation. (App. II, 0322). Mr. Shaw and Mrs. Kimbrew agreed with Mrs. Barcus' recommendation, but Ms. Rinck did not. (App. II, 0323). According to Mrs. Barcus, Ms. Rinck felt Ms. Knotts was a good employee and didn't want to be short-staffed. (App. II, 0323). Notwithstanding that view, the Hospital made the decision to terminate Ms. Knotts, and did so the next day on April 3, 2012. (App. I, 0244).

Ms. Knotts subsequently participated in the Hospital's voluntary (non-union) grievance procedure, where an employee can file a 'grievance' if he or she disagrees with an employment decision and perhaps have it reconsidered or even overturned. (App. II, 0327). Step 1 of the grievance is handled by the employee's department head – here, Ms. Rinck. (App. II, 0327). While Ms. Rinck apparently disagreed with discharging Ms. Knotts, she participated in the preparation of a letter which upheld the decision to terminate her because of her violation of the Hospital's policy. (App. II, 0250).

Ms. Knotts then appealed the Step 1 decision. An appeal of step 1 grievances goes to the next higher-up supervisor at Step 2, and then to the Administrator of the Hospital, Mr. Shaw, at Step 3, if pursued that far. In this case, Mr. Shaw happened to be Ms. Rinck's direct supervisor, so he heard both Step 2 and Step 3 of the grievance process at the same time. (App. II, 0510). In addressing the grievance, Mr. Shaw interviewed Ms. Knotts, Nurse Davis, Aide Hickman, and also spoke with the patient, Rebecca Green. (App. II, 0510). During this process, Ms. Knotts claimed that she has a hearing problem and never heard Nurse Davis tell her that what she did on  

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Jeanne, "Stop," and she had stopped, that I probably would've recommended something else. I would've recommended maybe, you know, a lesser – a lesser disciplinary action and more education. But because it was flagrant and repetitive, I felt that I had – I had no – no other course than to recommend termination." (App. II, 0322).

the day in question was wrong or a policy violation.<sup>5</sup> (App. II, 0515). At the conclusion of his review, and considering all the evidence, Mr. Shaw decided to uphold Ms. Knotts' discharge. (App. I, 0257). Ms. Knotts' civil action followed, and subsequent to the Court below issuing Findings of Fact and Conclusions of Law granting the Hospital's Motion for Summary Judgment, this appeal followed.<sup>6</sup>

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<sup>5</sup> Neither Mr. Shaw, nor Mrs. Barcus, nor Mrs. Kimbrew, nor Nurse Davis, nor Aide Hickman knew that Ms. Knotts had any specific hearing problem, or ever saw her wear any hearing aide device, over Ms. Knotts' entire 6+ year tenure at the Hospital. (App. II, 0311, 0346, 0403, 0454, 0494). *See also*, fn. 1, *supra*.

<sup>6</sup> Prior to taking the appeal, Ms. Knotts filed a Motion to Alter or Amend the Circuit Court's Findings and Conclusions granting the Hospital Summary Judgment based on a video which she says she discovered on May 12, 2014, after the Circuit Court issued an Order on May 7, 2014 indicating that it would grant the Hospital's Motion and stating in the Order that it would detail Findings of Fact and Conclusions of Law thereafter. The Hospital opposed the consideration of this submission because, *inter alia*, the video was discovered after the entry of the Court's May 7, 2014 Order and the West Virginia Rules of Civil Procedure do not allow for a party to keep submitting evidence indefinitely just because something happens after the Judgment which might possibly have been considered as bearing on the issues at-hand if it had been in existence at the time of the Court's decision. The Hospital also opposed the consideration of the video because – in any event – it failed miserably to either overcome the Hospital's legitimate non-discriminatory reason for discharging Ms. Knotts or otherwise establish that the Hospital's reason for terminating her was pre-textual since there was no basis to make the bald and unsupported conclusion, as Ms. Knotts did, that the alleged residents featured in the video did not consent to the use of their image or that the video constituted a violation of the Hospital's confidentiality policy. Obviously, the Court below agreed with the Hospital's position because it summarily denied Ms. Knotts' Motion in a separate Order on the same date it granted the Hospital summary judgment.

## SUMMARY OF ARGUMENT

The Circuit Court of Taylor County's Order granting summary judgment to Grafton City Hospital on Ms. Knotts' age discrimination claim is well-supported and should be affirmed. The Court below did not err in concluding that Ms. Knotts failed to establish the third element of her *prima facie* case. Simply stated, she failed to create a genuine issue of material fact that but-for her age, she would not have been discharged. The litany of undisputed record evidence below supports this conclusion, including but not limited to Ms. Knotts' admission that she engaged in the conduct she was accused of in violation of the Hospital's confidentiality policy, the prior and recent training she received on the policy, and the testimony of the Hospital's unrebutted HIPAA expert that the Hospital was obligated to have and enforce its policy in Ms. Knotts' situation.

The Court below also properly applied *Young v. Bellofram*, 227 W.Va. 53, 705 S.E.2d 560 (2010)(*per curiam*) to conclude that Ms. Knotts' proposed comparators were further insufficient evidence to establish her *prima facie* case. With the exception of one twenty-something employee who did not engage in substantially similar conduct, all of Ms. Knotts' proposed comparators were all over 40 years of age and therefore in the same protected class as Ms. Knotts. Pursuant to *Young*, such evidence cannot be something a plaintiff relies upon to meet her threshold burden, and Stare Decisis principles mandate that this Court follow *Young* in the case at bar because there has been no change in the law in the short, four (4)-year period since *Young* was issued, and because the context which the legal principles in *Young* were applied to are highly similar in the matter presently before the Court.

