

14-1262

Received  
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IN THE CIRCUIT COURT OF GILMER COUNTY, WEST VIRGINIA

JULIE CONRAD,  
PLAINTIFF,

V.

THE COUNCIL OF SENIOR CITIZENS OF  
GILMER COUNTY, INC.,  
DEFENDANT.

CASE NUMBER: 14-1262

FILED  
2014 NOV -5 AM 10:58  
KAREN ELKIN  
CIRCUIT CLERK  
GILMER COUNTY, WV

OPINON AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Pending before the Court is a *Motion to Dismiss* filed by the defendant, through counsel Jan L. Fox, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The Court has considered the oral arguments of counsel, the parties' respective memoranda filed herein, the applicable law, as well as viewed the Amended Complaint in light most favorable to the plaintiff. Upon plenary review the Court finds as a matter of law that the plaintiff has failed to state a claim for which relief can be granted. Accordingly, for the reasons discussed below the case is dismissed with prejudice.

FINDINGS OF FACT

1. The plaintiff was employed by the defendant from February 8, 2002 to January 31, 2013, in the capacity of a "homemaker," wherein the plaintiff was charged with providing in-home services to clients assigned by the defendant.
2. It is undisputed that the plaintiff was an at-will employee of the defendant for the duration of her employment.
3. The plaintiff through Klie Law Offices, PLLC, filed an original complaint with the Court on January 8, 2014, setting forth the following facts:

- a. "To the best of Plaintiff Conrad's knowledge Plaintiff Conrad has been employed by Defendant Council of Senior Citizens since February 8, 2002. (Compl. ¶ 3)<sup>1</sup>.
- b. "At all times relevant herein, Plaintiff Conrad was performing her work related duties for Defendant Council of Senior Citizens in Glenville, Gilmer County, West Virginia in an excellent manner." (Id. at ¶ 4).
- c. "At all times relevant herein, Plaintiff Conrad performed all of her job duties in a satisfactory and/or above satisfactory manner." (Id. at ¶ 5).
- d. "On or about February 8, 2002, Plaintiff Conrad began working as a homemaker under the direction of Defendant Council of Senior Citizens." (Id. at ¶ 6).
- e. "On or about January 31, 2013, Plaintiff Conrad confided in her employer Defendant Council of Senior Citizens, after numerous previous complaints, and spoke with, Ms. Mathess, Plaintiff Conrad's Supervisor, to discuss that the Plaintiff could no longer work for the client, Connie Ables, due to the clients' [sic] brother-in-law would consistently block the driveway off so Plaintiff could not go to the home, flatten her tires, and vandalized her vehicle. She stated to Ms. Mathess that she could no longer care for the client at the home; she could no longer physically or emotionally handle it. She was directed by her employer to 'stick it out.'" (Id. at ¶ 7).
- f. "Plaintiff Conrad felt as if she had no other choice and resigned." (Id. at ¶ 8).

4. Relying on those purported facts, the plaintiff set forth the following counts for relief: 1) Tort of Outrage; 2) Violations of Employee Handbook and/or Manual; 3) (Constructive) Wrongful Discharge in Violation of Public Policy; and 4) Damages.

5. The defendant subsequently filed the *Motion to Dismiss* currently at issue on February 14, 2014, as well as a memorandum in support thereof, alleging that pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the plaintiff had failed to set forth a claim for which relief could be granted.

6. A hearing was held on the defendant's said motion on April 14, 2014, and the Court takes judicial notice of the arguments of counsel set forth therein.

7. At the conclusion of the hearing, the Court concluded that the complaint was insufficient,

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<sup>1</sup> Paragraphs 1 and 2 of the Complaint set forth facts solely relevant to establishing jurisdiction and venue. Further, it is undisputed that both are proper in the Circuit Court of Gilmer County. As such, a recitation of those paragraphs has been intentionally omitted from the Findings of Facts, in that they are not relevant to the resolution of the Defendant's *Motion to Dismiss*.

because on its face, it failed to set forth what facts and/or actions, if any, the plaintiff based its claim for relief. The Court then granted the plaintiff twenty (20) days to file an amended complaint to allege with specificity what the allegations and violations laws of this State were pertaining to the plaintiff's cause of action.

