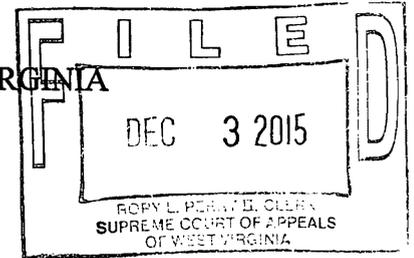


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 15-0695



HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION,

Petitioner,

v.

(Civil Action No. 11-C-1335)
(Kanawha County Circuit Court)

SUSAN NUTTER,

Respondent.

RESPONSE TO PETITION FOR APPEAL

Respectfully submitted:

Kelly Elswick-Hall (WVSB # 6578)
Marvin W. Masters (WVSB # 2539)
The Masters Law Firm lc
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106

Counsel for Respondent

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I. STATEMENT OF THE CASE

Susan Nutter was and is an experienced registered nurse. Susan first started nursing in 1974.

(829) 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. (830-3) At times supervised up to 50 employees. (830-3) She worked in nearly every division at CAMC, as a critical care staff nurse. (835-7) In 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." (244, 253-4, 396, 849-50) She was told upon hire that as charge nurse she was to "trouble shoot" the unit. (856-7) After working on this unit, Susan discovered problems with the unit and advised her supervisors regarding safety concerns and possible violations of law if not corrected. (845) She believed that she was supposed to do that based on her instructions and her training. (839-48, 252-3, 490-1, 661-2) Thomas Hospital's own policies contain protections for employees who bring these types of concerns to their supervisors. (844-5,849, 492, 639) Susan's 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 Medicare fraud (814-5, 885-7, 343-4, 1359-60,1416-9); b) complaining about patient care issues, such as the fact there was only one shower available on the whole unit for patient use, there were no defibrillators on the floor in case someone coded, and the patients were not using skid proof socks (875-6,887-93, 352-3, 374,384-5,1562); 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 (894-900,1236-40,1385); and d) nurses improperly calling in prescriptions to pharmacies without a written order or prescription from a physician. (869-73, 382-3, 492-4, 1563).

Specifically, within the first 90 days she was employed, Susan pointed out to Thomas that recreation therapy was listed as being performed with patients, when it was not. (814-5, 885-7, 343-4, 1359-60,1416-9) In addition, the nearly undisputed evidence showed that the Med-Psych unit was understaffed. (850-4,860-1,865-7,381-2,653,1373,1522-3,1563) A significant number of the patients had

dementia or Alzheimer's and were mobile, required close monitoring and care. (852-55, 217,247-8, 411) The criteria for admission to the locked-down unit was that the patient was a danger to themselves or others. (852-55, 217,247-8, 411) 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. (862, 864-5, 2162) Thomas Hospital did not comply with this regulation. (865-7) 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. (584-592,1913-2003,2139-2155,2162-2237)

Susan was told when she was hired that she would have a unit clerk and sufficient staff to assist her with the charting and paper work required, so she could spend the time needed on patient care. (850-852,915-6,1482,1522-3) Thomas was not truthful about this. Id. Although Susan complained, she was left to try to care for her challenging patients during her shift. (852-4,860-1,865-8,411) This was Susan's number one priority according to everyone who testified. (868-9,252,256,665-70) Then she was required to complete charting when she could. (857,868-9) When Susan would stay over her shift to complete charting, management would be angry because they did not want the overtime. (868-9,917-8,423,471) This placed Susan in a position where she had to work without pay, at times. (1537,1556-8) Susan, as a charge nurse of the floor, was even written up by her supervisor for not allowing another staff member to go home early. (900-6, 467) The jury heard that Susan needed the staff member to stay because Susan needed to be available at bedside for a dying patient, who did subsequently die during that shift. (900-6, 466-9) She needed the other staff member, who was not even an R.N., to be available for the other patients. (900-6)

The evidence showed that there was not enough staff for the R.N.'s to take reasonable or proper breaks. (900, 676-7, 1563) The unit required that an R.N. be present on the floor at all times, but there was only one R.N. per shift assigned to the unit. (900-1) Susan 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. (902) The time records and testimony showed that Susan would work oftentimes twelve or thirteen hour shifts with *no* breaks. (900,2501-2511) Susan was written up for taking a few minute break to get herself

together, after caring for and holding a patient's hand while she passed away. (900-904) This occurred only two weeks or so after Susan's mother with dementia had died. (902) Susan left a physician's assistant on the unit when she took the break, in order to compose herself because she was so upset. (900-4) The supervisor was available to write her up, but not for her to take a break. (904)

Susan was instructed during her training at Thomas that nurses were to call in prescriptions for patients to pharmacies, which is not permitted in a hospital setting. (869-73) Susan tried to remedy the situation by getting a form for the nurses to use to have the physician sign and Susan advised her supervisor, who was also a nurse, of the improper practice. *Id.* This was met with open hostility from her supervisor and the other nurses. (869-73, 445) Eventually, Thomas was instructed not to do this, and a notice was posted in the hospital saying that this practice was no longer permitted. *Id.* Susan reported other concerns about call bells being disconnected on the patient beds and that the bathroom alarms rang into a different unit. (877-8) Patients were left overnight without sufficient water, which was dangerous to their kidneys because of the medication they were taking, because other personnel did not want to change wet beds. (887-8, 880-3) Patients were being extendedly restrained without proper doctor orders. (883-4)

