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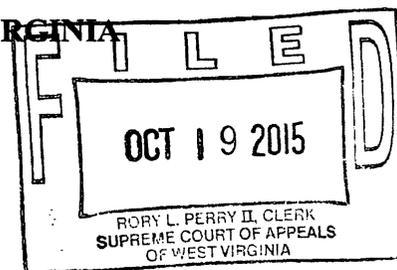
**HERBERT J. THOMAS MEMORIAL  
HOSPITAL ASSOCIATION,**

*Defendant Below/Petitioner,*

v.

**SUSAN NUTTER,**

*Plaintiff Below/Respondent.*



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Hon. Tod J. Kaufman, Judge  
Circuit Court of Kanawha County  
Civil Action No. 11-C-11335

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**BRIEF OF PETITIONER**

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Petitioner Herbert J. Thomas Memorial Hospital Association (“Thomas Memorial” or “the Hospital”) submits this brief in support of its appeal from the Circuit Court’s final order denying Petitioner’s motion for judgment as a matter of law or, in the alternative, for a new trial. In addition to the legal weakness of Plaintiff/Respondent Susan Nutter’s (“Nutter”) case below, the trial of this case became a mockery of fairness as Judge Kaufman incessantly injected himself and his opinions into the proceedings before the jury by asking more than 300 questions of witnesses, unfairly cross-examining defense witnesses, attempting to rehabilitate Nutter’s testimony, making prejudicial comments before the jury, and demonstrating anger toward defense counsel. Due to the conduct of the trial, and the lack of fundamental fairness, the defense moved for a mistrial three times. During the argument of the third motion on the seventh day of trial, Judge Kaufman confiscated defense counsel’s contemporaneous attorney notes, which counsel was referring to during the argument, and ordered them placed under seal in the record. Thomas Memorial is entitled to judgment on all counts. In the alternative, and at a minimum, however, Thomas Memorial is entitled to a new and fair trial.

## I. ASSIGNMENTS OF ERROR

- A. The trial court erred in denying Thomas Memorial’s motion for judgment as a matter of law.
  - 1. The trial court erred in concluding that Nutter had identified a substantial public policy violated by Thomas Memorial with respect to Nutter’s termination.
  - 2. The trial court erred in concluding that the evidence presented at trial was legally sufficient to support a verdict on Nutter’s outrage claim.
  - 3. The trial court erred in allowing the jury’s verdict against Thomas Memorial on Nutter’s defamation claim to stand.
  - 4. The trial court erred in declining to grant Thomas Memorial judgment as a matter of law on Nutter’s Wage and Payment Collection Act claim.
- B. The trial court erred in denying Thomas Memorial’s motion for a new trial as the trial of this action was fundamentally unfair to Thomas Memorial.
  - 1. The trial court unfairly prejudiced the case in its questioning of witnesses and conduct towards defense counsel.

2. The trial court's erroneous evidentiary rulings prejudiced Thomas Memorial's case.
3. The trial court erred in instructing the jury with respect to the substantial public policy of West Virginia and in failing to instruct the jury with respect to issues central to Thomas Memorial's defense.

## **II. STATEMENT OF THE CASE**

### **A. Summary of Facts**

#### **1. The Behavioral Health Department at Thomas Memorial**

Thomas Memorial Hospital, as do many hospitals, has a behavioral health department. That department is divided into two units, an adult unit, sometimes referred to as "One South," and a geriatric unit, sometimes referred to as the "Med-Psych Unit." The latter unit, located on a portion of the third floor, serves elderly patients who have medical issues too serious for a nursing home and psychiatric issues too serious for the general population of the Hospital. (J.A. 244).

The Med-Psych Unit is a locked area with capacity for up to ten patients in five rooms. (J.A. 245). Typically, the unit is staffed with one registered nurse, one licensed practical nurse, two mental health technicians on the day shift and one at night. (J.A. 245, 296). Social workers and therapists rotate through as they provide services. (J.A. 1434-35). Managers are on and off the floor.

#### **2. Susan Nutter's Work History**

Susan Nutter was hired on August 18, 2008, to fill an opening for a staff nurse in the Behavioral Health Department at Thomas Memorial. (J.A. 850). Nutter had never worked at Thomas Memorial, nor had she worked as a psychiatric nurse.<sup>1</sup> Nutter did have, however, considerable experience as a hospital R.N., working at St. Francis Hospital from 1974 to 1994. (J.A. 830).

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<sup>1</sup> Two years earlier, however, Nutter had been an in-patient for one month at River Park Hospital, a psychiatric hospital. (J.A. 1312-13). She was dealing with serious family problems.

Nutter was supervised by R.N. Christina Edens, a 10-year veteran of Thomas Memorial and the nurse manager of the Behavioral Health Department. (J.A. 242). Edens, in turn, was supervised by Anna Laliotis, the administrator of Behavioral Health Services. (J.A. 1348-52.)

After 90 days of employment, on November 18, 2008, Nutter received a favorable probationary performance evaluation. (J.A. 1841). Approximately one month later, however, Nutter began experiencing problems. On one documented occasion, during a self-scheduled break, Nutter left the Med-Psych Unit without R.N. coverage. (J.A. 2475). She also declined a request from another department to pull an employee over to that department at a time when the Med-Psych Unit's census was low. Likewise, on another occasion, she refused the request of an ill L.P.N. to leave work early, resulting in the issuance of a Disciplinary Action Report. (J.A. 2475-78).

On February 11, 2009, Nutter was placed on a work improvement plan, (J.A. 2480), due to her being "unable to complete tasks in a timely manner; orders not signed off timely; nursing documentation incomplete; [and] lack of daily progress notes." (*Id.*). Specific areas of job performance in which improvement was deemed necessary were "time management, daily completion of tasks – orders and charting." (*Id.*)<sup>2</sup> This work improvement plan stretched into May 2009. Contemporaneous documentation showed that Nutter continued to struggle with documentation and time management. (J.A. 2483). In addition, the staff complained about lack of team work and Nutter's failure to "help with patients' care." (J.A. 2486).

On April 6, 2009, Nutter made her one and only trip to Thomas Memorial's Human Resources ("HR") Department. She asked for Marybeth Smith, Director of HR, but Smith was out of the office that day. (J.A. 1185). Consequently, Nutter was referred to Beth Davis, a 30-plus year employee of the HR Department and a nurse recruiter. (J.A. 1473-74). Davis had hired Nutter. (J.A. 1185). Nutter told Davis that she wanted to transfer to another area. (J.A. 2485). Nutter

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<sup>2</sup> Christina Edens described what she saw from Nutter as "a constant shuffling of paperwork ... disorganization ... not having a handle on this belongs here, this needs to go there." (J.A. 417.)

related that she was having trouble with Becky Chandler, the R.N. whose shift followed that of Nutter. According to what Nutter told Davis, Chandler was rude to Nutter when Nutter was “trying to get charting done at the end of the shift.” (*Id.*; J.A. 1478-79). Nutter told Davis, however, that she loved Christina Edens, her manager, “and she thinks [Christina] is doing an excellent job.” (*Id.*; J.A. 1481). Nutter had started her session with Davis by informing Davis that she was on a work improvement plan (as implemented by Christina Edens) “to try and get her charting up to par.” (J.A. 2485). Davis told Nutter that, under Hospital policy, she was not eligible to transfer while she was on an improvement plan. (*Id.*)

Nutter would later claim in her discovery deposition in 2012 that she had overheard Edens and Laliotis plotting to fire her and that that was what prompted her to go to the HR Department in April 2008. (J.A. 1183-88). She claimed that she told Davis that her managers were hostile and that the unit had turned into a “hostile environment.” (J.A. 920; 1187). She had so testified in her deposition before she knew that Davis had prepared a “fairly accurate” summary (J.A. 1191) of the meeting on April 6, 2009. (J.A. 2485). Davis did not hear, consequently she did not record, anything from Nutter about a “cloak and dagger” plot to fire Nutter, (J.A. 1191), a hostile work environment, or “hostile managers.” (*Id.*) Again, Nutter “loved” Christina Edens. (*Id.*) Likewise, Nutter did not complain to Davis about supposed Medicare fraud, showers not working, socks not provided, defibrillators not being available, bed weights, the calling in of prescriptions, “elder abuse,” “cycling” of patients, or failure to be paid a \$1.00 charge nurse differential. (J.A. 1483).<sup>3</sup> Nutter never returned to the HR Department after April 6, 2009. (*Id.*) Nor did she ever again inquire about transferring to another department. (J.A. 1201-02).

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<sup>3</sup> Nutter claims that she would have talked about all of these issues with HR Director Marybeth Smith had she met with Smith as was her plan, rather than with Davis, the lady who hired her. (J.A. 1216). Nutter claimed that she was hoping that Smith would contact her, but she neither left word for Smith to do that nor ever again reached out to Smith. (J.A. 1215).

Nutter successfully completed her work improvement plan on May 21, 2009. (J.A. 2515). On August 10, 2009, Christina Edens met with Nutter for an annual performance evaluation. Nutter received a good evaluation from Edens – “meeting expectations.” (J.A. 1852). In her own hand, Nutter wrote that she had “good communication with manager.” (J.A. 1844).

