

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0695

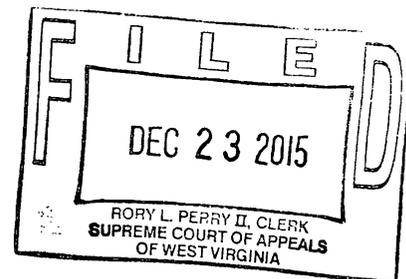
**HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION,**

Defendant Below/Petitioner,

v.

SUSAN NUTTER,

Plaintiff Below/Respondent.



Hon. Tod J. Kaufman, Judge
Circuit Court of Kanawha County
Civil Action No. 11-C-1335

REPLY BRIEF OF PETITIONER

Bryan R. Cokeley (WVSB #774)
Katherine M. Mullins (WVSB #11425)
STEPTOE & JOHNSON PLLC
Seventeenth Floor, Chase Tower
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Facsimile: (304) 353-8180

Counsel for Petitioner

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Argument	1
A.	Respondent Nutter’s “Statement Of The Case”	1
1.	“Billing Irregularities” And “Medicare Fraud”	1
2.	Staffing Of The Med-Psych Unit.....	2
3.	The CMS Surveys	4
4.	Showers, Defibrillators, And Socks.....	6
5.	Nutter’s Own Testimony Demonstrated That She Was Not A “Whistle-Blower” Or Complainer On Alleged “Patient Cycling” Or Medicare Fraud	6
6.	The November 12, 2009 Charting Incident	8
B.	Nutter’s Response Brief Fails To Identify Substantial Public Policies That Are Implicated By Her Discharge From At-Will Employment.....	10
C.	Nutter’s Response Brief Fails To Elevate The “Tort Of Outrage” Claim To Meet The High Standard For That Legal Theory.	13
D.	Nutter’s Defamation Claim Is Barred By The Applicable Limitations Period And Is Otherwise Barred By Qualified Immunity	14
E.	Thomas Memorial Is Entitled To Judgment As A Matter Of Law On Nutter’s Wage Payment And Collection Act Claim Because She Did Not Comply With Hospital Policy Or The Terms Of Her Employment Regarding Time Entry.....	15
F.	The Trial Court’s Improper Questions And Comments Denied Thomas Memorial A Fair Trial.....	17
III.	Conclusion	20

TABLE OF AUTHORITIES

Cases and Statutes

Tudor v. C.A.M.C., 203 W.Va. 111, 506 S.E.2d 554 (1997) 10, 11

Wilt v. State Auto, Mut. Ins. Co., 203 W. Va. 165, 170, 506 S.E.2d 608, 613 (1998)..... 14

W. Va. C.S.R. § 64-12-14.2.4 10

W. Va. Code § 21-5-1 15

29 U.S.C. §§ 206, 207..... 15

42 C.F.R. § 482.21(e)(2) 10, 12

42 C.F.R. § 482.23(b). 10

42 C.F.R. § 482.24(c)(1) 10, 12

42 C.F.R. § 482.24(c)(2) (vii), 10

42 C.F.R. § 482.43(a), 10

42 C.F.R. § 482.43(d), 10

42 C.F.R. § 483.25(l)(2)..... 13

I. INTRODUCTION

For the reasons set forth below and in its initial brief, Petitioner Herbert J. Thomas Memorial Hospital Association (“Thomas Memorial”) is entitled to judgment as a matter of law on Respondent Susan Nutter’s legal theories. In the alternative, Thomas Memorial should be granted a new and fair trial.

Under the rules, Thomas Memorial is limited to 20 pages for this reply. Consequently, Thomas Memorial cannot possibly address every instance in which Nutter’s statements in her brief are not supported by the record.¹ Thus, Thomas Memorial will address a few of the more egregious instances before turning to the specific legal theories.

II. ARGUMENT

A. Respondent Nutter’s “Statement of Case”

1. “Billing Irregularities” and “Medicare Fraud”

Respondent Nutter claims that, “within the first 90 days she was employed, [she] pointed out to Thomas that recreation therapy was listed as being performed with patients, when it was not.” (Brief at 1). The first citation (J.A. 814-15) is to the testimony of HR Manager Marybeth Smith, but none of Ms. Smith’s testimony supports the proposition stated. The second citation in Nutter’s brief (J.A. 885-87) is to Nutter’s testimony where she noted that where orders called for seven days of therapy, patients were getting three and the therapist billed for three days. Nutter claims that she

¹ In the 15 paragraphs of Nutter’s “Statement of The Case,” Nutter, on 104 occasions, cites to a page(s) of the record that, upon close inspection, does not support the proposition asserted. By assigning numbers to each paragraph, Thomas Memorial questions the following record citations: (1) 252-3, 490-1, 661-2, 814-5, 885-7, 343-4, 1359-60, 1416-9, 374, 384-5, 1562, 894-900, 1236-40, 1385, 382-3, 492-4, 1563; (2) 814-5, 885-7, 343-4, 1359-60, 1416-9, 381-2, 653, 1373, 217, 411, 862, 865-7, 584-592, 1913-2003, 2139-2155, 2162-2237; (3) 915-6, 1522-3, 411, 857, 868-9, 423, 471, 1537, 1556-8, 467, 466-9; (4) 676-7, 902; (5) 445, 883-4; (6) 394, 217, 355-6, 1396, 2171, 354, 1239, 874-900, 1420-22; (7) 873, 882, 873, 918-20, 373, 1564, 373, 615-6; (8) 220-1, 931, 452, 1582, 265; (9) 270-3, 270-3, 309, 502, 1499-1500, 1528, 220-1, 1595; (10) 932-5, 292-302, 307-11, 542; (11) 781-2, 373, 268-9, 463-4, 530-1, 3419, 1582, 534-6, 793-7; (12) 981; (13) 252-3, 490-1, 661-2, 635-7, 1961-3; (14) 346-7, 349-50; and (15) 437, 651-2, 1434, 437, 1434. In contrast, in its initial brief, Thomas Memorial cited to the record 231 times. Nutter does not question the accuracy or legitimacy of even one of those citations.