Also, the majority of patients on her unit were severely mentally compromised elderly persons. (850-4,394,217) Typically, these patients would be transferred from nursing homes for needed hospital care and, while at the hospital, the patient's medication would be adjusted or new medication instituted and their condition would improve enough for discharge. (894-900, 355-6, 604,1396) However, Thomas had a practice of discharging the patients without orders for coordinating continued medications, even though regulations required proper discharge planning. (894-7, 2171) *See* 42 CFR 482.43, 42 CFR 482.24(c)(2)(vii). As a result, 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. (894-900, 354) This was very hard on the patients and Susan received complaints from patients' family members about it and recognized this pattern herself. (1239) After two failed attempts at discontinuing medications, the doctor could write a note and keep the patients from being removed from their medications. (894-5) Susan suggested to her

nurse management and others and advocated that the patients' medication should be coordinated at discharge, so they would not have revolving hospitalization cycles. (874-900, 1420-22) This revolving door type of treatment meant possible repeated billing to Medicare and Medicaid, all of which concerned Susan. (900) **Susan was fired about two to three weeks after she made this complaint.** (900,1240.)

The backlash and retaliation from her simple requests and her serious complaints were severe. (873,882) 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." (873,918-20,985) The evidence showed that, despite demeaning treatment, Susan did not quit her job but did ask for a transfer, telling administration she felt it was becoming a hostile work environment, but she was not allowed. (919-20) Eventually, management falsely accused Susan of *intentional* and *fraudulent* improper charting, and wrongfully terminated her on or about November 16, 2009. (373,1564) In order to discredit Susan and cover up the wrongful conduct, Thomas then filed a complaint against Susan with the Board of Nursing, again falsely accusing her of intentional, improper and fraudulent charting. (945, 373, 615-6)

Susan very competently and credibly explained to the jury how and why she charted the way that she did. (922-932, 935, 966-7, 220-1) Specifically, Thomas fired Susan accusing her of intentional fraudulent charting. (969,373,658, 697-9) This was the sole reason for her discharge. Id. As discussed below, this allegation proved to be not only false, but on its face clearly made up by management. With regard to these pretextual allegations against Susan, on one day, Susan charted from 12:00 to 12:45, that she was providing medication education to her nine patients on her floor. (935) While the testimony was contradictory, it appears that from 11:45 to 12:25, the recreation therapist was showing a video. (931, 452, 1582) The recreational therapist checked "group" for her services. (1582) The management and their witnesses testified that, according to the chart, the patients were participating in a recreation 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. (942, 265) Supervisors and the recreation therapist testified that a nursing group was conducted by Susan at the same time as a recreational group

was conducted. (265-7, 280-1, 302-3, 452, 562-4, 791) However, the medical records show that, of the nine patients involved, only **one** of them went to see the video and there was not a recreational therapy “group.” (302-3, 330-11581-85,1855-72) The others were documented in Patient Flow Sheets or “bed checks” as being elsewhere and were available to receive the medication counseling from Susan. Id. With regard to the remaining patient who watched the film, it ended at 12:25, giving Susan plenty of time to provide medication counseling between 12:25 and 12:45 to that particular patient. (343, 1581,1617-9, 1623) In fact, the records showed that neither Susan nor the recreation therapist had a group. (330-1)

The charts showed clearly and Susan explained that she was giving the medication education to the patients, “1:1,” meaning one on one, during the period from 12:00 to 12:45. (302-3, 330-11581-85,1855-72) She explained that she would talk to a patient about their medications, 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 reinforce what they did not remember from the first time. (935,270-3) She explained 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. (935,270-3) 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. (900-1) Importantly, 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. Even if this were possible or practical, neither Susan nor any other employee who testified, was trained or told that they had to chart this way. (309,502) Clearly others were charting this way, as discussed below. (1499-1500,1528) Regardless, the jury correctly determined that Susan actually provided the medication therapy to the patients. (922-32,935,966-7, 220-1,1595)

The jury also saw from the Patient Observation Flow Sheets, or “bed checks” that another employee on the same shift, medical technician Carnefix, with the same patients, 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 and documented giving current events education to

one patient, where the records show that the patient was in the shower. (932-5, 292-302, 307-11,542, 1855-6, 1859-64) Yet the jury heard that absolutely nothing was done or even mentioned to this employee. (935,1528) The medical technician was not fired, was not accused of fraud, was not disciplined and was not even spoken to by supervisors. (935) These discrepancies were on the very same records that Thomas Hospital used to support their termination and *accusations of fraud* against Susan Nutter. (32-5,1859-62) The jury saw the hypocrisy and the pretext.

Without allowing Susan any real opportunity to address the issue or explain, Thomas accused Susan of falsifying the record and fired her and told her that they were going to report her to the Board of Nursing. (781-2, 938-41,982-4,373) Defendants claim that they spoke with patients after the fact, who supposedly said they did not remember being given medication education, but the patients had dementia and were otherwise severely mentally compromised. (268-9,463-4) At the deposition, the supervisor Sarala Sasidharan admitted that the decision to fire Susan was made before she ever walked into the meeting. (530-1, 3419) The termination papers and final paycheck were prepared prior to the meeting. (746-7,940) Certain supervisors and the HR manager admitted that they did not do any independent investigation of the allegations made against Susan before firing her. (672,768,3419) Importantly, the supervisor essentially admitted that the recreation therapist had erroneously charted her activity because he charted that her music therapy was group therapy, when in fact there was only one person there. (1582) The defendants were not able to explain how they made the determination that Susan did something intentionally wrong, while the recreation therapist did not. (534-6) Yet, just like the medical technician, the defendant did nothing to the recreation therapist and, in fact, made her its star witness. (793-7) They fired Susan and then filed a Board of Nursing complaint against her. The jury could reasonably infer from this that defendant's real reason for firing Susan was her complaints about improper practices in the unit.

