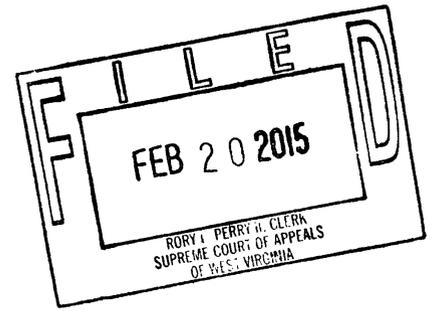


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO.: 14-0679



JENNIFER N. TAYLOR and
SUSAN S. PERRY,
Plaintiffs Below,
Petitioners,

vs.

THE WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
ROCCO FUCILLO, WARREN KEEFER,
Defendants Below,
Respondents.

RESPONDENTS' RESPONSE TO BRIEF OF THE PETITIONERS

Charles R. Bailey (WV Bar #0202)
Betsy L. Stewart (WV Bar #12042)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222
cbailey@baileywyant.com
bstewart@baileywyant.com
Counsel for Respondents

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I. STATEMENT OF THE CASE

The subject of this case is government contracting relating to the award of HHR 12052, a contract to provide advertising services to the West Virginia Department of Health and Human Resources (“DHHR”). Three areas of the law relate to this case: (1) **Employment law**, because Petitioners were at-will employees terminated from DHHR; (2) **public procurement law**, because Petitioners interfered with the contract award process of HHR12052; and (3) **professional responsibility law**, because Petitioners were employed as attorneys when they intervened and interfered with that process, including giving erroneous legal advice to DHHR.

Professional responsibility is the most relevant area of law because the actions that each side took revolved around the fact that Petitioners were attorneys. The trial court disagreed that Petitioners’ status as attorneys entitled them to intervene in the activities of the evaluation committee that was responsible for the task of grading the proposals submitted by vendors bidding on HHR 12052. Respondents believed, and the trial court agreed, that Petitioners’ experience as attorneys should have caused them to investigate the real reasons they were asked to intervene, to understand that their intervention in the evaluation process violated the procedures which governed that process, and to understand that if DHHR followed their advice to have the evaluation process repeated, the governing procedures would have been violated again. Respondents will structure the remainder of this section in accordance with the *W.Va. Rules of Appellate Procedure*, Rule 10(d), and limit it to what is necessary to correct inaccuracies or omissions in Petitioners’ *Statement of the Case*.

Specific omission, page v. et seq.: *Brief of Petitioners* (“Brief”) contains no reference to *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995). In *Bryan*, counsel for the West Virginia Lottery Commission facilitated the awarding of an advertising contract to a particular vendor by

intervening in the evaluation committee process. That intervention resulted in criminal convictions of both the counsel and the Director of the Commission. App. I, 28, ¶ 26, 53-54, ¶ 76, App. II, 413. The Order granting Respondents' Summary Judgment ("Order") cited *Bryan*, and explained "a number of similarities between the factual situation" in that case and in this one. App. I, 28, 30-31.

General omission, page 4, footnote 4: This footnote explains the function of the evaluation committee and cites to the *West Virginia Purchasing Division Procedures Handbook* ("*Purchasing Handbook*"), promulgated by the Department of Administration, Division of Purchasing ("DOA, DOP"). The *Purchasing Handbook* is the source of the procedural requirements that govern the grading of the proposals submitted by vendors. However, their Brief does not contain a comprehensive discussion of these requirements. This is a significant omission because the core issues in this case are (1) the extent to which Petitioners' involvement with the evaluation committee violated the procedures applicable to the contract award process and (2) the extent to which DHHR itself would have violated those procedures if it had followed Petitioners' advice to repeat the scoring process. Petitioners were terminated because, as attorneys, they first did something that they should not have done and then advised the DHHR it had a legal obligation to do something that it was procedurally not authorized to do. Petitioners' omission of a comprehensive discussion of the *Purchasing Handbook* is strange because of how they characterize their intervention by stating their intervention was a review of DHHR's "procedures in scoring the contract." *Brief*, i, 2 (emphasis added). Petitioners' procedure focused verbiage on appeal is different from their trial court characterization of their intervention.

In their Amended Complaints, they substantively reviewed "the scoring of the technical portion to determine whether it was conducted appropriately based upon the concerns John Law

expressed.” App. IV 2329, ¶ 32, 2383, ¶ 33. They determined that “the technical scoring for RFP HHR 12052 was inconsistent, arbitrary and deficient [and] legally indefensible.” *Id.*, 2331, ¶ 41, 2385, ¶ 42. Whether Petitioners reviewed the actual “scoring,” as they pled, or reviewed “procedures,” as asserted on appeal, there is one certainty; Petitioners never specify which purchasing procedures were the subject of their “review” in their Brief. Other than footnote 4, their only mention of the *Purchasing Handbook* is their argument that the trial court afforded excessive importance to it. *Brief*, 21. Because Petitioners failed to specify which of “the agency’s procedures for scoring technical proposals” was the subject of their “legal review,” and to remedy the absence of any substantive discussion of the scoring-related procedures in the *Purchasing Handbook*, Respondents direct the Court’s attention to three portions of the record:

Purchasing Handbook: The publication, sans appendices, is located in App. II, 764-857 and on the Purchasing Division’s website. This publication is used by the State and by vendors desiring to do business with the state that rely on the State to follow the procedures in the *Purchasing Handbook*. Purchasing officials are required to follow these procedures for non exempt contracts. App. II, 768A, §1.2, 1.3 and 1.4. Petitioner Taylor herself confirmed that a “state procurement officer for a non exempt contract is bound by the [*Purchasing Handbook*].” App. III, 1773 (115:18-24; 116:1-2). The *Purchasing Handbook* also serves as a guide for exempt spending units, such as the State Treasurer’s Office, where Taylor previously worked. 148 C.S.R. § 1-3.1, W.Va. Code § 12-3A-3, App. III, 1773 (113:11-16; 114:20-24; 115:1-3).

Affidavits of David Tincher and of Roberta Wagner: The relationship between the *Purchasing Handbook* procedures and the scoring of the proposals at issue is established in affidavits of David Tincher (Director of DOA, DOP) and Roberta Wagner (DOA, DOP Representative assigned to HHR 12052). App. II, 453-60, 465-69. They explain the relationship

that existed between the Purchasing Division and the DHHR technical evaluation committee. App. II, 461-64.

The Circuit Court's final Order: This Order refers to the *Purchasing Handbook* and the affidavits of Wagner and Tincher; as exemplified by the two omissions discussed below, a clear relationship exists between those references and the Order. App. I, 1-71.

Specific omission, page 4, footnote 4: Petitioners omit the procedural requirement that the recommended scores to the Purchasing Division are "consensus" scores. This concept is discussed in the Order, Tincher's affidavit, and the *Purchasing Handbook*. App. I, 6, ¶ 12, App. II, 457, ¶ 12, 461-464, § 7.2.4. Tincher has the authority to replace committee members if necessary to achieve a consensus. App. I, 6, ¶ 12, App. II, 457-58, ¶ 12, 464. Tincher explains; "The 'consensus' recommendation concept is extremely important ... because it reduces the extent to which the personal biases of each committee member will skew the scores that the committee recommends to the Purchasing Division." App. II, 457-458, ¶ 12. This requirement is specifically relevant to this case because the scores Taylor criticized were the ones Petitioners used as a basis for their assertion that the DHHR was legally obligated to repeat the scoring process. Taylor made this determination without any interaction, much less reaching a consensus, with the individuals who were actual members of the evaluation committee. Petitioners suggest to this Court that, for purposes of evaluations, the opinion of an individual with a law degree, who was not a member of a duly constituted evaluation committee, should override the consensus opinion of three committee members who lack law degrees. App. I, 6-12.

Specific omission, pages 5 and 6: Although Petitioners state how much time it took the evaluation committee to score the technical proposals, they failed to mention how little time it took Taylor to determine their scores were, "inconsistent, arbitrary, and deficient" and "legally

indefensible.” App. IV, 2331, ¶ 41, 2385, ¶ 42. This is a significant omission.

Thirteen weeks elapsed between the time the Purchasing Division provided the technical proposals to the evaluation committee on January 24, 2012, and the time that the Purchasing Division approved the committee’s scoring of those proposals on April 5, 2012. App. III, 1788, App. II, 458, ¶ 13. Petitioners reference “problems” that arose during the process and indicate that these problems caused the proposals to be “re-scored.” *Brief*, 5. This implies there was some inadequacy in the committee’s performance that required some unusual intervention from the Purchasing Division. This is false; the record does not contain, and Petitioners do not cite, any evidence of this. In other words, the normal back-and-forth process between the evaluation committee and the procurement professionals in the Purchasing Division, as described by Tincher and Wagner, is what occurred in this time period and is demonstrative of the painstaking efforts by the Evaluation Committee and DOA, DOP to make the scoring consistent. App. II, 453-60, 465-69, 622-23, App. III, 1347-1357.

However, Petitioners failed to state how quickly Taylor, who was not a procurement professional, determined the scores that had been approved by procurement professionals in the Purchasing Division were “legally indefensible.” Taylor said she “spent three days working long hours going through” each of the four technical proposals and formed her opinion about the legal indefensibility of the scores before she reviewed all of them. App. III, 1428. On May 3, 2012, she indicated to Perry that the proposals “all need to be sent back for re-review” even though she had “only made it through two of the four sets,” which were the Arnold Agency’s and Fahlgren Mortine’s proposals. App. III, 1529; App. II, 716-17. The next day, having still not completed her review, she stated, “My recommendation would be to (1) send the proposals back for a review by a new committee or (2) send them back for a review by the old committee after a

refresher course on how to rate a proposal.” App. I, 10-11, ¶ 32, App. II, 564.

Specific omission, page 4, footnote 4: Petitioners referenced, but did not discuss, the procedural requirement that the Purchasing Division had to approve the evaluation committee’s scores of the technical proposals (the services each vendor proposed to provide) before the cost proposals were opened (the vendor’s proposed cost for services) and forwarded to the evaluation committee to calculate the final score. This requirement is discussed in the Order, Tincher’s affidavit, and the *Purchasing Handbook*. App. I, 5, ¶ 10, App. II, 457, ¶ 11, 462, § 7.2.4.

Those references address the requirement that the Purchasing Division could only open the cost proposals after it approved the technical scores of the evaluation committee. The rationale for the “technical before cost procedure” is “to eliminate the possibility that any committee member will allow his or her evaluation of the technical proposals to be influenced, consciously or subconsciously, by an awareness of the price that the vendors propose to charge for the goods or services that they are proposing to provide.”⁴ App. II, 459, ¶ 15. This requirement is relevant because when Petitioners advised DHHR to repeat the technical scoring process, the cost proposals had already been opened. Petitioners tell this Court that because a lawyer disagreed with the result of a procedurally required “technical before cost” evaluation process, DHHR should have disregarded it and conducted a procedurally unauthorized cost before technical evaluation process. App. I, 21, ¶ 6-7, App. III, 1544, 1797.

