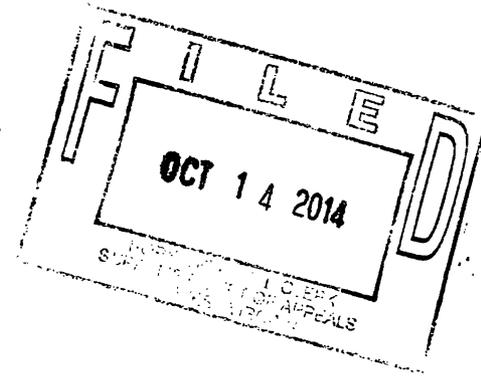


No. 14-0679
In the West Virginia Supreme Court of Appeals



Jennifer N. Taylor
Petitioner,

v.

WVDHHR, Rocco Fucillo,
and Warren Keefer,
Respondents.

And

Susan S. Perry,
Petitioner,

v.

WVDHHR, Rocco Fucillo,
and Warren Keefer,
Respondents.

Brief of the Petitioners

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2. The trial court erred in concluding that pursuant to the West Virginia Purchasing Handbook, once the Purchasing Division concludes its scoring and thereafter opens cost proposals, an agency is precluded as a matter of law from conducting an internal legal review of its procedures in scoring the contract.	
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No. 14-0679

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JENNIFER N. TAYLOR,

Petitioner,

v.

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

Respondents.

SUSAN S. PERRY,

Petitioner,

v.

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Respondents.

BRIEF OF THE PETITIONERS

I. ASSIGNMENTS OF ERROR

1. The trial court erred in making numerous findings of fact that were variously (a) based on disputed evidence, (b) based on no evidence at all, and (c) based on the drawing of inferences from evidence that was susceptible to the drawing of contrary inferences.

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3. The trial court erred in concluding that summary judgment against petitioner Taylor was appropriate because she had breached attorney-client privilege in an unrelated matter, thus warranting termination of her employment.

4. The trial court erred in concluding that the respondents were entitled to qualified immunity on every one of the petitioners' claims, including but not limited to the statutory claims of whistle-blower violations and gender-based discrimination.

5. The trial court erred in concluding as a matter of law that the Ethics Act may not serve as a basis of public policy in support of a *Harless*¹ claim.

6. The trial court erred in concluding that the petitioners had failed to put forward any evidence to support their claims: whistle-blower violations, honest legal advice, the Ethics Act, false light/invasion of privacy, and gender-based discrimination.

7. The trial court erred in granting partial summary judgment against petitioner Perry on the ground that her employment had been terminated by the Governor, not by her employer, DHHR.

8. The trial court erred in granting partial summary judgment in favor of respondent Warren Keefer, dismissing petitioner Taylor's case against him.

II. STATEMENT OF THE CASE

This is a case in which the Circuit Court of Kanawha County granted summary judgment against the petitioners, Jennifer N. Taylor and Susan S. Perry, on their

¹ *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

respective claims involving wrongful termination from their employment (on grounds including public policy, honest legal advice, and the Ethics Act); violations of the Whistle-Blower Law; gender based discrimination; and false light/invasion of privacy. During the relevant time period, Ms. Taylor was General Counsel for the West Virginia Health and Human Resources and Ms. Perry was the agency's Deputy Secretary for Legal Services. Both were "administratively reassigned" and then terminated from their positions after they advised their client that there were procedural irregularities underlying the technical scoring of bid proposals for a contract (HHR 12052) under which the successful bidding vendor would provide advertising services to DHHR.

The petitioners' initial complaints were filed on October 9, 2012 (Docket Sheet, Case 12-A-2029, Line 1; Docket Sheet, Case 12-C-2031, Line 1). The complaints were amended on July 9, 2013 and October 9, 2013, respectively (App. IV, 2323-47; 2377-2403), and consolidated for all purposes except trial. (App. IV, 2317-19). The parties did extensive discovery,² following which the respondents filed motions for summary judgment on all claims against respondent Keefer (App. IV, 2121-68); for partial summary judgment on petitioner Perry's discharge claims (App. IV, 1903-58); and for summary judgment on all remaining claims against all respondents (App. II, 0380-1041).³ The circuit court granted all three of these motions on April 15, 2014, May 15, 2014 and June 13, 2014, respectively. (App. I, 0239, Keefer Order; App. I, 0215, Order on Perry's Discharge Claims; App. I, 0001, Order on All Remaining Claims.)

The facts of this case are disputed and there are multiple, and contradictory, inferences which may be drawn from the evidence adduced during discovery. The

² There was also extensive motion practice, none of which is relevant to this appeal.

³ The petitioners had voluntarily dismissed their claims against defendant Bryan Rosen. (App. IV, 2723-24.)

petitioners will present the facts supported by their testimony and evidence – all of which was discounted or simply ignored by the court below – and all of which, if believed by the jury, is sufficient to support petitioners’ claims. In this regard, it is well established that “[t]he circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pt. 3, *Gray v. Boyd, et al.*, No. 13-0531 (W. Va., April 10, 2014); Syl. Pt. 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). “A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment. Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963).” Syl. Pt. 4, *Gray, supra*.

At the heart of this case is a DHHR advertising contract held by the Arnold Agency which was up for renewal in late 2011 and set to expire on November 16, 2011. DHHR Assistant Secretary John Law was aware of this contract, as his job required him to work closely with the advertising agency. On June 16, 2011, Mr. Law submitted a request to proceed with an RFP (App. II, 0448), and a committee was thereafter formed to develop the criteria for the RFP and to perform the technical scoring of the vendors’ responses.⁴ For reasons that are not relevant to this appeal, the process dragged on and the Arnold Agency contract was extended to May 15, 2012. (App. III, 1362.) For

⁴ As set forth in the trial court’s final order, at paragraph 10 (App. I, 0005), Section 7.2.4 of the *West Virginia Purchasing Division Procedures Handbook* requires that a vendor respond to a Request for Proposal (“RFP”) by submitting two separate proposals: a technical proposal describing the services to be performed, and a cost proposal. After all of the vendors’ proposals are received by the Purchasing Division, the technical proposals are forwarded to an agency evaluation committee, which scores them. Only after the agency’s scores have been accepted by the Purchasing Division (such acceptance in some cases preceded by back-and-forth between the Division and the agency) are the cost proposals opened.

reasons that are relevant but disputed, the Arnold contract was extended again through June 30, 2012.⁵

In January, 2012, four bids were received and opened, and the DHHR Technical Evaluation Committee began its work of scoring the technical aspects of the bids. From mid-February 2012, when the Committee sent its scores to the Division of Purchasing, through April 3, 2012, the proposals were re-scored in response to problems and suggestions raised by Purchasing. (App. II, 0451; App. III, 1345-57.) Significantly, the scores did not change.

In late April or early May, 2012, John Law (who had not been on the Technical Scoring Committee) expressed concerns to petitioner Perry about the technical scoring process which had been utilized in awarding the advertising contract. Ms. Perry, who had been on the receiving end of scathing publicity and concomitant anger from the Governor's Office over DHHR's dismal history with respect to purchasing issues,⁶ deemed it necessary to take Mr. Law's concerns seriously and to look into the matter. (App. II, 0496-97; App. III, 1367, 1376-79, 1390-91, 1410-11.) Ms. Perry's only concern was whether the technical evaluation process was legally defensible, or whether DHHR

⁵ The respondents claim that the second extension was necessary because of the petitioners' interference with the awarding of the contract to Fahlgren Mortine. However, there is evidence in the record to support a finding that DHHR's request for the second extension was necessary because the recommendation for a final award to Fahlgren Mortine "must go to the Office of Technology (OT) for secondary approval ... which can take up to an additional four weeks." (App. III, 1363.)

⁶ Issues within DHHR's purchasing division reached a crescendo in the fall of 2011, when the Bureau for Medical Services so mishandled the Medicaid Management Information System (MMIS) contract that an RFP had to be pulled back two times. (App. III, 1381-85.) The Legislative Auditor recommended that the purchasing exemption previously granted to BMS be repealed, noting that "BMS has not developed adequate staff resources for the procurement process." (App. III, 1308.) While all this was going on, Petitioner Perry was called to the Governor's Office several times where she was raked over the coals – to put it mildly – and subjected to "icy stares." (App. III, 1380-84.)

would once again find itself on the front page of the *Charleston Gazette* as it had during what may charitably be termed as the MMIS fiasco. *See* fn. 6, *supra*.

In short, notwithstanding what Mr. Law's motives may have been and what he may or may not have known, Ms. Perry testified that during the relevant time period at issue, her only motive was to spare DHHR legal liability and adverse publicity. She didn't know where the purchasing process stood with respect to the advertising contract and didn't even know who the bidders were, let alone care which one was awarded the contract. (App. III, 1394, 1411.)

Because Ms. Perry was not immediately available to do a legal review, she assigned the task to petitioner Taylor, who had considerable experience in purchasing matters as a result of her tenure with the Treasurer's Office.⁷ Ms. Taylor was initially annoyed with the assignment, assuming that "it was going to be a waste of time" – until she began the review, at which point "I started digging into it, and then it became apparent there was something wrong." (App. III, 1776.) Ms. Taylor prepared a spreadsheet (App. III, 1514-27) comparing the four vendors' proposals, point by point, to determine whether the criteria for evaluating and scoring those proposals had been applied fairly and consistently.

⁷ In her statement to Mr. Bishop, Ms. Taylor said that she had once jokingly referred to herself as the "Queen of RFP's," as a result of her earlier employment with the Treasurer's Office, which was probably why Ms. Perry assigned her the task of reviewing the technical proposals for the advertising contract. (App. III, 1123, 1426.)