Nutter claims that in late October or early November 2009 she spoke to Anna Laliotis about patients returning to the Hospital from nursing homes. (J.A. 898). By way of background, nursing homes are required by federal regulation to attempt every six months to taper patients off of psychotropic drugs unless a physician orders otherwise. (J.A. 895). Thomas, as do other hospitals, experiences elderly patients occasionally returning to the Hospital from nursing homes. (J.A. 1394-95). When the patient is discharged to a nursing home, Thomas Memorial turns the medical care over to a personal physician or the nursing home’s medical director. (J.A. 1398). Thomas Memorial does have a case worker, however, whose sole job is to work with nursing homes on continuity of care. (J.A. 1392). Thomas Memorial does not bill for the case worker. (J.A. 1392-93). Also, in terms of billing, Thomas Memorial is penalized by Medicare if the “recidivist” rate for nursing home patients is too high. (J.A. 1396-97).

Nutter would later claim, in a letter to the Nursing Board, that her notion on how to reduce repeat admissions “could have, if enacted in a responsible manner, save[d] a financial stressed [sic] Medicare system billions if investigated and pursued on a nationwide scale.” (J.A. 2497). Back at Thomas Memorial, Nutter claims that there was a particular day when she was asking Anna Laliotis in late October, early November 2009 if there was “a form that could be used to document failed attempts to remove patients from anti-psychotic or some kind of form that the physicians send back to the nursing homes with an order to say continue the anti-psychotic meds?” (J.A. 1237). Laliotis supposedly asked what happened. (*Id.*). Nutter says that she told Laliotis that a patient’s family was asking about documentation to send at discharge.

(J.A. 1237-38). Then, the phone at the nurse's station rang. Nutter says that she turned around to take a lab report over the phone. (J.A. 1238). When she turned back around, Laliotis was gone. (*Id.*) Nutter never spoke further with Laliotis or any other manager on the subject.<sup>4</sup> Nor did Nutter make a report to any outside agency about "Medicare fraud" or any other issue. (J.A. 1242-43). She made no complaints externally to the Centers for Medicare & Medicaid Services (CMS), the State Office of Health Facility Licensure and Certification (OHFLAC), Adult Protective Services (APS), or the Joint Commission: Accreditation, Health Care, Certification (JCAHCO). (J.A. 1242-44). Nor did she make any internal complaints to the director of nursing, the Hospital's compliance department, the Hospital's legal department, or HR. (J.A. 1241-42). She never called the 1-800 concerns line posted by the Hospital, not even anonymously. (J.A. 700, 1243). She neither generated nor retained one email, note, or scrap piece of paper made contemporaneously with the issues that she now claims existed at Thomas Memorial and about which she supposedly complained to management. (J.A. 997-98, 1127).

### **3. The November 12, 2009 Incident**

The Med-Psych Unit used two one-page forms that were unique to the unit. The "Patient Education Record" was a daily one-page record that unit personnel used to chart patient educational activities such as "current events," "recreational therapy," and "medication management." (*See, e.g.,* J.A. 3472). A sheet was assigned to each patient. On that sheet, a staff member would record across from the activity the following: (1) whether the patient attended the activity; (2) the method used (e.g., one-to-one discussion, audio-visuals, group didactic, etc.); (3) an evaluation (whether the patient met objectives); (4) whether the patient participated; and (5) the staff member's signature. These education records were part of the patient's official medical record.

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<sup>4</sup> Laliotis, a native of Greece, left on November 7, 2009, for a three-week trip to see her family in her home country. (J.A. 1400). While gone, she had no contact with the Hospital. (J.A. 1401). She did not discover that Nutter had been discharged until she returned to the country. (J.A. 1400-01).

Also, the mental health technicians (MHT) on the floor were tasked with observing each patient at least once every 15 minutes and making a record on a “Patient Observation – Q15 Minute Flow Sheet.” (See e.g., J.A. 3473). Codes were used for various locations in the unit, such as “BR” for bathroom, “NS” for nurses station, and “R” for patient’s room. Likewise, codes were used on the form for various types of behavior, such as “SO” for socializing, “LA” for lying in bed awake, and “S” for sleeping. The MHT would initial each 15-minute block indicating location and behavior for the patient. This form, once signed, became a part of the medical record.

On the day shift of November 12, 2009, music therapist Lara Woodrum was scheduled to provide musical therapy to nine patients in a group setting starting at 11:45 a.m. (J.A. 1581). For this voluntary exercise, however, only one patient attended Woodrum’s therapy session. (J.A. 1582-85). Woodrum noted on that patient’s form that he participated and met objectives. (J.A. 2295). Although she circled “group didactic” to reflect the original plan for her program, she also noted in writing on the form that it became a “1:1” session. (J.A. 2295). As to the other eight patients on the unit at that time, Woodrum noted on the Patient Education Form that none attended or participated: five of them were “in bed,” one was “in room, then sat in hallway,” another was “not feeling well,” and the last one was “on phone, then came in at end.” (J.A. 3472-90). Although Woodrum did not review the 15-minute flow sheet before charting (J.A. 1583), her location of the patients matched what MHT Bev Carnefix had recorded on the flow sheet. For instance, Carnefix noted that the last patient was on the phone in her room from 11:30 through 12:00 p.m. (J.A. 3487).

Nutter, who was working an 8-hour shift and not her typical 12-hour shift, filled out a line for “medication management” for each of the nine patients on November 12, 2009. Her charting for each of the nine patients on nine separate sheets of paper was identical. According to

her medical documentation, Nutter supposedly gave each patient one-on-one education from 12:00-12:45; each patient “attended”; each patient “participated”; and each patient “partially meets objective, needs reinforcement.” (J.A. 3472-90). Nutter signed each form.

Therapist Lara Woodrum noted at the end of her shift that there was an overlap of purported staff-patient interaction on the forms.<sup>5</sup> Woodrum conducted her group (with one patient) from 11:45 to 12:25 p.m. Nutter had charted a nursing group session (albeit supposed one-to-one discussions) from 12:00 to 12:45 p.m. Woodrum was upset over the conflicting documentation. (J.A. 1587). She was placed in a situation that she was not comfortable with, and she felt that she had to make a choice. (J.A. 1587-88). Her “gut” told her that it was “charting fraud.” (J.A. 1611).<sup>6</sup> Woodrum decided to put the issue on the desk of Christina Edens. At 4:47 p.m. the evening of November 12, Woodrum sent an email to Edens: “This is to inform you that the November 12, 2009 education sheets show that the nursing group was conducted during the recreational therapy group time. The recreational group time went from 11:45 to 12:25. The nursing group is stated to being at noon and end at 12:45. [sic] This is not true.” (J.A. 2487).

#### **4. Christina Edens’s Investigation**

Christina Edens began her investigation after receiving the contact from Lara Woodrum. (J.A. 265). She spoke with Lara Woodrum on the unit. (J.A. 1590). She obtained a statement from Woodrum with a bit more elaboration, reviewing the patient records for that shift, including the 15-minute flow sheets. (J.A. 1591). She observed that two of the 15-minute flow sheets showed patients asleep during the supposed time of Nutter’s educational sessions. (J.A. 3143, 3477, 3481). She spoke with staff. (J.A. 3143). She spoke with a couple of patients. (J.A. 268).

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<sup>5</sup> Nutter had already completed her shift and left the Hospital at 3:17 p.m. (J.A. 2510).

<sup>6</sup> Woodrum had no negative history with Nutter. (J.A. 1588). She came to Thomas just a few months after Nutter. (J.A. 1569). She had never been disciplined by Nutter. (J.A. 1588.) Indeed, Nutter had brought a meat tray to Woodrum’s wedding shower. (J.A. 1246). No one in management had told Woodrum to watch Nutter. (J.A. 1588-89).

Christina Edens concluded that Nutter had falsely documented care “to get the job done ... to complete the paperwork to say the job had been done.” (J.A. 335). She offered that such was “not acceptable.” (J.A. 322). “It is just not what we do.” (*Id.*). She took her findings to Becky Brannon, a long-time R.N. and the Chief Nursing Officer for Thomas Health System. (J.A. 318-21). Brannon agreed that it was a terminable offense. (J.A. 531). Edens then went to Marybeth Smith, the long-time HR Manager of Thomas Memorial. (J.A. 322). Smith agreed that, absent a compelling explanation, termination was the appropriate sanction. (J.A. 744-45).

#### **5. The November 16, 2009 Meeting with Nutter in the HR Office**

Marybeth Smith, a 30-plus year employee in the HR Department, used a procedure for terminable offenses – allegations that if true justified termination – that combined the investigatory interview of the accused employee with the termination decision. (J.A. 746). That is, if the interview with the employee did not reveal any evidence that altered or contradicted the pre-interview evidence that suggested termination, then the Hospital would proceed directly to termination. (J.A. 746-48). There have been times, however, that Ms. Smith has switched course in a “termination meeting” depending upon the employee’s explanation. (J.A. 747).