said to her supervisor, “Christina, if we are billing for recreation therapies that we are not doing, that could be considered Medicare fraud.” (J.A. 887)(emphasis added). The third citation to the record (J.A. 343-44) is to the testimony of Christina Edens and has nothing to do with the assertion in the brief; rather, Ms. Edens stated that on a particular day, Recreation Therapist Lara Woodrum did not give therapy to eight of nine patients in the Med-Psych unit. (J.A. 344). Woodrum noted in her paperwork that the non-participating patients were lying in their beds, asleep, or in the hallway rather than participating in this voluntary program. (J.A. 1584-85). Anna Laliotis, Behavioral Health Services Administrator, testified that the hospital did not bill per service rendered. (J.A. 1356-57). Rather, billing was done on a per diem basis. (*Id.*).² Nutter readily admitted that she did not know how billing was done. (J.A. 1089-90).

2. Staffing of the Med-Psych Unit

Nutter states in her response brief that “the nearly undisputed evidence showed that the Med-Psych unit was understaffed.” (Brief at 1.) For support, Nutter cites to eight places in the record, but none support her assertion. Nutter claims that she was told during hiring that there would be more staff. (J.A. 850-54). Of course, that in and of itself proves nothing on the issue of adequate staffing. Nutter offered her personal testimony that three full-time employees (and, in addition, therapists, managers, and others coming on and off the floor) were not enough to handle the patients. (J.A. 860). Record cite 865 is where Nutter read from a CMS standard. The CMS evidence is discussed below. Nutter cites to pages 381-82 of Christina Edens’ testimony that managers always hear about “more hands” needed, but Edens also testified that national standards were followed at Thomas Memorial and that the environment was safe. Marybeth Smith, HR, testified in the most general of fashions that she might hear from time to time on a particular day in the hospital that a floor “didn’t have enough staff that day ... [but] not anything formalized.” (J.A.

² Nutter cites to pages 1359-60 and 1416-19 of Laliotis’s testimony. These record citations do not support the proposition asserted. There was nothing in that testimony about billing or services not performed.

653). Echoing the “universal” nature of the complaint in healthcare, Laliotis testified that she often hears, in her current role as a consultant to hospitals around the country, grumblings about staffing. (J.A. 1373). Beverly Carnefix, a mental health technician, and Becky Chandler, an R.N., testified that there were times when they could have used more staff (J.A. 1522-63), but they never testified to any deleterious effect on patient care.

Nutter states 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.” (Brief at 2.) The Med-Psych unit at Thomas Memorial is a 10-bed unit. Certainly, the regulation in question cannot be interpreted to require Thomas Memorial to staff 10 registered nurses on the Med-Psych unit. Nevertheless, Nutter states that Thomas Memorial “did not comply with this regulation.” (*Id.*) Nutter cites her own testimony as authority for that statement. (J.A. 865-67). In the very next sentence of her brief, she makes this statement: “Thomas was cited repeatedly during CMS audits on numerous bases including their failure to provide sufficient staff and was placed on an improvement period for the various violations.” (*Id.*) Nutter makes four citations to the record (J.A. 584-592, 1913-2003, 2139-2155, 2162-2237). A casual reader of Nutter’s brief might conclude that CMS agreed with Nutter’s personal, conclusory opinion. A casual reader might conclude that CMS found the Med-Psych unit to be understaffed. Not one page of the 189 pages cited by Nutter, however, supports these propositions.

Pages 584-92 reflect the testimony of DON Brannon where she is being led through CMS surveys by Nutter’s counsel. Brannon never testified that the Med-Psych unit was understaffed or that it was cited by CMS for understaffing. The other record references are to CMS surveys, but not one of those surveys had anything to do with staffing in the Med-Psych unit. The survey from which Nutter read the standard (J.A. 2162) pertains to the Med-Surg unit, not the Med-Psych unit. The issue dealt with that 30-bed unit being short, on a few shifts, either one nursing assistant or one

nurse. The CMS surveyors, in arriving at that conclusion, conducted staff interviews and reviewed the Med-Surg unit's staffing plan, staff schedules, staff assignments, and patient census. Nutter's conclusory statements about staffing were never subjected to the rigor of a CMS process.

Nutter claims that she was placed "in a position where she had to work without pay, at times." (Brief at 2). The record citation, however, was not to Nutter's testimony. Rather, it was to the testimony of the nurse, Becky Chandler, who followed Nutter on the next shift. In testifying about Nutter's inefficiencies, Chandler testified that Nutter would sometimes clock out and come back to the unit. (J.A. 1537-39). Chandler did not testify, however, that Nutter was working without pay. She testified that she did not know what Nutter was doing because she (Chandler) was out on the floor taking care of the patients. (J.A. 1557).

