No. 24434 - Betty A. Tiernan v. Charleston Area Medical Center, Inc., a West Virginia corporation

Starcher, Justice, dissenting, in part and concurring, in part:

I.
Introduction

Ms. Tiernan, an exemplary employee, was fired and then allegedly "blacklisted" by her employer -- all because Ms. Tiernan wrote a letter to a newspaper criticizing her employer, and/or because Ms. Tiernan openly brought a newspaper reporter to an employee meeting.[1]

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[1]The following factual summary, somewhat more detailed than the summary given in the majority opinion, is taken from Ms. Tiernan's Petition for Appeal. Obviously, Ms. Tiernan's summary presents the evidence and allegations in the record in a light favorable to Ms. Tiernan's claims. We are reviewing the circuit court's granting of motions for summary judgment against Ms. Tiernan; in addressing such motions, a court also must look at the proffered evidence in the light most favorable to Ms. Tiernan.

The appellant was by all accounts one of the leading lights of the Medical Intensive Care Unit at Charleston Area Medical Center ("CMAC"). Her performance evaluations were consistently superior. Her supervisor literally raved about the job she did, not just as a registered nurse, but as a problem solver and a leader. Patients (including physicians) stuffed her personnel file with notes thanking her for saving their lives and giving their loved ones excellent care.

The appellant's direct supervisor and her manager and the defendant's administration and personnel departments noted on the appellant's 1990 evaluation that she "follows hospital policies and procedures. That she is a resource person to new staff." She is characterized by the employer in the 1990 evaluation as "knowledgeable, flexible, adaptable, ACLS [Advanced Cardiac Life Support] certified, dependable, [and] seen as a leader and resources person by staff."

Appellant's 1991-1992 evaluation by her direct supervisor, approved by the personnel department, notes: "staff perceive you put forth great effort to assure fairness and consistency of assignments. You work hard to meet special needs as well. You are always calm in a crisis, which keeps others calm. You have a gift for generating a 'team

approach & support from your staff'. You take changes mid-shift in stride and adapt appropriately." The appellant was noted to "meet . . . standards . . . in patient care, knowledge and skills, professional ethics sections, plus you consistently anticipate your staff's needs. You will cheerfully take patients to lighten a heavy load and still provide assistance to others. This is a real strength of yours!" (emphasis in original); "consistently teaches [one-to-one] with a non-threatening approach;" "Possess high standards for the care delivered in the unit as well as your own" and a "calm, organized leader," having "great critical care knowledge base, ability to share it effectively," an "excellent clinician," possessing the "ability to gain acceptance for anything needed from staff," a "strong back-up for staff -- makes them feel supported and more confident." The appellant was noted to have "good ideas to improve unit functioning. Greets others with a smile. Role model of caring for PTS/Families. Caring and supporting of staff."

During her 1992-1993 performance appraisal, the appellant was noted by her direct supervisor to "meet both patient and staff needs," and to "readily [gain] staff acceptance for needed changes." Appellant was further acknowledged to be a "role model and leader" and to be "willing to be involved to change things for the better." The appellant was specifically noted in this evaluation to be "a + influence on the cohesiveness of night shift." She was said to be "very caring with pts. families -- expends whatever energy necessary to see that their needs are met."

Appellant's 1993-1994 evaluation was completed by her direct supervisor in March, 1994. The appellant was said to meet or exceed all standards upon which she was measured in this evaluation. Her direct supervisor said that she "contributes positively to unit/shift morale" and acted as a "strong leader in the unit." Appellant was said to exceed the criteria of "utilizing nursing skills in the delivery of care for a given patient population." The appellant, in this regard, was said to "[act] as unit resource in charge role, as well as resource outside of the unit on 3 East." It should be noted that the appellant was awarded a "miracle of MICU" employee recognition award by defendant.

The defendant's stated basis for termination is that the appellant brought a newspaper reporter to a meeting which hundreds of people attended and which was broadcast on a closed circuit TV station over the whole CAMC system. The appellant had, the defendant admits, no prior disciplinary actions of any kind during her many years of employment at CAMC.

The purpose of the meeting, which appellant attended with a reporter from the Charleston Gazette, was to let CAMC employees know in advance of the discussions going on between St. Francis Hospital and CAMC regarding some kind of joint venture or other business relationship. The same thing was announced at a press conference later that day.

The appellant's efforts to get her job back by appealing within the CAMC system were fruitless. She exhausted every avenue available to her to retain a job that she loved and at which she was exceptionally good.

After considerable difficulty, appellant obtained fairly steady *per diem* employment with the Arthur B. Hodges Center ("ABH"), a long-term care facility located across the street from CAMC General Division. Upon CAMC becoming aware of appellant's employment with ABH, CAMC advised ABH that the appellant was a "union organizer." Thereafter, ABH no longer employed her.

The appellant contends that, therefore, her efforts to obtain employment of a similar nature to that which she enjoyed at CAMC proved fruitless. The appellant claims that on several occasions there would be initial interest expressed, followed by a statement that the potential employer would have to check with CAMC personnel, after which nothing would be heard. The appellant claims she was effectively frozen out of comparable employment after being terminated by CAMC.