Contrary to the position of Ms. Knotts and Amici, the United States Supreme Court Opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) does not change the analysis. *O'Connor* was issued almost 15 years before

this Court issued its opinion in *Young*, and the question of *O'Connor's* application in these circumstances was already heard by this Court in *Young* on the Petition for Rehearing filed in that case. Moreover, the United States Supreme Court stated in 2009, subsequent to *O'Connor*, that the assumption on which *O'Connor* was based is false. That opinion, *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119, concluded that a plaintiff bringing an age discrimination case (under the Age Discrimination in Employment Act) must prove that age was the “but-for” cause of the challenged employment action – a standard this Court has already long applied to these claims dating back to *Conaway v. Eastern Associated Coal Corp*, 178 W.Va. 164, 358 S.E.2d 423 (1986). For these reasons, *O'Connor* has little persuasive value in determining how comparator evidence is used in age discrimination cases.

Other cases Ms. Knotts and Amici rely upon also fail to provide a sufficiently persuasive reason why *Young* shouldn't stand or why the lower court's reliance on it was improper. Those cases are distinguishable on the facts (and/or context), and there are just as many cases from those or other jurisdictions which set forth a standard for age discrimination that doesn't mention or follow *O'Connor* and instead is more in line with *Young* (and *Gross*). Additionally, the *Young* standard is equally applicable to the way the Circuit Court below addressed – and rejected – Ms. Knotts' replacement evidence, even though there was no direct proof of such evidence.

Finally, even if Ms. Knotts had sufficiently established her *prima facie* case, the Court below properly concluded that she failed to present a genuine issue of material fact for a reasonable jury to conclude that the Hospital's legitimate, non-discriminatory reason for discharging her was pretextual. It did not construe evidence inappropriately or misconstrue the applicable legal standard. Rather, the Court's determination is well-supported in the record below. As such, summary judgment in favor of the Hospital was proper.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Contrary to Ms. Knotts' position that oral argument is necessary in this case pursuant to Rules 18(a) and 20(a)(2) of the West Virginia Rules of Appellate Procedure, the Hospital asserts that oral argument is not necessary. The claim presented in this case – a single cause of action for age discrimination under the West Virginia Human Rights Act, the standard for which has been established for nearly three (3) decades – is straightforward and anything but novel. Similarly, the legal issues involved – including the application of binding authority from this Court in *Young v. Bellofram*, 227 W.Va. 53, 705 S.E.2d 560 (2010) (per curiam), decided only four (4) years ago – are well-settled and authoritatively decided. As such, and considering that the record below is replete with undisputed evidence supporting the well-reasoned findings and conclusions of the Circuit Court that Ms. Knotts failed to demonstrate her *prima facie* case and – in any event – present proof of pretext sufficient to overcome the Hospital's legitimate non-discriminatory reason for discharging her, oral argument is not necessary for the Court's proper consideration of the appeal.

## ARGUMENT

I. The Circuit Court Did Not Err In Concluding That Ms. Knotts Failed To Establish The Third Element Of Her *Prima Facie* Case For Age Discrimination Because She Did Not Create A Genuine Issue Of Material Fact That But-For Her Age, She Would Not Have Been Discharged

Ms. Knotts alleges in this straight-forward appeal that the Circuit Court below erred when it concluded that the Hospital did not discriminate against her by terminating her employment on the basis of her age in violation of the West Virginia Human Rights Act (“WVHRA”). The proof-paradigm in West Virginia for discrimination claims of all types – including age discrimination – has been well-settled for decades. In order to establish a *prima facie* case of discrimination, a Plaintiff must offer proof that: (1) she is a member of a protected class; (2) the employer made an adverse decision concerning her; and (3) *but for* the Plaintiff’s protected status, the adverse decision would not have been made. Syl. pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986)(emphasis added). The WVHRA defines “Age” – the protected class in this case – as “the age of forty or above.” W.Va. Code §5-11-3(k)

The Hospital conceded below that Ms. Knotts is a member of the protected age class and that she suffered an adverse employment action (discharge). To satisfy her initial burden with respect to the third element, however, Ms. Knotts is required to show some evidence which sufficiently links her age to the Hospital’s decision to discharge her, “so as to give rise to an inference that [this adverse] employment decision was based on an illegal discriminatory criterion.” *See Conway*, 358 S.E.2d at 429-30. As the Circuit Court below properly found, Ms. Knotts did not present sufficient evidence to create a genuine issue of material fact that, *but for* her age, she would not have been discharged. This finding is well-supported in a record that

contains a wealth of undisputed facts supporting the legitimate, non-discriminatory basis for the Hospital's decision.

A. *The Litany Of Undisputed Record Evidence – Including Ms. Knotts' Admission That She Engaged In The Conduct At-Issue – Supports The Circuit Court's Conclusion That Ms. Knotts' Did Not Establish Her Prima Facie Case*

The list of undisputed facts in this case which overwhelm Ms. Knotts' attempt to cast what happened to her as age discrimination is a long one. To begin with, it is undisputed that the Hospital adopted a Patient Confidentiality policy which obligates all employees – including Ms. Knotts – to not improperly access or **discuss** protected health information, **other than in the course and scope of the patient's care and treatment**. The relevant provision of this policy unambiguously states:

As an employee, your job may allow you access to medical records or other pertinent patient information considered to be confidential. You must not *discuss* patients or their visitors *with anyone* outside or *inside* the Hospital, *other than in the course of the patient's care and treatment*.

(App. I, 0237) (emphasis added).

It is also undisputed that Ms. Knotts asked a patient, Mrs. Green, what was wrong with her, resulting in a Hospital nurse having to intervene to admonish her. It's additionally undisputed that Ms. Knotts then followed up with a similar inquiry to Mrs. Green's son. Ms. Knotts admitted engaging in this conduct when confronted about it by the Hospital. There simply is no genuine issue of material fact in this case about Ms. Knotts' underlying behavior.