Nutter claims that she was written up for leaving the unit without R.N. supervision so that she could take a cigarette break. (J.A. 2475-77). At the time, she made the statement that "she did not know what she was thinking," and that if her supervisor "needed to fire her over the incident she would understand." (*Id.*) Nutter was also admonished for countermanding her supervisor's directive that a sick employee could go home on a low-census day. (*Id.*; J.A. 405-07). Nutter attempts to portray herself as a beleaguered nurse with no ability to draw resources from elsewhere, stating, "the other units were understaffed as well, so often they could not relieve her." (Brief at 2). When one turns to the record, (J.A. 902), however, there is nothing to support the statement.

3. The CMS Surveys

Nutter introduced, often over Thomas Memorial's objection, findings from nine different CMS surveys ranging in time from February 13, 2008 to August 12, 2010. Without exception, none of these surveys support the propositions urged by Nutter. Indeed, Nutter repeatedly mischaracterizes and misrepresents the applicability and content of the survey results. Because of

page limitations, Thomas Memorial cannot fully discuss here the 102 pages of CMS survey results spanning two and one-half years, but can only direct the Court to the record and offer a summary.

Thomas Memorial notes first that in using the CMS survey results, Nutter conflates the Med-Psych and Med-Surg units, both of which are on the third floor at Thomas Memorial. As explained by Anna Laliotis, however, there was a difference in the two units. (J.A. 1377-90, 1447). For instance, a reference in the CMS survey to “nurse manager of the third floor” is not a reference to either Christina Edens or any other manager of Nutter and the Med-Psych unit. (*See, e.g.*, J.A. 1914). It is a reference to the “director of medical surgical services.” (J.A. 1447). Once all of the inapposite references to the Med-Surg unit (J.A. 1913-16, 1926-64, 2000-03, 2139-55, 2162-73) (totaling seventy-six pages) are dropped out of the discussion, the record is left with twenty-six pages that pertain to the Med-Psych unit. (J.A. 1921-25, 2174-75, 2176-79, 2180-93).

The October 1, 2008, survey did pertain to the Med-Psych unit, but its findings do not support the propositions in Nutter’s response brief. First, Thomas Memorial policy allowed 30 days for the hospital to document the resolution of all complaints. The pertinent regulations provided a 7-day window. (J.A. 1921-22). Anna Laliotis testified that complaints were being addressed orally, and that the hospital had just not done some documentation. (J.A. 1379-81). Second, in a reviewed chart, a discharge summary had been dictated by a physician’s R.N., who was also a licensed psychologist. (J.A. 1923-25). The nurse did not make an assessment or diagnostic decision. (J.A. 1924). The physician reviewed, adopted, and signed the summary. (J.A. 1451, 1924). Nevertheless, CMS had a problem with the nurse, in the first instance, dictating the summary. (J.A. 1450).

The February 26, 2009, survey dealt with three categories of issues, only one of which involved the Med-Psych unit. The only issue noted in the Med-Psych unit was a failure to send a written response to complaints. (J.A. 1929-30). Ms. Laliotis testified that the hospital had responded

orally to the complaints in a timelier manner than required by the CMS standard. (J.A. 1380). In any event, the manner of responding to complaints was not one of Nutter's supposed issues.

Finally, Nutter cites in her brief to a CMS survey completed on June 4, 2008, two months before Nutter arrived at the hospital. A review of a record from February 2008 revealed that there was no documentation of an investigation of a complaint about skin care by a patient who had been on a medical floor and the Med-Psych unit. (J.A. 2174-76). The CMS survey team also noted that the Behavioral Health Services Department was not reporting Quality Assessment and Performance Improvement data and did not have meeting minutes in order. (J.A. 2176-80). Moreover, the June 2008 survey discovered that a nurse in the Med-Psych unit had failed to implement skin care protocol for four patients. (J.A. 2180-93). These issues occurred many weeks before Nutter's arrival and their documentation cannot support Nutter's attempt to paint a picture of the Med-Psych unit.

4. Showers, Defibrillators, and Socks

Nutter claims in her response that the record reflects that she complained about showers, defibrillators, and socks. (Brief at 1). Nutter did not testify at trial, however, that she assigned these issues as being the cause of her termination. (J.A. 1238-40). Moreover, the citations relied upon establish that no patients went without showers (J.A. 892-94, 352) and that "a whole basket of non-slip socks ... were available," (J.A. 384). With respect to the defibrillators, there was no evidence that such an apparatus was required for the floor when a Med-Surg unit right next door had a defibrillator. (J.A. 351-52, 603). Nutter testified that she "laughingly shared" with her supervisor that she had asked a representative of a medical equipment dealer for a used one. (J.A. 1102-03).

5. Nutter's Own Testimony Demonstrated That She Was Not a "Whistle-Blower" or Complainer on Alleged "Patient Cycling" or Medicare Fraud.

In her brief, Nutter claims that she "question[ed] whether the defendants were creating a cycle of funneling patients back to the hospital from the nursing homes by failing to provide continuing medication orders with patients when they were discharged to their respective nursing

homes.” (Brief at 1). The testimony at trial does not support this characterization. First, with regard to the supposed “questioning,” Nutter narrowed that alleged activity to a single, partial conversation with supervisor Anna Laliotis, which will be discussed below.³ Second, the only reference to “Medicare fraud” was Nutter claiming in trial testimony that she had that subjective speculation. (J.A. 900). She never testified to alleging Medicare fraud in the workplace on this subject.