⁸ Based on the evidence of record, the earliest Ms. Taylor could have known was May 4, 2012, when she was copied on a May 4, 2012, e-mail from Brian Rosen to Marsha Dadisman in which Mr. Rosen said that the scoring for the contract was complete and the cost proposals had been opened. (App. III, 1546.) Ms. Taylor testified that she couldn't "remember if – if that was mentioned in the flurry of E-mails that went back and forth before the meeting. But I'm thinking that I – the – when it really came – settled in my mind that the cost bids had already been opened was in this [May 16, 2012] meeting." (App. II, 0544.)

As was the case with Ms. Perry, Ms. Taylor had no interest in “winners” and “losers”; her only concern was to complete an assignment that had been given to her by her supervisor, Ms. Perry. (App. III, 1781.) As was also the case with Ms. Perry, Ms. Taylor did not know who had been on the Technical Evaluation Committee, with the exception of Marsha Dadisman, and did not know where the purchasing process stood. (App. II, 0541-43.) This latter point is significant, because Ms. Taylor acknowledged that had she been aware the process was complete, i.e., that the technical scores had approved by Purchasing and the cost proposals opened, she “probably would have cut the whole process short and said this has already been discussed, I don’t need to bother with this...;” (App. II, 0546)⁸ and that her “sole recommendation would have been, ‘Give this back to Dave Tincher, let him decide what to do.’” (App. III, 1774.)

When Ms. Taylor completed her review, she reported her findings to Ms. Perry and also mentioned her concerns to Marsha Dadisman because she (Taylor) was under the impression that it was Ms. Dadisman who had initiated the review. (App. II, 0548-49; App. III, 1428.) Ms. Dadisman, in turn, reported to Bryan Rosen and respondent Warren Keefer that DHHR’s legal department was reviewing the advertising contract. Messrs. Rosen and Keefer were not happy about the review; Mr. Rosen took the position that “I won’t revise the technical scoring of the evaluation committee based on Jennifer’s review...,” (App. III, 1580), and Mr. Keefer then upped the ante by stating that “[w]e are NOT going to change the review committee’s scoring regardless of Legal’s

⁸ Based on the evidence of record, the earliest Ms. Taylor could have known was May 4, 2012, when she was copied on a May 4, 2012, e-mail from Brian Rosen to Marsha Dadisman in which Mr. Rosen said that the scoring for the contract was complete and the cost proposals had been opened. (App. III, 1546.) Ms. Taylor testified that she couldn’t “remember if – if that was mentioned in the flurry of E-mails that went back and forth before the meeting. But I’m thinking that I – the – when it really came – settled in my mind that the cost bids had already been opened was in this [May 16, 2012] meeting.” (App. II, 0544.)

assessment. It could readily be perceived as *bid fixing or some other attempt to alter outcome.*" (App. III, 1580, emphasis supplied) Petitioner Perry, attempting to pour some oil on these troubled waters, sent an e-mail stating in relevant part that

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

Mr. Rosen, now quite combative, told Ms. Perry that "a legal review is outside of the evaluation committee process [and] is not part of DOA policy," and that he was "concerned about the implication of having people outside the committee potentially swaying the procurement process." (App. III 1552.) Ms. Perry responded that while she agreed with his concerns, "we also have some concerns and we want to at least bring them to your attention before it [the advertising contract] goes out. Could we at least have a meeting so we can share them? If you decide to send it on, at least we will know that you have heard of our concerns." (App. III, 1557.)

The following day, May 8, 2012, Marsha Dadisman contacted Ms. Perry about scheduling a meeting, noting that "Jennifer voiced some of her concerns verbally to me. Jennifer also sent to me via email her preliminary post legal review recommendations. The evaluation committee would welcome the opportunity to respond." (App. III, 1557.) To this, Bryan Rosen responded: "Susan this really has to stop or this procurement is going to be dead." (App. III, 1560.) Thereupon Ms. Perry responded as follows:

If you feel that it has to go or be lost then let it go. But be aware that Harry will have to be your counsel if a challenge occurs as Jennifer and I believe that there are “issues.” We do not wish to put them in emails. We will talk when everyone is back in Charleston. (App. III, 1560.)⁹

On Wednesday, May 16, 2012, Ms. Perry, Ms. Taylor, Mr. Keefer and Mr. Rosen met. The meeting was fairly contentious, with Messrs. Keefer and Rosen making clear that they were not interested in the results of Ms. Taylor’s review and even less interested in seeing her spreadsheet.¹⁰ At the conclusion of the meeting it was clear that DHHR was going to proceed with the contract, whereupon Ms. Taylor gathered up the unlooked-at and ignored copies of her spreadsheet and both women considered their participation in the matter to be concluded. (App. III, 1370, 1393, 1402, 1407, 1432-33.)¹¹ Mr. Keefer sent an e-mail to Molly Jordan stating that “[t]he legal team agreed to stand down and allow the prescribed process to work.” (App. II, 0630.)

On or about May 31, 2012, Mr. Perry and Mr. Law were summoned to the Governor’s Office and informed that the Secretary of DHHR, Dr. Michael Lewis, was retiring. Ms. Perry was asked to provide a memo listing any possible legal issues for DHHR that might arise while a new Secretary was recruited and selected. (App. III, 1396-98) Ms. Perry dutifully prepared such a memo, listing the advertising contract as Item 19, “[c]hallenge to the advertising contract,” in a lengthy list of possible legal issues

⁹ The respondents characterize this e-mail as a threat – Harry being, presumably, the “B Team” – which Ms. Perry absolutely denies. (App. III, 1798.)

¹⁰ Mr. Rosen reiterated to Ms. Perry and Ms. Taylor that the actions of the legal department “could be viewed [in his opinion] as violating West Virginia Code § 5A-3-17 and 5A-3-29,” which Ms. Taylor took as a clumsy threat designed to force her to change her opinion. “I won’t change my legal opinion due to intimidation. I’ve worked too hard for my law degree. I worked to keep DHHR, my client, out of court and out of the paper.” (App. II, 0700.)

¹¹ The respondents attempt to put a sinister spin on the fact that Ms. Taylor gathered up and took the spreadsheets, implying that her motive was to leave no evidence behind. To the contrary, as set forth *supra* in the text, Ms. Taylor stated that she took the spreadsheets because no one wanted to look at them anyway and it was quite clear at the conclusion of the meeting that the matter was closed.

“to be resolved *within the next six months.*” (App. III, 1600.)¹² On or about July 3, 2012, this time at the request of respondent Rocco Fucillo, Ms. Perry updated the list, again listing the advertising contract as item number 19. (App. III, 1602-08.)

On July 9, 2012, approximately six weeks after the Perry/Taylor/Keefer/Rosen meeting and six weeks since Ms. Taylor had given one second’s thought to the advertising contract, she was informed by Mr. Law that Erica Mani, the Governor’s Deputy Chief of Staff, wanted to talk to her about the contract. Ms. Mani’s request was the result of Mr. Law’s approaching her to discuss “concerns from legal counsel” about the contract issue (App. III, 1611), a fact unknown to Ms. Taylor. Since Ms. Taylor was scheduled to be on annual leave and playing in a golf tournament the following day, Ms. Mani was given Ms. Taylor’s DHHR cell phone number. The two spoke several times on July 10, 2012, while Ms. Taylor was on the golf course. In the initial conversation Ms. Mani said that if DHHR’s General Counsel and Deputy Secretary for Legal Services had concerns about the bid scoring, then the Governor’s Office had concerns as well. (App. III, 1435-1436.) Ms. Mani and Ms. Taylor made plans to meet the following day to review Ms. Taylor’s spreadsheet. (App. III, 1611-15.) However, during the final conversation, Ms. Mani informed Ms. Taylor that she (Mani) had spoken to Purchasing Director David Tincher, who informed her that Purchasing had approved the RFP review committee’s scoring and approved it. For this reason, the Governor’s Office had

¹² The respondents point to the inclusion of the advertising contract in this memo as evidence that Ms. Perry just wouldn’t leave the issue alone. To the contrary, Ms. Perry stated that this five word recap of an issue listed toward the end of the memo demonstrates simply that she continued to believe that a vendor challenge to the contract was possible at some later date and she was trying to list every possible legal issue she could think of in response to *a specific request that she do so.* (App. III, 1408.) The fact that the issue was listed as one for the future – “to be resolved within the next six months” – is circumstantial evidence that Ms. Perry believed the issue to be dead and gone unless and until a vendor challenge to the contract was filed.

decided not to get involved. (*Id.*) Ms. Mani informed Ms. Taylor that she could speak to Mr. Tincher. (*Id.*)

The following morning, July 11, 2012, Ms. Taylor reported these discussions to her supervisor, Ms. Perry, who concluded that the two women needed to inform Acting Secretary Fucillo about the matter since it involved a contact with the Office of the Governor. (App. III, 1397.) Ms. Perry was unable to speak to Mr. Fucillo until Friday, July 13, 2012, when the two of them (Perry/Fucillo), along with Ms. Taylor, participated in a conference call to discuss various matters within the legal division. (App. III, 1151.) Unbeknownst to either Ms. Perry or Ms. Taylor, Mr. Fucillo had previously been given what he described as a “heads up” by Mr. Keefer concerning the advertising contract, and told by Mr. Keefer that Ms. Perry and Ms. Taylor “were Involved and doing illegal things that can put you in jail like people in Wally Barron’s administration.” (App. III, 1150.) Not surprisingly, then, when Ms. Taylor told Mr. Fucillo about the telephone conversations with Ms. Mani and asked Mr. Fucillo how he wished her to proceed with the suggestion that she meet with David Tincher, Mr. Fucillo advised that the contract was going to be awarded and that the three of them would discuss the matter further on Monday, July 16, 2012. Mr. Fucillo also echoed Mr. Keefer’s and Mr. Rosen’s concerns about interfering with a contract and “tainting the bid process.” (App. III, 1151-52.)