It is further beyond dispute that, in making these inquiries, Ms. Knotts sought confidential protected health information which she – as a housekeeper, in a position as attenuated from patient care as any position at the Hospital – did not require for the course of the patient's care and treatment. Therefore, there is no real dispute of material fact that the Plaintiff

violated the policy not once, but at least twice – violations which are subject to immediate discharge under the Hospital’s discipline policy.<sup>7</sup>

The undisputed facts in this case supporting the Circuit Court’s conclusion that Ms. Knotts failed to sufficiently demonstrate a genuine issue of material fact which somehow links age to the decision to discharge her certainly don’t end with the policy language or her admission of conduct, either. It is undisputed that Ms. 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. In addition to those trainings, it also is undisputed that Ms. Knotts read a memorandum posted in her own housekeeping lunchroom just two weeks before the incident at-issue, reminding her and the other housekeepers of the importance of patient confidentiality.<sup>8</sup>

In an effort to avoid the natural consequence of this undisputed evidence, Ms. Knotts contends in her brief – as she did below – that the Hospital’s Confidentiality policy, either in fact

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<sup>7</sup> The discipline policy sets forth the following example of a critical offense subject to immediate discharge:

Violation of medical patient or personnel confidentiality: Unauthorized disclosure of information including unauthorized possession, use, copying or revealing of confidential information regarding patients, employees or Hospital activities.

(App. I, 0238-0239).

<sup>8</sup> While Ms. Knotts emphasizes an example in that memorandum to support her theory that the policy only related to disclosure of protected health information outside the Hospital – or even to somehow collaborate a theory that she didn’t understand what the policy meant – what she fails to mention is that the Memorandum incorporated by reference a statement each employee, including Ms. Knotts, signed with essentially the same language in the Confidentiality policy itself, pledging to uphold patient privacy and abide by the terms of the policy, and which Ms. Rinck’s Memorandum plainly states was being posted together with it. (App. 266).

or by intention, simply restricts disclosure of confidential patient information outside the Hospital. Of course, confidential information is not permitted to be disclosed outside the Hospital; however, Ms. Knotts' attempt to limit the confines of the policy in this manner is nearly inexplicable, if for no other reason because it is at odds with the plain language of the policy. It also defies common sense, because the strained notion that the focus on patient confidentiality should only be on 'outside' disclosure treats patient privacy as if it somehow doesn't exist within the walls of where the care is being administered.

By its own terms, as set forth above, the Hospital's Confidentiality policy is uncomplicated: it does not permit employees who are outside of the line of care and treatment to even discuss protected health information, outside or inside the Hospital – and that includes soliciting that information by asking a friend or family member who, frankly, may not wish for even those individuals to know anything about his/her condition. Clearly, the Circuit Court below understood this and read the language in the policy for its plain meaning, even if Ms. Knotts for some reason does not.

In a further effort to combat the undisputed record evidence below, Ms. Knotts tries to point out apparent factual disputes in this case – like whether she had trouble hearing, or whether the patient involved, Mrs. Green, truly objected to Ms. Knotts asking about her health condition. Even to the extent there are disputes on those issues, however, they fail to provide this Court with sufficient basis to reverse the Circuit Court below because, assuming the truth of Ms. Knotts' version – which is the standard the lower Court applied in addressing the Hospital's summary judgment motion – they still do not change any of the undisputed facts outlined above which, according to the Circuit Court, presented a more than sufficient basis to grant summary judgment. Put another way, and in light of the other overwhelming evidence, those

circumstances simply don't create a material fact that, but-for her age, Ms. Knotts would not have been discharged. Ms. Knotts' arguments in this regard are nothing more than a red herring. As such, the Circuit Court's conclusion that Ms. Knotts failed to sufficiently demonstrate her *prima facie* case was proper.

B. *The Unrebutted Opinion Of The Hospital's Expert Constitutes Additional Evidence To Support The Circuit Court's Conclusion That Ms. Knotts Failed To Sufficiently Prove Her Prima Facie Case*

In addition to all the foregoing undisputed facts supporting the Circuit Court's findings and conclusions that Ms. Knotts failed to sufficiently demonstrate the third element of her *prima facie* case, the Hospital's HIPAA and privacy expert, Catie Heindel – a Certified HIPAA Professional (CHPC) whose expertise concentrates in evaluating health care privacy compliance programs and providing guidance on privacy best practices – corroborated the Hospital's need to take action related to Ms. Knotts. Ms. Heindel very clearly explained in her report in this case that the Hospital was "**required to have and apply appropriate sanctions against members of its workforce who fail to comply with the privacy policies and procedures of the covered entity or the requirements of the HIPAA law.**" (App. II, 0590, *citing* 45 C.F.R. § 164.530(e) (2012) (emphasis added)).

Basically, Ms. Heindel opined that HIPAA requires hospitals to put together policies that protect confidential protected health information and to enforce those policies, but permits hospitals to determine what levels or degrees of discipline are appropriate in its particular setting and under the circumstances at hand in order to meet the 'minimum necessary' standard. (App. II, 0557, 0561). It was her opinion that the Hospital acted in accordance with best practices under HIPAA when enforcing its Confidentiality Policy with respect to Ms. Knotts' termination this case. (App. II, 0567, 0592). It was also her opinion that, had the Hospital not enforced its

policy in the manner that it did, it was in danger of violating HIPAA and the regulations established by the Centers for Medicare & Medicaid Services protecting patient privacy and confidentiality.<sup>9</sup> (App. II, 0593-0594).

Continuing her theme of focusing on anything which distracts this Court from the large amount of undisputed evidence supporting the determination of the Circuit Court below, Ms. Knotts argues in her brief that her conduct cannot possibly have been a policy violation simply because the patient involved was somebody distantly related to her by marriage, and/or that she was simply making an expression of concern by asking what she did, when she did. However, all that argument does is reinforce Ms. Knotts' inability (or unwillingness) to be objective about the plain terms and application of the policy she violated. Mrs. Heindel made it abundantly clear when she testified: there are no exceptions to HIPAA for people you know – no matter how well you know them or if you are related to them – or for the size of the hospital or community involved: (App. II, 0571; *see also* App. II, 0534).<sup>10</sup> Common sense reinforces this idea since, as mentioned previously, a person may not want friends or family – including people they even know well – to have knowledge about their confidential health information.