Inaccuracies, page 6, lines 5-6; page 7, lines 3-5; page 14, lines 17-19; page 21, lines 4-6; page 35, lines 6-7; page 37, lines 12-13: The procedural requirement that technical proposals be approved first is only mentioned in a footnote in Petitioners’ Brief. Petitioners’

⁴ The Best Value Online Module Video states, “[a]fter the evaluation committee meets and all members are in consensus with the deductions made, a draft recommendation is prepared with the scores for all participating vendors. Before the recommendation is signed and approved, **the scores may be altered, as long as the changes occur before the cost opening.**” (emphasis added) App. II, Exhibit NN is the disc attached; minutes 18:20-18:37.

Joint Memorandum in Opposition to Defendants' Motion for Summary Judgment contains no mention of it; however, it did state that Taylor's review of the technical proposal scoring occurred after the cost proposals "had been opened." App. III, 1055. Although Petitioners attribute minimal significance to that procedural requirement, their Brief attributes a great deal of significance to their lack of knowledge of where, in relation to that requirement, the scoring process was when they decided to intervene. Petitioners argue they were both unaware that the technical scores had been approved and the bids opened. *Brief*, 6:5-6, 7:3-5, 14:17-19; 21:4-6; 35:6-7; 37:12-13. This is an issue raised for the first time on appeal and should be disregarded, *Barney v. Auvil*, 195 W.Va. 733, 741, 466 SE2d 801, 809 (1995), but to the extent that the Court elects to evaluate this allegation Respondents respond as follows:

Petitioners' six separate representations Perry was unaware the technical scores Taylor reviewed during early May 2012 had already been approved and that she was unaware her review was being conducted after the cost proposals had been opened are inaccurate. Perry was notified in an April 19, 2012, e-mail that the cost proposals were opened on April 12, 2012, more than two weeks before Taylor began her legal review. App.III, 1734, 1786-1788. There is other substantial evidence that Petitioners knew, or by minimal investigation, should have known, the cost bids were opened when they began the legal review. Perry heard Law's excitement over Arnold being the low cost bidder, demonstrating Perry's knowledge that the technical scores had to have been approved. App. II, 494 (361:9-12); 495 (352:2-16). Nancy Sullivan heard Law voice concern that Fahlgren was an "out of state vendor" and told Perry and Taylor that an award to Fahlgren was bad for the Governor in an election year; Perry admitted she heard Law say an "out of state vendor" would be bad for the Governor, creating knowledge of where in the process the award was. App. II, 481-483, 488 (268:18-23), 495 (362:2-17), 668-670. Perry believed Law

was concerned about a change in vendors and he told her once or twice that Arnold might not get the contract, placing her on notice of the advanced stage of the process. App. II, 485-486 (254:21-24; 255:1; 255:14-19). Taylor recalls Law expressing concern the award might go to an out of state vendor and that it would be bad for the Governor; this is knowledge Law would not have unless the technical scoring was complete and cost bids were opened. App. I, 170 (367:8-24; 368:1-8). Taylor also admitted she would have known the technical scoring had to be approved before the cost bids were opened and never asked about the status of the cost bids before performing the legal review. App. II, 543 (287:13-24; 288:1-18).

Omissions, page 6, lines 5-6; page 7, lines 3-5; page 14, lines 17-19; page 21, lines 4-6; page 35, lines 6-7; page 37, lines 12-13: There is an omission regarding Taylor that is related to each of the six inaccuracies regarding Perry. The inaccurate statements imply that Taylor's ignorance of relevant information was limited to information about the status, within the procedural framework, of the committee's technical scoring, or, in Taylor's verbiage, "where the purchasing process stood." Her ignorance went deeper than that. Petitioners omitted the fact that Taylor lacked a fundamental understanding of the process itself, not just of where the "process stood." This omission is significant because Petitioners assert in their Complaints that Taylor was "well qualified to perform the review" because she was "familiar with state purchasing requirements." App. IV, 2330, ¶ 35, 2383-84, ¶ 36. Taylor did not understand the role the Purchasing Division played in the proposal scoring process. She testified that, until the May 16th meeting with Rosen and Keefer, she "was under the impression" that the evaluation committee sent their technical proposal scores to personnel "in-house in our Purchasing, in DHHR Purchasing." App. II, 544 (382:3-14). Then, she "finally understood cost had been opened and technical scores had been sent – both of them had been sent to State Purchasing." *Id.* When

asked if she had understood that the “technical evaluation committee ... had received the cost bids and made their calculation and made a recommendation to the Division of Purchasing,” she answered, “I’m not sure that I understood that, as you just described it.” *Id.* (383:1-7). She then (1) described how, in her “prior experiences,” the Purchasing Division played a role that was different from the role that it played in HHR 12052 and (2) indicated that this difference in the Purchasing Division’s role caused her to believe, in relation to DHHR’s role in HHR 12052, that “apparently DHHR was doing it backwards” and they were “doing it opposite from what I was used to having happen.” *Id.* (383:7-15).⁶

Inaccuracies, page 3 (beginning on line 6): Petitioners represent that they were terminated “after they advised their client that there were procedural irregularities underlying the technical scoring” of the proposals that vendors had submitted to provide advertising services to DHHR. *Brief*, 3. This inaccuracy relates to the term “procedural irregularities” because it overstates Taylor’s function regarding the scoring. Taylor did nothing more than review the proposals and criticize the differing scores assigned by the scoring committee. App. I, 9-10, ¶ 29; App. II, 711-18; App. III, 1428-29. The “irregularities” that she identified were differences in personal opinions, not deviations from purchasing procedures. The representation is also inaccurate because it overstates the function Taylor performed and understates the resulting advice Petitioners gave to their client, the DHHR. They did more than notify DHHR of “procedural irregularities;” they told DHHR (1) that the scores which the evaluation committee had assigned were wrong to the point of being “legally indefensible” and (2) that DHHR had a resultant legal obligation to have the proposals reviewed again, either by the same committee or by a newly appointed committee. App. I, 10, ¶ 31-32. The advice that they gave, which they characterized as a “legal opinion,” was not just that a certain condition existed, but also that

⁶ Taylor exaggerated her qualifications as the “queen of RFPs.” App. III, 1123, 1734-36.

DHHR had a legal obligation to take affirmative action to correct it.

Inaccuracy and omission on page 5 (in footnote 6): Petitioners' reference to "DHHR's purchasing division" is inaccurate and their discussion of it in the context of "DHHR's dismal history with respect to purchasing issues" contains a significant omission. The reference to "DHHR's purchasing division" is inaccurate because DHHR has a "purchasing office." App. I, 3. The "Purchasing Division" to which the Petitioners refer elsewhere (oftentimes simply as "Big Purchasing") is a component of the DOA, not the DHHR. This is more than a matter of semantics; the distinction between DHHR and DOA is important. App. I, 3.

The omission from footnote 6 relates to its reference to the Bureau of Medical Services ("BMS"), a component of DHHR. Petitioners cite problems with DHHR's processing of BMS' "MMIS" contract as an example of DHHR's "dismal history with respect to purchasing issues" and cite that "dismal history" as a basis for their decision to involve themselves in HHR 12052. *Brief*, 5. The omission from that cause and effect reasoning is the fact that the MMIS contract was processed by DHHR without DOA involvement while the advertising contract was processed by DOA on behalf of DHHR, with support from DHHR. The significance of Petitioners' mention of the repeal of the "purchasing exemption previously granted to BMS" is that future contracts for BMS could not be processed by DHHR and must be processed, by DOA on behalf of DHHR, as HHR 12052 was. DHHR received services via both the MMIS and HHR12052; however, the former was solicited, processed, and awarded by DHHR and the latter by DOA, DOP. This distinction is significant because no need existed for Petitioners to insert themselves in HHR 12052 in search of alleged DHHR supervisory problems regarding the MMIS contract because HHR 12052 was being supervised by DOA, not DHHR. App. I, 3-6.

Inaccuracy, page 5, lines 9-14: Petitioners reference Law's "concerns about the

technical scoring process” and represent that Perry “deemed it necessary to take Law’s concern seriously and to look into the matter.” *Brief*, 5. Respondents have difficulty acknowledging that as a fact because, pursuant to finding of fact 24, Perry did not even ask Law to explain the basis for his “concerns” that were apparently significant enough for him to request her intervention into the contracting process. App. I, 8, ¶ 24. Had she asked, Law would have told her that he was concerned the committee had recommended that the contract be awarded to a vendor other than the vendor to which he wanted the contract to be awarded. App. I, 8-9, ¶ 21, 22, 25; App. II, 583 (512:2-12; 514:2-14).

II. SUMMARY OF ARGUMENT

Petitioners were justifiably terminated for the same reason many other at will attorneys have been terminated - they provided erroneous legal advice to their client DHHR (i.e. that it had an obligation to repeat the scoring of the technical proposals after the cost proposals had been opened). This was the result of multiple errors in judgment. When Perry inserted herself and Taylor into HHR 12052, only one problem existed: John Law, the DHHR official responsible for the agency’s advertising, wanted the Arnold Agency to retain the contract; however, the evaluation committee, with the approval of DOA, recommended the award to another vendor. Instead of acting to prevent Law’s personal problem from metamorphosing into an agency-level problem, they facilitated that metamorphosis by making six errors in judgment.

Their **first error** was Perry’s decision to allow Law to maneuver her into inserting Taylor into a procurement process which they believed, or at least now represent they believed, involved a DHHR contract being processed under DHHR supervision, but actually involved a DOA contract under DOA supervision for the benefit of DHHR.

Their **second error** was their failure to analyze and abide by required processing procedures, which mandated that DHHR could not follow their “legal advice” to repeat the scoring of the technical proposals after those scores had been approved by the Purchasing Division and the cost scores had been made public.

Their **third error** was intervening in a manner that mirrored *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995). Without notifying anyone who had oversight responsibility for the contract process, they confiscated the evaluation committee work papers just as counsel for the W. Va. Lottery Commission did when Butch Bryan sought to have the advertising contract awarded to a vendor other than the one that received the highest evaluation committee score.

Their **fourth error** was reacting unprofessionally after Bryan Rosen discovered and notified Warren Keefer about Petitioners’ intervention. Rosen and Keefer explained (1) that their intervention could be interpreted as unlawful interference with a public contract and (2) that DHHR was procedurally prohibited from following their advice to rescore the technical proposals. They counterproductively interpreted the explanations provided by those two procurement professionals as an attempt by non-attorneys to interfere with attorneys.

Their **fifth error** was failing to understand that, independently of *United States v. Bryan*, Rosen, as Director of the DHHR purchasing office, was required to follow the *Purchasing Handbook* or be subject to criminal prosecution. App. II, 768A, 770-1 (1.2, 1.3, 1.4, 1.11).

Their **sixth error** was Perry’s decision, following the May 16, 2012, meeting with Rosen and Keefer, to write two memoranda regarding the advertising contract. The memo to Rob Alsop (Governor’s Chief of Staff) asserted as a legal issue “challenge to the advertising contract” but omitted the material fact that the technical scores had been approved by DOA and the cost

proposals had been opened. This set off an unnecessary reaction by Alsop. Perry's memo to Secretary Fucillo cautioned him that attorneys had not been included in the scoring process even though there is no requirement that an attorney either sit on an evaluation committee or review the scores that it assigns. Those representations that the procedural sky was falling were the catalyst for Law to involve the Governor's Office and the resultant DHHR, OIG investigation of the Petitioners' conduct. Although the Prosecuting Attorney of Kanawha County declined to prosecute Petitioners, he expressly noted "there appears to have been violations of internal policy and the exercise of bad judgment" on the part of Petitioners. App III, 1689. An employer certainly retains the right to terminate an employee for violating internal policy and exercising bad judgment. ("Employers retain the right to restructure jobs and exercise business judgment, including even bad judgment. Employees can be let go for any reason or for no reason, provided that the reason is not a prohibited one." *Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 79, 479 S.E.2d 561, 589 (1996)). Respondents had legitimate, non-discriminatory reasons for taking adverse employment action against Petitioners and the circuit court's Order granting summary judgment in favor of Respondents is correct.

