

COPY

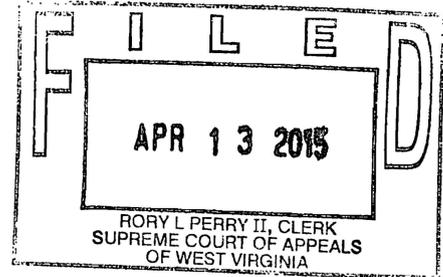
BRIEF FILED  
WITH MOTION

Before the West Virginia Supreme Court of Appeals  
No. 14-0679

**Jennifer N. Taylor**  
and  
**Susan S. Perry**  
**Plaintiffs-Below,**  
**Petitioners**

v.

**WVDHHR, RoccoFucillo,**  
**And Warren Keefer,**  
**Defendants-Below,**  
**Respondents.**



Upon Appeal from the Circuit Court of Kanawha County  
The Honorable James Stucky C. Presiding

Civil Action Numbers 12-C-2029 and 2031

**Reply Brief**  
**Of the Petitioners**

Barbara H. Allen, #1220  
736 Melborne Street  
Pittsburgh, PA 15217  
(304) 206-6315  
mistrial1@aol.com

Michele Rusen, #3214  
Walt Auvil, #0190  
Rusen and Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
(304) 485-3058  
auvil@rusenandauvil.com

## TABLE OF CONTENTS

|  |           |
|--|-----------|
| <i>Table of Authorities</i>  | <i>ii</i> |
| <b>I. Introduction</b>   | <b>1</b>  |
| <b>II. The Errors in the Trial Court’s Finding of Facts</b>  | <b>2</b>  |
| <b>III. Respondents have failed to offer indisputable evidence warranting summary judgment in this matter, and accordingly, Petitioner’s claims should be heard by a jury.</b> | <b>12</b> |
| <b>A. The trial court’s conclusion that Jennifer Taylor was terminated because she had breached attorney-client privilege in an unrelated matter was erroneous.</b>            | <b>12</b> |
| <b>B. Petitioners’ Whistle-Blower Claims</b>   | <b>13</b> |
| <b>C. Qualified Immunity does not bar Petitioners’ Claims.</b>   | <b>16</b> |
| <b>D. Gender Discrimination</b>  | <b>18</b> |
| <b>E. Petitioner Perry’s Employment was terminated By DHHR.</b>  | <b>23</b> |
| <b>F. Jennifer Taylor’s case against Warren Keefer should continue.</b>  | <b>25</b> |
| <b>G. Petitioners’ claims against Respondents for honest legal advice, the Ethics Act, and false light/invasion of privacy should proceed.</b>                                 | <b>26</b> |
| <b>III. Conclusion</b>   | <b>27</b> |
| <b>Certificate of Service</b>  | <b>28</b> |

## TABLE OF AUTHORITIES

### Federal Cases

|  |    |
|--|----|
| <i>EEOC v. Bojangles Rests.</i> , 284 F. Supp. 2d 320 (MD NC 2003)                 | 19 |
| <i>Hindman v. Thompson</i> , 557 F. Supp. 2d 1294 (ND OK 2008)                     | 19 |
| <i>Marshall v. Manville Sales Corp.</i> , 6 F.3d 229 (4 <sup>th</sup> Cir 1993)    | 23 |
| <i>Sauers v. Salt Lake County</i> , 1 F 3d 1122, 1128 (10 <sup>th</sup> Cir. 1993) | 19 |
| <i>United States v. Bryan</i> , 58 F.3d 933 (4 <sup>th</sup> Cir. 1995)            | 10 |

### West Virginia Cases

|   |       |
|---|-------|
| <i>Beichler v. W. Va. Univ. at Parkersburg</i> , 226 W.Va. 321,<br>700 SE 2d 532 (2010)                         | 18    |
| <i>Benson v. AJR, Inc.</i> , 215 W. Va. 324, 599 S.E.2d 747 (2004)  | 11    |
| <i>Dawson v. Allstate Insurance Co.</i> , 189 W. Va. 557;<br>433 S.E.2d 268 (1993)                              | 23    |
| <i>Frank's Shoe Store v. West Virginia Human Rights Commission</i><br>179 W. Va. 53, 365 S.E.2d 251 (1986)      | 19    |
| <i>Gray v. Boyd, et al.</i> , No. 13-0531 (W. Va., April 10, 2014)  | 3     |
| <i>Hanlon v. Chambers</i> , 195 W. Va. 99; 464 S.E.2d 741 (1995)  | 22-23 |
| <i>Holstein v. Norandex, Inc.</i> , 194 W. Va. 727,<br>461 S.E.2d 473 (W. Va. 1995).                            | 23    |
| <i>Hutchison v. City of Huntington</i> , 198 W. Va. 139, 479 S.E.2d 649 (1996)                                  | 17    |
| <i>Merrill v. West Virginia Dept. of Health and<br/>Human Resources</i> , 219 W. Va. 151, 632 S.E.2d 307 (2006) | 11    |
| <i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994)   | 3     |
| <i>State v. Chase Securities, Inc.</i> , 188 W. Va. 356, 424 S,E,2d 591 (1992)                                  | 18    |

|  |    |
|--|----|
| <i>Yoak v. Marshall Univ. Bd. Of Governors, et al.</i> 223 W. Va. 55,<br>672 S.E.2d 191 (2008) | 17 |
|--|----|

**Other Jurisdictions**

|   |    |
|---|----|
| <i>Kidwell v. Sybaritic, Inc.</i> , 784 N.W.2d 220 (2010) | 16 |
|---|----|

**Statutes**

|  |    |
|--|----|
| West Virginia Code § 6C-1-1 <i>et seq.</i> | 15 |
|--|----|

|                               |    |
|-------------------------------|----|
| West Virginia Code §6C-1-2(b) | 16 |
|-------------------------------|----|

|                                 |    |
|---------------------------------|----|
| West Virginia Code § 6C-1-2-(d) | 13 |
|---------------------------------|----|

No. 14-0679

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JENNIFER N. TAYLOR,

Petitioner,

v.

THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; ROCCO FUCILLO; WARREN KEEFER; and BRYAN ROSEN,

Respondents.

SUSAN S. PERRY,

Petitioner,

v.

THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; ROCCO FUCILLO; WARREN KEEFER; and BRYAN ROSEN,

Respondents.

---

REPLY BRIEF OF THE PETITIONERS

---

**I. Introduction**

As Petitioners established in their opening brief, summary judgment in this case must be reversed because the “facts” argued by Respondents and adopted by the trial court are unquestionably “shot through” with innuendo laden conclusions simply not supported by the record. (*Petitioners’ Brief at 18.*) Accordingly, the findings of fact laid out in the “*Order Granting Defendants’ Combined Motion for Summary Judgment,*” must be cautiously analyzed before relying on these findings since many are (a)

based on disputed evidence, (b) based on no evidence at all, or (c) based on the drawing of inferences from evidence that was reasonably susceptible to contrary inferences.<sup>1</sup>

Nothing offered in *Respondent's Response to Brief of the Petitioners* dispels these doubts. Instead, Respondents parrot their characterizations of "undisputed" evidence in the record, while ignoring contrary inferences logically suggested by that very evidence. Respondents' arguments regarding evidence deemed "dispositive" of Petitioners' claims are unfounded and amount to little more than a trip down the proverbial rabbit hole.

This includes two flawed propositions "of law" advanced by Respondents and accepted by the court below. The first - that the West Virginia Purchasing Handbook mandates dismissal of all of Petitioners' claims, since this handbook precludes any review, by any person, at any time of any RFP bids outside of the Department of Administration, particularly once technical scoring is concluded and cost proposals have been opened. Secondly, Respondents asserted, and the trial court agreed, that the West Virginia Purchasing Handbook absolutely precludes any internal review or consideration of a bidding matter by an agency attorney. Both contentions, relied upon by the trial court, are at odds with the Petitioners' professional duty to their client, WVDHHR and accord to the Purchasing Handbook a status not provided for it by the plain language of the manual itself.