As this Court knows, employers have the ability to institute reasonable policies and to enforce them, as long as they do not use a legally prohibited factor to influence their decisions. *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561, 588-89, n. 33 (1996). Here, the undisputed facts demonstrate that the Hospital had a legitimate policy which – according to Ms. Heindel – the

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<sup>9</sup> It is worth noting that Ms. Knotts has no privacy expert of her own in this case, which means that Ms. Heindel's testimony stands credibly without any expert rebuttal.

<sup>10</sup> Moreover, as Ms. Heindel testified, whether Ms. Knotts actually disclosed information or not is not pertinent; the HIPAA privacy rule – which the Hospital's Confidentiality Policy was created to protect – covers obtaining protected health information, too. (App. II, 0570).

Hospital was legally required to uphold and enforce.<sup>11</sup> That fact, along with the undisputed evidence that Ms. Knotts' had been trained on and reminded of the policy, and the undisputed evidence that Ms. Knotts engaged in the conduct she did, together creates more than an adequate underlying record to support the Circuit Court's granting of Summary Judgment in favor of the Hospital.

II. The Circuit Court Did Not Err By Concluding That Ms. Knotts' Comparators Being Over 40 Years Of Age And In The Same Protected Class Rendered Evidence Of Their Alleged Disparate Treatment Insufficient To Support An Inference of Unlawful Discrimination Under *Young v. Bellofram*

While Part I of this argument demonstrates the propriety of affirming the Circuit Court's determination below, independent of any question about the status of comparator or replacement evidence, Ms. Knotts – along with the Amici who have submitted briefs in support of her position – all devote substantial attention in their briefing to the role such evidence played in this case, and assignments of error which are supposedly attributable to the Circuit Court's application of the law to such evidence. However, contrary to the assertions of Ms. Knotts' and Amici, the Circuit Court did not err in the way it treated such evidence, as set forth in more detail below.

A. *Young Was Properly Applied By the Circuit Court*

A part of Ms. Knotts' attempt to demonstrate the third element of her *prima facie* case

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<sup>11</sup> In fact, the recognition of the Hospital's legal obligation to develop and enforce such a policy as a matter of law in this case is not unlike a plaintiff relying on the employer's obligation to comply with a source of public policy from a statute in a case claiming wrongful termination in violation of state public policy, or a plaintiff relying in a deliberate intent case on a safety standard which an employer has an obligation to comply with to protect its employees from being injured. In those cases, plaintiffs frequently seek shelter under the obligations those respective sources of law impose on employers. Here, the Hospital lived up to its obligations by promulgating a confidentiality policy and enforcing it as required by a similar source of law. In the same way employers are often held to the consequences of non-compliance in the former examples, the Hospital should be given the benefit from the implications of compliance in this case.

before the Circuit Court below centered around her reliance on comparator evidence. Essentially, she argued that certain nonmembers of her protected group were treated differently than she was, even though both engaged in similar conduct. Plaintiffs commonly use this approach in discrimination cases. See Syl. Pt. 2, *State ex rel. State of W. Va. Human Rights Comm. v. Logan-Mingo Health Agency Inc.*, 174 W. Va. 711, 329 S.E.2d 77 (1985). In fact, only a few years ago, this Court reaffirmed the importance of identifying a comparable employee who is a nonmember of the protected class that was treated more favorably in order to demonstrate a *prima facie* case of discrimination under the WVHRA in *Young v. Bellofram Corp.*, 227 W. Va. 53, 705 S.E.2d 560 (2010) (per curiam).

*Young* is particularly relevant in this case, not just because it reaffirmed the importance of identifying an appropriate comparator to demonstrate a *prima facie* case of discrimination, but also because a part of the claimed disparate treatment at-issue in *Young* was age, like the type of discrimination Ms. Knotts claims in this case. In *Young*, the plaintiff was a 60-year old shift supervisor who was terminated by the employer because she failed to properly manage or discipline her subordinates. In her lawsuit, she claimed she was discriminated against and would not have been discharged but-for her age, and a big part of her evidence involved a fellow shift supervisor who she felt engaged in similar conduct, but was disciplined less harshly. The lower Court in that case agreed that this constituted *prima facie* evidence of age discrimination.

However, in reversing the lower court, this Court determined that the plaintiff in *Young* failed to set forth sufficient evidence of age discrimination because the comparator employee was also over 40 years of age, and therefore, within Ms. Young's protected age class. *Young*, 227 W. Va. 53, 705 S.E.2d 566-67. As this Court stated, the Plaintiff "neglected to provide a comparable employee outside of the protected age group." *Id.* at 567 (emphasis added). As

such, and noting the fact that the plaintiff was promoted while already well into the age class at 59 years old, this Court concluded that Ms. Young's *prima facie* case for age discrimination failed. *Id.* The approach in *Young* relating to comparator evidence has been followed by federal courts in West Virginia, as well. *See, Alderman v. Fola Coal Co.*, 2011 WL 5358717 at \*7-8 (S.D. W. Va. Nov. 7, 2011) (citing *Young* repeatedly in the course of concluding that the plaintiff could not prove a *prima facie* case of age discrimination where his proposed comparators were over forty and therefore members of the same protected class).<sup>12</sup>

In this case, Ms. Knotts did the exact same thing as the plaintiff in *Young* did: she relied on evidence of comparators who she claims were treated differently, but who all (with the exception of one individual – addressed below) were over 40 years of age and in the same protected age class.<sup>13</sup> Not surprisingly, the Circuit Court below applied *Young* and, not surprisingly, given the stark similarities between *Young* and this case, the Circuit Court below concluded that Ms. Knotts' comparator evidence could not sustain her *prima facie* case of discrimination.<sup>14</sup> This Court should do the same.