Although it took months, the Board of Nursing eventually upheld her license. (945-6,551) In the meantime, Susan's career and life were completely devastated. (944-5) Susan filed this civil action asserting that the defendant conspired to retaliate against her in furtherance of a plan, scheme or design to wrongfully terminate Susan's employment because of her above described actions and statements. (981-

2, 984-5, 2669-2675) Susan further asserted that the 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. (981-2, 2669-2675) Susan asserted that the acts and conduct of the defendants were willful, wrongful, deliberate, malicious, in conscious disregard of her rights, in contravention of substantial public policy, outrageous, reckless and/or extremely negligent, and offended the generally accepted standards of decency and morality of the community. (2669-2675)

She thought it was her job as a charge nurse to improve the unit and to make sure it used best practices in patient care. (839-40,252-3, 490-1,661-2) Instead of trying to correct the issues, or even just ignoring them and ignoring Susan, the defendants set out to ruin her and her livelihood. (635-7) As a direct and proximate result of the defendants' outrageous acts conduct, Susan has suffered severe emotional distress, embarrassment and humiliation. (941, 945-7, 950) Her financial duress and worry about her career and her future caused Susan to suffer major depression and anxiety. (947-50, 1961-3) She had to undergo counseling for months, and she requires continued treatment now, as she has yet to recover from the effects, estimated to cost approximately \$30,860.00. (962-3)

Thomas admitted that it knew the complaint would damage Susan's ability to get another job as a nurse. (346-7,349-50) Susan was required to report the pending charges against her to any potential employer. (945-7, 479-80,548) She also had to explain her wrongful termination from Thomas. (945-7) As a result, Susan could not get a job as a traditional RN at other hospitals or medical facilities because of Thomas's wrongful firing and false complaint to the Board. (945-7,1487-8) She was making an average of \$55,000 to \$59,000 per year as an RN before she was fired. (951-2,1813) 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. (945-7 951,960-1,479) The only employment she has obtained since her termination was as a part time home health aide and house keeper and care giver. (950, 958-9) Susan 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. (948)

Additionally, as explained above, Susan was hired as a charge nurse and was told she would receive \$1 more per hour charge nurse pay for shifts where she was the charge nurse. (952-4, 437, 651-2,1434) However, for extended periods, she was not paid the proper rate of pay for a charge nurse. (952-6, 2501-11) Susan requested a correction during her employment. (954,957-8,437) When they fired her, defendants still refused to pay her the proper amount. 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. (1434) Thus, defendants conduct violated applicable law including, but not limited to, West Virginia §21-5-3 and §21-5-4.

II. SUMMARY OF ARGUMENT

Susan Nutter identified and complained to her supervisors about violations of substantial public policies implicating medical welfare concerns for vulnerable hospital patients to assure that they received proper medical care. She was fired as a result. She provided a wealth of evidence from which a reasonable jury could conclude that there was a nexus between her complaints related to those public policies and her wrongful termination. The evidence showed that the reasons given for her termination and petitioner's allegations of fraud against her were wholly unsupported and pretextual. Thus, the jury could properly conclude that Susan Nutter was wrongfully discharged. The outrageous and hypocritical conduct of Thomas Hospital in its treatment of Susan Nutter following her complaints, including accusing her of intentional fraud for medical charting done the same way others were charting, and then filing a complaint against her with the Board of Nursing accusing her of fraud, was obvious to the jury and, as such, justified its decision to hold Thomas accountable for intentional infliction of emotional distress and defamation.

She sufficiently pleaded a retaliatory discharge case and a case of defamation under notice pleading and Thomas was further on notice of it because the discovery centered on its false allegations made against her. It was a continuing and intentional tort from which the respondent was not immune, because no one is immune for making an intentionally or reckless false statement to a licensing board, and the jury found Thomas guilty of intentional misconduct in its finding of intentional infliction of emotional

distress. The petitioner's assertion of the statute of limitations on the defamation count was untimely and, regardless, damage to reputation is an element of damage available under other counts which the jury found petitioner liable, including the tort of outrage and wrongful discharge counts, so the issue is moot.

The Court properly instructed the jury. The Court was correct not to give defendant's proposed "business judgment" instruction because it was not a correct statement of law as proposed, it directed the jury to improperly find for the defendant for the wrong reasons, and there was not enough evidence that the petitioner did a sufficient investigation to justify the instruction. It would have been reversible error to instruct the jury on immunity because it is a determination to be made by the Court. The Court was correct not to instruct the jury on unemployment law because the jury was not deciding whether respondent was entitled to unemployment.

The Court was correct not to allow defendant to play the deposition of the plaintiff at trial as substantive evidence and was well within its discretion in management of the presentation of cumulative, cumbersome and confusing evidence. Thomas was not prejudiced because it was able to ask her all of the questions it desired when she testified live and impeach her with the deposition. The Court was correct to exclude unreliable, prejudicial, double hearsay statements that also duplicated live testimony of a supervisor, and to exclude testimony from a coworker about extraneous and prejudicial matters centered around issues that had nothing to do with her discharge. The Court's conduct at trial and questioning 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.

In its brief, petitioner alleges multiple errors, many in a summary fashion, much of which contain an incomplete recitation of the evidence. It further mischaracterizes the court's statements and conduct during trial. At best, petitioner's motion construes all the evidence liberally in its favor, citing only testimony favorable to it, which is not sufficient to support a motion to set aside the verdict or for a new trial. Under W.Va. R. Civ. P. 50(b), considering the evidence most favorable to the respondent; assuming all conflicts in the evidence were resolved by the jury in her favor; assuming as proved all facts which her evidence tended to prove; and giving her the benefit of all favorable inferences which reasonably may be

drawn from the facts proved, it is clear that the jury verdict was correct. Moreover, under W. Va. R. Civ. P. 59, the verdict was not against the clear weight of the evidence, was not based on false evidence, and did not result in a miscarriage of justice, so the judge's refusal to set aside the verdict was correct and not an abuse of discretion.

