

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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SUSAN NUTTER,

Plaintiff,

v.

Civil Action No. 11-C-1335
Honorable Tod J. Kaufman

HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION,
a West Virginia corporation,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT
AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL**

On a previous day, came the plaintiff, Susan Nutter, by counsel, Marvin W. Masters and Kelly Elswick-Hall, and the defendant, by counsel, Bryan Cokeley for a hearing on defendant's motion for judgment as a matter of law or, in the alternative, for a new trial. Based upon a review of the motions, briefs of the parties, hearing the arguments of counsel, and a review of the record in this matter, the Court hereby denies defendant's motion. The Court finds that the defendant has not met its burden under Rule 50 or Rule 59 and the jury verdict and judgment thereon should be affirmed. The Court further finds and orders as follows:

I. FINDINGS OF FACT

This matter was tried to a jury beginning on and continued for days. The lengthy trial testimony and documentary evidence showed, *inter alia*, the following:

Susan Nutter was an experienced registered nurse. Susan first started nursing in 1974. Her positions included head nurse in the recovery room, clinician manager, supervisor of night shift and ICU nurse at St. Francis for approximately 20 years. She worked in many divisions at

CAMC, as a critical care staff nurse. She was a dialysis nurse and a nurse at a nursing home facility. In approximately August 2008, she began working for the defendant, Thomas Memorial Hospital, as a charge nurse in the geriatric psychiatric unit, called the "Med-Psych Unit." She testified that she was told upon hire that as charge nurse she was to "trouble shoot" the unit.

After working on this unit a short time, the plaintiff testified that she discovered problems with the unit and advised her supervisors regarding safety concerns and what she believe to be possible violations of law if not corrected. The plaintiff testified that she believed that she was supposed to do that based on her directions and her training. Evidence shows that Thomas Hospital's policies contain protections for employees who bring these types of concerns to their supervisors. The plaintiff testified that her complaints to her superiors included:

- a. patients were not getting physical therapy as ordered or recreation therapy, and questioning whether the hospital was billing for said services and seeking assurances that such practice did not constitute not Medicare fraud;
- b. complaining about patient care issues, such as the fact there were no showers available on the floor for patient use, there were no defibrillators on the unit in case someone "coded," and the patients were not being given skid proof socks;
- c. questioning whether the defendants were creating a cycle of funneling patients back to the hospital from nursing homes by failing to provide continuing medication orders with patients when they were discharged to their respective nursing homes;

- d. nurses improperly calling in prescriptions to pharmacies without a written order or prescription from a physician, which she believed was not permissible in a hospital setting.

The plaintiff testified that, within the first 90 days she was employed, she pointed out to the defendant that recreation therapy was listed as being performed with patients, when it was not. Also, the testimony of several witnesses showed that the majority of patients on her unit were mentally compromised elderly persons. Typically, these patients would be transferred from nursing homes for needed hospital care, and then would be returned from the hospital back to the nursing home. The plaintiff testified that, while at the hospital, the patient's medication would be adjusted or new medication instituted and their condition would improve enough for discharge. However, the plaintiff testified that defendant Thomas Hospital had a practice of discharging the patients without orders for coordinating continued medications. The plaintiff testified that, as a result, once the patients were sent back to the nursing home or other facility and the hospital medications expired, they would regress back to their prior, unacceptable state and need to be brought back to the hospital again in short order for treatment and stabilization. The plaintiff testified that she received complaints from patients' family members about it and recognized this pattern herself.

Testimony showed that Susan suggested to her nurse management and others and advocated that the patients' medication should be coordinated, so they would not have revolving hospitalization cycles. In addition, plaintiff testified that this revolving door type of treatment meant repeated hospitalizations and possible repeated billing to Medicare and Medicaid, all of which concerned her.

The nearly undisputed evidence showed that the Med-Psych unit was understaffed. It was undisputed during testimony that a significant number of the patients had dementia or Alzheimer's and were mobile. The documentary evidence showed that the criteria for admission to the locked-down, Med-Psych unit was that the patient was a danger to themselves or others. All were "high-maintenance" and required close monitoring and care. The plaintiff presented documentary evidence from Medicare "CMS" audits showing that the regulations require that the hospital provide sufficient staff so that each patient has available a registered nurse to care for them at bedside, when needed. The jury could reasonably conclude from the testimony from witnesses that Thomas Hospital did not comply with this regulation. Plaintiff presented documentary evidence showing that Thomas was cited repeatedly during CMS audits on numerous bases including its failure to provide sufficient staff.

The plaintiff testified that she was told when she was hired that she would have a unit clerk and sufficient amount staff to assist her with the charting and paper work required, so she could spend the time needed on patient care. She testified that the defendant Thomas was not truthful about this and most often she did not have this assistance. Plaintiff testified that although she complained, she was left to try to care for her challenging patients during her shift. According to multiple witnesses who testified, this was the plaintiff's priority. Plaintiff testified that she was required to complete charting when she could and, when she would stay over her shift to complete charting, management would be angry because they did not want the overtime. She testified that this placed her in a position where she had to work without pay, at times.

The plaintiff testified that, as a charge nurse of the floor who was in charge of the floor, she was written up by her supervisor for not allowing another staff member to go home early. The jury heard that the plaintiff needed the staff member to stay because she needed to be available at

bedside for a dying patient, who subsequently died during that shift. She testified that she needed the other staff member, who was not an R.N., to be available for the other patients.

The jury could reasonably conclude from the evidence that there was not enough staff for the R.N.'s to take reasonable or proper breaks. The unit required that an R.N. be present on the floor at all times, but the undisputed evidence was that there was only one R.N. per shift assigned to the unit. Plaintiff testified that she would have to call other units to see if someone could come to relieve her, but the other units were understaffed as well, so often they could not relieve her. The supervisors testified that they worked mostly days and plaintiff testified that they were often not available. The time records and testimony showed that the plaintiff would work oftentimes twelve or thirteen hour shifts with no breaks. Evidence showed that the plaintiff was written up for taking a short break to get herself together, after caring for and holding a patient's hand while she passed away. This occurred only two weeks or so after the plaintiff's mother had died. The plaintiff testified that she left a physician's assistant on the unit when she took the break, in order to compose herself because she was upset.

The plaintiff testified that she was instructed during her training at Thomas that nurses were to call in prescriptions for patients to pharmacies without a written order or prescription from a physician, which she testified is not permitted in a hospital setting. A supervisor acknowledged in testimony the calling in of prescriptions. The plaintiff testified that she tried to remedy the situation by obtaining a form for the nurses to use to have the physician sign and the plaintiff advised her supervisor, who was also a nurse, of the improper practice. The plaintiff testified that this was met with open hostility from her supervisor and the other nurses. Eventually, plaintiff testified that a notice was posted in the hospital saying that this practice was no longer permitted.

The plaintiff testified that she received retaliation as a result of her requests and her complaints. The plaintiff's testimony indicated that management became openly hostile toward Susan and took action against her to "drive her out" or to fabricate reasons to fire her, discrediting her and placing her on "improvement periods." The evidence showed that, eventually, management accused Susan of intentional, improper charting, and wrongfully terminated her on or about November 16, 2009.

The defendant then filed a complaint against the plaintiff with the Board of Nursing, accusing her of intentional, improper and fraudulent charting. It was the plaintiff's position that defendant did this in order to discredit Susan and cover up the wrongful conduct. Thomas supervisory witnesses admitted that it knew the complaint would damage the plaintiff's ability to obtain another job as a nurse. The plaintiff testified that she was required to report the pending charges against her to any potential employer and that she also had to explain her termination from Thomas. As a result, the plaintiff testified that she could not get a job as a traditional RN at other hospitals or medical facilities because of the firing and complaint to the Board. Documentary evidence showed that the Board of Nursing eventually upheld the plaintiff's license after many months.

The plaintiff's complaint asserted that the defendant retaliated against her in furtherance of a plan, scheme or design to wrongfully terminate her employment because of her above described actions and statements. The plaintiff further asserted that the acts and conduct of the defendant in furtherance of the conspiracy, plan, scheme or design included filing a complaint with the Nurse Licensure Board in an effort to adversely affect her credibility and prevent the plaintiff from earning income and to injure her reputation.

The plaintiff's complaint asserted that the aforesaid acts and conduct of the defendant were willful, wrongful, deliberate, malicious, in conscious disregard of her rights, in contravention of substantial public policy, outrageous, reckless and/or extremely negligent. The plaintiff further asserted that the acts and conduct of the defendant as previously set forth were intentional and/or reckless and were outrageous and offend the generally accepted standards of decency and morality of the community.

Plaintiff's complaint asserts that, as a direct and proximate result of the defendants' outrageous acts and conduct, the plaintiff suffered severe emotional distress, embarrassment and humiliation.

Defendant asserted that it terminated the plaintiff because she intentionally charted medication education therapy that she did not perform and that it was required to report her actions to the Board of Nursing.

The evidence showed that, after her termination from Thomas, she was without income. She testified that she was unable to find a job from her termination on November 16, 2009 through June of 2012, resulting in a loss of income for that time period. She testified that the only employment she obtained since her termination was as a part time home health aide and house keeper from approximately August 2012 to March 2013, three days a week, at six or less hours per day, at \$12.00 per hour, and part time care giver and housekeeper from approximately June of 2012 to the present at \$400.00 per month. She testified that the duties in these positions including cleaning house, cooking meals and assisting people in activities of daily living and taking them to doctor appointments.