The one employee Ms. Knotts attempted to rely upon as a comparator below who was not in her protected age class was Mr. Setler, an admissions clerk at the Hospital who was then in his late-twenties. (App. II, 0330). Mr. Setler was arrested related to drug charges/conduct that occurred off Hospital premises on his own time. (App. II, 0330-0331). Inexplicably, Ms. Knotts continues to advocate that Mr. Setler's situation somehow demonstrates disparate treatment.

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<sup>12</sup> Conveniently, Ms. Knotts fails to mention this case in her Brief to this Court, nor do any of the Amicus Curiae mention *Alderman*.

<sup>13</sup> The ages of all Ms. Knotts' proposed comparators are not in dispute. With the exception of one instance, discussed in more detail, *infra*, all are over forty (40) years of age.

<sup>14</sup> Also like the plaintiff in *Young*, Ms. Knotts was well into the protected age class in her late 50's at a relevant time in the employment relationship – *e.g.*, when she was initially hired by the Hospital.

However, unlike Ms. Knotts' violation of the Hospital's Confidentiality policy in this case, nothing whatsoever about Mr. Setler's conduct had anything to do with patient privacy, confidentiality or HIPAA. As this Court is well-aware, "unless a comparison employee and a plaintiff share the same disputed characteristics, the comparison employee cannot be classified as a member of a plaintiff's class for purposes of rebutting prima facie evidence of disparate treatment." Syl. Pt. 4, *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457, S.E.2d 152 (1995). Other courts have also typically required in this situation that a Plaintiff prove a substantial similarity with the proffered comparator in all relevant aspects. See, e.g., *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004) (emphasis added) (similarly situated employee must be nearly identical to the Plaintiff to prevent courts from second guessing reasonable decision by employer); *Kosereis v Rhode Island*, 331 F.3d 207, 214 (1st Cir. 2003) ("to successfully allege disparate treatment, a the Plaintiff must show 'that others similarly situated to him in all relevant respects were treated differently by the employer' . . . ") (emphasis added) (citations omitted).<sup>15</sup>

The gross dissimilarity between Mr. Setler's situation and Ms. Knotts' situation – as the Circuit Court below recognized – only magnifies how desperate Ms. Knotts was below to try and find any possible comparator in this case, because she knows *Young* is a big roadblock to her proof. In fact, because of how much of an impediment it is, Ms. Knotts and Amici assault this Court's conclusion in *Young*, insultingly claiming that this Court's conclusions were "inadvertent" and "mistaken," and boldly asserting that the Court "decimated" and "eviscerated"

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<sup>15</sup> Even if *Young* did not bar evidence regarding Ms. Knotts other proposed comparators on account of them being in the same protected class, they, too, are not nearly similarly situated enough to help establish her *prima facie* case, as even a cursory examination of their circumstances illustrates. As detailed in the brief the Hospital filed in the Circuit Court below, the other proposed comparators were either contract employees, held different positions, were supervised by others, or did not engage in conduct which the decision-makers with respect to Ms. Knotts were even aware of at the time of her offenses. (App. I, 0042-0048).

age discrimination in West Virginia (Petitioner’s Brief, pp. 15, 22-23, 26). They take this position even though the *Young* opinion came without any dissent and was rendered only slightly more than four (4) years ago when four (4) of the (5) Justices presently on the Court also participated in deciding *Young*, and even though plaintiffs have a great number of other methods to demonstrate age discrimination besides the reliance on comparator (or even replacement) evidence. However full of rhetoric Ms. Knotts and Amici are, the Circuit Court’s reliance on *Young* in this case – as set forth above – was proper.

B. *Stare Decisis Principles Also Mandate The Circuit Court’s Reliance On Young In This Case Should Be Affirmed*

As this Court is well aware, the principle of stare decisis requires allegiance to this Court’s prior holdings. *Master Mechanical Insulation, Inc. v. Simmons*, 232 W.Va. 581, 753 S.E.2d 79, 88 (2013) (Davis, J., dissenting). More specifically, “[a]bsent some compelling justification for deviation, such as a change in the law or a distinguishable fact pattern, the doctrine of stare decisis requires this Court to follow its prior opinions.” *State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W.Va. 73, 726 S.E.2d 41, 51 (2011) (Davis, J., concurring, in part, and dissenting, in part). This principle has been a foundation of law in West Virginia and throughout the United States for more than a century: “[S]tare decisis ensures that ‘the law will not merely change erratically’ and ‘permits society to presume that bedrock principles are founding in the law rather than in the proclivities of individuals.’” *Murphy v. Eastern American Energy Corp.*, 224 W.Va. 95, 680 S.E.2d 110, 116 (2009) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1996)).

Stare decisis should be applied with equal force in this case, and the *Young* opinion should be followed as it relates to the comparator evidence in age discrimination claims in West Virginia. Simply stated, if you are a member of the same protected class, you cannot be

considered a comparator for purposes of establishing a plaintiff's *prima facie* case for discrimination. There is no compelling justification, such as a distinguishable fact pattern, which compels this Court not to follow *Young* in this case. In fact, quite to the contrary, as established previously the facts in this case highly parallel those in *Young*.

Additionally, there has not been any change in the relevant law in West Virginia (or elsewhere) relating to the standard applied in *Young* for evaluating the sufficiency of comparator evidence in age discrimination cases at any point during the short, intervening four (4) year period since *Young* was decided. Mere disagreement as to how this Court decided *Young* – which is essentially what Ms. Knotts and Amici demonstrate in page after page of their briefing submissions – is not a sufficient reason for this Court to deviate from the principles of stare decisis.