8. The Amended Complaint was filed May 5, 2014, and in its current form sets forth the following purported facts:

- a. "To the best of Plaintiff's knowledge Plaintiff has been employed by the Defendant since February 8, 2002." (Amended Compl. ¶ 3)<sup>2</sup>.
- b. "At all times relevant herein, Plaintiff was performing her work related duties for Defendant in an excellent and/or above satisfactory manner." (Id. at ¶ 4).
- c. "At all times relevant herein, Plaintiff performed all of her job duties in a satisfactory and/or above satisfactory manner." (Id. at ¶ 5).
- d. "On or about February 8, 2002 Plaintiff began working as a homemaker under the direction of Defendant, wherein she would be placed in the homes of clients by the Defendant." (Id. at ¶ 6).
- e. "On or about January 31, 2013, Plaintiff reported to her employer, Defendant, after previously making numerous previous complaints that the Plaintiff could no longer work for her assigned client, in that the client's relative<sup>3</sup> would consistently block the driveway off so the Plaintiff could not go to the home, flatten her tires, and vandalize her vehicle. Plaintiff felt in danger and physically threatened. She stated to her supervisor that she could no longer care for the client at the home; she could no longer physically or emotionally handle it. She was directed by her employer to 'stick it out'." (Id. at ¶ 7).
- f. "Plaintiff felt as if she had no other choice but to quit or put herself and her property in danger and therefore with no choice, resigned." (Id. at ¶ 8).

9. Relying on the above-stated facts, the Amended Complaint set forth the following theories of relief: 1) (Constructive) Wrongful Discharge in Violation of Public Policy; and 2) Tort of Outrage<sup>4</sup>.

10. The defendant renewed its motion to dismiss and the matter was set for hearing on

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<sup>2</sup> Paragraphs 1 and 2 intentionally omitted. See note 1, *supra*.

<sup>3</sup> The original complaint alleged the client's brother-in-law was responsible. The Amended Complaint alleged the client's relative. It was eventually determined (in the parties' respective briefs regarding the defendant's motion) that the alleged individual was actually the client's son-in-law.

<sup>4</sup> In the Amended Complaint, the plaintiff did not include a cause of action for "Violation of Employee Handbook and/or Manual" as previously set forth in the original complaint. Therefore it is deemed abandoned by the plaintiff.

August 11, 2014. The Court takes judicial notice of the parties' briefs in support of their respective positions as well as the arguments made at said hearing. At the conclusion of the hearing the Court took the matter under advisement and informed the parties it would issue a written decision.

**STANDARD OF REVIEW FOR DISMISSAL OF A  
COMPLAINT PURSUANT TO W. VA. R. CIV. P. 12(b)(6)**

When presented with a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a trial court is charged with appraising the sufficiency of the complaint and should not dismiss the complaint unless it appears beyond doubt that that plaintiff can prove no set of facts in support of his claim which would entitled him to relief. See *Flowers v. City of Morgantown*, [166] W.Va. [92], 272 S.E.2d 663 (1980). It is noted that in West Virginia practice, motions to dismiss are generally viewed with disfavor because the complaint is to be construed in light most favorable to the plaintiff and its allegations are to be taken as true. *Sticklen v. Kittle*, 168 W.Va. 147, 163-64, 287 S.E.2d 148, 157 (1987). However, this liberal standard does not relieve a plaintiff of the obligation of presenting a valid claim upon which relief can be granted. *Wilhelm v. West Virginia Lottery*, 198 W.Va. 92, 479 S.E.2d 602 (1996). Moreover, a complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist. *Fass v. Nowasco Well Service, Ltd.*, 177 W.Va. 50, 52; 350 S.E.2d 562, 563-64 (1986).

With these principles in mind the Court turns its attention to the defendant's present motion.

**DISCUSSION**

In the present case, the Amended Complaint ("Complaint") puts forth the claims of wrongful discharge in violation of public policy and the tort of outrage. The plaintiff relies on the

alleged criminal activity of client Connie Ables' son-in-law as the basis for these claims, arguing that by blocking the driveway, deflating her tires, and vandalizing her vehicle intolerable working conditions were created. Furthermore, the plaintiff avers that despite making "numerous complaints" to the defendant regarding the client's son-in-law's activities and her discomfort and fears in continuing to work for her client in that regard, the defendant told her to "stick it out." As a result of the defendant's alleged response the plaintiff maintains the working conditions became so intolerable that she had no choice but to resign from her job.