Based on the Petitioners' preceding six errors in judgment, the circuit court correctly ruled that there was no genuine issue of material fact that Petitioners did not have valid whistleblower claims and that there was no legal or factual basis for a *Harless* claim disguised as a whistle-blower claim or for their honest legal advice claim, which is not really a civil action.

The court correctly ruled the Ethics Act does not provide a basis for a common law *Harless* action nor does it create an implied private cause of action separately from the Act. Allowing a plaintiff to invoke *Harless* or plead an implied action and bypass the statutory mechanism to adjudicate violations of the Ethics Act would frustrate the purpose of the Act. The

legislature specifically did not intend trial courts to have original jurisdiction, but gave them appellate jurisdiction after completing the administrative process. Moreover, the court correctly found Petitioners did not assert a valid invasion of privacy claim because Respondents did not release information about Petitioners and the information released was a matter of legitimate public concern and involved Petitioners as public figures. The court also rejected Petitioners' gender discrimination claim because they failed to present any evidence that the adverse employment decisions related to Petitioners were made on the basis of their gender. The record shows that any adverse employment decision made involving Petitioners was based upon legitimate, non-discriminatory reasons. The court correctly ruled Keefer did not discharge Taylor and Charles Lorensen, Governor Tomblin's Chief of Staff, not Respondents, discharged Perry.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the *West Virginia Rules of Appellate Procedure*, oral argument of this matter is not required because the issues contained herein "have been authoritatively decided."

IV. STANDARD OF REVIEW

On appeal, the standard of review for a trial court's decision on a motion for summary judgment is *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994).

V. ARGUMENT

1. Petitioners' first assignment of error should be disregarded because the court did not "violate the most basic rule governing summary judgment."

Petitioners claim that the court violated "the most basic rule governing summary judgment," and describe the summary judgment order as being "shot through with findings of fact that were not supported by the record before the court and are clearly erroneous." *Brief*, 18, 20. However their argument in support of that assertion consists of nothing more than citing, as

“examples” of erroneous conclusions of law: 27, 28, 30, 49, and 105. *Brief*, 18-20; App. I, 28-30, 39, 70.

A. Petitioners believed that DHHR was obligated to follow their “legal advice.”

Respondents believe that only one of those five alleged errors, conclusion of law 49, is material to the issue of whether Petitioners’ termination was justified. Petitioners contend that the record does not contain “a shred of evidence” to support the court’s conclusion that Petitioners “believe that DHHR had no right to decline to follow their legal advice [to have the technical proposals rescored] and actually had a positive obligation to follow it – in spite of the fact that it would have been procedurally impossible for DHHR to have followed it;” they now indicate that having such a “no right to decline” belief would have been “ridiculous.” App. I, 10, ¶ 31-32. *Brief*, 18-19.

However, the “shreds of evidence” to support the court’s conclusion are found in findings of fact 31, 37, and 46. App. I, 10, 12, 16. Finding 31 refers to allegations in Petitioners’ Complaints that the evaluation committee’s scores were “legally indefensible” to the point of being “a poster child for arbitrary and capricious.” *Id.*, 10. Finding 37 quotes Taylor’s description of her reaction to the May, 2012, meeting when Rosen and Keefer explained the procedural obstacles to repeating the technical proposal scoring. *Id.*, 12. Finding 46 points out that during July, 2012, two months after meeting with Rosen and Keefer, Petitioners were still taking the position that the scoring had been “arbitrary and capricious.” *Id.*, 16.

Petitioners’ representation that they believed that DHHR was not obligated to rescore the technical proposals is inconsistent not only with those three findings, but also with Perry’s position, in a May 8, 2012, e-mail to Rosen that, because of the “issues” she and Taylor had with the scores, they would not represent DHHR “if a challenge occurs” regarding the contract if it

was awarded on the basis of those scores. App. III, 1560. That representation is also inconsistent with their whistleblower claims, which allege that the awarding of the contract was an “instance of ‘wrongdoing or waste.’” App. IV, 2342-43, 2398-99. If, as Petitioners stated, the erroneous scoring produced “wrongdoing or waste,” they cannot credibly state, as they have in their Brief, that they do not believe that DHHR had an obligation to follow their “legal advice” to have the technical proposals repeated in order to avoid the “wrongdoing or waste.”

In summary, during the events that led up to these proceedings and into the proceedings themselves, the Petitioners consistently took the position that (1) because they are attorneys, they knew more about the procurement process than DHHR’s non-attorney procurement professionals and (2) DHHR had a resultant obligation to follow advice that they offered. This continued until it became apparent, during discovery, that they knew far less about the procurement process than they thought that they knew.

B. Petitioners’ “legal advice” was erroneous

The evidence considered by the court and discussed in findings 9-12, 15-17, 27, and 30 relates to the erroneousness of the Petitioners’ advice and the consequences that would have resulted if DHHR had followed it. App. I, 4-7, 9-10. Each one, except findings 17 and 30, expressly references Tincher’s affidavit. App. II, 453-460. The court found that (1) the *Purchasing Handbook* was promulgated pursuant to *W.Va. Code Chapter 5A, Article 3* and *Legislative Rule Title 148 Series 1*; (2) the procedures contained in the *Purchasing Handbook*, specifically Section 7.2.4, governed the processing of HHR 12052; (3) those procedures required that the scores recommended by the evaluation committee be “consensus” scores; (4) those procedures required that the recommended scores be approved by the Purchasing Division before the cost proposals are opened; (5) HHR 12052 was processed in accordance with those

procedures; (6) those procedures did not provide for the “legal review” that Taylor conducted; and (7) Taylor’s review treated the vendors differently because it could not have improved the position of Fahlgren Mortine but could have improved the position of the Arnold Agency, Mr. Law’s preferred vendor. In response to those specific findings, the Petitioners offered the general assertion that “the entire Tincher affidavit is completely worthless.” App. I, 20. The court’s correct response is contained in its conclusions of law 5-8. App. I, 20-21.

C. The Petitioners-DHHR attorney-client relationship is dispositive.

These cases involve multiple relationships among individuals and governmental entities; however, the attorney-client relationship between the Petitioners and DHHR is dispositive of the issues under appeal. The court correctly ruled this relationship was not wrongfully terminated by the DHHR and its ruling was based on correct findings of fact related to the obligations that attorneys have to their clients. The court defined the dispositive issue as “whether the ‘legal advice’ [provided by Petitioners] was legally correct, in that DHHR would have benefited from following it.” App. I, 34, ¶ 38. The *Rules of Professional Conduct* require that an attorney provide a client with “an informed understanding of the client’s legal rights and obligations and explains their practical implications;” however, the court stated that the “legal advice” Petitioners provided to DHHR “did not meet the standards of the Preamble.” App. I, 34, ¶ 39. The court explained the concepts upon which that ruling was based in its conclusions of law. App. I, 35-36, ¶ 41-43. It also concluded (1) that if DHHR had followed Petitioners’ advice to have the technical proposals rescored, it would have violated the procedural requirements of the *Purchasing Handbook* and (2) a violation of those requirements by DHHR would have made the award of the advertising contract more vulnerable to being challenged than it would have been otherwise. App. I, 20-21, ¶ 5-7; 36, ¶ 43.

D. Lack of factual knowledge does not justify erroneous legal advice.

The crux of the Petitioners' circuit court argument was that their intervention into the scoring process and resultant advice was consistent with DOA purchasing procedures. On appeal, the focus of their argument has shifted to a lack of knowledge. Supposedly they "did not know where the purchasing process stood." *Brief*, 6-7. They "didn't know the cost proposals had been opened" and "were completely unaware" that "the cost proposals had been opened" until May 4, 2012, when Rosen told them after he learned about their intervention in the scoring process. *Id.*, 14, 21, App. I, 10-11, ¶ 32-34. They "did *not* know ... Purchasing had already reviewed and approved the technical scoring" and "Taylor didn't know that Tincher had ever approved anything," until the May 16, 2012, meeting with Rosen and Keefer. *Brief*, 35, 37, App. I, 12, ¶ 36. They were unaware the cost proposals were opened because it "never crossed [Taylor's] mind to ask about the cost scores." App. I, 11, ¶ 34.

Perry's representations of how little she knew about the status of the purchasing process prior to May 4, 2012, when Rosen learned about the legal review and began sending cautionary e-mails about it, are inaccurate. On April 19, 2012, Perry received an e-mail notifying her that the cost bids had been opened on April 12, 2012. App. III, 1786-88. Additionally, she heard John Law say that the Arnold Agency was the low cost bidder. App. II, 494 (361:9-12). She also heard Law announce that the contract was going to Fahlgren Mortine, the "out of state" bidder (which was a false statement); Law could not have made either of those statements unless he knew the combined technical scores and cost scores. App. II, 495 (362:2-16); App. II, 476-479; App. I, 8, ¶ 22. This information should have alerted Petitioner Perry about the procedural status of HHR 12052.

The fact is, Petitioners take a markedly different position on appeal regarding their lack

of knowledge about the procedural issues about the status of the contract. Their so called lack of knowledge is wrong and is incredible, if true, in light of their self professed legal expertise in government contracting. On May 4, 2012, after Petitioners had intervened in the process, Rosen advised them that “the technical scoring was complete and the cost bids have been opened.” App. I, 10-11, ¶ 32. On May 7, 2012, Rosen re-emphasized to Petitioners “the technical scoring was already submitted to and accepted by DOA and the cost bids [had] been open[ed] [and] a legal review outside the evaluation committee process is not part of DOA policy.” *Id.*, App III. 1797. Anyone with a rudimentary understanding of the purchasing procedures would have understood the exact status of the contract and withdrawn from further interference with it.

Even if Perry’s representations about her lack of knowledge were accurate, that does not support her claims because, as discussed above, she and Taylor had, as attorneys, an obligation to offer DHHR only advice that reflected an “informed understanding” of its situation. The best indication that their advice did not fit within that category is Taylor’s testimony that they would have acted differently if they had known what they supposedly did not know. If Taylor had “been aware the process was complete,” (i.e., that the technical scores had been 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.” *Brief*, 7, App. I, 10, ¶ 31. Supposedly, her “sole recommendation would have been, ‘Give this back to Dave Tincher, let him decide what to do.’” *Id.*

According to Taylor, the May 16, 2012, meeting with Rosen and Keefer was when she “finally understood” the connection between DOA and the evaluation committee’s scoring process. App. II, 544 (382:6-14). This gave her the impression, based on her “prior experiences,” that DHHR was “doing it backwards” and “just the opposite” from what she “was used to having

happen,” or in light of Rosen’s May 7, 2012 e-mail, repeating the status of the bid. App. II, 544 (383:6-15); App. III, 1797. However, when Taylor learned from Rosen that she misunderstood the procedures that governed the process in which she had intervened, she was not receptive to the news and stated she “took that as a public officer threatening and intimidating me to get me to change my legal opinion and I’m not going to do it. Not for anybody.” App. I, 12, ¶ 37.