C. *The United States Supreme Court Opinion in O'Connor v. Consolidated Coin Caterers Corporation Is Inapposite*

Aside from the fact that they just do not like the result, the other primary disagreement Ms. Knotts and Amici have with how this Court decided *Young* is premised on the short 4-5 page opinion of the United States Supreme Court in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). *O'Connor* was an age discrimination case brought under the federal Age Discrimination in Employment Act (“ADEA”), in which the plaintiff sued his employer for age discrimination after he was fired. The plaintiff in *O'Connor* attempted to establish his claim by arguing that the age of the person who replaced him evidenced discrimination. The employer argued that the replacement employee was within the same protected age class of the plaintiff. According to the U.S. Supreme Court, that was not enough to defeat the plaintiff's claim because a *prima facie* showing of age discrimination under

the ADEA did not require the demonstration of a replacement employee under 40. *O'Connor*, 571 U.S. at 312.

There are several problems with Ms. Knotts and Amici relying on *O'Connor*. To begin with, the *O'Connor* decision was issued almost 15 years before this Court issued its opinion in *Young*. While Ms. Knotts and Amici take the position that this Court never considered *O'Connor* in issuing *Young* – despite the prior existence of the opinion for a decade and a half – that contention is, at best, misguided, and at worst, simply wrong.

While *O'Connor* was not cited in the briefing to this Court before the *Young* opinion was issued, Ms. Young – through counsel – filed a Petition for Rehearing in that case, and in that Petition, argued that this Court erred in deciding *Young* in part because of *O'Connor*. Additionally, an Amicus Curiae brief was submitted in that case in support of Young's Petition for Rehearing by the AARP – just as the AARP has made an amicus submission on the merits in this case.<sup>16</sup> That Amicus Curiae brief also argued about the impact of *O'Connor*. Of course, the employer in *Young* opposed the Petition, and addressed the import of *O'Connor* as well. After maturely considering the Petition for Rehearing and all of the related submissions, this Court refused to hear the Petition, which suggests strongly that this Court was not persuaded to adopt the theory that *O'Connor* should change its opinion or analysis as it related to comparator evidence in age discrimination cases in West Virginia.<sup>17</sup>

More importantly, the Hospital submits this Court reached that conclusion at least in part

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<sup>16</sup> Notably, counsel for Ms. Knotts in this case is the attorney who submitted that Amicus Brief on behalf of the AARP in *Young*.

<sup>17</sup> Additionally, it is worth noting that, even though this Court didn't mention *O'Connor* in its decision in *Young*, it cited to other precedent from the United States Supreme Court that was even *older* than *O'Connor*, including *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207, (1981). See *Young*, *supra* 705 S.E.2d at 566. Thus, there can be no fair suggestion that this Court somehow overlooked *O'Connor*.

because it understood *O'Connor's* persuasiveness was limited since it was based on a false premise. In *O'Connor*, the United States Supreme Court assumed that the standard *McDonnell-Douglas* burden-shifting paradigm applicable to discrimination cases under Title VII of the Civil Rights Act of 1964 prohibiting discrimination based on other protected characteristics *besides age* was applicable to addressing cases under the separate ADEA prohibiting age discrimination. *O'Connor*, 517 U.S. at 311. The Court relied upon that assumption in reaching its conclusion. However, the United States Supreme Court has stated subsequent to *O'Connor* that this assumption is incorrect. Specifically, the Supreme Court has since opined that the proof requirements in age discrimination cases under the ADEA are different than those under Title VII and therefore, the *McDonnell-Douglas* proof paradigm is not applicable in those cases. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175, n. 2, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). Stated simply, *Gross* rejected the appropriateness of the assumption upon which the decision in *O'Connor* was based and held that a plaintiff bringing an age discrimination case (under the ADEA) must prove that age was the “but for” cause of the challenged adverse employment action.<sup>18</sup> *Id.* at 176.

Therefore, in light of *Gross*, the Supreme Court’s prior opinion in *O'Connor* has little persuasive value in determining how comparator evidence is used in age discrimination cases, or as a basis upon which this Court should revisit and/or consider overruling *Young*. In this regard, the Hospital also notes that *Gross* was decided before *Young* was decided, so it is not unreasonable to think that this Court was well aware of the limited impact of *O'Connor* on the issues in that *Young*. The circumstances are no different in the present appeal before the Court.

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<sup>18</sup> Not surprisingly, this is the same formulation of the test for discrimination which this Court has long applied to a plaintiff’s *prima facie* proof in age discrimination cases dating back to *Conaway*, 178 W.Va. 164, 358 S.E.2d 423 (1986).

D. *The Rice and Nagy Cases Which Ms. Knotts Relies Upon Do Not Change The Analysis*

Ms. Knotts also devotes time in her brief to the opinions of this Court in *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). Essentially, Ms. Knotts argues that these opinions suggest – only by implication, since neither so state expressly – that *O'Connor* sets forth the appropriate manner to treat comparator evidence in analyzing whether a plaintiff has satisfied his or her *prima facie* case of age discrimination. Respectfully, the Hospital asserts that Ms. Knotts is wrong.

Aside from the fact that *Gross* is clear on this issue, both *Rice* and *Nagy* are distinguishable. *Rice* addressed an evidentiary issue under Rule 404(b) and this Court never once cited to or discussed *O'Connor* in its opinion. This Court also failed to cite or discuss *O'Connor* in the *Nagy* decision, which is a Memorandum Decision that merely affirmed the Circuit Court below and adopted its Order denying post-trial Motions. Notably, that Circuit Court Order was issued before *Young* had been decided. In any event, this Court did not clearly adopt or embrace *O'Connor* in either *Rice* or *Nagy*, nor did this Court opine in either case that *O'Connor* set forth the proper standard to assess comparator evidence in analyzing a plaintiff's *prima facie* case of age discrimination, or otherwise state anything to call the continued import of this Court's prior opinion in *Young* into question. Certainly, this Court had the opportunity to expressly do just that if it felt *O'Connor* represented the proper standard to apply, or that *Young* for some reason may no longer constitute good law. It did not. As such, *Rice* and *Nagy* have no real import on the issues in the case at bar.