Nutter claimed that at unnamed nursing homes, patients would be tapered off of anti-psychotic drugs pursuant to federal regulations. (J.A. 1399). She further claims, despite nursing homes having their own medical directors (J.A. 1398) and patients having their own personal physicians (J.A. 355-56), Thomas Memorial should be required to write prospective prescriptions for patients being discharged to nursing home care. (J.A. 894-95). Nutter testified that Thomas Memorial “had a practice of discharging the patients without orders for coordinating continued medications, even though regulations required proper discharge planning.” Nutter’s citation to her own testimony, (J.A. 894-97), does not, yet again, support such a sweeping condemnation of Thomas Memorial. Perhaps in an effort to bolster her “policy,” Nutter cites to a CMS survey conducted months before she was employed. (J.A. 2171). In that survey of the Med-Surg unit (not the Med-Psych unit), the hospital was cited because a social services consult was not done timely after an admission assessment identified that need. In another case, a nursing admission assessment was not completed. (J.A. 2171-72).

Nutter writes that “once the patients were sent back to the nursing home, they would be removed from their medications and would regress back to their prior, unacceptable state and need to be brought back to the hospital again for treatment and stabilization.” (Brief at 3). Nutter cites to the testimony of Christina Edens as support for that proposition. Here is what Edens testified to at

³ Nutter acknowledged that she never complained in any fashion to any entity external to Thomas Memorial, such as CMS, Adult Protective Services, or OHFLAC, not even anonymously. (J.A. 1241-44). Nor did she take any complaints to the administrative suite of the hospital.

trial: “I am not saying that patients did not return. Patients did return. But was it due to a medications issue, you know, I am not a physician. I am not qualified to make that decision nor are any, we, as nurses, qualified to make that decision. So did patients – or patients discharged, were they brought back to the unit, absolutely, they were. And it happens, you know, not only happens in behavioral health, it happens in healthcare period.” (J.A. 354).

Nutter states in her brief that the record will support that she “suggested to her nurse management and others and advocated that the patients’ medication should be coordinated at discharge, so that they would not have revolving hospitalization cycles.” (Brief at 4). Nutter’s testimony at trial, however, does not quite match the prose on appeal. Here is the essence of her story: “[W]hen I realized what was going on that the patients were being sort of cycled back six and a half months or so, I felt that it was important enough. I spoke with Mark Hughes, the medical director about one patient. And then I talked to Anna Laliotis and I made her aware, and I was seeking her instruction on what to do about it. I said ‘you know, is there a form that we should be sending home to the nursing homes with this patient, with these patients. And you know, what is my responsibility to have these physicians follow through on that?’ And while we were discussing the problem, the telephone rang so I had to turn around and answer the phone to take a lab report. And when I turned back around, Anna Laliotis had left the unit. I never saw her again.” (J.A. 899-900).

6. The November 12, 2009 Charting Incident

Nutter’s citations do not support what she represents relating to her documenting falsely that medical education was given to nine patients by her on November 12, 2009. The testimony was not “contradictory” as to whether Lara Woodrum was doing recreation therapy from 11:45 – 12:25 on November 12, 2009. Nutter’s citations to J.A. 931, 452, and 1582 do not support her stated proposition. Nutter then builds a strawman argument by representing that Woodrum was conducting a “group” and that those patients were not available to Nutter for medication education. (Brief at 4).

Woodrum's documentation clearly showed, however, that only one patient came to her group; for each patient who did not show, Woodrum set out on their chart the reason and their whereabouts.⁴

Nutter represents to the Court that with just one patient in Woodrum's recreational therapy session, there was ample opportunity for Nutter to give one-on-one education to the other patients, as if that statement rebuts Thomas Memorial's conclusion of document falsification. Nutter neglects to tell the Court that Christina Edens's conclusions were based upon (1) a review of Nutter's documentation (which for nine different patients could not have been more identical if one record had been run through a copy machine eight times); (2) Lara Woodrum's highly individualized records; (3) a statement from and an interview of Woodrum; (4) interviews of coworkers; (5) interviews of patients; and (6) a review of the 15-minute patient observation flow sheets. (J.A. 264-71). Nutter then compounds her misrepresentations by stating that, "[i]mportantly, she explained 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." (Brief at 5). Nutter makes no citation to the record. She cannot. The statement is an invention. More than that, it is an unfortunate attempt to link up and rationalize Nutter's false documentation with the earlier described inventions on the "under staffing" issue.

Nutter states that even if it "were possible or practical" to accurately chart education, "neither Susan nor any other employee who testified, was trained or told that they had to chart this way." (Brief at 5). Nutter cites to the testimony of Christina Edens (J.A. 309), but Edens's testimony is not supportive. The other citation, to DON Brannon's testimony (J.A. 502), is where Brannon is explaining the patient observation sheets. Nutter then states that "others were charting

⁴ Nutter accuses the recreation therapist, Ms. Woodrum, of falsification for placing "group" on her documentation for an event that was planned as a group. Ms. Woodrum wrote "1:1" on the chart for the one patient who attended. (J.A. 855). She accurately recorded that the other eight patients did not attend. (J.A. 1857, 1859, 1861, 1863, 1865, 1867, 1869, 1871). Yet, Nutter states to this Court that "the defendant did nothing to the recreation therapist, and, in fact, made her its star witness." (Brief at 6).

this way.” (Brief at 5). Nutter cites to three pages of mental health technician Bev Carnefix’s testimony, but Carnefix did not chart in a way that was remotely similar to what Nutter did on November 12, 2009.⁵ In any event, it must be remembered that Nutter was not found to have written down her care in a sloppy fashion. Rather, she was found to have “documented provision of care which did not take place, therefore resulting in falsification of documentation.” (J.A. 3006).