The plaintiff testified that she attempted to obtain further training in hopes to improve her employability outside the medical field and started classes for paralegal training, but had to stop because of the cost involved.

Plaintiff and plaintiff's expert psychologist testified that her financial duress and worry about her career and her future caused Susan to suffer major depression and anxiety. Plaintiff presented documentary evidence of counseling with Licensed Counselor Amy Williams from March 18, 2011 through October 12, 2011. Plaintiff's expert psychologist testified that she requires continued treatment, estimated to cost approximately \$30,860.00.

The testimony of all witnesses was that the defendant fired the plaintiff accusing her of fraudulent charting. The jury heard all of the evidence and found this allegation proved to be false. With regard to these allegations against the plaintiff, Sarala Sasidharan, who was a supervisor at Thomas Hospital, testified by deposition at trial. The jury heard testimony that, on one day, Susan charted from 12:00 to 12:45, that she was providing medication education to her nine patients on her floor. It appeared that from 11:45 to 12:25, the recreation therapist was showing a video. The music therapist checked "group" for her services. The management and their witnesses testified that, according to the chart, the patients were participating in a group watching the video and, therefore, could not have had medication counseling, or that Susan did not give medication counseling, when she checked that she did.

The jury saw from the medical records submitted into evidence for these patients that, of the nine patients involved, only one of them went to see the film shown by the music therapist. The others were documented in "bed checks" as being elsewhere. Therefore, the Court finds that the jury could reasonably conclude that the other eight were available to receive the medication counseling from Susan. With regard to the remaining patient who watched the film, it ended at

12:25, from which the jury could reasonably find it would give the plaintiff enough time to provide medication counseling between 12:25 and 12:45 to that particular patient. One supervisor testified that it was possible to do all of the medication counseling for the nine patients after 12:25. Further, some of the patients could have been pulled aside to give individual counseling during the film. The plaintiff testified that she actually provided the medication therapy to the patients.

Defendant witnesses testified that they spoke with patients after the fact, who said that they did not remember receiving medication education or seeing the plaintiff, but the jury heard testimony from witnesses that patients had dementia and were otherwise severely mentally compromised.

The jury heard testimony from a supervisor that the recreation therapist had erroneously charted her activity, as well. The supervisor testified that the music therapist made an error by checking group therapy, when there was only one person. The documents showed that the recreation therapist charted that her music therapy was group therapy, when there was only one person there. The defendant's witnesses testified that they made the determination that plaintiff did something intentionally wrong, while the recreation therapist did not do something wrong. The jury heard testimony that the defendant did not perform any discipline on the recreation therapist. The jury heard testimony that the defendant fired Susan and then filed a Board of Nursing complaint against her.

The plaintiff testified that the defendants did not give meaningful opportunity to explain herself or discuss the matter before they decided to fire her. The supervisor Sarala Sasidharan admitted that the decision to fire the plaintiff was made before the meeting. The supervisor further testified that she did not do any independent investigation of the allegations made against

the plaintiff before firing her. The plaintiff argued that the defendant's real reason for firing Susan was her complaints about improper practices in the unit.

The plaintiff presented testimony from more than one witness that she was hired as a charge nurse and was told she would receive a rate of pay over and above what a registered nurse in her department would be paid for shifts where she was the charge nurse. The difference was \$1.00 per hour. However, the records presented by plaintiff showed that she was not paid the proper rate of pay for a charge nurse. At various times, the records showed that the defendants did not pay her at the charge nurse rate of pay. The plaintiff testified that she requested a correction during her employment. The records showed that, when she was fired, defendants did not go back and pay her the charge nurse pay. Supervisor Christina Edens essentially admitted that as a charge nurse, Susan should have been receiving the higher rate of pay for the shifts she worked as a charge nurse. Plaintiff argued that this conduct violated applicable law including, but not limited to, West Virginia Code §21-5-3 and §21-5-4.

II. STANDARDS OF POST-TRIAL REVIEW

A. Standard of Review Under R. Civ. P. 50(b).

"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus point 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

A motion for judgment notwithstanding the verdict “may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. Where there is sufficient conflicting evidence, or insufficient evidence to conclusively establish the movant’s case, judgment notwithstanding the verdict should not be granted.” *McClung*, 178 W.Va. at 453, 360 S.E.2d at 230–31. *Mace v. Charleston Area Medical Center Foundation, Inc.*, 422 S.E.2d 624, 633, 188 W.Va. 57 (1992)

B. Standard of Review Under R. Civ. P. 59.

“A new trial may be granted to all or any of the parties and on all or part of the issues [] in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law[.]” W.Va.R.Civ.P. 59. *Accord In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 124, 454 S.E.2d 413, 418 (1994). “As we have cautioned, the power to grant a new trial should be used with care, and a circuit judge `should rarely grant a new trial.’ *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 124, 454 S.E.2d 413, 418 (1994).” *Gerver v. Benavides*, 207 W.Va. 228, 231, 530 S.E.2d 701, 704 (1999) (per curiam).

“Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. . . .” *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. at 124, 454 S.E.2d at 418 (quoting 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* §2803 at 32-33 (footnotes omitted)). The appellate court “will reverse a circuit court order setting aside a jury verdict when a consideration of all the evidence clearly shows that the case was properly one for jury determination.” *Gerver v. Benavides*, 207 W.Va. at 232, 530 S.E.2d at 705 (citing Syl. Pt. 1, *Utter v. United Hospital Center, Inc.*, 160 W.Va. 703, 236 S.E.2d 213 (1977)).

“A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the *West Virginia Rules of Civil Procedure*, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. Only if the trial judge finds the verdict is **against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice**, may the trial judge set aside the verdict, and grant a new trial. A trial judge’s decision whether or not to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.” Syl. Pt. 3, *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994) (emphasis added). *Accord* Syl. Pt. 1, *Gum v. Dudley*, 202 W.Va. 477, 505 S.E.2d 391 (1997).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Wrongful Discharge

The Court finds that the plaintiff identified a substantial public policy upon which to base her claim and provided sufficient evidence from which a reasonable jury could conclude that there was a nexus between those public policies and the plaintiff’s termination.

“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.” Syllabus, *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978). “To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.”

Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111, 122, 506 S.E.2d 554, 565 (1997)

As explained in *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 122-23, 506 S.E.2d 554, 565-66 (1997), in numerous prior decisions, our Court has identified specific instances of what qualifies as substantial public policy. *See, e.g.*, Syl. Pt. 4, *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996) (finding substantial public policy violation when at-will employee was discharged based on concern that employee has given or may be called to give truthful testimony in legal action); Syl. Pt. 4, *Roberts v. Adkins*, 191 W.Va. 215, 444 S.E.2d 725 (1994) (holding that cause of action for wrongful discharge may exist under West Virginia Code § 21-5-5, which sets forth criminal liability for employers who coerce employees to purchase goods in lieu of wages); *Slack v. Kanawha County Hous. & Redevelopment Auth.*, 188 W.Va. 144, 423 S.E.2d 547 (1992) (finding generally that substantial public policy implicated where employee brings attention of federal prosecutors to improprieties in operation of housing authority); Syl. Pt. 2, *Lilly v. Overnight Transp. Co.*, 188 W.Va. 538, 425 S.E.2d 214 (1992) (holding that substantial public policy is predicated upon West Virginia Code § 17C-15-1(a), § 17C-15-31 and § 24A-5-5(j), relating to operation of motor vehicle with brakes in unsafe working condition); Syl. Pt. 2, *Collins v. Elkay Mining Co.*, 179 W.Va. 549, 371 S.E.2d 46 (1988) (holding that substantial public policy arises from West Virginia Mine Safety Act, West Virginia Code § 22A-1A-20); Syl. Pt. 2, *McClung v. Marion County Comm'n*, 178 W.Va. 444, 360 S.E.2d 221 (1987) (holding that substantial public policy is grounded in Wage and Hour Act, West Virginia Code § 21-5C-8); Syl. Pt. 2, *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980) (holding that substantial public policy arises from Workers' Compensation Act, West Virginia Code § 23-5A-1).

In *Mace*, the employee asserted that a substantial public policy emanated from a state West Virginia Code of State Regulations § 64-12-14.2.4(1987), a regulation promulgated by the West Virginia Board of Health as part of a regulatory scheme governing the licensure of hospitals. That regulation provided, *inter alia*, that:

14.2.4. There shall be an adequate number of licensed registered professional nurses to meet the following minimum staff requirements:

....

d. A registered professional nurse shall be on duty and immediately available for bedside care of any patient when needed on each shift, 24 hours per day and seven days a week.

e. Licensed practical nurses as needed to supplement registered professional nurses in appropriate ratio to professional nurses.