The defendant posits that the vague and conclusory facts and allegations set forth do not give rise to a viable cause of action in that, even in its amended form the Complaint remains factually deficient and fails to state claim for which relief can be granted. Taking the facts set forth in the Complaint as true, the Court will now address the viability of each cause of action.

### **The Wrongful Discharge Claim**

The first theory of recovery advanced by the plaintiff is a constructive (or retaliatory) wrongful discharge in violation of public policy cause of action. In this respect, the plaintiff avers that the Complaint sets forth sufficient facts to meet the substantial public policy requirement advanced by *Harless v. First Nat. Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978)<sup>5 6</sup>, as well as satisfy the elements of a constructive discharge claim that were adopted by the West Virginia Supreme Court of Appeals in *Slack v. Kanawha County Housing and*

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<sup>5</sup> "The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge." See Syl. *Harless*, supra.

<sup>6</sup> The original complaint failed to make reference to any 'substantial public policy' violated by the defendant. However, in the plaintiff's reply brief to the Motion to Dismiss, the plaintiff cited W.Va. Code § 21-3-1. At the initial hearing on April 14, 2014, when the Court inquired about which 'substantial public policy' the plaintiff claims was violated, the hearing transcript reflects a discrepancy, in that, the plaintiff cited § 21-3-1, but later argues that while this is not a deliberate intent cause of action, the deliberate intent statute W.Va. Code § 23-4-2 (1994) (Repl. Vol. 2014), is the 'substantial public policy' violation to support this cause of action. The Amended Complaint cited the general labor statute W.Va. Code § 21-3-1 (1937) (Repl. Vol. 2014), and makes no argument regarding deliberate intent. However, having determined this case on the issue of duty, the Court need not discuss whether the plaintiff has established a 'substantial public policy.'

*Redevelopment Authority*, 188 W.Va. 144, 423 S.E.2d 547 (1992)<sup>7</sup>, all of which are necessary to maintain a constructive wrongful discharge cause of action. Naturally, the defendant resists this contention.

Having reviewed the Complaint and the arguments of counsel set forth in their respective memorandums with respect to the Motion to Dismiss, the Court is of the opinion that both parties have failed to address the overreaching issue at the crux of this case, as well as the core of any negligence related cause of action: duty.

It is a well-known basis of West Virginia jurisprudence that “[i]n a negligence suit, a plaintiff is required to show four basic elements: duty, breach, causation, and damages. **The plaintiff must prove that the defendant owed the plaintiff some duty of care; that by some act or omission the defendant breached that duty; and that the act or omission proximately caused some injury to the plaintiff that is compensable by damages. When we say that a defendant is “negligent,” we are merely saying the defendant owed some duty of care to another yet failed to abide by that duty.**” *Hersh v. E-T Enterprises, Ltd. P’ship*, 232 W. Va. 305, 310, 752 S.E.2d 336, 341 (2013) (emphasis added). *See also, e.g.,* Syl. pt. 2, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983) (holding “[i]n order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.”). In sum, it is crucial that a duty must first be owed to later be broken; therefore, the Court finds it is necessary to determine whether the employer/defendant owed a duty to the

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<sup>7</sup> “Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish the retaliatory discharge. In addition, the employee must prove that the intolerable conditions that caused the employee to quit were created by the employer and were related to those facts that gave rise to the retaliatory discharge. In order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer’s actions were taken with a specific intent to cause the plaintiff to quit.” *See* Syl. Pts. 5,6 *Slack*, *supra*.

employee/plaintiff to protect them from the criminal acts of a third party, or in this case Connie Ables' son-in-law. If such a duty cannot be established then it goes without question that the plaintiff has failed to set forth a claim for which relief can be granted.

***The Imposition of Duty and the Employee-Employer (Master-Servant) Relationship***

“The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” Syl. Pt. 4, *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197 (2004), quoting Syl. Pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2004).