On November 16, 2009, Nutter was summoned to a meeting in the HR office. Present were Marybeth Smith, Christina Edens, and Sarala Sasidharan. (J.A. 748).<sup>7</sup> Smith chaired the meeting. (J.A. 748). Nutter estimates that the meeting lasted 20 to 30 minutes. (J.A. 977). The three women discussed the medical documentation with Nutter from the shift of four days earlier. (J.A. 749-50). Nutter could not explain the time overlap and the conflicting documentation. (*Id.*). She did not claim during the meeting that she did not understand the form. (J.A. 750). She

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<sup>7</sup> As mentioned above, Anna Laliotis was out of the country. Sarala Sasidharan, the former Director of Behavioral Health and then head of Out-Patient Services, was covering the department in Laliotis’s absence. (J.A. 3417). Nutter claimed in her deposition testimony that Sasidharan took a “swing” at her during the meeting in the HR office. (J.A. 983). That testimony, upon questioning, was downgraded to a “swat,” and then to “physical expressiveness.” (J.A. 983-84).

did not claim, as she did weeks later, that she had relied upon standards from some psychiatric nursing manual. (*Id.*) She did not claim to have been harassed or subjected to poor treatment by supervisors. (*Id.*) She did not raise any ethical or compliance issues. (J.A. 750-51). She did not allege elder abuse or Medicare fraud. (*Id.*)

Marybeth Smith concluded, as had Edens and Sasidharan, that Nutter had “documented care she did not give.” (J.A. 752). Accordingly, Marybeth Smith advised Nutter of her employment termination. (*Id.*) At the end of the meeting, Marybeth Smith advised Nutter that, due to the nature of the offense, the Hospital was required to notify the Board of Nursing. (*Id.*)

#### **6. Nutter’s Subsequent Excuses for her Documentation of November 12, 2009**

Notwithstanding her lack of explanation at the termination meeting on November 16, 2009, Nutter soon began offering explanations. In her December 11, 2009 letter to the Nursing Board, Nutter implied that she had done medication education throughout the morning “after assessments of [the] nine patients” and that she had charted a “time estimate” of when she “believed that attainment of an expected outcome (patient met criteria) was accomplished.” (J.A. 2492-99). She attached to the letter an inapposite page from a psychiatric nursing manual referring to expected outcomes from a patient plan that “includes a time estimate for attainment of expected outcomes.” (J.A. 2522). In other words, Nutter was saying to the Nursing Board that she did not give care between 12:00 and 12:45. Rather, her supposed interaction with the patients was “ongoing” because this “occurred whenever the patient was cognitively able to interact” and this “opportunity came and went several times a day.” (J.A. 2495). She claimed that the time that she wrote was her estimate as to when the patients would realize a benefit. (*Id.*)

At an unemployment compensation hearing in January 2010, Nutter testified that she did not actually see the patients for education between 12:00 and 12:45. Rather, she had “been doing

it ongoing with them all morning long.” (J.A. 1027-28). She claimed at the hearing that it was not falsification; “it was a charting error.” (J.A. 1031).<sup>8</sup>

Nutter claimed at trial that she did not understand the Patient Education Record when she was given it in February 2009 by Christina Edens. (J.A. 1073). And she did not understand it in March, April, May ... right up until November 2009 when she was terminated. (J.A. 1074). She says that she did not have the opportunity to ask Edens, her immediate supervisor, about the one-page form between February and November 2009. (J.A. 1075). At trial, Nutter flatly stated that she started down the hall at 12:00 and that that was the time that she was “actually starting [her] education session.” (J.A. 926). She emphasized her then story:

Q. So are you saying that you saw all nine patients between 12:00 and 12:45?

A. Yes.

(J.A. 966). Nutter then testified that each patient would have received about “40 minutes of interaction time” between 12:00 and 12:45. (*Id.*) Likewise, she testified at another point that 45 minutes would be accurate for the amount of education that a patient received that day. (J.A. 1038). And, if a family member had come in with questions, she “could pull that chart and say [that the family member’s loved one] received 45 minutes, and feel that I could defend that education.” (J.A. 1041). After conflicting explanations, Nutter summed up her testimony by stating that “[t]here was no error on that chart.” (J.A. 1066).

## **7. CNO Becky Brannon’s Required Letter to the Board of Nursing**

Becky Brannon has been an R.N. since 1977. (J.A. 594). After 21 years at St. Francis Hospital, she became the CNO of that hospital in 2003. (J.A. 594-95). In 2009, she became the Chief Nursing Officer for Thomas Health System, over both St. Francis Hospital and Thomas Memorial. (*Id.*) As a registered nurse, Brannon has an obligation to report to the West Virginia

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<sup>8</sup> The unemployment compensation ALJ found “simple misconduct” and disqualified Nutter from unemployment compensation benefits for six weeks. (J.A. 2516).

Board of Examiners for Registered Professional Nurses the suspected incompetent, unethical, or illegal practice of an R.N. Such report must be made within 30 days of the violation. W. Va. C.S.R. § 19-3-14.1.b; 14.1.u; and 14.1.aa. Falsification of medical documentation is subject to a mandatory report to the Board of Nursing. (J.A. 616-17). Given the findings of the Hospital investigation, Becky Brannon did not have any choice but to make a report.

Brannon wrote a letter on November 17, 2009, advising the Board that Nutter “had falsely documented educational sessions with patients” and that Nutter had been terminated from the Hospital. (J.A. 2490). Brannon did not engage in any advocacy (J.A. 616); she did not send any documents with the letter (*Id.*); she did not request any particular action. (*Id.*). The Board later served a subpoena on Thomas Memorial and the HR department provided Nutter’s file. (J.A. 754-55).

The Board did not conduct a hearing; did not interview Christina Edens, Lara Woodrum, Bev Carnefix, or Marybeth Smith; and did not examine Nutter under oath. (J.A. 2247-50). After eight months, on July 22, 2010, the Board sent a letter to Nutter advising that no action would be taken against her license. Nevertheless, the Board “caution[ed] [Nutter] to review [her] current practice for measures of improvement related to documentation.” (J.A. 2252). Such was consistent with the recommendation of a Board investigator that Nutter “should have CE [continuing education] related to legalities of documentation and a strong letter.” (J.A. 2250).

#### **8. Nutter’s Letter to the Board of Nursing**

After being notified by the Board that it was treating Becky Brannon’s November 17, 2009, letter as a complaint, Nutter wrote an 8-page letter to the Board on December 11, 2009. (J.A. 2492-99). In explaining how she had done education all morning long, Nutter proceeded to set forth approximately 50 specific details that she claimed to remember, without the benefit of

notes or medical records, about eight of the patients on the Med-Psych Unit. (*Id.*). She then set forth a laundry list of issues that she claimed to have “identified and related” to Christina Edens.

a. Calling in of prescriptions by nurses. Nutter implied in her letter that nurses were prescribing medications. There was no evidence that that occurred. Rather, some physicians were asking hospital-employed nurses to call in to the pharmacy prescriptions written by the physicians. (J.A. 611-12). Nurses employed by physicians can do that; hospital-employed nurses cannot. (J.A. 493). Becky Brannon discontinued the practice when she came to Thomas. (J.A. 492-93). Brannon never associated Nutter with that issue. (J.A. 613-14).

b. Billing for services not provided. Nutter claimed, in her letter to the Board, that if the Hospital were billing for recreational and music therapies – “services that the patients weren’t being provided, I was concerned that it could be considered Medicare fraud.” (J.A. 2496). Nutter claims to have made the comment to Christina Edens three weeks before her favorable 90-day evaluation and more than one year prior to her termination. (J.A. 1235). Nutter admitted, however, that she did not do billing and that she did not understand billing. (J.A. 1089-90). As point in fact, Thomas Memorial did not bill Medicare by the individual service. Rather, patients on the Med-Psych Unit were billed at a flat per diem rate. (J.A. 1356-57).

c. The crash cart. In her letter to the Board, Nutter claimed that the crash cart in the Med-Psych Unit did not have a cardiac monitor or defibrillator. Yet, psychiatric nurses are not required to have advanced cardiac life saving certification (ACLS). (J.A. 1366). There is no requirement that a defibrillator must be on the Med-Psych crash cart, especially when there was a crash cart located just next door in the Med-Surg Unit. (J.A. 603).

d. Bed weights. Nutter wrote that weights on patients were not being done and that the Hospital was deviating from the standard of care. She then went on to write, however, that Edens had the beds updated to calculate patient weights by the summer of 2009.

e. Repeat admissions. This issue is discussed above. In essence, Nutter blamed nursing homes for attempting to follow federal regulations requiring that attempts be made to taper nursing home residents off of psychotropic drugs every six months. She claimed that “families would cry in my arms and say things like, ‘if they would just leave my mom’s medications alone, she would never act like this.’” (J.A. 2497).

As to the motivation for her termination, Nutter claimed in her letter to the Board that this 1300-employee hospital was having financial trouble and that she “was targeted for termination due to economic instability” and that she was replaced by a younger nurse. (J.A. 2498). She opined in her letter to the Board that her termination would save the Hospital “\$25,000 to \$30,000 on the upcoming year’s salary budget.” (*Id.*)

#### **9. A Civil Action is Filed**

On August 11, 2011, Nutter filed her three-count complaint. Count I alleged a retaliatory termination. Count II, based on the same facts, alleged a “tort of outrage.” Nutter recited some of the “issues” that she had put in her post-employment December 11, 2009 letter to the Nursing Board and then added to the list of what she supposedly complained about at Thomas Memorial. She claimed that there were “no showers available on the floor for patient use” and “the patients were not being given skid-proof socks.” As to the showers, Nutter admitted at trial that patients could be taken to other rooms to be showered and that patients “were going to be showered.” (J.A. 894). As to socks, multiple witnesses testified to skid-proof socks being available on the unit. (J.A. 1514, 1545-46). The Hospital was never cited over a lack of socks.

At trial, Nutter brought up staffing on the unit, offering her personal opinion that more staff was needed. (J.A. 860-61). The informed testimony, however, was that the Hospital was compliant with the staffing requirements. (J.A. 1372). The Hospital used a matrix for staffing that was consistent with national standards. (J.A. 381, 1372).