The Court finds that this provision is very similar and, in part, identical to one of the public policies asserted by Susan Nutter and of which this Court instructed the jury:

[T]he Court instructs the jury that in 2008 through 2009, the following regulations were in effect, which are statements of public policy:

1. Standard 42 CFR 482.23 (b): Public policy requires that there be adequate personnel available in each unit of a hospital to ensure that there is the immediate availability of a registered nurse for bedside care of any patient when needed.
2. Standard 42 CFR 482.24(c)(1): All orders must be authenticated based upon Federal and State law. All orders, including verbal orders, must be dated, timed and authenticated promptly by the ordering practitioner or another practitioner who is responsible for the care of the patient and authorized to write orders in accordance with State law.
3. Standard 42 CFR 482.43(a): The hospital must identify at an early stage of hospitalization all patients who are likely to suffer adverse health consequences upon discharge if there is no adequate discharge planning.
4. Standard 42 CFR 482.43 (d): The hospital must transfer or refer patients, along with the necessary medical information, to appropriate facilities, agencies or outpatients services, as needed, for follow-up or ancillary care.
5. Standard 42 CFR 482.24(c)(2)(vii): All records must document the following as appropriate: Discharge Summary with outcome of hospitalization,

disposition of care and provisions for follow up care.

6. Standard 42 CFR 482.21 (e) (2): Public policy requires that the hospital governing body, medical staff, and administrative officials are responsible and accountable for ensuring that the hospital-wide quality assessment and performance improvement efforts address priorities for improved quality of care and that improvement actions are evaluated.

In its brief, the defendant argues that these regulations do not constitute substantial public policy. In *Tudor*, CAMC made the same argument Thomas Hospital makes to this Court and relied upon the same case of *Birthisel v. Tri-Cities Health Services Corp.*, 188 W.Va. 371, 424 S.E.2d 606 (1992) and the West Virginia Supreme Court rejected it:

The Appellants maintain that because this regulation is “too general to provide any specific guidance or is so vague that it is subject to different interpretations[,]” they should not be exposed to liability under this Court's pronouncements in *Birthisel*. See 188 W.Va. at 377, 424 S.E.2d at 612. In *Birthisel*, the plaintiff relied upon general admonitions relating to the requirement of good care for patients by social workers found in regulations established by the West Virginia Social Work Board as a basis for her retaliatory discharge claim, when she was forced to resign because of her failure to transfer data from various records onto master treatment plans. Finding that those general admonitions “contain[ed] no specific provision relating to a patient's record review” and were “extremely general,” this Court concluded that the regulations “d[id] not constitute a specific statement of public policy.” *Id.* at 379, 424 S.E.2d at 614. In arriving at this conclusion, we further noted in *Birthisel*, however, that “ ‘[t]he employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes[.]’ ” *Id.* at 377, 424 S.E.2d at 612 (quoting *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1095, 4 Cal.Rptr.2d 874, 882, 824 P.2d 680, 688 (1992)). In the instant case, it does not take an in-depth analysis for this Court to hold that West Virginia Code of State Regulations § 64-12-14.2.4 sets forth a specific statement of a substantial public policy which contemplates that a hospital unit will be properly staffed to accommodate the regulation's directive; to ensure that patients are protected from inadequate staffing practices; and to assure that medical care is provided to hospital patients, especially children and young adolescents, who must depend upon others to protect their medical interests and needs.

Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111, 123-24, 506 S.E.2d 554, 566-67 (1997) [Emphasis added.]

There is additional support for plaintiff's position from the Northern District Court in *Weirton Health Partners, LLC v. Yates*, CIV.A. 5:09CV40, 2010 WL 785647 (N.D.W. Va. Mar.

4, 2010). Weirton Health argued that Yates' wrongful discharge claim had to be dismissed because it failed to establish that Weirton Health's conduct contravened any substantial public policy of the state of West Virginia. A couple of the legislative rules establishing the public policy Weirton Health was alleged to have contravened provided:

W. Va. Code § 16-5D-1(a), (b)

It is the policy of this state to encourage and promote the development and utilization of resources to ensure the effective care and treatment of persons who are dependent upon the services of others by reason of physical or mental impairment ...

... [I]t is the policy of this state to encourage, promote and require the maintenance of assisted living residences so as to ensure protection of the rights and dignity of those using the services of assisted living residences...

No assisted living residence may discharge or in any manner discriminate against any resident or employee for the reason that the resident or employee has filed a complaint or participated in any proceeding specified in this article.

Weirton Health Partners, LLC v. Yates, CIV.A. 5:09CV40, 2010 WL 785647 at p. 3 (N.D.W.

Va. Mar. 4, 2010) Like Thomas Hospital in this case, Weirton Health argued that these legislative rules did not constitute a specific statement of public policy because they were too general, relying *Birthisel*. After discussing *Birthisel*, the Northern District declined to follow it and, instead followed *Tudor*:

This Court agrees with Yates, however, that *Tudor v. Charleston Area Med. Ctr.*, 203 W.Va. 111, 506 S.E.2d 554 (W.Va.1997), provides more persuasive legal authority in relation to this action. There, the West Virginia Supreme Court held that rules similar to those at issue in this action stated a substantial public policy warranting a claim for constructive retaliatory discharge where the plaintiff, a registered nurse at a hospital, resigned after multiple failed attempts to persuade the hospital to comply with the staffing mandate provided by West Virginia Code of States Rules § 64-12-14.2.4. Syllabus Point 5 of that decision held:

West Virginia Code of State Regulations § 64-12-14.2.4 (1987) sets forth a specific statement of a substantial public policy which contemplates that a hospital unit will be properly staffed to accommodate the regulation's directive; to ensure that patients are protected from inadequate staffing practices; and to assure that medical care is provided to hospital patients, especially children and young adolescents, who must depend upon others to protect their medical interests and needs. Syl. Pt. 5, *Tudor*, 506 S.E.2d at 558.

As in *Tudor*, the legislative rules invoked in this action mandate certain conduct, including reporting practices, and they implicate medical welfare concerns for a vulnerable population. Given the similarities between this case and *Tudor*, this Court rejects Weirton Health's argument that Yates' wrongful discharge allegations fail to state a claim upon which relief can be granted.

Weirton Health Partners, LLC v. Yates, CIV.A. 5:09CV40, 2010 WL 785647 at p 4-5. (N.D.W. Va. Mar. 4, 2010) Likewise, the Court finds that all of the public policies asserted by Susan Nutter mandated certain conduct and implicated medical welfare concerns for a vulnerable population. Thus, the Court concludes that Susan Nutter established the existence of a substantial public policy to support her claim of wrongful discharge.

Thomas Hospital argues that the plaintiff did not identify constitutional provision, legislative enactments or regulations, or judicial opinions to support the Court's instruction on substantial public policies, including 1) for nurses to report issues regarding patient safety to her superior; 2) for nurses to report issues that could be violations for federal standards and law to her superior and 3) to prohibit employers from terminating an at will employee if a substantial motivation for that termination is that employee reporting patient safety issues. The Court finds that these are fundamental public policies and consistent with the case law enunciated in *Tudor* and *Yates*, discussed above. Second, defendant concedes that the plaintiff identified several regulations of the Centers for Medicare/Medicaid Services which this Court presented in jury instructions as sources of the public policy described. There is no requirement that a Court only read a statute or regulation to a jury. A court is permitted to, and indeed has a responsibility to, instruct the jury about those regulations in a meaningful way that a jury can understand. Here, the Court finds that it correctly provided the complete and proper instructions to the jury, with the supporting regulations.

The defendant argues that CMS regulations address whether a hospital can obtain Medicare and Medicaid reimbursement and these regulations requiring proper patient care are only "fiscal concerns," and not a matter of broad social interest. The Court finds that Medicare and Medicaid requires proper patient care for the safety of patients, not only to save money or

decide whether it will pay. The Court finds that Medicare and Medicaid use the reimbursement as a penalty, and a way to enforce its mandates for patient safety and, therefore, contain statements of important public policy.

Thomas claims that “the West Virginia legislature has not endorsed these regulations or ones similar to them of them.” The Court disagrees. Parts of language of one Medicare provision at issue in this case was adopted by our state, as it is identical in parts to the language found by our court in *Tudor* to constitute substantial public policy. Moreover, federal regulations apply to the defendant and are legitimate sources of public policy as stated in our case law. There is no requirement that our state adopt a federal regulation before it is deemed a source of public policy.

The defendant argues that the substantial public policies must provide specific guidance to a reasonable person, referencing *Birthisel*. Plaintiff presented evidence which showed the defendant knew about each of these policies, as it was cited multiple times for violations of them by CMS, had meetings and interviews with CMS and, in most instances, admitted to the violations. In this case, the plaintiff not only showed that a reasonable person would have specific guidance, plaintiff presented documentary evidence that the defendant had actual knowledge and actual guidance.

The plaintiff testified that she complained of nurses calling in prescriptions outside of licensure; services not being provided to patients; no defibrillator on the locked unit; understaffing; failure of the night staff to use hospital mandated non-slip socks; staff keeping patient’s bed rails up so they could not get out of bed, constituting a safety hazard and restraint that needed proper documentation; not having water available for patients who are on medications that require their kidneys to remain hydrated because certain staff did not want to be

changing beds all night; and not providing proper continuing discharge medication plans for patients, resulting in those patients cycling back to the hospital over and over, and failure to pay her charge nurse wages owed. The defendant's witnesses testified that plaintiff did not make these complaints and that safety complaints were not a motivation for Thomas discharging her. The defendant's witnesses testified that there were no written safety complaints made by the plaintiff. The jury heard the positions of both parties, weighed the evidence and credibility of the witnesses. The jury disagreed with the defendant.