When framed in the context of the present case, the Court must determine as a matter of law whether this employer had a duty to protect this employee from the deliberate criminal actions of her client's son-in-law. With respect to this issue, the Court notes that as a general rule of common law, a person owes no duty to protect others from the deliberate criminal conduct of third parties. See *Miller v. Whitworth*, 193 W.Va. 262, 266; 455 S.E.2d 821, 825 (1995). This tenet of common law is subject to two general exceptions: (1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct; and (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct. *Id.*

With respect to the first exception, there are four (4) instances where a special relationship has been said to give rise to such a duty: (1) a common carrier; (2) innkeepers; (3) a possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to an invitation; one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal

opportunities for protection is under a similar duty to the other. *See* n.4 *Miller v. Whitworth*, 193 W.Va. 262, 455 S.E.2d 821 (1995), *citing* Restatement of Torts (Second) § 314A (1965). Noticeably absent from this list is the employer/employee relationship.

While *Whitworth*, deals specifically with the landlord/tenant relationship, it has rationale that is nevertheless instructive, in part to the Court's determination in this case. *Whitworth* was a case of first impression for the West Virginia Supreme Court wherein it was presented with a mobile home park tenant who brought suit against the landlord following an attack by a fellow tenant. The *Whitworth* Court following the majority of other jurisdictions, declined under the 'special relationship' exception to find a special relationship existed between a landlord and tenant which would ultimately impose a duty on the landlord to protect the tenant from the criminal activity of a third party; specifically noting that a landlord should not have a duty to protect tenants from criminal activity of a third person *merely* because there is a landlord/tenant relationship *Id.* at 266-67 825-26. (emphasis added).

Likewise, under the facts of the present case, the Court is of the opinion that the same is true of employer/employee relationship, viz., that an employer should not have a duty to protect employees from the criminal activity of a third party *merely* based on the premise that there is an employer/employee relationship. This conclusion is further supported by the fact that no West Virginia Supreme Court decision has subsequently elevated the employer/employee relationship into the list of 'special relationship' exceptions. As such, with respect to the 'special relationship' exception this Court declines to find as a matter of law, that the plaintiff owed a duty to protect the defendant from the criminal conduct of Connie Ables' son-in-law based solely on the existence of an employer/employee relationship. Therefore, the plaintiff fails to state a claim upon which relief can be granted.

With respect to the second exception, The *Whitworth* Court concluded that such a duty can only arise when the landlord could reasonably foresee that his own actions or omissions have unreasonably created or increased the risk of injury from the intentional criminal activity, and such a determination requires a case-by-case analysis. *Id.* at 266, 826.<sup>8</sup> While *Whitworth* recognizes a “reasonably foreseeable” standard, this standard is not applicable in the present case. This instant case involves the distinct situation of an employee bringing suit against an employer to recover for the criminal conduct of a third party, a factual scenario that was addressed by the West Virginia Supreme Court in *Blake v. John Skidmore Truck Stop, Inc.*, 201 W.Va. 126, 493 S.E.2d 887 (1997). The *Blake* Court specifically addressed that while the West Virginia Workers’ Compensation Act generally granted immunity to employers from suit by employees, there was a narrow limited circumstance under which an employer’s immunity could be lost. In that respect the *Blake* Court stated, in part:

“[I]n revising the [West Virginia Code § 23-4-2] statute, the legislature specifically emphasized, in part, that the Workers’ Compensation Act is designed ‘to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided...’ W.Va. Code § 23-4-2(c)(1)...the legislature stated that it was its express intention ‘to create a legislative standard for loss of ... [employer] immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct....’” *Id.* at 891, 130.

The *Blake* Court ultimately held:

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<sup>8</sup> In this respect, the *Whitworth* Court held that while the landlord/tenant relationship does not impose a duty by the very nature of the relationship alone, there are certain circumstances under which such a duty may be imposed on the landlord. In this respect, *Whitworth*, following the insight of other jurisdictions, enumerated that circumstances in which the landlord’s own affirmative actions or omissions may impose a duty to protect the tenant from the criminal activity of a third party, noting that while the landlord is not an insurer of his tenants’ safety *he is certainly is no bystander. Id.* (emphasis in the original). The holding in *Whitworth* stressed however, that it would be absurd to expect landlords to protect tenants against all crime since it is foreseeable anywhere in the United States *Id.*