## **II. THE ERRORS IN THE TRIAL COURT'S FINDINGS OF FACT**

In this case, the Circuit Court of Kanawha County, the Honorable James C. Stucky presiding, granted summary judgment against Petitioners, Jennifer N. Taylor and Susan S. Perry, on their claims of wrongful termination from their employment (on grounds including public policy, honest legal advice, and the Ethics Act); violations of the Whistle-Blower Law; gender discrimination; and false

---

<sup>1</sup> Indeed, not one paragraph, letter or punctuation mark was changed by the trial court before entering the seventy-one page *Order* proposed and prepared by Respondents. Subsequent to this appeal, however, Respondents sought a "correction" of this *Order* to "clarify" a paragraph in the *Order* that made no sense. App. V, 2734-2763.

light/invasion of privacy. Petitioner Taylor was removed from her position as WVDHHR's General Counsel and Petitioner Perry was removed as the agency's Deputy Secretary for Legal Services. Both were first "administratively reassigned" to their homes, then were summoned to work at menial, administrative tasks in tiny cubicles in an obscure location, and finally were terminated from their positions. These events all occurred after Petitioners advised DHHR purchasing officials that there were potential problems with the technical scoring of bid proposals for a contract (HHR 12052) for advertising services to DHHR.

Most of the facts of this case are disputed and there are multiple, and contradictory, inferences which may be drawn from the evidence adduced during discovery. Petitioners presented facts supported by their testimony and evidence – all of which was discounted or simply ignored by the court below – and all of which, if believed by the jury, would be sufficient to support petitioners' claims. In this case, the trial court violated the cardinal rule of summary judgment and improperly engaged in weighing the evidence and adopting Respondents' view of the truth of the matter instead of determining "whether there [was] a genuine issue for trial." Gray v. Boyd, et al., No. 13-0531 (W. Va., April 10, 2014); Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

All agree that the DHHR advertising contract held by the Arnold Agency was up for renewal in late 2011 and set to expire on November 16, 2011. DHHR Assistant Secretary, John Law was aware of this contract, as he worked closely with the advertising agency as part of his job. A request to proceed by RFP was submitted in June 2011 and a committee was formed to develop the criteria for the RFP and to perform the technical scoring of the vendors' responses.<sup>2</sup> For unrelated reasons, the process dragged on and the Arnold Agency contract was extended to May 15, 2012. (App. III, 1362.) For reasons that are

---

<sup>2</sup> Section 7.2.4 of the *West Virginia Purchasing Division Procedures Handbook* outlines that a vendor may respond to a Request for Proposal ("RFP") by submitting two separate proposals: a technical proposal describing the services to be performed, and a cost proposal. After all of the vendors' proposals are received by the Purchasing Division, the technical proposals are forwarded to an agency evaluation committee, which scores them. Only after the agency's scores have been accepted by the Purchasing Division (such acceptance in some cases preceded by back-and-forth between the Division and the agency) are the cost proposals opened.

relevant and are very much disputed, the Arnold contract was extended again through June 30, 2012 and was awarded to Fahlgren Mortine on July 16, 2012.<sup>3</sup>

In January, 2012, four bids for HR 12052 were received and opened, and the DHHR Technical Evaluation Committee began its work of scoring the technical aspects of the bids. From mid-February 2012, when the Committee sent its scores to the Division of Purchasing, through April 3, 2012, the proposals were re-scored in response to problems and suggestions raised by Roberta Wagner in Purchasing. (App. II, 0451; App. III, 1345-57.) Significantly, even after the suggestions of Roberta Wagner were supposedly considered, the tallied scores remained exactly the same. See, App. III, 1345 and 1359.

Sometime in late April or early May, 2012, John Law (who was not on the Technical Scoring Committee) expressed concerns to Petitioner Perry about the technical scoring process used in considering the advertising contract. Ms. Perry, who had been on the receiving end of scathing publicity and concomitant anger from the Governor's Office over DHHR's dismal history with respect to purchasing issues,<sup>4</sup> took Mr. Law's concerns seriously and decided to look into the matter. (App. II, 0496-97; App. III, 1367, 1376-79, 1390-91, 1410-11.) Ms. Perry's only concern was whether the technical evaluation process was legally defensible, or whether DHHR would once again find itself on the front page of the *Charleston Gazette* as it had during what may charitably be termed as the MMIS fiasco.

---

<sup>3</sup> Respondents claim the second extension was necessary because Petitioners interfered with the awarding of the contract to Fahlgren Mortine. However, evidence in the record supports a finding that DHHR's request for the second extension was required because the recommendation for a final award to Fahlgren Mortine had to be reviewed by "the Office of Technology (OT) for secondary approval ... which can take up to an additional four weeks." (App. III, 1363.)

<sup>4</sup> Personnel within DHHR's purchasing division including Messrs. Rosen and Keefer, participated in the handling of the MMIS contract. The issues and problems attendant with this contract were at the forefront in the fall of 2011, when the Bureau for Medical Services so mishandled the Medicaid Management Information System (MMIS) contract that an RFP had to be pulled back twice. (App. III, 1381-85.) The Legislative Auditor recommended that the purchasing exemption previously granted to BMS be repealed, noting that "BMS has not developed adequate staff resources for the procurement process." (App. III, 1308.) While all this was going on, Petitioner Perry was called to the Governor's Office several times where she was raked over the coals – to put it mildly – and subjected to "icy stares." (App. III, 1380-84.) Thus, to say that Petitioners were leery of the work product of DHHR's purchasing office is an understatement.

Respondents have attacked Petitioners' motivations for undertaking this review from the beginning notwithstanding the clearly articulated reasons for the review Petitioners provided to Respondents at the outset. Respondents have variously claimed that (a) Petitioners knew John Law had a conflict of interest regarding this contract; (b) Petitioners knew John Law wanted Arnold Agency to win the contract; and most recently (c) Petitioners and specifically Susan Perry had been unwittingly "maneuvered" by John Law into performing this review. Setting aside for the moment that proof of motivation is the most difficult to establish for purposes of winning summary judgment, the "evidence" cited by Respondents to support their case regarding motivation showcases the absurdity of these arguments. For instance, Respondents claim that because "Perry heard Law's excitement over Arnold being the low cost bidder," that Ms. Perry therefore knew that the technical scores had been approved.<sup>5</sup> (*Respondent's Response to Petitioners' Brief* at 7.) Yet, when asked about these matters at her deposition, Susan Perry explicitly explained that "it was a part of [her] responsibility to ensure that the legal work of the department was performed correctly. And [she] felt that an independent review would do no harm." App. II, 495. Nevertheless, even in light of Ms. Perry's explanation of her motivation in undertaking the review, Respondents persist in arguing that as a matter of undisputed fact, that Susan Perry's failure to do "a", "b" and "c" proves she was conspiring to interfere with this contract, a conclusion accepted by the court below. In fact, Respondents go so far as to fault Petitioners for not discovering an email sent by John Law regarding the RFP sent to the Arnold Agency in December 2011, an email DHHR did not discover for months after their investigation began.<sup>6</sup>

---

<sup>5</sup> The cited excerpt from Susan Perry's deposition testimony cited to support this argument states:  
Q: Okay. And I – okay. You had heard John Law express some happiness over the fact that Arnold was the low-cost bidder, correct?  
A. That's correct. (App. II 494.)

<sup>6</sup> Respondents make the rather incredible claim that if Petitioners had questioned John Law's true motivation for asking for this review, "they would have uncovered that he had unlawfully emailed the RFP for HHR 12052 to the Arnold Agency two weeks in advance of it being made available to prospective vendors." *Brief* at 23. How Petitioners could have accomplished this feat eludes this writer.