B. Nutter’s Response Brief Fails to Identify Substantial Public Policies That Are Implicated by Her Discharge From At-Will Employment.

In Thomas Memorial’s opening brief, it challenged Nutter’s supposed public policies – that is, she had not identified a substantial public policy that was violated when she was terminated in 2009. In her response, Nutter has doubled down on two sources of supposed public policy. First, she relies upon a general federal regulation on staffing, 42 C.F.R. § 482.23(b). Second, she cites to several regulations that relate to discharge orders and summaries, 42 C.F.R. §§ 482.24(c)(1), 482.43(a), 482.43(d), 482.24(c)(2) (vii), 482.21(e)(2). Thomas Memorial turns first to the staffing regulation, but notes that Nutter moves beyond the staffing issue and further narrows her claim in a temporal sense by pointing to patient cycling as the causative factor for her termination.

Nutter relies upon this Court’s holding in *Tudor v. C.A.M.C.*, 203 W.Va. 111, 506 S.E.2d 554 (1997). Nutter does not rely, however, upon the state regulation at issue in *Tudor*. W. Va. C.S.R. § 64-12-14.2.4. Rather, Nutter read into evidence at trial, from a CMS survey, the similar federal standard. (J.A. 865). That CMS survey, completed on February 13, 2008, revealed an issue in the Med-Surg unit. (J.A. 2162). The CMS surveyors, in finding a violation of the standard, did not rely upon the subjective personal opinion of one nurse. Rather, they examined the unit staffing plan, the schedules, and the assignment sheets with patient census. They also interviewed the nurse manager – that is, the manager of the Med-Surg unit.

⁵ Carnefix’s day, as a mental health technician charged with regular patient observation on the Med-Psych unit, was divided into 15-minute blocks. (J.A. 1502-05). Thus, when she charted, say, “9:30,” for conversations with two patients in adjoining rooms, she was operating in that window of time. (J.A. 1507).

In the *Tudor* case, the plaintiff testified to being the only caregiver on a unit. *Tudor* at 560. CAMC's own guidelines indicated that more than one nurse or caregiver was required on any given shift. *Id.* at 567, n.28. CAMC's DON testified (1) that the unit was understaffed according to CAMC's own Medicus records and (2) that the practice of assigning only one nurse per shift on the unit contravened internal policies adopted by CAMC's nursing administrators which required a minimum of two caregivers per shift. The plaintiff in *Tudor* also relied upon expert testimony. Dr. Deborah Kisner testified that CAMC's practice of routinely assigning only one nurse to the unit was unsafe. *Id.* Unlike in *Tudor*, the evidence here was that Thomas Memorial followed and met national standards on staffing. (J.A. 381, 1372).

In response to Thomas Memorial's argument that a "substantial public policy" should "provide specific guidance to a reasonable person," (Brief at 18), Nutter states that "Thomas knew about each of these policies, as it was cited, (repeatedly) for violations of them by CMS, at meetings and interviews with CMS and, in most instances, admitted to the violations." (Brief at 15). As set forth above, the CMS surveys had nothing to do with Nutter's supposed issues on the Med-Psych unit. Thus, it is incorrect for Nutter to assert that the CMS process bolsters her case.

As mentioned, Nutter narrows her focus, in this retaliatory termination case, to one type of policy relating to discharge orders and summaries. She relies upon a partial conversation that she had with manager Anna Laliotis in late October or early November 2009. With emphasis, her counsel states, "**Susan was fired about two to three weeks after she made this complaint.**" (Brief at 4) (emphasis in original). This emphasis was consistent with the argument of counsel to the jury – "the only thing that happened" (J.A. 1759-60) – and consistent with Nutter's testimony that she had a good relationship with her supervisor in the second half of 2009. (J.A. 1222-24, 1226, 1241, 1244). In other words, Nutter, with her own words and through counsel's argument, staked her termination theory on the interaction with Anna Laliotis in late October/early November.

The supposed interaction between Nutter and Laliotis was described above. It was a partial conversation interrupted by a telephone call. (J.A. 899). Public policy, in the context of a wrongful discharge case, does not exist in a vacuum. It is axiomatic that a plaintiff must identify a public policy that applies to her situation. Accordingly, this Court is faced with the issue of whether Nutter has identified a public policy that matches her claimed actions of early November 2009.

Nutter quotes five C.F.R. regulations in their entirety. (Brief at 12-13). The first, 482.24(c)(1) requires that “[a]ll 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.” That regulation has nothing to do with Nutter’s claims. The last of the five regulations, 482.21(e)(2) could not be more vague: “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.” The middle three regulations seem to touch upon Nutter’s theory. Under the regime imagined by Nutter, Thomas Memorial physicians would be required to consider placing in patient discharge papers an order that patients be continued on anti-psychotic medications so as to override nursing homes reducing medications. In essence, Nutter was not advocating a substantial public policy of West Virginia. Rather, she was seeking to construct her own fanciful version of what would be better medicine. Nutter believed that her new model (read “policy”) “could have, if enacted in a responsible manner, save [sic] a financially stressed Medicare system billions if investigated and pursued on a nationwide scale.” (J.A. 2961). Nutter does not articulate a public policy that would match up with the partial conversation she describes having with Anna Laliotis. Stated succinctly,

there is no public policy that is implicated by healthcare provider asking her supervisor about a form, regardless of how grand the backdrop in the employee's mind.