At trial, Nutter's counsel introduced routine CMS audits of Thomas Memorial, but those audits almost exclusively pertained to other areas of the Hospital or pre-dated Nutter's employment. (J.A. 1376-91). Nutter never made a complaint that led to a CMS investigation or that matched up with a CMS audit citation.

Finally, Nutter had a count under the Wage Payment and Collection Act, claiming that the Hospital did not pay her a \$1 per hour charge nurse differential. Nutter was not hired, however, as a charge nurse per se. That is a rotated position. (J.A. 651). In order to qualify for the charge nurse differential, Nutter had to swipe her time card and then enter a code into the payroll system. (J.A. 697). If not done when swiping in, then the employee could use manual edit sheets to obtain the pay differential. (*Id.*). For some reason, Nutter stopped claiming the differential on October 30, 2008; then, equally without explanation, Nutter starting reclaiming the differential on August 6, 2009. (J.A. 707).

**B. Proceedings Below**

This civil action was filed on August 11, 2011, in the Circuit Court of Kanawha County. (J.A. 2669). After discovery, the case was tried to a jury beginning on April 1, 2014. After eight days of trial, the jury returned a verdict in favor of Respondent and against Petitioner on the theories of retaliatory discharge, tort of outrage, defamation, and unpaid wages (Wage Payment and Collection Act). The jury awarded Respondent \$318,000 in past lost wages and benefits; \$480,000 in future lost wages and benefits; \$100,000 for damage to reputation; \$100,000 as damages for claimed emotional distress; and \$6,900 for alleged unpaid wages under the WPCA. (J.A. 2667-68).

The trial court entered a judgment order on July 25, 2014. (J.A. 2662). On August 1, 2014, Petitioner filed its post-trial motion. (J.A. 2572). Respondent filed its opposition to the motion on December 8, 2014. (J.A. 2599). On June 23, 2015, the trial court denied Petitioner's

post-trial motion. (J.A. 2523). Petitioner filed its Notice of Appeal to this Court on July 20, 2015, and has timely perfected the appeal.

### **III. SUMMARY OF ARGUMENT**

Petitioner Thomas Memorial rightfully terminated Respondent Susan Nutter on November 16, 2009, after an investigation revealed that Nutter had documented care the prior week that she did not in fact give. Although successful in injecting a lot of emotion and sympathy into the trial, Nutter failed to identify a substantial public policy of the State of West Virginia that Thomas Memorial violated in discharging her. Moreover, Nutter failed to show a relation between her alleged conduct and the “public policies” she purported to rely upon.

The facts of this employee discharge case do not meet the high standard for a “tort of outrage” under West Virginia law. Nutter did not plead a defamation claim, a fourth legal theory, in her three-count complaint. To the extent that the trial court allowed Nutter to amend her complaint, Thomas Memorial should have been granted similar leeway to amend its answer to assert a statute of limitations defense. The defamation claim was untimely. Moreover, Thomas Memorial has qualified immunity for reporting a nurse for suspected document falsification to the West Virginia Board of Nursing.

The West Virginia Wage Payment and Collection Act does not mandate particular terms of employment. The evidence at trial established that it was Nutter’s obligation to “code” her time if she was claiming a charge nurse differential. She did not consistently do so. Accordingly, she cannot use the WPCA to rewrite the terms of her employment.

Judge Kaufman’s conduct of this trial denied Thomas Memorial a fair process. He asked over 300 questions of witnesses, asked leading and loaded questions of Thomas Memorial’s employees, made prejudicial comments on the evidence, and cast defense counsel in a poor light for attempting to represent his client. During counsel’s third motion for a mistrial, Judge Kaufman

confiscated defense counsel's notes and placed them under seal in the record. Finally, the judge made rulings on the evidence and instructions that prejudiced Thomas Memorial.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is necessary in this case because it would significantly aid the decisional process for the Court to hear directly from the counsel who tried the case below. Petitioner submits that this case is suitable for Rule 19 argument, as it involves assignments of error in the application of settled law, claims of unsustainable exercises of discretion, and claims of insufficient evidence.

#### **V. ARGUMENT**

##### **A. The trial court erred in denying Thomas Memorial's motion for judgment as a matter of law.**

This Court reviews denial of a Rule 50(b) motion for judgment as a matter of law *de novo*, under the same standards applicable to the trial court's analysis. *See Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482, 457 S.E.2d 152, 159 (1995) ("A denial of a motion for j.n.o.v. is reviewed *de novo*, which means the same stringent decisional standards that control the circuit courts are used.") (Cleckley, J.) (footnotes omitted). "In considering whether a motion for judgment notwithstanding the verdict under Rule 50(b) of the West Virginia Rules of Civil Procedure should be granted, the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a *prima facie* right to recover, the court should grant the motion." Syl. pt. 6, *Huffman v. Appalachian Power Co.*, 187 W. Va. 1, 415 S.E.2d 145 (1991).

##### **1. The trial court erred in allowing Nutter's *Harless* claim for wrongful discharge to go to the jury.**

Nutter failed to establish her retaliatory discharge claim because (a) she failed to identify any legal authority representing a substantial public policy of the State of West Virginia; and (b) the sources of public policy identified by Nutter, and upon which the jury was instructed, had no

nexus to Nutter's alleged conduct. Thus, no legally sufficient evidentiary basis existed upon which a reasonable jury could find for Nutter on her claim for wrongful discharge. These arguments were presented to the trial court in connection with Thomas Memorial's motion for judgment as a matter of law at the close of evidence (J.A. 1699-1700) and in the post-trial motion. (J.A. 2579).

This Court has explained the confines within which a trial court exercises its power to determine the existence of a public policy as a matter of law as follows:

To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.

Syl. pt. 2, *Birthisel v. Tri-Cities Health Services Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

"Inherent in the term 'substantial public policy' is the concept that the policy will provide specific guidance to a reasonable person." *Id.* at Syl. pt. 3.

Over Thomas Memorial's objection (J.A. 1508-13), the trial court instructed the jury on a myriad of purported substantial public policies. The jury was instructed that the following are substantial public policies of West Virginia: (1) for nurses to report issues regarding patient safety to their superiors; (2) for nurses to report issues that could be violations of federal standards and law to their superiors; (3) to prohibit employers from terminating an employee if a substantial motivation for that termination is that employee's reporting of patient safety issues. Plaintiff identified no constitutional provisions, legislative enactments, legislatively approved regulations, or judicial opinions upon which these purported substantial public policies were based. Further, these statements are far too vague and generalized to form a basis for a substantial public policy of West Virginia. *See Birthisel*, 188 W. Va. at 377-78, 424 S.E.2d at 612-13. Thus, it was error for the trial court to so instruct the jury.

Nutter identified several CMS regulations, which the trial court presented in jury instructions, as the sources of substantial public policies of West Virginia. Those federal regulations, however, are Conditions for Participation addressing the matter of whether a hospital can obtain Medicare/Medicaid reimbursement. That is a fiscal concern of a specific group – not a matter of broad societal interest. As such, the Conditions of Participation for hospitals do not state a substantial public policy within the meaning of West Virginia retaliatory discharge law.

Nor did Nutter’s alleged conduct have any relation to the purported public policies she identified. This Court has found the following formulation helpful when assessing a plaintiff’s burden when making a claim for retaliatory discharge in violation of a substantial public policy:

1. [Whether a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
2. [Whether] dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the *jeopardy* element).
3. [Whether t]he plaintiff’s dismissal was motivated by conduct related to the public policy (the *causation* element).
4. [Whether t]he employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

*Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 750, 559 S.E.2d 713, 723 (2001).

“The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates.” *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 705, 696 S.E.2d 1, 7 (2012); *see also Birthisel*, 188 W. Va. at 379, 424 S.E.2d at 614. Here, Nutter’s alleged complaints related to the following issues: nurses calling in prescriptions; billing irregularities; no defibrillators on the unit; not receiving the staffing promised; failures of night staff to use skid proof socks; failure to follow the bed rail policy; patients not having water overnight; and alleged “cycling” of patients. As explained above, none of those issues were of genuine concern.

The jury was instructed on six regulations related to Medicaid and Medicare participation by hospitals. None has any nexus to the activity identified by Nutter as her supposed protected activity, especially the one that Nutter assigned as the causative factor for her termination: the partial conversation with Anna Laliotis in late October/early November about a form to use at the time of discharge. (J.A. 1237-38). Moreover, the evidence showed that the CMS surveys upon which Nutter relied did not address activity on the Med Psych unit. (J.A. 1377, 1378, 1382, 1387, 1389, 1390). Without conduct relating to the alleged public policies, Nutter failed to present any evidence of the “jeopardy” and “causation” elements. As set forth above, Nutter failed to satisfy the “clarity” element by her failure to identify a substantial public policy of West Virginia. Thus, the evidence is legally insufficient to support the jury’s verdict in Nutter’s favor on her retaliatory discharge claim.

**2. The trial court erred in concluding that the evidence presented at trial was legally sufficient to support a verdict on Respondent’s outrage claim.**

As the trial court recognized, Plaintiff had to prove each of the following elements:

(1) that the defendant’s conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Syl. pt. 3, *Travis v. Alcon Labs., Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998); *see also* Syl. pt. 6, *Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982); (J.A. 2542).