Respondents also continue to insist that the MMIS contract, involving the same WVDHHR personnel (Rosen and Keefer) and resulting in disastrous consequences for WVDHHR formed no part of the Petitioners' motivation for looking into this contract. Respondents reason that due to Department of Administration's involvement, DHHR was "safe" from its own incompetence and there was no reason to worry at all. This ignores the overarching fact that Bryan Rosen and Warren Keefer, the bunglers of MMIS, were involved in HR 12052 as well. Notwithstanding DOA's involvement in the contract, unknown to Petitioners when the review was undertaken, caution was indicated and justified on Petitioners' part.

As to Petitioner's evidence of their purpose for this review and their motivation in undertaking it, two contemporaneous e-mails sent by Susan Perry while the review was underway are completely refute Respondents' claims. When Susan Perry attempted to discuss HR 12052 with Rosen and Keefer in May of 2012 to explain Petitioners' concerns, she sent two different e-mails to them while the review was ongoing. These e-mails are highly probative of and relevant to Petitioners' motivation for conducting this review, yet were completely ignored by the trial court. One such contemporaneous evidence outlining Perry's reasons for undertaking the review is sent by Ms. Perry to Bryan Rosen stated:

[b]ecause of the issues that have occurred with the awarding of some other contracts we decided to take a look at this one to see if anything caught our eyes. Jennifer has found a couple of issues and I think we need to have an *internal* discussion to see how to proceed. (App. III, 1561, emphasis supplied)

Accordingly, no matter what Mr. Law's motives may have been, Ms. Perry's reason for looking into the matter was clearly and unequivocally expressed in this email, and supports her testimony that her only motive was to spare DHHR legal liability and adverse publicity.

A second email sent by Susan Perry regarding this matter on May 8, 2012 followed a string of communications shared among Marsha Dadisman, Bryan Rosen and Susan Perry about scheduling a meeting to discuss this matter. After Bryan Rosen informed Ms. Perry "Susan this really has to stop or this procurement is going to be dead," Ms. Perry responded as follows: (App. III, 1560.)

If you feel that it has to go or be lost then let it go. But be aware that Harry will have to be your counsel if a challenge occurs as Jennifer and I believe that there are “issues.” We do not wish to put them in emails. We will talk when everyone is back in Charleston. (App. III, 1560.)<sup>7</sup>

This contemporaneous email is evidence that (1) Petitioner Perry had concerns that she wished to share and (2) Petitioner Perry was not pushing an agenda that included aborting HR12052 no matter what. Yet this evidence regarding Ms. Perry’s motivation and purpose for conducting the review was either discounted or totally ignored by the trial court. At best, these two emails are conclusive proof of Petitioners’ motivation; at worst, they create a jury issue. In fact, despite Respondents’ best efforts to concoct evidence of some ulterior motive, the record is completely devoid of any proof whatsoever that either Ms. Perry or Ms. Taylor had any interest in who received the contract. Both reported that their only concern was to advise and protect their client, WVDHHR.

Respondents also argue that Petitioners had a duty to investigate and determine where the purchasing process stood before beginning their investigation. Respondents reason that Petitioners’ failure to determine the procedural posture of the bid was essentially malpractice warranting termination. Respondents also assert that the recommendations and advice given by Petitioners to WVDHHR was legally impossible to follow. Again these arguments miss the mark and would be more appropriate for closing argument.

To begin, nothing in the West Virginia Purchasing Handbook precluded Petitioners, as counsel for DHHR, from attempting to protect their clients from legal challenges and adverse publicity by proactively reviewing this matter. While the West Virginia Purchasing Handbook applies to purchasing professionals and their support staff, it does not apply to attorneys. App.II, 768A. Nothing in that handbook precludes agency attorneys from stepping in to protect their clients. In that regard, the

---

<sup>7</sup> The respondents characterize this e-mail as a threat – Harry being, presumably, the “B Team” – which Ms. Perry absolutely denies. (App. III, 1798.)

affidavit of David Tincher, presumably prepared by attorneys for DHHR and signed at their request is telling. Importantly, this affidavit does not say that legal reviews are prohibited or precluded. Rather, David Tincher says that the procedure set out in the handbook does not provide for a legal review. Nor does Mr. Tincher conclude that the Petitioners' actions were inappropriate, wrong, against procedure or illegal. If indeed this Purchasing Handbook, offered by Respondents as the lynchpin of their case against Petitioners, prohibited the actions taken by Petitioners, doesn't it follow that the guru of purchasing David Tincher would directly and explicitly say so? But he doesn't. Yet, notwithstanding explicit provisions of the Purchasing Handbook which state it applies only to purchasing professionals and is only guidance for others, the trial court determined that Petitioners violated purchasing policies by their actions and thereby committed illegal acts. This conclusion is unsupported by the Handbook and by the record.

Additionally, Respondents repeat the refrain that Petitioners' recommendations were procedurally and legally impossible to perform according to the terms of the West Virginia Purchasing Handbook. However, Respondents have ignored salient terms within that document which provide for a number of means for bids to be recalled, cancelled or changed. For instance, Section 4.7.6 of the Handbook provides that the "Purchasing Director reserves the right to cancel any contract or purchase order upon written notice to the vendor" under certain circumstances including **but not limited** to when the vendor agrees, when the vendor obtained the contract by "fraud, collusion, conspiracy, or in conflict with" West Virginia law; when an organizational conflict of interest exists or lack of funds. Section 7.2.21 notes that erroneous bids can be rejected. Section 7.7 notes that "[o]ccasionally it becomes necessary to amend, clarify, change or cancel purchasing documents." Thus, there is built into the procedure a

number of provisions to cover unexpected contingencies. It is accordingly incorrect for Respondents to assert and for the court-below to accept that Petitioners' recommendations could not be followed.<sup>8</sup>

Problematically for Respondents, almost all of the trial court's findings and conclusions in this case flow from the court's determinations that "[t]he provisions of the Purchasing Handbook applicable to the processing of the HHR12052 technical and cost proposals **do not provide for a legal review to be conducted at the DHHR level...**" (App. I, 0009, emphasis in original) and that the petitioners' legal advice to their client was "in direct contravention of the procedural requirements of the *Purchasing Handbook...*" because their legal review was undertaken after the cost proposals for the advertising contract had been opened. (App. I, 0021.) This completely ignores evidence that Petitioners were unaware until May 4, 2014, at the earliest, that the cost proposals had been opened. Second, the court below went along with Respondents' efforts to elevate the legal effect of the *Purchasing Handbook* to such status that the court below concluded that "[the petitioners'] legal review violates the clear statutory construct of the Purchasing Division's statutory authority..." whatever that is supposed to mean.<sup>9</sup> Third, just as David Tincher did in his affidavit, the court evaded directly stating the obvious conclusion from all this would have been—that it is illegal for an in-house agency lawyer to review a contract after the fact, period.<sup>10</sup>

---

<sup>8</sup> In the MMIS matter, an RFP was recalled and rebid twice. Common sense and reading the newspaper confirm that government bidding contracts are often recalled and put out for bid on more than one occasion due to various problems that arise.

<sup>9</sup> In fact, the procedures of the handbook are not set in stone. As the introduction to the West Virginia Purchasing Division Procedures Handbook states, the handbook is to serve as a "helpful tool" which David Tincher "strongly recommends" be used. (App. II, 768.)

<sup>10</sup> In this regard, the court addressed motivation and found that Petitioners knew or should have known that John Law, who requested the legal review, had a conflict of interest because he hoped the Arnold Agency would win the contract. Both Ms. Perry and Ms. Taylor stated that in fact they *didn't* know Mr. Law had a rooting interest in the matter. Further, why *should* Ms. Perry have known this? As set forth earlier, she had been uninvolved in the advertising contract process and didn't even know who the vendors were. And why *should* Ms. Taylor have known this? She was totally uninvolved in the advertising contract process and was just handed an assignment by Ms. Perry; and she thought that the legal review had been requested by Marsha Dadisman, a member of the Technical Scoring Committee, not by John Law.