Moreover, the problem with Nutter trying to force the square peg of discharge orders/summaries into the round hole of public policy is that the federal government has already filled that hole. 42 C.F.R. 483.25(1)(2) addresses tapering of anti-psychotic medications in nursing home settings and requires that "(i) Residents who have not used anti-psychotic drugs are not given these drugs unless anti-psychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and (ii) Residents who use anti-psychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs." The issue that Nutter assigns as the causative factor in her termination does not implicate a substantial public policy of West Virginia, and, accordingly, the trial court should have granted Thomas Memorial's motion for judgment as a matter of law.

C. Nutter's Response Brief Fails to Elevate the "Tort of Outrage" Claim to Meet the High Standard for That Legal Theory.

The tort of outrage carries a very high standard. The standard has been oft repeated: "the conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency." Nutter apparently recognizes her burden because she adopts a hyperbolic and *ipse dixit* approach in her response. She uses the word "outrageous" nine times in the section of her response addressing this count. Nutter cannot, however, speak the tort into existence.

Nutter hyperbolically claims that Thomas Memorial accused her of "intentional fraud." Thomas Memorial found that Nutter had "documented provision of care which did not take place, therefore resulting in falsification of documentation." (J.A. 3006). Nutter states that "supervisors further admitted that they did not do any independent investigation of the allegations made against plaintiff before firing her." (Brief at 18). To quote Lara Woodrum, whose complaint prompted the investigation of Nutter, her co-worker, "this is not true." (J.A. 2488). Nutter further claims that

Thomas Memorial “submitted an incomplete and different set of patient records than those that were shown at trial.” (Brief at 18). The testimony, however, was that this omission was most likely a simple copying error. (J.A. 811). Neither counsel caught the error during two years of litigation until shortly before trial and the three missing pages were then supplemented. (J.A. 3462). There was testimony that the three omitted pages made Thomas Memorial’s case stronger. (J.A. 758).

Nutter cites to the testimony of Marybeth Smith, the HR manager, to the effect “that she knew [that filing the required notice with the Board of Nursing] would damage [Nutter’s] reputation and her employment in the future.” (Brief at 19). But, Ms. Smith only said that it was “always a possibility.” (J.A. 813). In any event, using that possibility as a measuring stick, every employment termination or report to a licensing board would constitute a tort of outrage.

D. Nutter’s Defamation Claim is Barred by The Applicable Limitations Period and Is Otherwise Barred by Qualified Immunity.

This was a plaintiff with a three-count complaint who was able to put four lines on a verdict form. Burying a supposed claim within the statement of another claim may be “short,” but it is not “plain.” It is not even a “statement.” If the trial court was going to allow Nutter to proceed with a defamation theory, then it should have allowed Thomas Memorial to assert a statute of limitations defense. Nutter claims that had she known that Thomas Memorial had “a serious affirmative defense, she could have presented evidence during the trial about the continuing wrongful actions of Thomas Hospital ...” (Brief at 21). In essence, Nutter claims that she was sandbagged. There is another angle, however, on this notion of “sandbagging.”

The tort of defamation is subject to a one-year limitations period in West Virginia. *Wilt v. State Auto, Mut. Ins. Co.*, 203 W. Va. 165, 170, 506 S.E.2d 608, 613 (1998). Nutter was terminated on November 16, 2009. DON Brannon wrote her letter to the Board of Nursing on November 17, 2009. (J.A. 2490). Per a request from the Board, Human Resource Manager Smith sent personnel records to the Board on December 1, 2009. (J.A. 2519). The last documented contact with the Board

by Thomas Memorial was on January 13, 2010. (J.A. 2248). Nutter filed her complaint on August 11, 2011, almost 19 months later. Counsel is presumed to know the law, including applicable limitations periods. The three counts were set out separately. “Count I” alleged a common law retaliatory discharge action and referred to a “substantial public policy”; “Count II” alleged a tort of outrage; and “Count III” alleged a violation of the West Virginia Wage Payment and Collection Act. The first two theories carry two-year limitation periods; the last has a five-year period. The three pled causes of action were timely; a defamation count would not have been. Nutter was able to dodge a motion to dismiss and then eventually get her fourth cause of action to the jury.

In arguing that Thomas Memorial should have raised its immunity defense prior to trial, Nutter confuses the qualified immunity which attaches to an administrative complaint with the constitutional immunity that a police officer might enjoy under state or federal law. Clearly, Nutter did not produce evidence to defeat Thomas Memorial’s immunity for making a mandatory report.

E. Thomas Memorial is Entitled to Judgment as a Matter of Law on Nutter’s Wage Payment and Collection Act Claim Because She Did Not Comply With Hospital Policy or The Terms of Her Employment Regarding Time Entry.