No such follow-up discussion ever occurred. Rather, over the course of the weekend Mr. Fucillo had various phone conversations with others from DHHR, including Mr. Keefer, Deputy Secretary Molly Jordan, Human Resources Director Harold Clifton, and then-Inspector General David Bishop. (App. III, 1152.) Although Mr. Bishop was

decided as a result of what he heard that he need to put on his other hat, so to speak, and commence an investigation. (*Id.*)

On Monday, July 16, 2012, Mr. Clifton informed Ms. Perry and Ms. Taylor that they were on “administrative leave” from their respective positions, a status quickly changed to “administrative reassignment.” (App. III, 1162-70.) The two women were told to gather their personal belongs, after which they were escorted from their offices in an administrative version of a perp walk. The locks to their offices were changed; they were blocked from accessing or using their office e-mail accounts; their access cards to the office and parking garage were confiscated; and they were told that they could not have contact with any DHHR employees. For the next four months they were “working from home,” which meant that they were to be on call in case there were any assignments for them – which assignments were few and far between.¹³ Thereafter, in December, 2012, Ms. Perry and Ms. Taylor were assigned to share a tiny cubicle in the Diamond Building, where they were never provided a phone and for some time had no access to printers or copiers. They were assigned tasks typically not performed by attorneys, such as Medicaid reviews, as well as the task of “[p]rovid[ing] a list of projects, programs or initiatives that are mandated by code or court action” – makework at its finest. (App. III, 1723.)

While the petitioners were still “working from home,” Mr. Bishop continued his investigation and ultimately produced a report (App.II, 0614-0735) (hereinafter “the Bishop Report”), recommending that the matter be turned over to the Kanawha County

¹³ Ms. Perry noted that during the first several weeks of her “reassignment,” her only assignment was to return one phone call, a job that took about fifteen minutes. (App. III, 1416-18.) During the four months in which Ms. Taylor was “working on assignment from home,” she had one project which required about three weeks to complete. (App. II, 0557.)

Prosecuting Attorney for possible prosecution.¹⁴ At the request of then-Assistant Prosecuting Attorney Robert Schulenberg, Mr. Bishop wrote a multi-page search warrant for *all of the information and evidence that the DHHR had maintained under lock and key, and to which Ms. Perry and Ms. Taylor had no access.* (App. III, 1695-1704.) The search warrant was published in the newspapers in Charleston and throughout the state (App. III, 1654-69), with the predictable result that Ms. Perry and Ms. Taylor were branded as felons and suffered continuous humiliation and embarrassment.

Here it should be noted that during the course of Mr. Bishop's investigation, it was learned that Ms. Taylor had seemingly breached attorney-client confidence in an unrelated matter, by sending her husband a string of inter-agency e-mails appended to a bill then pending in the Legislature. The investigator did not include this information in the Bishop Report (App. II, 0859-70), and the court's factual conclusion that Ms. Taylor was fired as a result of the breach is clearly erroneous. See argument at pp. 21-24, *infra*.

Although the DHHR and apparently the court below considered the Bishop Report to be gospel, on January 28, 2013, the Kanawha County Prosecuting Attorney concluded, after reviewing the report and the evidence produced as a result of the search warrant, that there was no basis on which to present the case to a grand jury. (App. II, 0748.)

¹⁴ In this report, Mr. Bishop's investigator delineates, at length, every possible inference that could be drawn against the petitioners, crediting all of the information provided by the respondents and none of the information provided by the petitioners. At best, the report is biased in favor of a predetermined conclusion. In fact, the report is a hatchet job.

On February 4, 2013, less than a week after the Prosecuting Attorney had announced that no prosecution would be instituted, Ms. Taylor was terminated from her position with DHHR. (App. III, 1729.) Ms. Perry, who remained in her cubicle for another six months, was offered another position on June 26, 2013. (App. III, 1726.) When she declined to take the offer, on June 28, 2012, she too was terminated from her position. (App.III, 1727.)

III. SUMMARY OF ARGUMENT

The opinion of the court below is filled with factual findings that are clearly erroneous, as they are based solely on testimony and evidence presented by the respondents with no consideration of the testimony and evidence presented by the petitioners. Further, the court drew multiple inferences, all adverse to the petitioners, where contrary inferences could have been drawn.

The court erred in concluding that as a matter of law, that the petitioners were legally prohibited from reviewing the agency's procedures for scoring technical proposals submitted by bidders pursuant to an RFP after the cost proposals have been opened. The court based its conclusion on the fact that the Purchasing Handbook does not include a provision for such legal review. The court ignored the petitioners' evidence that at the time the legal review was performed, they didn't know the cost proposals had been opened.

The court erred in concluding that summary judgment against petitioner Taylor was appropriate because she had breached attorney-client privilege in an unrelated matter. The court found as a fact that Rocco Fucillo's decision to terminate Ms. Taylor was based "upon the OIG [Office of Inspector General] report and Taylor's disclosure of

attorney-client information...,” citing Mr. Fucillo’s deposition testimony in which he said no such thing. (In fact, in another order in this same case, the court specifically found as a fact, again citing Mr. Fucillo’s testimony, that Ms. Taylor was fired “because [she] was an ‘at will employee.’”) The fact of Ms. Taylor’s breach was not even known to the respondents at the time she was suspended and marched out of DHHR’s offices, and a jury could reasonably infer from the evidence of record that the breach is an after-the-fact justification or pretext for respondent’s actions.

The court erred in concluding that the respondents were entitled to qualified immunity on every one of the petitioners’ claims, by finding as a fact, notwithstanding the existence of contradictory evidence, that the actions of the petitioners placed respondents in some sort of “situation” that necessitated the draconian response of suspension, investigation and ultimate termination. In so doing, the court considered the actions of a third party,¹⁵ John Law, and attributed certain of Mr. Law’s actions and motivations to the petitioners notwithstanding their testimony that they were unaware of such actions and motivations. The petitioners’ evidence is that they properly brought their concerns to their client and then accepted the fact, after presenting their concerns, that the client was not going to take their advice. Any actions they took thereafter were at the specific directive of others.

The court erred in holding as a matter of law that there is no private cause of action under the Ethics Act, and that the Ethics Act may not serve as a basis of public policy in support of a *Harless* claim. With respect to the first holding, the Ethics Act specifically contemplates “other applicable remedies and penalties,” and a violation of

¹⁵ The word “party” is used here in its generic sense; Mr. Law is not and has never been a party to this litigation.

the Act gives rise to a private cause of action pursuant to *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980). With respect to the second holding, the court relied on this Court's decision in *Hill v. Stowers*, 224 W. Va. 51, 680 S.E.2d 66 (2009), a case totally inapposite to the case at bar.

The court erred in concluding that the petitioners had failed to put forward any evidence to support any of their claims: whistle-blower violations, honest legal advice, the Ethics Act, false light/invasion of privacy, and gender based discrimination. The bases for all of the court's rulings were his findings of fact, all of which ignored or discounted the petitioners' evidence and were improper on motion for summary judgment.

The court erred in granting partial summary judgment against petitioner Perry on the ground that her employment had been terminated by the Governor, not by DHHR. The basis for the court's ruling, once again, ignored the evidence that Ms. Perry's termination was the direct result of unlawful conduct by respondents Fucillo and Keefer, and that Messrs. Fucillo and Keefer are liable under the Whistle-Blower Act and the Human Rights Act for their discriminatory acts.

The court erred in granting partial summary judgment in favor of respondent Warren Keefer, dismissing petitioner Taylor's claims against him. The basis for the court's ruling was that Mr. Keefer had not made the decision to fire Ms. Taylor. However, the court ignored evidence showing that Mr. Keefer "lit the fire" that led directly to Taylor's termination, by telling Rocco Fucillo that she was committing crimes and was the second coming of Wally Barron.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petitioners respectfully submit that this case is appropriate for inclusion on the Court's Rule 20 docket because it contains two important issues of first impression: whether the State's Whistle-Blower Law, W. Va. Code § 6C-1-1 *et seq.*, excludes in-house counsel from its purview; and whether the Ethics Act can serve as a public policy basis for a claim made pursuant to *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

V. STANDARD OF REVIEW

"This Court has indicated that a summary judgment should be reviewed de novo. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Further, the Court has indicated that: 'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Company v. Federal Insurance Company of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Lastly, the Court has stated that in determining whether there is a genuine issue of material fact in a case, the Court will construe the facts in the light most favorable to the losing party. *Alpine Property Owners Association v. Mountaintop Development Company*, 179 W. Va. 12, 365 S.E.2d 57 (1987)." *Bine v. Owens, et al.*, 208 W. Va. 679, 542 S.E.2d 842 (2000).

VI. ARGUMENT

1. The trial court erred in making numerous findings of fact that were variously (a) based on disputed evidence, (b) based on no evidence at all, and (c) based on the drawing of inferences from evidence that was susceptible to the drawing of contrary evidence.

The trial court's opinion is shot through with findings of fact that were not supported by the record before the court and are clearly erroneous. For example, the court found that the petitioners had an "intense level of concern about the evaluation committee's scoring that [they] persisted in expressing between May and July 2012...." (App. I, 0029.) There is not a scintilla of evidence in the record to support a finding that after the meeting of May 16, 2014, Ms. Taylor ever even thought about the advertising contract again,¹⁶ let alone expressed concern about it, until she was *specifically directed* on July 9, 2012, to talk to Erica Mani about the matter. With respect to Ms. Perry, the evidence of record is that the only thing she did after May 16, 2014, was to list the advertising contract as a possible upcoming legal issue (a five word summary, number 19 in a long list of issues) in a memo that she was *specifically directed to prepare* as a result of Dr. Lewis' impending retirement.