Finally, although Respondents now argue that Petitioners were terminated for giving legal advice contradicted by the *Handbook* (which is inaccurate), Respondents cannot resist continuing to characterize these two women as criminal conspirators, just as they did on July 16, 2012 when they were escorted from the building in the classic walk of shame. Why? Warren Keefer didn't like having his authority questioned, so he accused these two well respected attorneys, one with fourteen years of service to DHHR with engaging in "Wally Baron like" activity by questioning the scoring of this contract. When Prosecutor Plants refused to do Respondents' dirty work for them, Respondents began to inch away from the label of "felon" they had so easily slapped on Petitioners, and began to build their case for incompetence. However, unable to completely let go of their view that these two are criminals, Respondents invite this Court to agree with the astonishing findings by the court-below that this case is the same as United States v. Bryan, 58 F.3d 933 (4<sup>th</sup> Cir. 1995), a federal mail fraud case which can be factually distinguished from the instant case in under fifteen seconds.<sup>11</sup>

It is indeed impossible to chronicle and address in this brief all of the unsupported and exaggerated findings made by the court-below in its seventy-one page *Order Granting Combined Motions for Summary Judgment*. Suffice it to say that the *Order* is so riddled with argumentative conclusions and half-truths that it cannot withstand any degree of scrutiny. The bottom line is that the court's order, or more precisely the respondents' order which the court signed,<sup>12</sup> violates the most basic rule governing summary judgment: "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a

---

<sup>11</sup> Lottery Commissioner Bryan was prosecuted for persuading the deputy director of marketing to falsify scoring evaluations for a bidder and to falsely testifying to the Lottery Commission that the this bidder had prevailed in the scoring. Mr. Bryan was convicted of mail fraud. Mr. Bryan and his attorney Ed Rebrook also purchased shares of stock of companies doing business with the West Virginia Lottery for which they were prosecuted and convicted of securities fraud.

<sup>12</sup> The petitioners' twenty page objection to the respondents' proposed order, addressing fifty-three specific findings which were objectionable, was ignored. (App. I, 0075-95.)

genuine issue for trial.” Syl. Pt. 4, Merrill v. West Virginia Dept. of Health and Human Resources, 219 W. Va. 151, 632 S.E.2d 307 (2006).<sup>13</sup>

---

<sup>13</sup> Petitioners previously outlined a number of findings unsupported by any evidence in the record. For instance, the finding that the petitioners had an “intense level of concern about the evaluation committee’s scoring that [they] persisted in expressing between May and July 2012....” (App. I, 0029.) Not a scintilla of evidence in the record supports this finding. After the meeting of May 16, 2014, nothing reflects that Ms. Taylor ever thought about the advertising contract again, let alone expressed concern about it, until she was *specifically directed* on July 9, 2012, to talk to Erica Mani about the matter. The only evidence of record regarding Ms. Perry is that after May 16, 2014, she listed the advertising contract as a possible upcoming legal issue (a five word summary, number 19 in a long list of issues) in a memo that she was *specifically directed to prepare* as a result of Dr. Lewis’ impending retirement.

Another example is the court’s finding that by July 13, 2012, “[David] Tincher had already twice reviewed [the contract] and approved it, and notified Taylor of his findings. *Aff. Tincher, Memo Ex C*, paragraph 13-14.” (App. I, 0028, emphasis supplied.) But Mr. Tincher didn’t mention Ms. Taylor in paragraphs 13 and 14 of his affidavit (App. II, 0458); rather, her name appears only in paragraphs 17 and 18, in which Mr. Tincher notes that he learned of Ms. Taylor’s concerns only through his conversations with Erica Mani. He told Ms. Mani that he would be willing to talk to Ms. Taylor, *but she never contacted him*. (App. II, 0459.)

Another example is the court’s finding that “[Petitioners] believe that DHHR had no right to decline to follow their legal advice and actually had a positive obligation to follow it – in spite of the fact that it would have been procedurally impossible for DHHR to have followed it.” (App. I, 0039.) Nowhere in this voluminous record is there a shred of evidence that petitioners had any such ridiculous belief and in fact Ms. Perry’s emails contradict this conclusion..

Yet another example is the finding that “Ms. Taylor was terminated for her involvement in the legal review of HHR 12052 and her disclosure of confidential attorney-client privileged information to her husband, Steve Haid, who had previously lobbied for two entities concerned with the legislation under discussion.” (App. I, 0070.) First, there is no evidence to support a finding that the alleged disclosure had anything to do with Ms. Taylor’s termination; Mr. Fucillo testified as to the bases for his termination decision and the alleged breach was not mentioned. *See discussion Opening Brief* at pp. 21-24. Second, there is no evidence to even suggest that Steve Haid, or his prior lobbying activities which had ended in 2010 had anything at all to do with Ms. Taylor’s legal opinion concerning the advertising contract; she specifically denied that and repeatedly stated that *she didn’t care* who won the contract.

In their *Response*, Respondents press this contention in footnote 20 where they assert that Maple Creative and Steve Haid’s were mentioned in the search warrant because “OIG’s suspicions regarding Taylor’s involvement with her husband was indicated because Taylor was found by OIG to have breached the attorney-client privilege by providing her husband, who had been an officer at Maple Creative, an advertising firm, attorney-client protected information.” However, the search warrant was drafted and issued on September 11, 2012. (App. III, 1696-1704.) The email at issue was not disclosed to David Bishop according to the record until October 16, 2012 (App. II, 859), so this contention appears to be completely false.

Further, the trial court drew every sinister inference that could possibly be drawn from the evidence, *i.e.*, “[t]he [petitioners] *infiltrated* the evaluation committee process at Law’s request, after he had admitted that it would be a conflict of interest for him to be involved directly.” (App. I, 0029, emphasis supplied.) “[Fucillo] was dealing with individuals who were oblivious to a conflict of interest in which they had become *enmeshed*.” (App. I, 0030, emphasis supplied.) Even putting aside the loaded words “infiltrated” and “enmeshed,” Mr. Law did not admit any conflict of interest to Ms. Perry and never even spoke to Ms. Taylor during the relevant time period.

**III. Respondents failed to offer indisputable evidence warranting summary judgment in this matter, and accordingly, the Petitioners' claims should be heard by a jury.**

**A. The trial court's conclusion that Jennifer Taylor was terminated because she had breached attorney-client privilege in an unrelated matter was erroneous.**

On October 16, 2012, three months after Jennifer Taylor was removed from her position as DHHR's General Counsel, the OIG investigator unearthed another possible violation regarding Ms. Taylor. (App. II, 859.) This was an e-mail sent on March 6, 2012, whereby Ms. Taylor forwarded a copy of Committee Substitute for H.B. 4554 (amending and reenacting W. Va. Code § 18-5-44) to her husband, Steve Haid. Attached was a chain of internal DHHR e-mails wherein DHHR personnel, including attorneys, discussed the bill. (App. II, 860-70.) By that point in time, Jennifer Taylor had already been removed from her former position for over six months. Thereafter, on February 4, 2013, Ms. Taylor was informed in writing that she was being dismissed from the employment of DHHR. App. III, 1729. No reason was given for her dismissal, as the letter noted only that she served at the will and pleasure of the Secretary and could be released from employment with or without cause. *Id.* This e-mail did not surface until late in this litigation when Ms. Taylor was shown the e-mail at her deposition. (App. II, 0560.)

Notwithstanding the obvious questions that the timing of these events raises, the circuit court found that "[t]hese grounds, the absolute breach of attorney-client privilege, were sufficient for Ms. Taylor's termination even in the absence of the underlying investigation involving HHR 12052. The court Specifically found that: "Mr. Fucillo testified he did not terminate Ms. Taylor on his own, but as a joint decision with the Governor's Chief of Staff Rob Alsop *because Ms. Taylor was an 'at will employee.'*" (App. I, 0241, emphasis supplied.)