The Court finds that there was sufficient evidence to support the determination made by the jury. Susan Nutter explained the reports she made about the problems to her supervisor and, at times, to higher ups, and steps she took to protect her patients. The fact that these problems and violations were occurring at Thomas was supported by the many citations by CMS to Thomas for the same or similar issues. Thomas supervisory personnel admitted in testimony to many of the violations.

In addition, Thomas elicited testimony from many witnesses in its attempt to show that Susan's reports of concerns were not a motivating factor for her discharge. The jury weighed that evidence and did not agree. The Court finds that determination was supported by sufficient evidence. Thomas's witnesses at times contradicted themselves and each other about reasons for terminating the plaintiff and did not explain its reasons to the satisfaction of the jury for not disciplining other employees for similar charting issues but firing the plaintiff and reporting her to the Board of Nursing, claiming intentional fraudulent charting. The plaintiff presented sufficient evidence from which a jury could reasonably conclude that Thomas maliciously fired her in retaliation and to discredit her.

As the Court is permitted to weigh the credibility of witnesses upon a Rule 59 motion for new trial, the Court finds that the testimony of the defendant's witnesses lacked sufficient credibility. The Court is in a unique position in its role to observe all of the witnesses, including their demeanor and manner of testifying, and to understand the believability, or lack thereof, of the defendant's witnesses. In addition, the Court finds that the plaintiff presented sufficient evidence from which a reasonable jury could conclude that her discharge was wrongfully motivated, that her discharge jeopardized and violated public policy, and that there was not a legitimate justification for her termination.¹

B. Infliction of Emotional Distress

The Court further finds that there was sufficient evidence to show outrageous conduct of Thomas Hospital in its treatment of Susan Nutter which justified the jury's decision to hold defendant accountable for intentional infliction of emotional distress.

Intentional or reckless infliction of emotional distress, also called the "tort of outrage," is recognized in West Virginia as a separate cause of action. To prevail on a tort of outrage claim, the following elements must be shown: "(1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the

¹ Thomas also argues briefly that the CMS violation notices did not pertain to the Med Psych unit. First, certain notices did apply to the Med Psych unit. Second, the Court finds that this is not relevant to whether a regulation states a substantial public policy. The defendant did not have to be cited for failure to comply with a federal regulation for that regulation to be a source of substantial public policy. This would be so even if Thomas never received a citation. Third, the Court finds that Thomas operates its hospital as a whole, including decisions about patient care and staffing, and to segregate it by floor or by different units on the same floor, as defendant proposes, is not proper public policy.

emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.” *Travis v. Alcon Laboratories, Inc.*, 504 S.E.2d 419, 425 (W. Va. 1998)

Our court has specifically held that a claim for the tort of outrage may exist where the employee has suffered emotional distress stemming from any improper conduct on the part of the employer in effecting such discharge. Where such a claim exists, you must weigh any conduct which surrounds the discharge, whether prior thereto, contemporaneous therewith, or subsequent thereto, so as to determine whether the employer's manner of effecting the discharge was outrageous. *Dzingski v. Weirton Steel Corp.*, No. 21888, slip. op. at 13 (W. Va. May 26, 1994).

In this case, there was sufficient evidence to show the outrageous conduct of Thomas Hospital in its treatment of Susan Nutter. The jury could reasonably conclude that particularly outrageous was the conduct that surrounded the plaintiff's firing. Susan was accused of intentionally and fraudulently charting treatment that she did not perform. Thomas did not simply say that Susan negligently charted or made a mistake in charting. It accused her of fraud. The jury could reasonably conclude that the testimony of Thomas's supervisors and employees, showed that this accusation was improperly supported, contradictory, and, a jury could conclude, hypocritical, as to constitute outrageous conduct in addition to a pretext for retaliation.

As explained above and from the testimony, the basis of the plaintiff's termination was that, on one day, she charted from 12:00 to 12:45, that she was providing medication education to patients, while it appears from the records that from 11:45 to 12:25, the recreational therapist was showing a video. The medical records reflect that the recreational therapist, Laura Woodrum, checked “group” for her services, meaning she was giving group therapy. The testimony indicated that the management told the plaintiff that she could not have performed the medication education sessions because the patients were participating in the “group,” i.e.,

watching the video and, therefore, could not have had medication education, or that the plaintiff did not give medication education, when she checked that she did. Every witness, nearly all of whom were hostile to the plaintiff, testified that this was the accusation made against Susan and this was the reason she was fired.

However, the jury saw the medical records for these patients which showed that, of the nine patients involved, only one of them went to see the film shown by the recreation therapist. The others were documented in bed checks by other employees as being elsewhere. Therefore, the other eight were not in a group with the recreational therapist and were available to receive the medication education from the plaintiff. With regard to the remaining one patient who watched the video, it ended at 12:25. The jury could reasonably conclude that this gave the plaintiff enough time to provide medication counseling between 12:25 and 12:45 to that particular patient. Assuming all nine watched the film, which the documentary evidence showed they did not, the supervisor Sidhartha testified that it was possible to do all of the medication counseling for the nine patients after 12:25. Further, some of the patients could have been pulled aside to give individual counseling during the film.

Susan Nutter testified that she was giving the medication education to the patients, one on one, during the period from 12:00 to 12:45. She testified that she would talk to a patient about their medications for a period of time, tend to whatever other need they may have, then go to the next patient and do the same, then come back around to the same patients to ask them about what they remembered about the medication education and to reinforce what they did not remember from the first time. She testified this was the only way she knew how to do it with mentally compromised patients that would have had a chance of sticking in their memory. She testified that she did this while being the only RN on the floor available for other patient care, which she

was required to perform at the same time. She testified that she did not have the time with the understaffing to record the ten minutes here with one patient, then five with another, then come back to the same patient for a few minutes, and back and forth, with all nine patients. Even if this were possible or practical, neither the plaintiff nor any other employee who testified, was trained or told that they had to chart this way. The jury saw from the records that other employees were charting this way, as discussed below. Regardless, the jury could reasonably determine from the evidence presented that the plaintiff actually provided the medication therapy to the patients.

The jury also saw from the Patient Observation Flow Sheets, or “bed checks” that another employee on the same shift, a medical technician Beverly Carnefix, with the very same patients, documented that she was giving “current events” education to patients. However, the medical technician documented that she was giving current events education to one patient in one room *at the same time* that she was giving current events training to a person in another room. That medical technician also documented giving current events education to one patient, where the records show that the patient was in the shower. The jury heard that nothing was done or even mentioned to this employee. The medical technician was not fired, was not accused of fraud, was not disciplined and was not spoken to by supervisors. These discrepancies were on the same records that Thomas Hospital showed to the jury to support their termination and accusations of fraud against Susan Nutter. The jury could reasonably conclude that this was outrageous conduct.

The supervisor, Sarala Sasidharan and others also admitted that the recreation therapist had erroneously charted her activity. She charted that her recreation therapy was group therapy, when in fact there was only one person there. The defendant did not explain in testimony how

they made the determination that the plaintiff did something intentionally wrong, while the recreation therapist did not. The supervisor admitted that the recreational therapist made an error by checking group therapy, when in fact there was only one person. The defendants did not discipline the recreation therapist. The defendant testified that it terminated the plaintiff, accused her of fraud, and then took it a step further and filed a Board of Nursing complaint against her. The jury could reasonably conclude from this evidence that the defendant was guilty of outrageous conduct against the plaintiff.

Furthermore, the defense and supervisors maintained throughout trial that Susan *intentionally committed fraud*, when the jury could reasonably conclude from the witness testimony that this was not true. This finding supports a verdict for the tort of outrage.

Further, the jury could reasonably conclude that the defendant did not allow the plaintiff any meaningful opportunity to address the charting issue or explain. Defendant witnesses testified that they spoke with patients after the fact, who did not remember seeing Susan that day for medication education therapy, but the patients admittedly had dementia and were otherwise severely mentally compromised.

The defendant argues in its brief and elicited certain witness testimony that they acted reasonably by bringing the plaintiff into the meeting and allowing her to explain the situation. However, the testimony from the supervisor, Sarala Sasidharan, was that the decision to fire the plaintiff was made before she ever arrived at the meeting. This supervisor further testified that she did not do any independent investigation of the allegations made against plaintiff before firing her. The jury could reasonably conclude that this was outrageous conduct.

Thomas Hospital filed a complaint against the plaintiff with the Board of Nursing, accusing her of intentional, fraudulent charting. From the testimony, the jury could reasonably

conclude that the accusations of intentional wrongdoing and fraud were without foundation. It further could reasonably conclude that the accusations were made in retaliation against the plaintiff. To take it a step further, and make accusations of intentional fraud to the Board of Nursing, which defendant admitted would affect her career, was further sufficient facts to support the jury's finding of extreme and outrageous conduct.

The Court further finds the evidence supported significant emotional and financial damage, embarrassment and humiliation as a result of the defendant's conduct. As a result of defendants' wrongful conduct, the plaintiff was without income that she relied upon to support herself, as explained above. The undisputed evidence was that she was unable to find a job from her termination on November 16, 2009 through June of 2012, resulting in a total loss of income for that time period. The only employment she has obtained since her termination was low wage, home health aide, house keeper or part time care giver.