The trial court failed to recognize, however, that on this record, as Thomas Memorial pointed out at trial and in its post-trial motion, the evidence was insufficient as a matter of law to support a finding that Nutter had satisfied the first element of her claim. (J.A. 1703-05; J.A. 2583-85).

The burden of proving outrage is “a high standard indeed.” *Keyes v. Keyes*, 182 W. Va. 802, 805, 392 S.E.2d 693, 696 (1990) (“[The *Harless* standard] is a high standard indeed. As one

court put it, ‘This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved.’” (citing *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974)); see also *Courtney v. Courtney*, 186 W. Va. 597, 600-01, 413 S.E.2d 418, 421-22 (1991) , *rev'd on other grounds*, *Courtney v. Courtney*, 190 W. Va. 126, 437 S.E.2d 436 (1993); *Hines v. Hills Dep't Stores, Inc.*, 193 W. Va. 91, 96, 454 S.E.2d 385, 389-90.

The evidence in this case showed that the actions taken by Thomas Memorial included: (1) an internal investigation; (2) preparation of an internal memorandum setting forth the results of the investigation; and (3) a meeting with Nutter to apprise her of the allegations against her and afford her the opportunity to explain her documentation. Those actions were appropriate under the circumstances. See *Dzingski v. Weirton Steel Corp.*, 191 W. Va. 278, 286, 445 S.E.2d 219, 227 (1994) (holding that actions by an employer such as interviewing employees, preparing internal memoranda setting forth the results of the interviews, and meeting with the employee to afford him the opportunity to affirm or deny the allegations could not conceivably constitute outrageous conduct), *modified in part on other grounds*, Syl. pt. 14, *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997). Nothing about the conduct of Thomas Memorial’s representatives could be considered extreme or outrageous, much less “utterly intolerable in a civilized community,” as is required to sustain a claim of outrage.

Moreover, as explained above, Becky Brannon was *required* to inform the Nursing Board that Nutter had falsified patient records and could have been disciplined had she failed to do so. Accordingly, because Nutter was terminated for intentional falsification of patient records, Becky Brannon, a registered nurse and Thomas Memorial’s Chief Nursing Officer, was required to report Nutter’s conduct to the Board. Brannon’s actions in informing the Board of Plaintiff’s termination for intentional falsification of patient records, as required by the Board regulations, cannot be regarded as extreme and outrageous.

Based on the foregoing, Thomas Memorial is entitled to judgment as a matter of law on Plaintiff's outrage claim.

**3. Thomas Memorial is entitled to judgment as a matter of law on Nutter's defamation claim because Thomas Memorial has qualified immunity and Nutter's claim is barred by the statute of limitations.**

a. Thomas Memorial is immune from liability pursuant to specific regulatory provision and public policy.

As discussed above, because Nutter's documentation on the Patient Education Records violated established standards set forth by the Nursing Board, Thomas Memorial had an obligation to report Nutter's conduct to the Board. Further, "complainants are immune from liability for the allegations contained in their complaints filed with the Board unless the complaint is filed in bad faith or for a malicious purpose." W. Va. C.S.R. § 19-9-3.5. No evidence was presented to suggest that Brannon made the report to the Board in bad faith or for a malicious purpose. Accordingly, W. Va. C.S.R. § 19-9-3.5 protects Thomas Memorial from liability.

Moreover, public policy in general provides that Thomas Memorial has qualified immunity for making such a report. A qualified privilege protects a defendant from liability for defamation when it "publishes a statement in good faith about a subject in which it has an interest or duty and limits publication of the statement to those persons who have a legitimate interest in the subject matter." *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 707, 320 S.E.2d 70, 78 (1983) (quoting *Swearingen v. Parkersburg Sentinel Co.*, 125 W. Va. 731, 744, 26 S.E.2d 209, 215 (1943)). Thomas Memorial undoubtedly had an interest in patient care and the standards of nursing practice. Furthermore, the report regarding Nutter's termination was sent only to the Board, the entity charged with regulation of registered professional nurses. Again, no evidence was presented to the jury that the report was made bad faith. As such, the report to the Board was privileged, and no liability for defamation may be found.

b. Nutter's defamation claim is barred by the statute of limitations.

Not only did Nutter not plead defamation in her complaint, but even if she had, such a claim is barred by the statute of limitations. The complaint's only reference to injury to Nutter's reputation is found in the retaliatory discharge claim, in which Nutter states that Thomas Memorial, as part of the alleged retaliation, "fil[ed] a complaint with the Nurse Licensure Board in an effort to prevent the plaintiff from earning income and to injure her reputation." (J.A. 2672). Even under West Virginia's notice pleading standard, this is not a separate claim for defamation, as explained at trial in connection with Thomas's Memorial's motion for directed verdict. (J.A. 1708-09; 2586).

If Nutter had included a defamation claim in her complaint, such claim would have been time-barred. Pursuant to W. Va. Code § 55-2-12(c), the statute of limitations for a defamation claim is one year. *See Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 170, 506 S.E.2d 608, 613 (1998). "[I]n defamation actions the period of the statute of limitations begins to run when the fact of the defamation becomes known ... to the plaintiff." *Padon v. Sears, Roebuck & Co.*, 186 W. Va. 102, 105, 411 S.E.2d 245, 248 (1991). Contrary to the trial court's implication, (J.A. 2550), this Court has *not* adopted the continuing tort theory with respect to defamation claims. *See Redden v. Staunton*, 2011 W. Va. LEXIS 206 at \*4, No. 101209 (Feb. 11, 2011).

Nutter's defamation claim is based solely on Thomas Memorial informing the Nursing Board that Nutter had been terminated for intentionally falsifying patient records. The undisputed evidence is that Nutter was aware of the report to the Board no later than December 11, 2009, when Nutter sent correspondence to the Board in response to the report. Nutter's complaint was not filed until August 2011. Accordingly, even assuming that Nutter's complaint asserted a defamation claim, it was clearly filed beyond the one-year statute of limitations. Thus, this Court should eliminate the \$100,000 awarded by the jury for loss of reputation.

4. **Thomas Memorial is entitled to judgment as a matter of law on Nutter's Wage and Payment Collection Act claim because Nutter did not comply with hospital policy or the terms of her employment regarding entering her time.**

If an employee is paid above the minimum wage rate, any additional pay above minimum wage is subject to employee/employer agreement. Pursuant to hospital policy and the terms of her employment, Nutter had the obligation, when she entered her time, to designate that she was acting in a charge nurse capacity in order to receive the charge nurse pay differential. (J.A. 698). It is undisputed that whenever Nutter appropriately designated that she was acting in a charge nurse capacity, she received the pay differential. (J.A. 2501-11). Because Nutter did not code her time properly from October 2008 to August 2009, Thomas Memorial is entitled to judgment as a matter of law on her Wage Payment and Collection Act claim.

3. **The trial court erred in refusing to order a new trial, as the trial of this action was fundamentally unfair as a result of the court's excessive questions and prejudicial comments and its erroneous rulings on evidentiary issues and jury instructions.**

In general, this Court reviews a trial court's ruling granting or denying a motion for a new trial under an abuse of discretion standard. Syl. pt. 1, *JWCF, LP v. Farruggia*, 232 W. Va. 417, 752 S.E.2d 571 (2013). Further, the Court "review[s] the circuit court's underlying factual findings under a clearly erroneous standard," while "[q]uestions of law are reviewed *de novo*." *Id.* Even under this highly deferential standard of review, Judge Kaufman's decision should be reversed and this matter should be remanded for a new trial, provided that judgment is not entered outright for Thomas Memorial.

It is well-settled that a grant of a new trial under Rule 59 may be premised on the cumulative error doctrine. *See Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 117-118, 459 S.E.2d 374, 394-395 (1995). The doctrine is applied in civil cases where it is "apparent that justice requires a [new trial] because the presence of several seemingly inconsequential errors has made any resulting judgment unreliable." *Id.* at 118, 459 S.E.2d at 395. In other words, the

application of the cumulative error rule is proper where the “erroneous rulings may well deprive an aggrieved litigant of due process unless the cumulative effect of the errors does not affect the outcome of trial.” *Id.* at 117 n.28, 459 S.E.2d at 394 n.28. In this case, the cumulative effect of the errors discussed herein and preserved in the record deprived Thomas Memorial of its right to due process and warrants the award of a new trial.

**1. Judge Kaufman’s Conduct at Trial Unfairly Prejudiced Thomas Memorial.**

As this Court has articulated, “The paramount function of the trial judge is to conduct trials fairly and to maintain an atmosphere of impartiality.” *Alexander v. Willard*, 208 W. Va. 736, 742, 542 S.E.2d 899, 905 (2000). The rules of evidence expressly permit the trial court to interrogate witnesses. *See* W. Va. R. Evid. 614(b). But trial judges must “sedulously avoid all appearance of advocacy as to those questions which are ultimately submitted to the jury.” *United States v. Hickman*, 592 F.2d 931, 933 (6<sup>th</sup> Cir. 1979); *see also* Fed. R. Evid. 614(b) Advisory Committee Note. Indeed, West Virginia’s version of Rule 614(b) cautions that “in jury trials, the court’s interrogation shall be impartial so as not to prejudice the parties.” In the proceedings below, Judge Kaufman abused his discretion in connection with the questioning of witnesses and by denying Thomas Memorial’s motion for a new trial.