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

Another example is the court's finding that "[Petitioners] believe that DHHR had no right to decline to follow their legal advice and actually had a positive obligation to

¹⁶ At the conclusion of the May 16, 2012, meeting, Ms. Taylor returned the vendor documents to Marsha Dadisman and said "Well, I think I'm through with this. You can have these back." (App. I, 0546.)

follow it – in spite of the fact that it would have been procedurally impossible for DHHR to have followed it.” (App. I, 0039.) Nowhere in this voluminous record is there a shred of evidence that petitioners had any such ridiculous belief.

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

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

[i]t was my understanding that Marsha Dadisman, as chairman of the review committee, went to John [Law] with concerns that the scoring was not done properly, that they had been unduly pressured and he felt certain that there would be a protest. Because of her concerns, Mr. Law then went to Susan Perry and asked for the legal review.

(App. II, 0548.) Further, while noting Ms. Taylor’s testimony that “John didn’t care who got the contract...,” (App. I, 0030), the trial court dismissed its evidentiary significance by holding that “Taylor’s assessment of Law and his vendor preference was completely wrong,” and noting that when Law was asked whether Taylor understood his preference for the Arnold Agency, he responded “I think everybody understood that.” (*Id.*)

The bottom line is that the court’s order, or more precisely the respondents’ order which the court signed,¹⁷ violates the most basic rule governing summary judgment, that “[t]he circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pt. 4, *Merrill v. West Virginia Dept. of Health and Human Resources*, 219 W. Va. 151, 632 S.E.2d 307 (2006).

2. The trial court erred in concluding that pursuant to the West Virginia Purchasing Handbook, once the Purchasing Division concludes its scoring and thereafter opens cost proposals, an agency is precluded as a matter of law from conducting a legal review of a contract.

Almost all of the trial court’s findings and conclusions in this case flow from the court’s determinations that “[t]he provisions of the Purchasing Handbook applicable to the processing of the HHR12052 technical and cost proposals **do not provide for a legal review to be conducted at the DHHR level...**” (App. I, 0009, emphasis in original) and

¹⁷ The petitioners filed a twenty page objection to the respondents’ proposed order, addressing fifty-three specific findings which were objectionable. (App. I, 0075-95.) Apparently not one single objection was persuasive to the court, pretty amazing in a case where thousands of pages of evidence were submitted in support of and in opposition to the motion for summary judgment.

that the petitioners' legal advice to their client was "in direct contravention of the procedural requirements of the *Purchasing Handbook...*" because their legal review was undertaken after the cost proposals for the advertising contract had been opened. (App. I, 0021.) First, the court ignored the evidence that the petitioners were completely unaware until May 4, 2014, at the earliest, that the cost proposals had been opened. *See* n. 8, *supra*. Second, the court elevated the provisions in the *Handbook* to the status of law with the legal legerdemain that "[the petitioners'] legal review violates the clear statutory construct of the Purchasing Division's statutory authority..." whatever that is supposed to mean.¹⁸ Third, the court evaded directly stating what was his obvious conclusion from all this – that it is illegal for an in-house agency lawyer to review a contract after the fact, period – by wading into the thicket of motivation. In this regard, the court found that the petitioners knew or should have known that John Law, who requested the legal review, had a conflict of interest because he hoped the Arnold Agency would win the contract. Both Ms. Perry and Ms. Taylor stated that in fact they *didn't* know Mr. Law had a rooting interest in the matter. Further, why *should* Ms. Perry have known this? As set forth earlier, she had been uninvolved in the advertising contract process and didn't even know who the vendors were. And why *should* Ms. Taylor have known this? She was totally uninvolved in the advertising contract process and was just handed an assignment by Ms. Perry; and she thought that the legal review had been requested by Marsha Dadisman, a member of the Technical Scoring Committee, not by John Law.

¹⁸ In fact, the procedures of the handbook are not set in stone. As the introduction to the West Virginia Purchasing Division Procedures Handbook states, the handbook is to serve as a "helpful tool" which David Tincher "strongly recommends" be used. (App. II, 768.)

3. The trial court erred in concluding that summary judgment against petitioner Taylor was appropriate because she had breached attorney-client privilege in an unrelated matter, thus warranting termination of her employment.

On October 16, 2012, three months after Ms. Taylor had been suspended from her position as DHHR's General Counsel, Christopher Nelson, the OIG investigator who had written the OIG report, sent a memo to David Bishop, informing him that he had uncovered another "possibl[e] viol[ation of] the above-captioned codes and policies in relation to another matter." (App. II, 859.) This alleged violation took place on March 6, 2012, when Ms. Taylor sent a copy of Committee Substitute for H.B. 4554 (amending and reenacting W. Va. Code § 18-5-44) to her husband, Steve Haid. Appended to the proposed legislation was a chain of internal DHHR e-mails wherein DHHR personnel, including attorneys, discussed the bill. (App. II, 860-70.) Mr. Nelson specifically advised that "[t]his information will not be included in the report of investigation for RFP HHR12052....," and thus Ms. Taylor was unaware of the OIS information until after this litigation was ongoing. When shown the e-mail at her deposition, she acknowledged that "I believe that I should not have sent this E-mail, that it probably did disclose inappropriate information." (App. II, 0560.)

The circuit court found that "[t]hese grounds, the absolute breach of attorney-client privilege, were sufficient for Ms. Taylor's termination even in the absence of the underlying investigation involving HHR 12052. Mr. Fucillo also averred that his decision to terminate Ms. Taylor was based upon the OIG report and Taylor's disclosure of attorney-client information. Fucillo Depo., Memo Ex. V, pp. 254-255, Memo Exs. X and DD. (App. I, 0022-23.)

However, *none of the exhibits cited by the court support its factual conclusion.*

In the cited pages from Mr. Fucillo's deposition, Fucillo states the exact opposite:

Q: Are there any other bases for your termination of Ms. Taylor other than the fact that Ms. Taylor's employment was "at will," that whatever happened in the July 13th – Friday, July 13, 2014 telephone call, the Office of Inspector General report and the statements by Prosecuting Attorney – Kanawha County Prosecuting Attorney, Mr. Plants.¹⁹

A: That's it.

(App. II, pp. 0603-04.) Exhibit DD is the memo from Mr. Nelson to Mr. Bishop, conveying the information about the alleged attorney-client breach with the express notation that the information would not be included in the OIG report. (App. II, 0859.) Exhibit X is the OIG report.

Further, in the court's order dismissing defendant Warren Keefer from the case, the court made this specific finding of fact: "Mr. Fucillo testified he did not terminate Ms. Taylor on his own, but as a joint decision with the Governor's Chief of Staff Rob Alsop *because Ms. Taylor was an 'at will employee.'*" (App. I, 0241, emphasis supplied.) Finally, the very fact that DHHR just sat on this information for almost four months – waiting, apparently, to see what would happen with the Kanawha County Prosecuting Attorney – is circumstantial evidence that the breach of privilege was not the basis for Ms. Taylor's termination.

A jury could reasonably infer from the evidence of record that any argument by the respondents that Ms. Taylor was fired as a result, in whole or in part, of the alleged breach of attorney-client information, is an after-the-fact justification or pretext. Ms.

¹⁹ Whatever Mr. Plants may have told Mr. Fucillo is not in the record, but it presumably had nothing to do with Ms. Taylor's breach of attorney-client privilege since that information was not provided to him. (App. II, 0859.)

Taylor was placed on “administrative reassignment” months before the alleged breach was discovered. When the breach was discovered, the OIG investigator made a decision that it would *not* be included in the OIG report. Mr. Fucillo testified that he terminated Ms. Taylor for a variety of reasons, none having anything to do with the alleged breach. Whether or not Ms. Taylor *could* have been fired as a result of the breach is therefore a moot point, since there’s no undisputed evidence (this being a motion for summary judgment) that she *was* fired for that reason. *Cf. Benson v. AJR, Inc.*, 215 W. Va. 324, 599 S.E.2d 747 (2004) (in wrongful termination case, although plaintiff admitted dishonesty, summary judgment was reversed because “[t]he record in this case is unclear as to whether AJR dismissed Mr. Benson from its employ for drug use or for dishonesty.”)

4. The trial court erred in concluding that the respondents were entitled to qualified immunity on every one of the petitioners’ claims, including but not limited to the statutory claims of whistle-blower violations and gender-based discrimination.

The trial court’s analysis of immunity flowed from its conclusion that the actions of the respondents in suspending and ultimately terminating the petitioners were not only discretionary²⁰ but necessary: “Because of circumstances in which Plaintiffs *and Law* had placed Defendants beginning in May 2012, Defendants had no choice but to make the decisions that they made.” (App. I, 0027, emphasis supplied.) The fatal flaw in the court’s analysis is his underlying factual determination that the petitioners’ actions had placed respondents in some sort of “circumstances” and that the respondents therefore had “no choice” but to suspend, investigate, humiliate and then fire them. In

²⁰ “Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Syl. Pt. 2, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995).

order to make such a determination, the court ignored the voluminous evidence in this case demonstrating “a bona fide dispute as to the foundational or historical facts that underlie the immunity determination....” Syl. Pt. 3, in part, *Yoak v. Marshall Univ. Bd. Of Governors, et al.* 223 W. Va. 55, 672 S.E.2d 191 (2008); Syl. Pt. 1, in part, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

First, let us remember that John Law is not and has never been a party to this case, and the evidence is hotly disputed as to whether either petitioner even knew that he had a dog in the fight, so to speak.²¹ Therefore, Mr. Law’s actions and motives are irrelevant in the absence of undisputed evidence that the petitioners were in some sort of conspiracy with him.²² With that in mind, let us examine just exactly what it is that the petitioners, *not John Law*, did: (1) at the request of Mr. Law, and because of DHHR’s less than exemplary track record in purchasing matters, Ms. Perry decided to review the technical scoring that had been done by a DHHR committee to ensure that there weren’t any problems that could cause her client, DHHR, legal jeopardy and/or unfavorable publicity; (2) thereafter, at the direction of Ms. Perry, Ms. Taylor performed the review and concluded that the scoring procedures were indeed flawed, a conclusion with which Ms. Perry agreed; (3) thereafter, Ms. Perry pushed Bryan Rosen, the head of DHHR’s purchasing division, for a meeting to discuss what she and Ms. Taylor perceived to be the problems; (4) thereafter, the meeting was held and Ms. Perry’s and Ms.