Competent and undisputed expert evidence was presented showing that her financial duress and worry about her career and her future caused the plaintiff to suffer major depression and anxiety. She participated in counseling with Licensed Counselor Amy Williams from March 18, 2011 through October 12, 2011. Plaintiff's expert psychologist testified to the severe emotional distress suffered by Susan Nutter. His testimony was uncontroverted, as the defendants did not call any expert on the subject. As such, the testimony that plaintiff suffered severe emotion distress was essentially undisputed.

C. Defamation.

The Court finds that the plaintiff sufficiently pleaded a retaliatory discharge case and a case of defamation. The Court further finds that the evidence showed it was a continuing and intentional tort from which the defendant was not immune, that the defendant's assertion of

statute of limitations was untimely and, regardless of the pleading, damage to reputation is an element of damage available under other Counts for which the jury found defendant liable.

Defendant argues that plaintiff did not assert claim for defamation in her complaint.

However, in her complaint, Susan Nutter pleaded, *inter alia*:

That the acts and conduct of the defendants in furtherance of their conspiracy, plan, scheme or design consisted of, but were not limited to:

a. filing a complaint with the Nurse Licensure Board in an effort to prevent the plaintiff from earning income and to injure her reputation.

First, defamation or damage to reputation is an element of damage under a retaliatory discharge claim. The jury found the defendant liable for the wrongful discharge claim and the tort of outrage. Either of those counts support an award for damage to reputation.

Furthermore, the West Virginia Supreme Court of Appeals has adopted the standard for the sufficiency of complaints set forth by the United States Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed. 80 (1957). *See Chapman*, 236 S.E.2d at 212; *John W. Lodge Distrib. Co.*, 245 S.E.2d at 159; *Mandolidis*, 246 S.E.2d at 920. More precisely, in addressing the proper standard for notice pleading, the *Conley* Court explained:

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the acts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified "notice pleading" is made possible by liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule (8)f that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on

the merits. Cf. *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 58 S.Ct. 507, 82 L.Ed. 745.

(Emphases added; footnotes omitted).

As stated by the West Virginia Supreme Court of Appeals in *John W. Lodge Distrib. Co.*, 245 S.E.2d at 158-59, addressing a motion to dismiss for failure to state a claim:

'The trial court's inquiry [is] directed to whether the allegations constitute a statement of a claim under Rule 8(a).' *Chapman v. Kane Transfer Co.*, ___ W.Va. ___, 326 S.E.2d 207, 212 (1977). W.Va.R.Civ.P. 8(a) reads as follows: '(a) A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief . . .'

* * *

All that the pleader is required to do is set forth sufficient information to **outline the elements of his claim or to permit inferences to be drawn that these elements exist.** The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings. . . .

(Emphases added; citations omitted). *Accord Mandolidis*, 246 S.E.2d at 920-21; *Sesco*, 427 S.E.2d at 460-61. The complaint says that the defendant filed a Board of Nursing complaint against her to injure her reputation. The plaintiff's complaint, read in total, clearly meets the notice pleading standard. In addition, the defendant had further notice of the defamation allegations because, as plaintiff argues, almost all of the discovery centered around the allegations made by Thomas Hospital, which the plaintiff asserted were false.

Defendant claimed, for the first time in the middle of the trial, that it was entitled to immunity for the defamation. First, the Court finds that this immunity argument should have been made in a dispositive motion long before the trial, so it was untimely. Second, the Court finds that no one is immune for making an intentionally false report about someone to a Licensing Board.

Also for the first time in the middle of trial, after plaintiff had rested, the defendant argued that plaintiff's claim for defamation was barred by the statute of limitations and argues in its instant motion that the jury should not have been instructed regarding defamation for this reason. This is an affirmative defense, upon which the defendant bears the burden of proof. The Court finds the defendant's argument was untimely and improper, as explained by the West Virginia Supreme court in a similar situation in *Miller v. Lambert*, Sup Ct. No. 22727 (W.Va. 1995):

In the present case, however, the statute of limitations defense was insufficiently presented by the Lamberts. Although the Lamberts did include a statute of limitations defense within their answer, **they never attempted to raise the issue again prior to trial.** They never proposed a jury instruction on the statute of limitations. In fact, according to the record before us, they did nothing to effectively raise the issue again until this appeal. Great emphasis was placed upon the alleged estoppel and laches defenses, but the precise issue of the statute of limitations was never crystallized below. Having failed to make an adequate record below, the Lamberts cannot now remedy that deficiency.

[Emphasis added.] Likewise, although Thomas Hospital included a generic statute of limitations defense within their answer, it never attempted to raise the issue again prior to trial. It never listed any basis for this affirmative defense in answers to discovery or asserted the defense in any motions for summary judgment. It never proposed a jury instruction on the statute of limitations. It is clear that statute of limitations was an afterthought. Therefore, defendant's untimely assertion of the statute of limitations must be disregarded.

This is important because, where a tort involves a continuing or repeated injury, the cause of action accrues at the date of the last injury, *Handley v. Town of Shinnston*, 169 W.Va. 617, 289 S.E.2d 201 (1992), and the determination of the date upon which the statute begins to run in the case of a continuing tort is properly within the province of the jury. *Miller v. Lambert*, Sup. Ct. No. 22727 (W.Va. 1995). Here, because of the untimely assertion of the affirmative defense, the jury never got to consider or hear evidence about when the defamation cause of action

accrued. Had the plaintiff been aware that this was a serious affirmative defense, she could have presented evidence during the trial about the continuing wrongful actions of Thomas Hospital, including the defamatory communications to the Board of Medicine and up to trial, after Susan's termination, and the jury could have made a determination of when the statute began to run. She could have investigated statements made by Thomas to potential employers. She could have presented specific evidence about the date of her last injury, which was the last time she was denied employment because of the damage Thomas inflicted to her reputation.

The same was true for defendant's assertion of immunity for defamation. The defendant never claimed immunity prior to trial. If it had, the plaintiff could have presented specific evidence about the conduct that caused Thomas Hospital to lose any immunity it may have had, and the jury could have determined this factual issue. In addition, any immunity employees may have had did not extend to Thomas, itself, and would be lost if the act was done intentionally or recklessly.

Also, the jury found the defendant liable for the wrongful discharge claim and the tort of outrage. Either of those counts support an award for damage to reputation. So even if the finding of defamation were reversed, it would not affect the jury award or outcome of the case.

D. Wage Payment

The Court finds that the plaintiff presented sufficient evidence to show that the defendant failed to pay her charge nurse pay owed. Thomas' pay records show that plaintiff worked without being paid her charge nurse differential pay. All the witnesses testified that there was only one R.N. working on the Med-Psych unit per shift and, therefore, if the plaintiff was working on the unit, she was the charge nurse. The documents and the testimony of the

witnesses showed that she was supposed to be paid a \$ 1.00 more per hour for her charge nurse differential pay. It is undisputed that Thomas did not pay it for certain, extended periods.

The defendant argued at trial to the jury and in its brief, that the plaintiff was responsible for coding her time properly to show that she was working as a charge nurse, so the defendant could not be held accountable for the failure to pay charge nurse pay. The plaintiff testified that her clock in badge was not working properly and would not take the code for charge nurse, and she told her supervisor repeatedly about it, but no one would fix it. The plaintiff testified that she would at times try to write the discrepancy in the book employees were supposed to use when that occurred, but often times the book was in the supervisor's office on another floor. She testified that she would ask for it, but the supervisor would not bring it to the floor. The plaintiff was not to leave the floor, according to supervisor testimony. Plaintiff argued that all of this was part of the retaliation against Susan and part of the outrageous conduct. Thomas argued that it was the plaintiff's fault, but the jury did not agree. There was enough evidence to support the jury verdict on this issue. There is no law that says it is the employee's responsibility to see that she is fully paid. Therefore, the defendant was not legally entitled to have the count dismissed.

Defendant further argued in its brief that any pay above minimum wage is subject to employer/employee agreement. The Court finds that this does not allow defendant not to pay the plaintiff for charge nurse pay in this case as a matter of law, because every witnesses who testified on the matter, including the designated corporate representative, did not dispute that there was a charge nurse differential supposed to be paid, and therefore agreed to be paid, by Thomas.

E. Jury Instructions

The Court properly instructed the jury in accordance with the applicable law and the facts presented as evidence. The defendant argues that the Court erred in not giving certain jury instructions. However, the Court finds that the disputed instructions did not correctly state the law of the case, so the Court was correct not to give them. Furthermore, the Court finds that the absence of the proffered instructions had no effect on the substantial rights of the parties or the outcome of the jury verdict. The defendant has failed to meet its burden to demonstrate the charge as a whole created a substantial and ineradicable doubt about whether the jury was properly guided in its deliberations. As explained by our Supreme Court:

To challenge jury instructions successfully, a challenger must first demonstrate the charge as a whole created a substantial and ineradicable doubt about whether the jury was properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case.

Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 70, 479 S.E.2d 561, 580 (1996). The Court further held:

If a party wishes to complain on appeal of the trial court's refusal to give a proffered instruction, that party must show as a threshold matter that the proposed instruction correctly stated the law.

Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 70, 479 S.E.2d 561, 580 (1996). Finally, the Court held:

Courts may not grant a new trial, set aside a verdict, or vacate or modify a judgment or order on the basis of any error or defect or anything done or omitted by the trial court "unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." W.Va.R.Civ.P. 61. The recent decisions in **581 *71 *O'Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), and *State v. Guthrie*, *supra*, direct reviewing judges to inquire, when determining whether an alleged error is harmless, whether they are in "grave doubt about the likely effect of an error on a jury's verdict," *O'Neal*, 513 U.S. at 435, 115 S.Ct. at 994, 130 L.Ed.2d at 951.

Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 70-71, 479 S.E.2d 561, 580-81 (1996)

1. Business Judgment/ Honest Belief Instruction

The Court finds that it was correct not to give defendant's proposed "business judgment" instruction. The defendant argues that the Court should have instructed the jury on the "honest belief doctrine," pursuant to *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996). The case law calls this the "business judgment" doctrine. While the "business judgment" instruction was discussed in a footnote in *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996), the defendant's proposed instruction was not identical and left out important qualifiers. In addition, the defendant's proposed instruction was improper because of the facts of this particular case.

For example, the entire first paragraph of defendant's proposed instruction No. 5, is not in the *Skaggs* decision. The first paragraph contained inflammatory and argumentative language: "Indeed the employment laws are not intended to be a vehicle for second-guessing business decisions nor to transform the members of the jury into personnel managers." The court finds that this argumentative language was a proper basis to refuse the instruction. Second, the instruction is also misleading because there is no qualifying statement in this sentence to say "unless it was against public policy or constituted unlawful retaliation." Therefore, the jury could have inferred with the defendant's instruction that the law does not allow them to make a decision that is different from the defendant's personnel managers. That is not the law. Therefore, the Court finds that the defendant failed meet the threshold to show that the instruction was a correct statement of law.

Third, the first paragraph is also repetitive of other sentences in the proposed instruction: "You are also not to decide this issue on the basis of whether you agree or disagree with the

Defendant's decision regarding Plaintiff". ...“Any employer, such as Defendant, is entitled to make its own business judgments,”... “the law provides that an employer has a right to make employment decisions for good reasons, bad reasons or no reason at all.” The *Skaggs* court said that “We would hope, however, that the trial court would use [its] discretion to avoid repetitious statements of the law that could create an unintended advantage for one side or the other.” *Id* at FN 33. Thomas's proposed instruction does that, by using repetitive statements.

Fourth, the Court finds that the instruction misinforms the jury entirely because the plaintiff in this case pleaded multiple causes of action and multiple bases for the discharge cause of action. For example, in its final sentence: “Therefore, if you conclude that the decision-makers honestly believed that the facts upon which they based their decision regarding Plaintiff were true, **you must return a verdict in favor of the Defendant.** Thus, the defendant's instruction told the jury it must return a verdict for the defendant if it finds honest belief. This “business judgment” instruction is only applicable to the wrongful discharge counts. The plaintiff pleaded several other causes of action, including intentional infliction of emotional distress, defamation, and wage and hour violations, which do not involve the honest belief doctrine. As the instruction improperly directs the jury to find a verdict for the defendant, the Court was correct not to give it.

Also of note is that the Court required the parties to meet and submit objections to proposed jury instructions by March 28, 2014, prior to the trial which started on April 1, 2014. The defendant filed this particular instruction on April 9, 2014, as the trial was concluding. The instruction was not based upon new evidence that came up at trial and was not a revision of a previously submitted instruction. As such, it should have been submitted prior to trial. The last minute submission did not allow the Court or the parties proper time address all of the errors it

contained or to fully brief and address the matter. The Court was within its discretion to reject it for this reason alone as untimely.

Sixth, the Court finds that, in this particular case, the evidence to support an instruction that defendant “honestly believed that the facts upon which they based their decision to fire the plaintiff were true” was not sufficient to support instructing the jury on the same. As explained above, the Court finds that the evidence was not sufficient to show that there was a legitimate, honest belief that the plaintiff intentionally, fraudulently charted. The Court finds that the evidence showed that the supervisors did not make a sufficient investigation to make a reasonably informed decision. As such, the doctrine does not apply. *See Shazor v. Professional Transit Management, Ltd.*, -- F.3d --, 2014 WL 627406 (6th Cir. 2014) (finding defendant failed to meet burden for the doctrine to apply as it had not conducted sufficient investigation to make a reasonably informed decision). The offering of the instruction, even if it were a correct statement of law, which it was not, does not automatically entitle the party to the giving of the instruction. Instead, a party must have presented evidence sufficient to support a particular instruction. The Court finds the defendant did not. Instead, multiple witnesses essentially conceded on examination that its reasons were false.

Seventh, as a whole the jury instructions properly instructed the jury. The instructions discussed at will employment, and even contained part of the defendant’s proposed “business judgment” instruction,” stating that an employer had the right to discharge an employee for any reason or no reason at all, so long as it is not in violation of public policy. This encompasses business judgment.

2. Immunity Instruction

The Court finds that it would be reversible error to instruct the jury on immunity because it is a determination to be made by the Court. The defendant argued that the court should have instructed the jury on “qualified privilege/immunity,” and “immunity provided by Board of Nursing regulations.” Other than stating this, the defendant did not elaborate on the error, or provide argument or statutory authority. As such, the alleged error may be disregarded for failure to properly support it by fact or law. Nevertheless, the determination of immunity is a legal one, which should have been asserted in a dispositive motion to the court, prior to trial. The defendant never filed a dispositive motion on the issue of qualified or absolute immunity.

Indeed, the U.S. Supreme Court has repeatedly recognized that because the question of immunity is essentially a legal question, *see Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815, “[i]mmunity ordinarily should be decided by the court long before trial.” *Hunter v. Bryant*, 502 U.S. 224, 228–29, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991). As explained by our Court: “We agree with the United States Supreme Court to the extent it has encouraged, if not mandated, that claims of immunities, where ripe for disposition, should be summarily decided before trial.” *Hutchison v. City of Huntington*, 198 W. Va. 139, 147, 479 S.E.2d 649, 657 (1996). An assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune—a trial—will, absent a pretrial ruling, occur and cannot be remedied by a later appeal. *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996).

In this case, to the extent that there were disputed predicate facts that the jury needed to decide, it was the Court that needed to make the ultimate determination of whether immunity applied. Therefore, it would not be proper to instruct the jury on legal immunity. As our Court explained:

Though it is the province of the jury to determine disputed predicate facts, the question of whether the constitutional or statutory right was clearly established is one of law for the court. In this connection, it is the jury, not the judge, who must decide the disputed “foundational” or “historical” facts that underlie the immunity determination, but it is solely the prerogative of the court to make the ultimate legal conclusion.

Hutchison v. City of Huntington, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996) (emphasis added).

In fact, as juries do not decide legal immunities, it would have been improper to give an instruction on immunities, qualified or absolute. As stated by the Fourth Circuit:

The question of whether Sergeant Crooke was entitled to qualified immunity under the facts found by the jury—*i.e.*, whether a reasonable officer would have known that his actions violated the law—should not have been submitted to the jury.

Willingham v. Crooke, 412 F.3d 553, 559 (4th Cir. 2005) The Fourth Circuit held that the district court erred in instructing the jury on qualified immunity and determined that instructing the jury as such was prejudicial error warranting reversal. *Willingham v. Crooke*, 412 F.3d 553, 560-561 (4th Cir. 2005). As such, this Court was correct not to instruct the jury on the qualified immunity or absolute immunity.

Furthermore, if the defendant had made such a motion to the Court, the Court would be correct in determining immunity did not apply in this case because the defendants were found by the jury to have committed intentional wrongdoing:

The Court in *Hutchison* further observed that the general test as announced in *Bennett* had been refined in *State v. Chase Securities, Inc.*, making it clear that immunity does not extend to fraudulent, malicious or otherwise oppressive acts of public officials.

City of Saint Albans v. Botkins, 228 W. Va. 393, 398, 719 S.E.2d 863, 868 (2011). The jury in this case found the defendant committed intentional wrongdoing, in its finding of intentional

infliction of emotional distress. Any privilege is lost when there is intentional wrongdoing found under the facts of the case. Therefore, if the defendant had moved post-verdict for the court to grant qualified or absolute immunity after the jury had made its factual findings, the Court would have denied the motion because the defendant was found by the jury under the facts to be guilty of intentional wrongdoing.

3. Unemployment Law

The Court finds it was correct not to instruct the jury on unemployment law. Defendant states, without legal support or argument, that the jury was required to be instructed upon the definition of “misconduct” under the unemployment compensation statute. The proposed instruction discussed, incompletely, how to determine the level of disqualification for unemployment benefits and went into a lengthy discussion of how to determine “simple” versus “gross” misconduct. (See Defendant’s Proposed Jury Instruction No. 9, submitted April 9, 2014.) The jury was not deciding whether or not the plaintiff was entitled to unemployment. The jury was not making any factual finding about whether the plaintiff was guilty of “simple” or “gross” misconduct. Therefore, the instruction was not necessary to explain to the jury any law upon which they needed to make a decision in the case. Also, the Court finds that it would have greatly confused the jury.

4. Defamation and Public Policy Instruction

The defendant further stated that the jury should not have been instructed on defamation or public policy for the reasons addressed above. The Court addressed defendant’s contentions regarding the defamation instructions and the public policy instructions above, and so incorporates those discussions here. The Court finds that it was correct in its instructions to the jury on defamation and public policy.