The evidence in this case revealed quite clearly that each and every factual allegation made by Susan Nutter was correct. This is the reason, and the only reason, that Thomas Hospital was held accountable by the jury. As explained below, the defendant did not meet its heavy burden under Rule 50 or Rule 59, the Court did not abuse its discretion in denying those motions, and the judgment should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The respondent agrees with the petitioner that a Rule 19 oral argument is appropriate.

IV. ARGUMENT

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 v. Marion County Comm'n*, 178 W.Va. 444, 453, 360 S.E.2d 221,230-1 (1987). *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)). “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).

C. The plaintiff identified a substantial public policy upon which to base her claim and provided a wealth of 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).¹

In *Tudor*, 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.

Id. As this Court is aware, 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. “The 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

¹ As explained in *Tudor* 506 S.E.2d at 565-66, this Court has identified specific instances of 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 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 statute, 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 substantial public policy 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 substantial public policy is predicated upon statutes 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 substantial public policy arises from West Virginia Mine Safety Act); Syl. Pt. 2, *McClung v. Marion County Comm'n*, 178 W.Va. 444, 360 S.E.2d 221 (1987) (holding substantial public policy is grounded in Wage and Hour Act); Syl. Pt. 2, *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980) (holding substantial public policy arises from the Workers' Compensation Act).

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 *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 this 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, 203 W. Va. at 123-24, 506 S.E.2d at 566-67 [Emphasis added.] This Court really need look no further to determine that Susan Nutter established the existence of a substantial public policy to support her claim of wrongful discharge. However, 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. 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.

Id at 3. 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 on *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.

Id at 4-5. Likewise, all of the public polices asserted by Susan Nutter mandated certain conduct and implicated medical welfare concerns for a vulnerable population.

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. First, these most certainly are fundamental public policies and consistent with the case law enunciated in *Tudor* and *Yates*, discussed above. Second, Thomas then goes on to admit 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 correctly provided the complete and proper instructions to the jury, with the supporting regulations.

Thomas disingenuously argues that CMS regulations address whether a hospital can obtain Medicare and Medicaid reimbursement and regulations requiring proper patient care are not a matter of broad social interest. Medicare and Medicaid requires proper patient care for the safety of patients, not just to decide whether to pay. They use the reimbursement as a penalty and a way to enforce its mandates for patient safety. Thomas claims that the West Virginia has not endorsed these regulations or ones similar to them of them. This is false. Parts of the language of a Medicare provision in this very 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 Thomas and are legitimate sources of public policy as stated in our case law. *Tudor*, 203 W. Va. at 123-24, 506 S.E.2d at 566-67. There is no requirement that our state adopt a federal regulation before it is deemed a source of public policy.

Thomas argues that the substantial public policies must provide specific guidance to a reasonable person, referencing *Birthisel*. Thomas knew about each of these policies, as it was cited (repeatedly) for violations of them by CMS, had meetings and interviews with CMS and, in most instances, **admitted** to the violations. (1913-2003,2139-2237) In this case, the plaintiff not only showed that a reasonable person would have specific guidance, she showed that Thomas had actual knowledge and guidance. Thomas further argues that plaintiff's conduct as a charge nurse in making reports of a multitude of safety concerns, including nurses calling in prescriptions outside of licensure; services not being provide to

patients, but Thomas potentially billing for those services; 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, were not a motivation for Thomas discharging her. The jury disagreed. Susan 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. This coupled with the pretextual and unsupported allegations of fraud given for her discharge, supported the jury's finding of a nexus between her complaints and her discharge.

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 just didn't buy it. Thomas's witnesses repeatedly contradicted themselves and each other and ultimately demonstrated that Thomas maliciously fired her in order to shut her up and discredit her. One would have to have been present, like the Court and the jury, to understand just how unbelievable the defendant's witnesses were in statements and demeanor, and how transparently pretextual their reasons sounded. Furthermore, firing Susan for reporting these issues, and thereby getting rid of an employee who looks out for patients first, not profits, certainly jeopardizes public policy of protecting the most vulnerable and making sure they receive proper and safe medical care. As such, 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.²

² Thomas also states the CMS violation notices did not pertain to the Med Psych unit. First, this is not true. Second, this is not relevant to whether a regulation states a substantial public policy. Thomas did not have to be cited for

D. The outrageous conduct of Thomas Hospital in its treatment of Susan Nutter was obvious to the jury and, as such, justified its 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 this 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 emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.” *Travis v. Alcon Laboratories, Inc.*, 202 W.Va. 369, 504 S.E.2d 419, 425 (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. *Dzingliski v. Weirton Steel Corp.*, 445 SE 2d 219, 191 W. Va. 278 (1994). 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. *Id.* In this case, the outrageous conduct of Thomas Hospital in its treatment of Susan Nutter was clear to everyone in the court room. While there was plenty of outrageous conduct upon which the jury based its verdict, particularly outrageous was the conduct that surrounded Susan’s firing. Susan was accused of intentionally and fraudulently charting treatment that she did not perform. (969,979,336, 373,658) Thomas did not simply say that Susan negligently charted or made a mistake in charting. It accused her of intentional fraud. (969,336,373,658,1564) The testimony of Thomas’s own supervisors and employees, one after the other, showed that this accusation was so improperly supported, so contradictory, and so hypocritical, as to constitute outrageous conduct (in addition to a pretext for retaliation). (265-6,270-3,274-6,346,562-

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, it operates its hospital as a whole.