E. *Cases From Other Jurisdictions Are Unpersuasive And Also Do Not Change The Analysis*

In their briefing, Ms. Knotts and Amici further assert that the highest courts in each of a number of other jurisdictions have adopted the reasoning in *O'Connor* and applied it to analyze the sufficiency of comparator evidence as it relates to a plaintiff's *prima facie* case of age discrimination, and take the position that West Virginia should do the same. This contention is unpersuasive for several reasons.

To begin with, Amicus Curiae AARP is incorrect that the states it identifies and claims to have adopted *O'Connor* are the highest courts in those respective states (AARP Brief, p. 7). In fact, at least half of the cases AARP cites come from courts which are not the highest courts in those jurisdictions, including the cases referenced from Tennessee, New York, Florida, Pennsylvania, Texas, Louisiana, Colorado, Missouri and Illinois.<sup>19</sup> AARP is also incorrect in asserting that every state to consider this issue has adopted the *O'Connor* standard. (AARP Brief, p. 7). To the contrary, there are a number of cases from other jurisdictions – and several from other courts in some of the same states that the AARP claims adopts *O'Connor* – which do not expressly adopt *O'Connor* in addressing age discrimination claims under their respective state laws or even cite *O'Connor*. See, e.g., *Spratt v. MDU Resources Group*, 797 N.W.2d 328 (N.D. 2011); *Johnson v. Crossroads Ford, Inc.*, 749 S.E.2d 102 (Ct. App. N.C. 2013); *Zechman v. Pa Human Relations Comm'n*, 2013 WL 3984637 (2013); *Villiger v. Caterpillar, Inc.*, 2013 WL 2298474 (Ill. App. 3 Dist. 2013); *Stillwell v. Halff Associates, Inc.*, 2014 WL 3513213 (Tex. App. – Dallas, 2014); *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111 (Ct. App. Ky. 2011); *Guild v. Dept. of Corrections*, 2014 WL 6679258 (Mich. App. 2014); *Drazin v. Binson's Hosp.*

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<sup>19</sup> To not be repetitive, the case citations from those jurisdictions are in the AARP's briefing, and will not be repeated here.

*Supplies, Inc.*, 2014 WL 231918 (Mich. App. 2014).

All of these cases are within the last three (3) years, and many are within approximately the last 12-18 months, so they are well after *O'Connor*. More importantly, they are subsequent to *Gross*, which – as set forth above – concluded in 2009 that the express assumption on which *O'Connor* was based was false, thus undermining the continued vitality of *O'Connor* in age discrimination cases. That is undoubtedly why several of the cases cited above by the Hospital – in addressing the *prima facie* elements for age discrimination – instead either coalesce around the “similarly situated” concept, or discuss an alternative standard, depending on whether the context of the evidence at issue relates to employees who were allegedly treated differently when it comes to discipline and discharge, or who were replacements. *See, e.g., Spratt*, 797 N.W.2d at 334 (stating in age discrimination claim that 4<sup>th</sup> element of *prima facie* case requires proof that others not in the protected class were treated more favorably); *Johnson*, 749 S.E.2d at 108 (fourth element of *prima facie* claim for age discrimination requires proof that other employees who are not members of the protected class were retained under apparently similar circumstances); *Stillwell*, 2014 WL 3513213 at \*2 (4<sup>th</sup> element of claim for age discrimination is that the plaintiff was replaced by someone outside the protected class or otherwise discharged because of age); *Zechman*, 2013 WL 3984637 at \*3 (in age discrimination claim, plaintiff must show as final element that others not in the protected class have been treated differently, which raises an inference of discrimination); *Villiger*, 2013 WL 2298474 at \*3 (to establish *prima facie* case of age discrimination, fourth element requires proof that a similarly-situated employee, who was not a member of the protected class, was not subject to the same adverse action).

In sum, the cases cited by the Hospital clearly support the conclusion – contrary to what Ms. Knotts and Amici represent – that *O'Connor* does not set forth some type of consistent,

national standard for treating comparator evidence in the *prima facie* component of age discrimination claims which this Court is said to have disregarded in deciding *Young* erroneously. In fact, because *O'Connor* is no longer consistent with other jurisdictions which have applied the proper standards, *Young* is therefore still good law, and should remain that way.

F. *The Standard Applied In Young Is Equally Applicable To Replacement Evidence As It Is Comparator Evidence*

Even though much of the focus and argument in the record below had to do with the comparator evidence, Ms. Knotts first attacks the replacement evidence issue in this Court, because the *O'Connor* opinion she relies so heavily upon addressed a situation where the age of the replacement was at-issue, and does not address comparator evidence like *Young* does. In fact, most if not all of the cases Ms. Knotts and Amici rely upon arise in the context where disparate treatment was alleged based on the age of the employee who replaced the plaintiff, rather than a situation where comparators were put forth for purposes of assessing whether they were similarly situated yet treated disparately.

In any case, despite the initial distinction Ms. Knotts raises between replacements and comparators in her briefing, she ultimately argues that comparator evidence should be analyzed in the same manner as replacement evidence. (Petitioner's Brief, p. 25). The problem with this contention is that, even if Ms. Knotts is correct, her analysis on the replacement evidence also fails for the reasons set forth in parts II.A. through II.E of this argument above. Therefore, the Hospital will not waste the Court's time repeating why the *O'Connor* case or the other cases Ms. Knotts and Amici rely upon are – separately or together – an insufficient basis to overturn this Court's well-reasoned opinion in *Young*. Instead, the Hospital will emphasize one other particular reason why the conclusion the Circuit Court below reached regarding the replacement evidence should not be reversed.