As explained above, the factual basis for Thomas Memorial’s defenses to Nutter’s claims was that the Hospital’s management terminated Nutter’s employment because it had concluded, after due investigation, that Nutter had falsified medical records. On numerous occasions during the trial, Judge Kaufman questioned Thomas Memorial’s managers in a manner suggesting that the judge viewed the Hospital’s charting requirements as either silly or unduly burdensome for the staff. Judge Kaufman’s interrogation of defense witnesses signaled to the jury his apparently jaundiced view of those witnesses’ credibility in other ways as well. By contrast, Judge Kaufman’s interaction with Nutter was friendly and conversational and elicited only testimony that

avored her position. Finally, Judge Kaufman expressed anger toward defense counsel any time defense counsel attempted to protect his client's interests by objecting to or otherwise challenging, among other things, Judge Kaufman's treatment of defense witnesses.

This Court's evaluation of whether the trial judge overstepped the proper bounds of judicial participation in trial proceedings such that his partiality become a factor in the jury's determinations is to be based on the entire record. *State v. Thomas*, 220 W. Va. 398, 400, 647 S.E.2d 834, 836 (2007). Standing in complete isolation, one from the other, those incidents described below still cannot be contorted to fall into the categories of harmless error or the trial judge's "ordinary efforts at courtroom administration." *Liteky v. United States*, 510 U.S. 540, 554 (1994). Considered in combination with Judge Kaufman's erroneous evidential rulings and flawed jury instructions, they compel beyond any doubt the conclusion that Petitioner did not receive a fair trial.

In his order denying Thomas Memorial's post-trial motions, Judge Kaufman justified his conduct in questioning witnesses as efforts to clarify the testimony and fill in gaps in the evidence. (J.A. 2565). He further states that his reprimands of defense counsel were provoked by counsel's conduct toward the bench. (J.A. 2566-67). Respectfully, the trial transcript, fairly read, does not support those characterizations.

a. Judge Kaufman's Questioning of Defense Witnesses

On the second day of trial, Nutter's counsel called Christina Edens as an adverse witness. At the relevant time, Edens was the Nurse Manager of Thomas Memorial's behavioral health units and Nutter's direct supervisor. Judge Kaufman joined in Nutter's counsel's questioning of Edens several times to ask a total of fifty-six questions, the vast majority of which were leading. Among other things, Judge Kaufman noted that the unit nurse (Nutter) was "covering a whole bunch of patients" and "trying to document what is going on at a certain time with certain pa-

tients.” (J.A. 277). Further, as “[s]ome patients [are] walking all over the place and nurses [are] walking all over the place,” it was “not a very easy thing to put a specific time with a specific patient at all times ....” (J.A. 277-78).<sup>9</sup> This is not clarification; this is advocacy. Nutter’s intentional and false documentation of care was at the core of the defense. Judge Kaufman was attempting to paint a picture of a chaotic environment in which mistakes could be made. At this point, defense counsel approached the bench and moved for a mistrial, but he was rebuked.

With respect to the patient 15-minute flow sheets, Judge Kaufman’s comments implied that he viewed the requirement that patient’s activities be accounted for in 15-minute intervals twenty-four hours a day as excessive. “Every 15 minutes?” (J.A. 295); “7/24?” (J.A. 296); “So that’s done for every patient?” (J.A. 296); “So you got four boxes per hour.” (*Id.*); “Every 15 minutes?” (*Id.*); “What’s the purpose of that?” (*Id.*). At one point Judge Kaufman stated, “Pretty hard to categorize what [the patients] are doing. Would you say that’s fair?” (J.A. 346). Not surprisingly, Edens, responded to the judge’s comments in agreement: “At times, yes.” (J.A. 346).

The next day, day three of trial, defense counsel again raised his concerns about the trial court’s questioning the previous day, without success. Upon the resumption of testimony, Judge Kaufman grilled CNO Brannon about the meaning of the phrase “Time/Duration” as it appears on the forms at issue. (J.A. 544-46). Brannon explained that “Time/Duration” means “time and/or duration.” From that, Judge Kaufman concluded that, as either the time or the duration or both could be charted there, “that one has no right or wrong to it?” (J.A. 544).

Later in the questioning of Brannon, Judge Kaufman returned to the “time and/or duration” point, unprompted by Nutter’s counsel, to focus on Nutter’s entry of 12:00 to 12:45 in the Time/Duration column: “So that had both of those in it. The time and duration, right?” (J.A. 568). Then he asked another leading question, “That would have been perfectly right?” (*Id.*).

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<sup>9</sup> It was not Nutter’s job to track patients’ activities; it was her job to accurately document *her own* activities with respect to patient care.

When the witness responded that it would have been right had service of that duration actually been provided during that time period, this back-and-forth ensued:

THE COURT: Right. That's – I know that's an issue in the case. But I just mean, the way that was done was perfectly right.

THE WITNESS: If –

THE COURT: You said that if someone did it wrong, that was falsifying; correct? That was your statement, if somebody got the wrong information in there, they would have falsified a document?

THE WITNESS: The wrong information, yes.

THE COURT: The wrong information. So then I asked you about the and or, and my point is that that information in there on the duration and the time is exactly right as to form, to form?

THE WITNESS: To form.

(J.A. 568-69). After some further interaction with Judge Kaufman, Brannon was able to describe the circumstances in which it would be proper to note the time of a particular activity (9:30) and when it was appropriate to show a time and a duration (12:00 to 12:45). (J.A. 569-70). It was at this point defense counsel again expressed alarm at the judge's continued advocacy through questions. Counsel had a continuing objection placed on the record. (J.A. 646).

Later that day, defense counsel questioned Brannon about the letter she had sent to the Nursing Board advising of Nutter's discharge and the reason for that discharge. (J.A. 614-16; 2490). Brannon had previously explained that she was required as a professional nurse to report professional misconduct on the part of other registered nurses. (J.A. 547). Brannon's testimony was undisputed on that point. Judge Kaufman nevertheless interrupted defense counsel's questioning on the subject to ask, "**Why did you send the letter?**" (J.A. 616). Brannon again explained that it was her obligation to do so as the Hospital's chief nursing officer and a registered nurse. (J.A. 618). Judge Kaufman responded, "**I know who you are,**" and "**I am just wondering why you would tell that to the Board.**" (*Id.*). (emphasis added). Judge Kaufman then obstructed

defense counsel's attempt to regain control of the examination and continued, "**Why do you tell the Board? Why is that told to the Board?"** (*Id.*). (emphasis added).

Judge Kaufman later interrupted defense counsel's questioning to emphasize that reporting a nurse's professional misconduct to the Board of Nursing is a serious matter: "**And there is no more important regulatory agency governing nurses than the Nursing Board, correct?"** (J.A. 642). Then, "**And falsification of a document would be what we might call moral turpitude or something, a really serious offense?"** (J.A. 643). Driving the point home, Judge Kaufman asked Brannon, "**Is there anything else you can do more serious in terms of the professional integrity of the nurse?"** (*Id.*). From this questioning, it was clear to the jury that Judge Kaufman had decided that Brannon's report to the Nursing Board was not justified.

In the defense's case-in-chief, counsel called Anna Laliotis as a witness. At the relevant time, Laliotis served as the administrator of behavioral health services at Thomas Memorial. (J.A. 1352). Judge Kaufman interrupted defense counsel's questioning of Laliotis several times, asking her, for example, how much time she spent on the Med Psych unit and whether she documented her time there. (J.A. 1371-72). The implication of that line of questioning was that Laliotis should not insist upon accurate and complete charting by the floor nurse if she herself was not subject to the same standards.

Laliotis is originally from Greece, and in November 2009 (when Nutter was discharged) she was in Greece visiting her parents. (J.A. 1399-1400). She did not learn of Nutter's termination until she returned from that trip. When defense counsel finished his direct examination of Laliotis, Judge Kaufman zeroed in on her trip to Greece in such a way as to suggest that she was either on a boondoggle in dereliction of her duties to the hospital or that she lived some exotic lifestyle. (J.A. 1402-05). The witness explained that her directors at the hospital could handle things and knew how to reach her if necessary. (J.A. 1404).

Nutter's counsel's question to Laliotis, "What does it mean to be loyal to the department?" triggered another interjection by Judge Kaufman. (J.A. 1458-59). Laliotis explained what the term "loyal" meant to her. Judge Kaufman persisted, "What would be disloyal?" And the witness answered that question. With a flourish that any trial lawyer would be proud of, Judge Kaufman then pointed to Nutter sitting at counsel's table and asked, "**What did you think, this woman is loyal or disloyal as an employee?**" Laliotis said she did not think Nutter was disloyal. Judge Kaufman: "**Loyal? Does that mean you would think she was loyal?**" Laliotis: "Yes." Judge Kaufman, perhaps realizing that he had again crossed the line, then said, "Okay. Pretty simple questions, but they may be hard to answer. I appreciate your answering them." (J.A. 1459). Any good advocate loves a question where he cannot lose with the answer. The answer of "loyal" scored points for Nutter: "Why would a loyal employee be terminated?" An answer of "disloyal" would have served just as well. Any plaintiff's counsel in a retaliatory discharge case would be thrilled to have a supervisor label the plaintiff as "disloyal." The record will never reflect whether Nutter's counsel would have asked that "gotcha" question. He did not have to even consider it. Judge Kaufman picked up the sword of advocacy and did it for him. At the conclusion of Laliotis's testimony, defense counsel again moved for a mistrial, as described below.