5,1581-5) The jury correctly determined that Susan actually provided the medication therapy to the patients and Thomas's allegations of fraud were false.

The jury also saw that the med-tech on the same shift 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 and giving current events education to one patient, where the records show that the patient was in the shower. Yet the jury heard that the medical technician was not fired, was not accused of fraud, was not disciplined and was not even spoken to by supervisors. Supervisors essentially admitted that the recreation therapist had erroneously charted her activity as a group, when in fact there was only one person there. Yet the defendants did nothing to the recreation therapist. (315) These discrepancies were on the very same records that Thomas Hospital showed to the jury to support their termination and *accusations of fraud* against Susan Nutter. The jury saw the hypocrisy and heard the mounting evidence of outrageous conduct against Susan. Furthermore, the defense and supervisors stuck to their story that Susan *intentionally committed fraud* throughout the trial, even as it became more obvious with each witness that this was not true. (969-70, 373, 538-43, 554, 1581-5, 1610-2, 1618)

Without allowing Susan any real opportunity to address the issue, Thomas fired her and escorted her to her unit and out of the building. They had already prepared her termination papers and final paycheck before the meeting. While defendant argues in its brief and had certain witnesses testify at trial that they acted reasonably by bringing Susan into the meeting and allowing her to explain the situation, the actual testimony from the supervisor, Sarala Sasidharan, was that the decision to fire Susan was made before she ever walked into the meeting. Supervisors further admitted that they did not do any independent investigation of the allegations made against Susan before firing her.

The outrageous conduct did not end there. The jury saw that Thomas showed up at the hearing to fight her unemployment and submitted an incomplete and different set of patient records than those that were shown at trial. (756-7, 811, 944, 1855-90) The missing records would have helped Susan because they showed that one patient was at the nursing station available for medication education. (284, 313-14, 944, 1855-90)

By the time the jury heard that Thomas filed a Board of Nursing complaint for fraud, the jury already knew that the accusations of intentional wrongdoing and fraud were without foundation. To take it a step further, and try to ruin her career was further justification for the jury's finding of extreme and outrageous conduct discussed above. The HR director admitted that she knew it would damage Susan's reputation and her employment in the future. (813)

There hardly is a case where the tort of outrage would be more applicable than this one. Susan Nutter thought it was her job as a charge nurse to improve the unit and to make sure it used best practices in patient care. The evidence showed that, instead of trying to correct the issues, or even just ignoring them and ignoring Susan, the defendants set out to ruin her and her livelihood. The evidence supported that Susan Nutter has been devastated emotionally and financially as a result of the defendants' wrongful conduct and suffered embarrassment and humiliation. (947-50,961-3,1292-5,1298,1302-6) Her financial duress and worry about her career and her future caused Susan to suffer major depression and anxiety. She had to undergo counseling with Licensed Counselor and has yet to recover from the effects. Plaintiff's expert psychologist testified to the severe emotional distress suffered by Susan Nutter. (1292-5,1298,1302-6) His testimony was uncontroverted, as the defendants did not call any expert on the subject.

E. The plaintiff pleaded a retaliatory discharge case and a case of defamation. It was a continuing and intentional tort from which the defendant was not immune, 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. v. Texaco, Inc.*, 245 S.E.2d 157,159 (1978);

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.**

(Emphases added; citations omitted). 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 almost all of the discovery centered around the false allegations made by Thomas Hospital against Susan.

Defendant claimed that it was entitled to qualified immunity for its defamation. First, this immunity argument should have been made in a dispositive motion long before the trial, so it was untimely. Second, no one is immune for making a reckless or 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 brief 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. Defendant's argument was untimely and improper, as explained by the court in a similar situation in *Miller v. Lambert*, 196 W.Va. 24, 467 S.E.2d 165 (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. (105) It never asked Susan questions about it in her deposition. 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 should 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 per *Miller*. 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 others up to the time of trial, long 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. Even if it were a question of fact, the defendant never claimed immunity prior to trial. If it had, she 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 any factual issue. In addition, any immunity employees may have had did not extend to Thomas and would be lost if the act was done intentionally or recklessly. **Again, 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.**

F. The plaintiff proved that the defendant failed to pay her charge nurse pay owed.

Thomas' pay records show that plaintiff worked those 12 to 13 hour shifts, not only without needed breaks, but also without getting 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 Susan 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. It is undisputed that Thomas simply did not pay it for extended periods. Thomas 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 Thomas could not be held accountable for its failure to pay. Susan testified that her clock in badge was not working properly and would not take the code, and she told her supervisor repeatedly about it, but no one would fix it. (954,957, 437) Susan 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. Id. She would ask for it, but the supervisor would not bring it to the floor. Of course, Susan was not to leave the floor. All of this was in fact part of the retaliation against Susan and part of the outrageous conduct. Thomas argued that it was Susan's fault, but the jury did not agree. There was more than 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. Instead, that is a legal duty placed upon the employer. 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. Every one of the 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.

G. The Court's 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). The defendant claims that the Court questioned witnesses in way that exhibited "deep seated" prejudice against it. That was simply not true. The limited times where the Court questioned witnesses, it was obviously for the purpose of clarifying confusing testimony, or to fill in where testimony was lacking for a proper understanding of the context. When evidence is presented it is difficult to know when there are areas that have not been covered with the jury or are confusing. Sometimes the evidence presented seems clear to the attorneys because we know the case, when in fact it is not. 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 on just that, clarifying testimony and promoting ascertainment of the truth, and to move the case along. Just because the Court was polite about it, does not mean there was a showing of bias. Indeed, the Court was cordial and friendly when posing questions to defendant's supervisory personnel. Most of the questions posed by the judge 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 reacted by asking for a mistrial.