²¹ Mr. Law admitted that he was hoping the Arnold Agency would be the successful bidder, but both petitioners deny knowing this. As detailed earlier, Ms. Perry testified that she didn’t even know who the bidders were at the time she assigned Ms. Taylor to perform a legal review, and that the only reason she undertook the review was because of DHHR’s abysmal past performance in RFP matters. Ms. Taylor testified that it was her belief the person who had requested the legal review was Marsha Dadisman, not John Law.

²² Notwithstanding the disputed evidence on this point, the court below seems to have resolved the factual issue against the petitioners, referring to “the Law-Perry-Taylor *consortium*...,” and discussing the petitioners’ “*scheme* to void the recommendation of the DHHR evaluation committee....” (App. I, 0029, 0031, emphasis supplied.)

Taylor's objections were overruled; and (5) thereafter, *neither Ms. Perry nor Ms. Taylor asked anyone to do anything*. Ms. Perry simply listed the matter, in a memo she was directed to prepare, as one of many legal issues that might arise in the future. Ms. Taylor simply complied with a directive that she call Erica Mani at the Governor's Office, a directive that arose from John Law's intercession with Ms. Mani, not from anything Ms. Perry said or did. And after Ms. Taylor spoke with Ms. Mani, she and Ms. Perry properly sought guidance from Acting Interim Secretary Rocco Fucillo before acting on Ms. Mani's suggestion that Ms. Taylor call David Tincher.

Looking at this evidence, it is clear that nothing done by either Ms. Perry or Ms. Taylor put DHHR in a "circumstance," let alone gave DHHR "no choice" but to suspend them. These petitioners are lawyers who had concerns that their client, DHHR, might find itself in legal jeopardy. They brought those concerns to the proper persons within DHHR, Warren Keefer and Bryan Rosen. They accepted the fact that the client was not going to take their advice. As Ms. Taylor stated to OIG, "Now, I'll give you my [legal] opinion. If you want it, you take it. If you don't want to follow it, that's fine too. I ... I could care less. I could care less who got this contract. My concern was I wanted to keep my client, DHHR, out of trouble, out of court, and out of the newspaper." (App. II, 0577.)

What the petitioners didn't bargain on was the over-the-top reaction of Mr. Keefer and Mr. Rosen, who apparently didn't like having their actions criticized. It was Keefer and Rosen who started the whole "Wally Barron" drum roll, assumed the worst possible intentions on the petitioners' part, poisoned the well with Rocco Fucillo, and

laid out a fantastic criminal conspiracy scenario that seems to have been bought hook, line and sinker by David Bishop's investigator.

The trial court also erred in concluding that the respondents' actions "did not violate clearly established laws of which a reasonable official would have known." *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992). The underpinning of this conclusion is the court's finding that neither the petitioners' whistle-blower claims nor their gender-based discrimination claims – clearly established laws in this state -- could be sustained. These findings were erroneous, as separately argued *infra* at pp.33-36 and 41-44. However, one factual finding common to the immunity issue, as well as the statutory issues, is key: the court's finding that the petitioners did not give "honest legal advice" and did not act in good faith because (1) the Purchasing Division had already given its final approval to the technical scoring of the advertising contract proposals, and (2) any action DHHR might have taken on the basis of the petitioners' advice "would have been a violation of the procedural rules that the Purchasing Division had issued pursuant to its legislative authorization."

As set forth earlier, the problem with the court's analysis is that both Ms. Perry and Ms. Taylor testified they were unaware that Purchasing had already approved the scores, neither having been previously involved in any matters involving the advertising contract. Further, the procedural rules contained in Purchasing's handbook do not have the force of law, and even if they did, David Tincher testified only that they "make no provision for a 'legal review' at the agency level." (App. II, 0459.) Nowhere in Mr. Tincher's affidavit (App. II, 0453-60) does he state that it would have been impossible,

let alone illegal, to pull back the advertising contract after the technical scoring was complete and the cost proposals opened.

5. The trial court erred in concluding as a matter of law that the Ethics Act may not serve as a basis of public policy in support of a *Harless* claim.

It is well established in this jurisdiction that “[t]he 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 charge.” Syllabus, *Harless, supra*; Syl. Pt. 3, *Wounaris v. West Virginia State College*, 214 W. Va. 241, 588 S.E.2d 406 (2003). With respect to what constitutes a substantial public policy, this Court has explained that “they generally were created to protect the public from threats to its health, financial well-being, or constitutional rights, or to guarantee the effective operation of the legal system. The rationale underlying each exception is that protecting the employee from discharge is necessary to uphold a substantial public interest.” *Wounaris, supra*, citing *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 751, 559 S.E.2d 713, 724 (2001) (Maynard, J., dissenting). “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.” *Id.*, citing Syl. Pt. 2, *Birthisel v. Tri-Cities Health Services Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). Consistent with these principles, this Court has determined that public policy considerations prevent termination in a variety of circumstances, including self-defense, *Feliciano, supra*; providing truthful information to an investigator, *Kanagy v. Fiesta Salons, Inc.*, 208 W. Va. 526, 541 S.E.2d 616 (2000); making a claim for overtime pay,

McClung v. Marion County Comm'n, 178 W. Va. 444, 360 S.E.2d 221 (1987); and refusal to take a polygraph test, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984).

In the instant case, the petitioners asserted several different bases for their public policy argument: whistle-blower violations, honest legal advice, the Ethics Act, false/light/invasion of privacy, and gender-based discrimination. With respect to the Ethics Act claim, the court held as a matter of law that it could not be the basis for a public policy argument because it is not a stand-alone cause of action.²³

The West Virginia Ethics Act, W. Va. Code § 6B-1-1 et seq. and specifically § 6B-2-2(a), broadly prescribe ethical standards for elected and appointed officials and public employees: “The decisions and actions of public officials and public employees must be made free from *undue influence, favoritism or threat*, at every level of government.” (Emphasis supplied) In their respective amended complaints, both petitioner Taylor and petitioner Perry asserted that respondents DHHR, Fucillo and Keefer used their respective positions to unduly influence petitioners into changing their legal opinions. Mr. Keefer and Bryan Rosen threatened the petitioners with criminal prosecution at the May 16, 2012 meeting; then Mr. Keefer “upped the ante” by advising Rocco Fucillo, the petitioners’ new boss, that they were engaged in Wally Barron-like conduct; then Mr.

²³ With respect to the remaining claims, which are discussed *infra*, the court did not hold that such claims can never be the basis for a finding of public policy. Rather, the court held that the petitioners, as in-house counsel, were not covered under the Whistle Blower Law; that they failed to establish that they had given honest legal advice because their advice was, in the court’s opinion, wrong; that they failed to establish that they had been the victims of false light/invasion of privacy as a result of anything the respondents did; and that they failed to establish gender based discrimination.

exactly what was going on, suspended them, humiliated them,²⁴ and ultimately fired them.

The court below held that if the petitioners had any Ethics Act-based claims against the respondents, they were required to bring them to the Ethics Commission for an administrative hearing, finding that “[petitioners] are asking the Court to bypass the probable cause requirement under the Act and have a jury rule that there were violations by the [respondents] without having a full and complete investigation by the Ethics Commission regarding [petitioners’] claims.” (App. I, 0050.) The court also held that a violation of the Ethics Act could not be the basis for a *Harless* violation of public policy, based upon this Court’s reasoning in *Hill v. Stowers*, 224 W. Va. 51, 680 S.E.2d 66 (2009). (App. I, 0050-52.)

Not only does the Ethics Act not prohibit a private cause of action, it specifically contemplates one. In W. Va. Code § 6B-1-4, **Remedies and penalties in addition to other applicable remedies and penalties**, we find the following language:

The provisions of this chapter shall be in addition to any other applicable provisions of this code and except for the immunity provided by section three, article two of this chapter shall not be deemed to be in derogation of or as a substitution for any other provisions of this code, including, but not limited to, article five-a, chapter sixty-one of this code and except for the immunity provided by section three, article two of this chapter the remedies and penalties provided in this chapter shall be in addition to any other remedies or penalties which may be applicable to any circumstances relevant to both.

This language is consistent with various West Virginia cases regarding exceptions to the general rule requiring the exhaustion of administrative remedies. *See*,

²⁴ Putting aside the cloudburst of publicity that attended the petitioners’ suspension, all of which relegated them to the status of felons in the eyes of the public, it will be remembered that these two seasoned attorneys were consigned to performing ministerial tasks in a tiny shared cubicle.

e.g., Wiggins v. Eastern Associated Coal Corp., 178 W. Va. 63, 357 S.E.2d 745 (1987) (remedies available in federal and state administrative proceedings were not adequate to protect the substantial public policy interests embodied in the Mine Safety Act); *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 337 S.E.2d 913 (1985) (although the Human Rights Commission was intended to be the primary enforcement mechanism for rights under the Act, it is not the exclusive enforcement mechanism).²⁵

The test for determining whether the violation of a statute gives rise to a private cause of action was set forth in Syl. Pt. 1, *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980):

The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.

See also Syl. Pt. 3, *Hill v. Stowers*, 224 W. Va. 51, 680 S.E.2d 66 (2009). Applying this test to the facts of this case, it is clear that an alleged violation of the Ethics Act gives rise to a private cause of action.

Factor One: The court below specifically found that “[petitioners] are members of the class contemplated by the Ethics Act...,” (App. I, 0049-50) and the respondents are hardly in a position to argue the point, having written the court’s order in toto.