The “us against them” mentality that the Petitioners demonstrated toward individuals who not only personified their client, but who were procurement professionals who provided them with relevant, accurate information was inappropriate. It was even more inappropriate for Petitioners to refuse to change, and to continue to actively advocate, a “legal opinion” that they formed before they received that relevant and accurate information. App. I, 4-7, 9-12, findings 9-12, 15-17, 27, 30, 34, 36-37.

2. Petitioners’ employments were not terminated because of the “review” they conducted but because of the erroneous legal advice they gave based on that “review.”

In support of Petitioners’ assignment of error number two, which contains no specific reference to any of the 52 findings of fact and 105 conclusions of law contained in the Order, Petitioners offered the following four-part argument: First, the court made the “obvious conclusion” that it is “illegal for an in-house agency lawyer to review a contract after the fact, period.” *Brief*, 21. Second, the court “evaded directly stating” that “obvious conclusion.” *Id.* Third, the court proceeded from its unstated-yet-obvious conclusion into “the thicket of motivation.” *Id.* Fourth, the issue of the Petitioners’ motivation is irrelevant because the Petitioners were “completely unaware” of one thing, “*didn’t* know” another thing, and mistakenly “thought” a third thing. *Id.*

As a threshold matter, neither this nor any other assignment of error should be based on

the premise that what Taylor did in relation to HHR 12052 was a “legal review” of a contract. She admitted that it involved “no legal analysis” and “could have been accomplished by someone without a law degree.” App. I, 9, ¶ 29, App. II, 397. She did nothing more than (1) review descriptions of advertising services that the vendors proposed to provide; (2) review the consensus scores that three non-attorneys assigned to those proposals; and (3) explain why she believed that those consensus scores were wrong. Consequently her “review” was only “legal” in nature because she happened to be an attorney. App. II, 711-718.

In response to the substance of the Petitioners’ argument, that entire argument is irrelevant. Petitioners’ employments were not terminated because they, as DHHR employees, conducted a review of an evaluation committee’s scoring. Their employments were terminated because they, as attorneys representing DHHR, repeatedly provided their client with erroneous legal advice based on the “legal review.”

Taylor was neither a member of the evaluation committee nor a member of the Purchasing Office staff; she should not have been involved in the evaluation committee process either before or after the Purchasing Division opened the cost proposals. While that involvement was unauthorized, it did not change the technical scores approved by the Purchasing Division. No evidence exists that Petitioners’ employments would have been in jeopardy if matters had not progressed beyond that stage. However, Petitioners’ and Law’s campaign to raise the specter of “legal issues” continued despite the promises made by Perry during the May 16th meeting to permit the process to move forward. App. II, 675-678, App. IV, 2166. In June, 2012, Perry sent a memo to Rob Alsop, Chief of Staff, raising the issue about challenges to HHR 12052. App. III, 1600-01. However, Perry failed to advise Alsop that the technical scores had been approved and the cost bids were open and public in her June, 2012, memo or during the meeting she and Law

had with him. App. I., 13-14, ¶ 40-41. This ignited an unnecessary reaction by Alsop involving the Governor's Office and the DOA, DOP, once again. App. I, 13-15, ¶ 40-43; App. II, 683-684. Perry then sent a memorandum to Fucillo that was misleading and expanded on her memo to Alsop in which she stated, "[t]he group that reviewed the bids for DHHR advertising contract did not include an attorney. We were not asked to participate and no one asked us to review the scoring until it was ready to go to DOA." App. III, 1607; App. I, 13, ¶ 40. There is no requirement that a lawyer review the technical evaluation scores or sit on an evaluation committee. App. II, 822-825. Petitioners and Law used "the legal review" as a pretext to involve the Governor's office for the purpose of undermining the purchasing process. App. I, 13-17, ¶ 40-49. Unfortunately matters evolved to a point in which Petitioners were rendering erroneous legal advice to the DHHR about the contract process that persisted until July 12, 2012, when Acting Secretary Rocco Fucillo, a former DHHR General Counsel himself who was familiar with purchasing procedures, sought new legal opinion. App. I, 15, ¶ 44-45, 16-18.

The Petitioners attempted to justify their intervention by discussing information of which they "were completely unaware" that they "didn't know" and that they incorrectly "thought." *Brief*, 21. Presumably they also contend that this lack of information justified the lack of accuracy in their legal advice to DHHR. However, it does not. Regardless of how many explanations Petitioners offer for their intervention into the scoring process, the fact remains that when they chose to offer advice based on that intervention, they were functioning as attorneys and had a professional responsibility to familiarize themselves with the procedures applicable to that process before offering advice regarding the process.

The Petitioners' obligation to educate themselves about the scoring process before offering legal advice regarding it was matched by an obligation to ascertain why John Law

requested their intervention in the first place. The court found that Law informed Perry and others that he had a potential conflict of interest regarding the advertising contract due to his ongoing involvement with The Arnold Agency. App I, 8, ¶ 20. The court also found that Law thought “everybody understood” he wanted The Arnold Agency to be awarded the advertising contract. *Id.*, 8-9, ¶ 25. The court found that the problems with the MMIS contract, which Petitioners repeatedly cite as a basis for their supposed concerns about HHR 12052, included a conflict of interest. *Id.*, 9, ¶ 26. Accordingly, it is reasonable to expect that when Law asked Perry to intervene in the proposal scoring process and when, as a result, Perry directed Taylor to intervene, they would at least have made an inquiry as to why he requested their intervention. Had they made a reasonable inquiry of Law’s true motivation, they would have uncovered that he had unlawfully e-mailed the RFP for HHR12052 to the Arnold Agency two weeks in advance of it being made available to prospective vendors. App. II, 1009. Of course, Taylor presumed Law didn’t care who got the contract. App. III, 1439. Considering that Petitioners were the two most senior attorneys in DHHR, would it not have been more appropriate for them to have (1) inquired about the basis for Law’s request or (2) simply done what he requested without giving any thought to the resultant procedural and legal implications? The Court correctly ruled that the former was the appropriate approach. App. I, 34-36.

3. The court did not err in ruling that Respondents were entitled to summary judgment on the basis of Taylor’s breach of attorney-client privilege.

During its investigation of HHR 12052, the OIG discovered that Taylor e-mailed her husband, Steve Haid, confidential, attorney-client privileged information violating W.Va. Rules of Pro. Conduct, Rule 1.6, W.Va. Code § 6B-2-5, DHHR Memorandum 2108, and IT-0512 Information Security. App. I, 21-22, ¶ 9-10; App II., 859-881. This e-mail included exchanges between DHHR attorneys and officials regarding legislation that could impact the DHHR. Taylor

admits that the disclosure of this information was a breach of the attorney-client relationship, that she should not have sent it, that it disclosed inappropriate information to Mr. Haid, and that she was an at-will employee and could be fired for any reason, including bad judgment. App. II, 559-561. *See, Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 79, 479 S.E.2d 561, 589 (1996). The disclosure of attorney-client privilege communication provides no protection to an attorney from discharge; therefore, excuses offered by Petitioners as to why Taylor sent the e-mail are irrelevant. *See Lawyers Disciplinary Board v. McGraw*, 194 W.Va. 788, 797, 461 S.E.2d 850, 859 (1995) (Confidentiality extends to information relating to the representation of a client). The court ruled that Respondents were entitled to summary judgment because no genuine issue of material fact existed that Taylor breached attorney client confidentiality and was an at-will employee. App. I, 22, ¶ 10; App. I, 24 ¶ 15.

Petitioners make an issue about the delay in terminating Taylor. The decision to place Petitioners on administrative leave with pay was a joint decision made in consultation with the Governor's office. App. I, 241, ¶ 9-11. Fucillo was directed by Alsop not to terminate or discipline Taylor without consulting with the Governor's office. *Id.* Fucillo informed the legislature that the investigation was following the lawful process. App. II, 605. The delay was not a pretext, but the result of an investigation of Petitioners' conduct.

Petitioners also assert that the court erred in ruling that one of the bases for Fucillo's decision to terminate Taylor was based on this disclosure. *Brief*, 22-24. Fucillo testified that the most important ground for discharging Taylor was her "at-will status." App. II, 603 (254:10-13). The Order is consistent with that testimony. Furthermore, in oral argument below and in their *Motion for Summary Judgment*, Respondents argued that one of the grounds for Taylor's termination was based upon her disclosure of attorney-client privileged information and violation

of DHHR policy. App. I, 291, App. II, 429-430. Taylor did not rebut this argument in their response. App. III, 1043-1098. Consequently the court properly ruled that a basis for her discharge was the undisputed fact that she was an at-will employee and had disclosed confidential communications of her client in violation of the Rules of Professional Responsibility. App. I, 21-24, ¶ 9-15, App. II, 859.

4. The court did not err in ruling that Respondents are entitled to qualified immunity.

The court's ruling related to qualified immunity is expressed in conclusions of law 16-33. App. I, 24-32. Petitioners' argue that this ruling is erroneous because "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...'" *Brief*, 25. This court should disregard that argument because the "facts" Petitioners cite as being in dispute did not underlie the immunity determination; they related only to the issue of why and how Petitioners conducted their "legal review" and advised DHHR to repeat the technical scoring. They did not relate to the issue of whether Respondents were qualifiedly immune from suit.

Petitioners' only references to the court's 18 conclusions of law regarding qualified immunity consist of quotes from conclusions 24, 27, and 31. *Brief*, 24, 25, fn. 22. Petitioners offered those quotes in an effort to demonstrate that the court was biased against them, which is a false and unsubstantiated predicate.⁹ Petitioners needed to, but did not, demonstrate that the court's finding of qualified immunity violated the substantial body of law regarding qualified immunity. The closest they came to doing that was citing *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). *Brief*, 27. Based on *Chase*, Petitioners argued that (1) Governmental officials are not entitled to qualified immunity regarding "clearly established laws

⁹ Petitioners ignore the fact that Respondents' Motion to Dismiss and Motion to Alter and Amend the Denial of the Motion to Dismiss were denied by the trial court and the trial court entered their Orders denying Respondents' Motion to Dismiss and denying Respondents' Motion to Alter and Amend. App. IV, 2587-2606.

of which a reasonable official would have known;” (2) there are “clearly established laws in this state” regarding whistle-blowers and gender-based discrimination; and consequently (3) if the court erred in dismissing, for reasons other than qualified immunity, those two claims, then its dismissal of those two claims based on qualified immunity was also erroneous. *Brief*, 27.

That argument ignores, and contravenes, the court’s analysis of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and the concept of “clearly established law” in relation to qualified immunity. App. I, 25 ¶ 19. The objective of qualified immunity is to shield governmental officials who take discretionary action based on their own judgments. However, there is a limit to that discretion. An official is not shielded by qualified immunity if his action violates clearly established law. The court explained that the presence or absence of qualified immunity depends on “the objective reasonableness of an official’s conduct, as measured by reference to clearly established law” and characterized this as “defining the limits of qualified immunity essentially in objective terms.” App. I, 25. In other words, the focus is on conduct.