While the Circuit Court properly applied the reasoning in *Young* to the relevance of the evidence with regard to who replaced Ms. Knotts in this case, the fact remains that, even if *Young* was improperly applied to that question, there remains insufficient record evidence to have permitted any reasonable inference of discrimination but for Ms. Knotts' age as it relates to replacements, since the person Ms. Knotts relies on for the assertion that she was replaced by a younger employee – Angela Rinck – was, in fact, not sure who specifically replaced Ms. Knotts. Ms. Rinck testified very unambiguously on this issue in the record below, saying: “[w]ho I hired specifically to replace Jeannie, I couldn’t tell you.” (App. II, 473). Notwithstanding that, and even if all the people who were brought into the housekeeping department at the Hospital after Ms. Knotts was discharged (those who therefore may have been a replacement for her) were considered, they were also in the same protected class. Thus, Ms. Knotts did not raise below a sufficient inference of discrimination to satisfy the third element of her *prima facie* case of disparate treatment due to age, in reference to replacement employees.

III. The Court Did Not Err In Finding That Ms. Knotts Failed To Present Sufficient Evidence That The Hospital’s Legitimate, Non-Discriminatory Reason For Discharging Her Was Pretextual

Even assuming, *arguendo*, that the Circuit Court erred in the manner in which it applied *Young* and Ms. Knotts had fairly set forth sufficient evidence to establish her *prima facie* case of age discrimination, the Court’s conclusion that Ms. Knotts failed to present a genuine issue of material fact for a reasonable jury to conclude that the Hospital’s legitimate, non-discriminatory reason for discharging her was pretextual is more than supported by the entirety of the record below. As this Court is well aware, summary judgment under those circumstances remains appropriate. *Conaway*, 358 S.E.2d at 430; *see also*, Syl. Pt. 2, *Powell v. Wyoming Cablevision, Inc.*, 184 W.Va. 700, 403 S.E.2d 717 (1991)(when a legitimate, non-discriminatory reason is

proffered, the burden shifts to the plaintiff to show that reason is pretextual); *Mereish v. Walker*, 359 F.3d 330, 335 (4th Cir. 2004) (a Defendant “must merely articulate a justification that is ‘legally sufficient to justify a judgment’ in his favor.”)

As detailed above in part I.A of this brief, there is a litany of not just any evidence, but undisputed evidence supporting the Circuit Court’s determination that the Hospital’s reason for discharging Ms. Knotts was legitimate. For one thing, Ms. Knotts admitted engaging in the conduct which the Hospital determined was violative of its confidentiality policy. For another, she had been trained on the policy, and recently reminded about it. Further, the Hospital’s unrebutted expert testimony demonstrated that the Hospital was obligated to enforce its policy under the circumstances or else be in danger of violating federal law. As such, it’s no surprise that the Circuit Court determined that the additional evidence Ms. Knotts attempted to put forth – including testimony from some people at the Hospital about the application of HIPAA, or that her conduct may not have really violated the policy – was insufficient to create a jury question on pretext.

As the Circuit Court below recognized, an employer is not required to persuade the Court that the proffered reason was the actual motivation for its decision. *Conaway*, 358 S.E.2d at 430 (emphasis added). Put another way, the lower Court’s task in this regard was not to discern if the Hospital’s decision to discharge Ms. Knotts was prudent, but whether a reasonable fact finder could infer that the Hospital’s proffered reason masks a decision based on an illicit factor, *i.e.*, age. *Skaggs v. Elk Run Coal Co.*, 198 W. Va. at 74, 479 S.E.2d at 584; *see also, Mingo County Equal Opportunity Council v. State Human Rights Comm’n*, 180 W. Va. 240, 245, 376 S.E.2d 134, 139 (1988). Here, the Court below properly opined that no reasonable fact finder could

reach that conclusion and its determination was well supported in the record.<sup>20</sup>

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<sup>20</sup> Contrary to the contention of Amicus Curiae AARP, the Court below did not inaccurately suggest or formulate the proper framework at the pretext stage, as this Court has enunciated in *Skaggs* (AARP Brief, pgs 3, 11-12). The Hospital agrees with AARP that Ms. Knotts does not have to establish that the Hospital was covering up an actual and specific illegal (discriminatory) motive. However, she does have to present sufficient evidence for a reasonable fact-finder to infer that the Hospital's proffered reason masks such a motive and was therefore pretextual, which is the standard which the Circuit Court applied (Circuit Court Findings and Conclusions, Conclusion 58, App. I, 0022). As set forth above, however, the Circuit Court properly concluded in this case – based on the totality of the evidence – that Ms. Knotts failed to do that. As such, the AARP's complaint that the Circuit Court's interpretation of *Skaggs* was misleading when it properly placed the ultimate burden of persuasion on Ms. Knotts rings quite hollow. The same is true of AARP's assertion that the Circuit Court must have misconstrued the applicable legal standard because its analysis on pretext was brief. To the extent the Circuit Court's analysis of Ms. Knotts' pretext evidence was succinct, it is because Ms. Knotts had so little worthwhile evidence to support her position in the record.

## CONCLUSION

In taking this appeal, Ms. Knotts and her counsel desperately assail the conclusion of the Circuit Court below in an effort to try and overturn a clear, well-reasoned principle of law in West Virginia previously set forth by this Court which they simply do not like. As this brief makes plain, however, those efforts depend upon an extremely weak vehicle – a case where the undisputed record evidence stacks highly against Ms. Knotts – in order to do so, and whether at the *prima facie* stage of proof or the pretext phase of proof, Ms. Knotts' efforts are unconvincing. The Findings of Fact, Conclusions of Law, and Order of the Circuit Court of Taylor County granting Summary Judgment to Grafton City Hospital in this case were not in error and should be affirmed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARTHA KNOTTS,

Petitioner (Plaintiff below)

v.

GRAFTON CITY HOSPITAL,

Respondent (Defendant below).

Docket #: 14-0752

(Circuit Court of Taylor County –  
Civil Action No. 12-C-66)

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2014, I served the foregoing  
“Respondent Grafton City Hospital’s Brief” upon counsel of record by e-mailing a copy to  
counsel for the Petitioner and by depositing a true copy thereof in the United States mail, postage  
prepaid, in an envelope addressed as follows:

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