The defendant argues that the Court showed anger and retaliated against the defendant's counsel which created an appearance of partiality. 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.³ Defense counsel moved for a mistrial very early on in the case, for what was an innocuous set of questions by the Court. (277-8) It was clearly unwarranted. 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. (522-3, 646-7, 1165, 1171-4, 1181 1462-4) The defendant even moved for a mistrial because the Court did not allow the defendant to play the plaintiff's video deposition as substantive evidence. (1171-1172) The Court allowed the defendant a continuing objection and a presumption that he was moving for a mistrial every time the Court asked any question. 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 attempt to make the same arguments, which the Court had already addressed and ruled upon. (1179)

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**

³ For example, the defendant complains that the Court instructed counsel to place notes outlining his argument into the record, under seal. 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.)

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 defendant has failed to meet this heavy burden. The defendant complains of questions asked of supervisor Christina Edens starting at 277, about the recording of patient activities. However, the defendant did not mention the Court's preface to those inquiries: "THE COURT: I am not sure I understand what you are saying. Maybe the jury does. Can you explain to me just --THE WITNESS: Just to you? THE COURT: Explain to the jury and everyone again. Say it again." (274). The defendant argues that the Court "suggested to the jury that Plaintiff had simply made a mistake." This is not correct, as the transcript reflects:

THE COURT: Just not with --what is the--what is the substantive difference? What goes on in the group and the individual if one person is in that group for medication counseling? Is there any substantive difference in those two activities? THE WITNESS: Substantive? THE COURT: It is exact? THE WITNESS: One on one is done in their room. THE COURT: Say one on one is in the group Meeting place, and for whatever reason there is just one in there. THE WITNESS: Right. You would document the time you did it. THE COURT: Document the time. But if there was a mistake in the--how that was charted, is there any substantive difference in what the nurse is doing? THE WITNESS: Not what they're actually performing. Education is not--in our policies from a hospital stand point, we have to be able to show that we--whatever we're doing, that we're documenting at the time we are doing it and the dates. THE COURT: Okay. But I mean, you are doing the same thing, but you are just documenting it differently? THE WITNESS: Correct. THE COURT: Because it is not the one. Is there just supposed to be a group there or should it have been documented as an individual, whatever way the problem is that those two aren't consistent in whatever the policy is set up to do? THE WITNESS: Unless in the documentation you also documented that you do a group session and an individual session at the time. (506-508)

Likewise, nowhere else the defendant cites does the Court say that the plaintiff simply made a mistake. (511,539) With regard to the comments about whether the charting was correct, a complete reading of the record shows that the Court was trying to help the jury understand whether the defendant was saying that it was the form of the charting that was incorrect, or whether the defendant was saying that the plaintiff did not perform the medication therapy that was charted. (567-569) In its brief, the defendant takes partial lines from the transcript and incorrectly characterizes them. Reading the entirety of the questions and the entire transcript, it is clear that the questioning was not as defense counsel characterized it and it did not affect the outcome of the trial.

The defendant complains that the Court made a comment that the plaintiff's testimony was consistent. Again, the defendant takes the Court's statements out of context. For example, the Court

made the statement in a ruling where the defendant kept 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." (1037-1038) While the defendant argues that the judge's comment that a statement was consistent vouched for the plaintiff's credibility, in looking at the entire transcript, as required, **it reveals that the judge made more favorable comments about the defense witnesses than the plaintiff.** To Supervisor Edens, the judge stated that, "you seem like you are totally able to handle yourself as a witness." (365) The judge commented to Vice President of Nursing Brannon that Ms. Brannon is a "strong witness." (565) He later stated that a manager witness was "doing the best she can" in answering questions from plaintiff's counsel. (631-2) He stated to another management witness Ms. Smith, "Ma'am you are doing fine." (796) The Court asked another management witness:

THE COURT: What is elder abuse? THE WITNESS: Elder abuse is someone abusing an older person. And according to the definition, an elder abuse is 65 and older someone who is abusing. THE COURT: Do you see that in the hospital? THE WITNESS: Not in a hospital. But we hear from our patients that they have been abused by others. THE COURT: It didn't occur in the hospital? THE WITNESS: No, absolutely not. THE COURT: None of the hospitals you have been involved with in your career? THE WITNESS: No. THE COURT: **That's a good thing.** THE WITNESS: Yes. That's why we monitor and watch for all of that. (1363-4)

Nearly all of these witnesses testified before Susan Nutter, and not once did defense move for a mistrial as a result.

The defense complains that the judge was cordial in its questioning of the plaintiff. The Court was equally cordial to the adverse witnesses. The Court had a cordial exchange with defendant's star witness Laura Woodrum. (1603) On page 674, the Court stepped in while plaintiff's counsel was grilling the HR manager. (674) The Court asked a series of questions whose responses were helpful to the defense at 505, and again at 555. At 333-4, the Court interrupted plaintiff's counsel asked a series of questions to move plaintiff's counsel along. 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. This is not helpful to the plaintiff. The other questions were "why is that told to the Board," "Why did you tell the Board." These were opened-ended, and innocuous questions, which were not eliciting helpful testimony for the plaintiff. Defendant claims that it was a flourish of cross examination, but at one point in the judge's questioning, he stated in the context of his question:

THE COURT: And your testimony's basically been that the Board is acting independently in what they're doing. That you are just doing what you feel is your job at Thomas and the Board has another role to do. THE WITNESS: Yes, sir. (641-2)

This is not a cross examination. Another example cited by the defendant was where supervisor 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 slighted. The plaintiff saw this as allowing this particular supervisor to explain why she did not participate in the decision to fire Susan Nutter. This line of questioning and the witnesses answers were, again, not helpful to the plaintiff. However, the defendant says that, by these questions, the Court "implied that Ms. Laliotis's job at the hospital was inconsequential." This is not true by reading the entirety of the questions and answers.