This brings us to the fundamental difference between Petitioners’ view of the “clearly established law” concept and the rulings regarding “clearly established law” in *Harlow* and *Chase*. Petitioners impliedly advocate, without expressly stating, that governmental officials are not entitled to qualified immunity for claims based on laws that are so “clearly established” that a reasonable official would be aware of them. However, *Harlow* and *Chase* stand for the proposition that governmental officials are not entitled to qualified immunity in situations where they took action that any reasonable official would realize violated a law. Boiled down to its simplest terms, the presence or absence of qualified immunity does not depend on whether a reasonable official would know that a law exists; it depends on whether a reasonable official would know that an existing law has been violated by his conduct.

“The presence or absence of qualified immunity is an issue for the court, not the jury” *The W.Va. Dept. of Health and Human Resources v. Payne*, Syl. Pt. 5, 231 W.Va. 563, 746 S.E.2d 554 (2013). App. I, 26 ¶ 21. Ample evidence existed for the court to conclude, as a matter of law, that Petitioners’ employment was not terminated in violation of whistle-blower or gender-based discrimination laws but, rather, because Petitioners were attorneys who (1) intervened in a process that was governed by, and being conducted in accordance with, a complex set of procedures and (2) because of their admitted unfamiliarity with those procedures, repeatedly gave their client erroneous legal advice which, if taken, would have violated those procedures.

5. The court did not err in ruling that Petitioners cannot assert a valid claim under the Ethics Act.

Petitioners broadly assign as error the court’s ruling that the Ethics Act may not serve as a basis of a *Harless* claim. *See Harless v First Nat’l Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978); *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W.Va. 371, 424 S.E.2d 606 (1992). The court made two rulings regarding the Ethics Act, each of which independently supports summary judgment. The court ruled that (1) there is not an implied private cause of action within the Ethics Act and (2) the comprehensive statutory scheme of the Ethics Act militates against a common law *Harless* action. App. I, 45-52; *see also, Walker v. W.Va. Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997). While these are two separate distinct legal theories, they share one dispositive concept, the comprehensive statutory procedures of the Ethics Act the court carefully explained in conclusions of law 61 through 73.¹⁰ *Id.*, ¶ 45-46.

The court found that the *express* intent of the Legislature in enacting the Ethics Act was

¹⁰ The comprehensive scheme is dispositive of both because, in order to have an implied private cause of action, it must be consistent with the intent of the legislature. Syl. Pt.1, *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980). Further, under *Harless*, a common-law may not be used to undermine a statutory scheme. *See e.g. Hill v. Stowers*, 224 W.Va. 51, 680 S.E.2d 66 (2009), discussed *infra*.

to “provide a means to define ethical standards; to provide a means of investigating and resolving ethical violations; and to provide *administrative and criminal penalties for specific ethical violations* herein found to be unlawful.” W.Va. Code § 6B-1-2 (emphasis added). App. I, 47-48, ¶ 66. Because of this statutory scheme, the court found that allowing a usurpation of the statutory mechanism through either an implied cause of action or a common-law *Harless* claim was counter to the express legislative intent.

In support of this conclusion, the court relied upon *Arbaugh v. Bd. of Educ.*, 214 W.Va. 677, 591 S.E.2d 235 (2003) and *Hill v. Stowers*, 224 W.Va. 51, 680 S.E.2d 66 (2009). In *Arbaugh*, this Court ruled that W.Va. Code § 49-6A-2 did not create a private cause of action. *Arbaugh*, 214 W.Va. at 680, 591 S.E.2d at 238. This was based, in part, on the finding that “[w]hen the provisions of the article are considered as a whole, we do not see that a private cause of action would meaningfully further the purposes of the article so as to find that such was intended by the Legislature.” *Id.* at 683, 241. In *Hill*, a candidate who lost the election sought to challenge the election and asserted the W.Va. Election Code as the basis for his ability to challenge the election (and seek monetary damages) in circuit court. *Hill*, 224 W.Va. at 59, 680 S.E.2d at 74. This Court ruled, however, that the Election Code provided a comprehensive scheme and procedure to allow for election challenges. *Id.* As a result, this Court prohibited the plaintiff from litigating the issue in circuit court. *Id.* The trial court ruled that the Ethics Act established a comprehensive scheme to adjudicate alleged violations of the Ethics Act, like in *Hill*. App. I, 50-51, ¶ 71. As in *Hill*, allowing a litigant to pursue common law claims that fall squarely within the Ethics Act would usurp the legislative scheme and would result in an inconsistent reading of the statute. App. I, 50-51; *Charter Communications*, 211 W.Va. at 77, 561 S.E.2d at 799. Therefore, the court’s ruling is correct. App. I, 50-51, ¶ 71.

Petitioners' only argument against the court's ruling on the Ethics Act is to assert that W.Va. Code § 6B-1-4 contemplates a private cause of action. *Brief*, 30. They argue that the Ethics Acts does not preclude liability under any *additional* applicable remedies or penalties. *Id.* The court ruled that a person may be subject to additional remedies or penalties for that same set of circumstance. App. I, 51. "Quite simply, the Ethics Act contemplates that an individual may pursue their claim before the Ethics Commission without giving up their concomitant rights to pursue other statutory claims." App. I, 51, ¶ 71. In interpreting statutes, "[i]t is the duty of this Court to avoid whenever possible construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *Charter Comm. v. Community Antenna Services, Inc.*, 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002). Petitioners' reading of this statute would create an unreasonable result by usurping the comprehensive legislative scheme designed to adjudicate the Ethics Act claims with the circuit court acting as an appellate court, not as the court of first resort. App. I, 50, 52.

Ultimately, the issue of whether Petitioners may maintain a separate Ethics Act claim is irrelevant because, under *Broschart v. WVDHHR*, No. 11-1569, 2013 W.Va. Lexis 548 (W. Va. 2013), when a plaintiff asserts a whistle-blower claim and other claims arising from the same facts, the other claims are subsumed into the whistle-blower claims. As a result, Petitioners' Ethics Act claims are subsumed into their whistle-blower claims and are therefore moot.

- 6. The court did not err in concluding that Petitioners failed to provide any evidence to support their claims regarding whistle-blower violations, honest legal advice, the Ethics Act, false light/invasion of privacy and gender-based discrimination.**

A. Whistle-Blower Claims

Conclusion of law 45, to which the Petitioners assign no error, discusses the standard a plaintiff must meet in order to assert a viable whistle-blower claim. App I, 36-37. Under that

standard, the Petitioners had to make a “report” of something that they had “reasonable cause to believe” constituted “wrongdoing” or “waste.” If they did that, then they were protected from adverse employment action taken as a result of that “report.” The court ruled that Petitioners’ claims failed to meet that standard and the correctness of that ruling is apparent when one asks three questions regarding those claims.

First, what was the “wrongdoing” or “waste” that the Petitioners reported? According to Petitioners, the wrongdoing and waste consisted of technical scoring that was so “flawed” it could cause the advertising contract to “be challenged” and that challenge “would grind the [contracting] process to a halt and cost DHHR time, money and embarrassment.” *Brief*, 35. Their complaints characterized the scoring as “a poster child for arbitrary and capricious.” App. IV, 2331, ¶ 42, 2385, ¶ 43.

The problem with the Petitioners’ flawed-scoring approach is that it is based on an assessment that they were neither entitled, nor competent, to perform. As the court noted, David Tincher was the statutorily designated authority for reviewing the contract and he had reviewed, and approved it, twice. App. I, 41, ¶ 54. The court explained Tincher’s initial review and approval was preceded by reviews and approvals from three other individuals within the DOA. *Id.*, 40-41, ¶ 53-54. The Order referenced the procedure by which awards could be challenged and explained if DHHR had followed Petitioners’ advice and repeated the technical proposal, it “would have been a violation of the procedural rules that the Purchasing Division had issued pursuant to its legislative authorization.” *Id.*, 41, App. 2762, 43, ¶ 55 and 57.¹⁵ Following that advice would have also made the award of the contract more subject to challenge because, in contravention of the *Purchasing Handbook*, that technical proposal rescoring would have

¹⁵ Page 42 of App. I, specifically paragraph 55, was replaced with Jt. App. 2762 pursuant to the December 31, 2014, Order of the Supreme Court of Appeals of West Virginia.

occurred after the cost proposals were public. This leaves us with the premise underlying the court's dismissal of Petitioners' whistle-blower claims. There was no factual issue for a jury to determine regarding wrongdoing or waste because the only alternative to a dismissal of the whistle blower claims would have been the bizarre scenario of having the jury decide, based on the testimony of Tincher and Taylor, whether he or she was more qualified to score proposals. App. I, 41, App. 2762, ¶ 55. Taylor herself tacitly admitted that Tincher was the more qualified; she explained that if she had known that "the technical scores had been approved by Purchasing," she probably would have "cut" her review "short." *Brief*, 7; App. I, 10, ¶ 31.

Second, what "report" did the petitioners make? According to the Petitioners, their report consisted of "Taylor's spreadsheet and her conclusions" regarding the evaluation committee's scoring. *Brief*, 34. They made that report to DHHR during the May 16, 2012, meeting with Rosen and Keefer. *Id.*, 9. They describe Rosen and Keefer being "[un]interested in the results of Ms. Taylor's review and even less interested in seeing her spreadsheet." *Id.*

The circuit court accurately characterized the Petitioners' report as a communication that (1) informed DHHR of a problem that did not exist and (2) recommended that DHHR take action which, if it had been taken, would have brought a problem into existence. App. I, 43, ¶ 57.

Third, did the Petitioners have "reasonable cause to believe" that the scoring was "flawed"? Petitioners' position on their "reasonable cause to believe issues" has evolved over time. Initially their "concerns ... that there was wrongdoing and/or waste" were based on the fact that "there was an approximate one-half point difference" in scores between the two highest scoring vendors. App. I, 40, ¶ 51. As the court explained, the half-point difference (actually .96 of a point) was in total score (i.e. technical score, plus cost score). *Id.*, ¶ 52. The technical scores that Taylor "reviewed" had a six point difference. *Id.* Petitioners did not challenge this

conclusion because they must maintain the illusion that they did not know the cost scores were opened. They also attributed their “concerns” about the technical scoring to problems that occurred during the MMIS contracts. App. I, 4, ¶ 7; App. IV, 2327, 2381. As the court explained, (1) the MMIS contract problems did not relate to its evaluation committee and (2) the MMIS contract was processed autonomously by DHHR, not by the Purchasing Division as HHR 12052 was. App. I, 4, ¶ 7. At the appellate level, Petitioners’ discussed the MMIS issue, but only via two footnotes. *Brief*, 5, fn 6; 25, fn 21.

For purposes of this appeal, Petitioners formulated a new “reasonable cause to believe” rationale; they are now saying they had reasonable cause to believe that wrongdoing and waste occurred because they “did not know at the time” that DOA “had already reviewed and approved the technical scoring.” *Brief*, 35. There are two reasons why that latest “reasonable cause” argument is just as invalid as the two arguments that preceded it. First, there cannot be anything “reasonable” about an erroneous belief an attorney has only because (1) she did not adequately investigate a factual situation before forming the belief and (2) she would not have had the belief if she had adequately investigated the situation. Second, notwithstanding their contrary representations, Petitioners actually knew, or should have known, that DOA had already approved the scores when Taylor began her review and immediately afterwards.¹⁶ The chronology of this follows, *infra*.