As explained in Thomas Memorial’s opening brief, if an employee is paid at or above the minimum wage rate, any additional compensation above the minimum wage is subject to employee-employer agreement. Federal law mandates that employees be paid a minimum wage for hours worked and requires overtime pay for hours worked above the prescribed maximum. 29 U.S.C. §§ 206, 207. State law imposes requirements concerning the timing of the payment of wages, among other things. W. Va. Code §§ 21-5-1, *et seq.* But neither specifies the amount of an employee’s compensation so long as the minimum wage/maximum hours and related standards are met.

Pursuant to the agreement between Nutter and Thomas Memorial, Nutter was entitled to claim a \$1/hour pay differential when she acted in the capacity of charge nurse. Nutter was paid that differential for every hour that she reported to Thomas Memorial as having acted in the charge

nurse capacity. She alleged at trial that for some period of time she was prevented from recording that she was working as a charge nurse because her “clock-in” badge was not working properly. (Brief at 22). She further claims that she could not get access to the unit “book” to make a manual edit. (J.A. 1130-31). She testified that Christina Edens promised to fix the coding “problem” at the August 10, 2009 evaluation. (J.A. 1131). The payroll records show, however, that Nutter had resumed claiming the charge nurse differential four days prior to the evaluation. (J.A. 2508).

Nutter admits to an awareness during her employment that she was not fulfilling her obligation to get the charge nurse differential into the system. With every paycheck, she should have been reminded of her failure or, giving her extreme latitude, someone’s failure. Yet, she said not one word to the Human Resources or Payroll departments of this 1300-employee hospital. (J.A. 695). She contends that the charge nurse differential was on her mind when she went to the Human Resources office on April 6, 2009. Human Resources Manager Smith was not in, however; so she met with Beth Davis, the nurse recruiter who hired her. (J.A. 1218). Nutter said not one word to Davis about the pay differential. (*Id.*) During her employment, she never went back to the HR office about this issue. (*Id.*)

Shortly after Nutter was terminated, she raised an issue about her final paycheck that was unrelated to charge nurse differential. (J.A. 696). That was promptly addressed. (*Id.*) Nutter said nothing, however, to Human Resources or Payroll about the differential for the balance of 2009. She said nothing in 2010. In August 2011, she asserted the issue for the first time; *see* Count III of her complaint. It is fundamentally unfair for Nutter not to hold up her end of the bargain, sit on her rights, and then claim treble damages. On this record, Thomas Memorial is entitled to judgment as a matter of law.

F. The Trial Court's Improper Conduct Denied Thomas Memorial a Fair Trial.

Nutter states that the trial court “centered its questions on ... clarifying testimony and promoting ascertainment of the truth, and to move the case along.” (Brief at 23). She then points at defense counsel – as if defense counsel was responsibility for the trial judge asking over 300 questions, taking over the cross-examination of Thomas Memorial’s managers, making prejudicial comments, denying three motions for mistrial, and seizing counsel’s confidential attorney notes. Nutter starts her argument by stating that the “Court asked several questions about the layout of the Med-Psych unit floor, where the nurses’ station was, where the patients’ rooms and the therapy rooms were, and how patients were seen, because the testimony was not clear.” (Brief at 24). Nutter provides no record citation. She then states, “the Defendant reacted by asking for a mistrial.” (*Id.*) Not quite true. Thomas Memorial sets forth at page 27 of its initial brief what happened and why defense counsel moved for a mistrial. The trial court asked a prejudicial leading question that was designed to undermine Thomas Memorial’s case – that is, that Nutter intentionally charted patient care that she did not provide. (J.A. 277-78). The transcript leaves no doubt.

On the subject of judicial intemperance, Nutter declares that “[t]he opposite was true and it was 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.” (Brief at 24). Setting aside her speculation as to counsel’s mental processes, Nutter ignores the flash of judicial temper when defense counsel moved for a mistrial on the second day of trial: “Let me make this clear, every other objection you make will be back at the counsel table. Okay. Every other objection in this trial you make at counsel table.” (J.A. 279). This Court knows well the optics in the courtroom at that moment – the jury in the box, defense counsel at the bench respectfully expressing concern, and defense counsel dramatically being ordered back to counsel table. (*Id.*)

Nutter seeks to justify the seizure of counsel's notes during trial by implying that defense counsel provoked the trial court with his "tone" and "disrespectful commentary." (Brief at 24, n.3). The commentary that defense counsel made related to the trial court's "improper questioning." (J.A. 1464). Counsel had been objecting to such since the second day of trial.⁶ In any event, the seizure of the notes was a misguided attempt by the judge to shut down defense counsel from making a record and constitutes an admission that the judge's questions and comments were improper.

Nutter characterizes the trial court's questioning of Anna Laliotis "as allowing this particular supervisor to explain why she did not participate in the decision to fire Susan Nutter." (Brief at 27). The context of the questioning must be understood. Laliotis left for Greece days before Nutter was investigated for document falsification; she had no contact with the hospital during her trip overseas; she only learned of Nutter's termination when she returned. (J.A. 1400-02). Defense counsel finished with the direct examination of Laliotis late in an afternoon. The trial court was ready to recess for the day. Rather than having Nutter's counsel commence cross-examination, the trial court asked a few leading questions of the witness at the end of that day: "THE COURT: I was going to ask you, I mean, you leave your job and you keep in touch with what's going on; right? ... I mean it wouldn't be unusual if you went on vacation and kept in touch with the hospital, would it? ... I mean, was your job one where you monitored what you were doing, you could just leave it and not keep in touch? ... Is that why you didn't call back, or you didn't have a job that required you to