Factor Two: Legislative intent to allow a private cause of action may readily be inferred

²⁵ Without question, this Court’s cases “go both ways” on the issue of whether there is a private cause of action under specific statutes. At App. I, page 49 & n. 4 of the circuit court’s opinion, a number of those cases are collected.

from the language of W. Va. Code § 6B-1-4, set forth above, “this chapter shall be *in addition to any other remedies or penalties* which may be applicable to any circumstances relevant to both.” (Emphasis supplied) This makes perfect sense where, as here, the penalties which could be imposed by the Ethics Commission are severely limited²⁶ and the petitioners would not be adequately compensated for their damages and loss. Factor Three: A private cause of action is consistent with the underlying purposes of the legislative scheme, to ensure that [t]he decisions and actions of public officials and public employees ... be made free from undue influence, favoritism or threat....” W. Va. Code § 6B-1-2. In this case the underlying factual scenario involves two state employees, both in-house lawyers, who informed their client that the scoring procedures for awarding a contract could be subject to court challenge. All contracts into which the state enters implicate the public fisc and are a matter of public concern; and it is difficult to argue against the proposition that alerting one’s agency client to the possibility of a court challenge is consistent with the Ethics Act. Factor Four: The fourth factor is irrelevant to this case, as the case does not involve any area delegated exclusively to the federal government.

In concluding that violations of the Ethics Act cannot be the basis for a *Harless* claim, the court below relied upon *Hill v. Stowers, supra*, a case which is wholly inapposite to the case at bar. The plaintiff in *Hill* was an unsuccessful candidate in the 1996 general election for Circuit Clerk of Lincoln County; he alleged that his defeat was the result of the defendant’s illegal vote-buying activities. Relying on *Shields v. Booles*, 238 Ky. 673, 38 S.W.2d 677, 679-80 (1931), this Court held that “[i]t is not an actionable

²⁶ West Virginia Code § 6B-2-4(q)(1) – (4) permits the Commission to impose a public reprimand; a cease and desist order; an order of restitution for money, things of value, or services taken or received; and/or (4) a fine not to exceed \$1,000.00 per violation.

injury to the character, person, or property of a candidate for office for his adversary to bribe voters. It is an offense to be redressed in a prosecution by the commonwealth, or in a contest of the nomination where the wrongdoer may be deprived of the fruits of his wrong...," *i.e.*, his illegally gained office. *Hill*, 224 W. Va. 51, 680 S.E.2d at 71. With respect to the *Harless* cause of action asserted by Mr. Hill, this Court found, citing *Hutchinson v. Miller*, 797 F.2d 1279, 1287 (4th Cir. 1986), that "permitting a losing candidate in an election to pursue a private cause of action for monetary damages against his opponent would actually be contrary to West Virginia public policy. *Hill*, *supra*, 224 W. Va. 51, 680 S.E.2d at 76.

Here, there are no such considerations which militate against a finding that violations of the Ethics Act can be the basis for a *Harless* claim. These petitioners were terminated from their positions for conscientiously performing their jobs, alerting DHHR to possible wrongdoing or waste in the scoring of contract bids. Their evidence, if believed by the jury, shows that they were coerced and threatened to change their opinion; and that although they didn't change their opinion, neither did they go anywhere, tell anyone or do anything to force the issue. This Court should allow a jury to decide whether the respondents' actions were such as to constitute an exception to the will-and-pleasure rule.

6. The trial court erred in concluding that the petitioners had failed to put forward any evidence to support their claims: whistle-blower violations, honest legal advice, the Ethics Act, false light/invasion of privacy, and gender-based discrimination.

A. WHISTLE-BLOWER CLAIMS

West Virginia's Whistle-Blower Law, W. Va. Code § 6C-1-1 *et seq.* and specifically § 6C-1-3, provide that

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

The court below held that there was no evidence to support petitioners' whistle-blower claims because the petitioners "lacked 'reasonable cause to believe' that the work [of the technical scoring committee] had involved wrongdoing or waste and they did not make their report in 'good faith...,'" and because "their report was made, as they allege, in the performance of their assigned responsibilities as counsel for DHHR." (App. I, 0037.)

Whether or not the petitioners acted in good faith is, without question, a disputed issue of material fact in this case. West Virginia Code § 6C-1-2-(d) defines a "good faith report" as "a report of conduct defined in this article as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true." The testimony of Ms. Perry and Ms. Taylor would certainly allow a jury to find that their report, i.e., Ms. Taylor's spreadsheet and her conclusions, were a "good faith report." The court below did not go so far as to find malice or personal benefit; rather, he found that the petitioners' actions had nothing to do with "wrongdoing or waste."

This conclusion is perplexing. That the petitioners' concerns about the technical scoring process implicated wrongdoing or waste seems so obvious that it is difficult to parse the basis for the court's contrary conclusion. The petitioners believed that because the technical scoring was flawed, the advertising contract could be challenged, all of which would grind the process to a halt and cost DHHR time, money and embarrassment. The fact that the court now knows what the petitioners did *not* know at the time – that Purchasing had already reviewed and approved the technical scoring, which certainly would have made a successful challenge more difficult (although certainly not impossible) – does not change the issue, which is what the petitioners reasonably believed at the time.

The court's legal conclusion, that an organization's in-house counsel has no whistleblower protection against adverse employment action, relies on the case of *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220 (2010). In *Kidwell*, the Supreme Court of Minnesota held that a whistle-blower claim asserted by an in-house counsel failed because there was no "evidence from which the jury could conclude that his purpose in sending the email was anything other than the performance of his assigned responsibilities as in-house counsel." *Kidwell*, 784 N.W.2d at 230. As set forth in the concurrence, however, "[w]hether and to what extent lawyers, particularly in-house lawyers, may pursue retaliatory discharge claims is a topic that has generated significant case law and scholarly discussion..." and "[a] majority of those decisions and most of the legal commentary support whistle-blower status for attorneys..."²⁷ *Id.* at 232. And the dissenting justice went much further, noting that the plurality's opinion essentially

²⁷ The concurring justice would have decided the case on the ground that the plaintiff attorney had breached his fiduciary responsibility to his client by disclosing client confidences outside his chain of command. *Kidwell*, 784 N.W.2d at 234.

construed an unambiguous whistle-blower statute by carving out an exception (in-house lawyers) that was not contained in the text: “[T]he Minnesota Whistleblower Act is a law of general applicability that applies to nearly every employee in the state....” *Id.* at 236.

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

B. HONEST LEGAL ADVICE

The court below held that the petitioners had not provided “honest legal advice” by means of an analysis filled with speculation: that Mr. Rosen would have been subject to criminal prosecution for failing to follow a procedure set forth in the Purchasing Division’s Handbook; that it “would have been prudent for Perry to assign Taylor to ‘review’ Law’s conflict of interest...;”²⁸ that a challenge to the contract might have been more likely had the petitioners’ advice been followed, since “adherence to procedures is the best defense against the vendors challenges that are more likely to

²⁸ Once again, the court simply ignores the petitioners’ testimony that neither of them was aware of the alleged conflict of interest, since Ms. Perry didn’t even know the identity of the bidders and Ms. Taylor was under the impression that the request for a legal review had come from someone other than Mr. Law.

arise when contracts be [sic] awarded on the basis of subjective criteria...;" that a vendor challenge to the advertising contract would probably not have been successful, because "a disagreement regarding subjective judgments will not meet the *E.D.S.*²⁹ criteria for voiding the award of a contract...;" that the petitioners should have anticipated all of the above; and that the conclusions Ms. Taylor drew from her spreadsheet about the technical scores were wrong. (App. I, 0032-36.) With respect to this latter point, the court went so far as to find that David Tincher's approvals of the technical scores "are *dispositive* of the issues of (1) whether the [petitioners] had 'reasonable cause to believe' that DHHR had committed wrongdoing or waste regarding the scoring of HHR 12052 and (2) whether DHHR had actually committed wrongdoing or waste regarding that scoring." (App. I, 0041-42.) This is an astounding conclusion. First, the petitioners' evidence is that until the meeting of May 16, 2014, Ms. Taylor didn't know that Mr. Tincher had ever approved anything. Second, Mr. Tincher's approval might be persuasive evidence to a jury, but it is not dispositive.³⁰ Under the court's reasoning, there could *never* be a successful challenge to the award of a contract because Mr. Tincher will in all instances have approved the scoring before the contract was awarded.

²⁹ *State ex rel. E.D.S. Federal Corp. v. Leon H. Ginsberg, Comm'r, Department of Welfare*, 163 W.Va. 647, 259 S.E.2d 618 (1979).

³⁰ This is especially true since the DHHR Committee's scoring wasn't immediately approved; there was a two month back-and-forth process during which Purchasing expressed various concerns to DHHR, necessitating an extension of the existing contract with the Arnold Agency. (App. III, 1347-57, 1361-65.) As set forth in the Affidavit of Marsha Dadisman, "DOA had concerns about the justification of some of the scores and sent them back to us to reevaluate. The evaluation team met and discussed the points, and we agreed to adjust points based on DOA's suggestion." (App. II, 0638.)

C. ETHICS ACT

The facts and circumstances surrounding the Ethics Act claim have been discussed *supra* at pp. 27-33. Clearly there was sufficient evidence to take this issue to the jury.

D. FALSE LIGHT/INVASION OF PRIVACY

“An ‘invasion of privacy’ includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another’s name or likeness; (3) unreasonable publicity given to another’s private life; and (4) publicity that unreasonably places another in a false light before the public.” Syl. Pt. 6, *Tabata v. Charleston Area Med. Ctr., Inc.*, No. 13-0766 (W. Va., May 28, 2014); Syl. Pt. 3, *Benson v. AJR, Inc.*, 215 W. Va. 324, 599 S.E.2d 747 (2004); Syl. Pt. 8, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983). “Publicity which unreasonably places another in a false light before the public is an actionable invasion of privacy.” *Bine v. Owens, et al.*, 208 W. Va. 679, 542 S.E.2d 842 (2000), citing Syl. Pt. 12, *Crump, supra*.