F. Admissibility of Evidence

The Court finds that it made proper evidentiary rulings on the admissibility and use of evidence and defendant was not substantially prejudiced by the rulings.

1. Deposition of the Plaintiff

The Court finds that it was within its discretion not to allow defendant to use the deposition of the plaintiff at trial as substantive evidence and was well within its discretion in management of the presentation of evidence. At trial, the defendant wanted to first play a portion of the deposition of the plaintiff and then ask the plaintiff, who was present live and who had not been impeached, the same questions or questions about her deposition testimony. The defendant was not using the video to impeach the plaintiff, but was using the video as substantive testimony, where the live witness was present and testifying. The defendant wanted to do this for the entire cross examination. The Court found it was repetitive, cumbersome, slow, unnecessary and confusing. The Court finds that it was within its discretion in the management of the trial to refuse to allow the defendant to play the plaintiff's video deposition in the manner it requested and did not abuse its discretion in managing the presentation of evidence.

In its motion for new trial, the defendant does not address this alleged error in any detail and only cites general rules of civil procedure and evidence. However, during the trial, the defendant presented a bench brief to the Court, that was prepared before trial. In its bench brief filed with the Court on April 7, 2014, Defendant cited no decision of the West Virginia Supreme Court of Appeals to support its unusual use of Plaintiff's deposition testimony for purposes other than impeachment, and, in fact, none could be found to support this use. In addition, the federal

cases cited by the Defendant in its bench brief were factually distinguishable from the instant case and did not allow use of a deposition in the manner defendant claims.

In the Fourth Circuit case cited by the Defendant in its bench brief, the testimony at issue was deposition testimony of the defendant that was *inconsistent* with the testimony of the defendant at trial. *Community Counselling Service, Inc. v. Reilly*, 317 F.2d 239, *242 (4th Cir. 1963). The Fourth Circuit Court of Appeals held:

It has been consistently held that the Rule permits a party to introduce, as part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at the trial or has testified there. Thus applied, the Rule is a restatement of the long recognized rule of evidence that *statements of a party which are inconsistent with his claim in litigation are substantively admissible against him.*

Id. at *243. It is clear from the Fourth Circuit's holding that it was not holding that *any* deposition testimony of a party could be used regardless of whether a person testified inconsistently or not, but rather testimony inconsistent with that at trial could be used as substantive evidence. The holdings of other circuits offered no more support for defendant's position.

In *Ueland*, also cited in defendant's bench brief, the deposition testimony of a non-party witness from other litigation was offered by the plaintiff as substantive evidence because the witness was unavailable. The witness fell under the exception afforded by Federal Rule of Civil Procedure 32(a)(3)(B), allowing use against any party present or represented at the taking of the deposition when the witness is greater than 100 miles from the place of trial. In making its ruling, the court took special note of the fact that the witness was greater than 100 miles from the place of trial due to being in the custody of the defendant. *Ueland v. United States*, 291 F.3d 993 (7th Cir. 2002). This is the same situation at play in both *Vespe* and *Carey*, cited by

defendant. *United States v. Vespe*, 868 F.2d 1328 (3rd Cir. 1989). *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1988). In other words, those witnesses were not present at trial to testify.

In *Angelo*, the testimony at issue was that of an *absent* expert witness and the court found the trial court did not err in holding the deposition testimony inadmissible. *Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957 (10th Cir. 1993). Finally, in *Southern Indiana Broadcasting, Ltd.*, cited by the defendant, the testimony at issue was deposition testimony of a non-party deponent used to impeach the testimony of a corporate party representative.

As such, this Court's ruling that it was inappropriate to play the plaintiff's video deposition without first eliciting an inconsistent statement was correct even under the cases cited by the defendant in its bench brief. Moreover, it was within the Court's discretion to manage the presentation of the evidence and to preclude it because of the cumbersome, slow and confusing process. Finally, the defendant was free to ask any questions it otherwise would have if it had played the deposition, and to play it for impeachment, so the Court finds defendant was not prejudiced by the Court's management of the presentation of the evidence.

2. Exclusion of Certain Hearsay and Extraneous Documents and Testimony

The Court finds that it was correct to exclude certain documents proffered by the defendant as unreliable, double hearsay statements that also duplicated live testimony of defendant's supervisor, and to exclude certain testimony about extraneous and prejudicial matters. The defendant argues that the Court erred in refusing to admit certain documents relied upon by the employees who made the termination decision, stating that they were offered as to the state of mind of the defendant. The defendant first complains that the Court excluded the statement prepared by Christina Edens, plaintiff's supervisor, Exhibit 19. Ms. Edens was present in Court and testified. Ms. Edens testified about the substance of what was in her statement. Mary Beth

Smith was permitted by the Court to read the statement verbatim to the jury. (See Tr. 736-739.) The Court allowed other supervisors to read from it and to comment on it with relation to their state of mind. (See Tr. 823-826.) Likewise, the Court allowed defendant's witness to read the entirety of Exhibit 20, the statement of Laura Woodrum, verbatim into the record. (See Tr. 740-742.)

The Court finds that, to allow the defendant to submit a supervisors' unsworn statement or any other witnesses' unsworn statement would be not only cumulative, but the equivalent of allowing a party to submit their (unsworn) pre-trial deposition as evidence to the jury, when the jury would be required to remember the-live testimony of the other witnesses. The Court finds that this would be unfairly prejudicial. It is even more prejudicial when the person testified live at trial, as that witness would receive the benefit of having her testimony live and having her statement in evidence as well, when others did not. The Court finds it was correct to exclude it on this basis.

Further, the statement in Exhibit 19 contained double hearsay. In other words, it was not just the statement of Ms. Edens, it was the statement of Ms. Edens saying the statements of other persons. The Court finds that the proffer of the document was an attempt by defendant to submit inadmissible statements from unverified and unreliable sources into evidence that it could not get into evidence otherwise, because the third party statements came from mentally compromised elderly patients. Simply put, the Court was within its discretion to preclude the statement from being admitted into evidence as an exhibit because it contained inherently unreliable and prejudicial double hearsay. A court is within its discretion to exclude otherwise admissible evidence if its probative value is outweighed by its prejudicial effect. This includes any supposed state of mind evidence. The Court finds it properly exercised that discretion.

Defendant argues that it was prejudicial error to not allow Ms. Chandler, a nurse on midnights, to testify about an interaction with the Plaintiff at shift change. Other than this statement, the defendant does not provide detail, or say why this was erroneous or prejudicial, or provide legal or factual support. As such, the Court may deny this assertion error for that reason. The portion of the trial transcript cited by the defendant dealt with having the night nurse testify about the plaintiff not taking lab work off a printer until the night nurse came in and being late coming in for her shift on occasion. (See Tr. 1538-1540.) Defendant's counsel said coming in late was "not a big issue." (See Tr. 1540.) The reason the Court denied the testimony is because the employee's commentary had nothing to do with the reason the defendant gave for terminating the plaintiff. All of the defendant's witnesses testified that the reason Susan was fired was for intentionally, fraudulently charting on November 12, 2009. The employee was proffered by defendant to testify about something unrelated that occurred long before that date. The defendant wished to call witnesses, who were long time employees of Thomas, former and current, to generally criticize the plaintiff on subjects unrelated to her termination. The Court finds it was correct to exclude it as a presentation of irrelevant, unnecessary and unfairly prejudicial evidence.

The defendant argued that the Court erred in failing to allow the defendant to impeach plaintiff's expert, Dr. Jeffrey Harlow on the extraneous matter of whether he shreds his notes or whether he maintains his notes. There was no evidence or allegation that the keeping of notes or not keeping of notes had any bearing on Dr. Harlow's substantive opinion. Dr. Harlow testified that he maintained his notes in this case, so there was nothing missing in this case. As Dr. Harlow was not a party, the Court finds it was within its discretion to exclude this extraneous

testimony about a minor and immaterial detail, and the defendant did not show prejudice as a result of the Court's proper exercise of its discretion.

G. Court's Questioning of Witnesses

The Court finds that its conduct at trial was appropriate and permissible as within the Court's purview to prevent confusion, and to manage the trial, and did not show partiality toward a party, or prejudice the defendant.

W.Va. R. E., Rule 614 provides:

(a) Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party, but in jury trials the court's interrogation shall be impartial so as not to prejudice the parties.

"A judge is responsible to promote ascertainment of truth when witnesses are examined" and "has a duty to help make clear to jury facts and circumstances pertinent to the case" *State v. Farmer*, 200 W. Va. 507, 513, 490 S.E.2d 326, 332 (1997). "A judge has certain latitude in examining witnesses and absent abuse of discretion, there is no error." *Earp v. Vanderpool*, 160 W. Va. 113, 122, 232 S.E.2d 513, 518 (1976), concurring opinion 314 S.E.2d 390, 160 W.Va. 113, rehearing denied.

The defendant claims that the Court questioned witnesses in way that exhibited "deep seated" prejudice against it. The Court disagrees. The limited times where the Court questioned witnesses, it was for the purpose of clarifying confusing testimony, or to fill in where testimony was lacking for a proper understanding of the context. It is the Court's role and within its discretion to help the jury glean the facts.