Perry received an e-mail that the cost bids had been opened on April 19, 2012. App. III, 1786-88. Petitioners did not notify DHHR purchasing office of their “legal review” and Rosen first learned of it via e-mail on Friday, May 4, 2012, when the evaluation committee mentioned a “legal review;” Rosen responded by sending an e-mail that copied Petitioners that asked, “[W]hat legal review are you talking about?” App. III, 1542. That day, Rosen e-mailed Taylor

¹⁶ This was previously discussed on pages 7-8 and 18 of Respondents’ Brief, *supra*.

stating he was “not clear as to what this review is for since it is not part of the procurement process” and explained to her that “DOA reviews our technical scoring.” App. III, 1544. On May 7, 2012, Rosen e-mailed Petitioners reminding them that the contract “[was] being processed through DOA” and that the “technical scoring was already ... accepted by DOA,” and indicated he was “concerned about the implication of having people outside of the committee potentially swaying the procurement process.” App. III, 1552. This e-mail alerted Petitioners to two procurement concepts that, despite Petitioners’ efforts to ignore them, remain crucially important to this litigation. First, the process in which Petitioners intervened was governed by procedures set forth in the *Purchasing Handbook*. Second, actions that bypassed those procedures and impacted that process were prohibited, as illustrated by *U.S. v. Bryan*, 58 F.3d 933 (4th Cir. 1995). Undeterred, Perry copied Taylor on her reply to the May 7th e-mail and requested a meeting with Rosen so she and Taylor could “share” their concerns with him. App. III, 1554. On May 8, 2012, Perry indicated that, because of “issues” she declined to put in writing, an attorney other than Petitioners would have to “be your counsel if a challenge occurs.” App. III, 1560. Perry reluctantly admitted that her “warning” that Harry Bruner, an Assistant Attorney General assigned to DHHR, would have to represent the DHHR in the event of a challenge to HHR 12052 could have been perceived as a threat. App. III, 1798 (206:9-20; 207:18-23). On May 14, 2012, Rosen asked Petitioners when they would like to meet and reiterated his May 16th inquiry, at which time, a meeting was scheduled for later that day. App. III, 1564.

Consequently, the representations Petitioners made in support of their whistle-blower claims about having little, if any, procedural knowledge about the process in which they had intervened, are bogus. When they made their “report” on May 16, 2012, they had known for at least nine days (1) that the scores that were the subject of their intervention had already been

approved by the Purchasing Division and (2) that their intervention could be interpreted as “potentially swaying the procurement process.” Before Petitioners made their “whistleblower” report, they had the information that they now say would have caused them to “cut short” the review that formed the basis for their report.

Petitioners’ argument regarding the court’s 13 conclusions of law regarding their whistleblower claims consists of (1) representing again, without addressing the documentary evidence to the contrary, that Petitioners “did not know” that the Purchasing Division had approved the technical scoring; (2) characterizing one conclusion, number 46, as “perplexing;” and (3) suggesting that their “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.” *Brief*, 35. The real reason for Petitioners’ argument that those conclusions of law are erroneous is Petitioners’ inability to understand them.

The circuit court’s dismissal of Petitioners’ whistle-blower claims was based not only on the statutory prerequisites for them, but on the precedent of *Kidwell v. Sybaritic, Inc.*, 784 N.W. 2d 220 (Mn. 2010). App. I, 37-39, ¶ 47-49. As stated in conclusion of law 47, *Kidwell* stands for the proposition that an in-house counsel is not entitled to whistle-blower protection when the purpose of the report that he or she makes is not to “expose an illegality” but, rather, to provide legal advice. *Id.*, 37-38. Petitioners characterize *Kidwell* as “bad law” and assert its reasoning excludes any in-house counsel from qualifying for whistle-blower protection. *Brief*, 36. That assertion is incorrect. The court correctly ruled whistleblower protection depends on the purpose of the report. App. I, 37, ¶ 47. If the purpose is to provide legal advice, there is no whistle-blower protection; however, there is whistle-blower protection if the purpose is to “expose an illegality.” *Id.* The *Kidwell* court discussed this distinction in terms of the “neutral party” concept, with

“neutral” signifying a person whose job responsibilities do not include investigating and reporting. *Kidwell*, 784 N.W.2d at 228. If an employee who was an attorney learned that the HVAC system in his employer’s building was contaminated with *Legionella* bacteria and reported it to health authorities after the company disregarded the employee’s reports, that attorney could be entitled to whistle blower protection. This is because that attorney-employee would be a “neutral party” (i.e. not someone functioning on behalf of the company, but someone who believed that company should not put people at risk). Whistle-blower protection would be denied, however, if the company was concerned about the possible presence of *Legionella* and the attorney employee advised the company of what steps it should take to minimize risks, and the company declined to take the advice. The attorney employee would not be a “neutral party” because he or she would be functioning on behalf of the company.

The *Kidwell* based problem with Petitioners’ whistleblower claims is that they have consistently described themselves as functioning on behalf of DHHR and categorized their report as “legal advice.” However having done this in order to “gain admission” to a process that otherwise did not concern them, they now cannot back away from those characterizations in an effort to advance their whistle blower claims.

There is no evidence that anyone other than the Petitioners viewed Petitioners as whistleblowers and there is considerable evidence that people who were familiar with the *Purchasing Handbook* “blew the whistle” due to Petitioners’ intervention. These individuals included Bryan Rosen, Warren Keefer, Marsha Dadisman, Molly Jordan, and Rocco Fucillo. Rosen explained to Petitioners how far the bid had progressed and expressed his concerns related to the possible perception of outside influence. Molly Jordan, former Deputy Secretary and OIG Inspector, became alarmed when she heard Law tell Perry about his concerns that the contract would go to

an agency other than Arnold and learned that Perry had directed Taylor to do a legal review. App. II, 670-674. Jordan conveyed her concerns to Dr. Lewis about the legal review. *Id.* When she called Warren Keefer to express her concerns, he acknowledged them and told her that he had arranged a meeting to meet with Petitioners to discuss the matter. App. II, 672-73. After the meeting, Keefer e-mailed her that the “legal team agreed to stand down and allow the prescribed process to work.” *Id.*, 673. She replied: “Doing the right thing feels good. Thanks.” *Id.*

Rocco Fucillo was confronted with this situation after he was appointed Acting Secretary of DHHR on July 1, 2012. App. II, 677; 678-683. On July 12, 2012, after speaking to Petitioners, Fucillo decided he needed to obtain a legal opinion related to this situation from someone other than Perry and Taylor and requested David Bishop’s assistance. App. II, 601 (121:6-23; 123:16-21), 615. Thereafter, Bishop informed Fucillo that he could no longer act as his lawyer and initiated an OIG investigation. App. II, 601 (124:1-7), 615, App. IV, 2057 (178:12-24). Therefore Respondents have demonstrated, by a preponderance of the evidence, that “the action complained of occurred for separate and legitimate reasons, which are not merely pretexts.” W.Va. Code § 6C-1-4(c).

B. Honest Legal Advice Claims

Petitioners contend that the “court below held that that petitioners had not provided ‘honest legal advice.’ *Brief*, 36. That statement is inaccurate; the operative issue is not whether the “legal advice” provided by Plaintiffs was “honest,” the issue is whether that advice was legally correct, in that DHHR would have benefited from following it.” App. I, 34, ¶ 38. “Honest legal advice” is a concept Petitioners invented for purposes of this litigation. This concept is an inversion of the criminal law concept of “honest services” codified in 18 U.S.C. § 1346. App. II, 424. It applies to situations like embezzlement in which an employee who is providing services

to an employer has the legal obligation to perform those services “honestly.” Previously, Petitioners articulated their “honest legal advice” argument in terms of public policy. They contended that because each of them provided DHHR with “legal advice ... to the best of [their] professional ability and according to [their] ethical obligations as an attorney,” there was a “substantial public policy” against DHHR taking adverse employment action against them. App. I, 32, ¶ 34. The court’s analysis of that theory was not, as Petitioners describe it, “filled with speculation” but addressed each contention Petitioners made and each authority that they cited in support of those contentions. *Brief*, 36, App. I, 32-36.

The Petitioners have now abandoned their “public policy” approach and are arguing that the *Purchasing Handbook* procedures which they advised DHHR to violate were not particularly important. Specifically they contend that they should not be faulted for failing to realize that the scoring that they advised DHHR to repeat had been approved by David Tincher because even the approved scores might possibly be challenged successfully. *Brief*, 37.

The fundamental problem with the Petitioners’ approach is that it does not relate to the central issue, which is whether their advice was “legally correct, in that DHHR would have benefited from following it.” App. I, 34, ¶ 38. The court quoted the *Rules of Professional Responsibility*, “[a]s advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications,” and explained the extent to which Petitioners neither provided DHHR with that understanding nor its practical implications. App. I, 34, ¶ 39. The best evidence that the Petitioners provided neither of those things is their own admission that, when they advised DHHR to repeat the scoring, they were unaware that those scores had already been approved by the Purchasing Division and that if Taylor had known about that approval, she would probably not have advised DHHR to have the

scoring repeated. App. I, 10, ¶ 31. How can they argue that their advice reflected an “informed understanding” of DHHR’s situation when they admit that, if they had understood more about that situation, they would probably have given different advice?

The situation before this Court is one in which two at-will-employee attorneys (1) chose to intervene in a complex procedural process; (2) failed to ascertain the procedural status of the process; and (3) gave their client potentially harmful legal advice they would not have given if they had ascertained the procedural status of the process. They do not characterize that advice as the product of some aberrant circumstance that caused atypical substandard performance which DHHR should have overlooked, but instead characterized it as advice that they “provided to the best of [their] professional ability.” App. IV, 2399, ¶105, 2343, ¶ 89. The essence of the court’s ruling is that this level of “professional ability” (i.e. giving advice regarding a situation governed by procedural rules without considering those rules) was less than the level to which DHHR was entitled to expect from its two most senior attorneys.

C. Ethics Act Claims

The Ethics Act was previously addressed by Respondents on pages 27-29, *supra*.

D. False Light/Invasion of Privacy Claims

Respondents were granted summary judgment on Petitioners’ “invasion of privacy/false light” claim because (1) the matter at issue involved the advertising contract, which was a matter of legitimate public concern; (2) Petitioners were “public figures;” and (3) Respondents did not actually publicly convey any information, including the search warrant. App. I, 53, 55-58. On appeal, Petitioners challenge these findings in a rather cursory fashion. *Brief*, 38-42. A party may not maintain a cause of action for invasion of privacy when the actions involve matters of legitimate public interest or involve a public figure. Syl. Pt. 9, *Crump v. Beckley Newspapers*,

Inc., 173 W.Va. 699, 320 S.E.2d 70 (1983).¹⁷ Petitioners' argument is that the publicity regarding their administrative reassignment unreasonably placed them in a false light before the public. *Id.* at Syl. Pt. 6.