⁶ Defense counsel, the day before, also offered this commentary: "I take no pleasure in the record I have made this morning. Going into this trial, there is no judge that I [had] more personal affection for; it is not personal. I am representing my client and doing what lawyers do." (J.A. 1181). Nutter claims that counsel moved for a mistrial "because the Court did not allow the defendant to play the plaintiff's video deposition as substantive evidence." (Brief at 24). That was just one ground among many, however, that Thomas Memorial assigned on one of three motions. At page 25 of the brief, Nutter seeks to minimize the prejudicial comments of the trial court during the testimony of Christina Edens. Nutter then recites a passage of testimony between "THE COURT" and "THE WITNESS." She neglects to inform the Court, however, that it is a different witness. Nutter goes from the testimony of Christina Edens to Rebecca Brannon without informing the court of the hyper-jump. Likewise, Nutter implies that the trial court "admonished" defense counsel for stating before the jury why he should be allowed to play Nutter's deposition. (Brief at 26). First, the trial court did not allow counsel to approach the bench to argue the issue. Objections and argument had to be made from counsel table. Second, there was no admonishment.

call back, or you didn't need to call back?" (J.A. 1402-04). As with a good advocate, it is the questions that were left hanging in the air. The judge, however, should not be the one to send the jurors home with cross-examination questions ringing in their ears.

Nutter states that "Defendant argues that one cannot see bias from the typed record because it was the demeanor of the questioning that showed bias." (Brief at 28). Thomas Memorial does not make that argument to this Court. Having constructed a straw man argument with a false statement, Nutter then says "nothing the Court said or did or its manner or tone affected the outcome of this case." (Brief at 28). Thomas Memorial rests on the record.

In straining to construct a revisionist history on the fairness of the proceeding below, Nutter argues that Thomas Memorial "dodged a huge bullet" when the trial court "refused the request of the plaintiff to submit certain evidence into the record that would have been quite damning to the defendant." (Brief at 28). Nutter accuses Thomas Memorial and defense counsel of a "fraud on the court" by not producing medical records from other days on the Med-Psych unit. In making her "fraud on the court" argument, Nutter withholds some material facts from the Court. First, Nutter never asked for the additional patient records during the many months that discovery was open. Second, patient records from other days were not reviewed by the decision makers in mid-November 2009; accordingly, they were not relevant to the issues at hand and they never became a part of the fabric of this case during two plus years of pre-trial litigation. Third, Nutter, who as a unit nurse always had access to patient charts, never claimed during employment or even during discovery that others had charted as she did. Fourth, Nutter, using an *ex parte* subpoena, asked for the medical records the day before the start of trial, deviating from regular procedure and violating a court order. Fifth, Thomas Memorial objected to the *subpoena duces tecum* on multiple grounds on the first day of trial; the trial court did not order production. Nutter did not again raise the issue until

the second week of trial. (J.A. 1275). Sixth, the other records do not support Nutter's arguments, and for Nutter to attempt to parse through documents without the aid of testimony is irresponsible.

The only relevance of the "other medical records" in this appeal is the role that they played in illustrating the objectionable conduct of the trial court. On the morning of the sixth day of trial, Nutter orally moved that Thomas Memorial be ordered to produce additional records. Over Thomas Memorial's objection, the trial court ordered Thomas Memorial "to get those down here today." (J.A. 1158). During Thomas Memorial's second motion for a mistrial, also the morning of that sixth day, defense counsel spread upon the record the improper questions and comments of the trial court up to that point in the trial. The court then interrupted counsel's argument and issued this directive: "Let me have your associate call the hospital and get those patient records by say 10:00 o'clock. Could you do that right now?" (J.A. 1167). Thus was the retaliation in this retaliation case.

Another piece of information that Nutter withholds from this Court is that on the eve of a post-trial, court-ordered settlement conference, Nutter filed a "Motion for Sanctions" on this issue. Thomas Memorial responded with a 16-page brief, with exhibits, countering Nutter's motion. Nutter never brought the issue on for a formal hearing once Thomas Memorial responded; nor did the trial court rule on the motion. Thomas Memorial directs the Court to its brief and exhibits filed below in response to the motion for sanctions. (J.A. 3452-3642).⁷

III. CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the court below and order that judgment be entered on all counts for Petitioner Thomas Memorial. In the alternative, the Court should order that Thomas Memorial is entitled to a new trial.

⁷ Thomas Memorial stands on its earlier-made arguments on evidentiary rulings and jury instructions not given.

Dated this 23rd day of December, 2015.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Bryan R. Cokeley", written over a horizontal line.

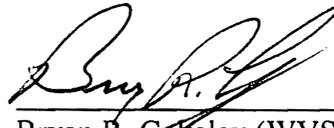
Bryan R. Cokeley (WVSB #774)
Katherine M. Mullins (WVSB #11425)
Seventeenth Floor, Chase Tower
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Facsimile: (304) 353-8183

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2015, I caused the foregoing Petitioner's Reply Brief to be served on counsel of record via hand delivery addressed as follows:

Marvin W. Masters
Kelly Elswick-Hall
The Masters Law Firm lc
181 Summers Street
Charleston, WV 25302

Counsel for Respondent



Bryan R. Cokeley (WVSB #774)
Katherine M. Mullins (WVSB #11425)

004600.01215
7066421.3