In this case, the Court centered its questions to clarify testimony and promote ascertainment of the truth. The Court was polite in its questioning of plaintiff and defense witnesses, but did not show bias. Most of the questions posed by the Court elicited testimony that was neither hurtful nor helpful to either side, but simply filled in information for the jury. For example, the Court asked several questions about the layout of the Med-Psych Unit floor, where the nurse's station was, where the patient's rooms and the therapy rooms were, and how patients were seen, because the testimony was not clear. The defendant moved for a mistrial as a result of the questions, but the Court was of the opinion that these questions did not merit a mistrial.

The defendant argues that the Court showed anger and retaliated against the defendant's counsel which created an appearance of partiality. The plaintiff argues that the opposite was true and it was the defense counsel's anger demonstrated toward the bench and unhappiness over what the witnesses were saying and what the evidence was showing that was evident at trial.²

The record of this matter reflects that, thereafter, the defendant's counsel repeatedly moved for mistrials or repeatedly objected to questions from plaintiff's counsel and the court, interrupting the trial and approaching the bench. For example, the defendant moved for a mistrial because the Court did not allow the defendant to play the plaintiff's video deposition as substantive evidence. (See Tr. at 1171-1172.) The Court was of the opinion that this ruling was not a proper basis for a mistrial.

² For example, the defendant complains that the Court instructed counsel to place his notes outlining his argument into the record, under seal. Plaintiff argues that the Court did this *after* and in response to the conduct and tone of the defendant's counsel, who even admitted on the record, "And if I sound upset, I am," and shortly thereafter making disrespectful commentary to the Court: "THE COURT: You may have a chance to speak and respond too without any notes. MR. COKELEY: Notes I made during the Court's improper questioning of the witness, just for the record." (See Tr. p. 1463-1464.)

The Court allowed the defendant a continuing objection and a presumption that he was moving for a mistrial each time the Court asked any question, so as to preserve any objection and allow the trial to proceed without undue interruption. Plaintiff points out that, even then, the defense counsel continued to interrupt the trial, approach the bench and make repeated objections and motions for mistrials and to make lengthy arguments and vouchers of the record and make similar arguments, which the Court had already addressed and ruled upon. It came to a point where the Court was required to instruct the defendant to make his motions from counsel table, so as not to keep disrupting the trial. This was within the Court's discretion to manage the trial.

Where a defendant on appeal asserts that a trial court's questioning of witnesses and comments prejudiced the defendant's right to present evidence and jeopardized the impartiality of the jury, the appellate court will evaluate the entire record to determine whether the conduct of the trial has been such that jurors have been impressed with the trial judge's partiality to one side to the point that the judge's partiality became a factor in the determination of the jury so that the defendant did not receive a fair trial. *State v. Thompson*, 220 W. Va. 398, 400, 647 S.E.2d 834, 836 (2007). The Court finds that defendant has failed to meet this burden.

In its brief, the defendant takes partial lines from the transcript and characterizes them as biased. The Court finds that reviewing the record in its entirety does not show bias.

The defendant argues that the Court made a comment that the plaintiff's testimony was consistent. Plaintiff argues that the defendant takes the Court's statements out of context. For example, the Court made the statement in a ruling where the defendant was trying to play the plaintiff's video deposition after she answered a question, but the plaintiff objected because the video testimony was not inconsistent with the plaintiff's testimony at trial. In turn, the defendant argued, in front of the jury, that it was an admission "and the jury is entitled to know the

admission she made.” The Court made a ruling that the testimony was not inconsistent, so defendant would not be allowed to show that portion of the video and then admonished counsel that “we can take it up outside the presence of the jury.” (See Tr. 1037-1038.)

The defendant makes its own characterizations about the questions asked by the Court based upon defendant’s perception that they were said in a slanted manner. For example, defendant cited the question, “And falsification of a document would be what we might call moral turpitude, a serious offense?” The witness answered yes. The other questions were “why is that told to the Board,” “Why did you tell the Board.” These were opened-ended, and innocuous questions.

The Court notes that both parties perceive the Court’s questioning differently. An example cited by the defendant was where Anna Laliotis was asked about her vacation at the time of the plaintiff’s discharge and was asked “is that why you didn’t call back, or you didn’t have a job that required you to call back, or you didn’t need to call back?” This question was not biased. The plaintiff argues that plaintiff saw this as allowing this particular supervisor to explain why she did not participate in the decision to fire Susan Nutter, which was not helpful to the plaintiff. However, the defendant argues that, by these questions, the Court “implied that Ms. Laliotis’s job at the hospital was inconsequential.” The Court was simply inquiring about whether Ms. Lalioti’s job required her to call work while on vacation.

Another example of the different perceptions of the parties cited by the defendant was where the plaintiff’s counsel, not the Court, asked “what does it mean to be loyal to the department?” This question from plaintiff’s counsel elicited testimony that was helpful to the plaintiff: “A: Loyal means to do the right thing. Work as a team. And as it relates to health care, working together as a team to do the best for the patient.” (See Tr. at 1458.) Plaintiff

argues that this testimony was helpful to plaintiff because other witnesses, including adverse witnesses, testified that Susan Nutter did her best for the patients. The Court then asked, and gave the witness the opportunity to explain “what would be disloyal.” The supervisor was permitted to explain what she thought that meant: “A: Doing whatever you want to do without regard of the rules and the standards that we set.” *Id.* Defendant argues that this was a showing of bias, while plaintiff argues that this testimony was not helpful to the plaintiff. The Court then allowed her to say whether Susan Nutter was or was not loyal. Plaintiff argues that the defendant’s issue is not really with the Court’s question, but the witness’s answer, which was that Susan was not disloyal. Plaintiff argues that the witness was free to say that Susan was disloyal and, if the witness had said this, the defendant would not likely have brought it up in its brief.

The Court finds that the defendant and the plaintiff cite what, on their face, are innocuous questions. Defendant characterizes them in a way that favors its motion for new trial. It does not cite the entirety of the questions and often leaves out the answers. Without addressing each example cited by the defendant, from an entire reading of the transcript, with the questions and answers, the Court finds that the questions were limited for such a lengthy trial, were appropriate, and did not show bias. Arguments of both sides noted, the Court finds that it did not commit reversible error in its management of the trial and limited questioning of the witnesses.

The defendant argues that the Court was biased in favor of the plaintiff in its comments and in its rulings on the admissibility of evidence. The plaintiff notes that the Court refused the request of the plaintiff to submit certain evidence into the record that would have been quite unfavorable to the defendant. In its brief, in support of its argument that the Court showed bias, defendant mentions that the Court ordered the defendant to produce the entire admission charts

of the patients (redacted of identifying information) who were on the floor on the day defendant alleged that the plaintiff fraudulently charted. Previously, the defendant had only produced certain pages of the charts. It is true that the court required this production. When defendant's in-house counsel produced the entire charts, the additional documents showed, more than one time, that the defendant's witness, Laura Woodrum, had charted that she did her "group" therapy with patients at the exact same time that another therapist was doing her therapy with the patients. These were the same patients, during the same admission that led to plaintiff's termination. Defendant fired the plaintiff for charting that she did medication education therapy at the same time that Laura Woodrum charted that she did recreation therapy. The Court excluded the records over plaintiff's objection. This example is addressed to show that the Court was not biased for or against any party.

In addition, the Court denied the request of the plaintiff to submit a document into evidence regarding defendant's designated Rule 30(b) witness Rebecca Chandler, which would have impeached her about a statement she made in her prior testimony. These are just a couple of examples showing that the Court's rulings on admissibility of evidence was unbiased.

Finally, the Defendant makes a broad statement that it should be granted a new trial for "each and every other evidentiary error raised and properly preserved on the record." This broad statement does not afford the Court reasonable grounds upon which to rule. If the defendant asserts reversible error, it should be required to state with reasonable specificity the error alleged and support it with cites to the record or applicable law. The Court finds that the defendant did not meet its burden to show that these unspecified errors and objections were incorrect, prejudiced the defendant or affected the outcome.

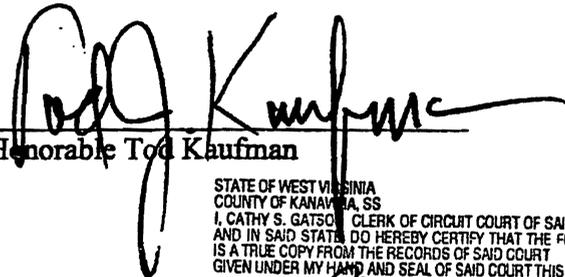
THEREFORE, the Court hereby denies the defendant's motion for judgment as a matter of law and motion for new trial.

The Court further reserves the issue of an award of any costs and attorney fees to the prevailing party pending resolution of any appeal of this matter.

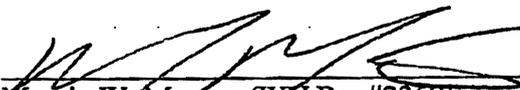
All exceptions and objections to said rulings are hereby noted and preserved for the record.

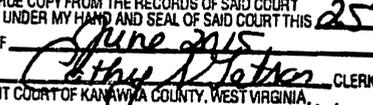
The Clerk is hereby ordered to forward a certified copy of this order to all counsel of record.

ALL OF WHICH IS ACCORDINGLY FOUND AND ORDERED THIS 23rd DAY OF June, 2015.


Honorable Tod Kaufman

Submitted by:


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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 25th
DAY OF June 2015
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
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