Another example 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." (1458) This testimony was helpful to plaintiff because it was clear from other witnesses, including adverse witnesses, that Susan Nutter did her best for the patients and they wrote she was loyal in her evaluation. (252,1460) However, the Court then 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. Again, not particularly helpful to the plaintiff. The Court then

allowed her to say whether Susan Nutter was or was not loyal. The defendant's problem is not really with the Court's question, but the witness's answer, which was that Susan was not disloyal. The witness was free to say that Susan was disloyal. If the witness had said this, the defendant would not likely have brought it up in its brief. Importantly, the defendant's own documents already said that she was very loyal to the department. (1841)

In its brief, the defendant cites what, on their face, are innocuous questions. It then 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 belaboring each example cited by the defendant, an entire reading of the transcript, with the questions and answers, shows that the Court's questions were limited for such a lengthy trial, were appropriate, and did not show bias. Defendant argues that one cannot see bias from the typed record because it was the demeanor of the questioning that showed bias. Because defendant argues something that cannot be seen in the record, the plaintiff in turn must make this crystal clear--nothing the Court said or did or its manner or tone affected the outcome of this case. Instead, it was the testimony and evidence that lost this case for the defendant. Defendant's own witnesses showed, without a doubt, that they had falsely accused Susan Nutter of fraud and then fired her and then went after her with the Board of Nursing. Nothing its skilled counsel could do would hide the fact that each witness made the case worse for the defendant than the last. They did so badly in their admissions, their hypocrisy, and their demeanor that nothing the Court did or didn't do would have made the slightest difference. It was that transparent. This Court did not commit reversible error in its management of the defendants' examination of witnesses and introduction of exhibits.

It also bears noting that the Court refused the request of the plaintiff to submit certain evidence into the record that would have been quite damning 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 under seal the more days of the admission charts of the patients (redacted of identifying information) who were on the floor on the day defendant alleged that the plaintiff fraudulently charted. (3648) Previously, the defendant had only produced various different and incomplete versions of certain pages of the charts.

(1855-1908) When defendant produced the additional documents from the charts, an outrageous fact, if not fraud on the Court, appeared in the remainder of the documents. The additional documents showed, more than one time, that the defendant's star witness, Laura Woodrum, had charted that she did her "group" therapy with patients at the same time that a different nurse documented doing her therapy with the patients. (4178,4224, 4362,4415, 4601,4650) These were the very same patients, during the very same admission that led to Susan's termination. The pages were close to each other and easily seen by any supervisor who did a reasonable investigation. (4178-9) Yet Woodrum testified in the entire time she worked there no coworker had put her in the position of charting overlapping hers. (1587-8,1610-1) Remember that Thomas fired Susan for charting that she did medication education therapy at the same time that Laura Woodrum charted that she did recreation therapy. One patient's chart revealed that the recreational therapist Laura Woodrum was performing recreation therapy with a patient from 11:15 to 12:00, while the nurse was doing her group from 10:45 to 11:30, and the Patient Observation/bed check said that, at 11:15, the patient was in the hallway with a physical therapist. (4178-80) The judge excluded the records over plaintiff's objection. Thus, the defendant dodged a huge bullet by the Court's ruling in its favor.

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 an important statement she made in her prior testimony. In defense to the retaliatory discharge, outrage, and defamation claims, a theme of the defendant and their director of nursing, Chandler, was that they had no ill will toward Susan Nutter and only submitted a letter to the Board of Nursing and let the Board take it from there and she did nothing else. (546-7,553-5, 616-23, 546-7, 759-61) A document from the Board of Nursing showed that, in fact, Chandler spoke at length with the Board of Nursing investigators. (2899-3142) The Court excluded the document that would have shown defendant and Chandler, to be a liar. These are just a couple of examples showing that the Court was unbiased. They are also examples showing how the defendant incompletely reports the proceedings of the Court to create a slighted representation of the Court's statements and rulings.

H. The Court made proper rulings on the admissibility and use of evidence and defendant was not substantially prejudiced by the correct rulings.

W.Va. R.Civ.Pro. 61 explains the standard for any error in admitting evidence:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, 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.

- 1. The Court was correct 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, 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. It was not using the video to impeach the plaintiff, but was using it as substantive testimony, where the live witness was present and testifying. It wanted to do this for the entire cross examination. It was repetitive, cumbersome, slow, unnecessary and confusing. The Court properly refused to allow the defendant to play the plaintiff's video deposition in the manner it requested and certainly 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 clearly prepared before trial. In it, 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. The federal cases cited in its bench brief were factually distinguishable from this case and did not allow use of a deposition in the manner defendant claims. In the Fourth Circuit case cited, 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 offer 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 allowing use of the deposition when the witness is greater than 100 miles from the place of trial. *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 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). In *Southern Indiana Broadcasting, Ltd.*, 935 F.2d 1340 (1991), the deposition testimony at issue was of a non-party deponent used to impeach the testimony of a corporate 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. Even if not, 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 it was not prejudiced by the Court's management of the presentation of the evidence.