The incidents set forth above are representative, but not exhaustive, of Judge Kaufman's participation in interrogating defense witnesses. They are in stark contrast to Judge Kaufman's attitude towards Nutter, which is addressed next.

b. Judge Kaufman's Interaction with Plaintiff Nutter

Nutter took the stand the afternoon of the fourth day of trial. From the start, Judge Kaufman established a friendly rapport with her. For example, Nutter stated near the beginning of her testimony that she had three daughters; Judge Kaufman, "**You have three girls?**" and "**I know**

**what that's like.”** (J.A. 829). Jurors **“that don't have three girls can disregard that.”** Those that **“have three girls ... can consider it.”** (*Id.*).

Later that day, Judge Kaufman interrupted Nutter's counsel's direct examination to ask a series of open-ended questions beginning with, **“What were patients like up there?”** (J.A. 852). **“What is a dementia patient?”** (J.A. 853). **“How does dementia affect them?”** (*Id.*). **“What other kinds of people are up there?”** (J.A. 854). Judge Kaufman also responded to Nutter's description of the unit's patients as including schizophrenic and schizoaffective individuals by having the witness confirm, more than once, that those patients **“were all up there together.”** (J.A. 854).

The next day during defense counsel's cross-examination, counsel asked Nutter “how much medication education did each patient receive between 12 o'clock and 12:45?” (J.A. 966). Nutter gave a rambling answer which ended with, “I would say that the patients all got about, you know, 40 minutes worth of interactive time like that. With what I was speaking and given them time to think it over, and respond.” (J.A. 967). Judge Kaufman, however, seemed to recognize that Nutter's admission was quite damaging on a critical part of the case. He reasoned aloud that, inasmuch as there were nine patients on the unit, Nutter **“might have four to five minutes each then?”** (J.A. 967). With that helpful prompt, Nutter testified that she “may have spent five or six minutes” or “maybe eight to ten minutes” with each patient. (*Id.*)

Judge Kaufman then proceeded to bring alive in living color the untenable position in which counsel is placed when challenging an improper question from the bench. Defense counsel objected. Instead of ruling on defense counsel's objection, Judge Kaufman responded, **“That was like on the hall, just coming, and you were moving up and down the hall?”** (J.A. 967-68). Nutter agreed with that characterization, whereupon Judge Kaufman noted that Nutter had “[d]escribed that earlier.” **“All right. That's consistent then.”** (J.A. 968). And that was not the

only time Judge Kaufman commented on the supposed “consistency” of Nutter’s testimony in the presence of the jury. (J.A. 1038). Defense counsel was prohibited from using Nutter’s deposition testimony as a “party admission”; “THE COURT: **She testified, and every single thing has been consistent with her testimony.**” (J.A. 1038).

Further, in the middle of defense counsel’s cross-examination of Nutter, Judge Kaufman essentially vouched for Nutter’s credibility. Defense counsel was questioning Nutter about a letter she had written to the Nursing Board in which she described eleven very specific activities she had performed relating to patient care on November 12, 2009. (J.A. 1055-59). In connection with ruling on an objection by Nutter’s counsel, Judge Kaufman took over the questioning:

THE COURT: [Addressing defense counsel.] You have asked a question of every line [in the letter] and she told you, how many were there, eleven?

THE WITNESS: Yeah.

....

THE COURT: [Addressing the witness.] All 11 of them you remembered, right?

THE WITNESS: Yes. Nursing is my life, I remember this day. It is –

THE COURT: You remembered the people probably too?

THE WITNESS: Yes, yes. I mean, I took care of them for, you know, some of them were two weeks, approximately two weeks. That was six days stretch, eight days off, prior to that six days before. These people become almost like family.

THE COURT: Could you describe their faces?

THE WITNESS: Yes, I could probably describe some of their faces.

THE COURT: You didn’t get that into that letter?

THE WITNESS: No, I did not. But that’s how close you become to your patient.

THE COURT: All right. I think that’s helpful.

(J.A.1059-60). Judge Kaufman’s participation in this line of questioning directly countered counsel’s effort to show the implausibility of Nutter’s claim to have remembered so many medical

and personal details about everything she had done on a particular day without the aid of even one note. Defense counsel again moved for a mistrial upon the conclusion of Nutter's testimony.

Judge Kaufman's sympathy for Nutter was made evident in other ways as well. During the testimony of Nutter's expert witness, a psychologist, Judge Kaufman interrupted defense counsel's cross-examination on the subject of life stressors to ask, "**Is age 55 or 57 pretty critical years?**" (J.A. 1310). Judge Kaufman then asked, "**Would you say ages 55 or 57, however old this woman was, are pretty critical years when you lose your job?**" (*Id.*). The witness readily agreed.

Throughout the trial, Judge Kaufman injected himself into the proceedings on behalf of Nutter. Such one-side intervention by the trial judge is frowned upon by reviewing courts. *See, e.g., Nationwide*, 174 F.3d at 808 (trial court's "interruptions were so numerous and his questions so one sided, they must inevitably have left the jury with the impression that the judge believed Nationwide's actions were egregious and improper"). Such was the lot of Thomas Memorial in April 2014. It was confronted with the specter of the most authoritative person in the courtroom asking questions and making comments that suggested he had an opinion as to how the case should be resolved. Moreover, a presiding judge's leading questions and improper comments put counsel in a terrible posture. He must object and then ask the questioner to rule on whether the question is proper. Counsel cannot win. If he does not object, then he risks waiver and inadmissible testimony being introduced. If he objects, he risks his credibility before the jury. In either scenario, the judge has ceased being a neutral and the law has left the courtroom.

c. Judge Kaufman's Treatment of Defense Counsel

As might be expected, defense counsel was distressed at Judge Kaufman's persistent and one-sided participation in the case. On the second day of trial, after Judge Kaufman had asked Nutter's supervisor seventeen questions, defense counsel requested a bench conference and, re-

luctantly, moved for a mistrial. (J.A. 278-79). Judge Kaufman denied the motion and then sternly instructed defense counsel, “**Let me make this clear, every other objection you make will be back at the counsel table. Okay. Every other objection in this trial you make at counsel table.**” (J.A. 279). During Judge Kaufman’s questioning of Becky Brannon in aid of Nutter’s counsel’s cross-examination, defense counsel asked to approach the bench.

MR. COKELEY: Your Honor, may I approach, Your Honor?

THE COURT: You just state your points.

MR. COKELEY: Yeah. I think the cross-examination is that of Mr. Masters, and so if he is finished, I would like to ask some questions of the witness.

THE COURT: You can.

MR. COKELEY: Okay. Should I do that now?

THE COURT: When I am finished.

(J.A. 511).

Before the jury was brought in on the third day of trial, defense counsel attempted to make a record with respect to his concerns with judge’s questioning of Petitioner’s witnesses. (J.A. 522). Judge Kaufman responded, “**Do you have an objection to make or are you just padding the record for something on the benefit of your client?**” (*Id.*). Judge Kaufman then offered defense counsel a choice between “**continually try[ing] to pad a record to try to make some point for your client**” and discussing the matter “**in a humanly way**” off the record. (J.A. 523). Defense counsel, in a futile act of good will, opted for an off-the-record discussion. (*Id.*)

Things did not improve. Nutter testified on the fourth and fifth days of trial, as described above. At the start of the sixth day, defense counsel again moved for a mistrial and attempted to support his motion by describing some of the specifics of the objectionable conduct from the bench. Judge Kaufman interrupted to ask, “Are you reading something there?” (J.A. 1165). Counsel replied that he was consulting his notes; Judge Kaufman suggested counsel put his notes in the record as Court’s Exhibit A. (J.A. 1165-66). Counsel demurred.

Upon the conclusion of Anna Laliotis's testimony on the seventh day of trial, defense counsel, for the reasons stated above, renewed his motion for a mistrial. Again, counsel consulted his notes in making his argument. This is how Judge Kaufman reacted:

THE COURT: [Addressing Plaintiff's counsel] I guess you would have the same opportunity to respond as he had to read again something he had written on yellow paper ahead of time. And also claim work product on yesterday when he read a long reciting objection. And I asked him to put into the record to be reviewed and he claimed work product. You may have a chance to speak and respond too without any notes.

MR. COKELEY: Notes I made during the Court's improper questioning of the witness, just for the record.

THE COURT: I don't really care what it is. I said put into the record now. Order that put into the record as Court's exhibit.

MR. COKELEY: My contemporaneous attorney notes?

THE COURT: Right. Put it into the record and under seal. Let me just make sure it is clear into the record, and if you have those from yesterday, you may want to consider putting those under record and be reviewed. You may state your objection, Mr. Masters.

MR. COKELEY: I –

THE COURT: I think Mr. Masters gets a chance to talk because I think I am finished talking to you on that issue right now.

(J.A. 1464-65). When defense counsel asked whether Judge Kaufman wanted him to sign his notes before relinquishing them, Judge Kaufman responded:

No, I just want you to put it in the way it is. The record will indicate it. I didn't get it yesterday, the work product, so foolish I didn't respond to it when you disclosed it yourself reading in the paper and claimed work product, that's all. This time over that objection, I just put it in the record so it can be reviewed.

(J.A. 1467-68).

These examples reflect Judge Kaufman's intemperate behavior, exhibited throughout, which "represent[ed] more than mere friction between zealous counsel and a diligent jurist."<sup>10</sup>

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<sup>10</sup> *Johnson v. Georgia*, 602 S.E.2d 623, 627 (Ga. 2004) (reversing conviction where "the trial court berated counsel in front of the jury for interrupting or impeding the proceedings when, in fact, it appears that counsel merely raised legitimate objections").