The very fact that DHHR sat on the e-mail for almost four months – waiting, apparently, to see what would happen with the Kanawha County Prosecuting Attorney – is circumstantial evidence that the breach of privilege was not the basis for Ms. Taylor's termination. The timing of the events surrounding

breach of privilege was not the basis for Ms. Taylor's termination. The timing of the events surrounding Jennifer Taylor's suspension and termination unquestionably creates an issue about Respondents' true motivation in firing Taylor. A jury could reasonably infer from the evidence that Respondents' claim that Ms. Taylor was fired, in whole or in part, because of an email discovered long after her removal from her job, is an after-the-fact justification or pretext.

As the facts establish, Ms. Taylor was placed on "administrative reassignment" months before the alleged breach was discovered. App. III, 1168. When the e-mail was discovered, the OIG investigator did *not* include it in the OIG report. And Mr. Fucillo testified that he terminated Ms. Taylor for a variety of reasons, none having anything to do with the alleged breach. Whether or not Ms. Taylor *could* have been fired as a result of the breach is not the question: Respondents' *actual* motive is the issue. Cf. Benson v. AJR, Inc., 215 W. Va. 324, 599 S.E.2d 747 (2004) (in wrongful termination case, although plaintiff admitted dishonesty, summary judgment was reversed because "[t]he record in this case is unclear as to whether AJR dismissed Mr. Benson from its employ for drug use or for dishonesty.")<sup>14</sup>

#### **B. Petitioner's Whistle-Blower Claims**

According to Respondents, Petitioners Whistle-Blower claims fail because Petitioners "lacked 'reasonable cause to believe' that the work [of the technical scoring committee] had involved wrongdoing or waste and they did not make their report in 'good faith...'" and because "their report was made... in the performance of their assigned responsibilities as counsel for DHHR" (App. I, 0037.) The circuit court determined that "the plaintiffs could not possibly have made" these reports "in good faith

---

<sup>14</sup> Similarly, the reason now given for terminating Susan Perry – her poor legal advice – it is notable that Warren Keefer, Bryan Rosen, Rocco Fucillo and others discussed Petitioners and the legal advice given during telephone conversations occurring on July 14 and July 15, 2012. All participants indicated they were well convinced at that time that Petitioners offered flawed legal advice. Yet, Petitioners were not terminated on July 16, 2012. Instead, they were subjected to a months-long investigation by David Bishop. Instead they were branded as felons and conspirators by virtue of this "investigation," and were relegated to "home confinement" and then to tiny cubicles without phones or printers. Had either Petitioner indeed been terminated for poor performance as Respondents now argue, that should have occurred months before it did. It is also curious that Petitioner Perry would be offered other employment in state government if she were in fact as incompetent as Respondents now assert.

because the evaluation committee's reportedly erroneous scoring, which supposedly constituted 'wrongdoing' and supposedly resulted in 'waste' had already been approved by the Purchasing Division, which was statutorily authorized to make the final approval of the scoring..." Petitioners allegedly told DHHR that it was "obligated" to repeat the scoring (not true), which would have violated the Purchasing Handbook (also untrue). The two recommendations made by Taylor were characterized by the trial court as "unprecedented" and "were not authorized under any law, rule, regulation or procedure."

The trial court's findings on this issue are not only inaccurate and completely lacking in evidentiary support, they also reflect a serious misapprehension of the nature of the Whistle-Blower Law . Whether Petitioners acted in good faith is, without question, a disputed issue of material fact in this case. West Virginia Code § 6C-1-2-(d) defines a "good faith report" as "a report of conduct defined in this article as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true." Petitioners' testimony would certainly allow a jury to find that their report, i.e., Ms. Taylor's spreadsheet and her conclusions, were a "good faith report."

Respondents' most recent argument, that Petitioners were not competent to undertake this review, posits that "the only alternative to a dismissal of the whistle blower claims would have been the bizarre scenario of having the jury decide, based on the testimony of Tincher and Taylor, whether he or she was the more qualified." This set up a straw man argument. (*Brief at 31.*) Respondents proceed from a flawed premise: that because a person or agency is tasked with a duty or responsibility, this precludes a whistle-blower report regarding that activity. Adherence to this reasoning would gut the purpose of the Whistle-Blower Law, since reports of wrongdoing and waste would nearly always involve reports about a task or matter someone else should be doing or has done incorrectly. West Virginia Code §6C-1-1 et seq. Thus, as to the validity of Petitioners' whistle-blowing reports, it is beside the point as to whether the Purchasing Division had a duty to check the scoring as well.

The scenario posed by Respondents is also framed incorrectly: the issue before the jury would not be whether David Tincher is more qualified in purchasing matters, but whether in this particular instance, the three days that Jennifer Taylor spent reviewing the technical scoring revealed problems or issues she reasonably believed were problematic. Whether these problems were or were not perceived by others routinely performing such reviews, including David Tincher, or those second guessing Ms. Taylor such as OIG is not the issue. Jennifer Taylor testified throughout this proceeding that she found issues and problems which she did not believe could be defended if a legal challenge arose. Whether or not others agreed with that analysis including David Tincher and David Bishop does not resolve that question of fact which should be considered by the jury.

Like so many other aspects of the *Order*, the conclusion that Petitioners' concerns about the technical scoring process did not implicate wrongdoing or waste is perplexing, perhaps because it seems so obvious that such concerns stem from a desire to avoid wrongdoing or waste. It is difficult to discern the basis for a contrary conclusion. Petitioners believed that because the technical scoring was flawed, the advertising contract could be challenged, all of which would grind the process to a halt and cost DHHR time, money and embarrassment. The fact that the court now knows what Petitioners did *not* know at the time – that Purchasing had already reviewed and approved the technical scoring, which certainly would have made a successful challenge more difficult (although certainly not impossible) – does not change the issue, which is what Petitioners reasonably believed at the time.

Respondents continue to defend the court's legal conclusion, that an organization's in-house counsel has no whistleblower protection against adverse employment action, relying upon the single case of Kidwell v. Sybaritic, Inc., 784 N.W.2d 220 (2010).<sup>15</sup> West Virginia's Whistle-Blower statute applies

---

<sup>15</sup> In Kidwell, a plurality of the Supreme Court of Minnesota rejected a whistle-blower claim asserted by an in-house counsel because there was no "evidence from which the jury could conclude that his purpose in sending the email was anything other than the performance of his assigned responsibilities as in-house counsel." Kidwell, 784 N.W.2d at 230. As the concurrence, noted, "[w]hether and to what extent lawyers, particularly in-house lawyers, may pursue retaliatory discharge claims is a topic that has generated significant case law and scholarly

to “[e]mployee[s] who perform[] a full or part-time service for wages, salary, or other remuneration under a contract of hire, written or oral, express or implied, for a public body.” W. Va. Code § 6C-1-2(b). Under this clear and unambiguous language *all* public employees are covered – not all employees except in-house lawyers. Petitioners reiterate that *Kidwell* is bad law; under *Kidwell*, an in-house lawyer cannot establish the intent to blow the whistle “unless he presents evidence that he reported the illegality through channels other than the normal channels.” Kidwell, 784 N.W.2d at 237. This is a perfect Catch 22, because by reporting outside the normal channels, the lawyer would be violating attorney-client privilege.<sup>16</sup>

**C. Qualified Immunity Does not Bar Petitioners’ Claims.**

As previously noted, the trial court’s analysis of immunity stemmed from its incorrect conclusion that Respondents’ decision to suspend, investigate and ultimately terminate Petitioners was discretionary and necessary: “Because of circumstances in which Plaintiffs *and Law* had placed Defendants beginning in May 2012, Defendants had no choice but to make the decisions that they made.” (App. I, 0027, emphasis supplied.) The trial court concluded that “[t]he decisions that resulted in the investigation and determinations regarding the Plaintiff’s employment were entirely discretionary; and no comparably situated public official would have believed that those decisions violated any clearly established laws.” (App. I, 31.)