In their respective complaints, the petitioners alleged that the maelstrom of publicity unleashed by respondents’ actions invaded their privacy, put them in a false light as criminal conspirators, and ruined their reputations.³¹ The court below dismissed

³¹ In various publications, we find, for example, Prosecutor Mark Plants noting that “[there’s some allegations of potential bid-rigging....[i]t’s a felony to try to affect the outcome of a state agency.” (App. III, 1654); that “[t]he search warrant alleges the three unlawfully tried to swing the contract’s outcome...” (App. III, 1657); “A September 11 search warrant....claims that the trio broke the law by trying to twist the outcome of state purchasing....” (App. III, 1661); “[t]he search warrant accused [Law, Perry and Taylor] of illegally interfering with awarding of the marketing contract...” (App. III, 1681); ““Mark Plants is considering whether to file charges against three state employees who are alleged to have illegally interfered with a multi-million dollar marketing contract;” (App. III, 1687); [t]he warrant alleges the trio conspired to steer the

these claims on the ground that the petitioners are public officials or public figures or involuntary public figures; that all matters surrounding issuance of the advertising contract were matters of legitimate public interest;³² that the statements contained in the search warrant were true;³³ that the petitioners somehow consented to the publicity; and that the respondents are therefore immune from liability. (App. I, 0052-64.)

The contention that the petitioners are public officials may be dealt with briefly: they were neither “elected [n]or appointed” to their positions. W. Va. Code § 6B-1-3(k). Rather, they were hired; their status was, at all times relevant to this case, that of employees.

With respect to the argument that the petitioners were public figures or involuntary public figures or consenting public figures – these three concepts are woven together in the analysis of the court below -- we look to the language of *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983): “In making a determination as to ‘public figure’ status, the inquiry ‘focuses on the person to whom the publicity relates and asks whether the individual either by assuming a role of special prominence in the affairs of society or by thrusting himself to the forefront of a

contract to a particular vendor...” (App. II, 932); “Lawyer involved in contract flap fired...” (App. III, 1670); and finally, under the Headline “Advertising Contract Controversy a Similar Scene,” the petitioners’ actions were likened to those of former Lottery Director Elton Bryan (App. III, 1661-1662).

³² Here the court below analogized this case to “the criminal convictions and civil lawsuit stemming from the 1968 Baron Administration investigation and the Lottery contract schemes.” (App. I, 0053-54.) The court conveniently ignored the fact that these petitioners were neither prosecuted (let alone convicted) nor sued.

³³ As set forth earlier in this brief, the petitioners’ evidence – ignored by the court below – is that many of the statements were *not* true and many of them depended on the drawing of inferences from disputed facts. See text *supra* at pp. 4-14

particular public controversy ... has become a public figure.” Nothing in the record of this case would allow the conclusion that either of the petitioners has assumed a role of special prominence in the affairs of society, and the petitioners’ evidence is that they didn’t thrust themselves to the forefront of anything, let alone a public controversy. Rather, they gave private legal advice to their client in the May 16, 2012 meeting with Warren Keefer and Bryan Rosen. Several weeks after the meeting Ms. Perry prepared a memo, *on specific directive as a result of the abrupt retirement of the Secretary of DHHR*, listing the advertising contract matter as an issue that might arise in the future. After the meeting Ms. Taylor didn’t do anything except follow a directive from John Law to call Erica Mani, and she was completely ignorant of any machinations by Mr. Law that might have gotten Ms. Mani “into the act.” Thereafter, Ms. Perry and Ms. Taylor attempted to bring the new Interim Acting Secretary, Mr. Fucillo, up to date, Ms. Taylor not wanting to call David Tincher (Ms. Mani’s suggestion) without running it by Mr. Fucillo first.

In short, nothing about the advertising contract was a “public controversy” until Ms. Taylor and Ms. Perry were suspended; rather, there was a simple in-house disagreement among staff members at DHHR. It was the respondents who forced this disagreement into the public sphere by their actions.

Additionally in *Crump*, the Court noted that a public figure was defined in some jurisdictions as “a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, has become a public personage. Although a person may not actively seek publicity, he or she may become a public personage by the force of

consequences which make his or her activities of legitimate interest to the public.” *Id.* (internal citations omitted) The petitioners do not qualify as public figures under this definition, unless this Court is prepared to hold that all lawyers working in state government are public figures. Further, the petitioners did not actively seek any publicity; although their lawyer appeared on Talkline to discuss the investigation after news broke that the search warrant had been approved (App. I, 0061), this hardly qualifies as the petitioner’s “consent” to having their reputations shattered by imputations of criminal conduct.

The petitioners are at a loss to understand how, on motion for summary judgment, the court below could find the allegations in the search warrant to be true (App. I, 0062); this determination could only be made by a jury in light of the disputed issues of material fact contained in this record. The petitioners’ evidence shows that the allegations contained in the search warrant and thereafter published throughout the state, contains numerous statements which were false and which held the petitioners in a false light. “On or around May 1, 2012, Mr. Law told Ms. Sullivan, Jennifer Taylor, and Susan Perry together that vendor Fahlgren Mortine had received the advertising contract. Mr. Law and Ms. Taylor then discussed concerns about an out-of-state vendor being awarded [the] contract.” (App. III, 1699.) *The petitioners deny this.* “Jennifer Taylor’s husband and stepson both work for Charleston-based advertising and media firm Maple Creative.” (*Id.*) *This fact is totally irrelevant*, as Maple Creative was not a bidder on the advertising contract, but it suggests that Ms. Taylor’s motive (to use a loaded word) was to steer the contract to her husband.³⁴ “[B]ecause of the ‘legal review’ a contract extension of the active DHHR advertising and media contract was

³⁴ Here it should be noted that Ms. Taylor’s husband had retired prior to any of these events.

initiated ... Without the 'legal review' the contract award would have gone to vendor Fahlgren Mortine on or around May 15, 2012." (App. III, 1701.) *This statement is a factual finding which ignores evidence to the contrary*, specifically, evidence in the record to suggest that the existing Arnold Agency contract was extended because of the two-month delay between DHHR's submission of its technical scores to Purchasing and Purchasing's acceptance of those scores, and thereafter the anticipated delay in sending the contract for Office of Technology review. (App. III, 1363.)

E. GENDER BASED DISCRIMINATION

Under well-established principles articulated by this Court, "[i]n order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq. (1979), the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class. (2) that the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made." Syl. Pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986). Thereafter, "[w]hen an employee makes a *prima facie* case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge." Syl. Pt. 2, *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991).

The court below dismissed Ms. Taylor's gender-based discrimination claim in cavalier fashion, stating at the outset that "[Petitioners] acknowledged during the hearing that Ms. Taylor's claims regarding gender discrimination are weak." (App. I, 0068.) This is a complete misstatement of what was said at the hearing, which was:

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

The court then found that the only evidence supporting Ms. Taylor's claim was the fact that her interim replacement as General Counsel was a male attorney, Will Jones. (App. I, 0068.)³⁵ The court discounted or ignored evidence that (a) Ms. Taylor had actually beat out Mr. Fucillo, the man who ultimately fired her, for the position of General Counsel at DHHR; (b) Ms. Villanueva-Matkovich was hired subsequent to the filing of the petitioners' lawsuits, which contained claims of gender-based discrimination; and (c) the over-the-top reaction of all the male principals in this case (Fucillo, Keefer and Rosen) to a legal opinion they didn't like, from two female attorneys they seemed to think should just butt out. As Ms. Taylor stated in her Pre-[OIG] Statement Interview, "I have done nothing but fix Bryan's messes since we've ... I've been there, and I truly believe that he's just tired of the girls ragging on him and he whined to Warren and Warren decided okay well, you know, taking up for his protégé here." (App. II, 0577, 0700.)

Finally, the court held that Ms. Taylor's gender-based claim could not be sustained because DHHR had suspended not only her and Ms. Perry, but also Mr. Law. John Law was not similarly situated to the petitioners, as (a) he isn't an attorney, and (b) he admitted that he wanted the Arnold Agency to win the contract – a fact which was, according to the petitioners' statements and testimony, unknown to them.

Petitioner Perry's gender-based discrimination claim contains an additional element which, again, the court below simply discounted: that on the same day the

³⁵ Ms. Taylor was ultimately replaced by Karen Villanueva-Matkovich. (App. I, 0068.)

petitioners approached Mr. Fucillo for the purpose of alerting him to the Mani-Taylor phone calls, Ms. Perry had met with Dawn Adkins, DHHR's EEO officer, to discuss the possibility of a gender-based discrimination grievance challenging disparate treatment between her and Mr. Fucillo. (App. II, 0994-1001.) (The grievance involved mileage; Mr. Fucillo, who lives in Fairmont, was paid for his mileage when he came to Charleston, while Ms. Perry, who lives in Logan, was not.)³⁶ Contrary to the lower court's apparent belief, a jury is not bound to believe Mr. Fucillo when he says he was unaware of Ms. Perry's actions at the time he took steps to reassign, investigate and then terminate her.

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

7. The trial court erred in granting partial summary judgment against petitioner Perry on the ground that her employment had been terminated by the Governor, not by her employer.