**2. Judge Kaufman’s erroneous evidentiary rulings prejudiced Thomas Memorial’s case.**

This Court “generally review[s] a court’s evidentiary rulings under an abuse of discretion standard.” *Hanson v. Miller*, 211 W. Va. 677, 678, 567 S.E.2d 687, 689 (2002) (citing Syl. pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983)). When “the claimed error relating to evidentiary admissibility turns on the interpretation of the *West Virginia Rules of Evidence*,” however, “[this Court’s] review is *de novo*.” *Id.* (citing Syl. Pt. 1, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995)). In this case, the challenged evidentiary rulings were based upon Judge Kaufman’s erroneous interpretation of the hearsay rules and are reviewable *de novo*.

a. “State of Mind” Evidence

“Evidence demonstrating the employer’s state of mind is ‘of crucial importance in wrongful discharge cases.’” *Garner v. Missouri Dept. of Mental Health*, 439 F.3d 958, 960 (8<sup>th</sup> Cir. 2006). Moreover, out-of-court statements offered, not for the truth of the matters asserted, but as evidence of the declarant’s motive or state of mind are not hearsay. *See* W. Va. Rule Evid. 801(c); Syl. Pt. 1, *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990). Judge Kaufman seriously and improperly prejudiced Thomas Memorial by refusing to admit into evidence certain documents that were relied upon by its employee who made the decision to terminate Nutter.

The Thomas Memorial managers reached consensus that termination was appropriate. The key decision maker was Marybeth Smith, Thomas Memorial’s long-time Human Resource Director. (J.A. 748, 752). Among the documents provided to Smith and upon which she relied in making her decision was a memorandum summarizing the results of Christina Edens’s investigation. (J.A. 3143). Nutter’s counsel read a portion of the memo to the jury during the examination, but Judge Kaufman still refused its admission into evidence. (J.A. 797-801).<sup>11</sup> This was error.

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<sup>11</sup> Nutter’s counsel had objected to Defense Exhibit 19, Christina Edens’s contemporaneous memo that memorialized a portion of Edens’s state of mind and was something Marybeth Smith reviewed

b. Use of Nutter's Deposition as Substantive Evidence

Judge Kaufman prevented counsel for Thomas Memorial from making effective use of Nutter's admissions in her deposition. (J.A. 1036-38; J.A. 1043-49). Rule 32(a)(2) of the West Virginia Rules of Civil Procedure provides that the deposition of a party "may be used by an adverse party for *any* purpose." (Emphasis added.)<sup>12</sup> In addition, R. Evid. 801(d)(2) excludes from the definition of hearsay an admission by a party opponent. Accordingly, testimony from a party's deposition is admissible as substantive evidence – not just for impeachment purposes – and admissions made by a party opponent in a deposition are admissible irrespective of whether the party is available to, or even in fact does, testify at trial. Pursuant to Rule 613(b), the usual rules of impeachment do "not apply to an opposing party's statement under Rule 801(d)(2)."

Given the shifting stories of Nutter and her general evasiveness at trial, it was essential that defense counsel have full use of her videotaped discovery deposition. The rules on this point are plain and their application in the courts has been consistent.

**3. The trial court erred in instructing the jury regarding the substantial public policy of West Virginia and in failing to instruct the jury with respect to issues central to Thomas Memorial's defense.**

This Court reviews the trial court's rulings on requested jury instructions for abuse of discretion. Syl. Pt. 6, *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995). Under that standard, "[i]t will be presumed that a trial court acted correctly in giving or refusing to give instructions to the jury unless it appears from the record ... that the instructions given were prejudicially erroneous or that the instructions refused were correct and should

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during the termination process. Then, during the cross-examination of Smith, Nutter's counsel put the memo up on the overhead projector and directed Smith's attention to one part of the memo. (J.A. 825-26). Defense counsel then moved the admission of the document. Nutter's counsel conceded that it was now admissible. It was admitted. (J.A. 800). Inexplicably, however, a few minutes later Judge Kaufman *sua sponte* revisited the issue, excluding Edens's contemporaneous memo from evidence.

<sup>12</sup> Defense counsel vouched the record by having Nutter's deposition marked for identification and made a part of the record. (J.A. 1171).

have been given.” Syl. pt. 9, *Craighead v. Norfolk & W. Ry. Co.*, 197 W. Va. 271, 475 S.E.2d 363 (1996). Further, this Court “ha[s] long held that ‘where [in a trial by jury] there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so.’” *Reynolds v. City Hosp., Inc.*, 207 W. Va. 101, 106, 529 SE.2d 341, 346 (2000) (citation omitted).

a. Substantial Public Policy Instruction Erroneously Given

The trial court erred by instructing the jury regarding the substantial public policy of West Virginia.<sup>13</sup> In this case, Nutter’s proposed jury instruction provided that it is the public policy of this State: (1) for nurses to report issues regarding patient safety to her supervisor; (2) for nurses to report issues that could be violations of federal standards and law to her supervisor; and (3) to prohibit employers from terminating an employee if a substantial motivation for that termination is that employee reporting issues regarding patient safety. Nutter did not identify any *constitutional* provisions, legislative enactments, regulations or judicial opinions on which these purported public policies are based. Moreover, as in *Birthisel*, general admonitions do not provide the type of substantial and clear public policy on which a retaliatory discharge claim can be based.

Nutter’s proposed jury instruction regarding public policy also identified several Centers for Medicare and Medicaid Services regulations which she contended formed the basis of West Virginia public policy. As explained above, those regulations, however, are merely the “Conditions of Participation” for hospitals in Medicare and Medicaid and do not state a substantial public policy within the meaning of West Virginia retaliatory discharge law. In addition, Standard 42 C.F.R. 482.23(b), 42 C.F.R. 482.43(a), 42 C.F.R. 482.43(d), and 42 C.F.R. 482.21(e)(2) are general statements that do not provide specific enough guidance to an employer, as required by *Bir-*

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<sup>13</sup> Counsel preserved Thomas Memorial’s objection to the substantial public policy instruction in the proceedings below. (J.A. 1638-43; Def’s Post-Trial Br. at 11).

*thisel*. With respect to 42 C.F.R. 482.24(c)(2)(vii), there is no evidence that Nutter made complaints about discharge summaries. The only evidence presented in relation to 42 C.F.R. 482.43(d) was that Nutter, a nurse, disagreed with the discharge orders being provided by the doctors. And, no evidence was presented regarding 42 C.F.R. 482.21(e)(2).

b. Instructions Improperly Refused

To the limited extent Judge Kaufman allowed Thomas Memorial to introduce “state of mind” evidence, Judge Kaufman effectively rendered such evidence meaningless by refusing to instruct the jury on the “honest belief” doctrine. This Court has approved of a jury instruction nearly identical to Thomas Memorial’s proposed jury instruction regarding business judgment and the employer’s honest belief. *See Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 78 n.33, 479 S.E.2d 561, 588 n.33 (1996). So long as the personnel who made the termination decision had an honest belief that the facts upon which they based the decision were true, the defendant’s reasons cannot be considered pretext. *Id.* “Any employer, such as [Thomas Memorial], is entitled to make its own business judgments, regardless of what others might think of those judgments. Stated another way, the law provides that an employer has the right to make employment decisions for good reasons, bad reasons, or no reason at all, absent [unlawful retaliation].” *Id.* Thus, Judge Kaufman improperly refused to give Thomas Memorial’s proposed jury instruction regarding the honest belief doctrine, prejudicing the Hospital’s defense. (J.A. 1627-37).

Judge Kaufman also refused to instruct the jury regarding various privileges to which Thomas Memorial enjoyed with respect to Nutter’s defamation claim. Thomas Memorial submitted jury instructions regarding qualified immunity and the immunity provided by the Board regulations (J.A. 1649-59; however, Judge Kaufman rejected those instructions, over the objection of the Hospital (J.A. 1685). In addition, throughout the course of the trial, Nutter’s counsel repeatedly referred to the unemployment compensation proceedings, noting that Nutter had “only”

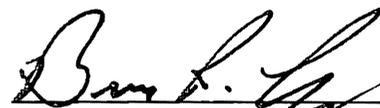
been found guilty of “simple misconduct.” (J.A. 177). “Simple misconduct,” however, is considered “conduct evincing such willful and wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior from which the employer has the right to expect of his employee ....” Syl. pt. 7, *Dailey v. Board of Review*, 214 W. Va. 419, 589 S.E.2d 797. Mere inefficiency, unsatisfactory conduct, ordinary negligence, or good faith errors in judgment are not deemed misconduct. *Foster v. Gaston*, 181 W. Va. at 181, 381 S.E.2d at 380; *Kirk v. Cole*, 169 W. Va. at 524, 288 S.E.2d at 549. Because the terms “gross misconduct” and “simple misconduct” are terms of art and might be misleading to a jury (such that simple misconduct might be misunderstood to equate to negligence, as opposed to a deliberate disregard of standards of behavior), the trial court should have instructed the jury as to these definitions. (J.A. 1666-67). Because the trial court’s rulings regarding the jury instructions had a prejudicial effect on Thomas Memorial, a new trial should be granted.

## VI. CONCLUSION

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

Dated this 19<sup>th</sup> day of October 2015.

Respectfully submitted:

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of October 2015, I caused the foregoing Brief of Petitioner to be served on counsel of record via hand delivery addressed as follows:

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