How Petitioners placed Respondents in these “circumstances” so that Respondents had “no choice” but to suspend, investigate, humiliate and then fire them is never fully explained. However, it is

---

discussion...,” and “[a] majority of those decisions and most of the legal commentary support whistle-blower status for attorneys...” *Id.* at 232. The dissenting justice noted that the plurality’s opinion essentially construed an unambiguous whistle-blower statute by carving out an exception (in-house lawyers) that was not contained in the text: “[T]he Minnesota Whistleblower Act is a law of general applicability that applies to nearly every employee in the state...” *Id.* at 236.

<sup>16</sup> Respondents have argued throughout this litigation that the review was not a legal matter and that this review did not have to be performed by an attorney. Therefore, according to Respondents, Kidwell would not apply.

crystal clear that in order to reach that conclusion, the trial court had to ignore all of Petitioners' evidence demonstrating "a bona fide dispute as to the foundational or historical facts that underlie the immunity determination...." Syl. Pt. 3, in part, Yoak v. Marshall Univ. Bd. Of Governors, et al. 223 W. Va. 55, 672 S.E.2d 191 (2008); Syl. Pt. 1, in part, Hutchison v. City of Huntington, 198 W. Va. 139, 479 S.E.2d 649 (1996).

What evidence has been ignored? Petitioners are lawyers who had concerns that their client, DHHR, might find itself in legal jeopardy. They brought those concerns to the proper persons within DHHR, Warren Keefer and Bryan Rosen. They accepted the fact that the client was not going to take their advice. What Petitioners didn't foresee was the over-the-top reaction of Mr. Keefer and Mr. Rosen, who apparently didn't like having their actions criticized by the ladies. Keefer and Rosen started the whole "Wally Barron" nonsense, assumed the worst possible intentions on Petitioners' part, poisoned the well with Rocco Fucillo, and laid out a fantastic criminal conspiracy scenario that seems to have been eagerly snapped up by David Bishop's investigator. And most perplexing of all is why Respondent Fucillo would accept the representations of Keefer, Rosen and others while not discussing this matter with his attorneys in the first place.<sup>17</sup>

Yet another problem with the court's analysis is that both Ms. Perry and Ms. Taylor testified they were unaware that Purchasing had already approved the scores, neither having been previously involved in any matters involving the advertising contract. Further, the procedural rules contained in the Purchasing Handbook do not have the force of law, and even if they did, David Tincher testified only that they "make no provision for a 'legal review' at the agency level." (App. II, 0459.) Nowhere in Mr. Tincher's affidavit (App. II, 0453-60) does he state that it would have been impossible, let alone illegal, to pull back the advertising contract after the technical scoring was complete and the cost proposals opened.

---

<sup>17</sup> Respondent Fucillo testified that he felt he would be committing a crime if he had spoken to his in-house counsel about the review he had conducted. This claim is so baffling, it defies explanation.

Finally, Defendants' qualified immunity arguments also fail to address a significant discontinuity between the case at bar and the decisions of this Court relied upon by Respondents: Two of Plaintiffs' causes of action are statutory claims (Whistleblower and Human Rights Act) in which the West Virginia Legislature has explicitly included the State and its agencies as parties subject to potential liability for violating the law and in which the Legislature has also prescribed the potential remedies available against the State for violations by the State and its agencies of these laws. Where the Legislature has named the State and its agencies as a potentially liable entities and identified by statute the remedy available, immunity is inapplicable. Beichler v. W. Va. Univ. at Parkersburg, 226 W.Va. 321, 700 SE 2d 532 (2010).

Based upon all of foregoing, it was error to conclude that Respondents' actions "did not violate clearly established laws of which a reasonable official would have known." State v. Chase Securities, Inc., 188 W. Va. 356, 424 S.E.2d 591 (1992). The conclusion is based on the court's finding that neither the petitioners' whistle-blower claims nor their gender-based discrimination claims – clearly established laws in this state -- could be sustained. These findings were erroneous, as separately argued *infra* at pp.12 and 19. However, the factual finding common to the immunity issue, as well as the statutory issues, is key: the court's finding that Petitioners could not have given "honest legal advice" and did not act in good faith because (1) the Purchasing Division had already given its final approval to the technical scoring of the advertising contract proposals, and (2) any action DHHR might have taken on the basis of Petitioners' advice "would have been a violation of the procedural rules that the Purchasing Division had issued pursuant to its legislative authorization."

#### **D. Gender Discrimination**

***Susan Perry's Claim*** - It is undisputed that Plaintiff Perry contacted Dawn Adkins, the DHHR EEO and Civil Rights Compliance Officer regarding a gender discrimination claim on June 28, 2012.

*Respondents' Response to Brief of Petitioners*, 43. Petitioner Perry also discussed with DHHR Human

Resources Director, Harold Clifton the fact that she was contemplating filing a gender discrimination claim naming Defendant Fucillo as a comparator, during the first two weeks of July, 2012. *Respondents' Response to Brief of Petitioners*, 44. Contrary to Respondents' suggestion, the gender discrimination claim which Mrs. Perry discussed with Clifton and Adkins directly implicated Defendant Fucillo. Two weeks after these gender discrimination disclosures to the DHHR EEO and Civil Rights Compliance Officer Adkins and DHHR Head of Human Resources, Clifton, Ms. Perry was removed from her position by Respondent Fucillo, the very same comparator employee forming the basis for her gender discrimination claim.

As the West Virginia Supreme Court has noted:

In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, *et seq.*, as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. *Syllabus point 4, Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).<sup>18</sup>

It is accordingly reasonable to infer that an otherwise exemplary Deputy Director of Legal Services who was removed from her job and office within two weeks of raising a potential gender discrimination claim has established that her protected activities occurred within such period of time that the Court and jury would be entitled to infer retaliatory motivation. This is especially true in view of the fact that the individual removing her was the comparator individual about whom the gender discrimination complaint was based, Respondent Fucillo.

---

<sup>18</sup> Retaliation based upon an employer's fear that an employee might report or pursue a claim is actionable in the same way that reprisal for the actual filing of a claim is actionable. *EEOC v. Bojangles Rests.*, 284 F. Supp. 2d 320 (MD NC 2003)(Title VII covers anticipatory retaliation); *Sauers v. Salt Lake County*, 1 F 3d 1122, 1128 (10<sup>th</sup> Cir. 1993) (reassignment because harasser feared plaintiff intended to file harassment claim actionable); *Hindman v. Thompson*, 557 F. Supp. 2d 1294 (ND OK 2008) (plaintiff fired because supervisor feared she would engage in protected activity).

Petitioner Perry's gender-based discrimination claim contains an additional element which, again, the court below simply discounted: on the same day Petitioners approached Mr. Fucillo for the purpose of alerting him to the Mani-Taylor phone calls, Ms. Perry had met with Dawn Adkins, DHHR's EEO officer, to discuss the possibility of a gender-based discrimination grievance challenging disparate treatment between her and Mr. Fucillo. (App. II, 0994-1001.) (The grievance involved mileage; Mr. Fucillo, who lives in Fairmont, was paid for his mileage when he came to Charleston, while Ms. Perry, who lives in Logan, was not.)<sup>19</sup> Contrary to the lower court's apparent belief, a jury is not bound to believe Mr. Fucillo when he says he was unaware of Ms. Perry's actions at the time he took steps to reassign, investigate and then terminate her.

Despite this evidence, Respondents apparently contend that this Court is required to believe Respondents' exculpatory and self-serving statements of innocence. Why this Court - or a jury - would be required to believe that the DHHR EEO/Civil Rights Compliance Officer and the DHHR Head of Human Resources did not inform their boss Respondent Fucillo that the agency's top attorney was filing a gender discrimination claim naming him as a comparator is inexplicable. This claim is particularly suspicious in light of the swift adverse action Fucillo thereafter took against Ms. Perry.