**“Having carefully examined our statute and finding no explicit impediments contained therein, we likewise hold that the fact that an employee who suffers injuries as the result of the criminal act of a third party does not preclude the assertion of a deliberate intention cause of action against an employer. In order to prevail, however, such employee must meet the five-factor test set forth in West Virginia Code § 23-4-2(c)(2)(ii) (1985).” *Id.* at 895, 134 (emphasis added).**

As this holding is the only case wherein our Supreme Court has recognized an employer may have a potential duty to protect an employee for the criminal conduct of a third party, and considering that the fulcrum of the plaintiff's case rests exclusively on the alleged criminal conduct of the defendant's client Connie Ables' son-in-law; this Court is of the opinion, that in the present case, in order for the plaintiff to establish the defendant owed her a duty, the plaintiff must meet the five-factor test established by W. Va. Code § 23-4-2(c)(2)(ii) in order to maintain her causes of action for constructive discharge and outrage. The Court will now analyze the present case under those factors.

#### *The Five-Factor Test*

Of importance to this Court's determination is the language set forth in West Virginia Code § 23-4-2(c)(2)(i)-(ii) which provides:

(2) The immunity from suit provided under this section and under section six-a [§ 23-2-6a], article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with “deliberate intention.” This requirement may be satisfied only if:

(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravate; or (C) willful wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) that a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) that the employer prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of the risk and the strong probability of serious injury or death presented by the specific unsafe working condition

(C) that the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) that notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed and employee to the specific unsafe working condition; and

(E) that the employee exposed suffered serious compensable injury or compensable death as defined in section one [§23-4-1], article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition. W.Va. Code § 23-4-2(c)(2)(i)-(ii) (2005) (Repl. Vol. 2014).

Furthermore, pursuant to West Virginia Code § 23-4-2(c)(2)(ii), a plaintiff must satisfy each element the following five-factor test in order to maintain a cause of action.<sup>9</sup>

When viewing the Complaint in light most favorable to the plaintiff, and when viewing those facts in conjunction with the five-factor test outlined above, the Court is of the opinion that

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<sup>9</sup> See, e.g., Syl. Pt. 2, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991); Syl. Pt. 4, *Blake v. John Skidmore Truck Stop, Inc.*, 201 W.Va. 126 (1997), “to establish ‘deliberate intention’ in an action under [West Virginia] Code, 23-4-2(c)(2)(ii), a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements.”

the plaintiff cannot successfully satisfy each of those factors; and therefore, as a matter of law, the plaintiff has failed to state a claim upon which relief can be granted. The first factor requires a showing *that a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death.* In this regard, the plaintiff has failed to prove this factor. The plaintiff was hired as a 'homemaker' to provide in-home services to clients, not third parties, or stated another way, the plaintiff's job was to care for client Connie Ables within her home, not the client's son-in-law.

There are no facts set forth to show that Connie Ables' home, the plaintiff's workplace, presented a high degree of risk and strong probability of serious injury or death. In other words, nothing in the Complaint outlines sufficient facts to show that a specific unsafe working condition existed. In fact, the only scenario remotely outlined in the Complaint is that a third-party allegedly vandalized the plaintiff's vehicle in an unspecified area extraneous to the client's home, the sole confines of the plaintiff's workplace. Therefore, the Court finds that the plaintiff has uniformly failed to meet her burden of proof, which is fatal to her cause of action as a whole.

#### ***Remaining Factors (B) through (E)***

With respect to the remaining factors (B) through (E), the Court finds it unnecessary to analyze the facts of this case in conjunction with those factors because the plaintiff cannot establish a specific unsafe working condition as required by law. It would be futile for the Court to further address those factors because the establishment of a specific unsafe working condition is tantamount to meeting each of those elements' burden of proof.

#### **OUTRAGE CLAIM**

Having already determined that the plaintiff has failed to establish that the defendant owed a duty to protect her from the criminal conduct of Connie Ables' son-in-law, the Court

finds this claim, for the tort of outrage, also fails as a matter of law for the reasons previously set forth above.