- 2. The Court was correct to exclude unreliable, double hearsay statements into evidence that also duplicated live testimony of defendant's supervisor, and to exclude testimony about extraneous and prejudicial matters.**

The defendant argues that the Court erred in refusing to admit certain documents 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 Supervisor Edens, Exhibit 19. Ms. Edens was present in Court and testified about the substance of what was in her self-serving statement. (452-453, 463-4) Mary Beth Smith was permitted to read the statement verbatim to the jury. (736-739) The Court allowed other supervisors to read from it and to comment on it with relation to their state of mind. (823-826.) Likewise, the Court allowed defendant's witness to read the entirety of Exhibit 20, the statement of Laura Woodrum. (732-3,740-742,797-9,824) As such, there is no prejudice. Moreover, to allow 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 pre-trial deposition to the jury, when the jury would be required to remember the live testimony of the other witnesses. This would be unfair. It is even more erroneous 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 was correct to exclude it on this basis alone.

Further, the statement in Exhibit 19 contained double hearsay. In other words, it was not just the statement of Edens, it was the statement of Edens saying the statements of other persons. The proffer of the document was simply 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, whether it is hearsay or not. This includes any supposed state of mind evidence. The Court 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, it is difficult for plaintiff to properly respond and she requests that this allegation of error be denied for that reason. The portion of the trial transcript cited by the defendant dealt with having the night nurse testify about Susan not taking lab work off a printer until the night nurse came in and being late coming in for her shift on occasion. (1538-1540.) Defendant's counsel even said coming in late was "not a big issue." (1540.) The Court denied the testimony because all of the defendant's witnesses testified that the reason Susan was fired was for intentionally, fraudulently charting on November 12, 2009. (368, 373.637-8,678-9) The employee was proffered to testify about something unrelated that occurred long before that date. The defendant wished to call long time employees of Thomas, former and current, to just generally "bash" the plaintiff on subjects unrelated to her termination. The Court was correct to exclude it as irrelevant and unfairly prejudicial.

I. 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 disputed instructions did not correctly state the law of the case, so the Court was correct not to give them. Furthermore, 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 heavy 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 this 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) [emphasis added]. 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 *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. The Court 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,” which the case law calls the “business judgment” doctrine. *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996). While the “business judgment” instruction was discussed in a footnote in *Skaggs*, the defendant’s proposed instruction was not identical and left out important qualifiers. In addition, Thomas’s proposed instruction was riddled with other problems because of the facts of this particular case. For example, the entire first paragraph of defendant’s proposed instruction is not in the *Skaggs* decision and contains 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.” 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 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.” Even 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 just that, by using repetitive statements. Fourth, it 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.**” This 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.

Sixth, the evidence to support an instruction that defendant allegedly “honestly believed that the facts upon which they based their decision to fire the plaintiff were true” was entirely lacking. The evidence showed very clearly that there was no legitimate, honest belief that the plaintiff intentionally, fraudulently charted. The evidence showed clearly 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.*, 744 F.3d 948 (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 it. Thomas did not. Instead, witness after witness 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. (2857-8) This encompasses business judgment.

2. 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." The determination of immunity is a legal one, which should have been asserted in a dispositive motion to the judge, prior to trial. Thomas never filed a dispositive motion on the issue of qualified or absolute immunity. Thomas admitted that it was a question of law to be made by the Court, (112-3), then complains now that the jury should have been instructed on it. The defendants did not answer any discovery when asked about their affirmative defenses, which alone serves as a basis to exclude it. (112) Indeed, the U.S. Supreme Court has repeatedly recognized that because the question of immunity is essentially a legal question, *see Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. at 2815 (1985), "[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, 198 W. Va. at 149, 479 S.E.2d at 659 (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. This was made clear 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. *Id.* at 560-561. 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 guilty of 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. Therefore, if the defendant had moved post-verdict for the judge 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. As such, defendant's assignment of error on the immunity/privilege instructions is without merit.

3. The Court 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 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. As this Court correctly found, 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, it would have greatly confused the jury. Moreover, defense counsel read the irrelevant standard to the jury during his questioning of a supervisor. (390) Finally, the defendant argued that the jury should not have been instructed on defamation or public policy. The plaintiff addressed the defamation instructions and the public policy instructions above, and so incorporates those arguments here. The Court was correct in its instructions to the jury on defamation and public policy.

V. CONCLUSION

Petitioner has failed to meet its burden to show that its alleged errors were incorrect, prejudiced the petitioner or affected the outcome. The trial court did not abuse its discretion. Viewing the evidence as a whole, it overwhelmingly supported the jury verdict.

WHEREFORE, the Respondent, by counsel, respectfully requests that the petition be denied, and for such further relief as is deemed proper and just.

Susan Nutter,
Respondent,
By Counsel



Marvin W/Masters (WV Bar #2359)

Kelly Elswick-Hall (WV Bar #6578)

THE MASTERS LAW FIRM LC

181 Summers Street

Charleston, West Virginia 25301

(304) 342-3106

Counsel for Respondent

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 15-0695

HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION,

Petitioner,

v.

(Civil Action No. 11-C-1335)
(Kanawha County Circuit Court)

SUSAN NUTTER,

Respondent.

CERTIFICATE OF SERVICE

I, Kelly Elswick-Hall, counsel for Petitioner, do hereby certify that a true and exact copy of the foregoing "Response to Petition for Appeal" was served upon:

Bryan R. Cokeley
Katherine M. Mullins
Step toe & Johnson
Chase Tower, Eighth Floor
Post Office Box 1588
Charleston, West Virginia 25326
Counsel for Respondent

by hand delivery, this 3rd day of December, 2015.



Kelly Elswick-Hall (WVSB# 6578)