***Jennifer Taylor's claim*** – Respondents, not Petitioners, ask the Court to make “an illogical leap” with regard to their motivation in terminating Taylor. *See, Respondents' Response to Brief of Petitioners*, 45. The record reflects that Respondent Fucillo applied for the DHHR General Counsel position at the same time Plaintiff Taylor applied. Taylor was selected for the job, by Petitioner Perry and others. Respondents argued - and the trial court accepted - that there was no possibility that Fucillo harbored a gender discriminatory animus against Taylor for besting him for the DHHR General Counsel position he sought, an animus which he held and exercised until he was elevated to the position above the woman

---

<sup>19</sup> The court concluded as a matter of law that this could not be considered discriminatory because Mr. Fucillo had accomplished his goal by negotiating to have Fairmont designated his home office; thus, “[t]his is not a situation where Ms. Perry and Mr. Fucillo were both assigned to Charleston and only Mr. Fucillo received travel reimbursement.” (App. I, 0066.)

(Taylor) who had been selected for the job by Petitioner Perry, among others. When a woman bests a man for job and is later fired from that job by the man she bested for it, an inference that her gender may have motivated her termination is quite reasonable. To urge as Respondents do that such a discriminatory motivation is not supported by the admitted facts flies in the face of human experience.

The court below dismissed Ms. Taylor’s gender-based discrimination claim in cavalier fashion, stating at the outset that “[Petitioners] acknowledged during the hearing that Ms. Taylor’s claims regarding gender discrimination are weak.” (App. I, 0068.) This completely misstates what was said at the hearing, which was:

Gender discrimination, we just deal with two plaintiffs. Ms. Taylor has the weaker gender discrimination claim. It’s still more than sufficient to survive summary judgment, more than suspicion, based on the evidence we have now, to sustain a verdict; but it’s the weaker of the two claims. (App. I, 0095.)

The court found that the only evidence supporting Ms. Taylor’s claim was the fact that her interim replacement as General Counsel was a male attorney, Will Jones. (App. I, 0068.)<sup>20</sup> Evidence that (a) Ms. Taylor had actually beat out Mr. Fucillo, the man who ultimately fired her, for the position of General Counsel at DHHR; (b) Ms. Villanueva-Matkovich was hired subsequent to the filing of Petitioners’ lawsuits, which contained claims of gender-based discrimination; and (c) the over-the-top reaction of all the male principals in this case (Fucillo, Keefer and Rosen) to a legal opinion they didn’t like, from two female attorneys they seemed to think should just butt out was discounted and ignored.<sup>21</sup> Finally, the court held that Ms. Taylor’s gender-based claim could not be sustained because DHHR had suspended not only her and Ms. Perry, but also Mr. Law. However, John Law was not similarly situated to Petitioners, as (a) he isn’t an attorney, and (b) he admitted that he wanted the Arnold Agency to win

---

<sup>20</sup> Ms. Taylor was ultimately replaced by Karen Villanueva-Matkovich. (App. I, 0068.)

<sup>21</sup> As Ms. Taylor stated in her Pre-[OIG] Statement Interview, “I have done nothing but fix Bryan’s messes since we’ve ... I’ve been there, and I truly believe that he’s just tired of the girls ragging on him and he whined to Warren and Warren decided okay well, you know, taking up for his protégé here.” (App. II, 0577, 0700.)

the contract – a fact which was, according to the petitioners’ statements and testimony, unknown to them.

Respondents also argue that the fact that the DHHR General Counsel position previously held by Ms. Taylor was ultimately filled by a woman (Karen Villanueva-Matkovich) vitiates her’ gender discrimination claims. However, this argument again ignores the immediate replacement of Petitioner Taylor by a male who served in an acting capacity as General Counsel for a year before Ms. Villanueva-Matkovich was hired as General Counsel. Moreover, Ms. Villanueva-Matkovich was hired after Petitioners filed their gender discrimination claim. She was also hired by a different Secretary of DHHR – a female - as compared to the more immediate replacement of Taylor by a male selected by Fucillo. Thus, the hiring of a female by Respondents and occurring only after Petitioners had raised the gender of their replacements as an issue does not save the day for Respondents. Such a post-facto scenario is not dispositive of Respondents’ motives when terminating Taylor.

West Virginia law applicable to summary judgment presents a high hurdle for a moving party in an employment discrimination case where the motive of the Defendants is at issue. This Court has clearly set forth the standards which apply to any motion under Rule 56 for summary judgment on discrimination claims.<sup>22</sup> Summary judgment is generally not proper in employment cases which involve

---

<sup>22</sup> In Syllabus Points 3 and 4 of Hanlon v. Chambers, 195 W. Va. 99; 464 S.E.2d 741 (1995), the Court established the high threshold which any party must meet when seeking summary judgment on behalf of a defendant in an employment discrimination case:

3. In most discrimination cases, once a plaintiff’s allegations and evidence create a prima facie case (showing circumstances that permit an inference of discrimination or an impermissible bias), unless the employer comes forward with evidence of a dispositive nondiscriminatory reason as to which there is no genuine issue and which no rational trier of fact could reject, the conflict between the plaintiff’s evidence establishing a prima facie case and the employer’s

Footnote 24 continued:

evidence of nondiscriminatory reason reflects a question of fact to be resolved by the fact finder after trial.

motive or intent. Dawson v. Allstate Insurance Co., 189 W. Va. 557; 433 S.E.2d 268 (1993) (reversing in part trial court's grant of summary judgment where Plaintiff did not file a responsive pleading to the motion). Further, individual decision makers - such as Respondent Fucillo - may also be liable for violation of the Human Rights Act. Marshall v. Manville Sales Corp., 6 F.3d 229 (4<sup>th</sup> Cir 1993); Holstein v. Norandex, Inc., 194 W. Va. 727, 461 S.E.2d 473 (W. Va. 1995). Accordingly, Respondents' arguments regarding the alleged justification for the discipline meted out to Petitioners are not dispositive of the issue of their motives. Where two or more motives for an action are possible, this Court has repeatedly held that resolving the question of motive is uniquely a jury function.<sup>23</sup>

On the totality of the evidence in this case, which is conflicting on virtually every factual issue, each Petitioner made out a *prima facie* case of gender-based discrimination and the issue should have gone to the jury for resolution.

**E. *Petitioner Perry's Employment was terminated by DHHR.***

The trial court also improperly granted *Respondents' Motion for Partial Summary Judgment* as to "any claims" asserted by Petitioner Perry "of wrongful, retaliatory or illegal discharge under the West

---

4. Although the plaintiff has the ultimate burden of proving elements of the claim of discrimination by a preponderance of the evidence, the showing the plaintiff must make as to the elements of the *prima facie* case in order to defeat a motion for summary judgment is *de minimis*. In determining whether the Plaintiff has met the *de minimis* initial burden of showing circumstances giving rise to an inference of discrimination, the function of the circuit court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive. It is not the province of the circuit court itself to decide what inferences should be drawn. *Id.* at Syl. Pts. 3 & 4.

<sup>23</sup> Similarly Defendants' argument that Mr. Law's termination shows the lack of gender discrimination is unavailing. There is no suggestion that the Plaintiff's job functions or involvement in the matters at issue were comparable to Law's. This is evidenced, in part, by the fact that Law was fired months before Petitioners and - in Mrs. Perry's case - almost a year before her. Again, the comparison between the Respondents' reaction to Law's behavior versus the Petitioners' behavior are matters of weight and credit, not for resolution upon a dispositive motion.

Virginia Human Rights Act” and the Whistle-Blower Law brought against WVDHHR, Rocco Fucillo, and Mr. Keefer as well as “any other claim pled in Plaintiff Perry’s Complaint that is based on allegations of wrongful, retaliatory or illegal discharge by these Defendants...” (App. I, 219-220.) The circuit court erroneously concluded that because the decision to terminate Ms. Perry was directed by the Office of the Governor, her “employer” had not discharged her and therefore the claims against the respondents must be dismissed. In so ruling, the court below misapprehended both the West Virginia Human Rights Act and the Whistle-Blower Law.