Likewise, the Court further holds that for the same reasons enumerated herein, that the plaintiff has failed to set forth a claim upon which relief can be granted. As such, this claim, and subsequently, the Complaint is wholly dismissed with prejudice.

**AS TO W.VA. CODE § 21-3-1**

Although, the Court has already determined that dismissal of this Complaint is proper, for the sake of argument, the Court finds it necessary to briefly address West Virginia Code § 21-3-1, the statute cited by the plaintiff in the Amended Complaint and subsequent memorandum as the 'substantial public policy' violation. However, as the Court previously discussed *supra*, the ultimate issue is duty, and therefore, the Court look to the aforementioned statute to determine if it imposes a duty upon an employer to protect employees from the criminal conduct of third parties. West Virginia Code § 21-3-1 states in its entirety:

**Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render employment and the place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees: Provided, that as used in this section, the terms "safe" or "safety" as applied to any employment, place of employment, place of public assembly or public building, shall include, without being restricted hereby, conditions and methods of sanitation and hygiene reasonably necessary for the protection of the life, health, safety, or welfare of employees or the public.**

**Every employer and every owner of a place of employment, place of public assembly, or a public building, now or hereafter constructed, shall so construct, repair and maintain the same as to render it reasonably safe.**

When an accident occurs in any place of employment or public institution which results in injury to any employee, the employer or owner of such place of employment or public institution, when the same shall come to his knowledge, shall provide the commissioner of labor the necessary information as to cause of the injury, on blanks furnished free of charge to the employer and prescribed by the commissioner of labor.

Moreover, while the statute also imposes liability on an owner of the place of employment, this exception also fails in terms of establishing liability on the defendant in this case because the defendant does not own, lease or otherwise have a right to possession and/or ownership of client Connie Ables' property where the alleged acts occurred. This finding is further supported by the long recognized common law tort principle that the owner or occupant of a premises owes to an invited person a duty to exercise ordinary care to keep and maintain the premises in a reasonably safe condition, including exercising ordinary care to protect an invited person from injury inflicted by other persons present on such premises.<sup>10</sup> Again, the defendant is neither the owner nor occupant of the premises where the alleged criminal acts occurred and therefore, as a matter of law, the imposition of a duty upon the present defendant is neither practical nor supported by law. As such, the plaintiff's Complaint must be dismissed with prejudice.

Finally, it should be noted that this Complaint, even in its amended form, is so sparsely populated with facts that it would not be proper for this Court to relieve the plaintiff of her obligation to "set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist,"<sup>11</sup> and in essence, to read into the Complaint, facts and inferences which are simply not there. This is especially true after the Court afforded plaintiff's counsel twenty (20) days to correct the deficiencies in the original complaint.

As such, the Court finds that as a matter of law the plaintiff has failed to set forth sufficient facts to establish a viable claim upon which relief could be granted. Wherefore, the Court hereby dismisses this case with prejudice.

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<sup>10</sup> See, e.g., Syl. Pt. 5, *Doe v. Wal-Mart Stores, Inc.*, 198 W.Va. 100, 479 S.E.2d 610 (1996).

<sup>11</sup> See *Fass, supra*.

**CONCLUSION**

Based on the foregoing, it is accordingly **ADJUDGED** and **ORDERED** that the above-styled action is hereby **DISMISSED WITH PREJUDICE** and **STRICKEN** from the active docket of this Court.

The parties' objections and exceptions are noted by the Court.

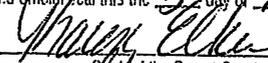
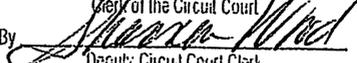
The Clerk is directed to send certified copies of this Order to counsel of record, forthwith.

ENTERED this 28 day of October, 2014.

  
\_\_\_\_\_  
JACK ALSOP, JUDGE

STATE OF WV  
COUNTY OF GILMER, to-wit:

I, Karen Elkin, Clerk of the Circuit Court and Family Court of Gilmer County, do hereby certify that the foregoing is a true copy of an order entered in the above styled action on the 5 day of November, 2014.  
Given under my hand and official seal this the 5 day of November, 2014.

  
\_\_\_\_\_  
Clerk of the Circuit Court  
By   
\_\_\_\_\_  
Deputy Circuit Court Clerk