The court correctly decided Respondents were not the individuals who disseminated information, including the search warrant, to the public. App. I, 53, ¶ 75; 59-60, ¶ 87. Because Respondents did not disseminate information that Petitioners claim is false, they cannot be held liable. Petitioners attack this finding by merely asserting that "it was the respondents who forced this disagreement into the public sphere by their actions." *Brief*, 40. However they fail to cite any evidence of what "actions" Respondents took to do that. Petitioners' own counsel appeared on statewide radio to discuss his clients' issues. App I. 61-62, ¶ 90. Petitioners (and Law) were administratively reassigned after OIG initiated an investigation.¹⁸ App. II, 740-743; App. II, 587. Newspapers reported the reassignment; however they speculated on the reasons for it. App. I, 53, ¶ 76, 59, ¶ 87; App. III, 1817. Those reasons were not confirmed by the DHHR, but from a FOIA request to the Governor's Office. App. I, 53, ¶ 76.

Summary judgment was also proper because the advertising contract was a matter of a legitimate public concern. App. I, 55-58, ¶ 79-83. Petitioners do not contest the finding that the advertising contract was a legitimate public concern; arguing otherwise would be counter to their alleged justification for interjecting themselves in the advertising contract. Therefore, Petitioners cannot maintain a claim of invasion of privacy because this is a matter of public concern. *See, Crump* at Syl. Pt. 9 ("The 'right of privacy' does not extend to communications ... which concern ... matters of legitimate public interest[.]").

¹⁷ The legitimate public interest and/or public figure immunity is lost if the publisher publishes information with malice. *Crump*, 320 S.E.2d at 84. Here, Petitioners do not state, and no evidence exists, that there was any malice on the part of Respondents with respect to the publication of information.

¹⁸ It is important to note the statutorily independent nature of OIG. W.Va. Code § 9-2-6(6). The record also establishes OIG initiated the investigation on its own. App. I, 16-17, ¶ 48; App. II, 615, App. IV, 2057 (178:12-24).

Summary judgment was also proper because the Petitioners were “public figures.” An individual becomes a public figure “either by assuming a role of special prominence in the affairs of society or by thrusting himself to the forefront of a particular public controversy.” *Crump*, 173 W.Va. at 712, 320 S.E.2d at 83 (quoting *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980)). Further, “[a]lthough 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.” *Crump*, 173 W.Va. at 712, 320 S.E.2d at 83.

The court correctly ruled that Petitioners were “public figures.” They were the two highest ranking attorneys for the DHHR and their counsel appeared on statewide radio to discuss this matter. App. I, 56, 58; App. IV, 2323, 2378. The court also found that they were involuntary public figures because their administrative reassignments were discussed in various news media outlets. App. I, 61, ¶ 89-90; *Wilson v. Daily Gazette Co.*, 214 W.Va. 208, 219, 588 S.E.2d 197, 208 (W.Va. 1996). Finally, the court appropriately relied upon *West Virginia Code* § 6B-1-3(k), defining “public official,” for further guidance of what constitutes a public figure under *Crump*.

Specifically, *West Virginia Code* defines “public official” as follows:

“Public official” means any person who is elected or appointed to any state, county or municipal office or position and who is responsible for the making of policy or takes official action which is neither ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimus nature on the interest or interests of any person.

It is important to note that the *Crump* public figure immunity applies more broadly than the statutory definition of “public official.” However, the court reasonably concluded that this statutory definition provides guidance as to what constitutes a “public figure” under *Crump*. Furthermore, both Petitioners pleaded that they were public officials. App., IV 2344, ¶ 91, 2400,

¶ 107. Aided by W.Va. Code § 6B-1-3(k), the court made the following findings: (1) Petitioners enjoyed and exercised considerable discretion and latitude in conducting their various duties within the DHHR (App. I, 59; App. II, 882-99);¹⁹ (2) Perry had signatory authority from Secretary Lewis and Fucillo, which authorized her to review the final approval of all grant requests to the DHHR and Taylor admitted Perry fulfilled a policymaking position within the DHHR. App. I, 59; App. II, 558 (684:16-19); and (3) Petitioners also claimed an extensive involvement and outreach in the MMIS contract. App. I, 59, ¶ 86; App. IV, 2327-28, ¶ 26; 2381-82, ¶ 27. This included correcting the mistakes of Keefer, Rosen, and others. App. I, 59, ¶ 86. Taylor acknowledged her job duties included drafting rules for pain clinics and reviewing, suggesting, and approving changes to legislative rules. *Id.* No doubt exists that Petitioners' professional responsibilities were not ministerial, but required independent professional judgment. Accordingly, Petitioners qualified as public figures for purposes of *Crump* and public officials under *West Virginia Code* § 6B-1-3(k).

In an attempt to confuse the issue of whether they may maintain an invasion of privacy claim, the Petitioners discussed certain findings the court made with respect to the search warrant. Petitioners argue that the court found they did not have a triable invasion of privacy claim because it ruled that statements in the search warrant were true. *Brief*, 41-42. This misrepresents the court's Order, which states:

Plaintiffs attack the credibility of the search warrant by stating that it contained salacious nature, Rob Alsop suggested that it be sealed after reading it, that it reads more like a press release than a search warrant, and is a malicious and intentional effort by the Defendants to smear Plaintiffs in the media by portraying them as corrupt criminals. A close review of Plaintiffs' Response and arguments reveals no direct information establishing that it contains salacious materials or that it was more of a press release than a search warrant.

¹⁹ App. II, 882-899 is an example of e-mails related to various job functions of Petitioners.

App. I, 62, ¶ 91.

The issue with the search warrant is simply who released it? It is undisputed that the Office of the Kanawha County Prosecutor released the search warrant to the public and the press. App. I, 59-60, ¶ 87; 350. Although the initial draft of the search warrant was prepared by OIG, it is undisputed that the Kanawha County Prosecuting Attorney's Office reviewed, analyzed, and came to an independent conclusion to present a search warrant to a Circuit Court judge.²⁰ App. II, 736-39. The Respondents cannot be held liable under an invasion of privacy theory for a document that was not released by them.

The court also ruled that the search warrant was a public document and its release was not wrongful. App. I, 62-63. The press and the public have a common law right to access to judicial documents. *See e.g. Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 62 (4th Cir. 1989). The public had a right to review this search warrant as it was a judicial document, unless some compelling governmental interest that is narrowly tailored is present to limit or redact the documentation. *Id.* The court explained that no such compelling governmental interest existed. App. I, 62-64. Consequently Respondents cannot be liable for the search warrant release. *Id.*

E. Gender Based Discrimination Claims

Petitioners failed to present any evidence establishing a cause of action for gender discrimination. The W.Va. Human Rights Act requires Petitioners to present evidence that (1) they are members of a protected class; (2) their employer made an adverse decision; and (3) but for their gender, the adverse decision would not have been made. Syl. Pt. 3, *Conway v. Eastern Associated Coal Group*, 178 W.Va. 164, 358 S.E.2d 423 (1986). "Once the employer articulates

²⁰ Petitioners attempt to make hay over the fact that the search warrant made reference to Taylor's husband and Maple Creative. OIG's suspicions regarding Taylor's involvement with her husband was indicated because Taylor was found by OIG to have breached the attorney-client privilege by providing her husband, who had been an officer at Maple Creative, an advertising firm, attorney-client protected information. App. II, 429; App. I, 21-22.

a legitimate, non-discriminatory reason for its action, the burden returns to the employee” to show pretext. *Graham v. Putnam County Bd. of Educ.*, 212 W.Va. 524, 532, 575 S.E.2d 134, 142 (2002). The court properly ruled that Petitioners each failed to support their claims for gender discrimination. App. I, 64-70.

1. The court did not err in granting summary judgment in favor of Respondents regarding Perry’s claim, as there was no disputed evidence supporting her contention

Perry’s gender discrimination claim is based on the theory that Fucillo altered her employment status due to a discussion she had with Dawn Adkins, DHHR’s Equal Employment Opportunity Officer, regarding a hypothetical disparate treatment claim. *Brief*, 43-44, App. IV, 2401-02, ¶ 112-115, App. I, 65-66, ¶ 98. Petitioners’ only argument is that “[c]ontrary 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.” *Brief*, 44. The court relied on the complete record, not solely on Fucillo’s testimony, and it is vital to understand the context of Perry’s hypothetical discussions of gender discrimination. On June 28, 2012, Perry approached Adkins with a hypothetical question about gender discrimination. App. I, 65, ¶ 98, App. II, 505 (168:14-22), 961-962, 996. She did not disclose she was discussing herself and Fucillo. App. II, 505 (168:14-22), 747, 961-962. The hypothetical was based upon the fact that Fucillo negotiated mileage with former DHHR Secretaries Walker and Lewis. App. II, 505-506, 607, 961-962. Perry once unsuccessfully attempted to negotiate a mileage reimbursement with former DHHR Secretary Nusbaum. App. II, 506 (169:23-24; 170:1-7; 172:7-10). This is not a case where Perry was discriminated against regarding travel reimbursement. While employed by DHHR, Perry’s home office was Charleston and her residence was in Logan County. Fucillo’s home office was in Clarksburg; and he only received reimbursement when his duties required him to travel to Charleston. App. II, 606-610.

Perry wanted reimbursement for travel from her home station in Logan to work in Charleston. App. II, 506 (169:23-24; 170:1-24; 171:1-24; 172:1-18). Respondents made no decision regarding Perry's travel reimbursement based upon her gender.

Regarding the evidence supporting Fucillo's lack of knowledge of Perry's alleged hypothetical gender discrimination discussions, the court cited the undisputed factual evidence. App. I, 65-68, ¶ 98-101. Only two DHHR employees, Adkins and Clifton, knew about Perry's hypothetical discussions regarding gender discrimination and neither Adkins nor Clifton discussed the hypothetical gender discrimination claim with Fucillo. App. I., 66, ¶ 99; App. II, 440, ¶ 1, 961-962. Therefore, the court's ruling that Perry's gender based claim failed for lack of evidentiary support is proper.²¹

Furthermore, Petitioners assert that it is irrelevant that Law, a male, received the same treatment that they did. The mere fact that Petitioners are lawyers and Law was not does not insulate their inappropriate conduct. Each was an at-will employee. Petitioners cite no authority for the proposition that at will lawyers should be subject to less discipline than at-will non-lawyers. Petitioners' status as lawyers should make them more culpable, as they should know better than to skirt the rules. To the extent Petitioners assert that they did not know Law preferred the Arnold Agency, it is a complete and unequivocal misstatement of the facts. Witnesses provided statements of being involved and/or overhearing Law express his desire for the Arnold Agency to be awarded the contract in the presence of Petitioners. App. II, 476-479. Law testified that he could see no reason why Petitioners would not know of his desire. App. II, 583.

The fact that a male was reprimanded in the exact same manner as, or worse than, the female Petitioners is direct evidence that the adverse employment decisions involving Petitioners

²¹ It is important to note that the failure to receive mileage reimbursement is not part of Petitioner Perry's claims and she does not place the blame on Respondent Fucillo for her not receiving mileage reimbursement. App. II, 506.

were not motivated by their gender. *See* Syl. Pt. 5, *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995). Law was terminated prior to Taylor and Perry. App. I, 18 ¶ 52. The fact that the same reprimand was directed equally amongst females and a male clearly establishes that no discriminatory motive existed.