Respondents Rocco Fucillo and Warren Keefer each provided the information and impetus for Ms. Perry’s removal and reassignment was information provided by Mr. Keefer and Mr. Fucillo accordingly DHHR Human Resources Director, Harold Clifton. (App. IV, 1970-72.) The investigation by David Bishop launched was also based upon the information provided by Messrs. Keefer and Fucillo. (App. IV, 1973-74.) Mr. Fucillo acknowledged that he took the actions he did after Warren Keefer told him that Susan Perry had engaged in “Wally Barron” type behavior. (App. IV, 2000, 2006.)

The lower court’s implicit conclusion, that the actions taken by Mr. Fucillo (after Mr. Keefer started talking about bid rigging and Wally Barron) did not cause or contribute to the decision to terminate Ms. Perry’s employment, is disingenuous. Clearly, the “administrative reassignment” and the OIG investigation had *everything* to do with Ms. Perry’s subsequent termination letter later issued; Charlie Lorensen, the Governor’s Chief of Staff who made the ultimate decision, acknowledged that Ms. Perry was removed from her position because it had been “effectively vacated” by her administrative reassignment. (App. IV, 1945.) The decision to administratively reassign Ms. Perry was made by Respondent Fucillo and no one else –this is undisputed. (App. II, 744.) Her termination letter was issued on DHHR letterhead and signed by Harold Clifton, a DHHR employee. Petitioner Perry was terminated from the employ of the West Virginia Department of Health and Human Resources on June 30, 2013 by DHHR Human Relations Director Harold Clifton.

The court below simply ignored the evidence from which a jury could reasonably find that Messrs. Fucillo and Keefer instigated Ms. Perry's "administrative reassignment," which led inexorably to her retaliatory discharge. And indeed, Harold Clifton's testimony supports Ms. Perry's assertion that the information from Fucillo and Keefer was provided in reprisal and retaliation for Ms. Perry's whistleblowing and gender discrimination complaints.<sup>24</sup> The factual scenario in this case is a textbook example of apparent pretext, as the respondents offered no reasonable explanation for treating two long time, loyal and honest employees as though they were a couple of crooks. Respondent Fucillo's misconduct in this matter, instigated, aided and encouraged by Respondent Keefer's comments, all leading to the investigation and reassignment of DHHR's top lawyer, was by no means incidental to Susan Perry's termination. The circuit court fundamentally misapprehended the scope of liability for individual defendants under the Act, which requires reversal of its rulings.

***F. Jennifer Taylor's case Against Warren Keefer should continue***

The lynchpin of summary judgment in favor of Mr. Keefer on Ms. Taylor's whistle-blower and gender-based discrimination claims against him was the court's finding that "[n]o evidence has been proffered that Warren Keefer, Deputy Secretary for Administration for WVDHHR had a decision making role in the termination of Jennifer Taylor; and therefore cannot be held responsible for claims of wrongful, retaliatory or illegal termination of Ms. Taylor." (App. I, 0242.)

---

<sup>24</sup> Harold Clifton could think of no reason why the investigation (launched on the basis of Keefer and Fucillo's statements) could not have gone forward while the petitioners continued to work in their offices, and confirmed that this possibility was not even considered by his superior, Mr. Fucillo. (App. IV, 1980.) Instead, both Ms. Perry and Ms. Taylor were removed from their positions without an opportunity to give their side of the story, and were told absolutely nothing about why they were being removed from their jobs. (App. IV, 1981-82, 1998.)

This misapprehends the whole thrust of Ms. Taylor’s evidence, which was that Mr. Keefer set the train of events leading up to her termination in motion by giving Rocco Fucillo what Mr. Fucillo termed a “heads up” before Mr. Fucillo had the opportunity to talk to Ms. Taylor and Ms. Perry:

In June when it became known I would be secretary, Warren Keefer gave me a heads up for hot issues including the advertising contract. He told me, and as I was aware of, John Law has a relationship/friendship/long history with the Arnold Agency, *and that Susan Perry and Jennifer Taylor were also involved and doing illegal things that can put you in jail like people in Wally Barron’s administration.* Later he told me there was a meeting and things settled down some. (App. II, 0592; App. III, 1146.)

Mr. Keefer need not have actually participated in the decision to fire Jennifer Taylor in order for her to prevail on this claim; it is sufficient that his actions caused or contributed to the OIG investigation, the so-called administrative reassignment,<sup>25</sup> and finally the termination. A jury could reasonably conclude that it was Mr. Keefer who started pushing the boulder towards the cliff; after he began talking about illegality, bid rigging and Wally Barron, it was the beginning of the end.

**G. *Petitioners’ claims against Respondents for honest legal advice, the Ethics Act, and false light/invasion of privacy should proceed.***

Respondents have raised nothing new in the *Respondents’ Response to the Opening Brief of Petitioners*. These matters were thoroughly briefed by Petitioners in their *Opening Brief*. Accordingly, Petitioners reiterate by reference the arguments on these matters previously set forth in their *Opening Brief*.

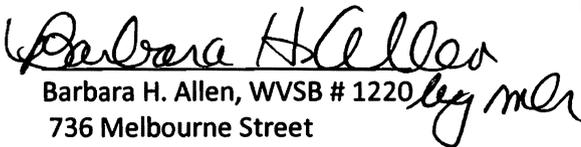
---

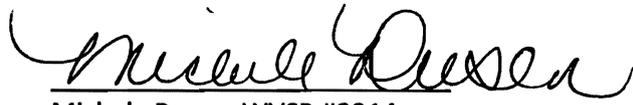
<sup>25</sup> It is fair to call this a “so-called” administrative reassignment because it began as an administrative suspension; soon thereafter, someone at DHHR woke up and realized that the agency couldn’t suspend the petitioners and continue to pay them – hence the fiction that they were doing meaningful work at home and then in their tiny cubicle.

III. CONCLUSION

For all of the reasons set forth in this Reply Brief and apparent on the face of the record, the judgment of the Circuit Court of Kanawha County should be reversed and this case remanded for a jury trial on all of the issues set forth in Petitioners' Amended Complaints.

JENNIFER N. TAYLOR and  
SUSAN S. PERRY,  
Petitioners

  
Barbara H. Allen, WVSB # 1220  
736 Melbourne Street  
Pittsburgh, PA 15217  
(304) 206-6315  
Counsel for Petitioner Jennifer N. Taylor

  
Michele Rusen, WVSB #3214  
Walt Auvil, WVSB #0190  
Rusen & Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
(304) 485-3058  
Counsel for the Petitioners Susan S. Perry  
and Jennifer N. Taylor

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
No. 14-0679

JENNIFER TAYLOR and SUSAN S. PERRY,  
Plaintiffs/Petitioners,

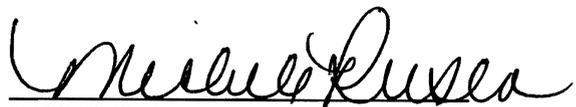
v.

THE WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,  
ROCCO FUCILLO, and WARREN KEEFER,  
Defendants/Respondents,

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Plaintiffs/Petitioners hereby certifies that on the 13<sup>th</sup> day of April, 2015, she caused to be served the foregoing and hereto annexed ***Reply Brief of the Petitioners*** upon Charles R. Bailey, by mailing, first class postage prepaid, a true and accurate copy thereof to the address that follows:

Charles R. "Chuck" Bailey  
Bailey & Wyant, P.L.L.C.  
500 Virginia St. E., Suite 600  
P.O. Box 3710 25327  
Charleston, West Virginia 25301



MICHELE RUSEN, #3214  
Counsel for Petitioners  
Rusen & Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
(304) 485-3058