Respondents' Motion for Partial Summary Judgment was granted as to "any claims" asserted by petitioner Perry "of wrongful, retaliatory or illegal discharge under the West Virginia Human Rights Act" and the Whistle-Blower Law brought against WVDHHR, Rocco Fucillo, and Mr. Keefer. (App. I, 219-20.) The court also ruled that "any other claim pled in Plaintiff Perry's Complaint that is based on allegations of wrongful, retaliatory or illegal discharge by these Defendants are also **DISMISSED** with prejudice pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure." (App. I, 220.) The circuit court erroneously concluded that because the decision to terminate

³⁶ The court concluded as a matter of law that this could not be considered discriminatory because Mr. Fucillo had accomplished his goal by negotiating to have Fairmont designated his home office; thus, "[t]his is not a situation where Ms. Perry and Mr. Fucillo were both assigned to Charleston and only Mr. Fucillo received travel reimbursement." (App. I, 0066.)

Ms. Perry was made by the Office of the Governor, her “employer” had not discharged her and therefore the claims against the respondents must be dismissed. In so ruling, the court below misapprehended both the West Virginia Human Rights Act and the Whistle-Blower Law.

It is undisputed that on July 16, 2012, Ms. Perry was removed from her position as the top attorney at DHHR and thereafter “reassigned” for months to her home and then to a cubicle in another building, with no access to her office, computer, e-mail account, or former co-workers. Her regular duties and assignments were taken from her and she was assigned to do what may fairly be termed busywork. This “administrative reassignment” was ordered by Mr. Fucillo following a series of phone calls over the weekend of July 14 and July 15, 2012. *See text supra* at pp. 11-12.

According to Harold Clifton, Rocco Fucillo and Warren Keefer, the basis for Ms. Perry’s removal and reassignment was information provided by Mr. Keefer and Mr. Fucillo. (App. IV, 1970-72.) The investigation by David Bishop was also based upon the information provided by Messrs. Keefer and Fucillo. (App. IV, 1973-74.) In this regard, it should be recalled that Mr. Fucillo acknowledged that he took the actions he did after Warren Keefer told him that Susan Perry had engaged in “Wally Barron” type behavior. (App. IV, 2000, 2006.)

The lower court’s implicit conclusion, that the actions taken by Mr. Fucillo (after Mr. Keefer started talking about bid rigging and Wally Barron) did not cause or contribute to the decision to terminate Ms. Perry’s employment, is disingenuous. Clearly, the “administrative reassignment” and the OIG investigation had *everything* to do with Ms. Perry’s subsequent termination letter later issued; Charlie Lorensen, the

Governor's Chief of Staff who made the ultimate decision, acknowledged that Ms. Perry was removed from her position because it had been "effectively vacated" by her administrative reassignment. (App. IV, 1945.)

The decision to administratively reassign Ms. Perry was made by respondent Fucillo and no one else –this is undisputed. (App. II, 744.) Her termination letter was issued on DHHR letterhead and signed by Harold Clifton, a DHHR employee. Petitioner Perry was terminated from the employ of the West Virginia Department of Health and Human Resources on June 30, 2013 by DHHR Human Relations Director Harold Clifton.

The court below simply ignored the evidence from which a jury could reasonably find that Messrs. Fucillo and Keefer instigated Ms. Perry's "administrative reassignment," which led inexorably to her retaliatory discharge. And indeed, Harold Clifton's testimony supports Ms. Perry's assertion that the information from Fucillo and Keefer was provided in reprisal and retaliation for Ms. Perry's whistle-blowing and gender discrimination complaints.³⁷ The factual scenario in this case is a textbook example of apparent pretext, as the respondents offered no reasonable explanation for treating two long time, loyal and honest employees as though they were a couple of crooks.

³⁷ Harold Clifton could think of no reason why the investigation (launched on the basis of Keefer and Fucillo's statements) could not have gone forward while the petitioners continued to work in their offices, and confirmed that this possibility was not even considered by his superior, Mr. Fucillo. (App. IV, 1980.) Instead, both Ms. Perry and Ms. Taylor were removed from their positions without an opportunity to give their side of the story, and were told absolutely nothing about why they were being removed from their jobs. (App. IV, 1981-82, 1998.)

In Syllabus Point 5 of *Travis v. Alcon Laboratories, Inc.*, 202 W.Va. 369, 404

S.E.2d 419 (1998), this Court noted that

[a]n agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship. Of course, if he his acting within the scope of his employment, then his principal or employer may also be held liable.” Syllabus Point 3, *Musgrove v. Hickory Inn, Inc.*, 168 W.Va. 65, 281 S.E.2d 499 (1981).

The court below ignored *Musgrove* and failed to consider the potential liability of respondents Fucillo and Keefer as agents of the employer, DHHR. The court also ignored the plain language of the Human Rights Act, W.Va. Code §5-11-9 (7)(a) and (c), which provide that liability may flow to “any person” (not simply an employer) who engages in “any form of threats or reprisal” or who conspires with others to commit acts “to harass, degrade [or] embarrass” an employee due to her protected status, such as gender. Thus, the court’s analysis of whether Mr. Fucillo made the ultimate decision to terminate Ms. Perry is entirely beside the point in terms of his potential liability under the Human Rights Act.

As to Ms. Perry’s whistle-blower claims, W.Va. Code §6-C-1-2(c) defines the term “employer” as “a person supervising one or more employees” or “an agent of a public body.” W.Va. Code §6C-1-3(a) provides that no employer may “discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee’s ... terms, conditions, location or privileges of employment” for prohibited reasons. W.Va. Code §6C-1-4 provides that an employee who alleges that she is a victim of a violation of W.Va. Code §6C-1-3 may bring a civil action for “appropriate injunctive relief or damages.”

Respondent Fucillo is an employer as defined by W.Va. Code §6C-1-2(c). He engaged in the discrimination described herein after being incited to take this action against Petitioner Perry by respondent Keefer. Fucillo then changed the terms, conditions, locations and privileges of Petitioner Perry's employment on July 16, 2012 through the "cat's paw" of causing a pre-textual investigation by former DHHR Inspector General Bishop. Indeed, Defendant Fucillo admitted that he, and not David Bishop, was the person with the authority to direct personnel actions against Susan Perry. (App. IV, 2004.)

The individual liability of respondents Fucillo and Keefer is further clarified by the fact that the West Virginia Legislature explicitly included a provision that not only assesses a monetary fine, but also permits the suspension of respondents from public service as possible relief available should it be determined at trial that either or both violated W. Va. Code §6C-1-3 with the intent of discouraging disclosure of information by petitioners.³⁸ The potential individual liability is clear from the statute regardless of who is determined to have terminated the petitioners' employment.

In summary, respondent Fucillo's misconduct in this matter, instigated, aided and encouraged by Respondent Keefer's comments, all leading to the investigation and

³⁸ W.Va. Code §6C-1-6 provides that:

A person who, as an employer or under color of an employer's authority, violates this article is liable for a civil fine of not more than \$500. Additionally, except where the person holds a public office by election or appointment, if the court specifically finds that

the person, while in the employment of the State or a political subdivision committed a violation of Section 3 of this article with the intent to discourage the disclosure of information, the court **may order the person's suspension for not more than 6 months.**

reassignment of DHHR's top lawyer, was by no means incidental to Susan Perry's termination. The circuit court fundamentally misapprehended the scope of liability for individual defendants under the Act, which requires reversal of its rulings.

8. The trial court erred in granting partial summary judgment in favor of respondent Warren Keefer, dismissing petitioner Taylor's case against him.

At the outset it should be acknowledged that counsel for petitioner Taylor failed to append a copy of the lower court's separate order granting summary judgment for Warren Keefer (App. I, 0239) to the Notice of Appeal, as counsel had omitted this as an appeal issue in said Notice. Rule 10(c)(3) of this Court's Rules of Appellate Procedure provides that "[t]he assignments of error need not be identical to those contained in the notice of appeal....," and therefore counsel respectfully submits that this issue is properly before the Court.

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

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

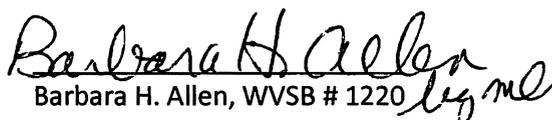
In June when it became known I would be secretary, Warren Keefer gave me a heads up for hot issues including the advertising contract. He told me, and as I was aware of, John Law has a relationship/friendship/long history with the Arnold Agency, *and that Susan Perry and Jennifer Taylor were also involved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

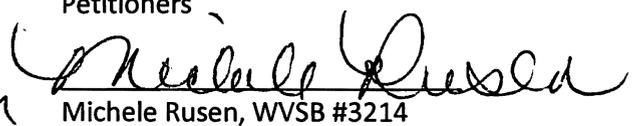
It isn't necessary to Ms. Taylor's claim that Mr. Keefer have actually participated in the decision to fire her; it is sufficient that his actions caused or contributed to the OIG investigation, the so-called administrative reassignment,³⁹ and finally the termination. *See* argument pp. 44-48, *supra*. A jury could reasonably conclude that it was Mr. Keefer who lit the fuse; after he began talking about illegality bid rigging and Wally Barron, it was the beginning of the end.

VII. CONCLUSION

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

JENNIFER N. TAYLOR and
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Petitioners


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³⁹ It is fair to call this a "so-called" administrative reassignment because it began as an administrative suspension; soon thereafter, someone at DHHR woke up and realized that the agency couldn't suspend the petitioners and continue to pay them – hence the fiction that they were doing meaningful work at home and then in their tiny cubicle.

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

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

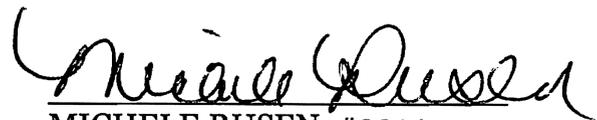
v.

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

CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiffs/Petitioners hereby certifies that on the 14th day of October, 2014, she caused to be served the foregoing and hereto annexed *Brief of the Petitioners* and *Joint Appendix* upon Charles R. Bailey, by hand-delivering the same to the address that follows:

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