2. The court did not err in granting summary judgment in favor of Respondents regarding Taylor’s claim, as there was no disputed evidence supporting her contention

Taylor’s claim lacks any support to sustain a gender discrimination claim and her only argument to defeat summary judgment on that claim was to assert that a male was temporarily assigned to perform the Petitioners’ functions during the OIG investigation. Taylor was not administratively reassigned on the basis of her gender; she was administratively reassigned because she was under investigation by OIG. App. II, 740-743; App. II, 587. Administrative reassignment with pay, suspension without pay, and termination are three options when an employee is under investigation by OIG. *Id.*, 744 (114:5-24; 115:1-14). The administrative reassignment was clearly based upon legitimate, non-discriminatory reasons.

Regarding the direct contentions by Taylor to support her “gender discrimination claim,” Taylor asserts that Fucillo apparently made an adverse employment decision *based upon* her gender because she received a job for which both Fucillo and Taylor competed. *Brief*, 43. Taylor does not cite any material evidence that establishes a reasonable inference that because Fucillo competed with her for a job, her *gender* was a motivation for his decisions. This argument requires this Court to make an illogical leap connecting job competition to gender discrimination without any evidence.

Although the Attorney General’s Office provided a male attorney under a temporary assignment, Taylor’s administrative reassignment was based upon the OIG investigation and not upon her gender. App. II, 441-442, 740 (65:24; 66:1-5). The court properly ruled that no

inference of gender discrimination existed based on the record. App. I, 68-69. Taylor also asserts that the female Secretary of the DHHR hired a female attorney as a full time replacement for Taylor after Taylor filed her gender discrimination claim. *Brief*, 43. It is Taylor's contention that her female replacement did not earn the position on her merits, but only as a strategy to defeat this litigation. This allegation has no evidentiary support; Taylor presented no evidence to the court that her replacement was not otherwise qualified or a "token" appointment. Because this argument is mere conjecture and speculation and is unsupported by any evidence in the record, it is insufficient to defeat summary judgment. App. I, 68-69; *See Crum v. Equity Inns, Inc.*, 224 W.Va. 246, 254, 685 S.E.2d 219, 227 (2009). Finally, Taylor asserts that there was an "over-the-top" reaction from the males at DHHR to Taylor's "legal" opinion regarding the subjective scoring portion of the bids. *Brief*, 43. The "over-the-top" reaction is an opinion, not a factual statement and is insufficient to defeat summary judgment. *Crum*, 685 S.E.2d at 227.

7. The court was correct in granting Respondents' Motion for Partial Summary Judgment as to any wrongful, retaliatory or illegal discharge claims under the W. Va. Human Rights Act and the Whistle-Blower Law as the Governor's office terminated Ms. Perry, not Respondents.

Assignment of Error 7 states: "[t]he trial court erred in granting partial summary judgment against Perry on the ground that her employment had been terminated by the Governor, not by her employer." *Brief*, 2. An employer may not discharge or in any way retaliate against an employee for making a good faith report to the employer regarding waste or wrongdoing. *W. Va. Code* § 6C-1-3(a). The elements of a retaliatory discharge are: (1) an employee engaged in a protected activity; (2) the employer knew this activity; and (3) the *employer discharged* the employee as a result of these acts. *Williams v. Basic Contr. Servs.*, Civil Action No. 5:09-cv-00049, 2010 U.S. Dist. LEXIS 84361, *14 (S.D. W. Va. Aug. 17, 2010) (citing *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 867 (4th Cir. 1999))

(emphasis added). With respect to discrimination, a Plaintiff has the burden to establish (1) That the plaintiff is a member of a protected class; (2) 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." *Councell v. Homer Laughlin China Co.*, Civil Action No. 5:11CV45, 2012 U.S. Dist. LEXIS 34727 (N.D. W. Va. Mar. 15, 2012).

Perry did not sufficiently establish retaliatory discharge. The undisputed evidence is that Perry was terminated by Charles Lorensen, the Governor's Chief of Staff. App. IV, 1945 (25:12-24). Harold Clifton, Human Resources Director for the DHHR, admitted that he did not have the power to fire Perry but was directed by the Governor's Office to send a letter to Perry dismissing her. *Id.*, 1948 (176:7-11). Although the termination letter was placed on DHHR letterhead, it was drafted by the Governor's Office. *Id.* (176:14-19). Fucillo was told by DHHR Interim General Counsel Will Jones that Perry was going to be terminated at the direction of the Governor's Office. *Id.*, 1951 (174:12-24; 175:4-10). Perry understood that Lorensen and Clifton testified that that it was not Fucillo's decision to terminate her, but it was the Governor's Office that terminated her. *Id.*, 1955 (149:16-20); 1945 (25:12-24). Perry admitted that the only evidence that Fucillo terminated her employment was the fact that the termination letter was on his letterhead. *Id.*, 1954-55 (148:19-24; 149:1-4).

The court found that Perry could not sufficiently establish retaliatory discharge under the Whistle-Blower Act. Specifically, the Order states: "The fact is that Plaintiff has not refuted, by Affidavit or otherwise, the testimony by Mr. Lorensen, Mr. Clifton, and Mr. Fucillo that the decision to discharge Ms. Perry was made by the Governor's Chief of Staff, Charles Lorensen. Therefore, pursuant to Rule 56(c) of the W.Va. Rules of Civil Procedure, the Defendants are entitled to judgment as a matter of law on Susan Perry's claims of wrongful, retaliatory or illegal

discharge under the Whistle-blower Act.” App. I, 219, ¶ 4.²² For the same reasons, the court found that Perry could not sufficiently establish a retaliatory discharge claim against Defendants under the West Virginia Human Rights Act. *Id.*, 219-220, ¶ 6. Petitioners’ only argument is that the actions taken by Fucillo and Keefer instigated Perry’s administrative reassignment which led to her discharge. Petitioners have put this in the terms of “pretext.” Petitioners cited to *Musgrove v. Hickory Inn, Inc.*, 168 W.Va. 65, 281 S.E.2d 499 (1981) for the proposition that Fucillo and Keefer were potentially liable as agents of their employer DHHR. Petitioners’ argument misses on two levels. First, it does not matter that Fucillo and Keefer were potentially liable as agents of the DHHR, because no evidence exists that anyone other than the Governor’s office terminated Perry’s employment with the DHHR. Second, Petitioners’ argument is beyond the scope of the Order. Their argument is that because retaliation in the form of administrative reassignment led to Perry’s eventual discharge is pretext for her termination, then Respondents are responsible for her termination. The Order, however, is limited in scope to any claims of wrongful, retaliatory or illegal discharge. Petitioners could offer no evidence to the trial court and can offer no evidence to this Court to rebut the fact that the Governor’s office ultimately terminated Perry. App. I, 218, ¶ 7. The court properly concluded that a rational trier of fact could not find for the Petitioners in regard to wrongful, retaliatory, or illegal termination claims against Respondents because the Governor’s office terminated Perry, not the DHHR or its employees.

8. The court was correct in granting Warren Keefer’s Motion for Partial Summary Judgment as to any wrongful, retaliatory or illegal discharge claims under the W.Va. Human Rights Act and the Whistle-Blower Law as the Governor’s office terminated Ms. Taylor, not Mr. Keefer.

In assignment of error 8, Petitioners state “[t]he trial court erred in granting partial summary judgment in favor of respondent Warren Keefer, dismissing petitioner Taylor’s case

²² The Order Respondents refer to here is the *Order Granting Defendants’ Motion for Partial Summary Judgment on Plaintiffs Discharge Claims*.

against him.” *Brief*, 2. The elements of a retaliatory discharge were discussed *supra*, on page 46.

Petitioners argue that 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.” *Brief*, 49. Petitioners also argue that Keefer did not actually need to participate in the termination of Taylor, it was sufficient that his actions contributed to the OIG investigation, job reassignment, and eventual termination of Taylor. *Id.*, 50. The court noted however that “there is no evidence that Mr. Keefer participated in any decisions regarding [Ms. Taylor]’s termination” and ruled that no genuine issue of material fact existed and Keefer was entitled to summary judgment as a matter of law. App. I, 239-246; 245, ¶ 15. The court acknowledged Fucillo testified that the decision to terminate Taylor was a joint decision between Fucillo and Alsop. *Id.*, 243, ¶ 5.

There is no evidence that Keefer played more than a limited role in the investigation into Taylor’s conduct or that he participated in the termination. Keefer’s role was limited to advising Fucillo of the May 16, 2012, meeting regarding HHR12052, Fucillo’s request that he participate in the July 2012 conference calls, and giving a required statement to the OIG. App IV, 2186-87.

Keefer's Affidavit reinforces that Keefer neither had the authority to discharge or terminate Taylor nor was involved in any employment decisions related to Taylor in her capacity as General Counsel for the DHHR. *Id.*, 2159-2160. The court found that Keefer’s Affidavit “was not rebutted by Plaintiffs, by Affidavit or other evidence that would raise a genuine issue of material fact in opposition to Defendant Keefer's Motion for Partial Summary Judgment.” App. I, 243-244, ¶ 6. The court correctly held that because the decision to terminate Taylor “was a decision made by Mr. Fucillo, with Mr. Alsop's consent, any claims of wrongful, retaliatory or illegal discharge” made by Taylor, whether under the Whistle-Blower Law or under the Human

Rights Act, were to be dismissed. *Id.*, 244, ¶ 7, 245, ¶ 16.

VI. CONCLUSION

John Law confirmed that he “would like to have seen The Arnold Agency awarded the contract” and “everybody understood that” he had this desire. App. I, 9 ¶ 25.

The committee that evaluated vendor proposals functioned within a framework of procedural safeguards that were established, pursuant to *W.Va. Code Chapter 5A, Article 3* and *Legislative Rule Title 148 Series 1*, by the Purchasing Division of the Department of Administration and promulgated via that Division’s *Purchasing Handbook*. One of the purposes of the procedural safeguards is to prevent evaluation committees from being influenced by people who, like John Law in this case and Butch Bryan in *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995), desire that certain public contracts be awarded to certain vendors.

The Petitioners, as attorneys representing DHHR, had a responsibility to protect the integrity of the evaluation committee process by (1) identifying potential threats to it and (2) utilizing the framework of procedural safeguards to neutralize those threats. The Petitioners did exactly the opposite. Instead of neutralizing the threat posed by John Law, they attempted to neutralize the work of the evaluation committee. This attempt consisted of (1) using their status as attorneys to circumvent the procedural safeguards and (2) using their status as attorneys as a platform for offering “legal advice” that, if taken by DHHR, would have directly violated those procedural safeguards. The Petitioners’ employments were terminated because of the latter misuse of their status as attorneys and, as reflected in the Order under appeal, those terminations were justified.

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

**JENNIFER N. TAYLOR and
SUSAN S. PERRY,**
Plaintiffs Below,
Petitioners

v.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "*Respondents' Response to Brief of the Petitioners*" was served upon the following parties by U.S. Mail on this day, Friday, February 20, 2015:

Barbara H. Allen
736 Melborne Street
Pittsburgh, PA 15217
Counsel for Petitioners

Walt Auvil and Michele Rusen
Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
Counsel for Petitioners



Charles R. Bailey (WV Bar #0202)
Betsy L. Stewart (WV Bar #12042)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222