After a stint as a manger at a home health agency in Charleston, the appellant resolved to somehow return to critical care hospital nursing. She eventually obtained a contract to do "traveling nurse" work for a company that supplies nurses on a contract basis to hospitals around the country. She was guaranteed nothing beyond the temporary, short term contracts she was offered. She was required to live away from her home and family for long periods.

The appellant contends that the real reason for her termination from CAMC had nothing to do with bringing a reporter to a meeting, but rather was retaliation by CAMC against the appellant for writing a "letter to the editor," which was published in the Charleston Gazette, which was critical of certain CAMC actions, and for voicing her concerns and the concerns of other nurses about CAMC's attempts to eliminate safe staffing.

Parts III.A. and III.B. of the majority opinion uphold the circuit court's grant of summary judgment against Ms. Tiernan, and promulgate two new legal rules that apply to claims of retaliatory discharge and tortious interference with a business relationship.

The majority opinion reflects scholarship, intelligence, and diligence. Importantly, the opinion reaffirms the principle that constitutional provisions are a valid source of public policy in our law of employer-employee relations.

However, on the retaliatory discharge and tortious interference issues, the majority opinion boils down to the following two equations:

1. employee + speech = totally unprotected.

2. employer + speech = totally protected.

I disagree with these results, and with the reasoning that leads to them. I therefore respectfully dissent to parts III.A. and III.B. of the majority opinion.

II.
Freedom of Speech

At the beginning of the majority's discussion of Ms. Tiernan's retaliatory discharge claim, the majority correctly states that:

> [t]he specific inquiry in this case is whether or not public policy emanating from the Free Speech clause of the state constitution applies to speech by private sector employees

> *who criticize or disagree with policies or other lawful actions taken by their private sector employers*.

Tiernan v. CAMC, ___ W.Va. ___, ___, ___ S.E.2d ___, ___, (1998), No. 24434, May 22, 1998, slip op. at 20 (emphasis added).

However, this crisp formulation of the free-speech issue raised in this case seems to have been forgotten by the time the opinion enunciates Syllabus Point 4, which states:

> The Free Speech Clause of the state constitution is not applicable to a private sector employer. In the absence of a statute expressly imposing public policy emanating from the state constitutional Free Speech Clause upon private sector employers, an employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's state constitutional right of free speech.

Syllabus Point 4, *Tiernan v. CAMC*, ___ W.Va. ___, ___ S.E.2d ___, (1998), No. 24434, May 22, 1998.

Thus, while the "specific inquiry" in the instant case involves private-sector employee speech that criticizes or disagrees with an employer that may be unprotected by public policy, the language of Syllabus Point 4 of the majority opinion sweeps broadly to include *all* private sector employee speech -- including speech about matters that are

none of the employer's legitimate concern.

I am deeply concerned that the broad scope of Syllabus Point 4 would permit private sector employers to penalize and chill an individual's exercise of fundamental democratic rights.

For example, Syllabus Point 4 would allow a restaurant to fire an excellent chef who has no problems at work, for writing a letter to the newspaper in favor of campaign finance reform -- or of better wages for chefs! Or, a taxi company could fire a driver with a 20-year spotless record, because she or he called in to a radio talk show to support a woman's freedom of choice -- or to call for stricter abortion laws.

In these hypothetical cases or others like them, applying our established law under *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978) and its progeny -- which recognize a cause of action for an employee who suffers a retaliatory discharge in violation of public policy -- I might well be prepared to hold that a constitutionally-derived public policy protecting freedom of speech that does not unfairly impinge on an employer's legitimate business concerns is indeed essential to and inherent in a system of ordered liberty.

Therefore, in spite of the apparent weight of authority to the contrary in other jurisdictions, as cited in the majority opinion, I am unpersuaded that in *our* jurisdiction we should totally exclude our constitutional free speech guarantee as a source of public policy (as the majority opinion does) in *our* evolution of the law of employer-employee relations.

I can certainly imagine cases, like the examples given above, where I might conclude that public policy -- based on our state's constitutional guarantee of the right of free speech -- *will* protect an employee from being discharged in retaliation for exercising that right. Moreover, I am confident that the recognition of such protection for employees' exercise of their free-speech rights is the trend of our common law, however long this long-term trend may take to arrive at a majority position.[2]

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[2]A thoughtful review of the law relating to the issue of free-speech protection for private sector employees is found in *Carl v. Children's Hospital*, 702 A.2d 159, 174 (D.C.App. 1997) (*per curiam*) (*en banc*). The majority opinion in the instant case, by focusing solely on the brief *per curiam* portion of the *Carl* opinion, *see* ___ W.Va. at ___, n. 17, ___ S.E.2d at ___, n. 17, (1998), slip op. at 25, n. 17, does not do justice to *Carl.* The concurring opinion authored by Associate Judge Schwelb in *Carl*, with which I am in substantial agreement, states in part:

> Ms. Carl contends, in substance, that by discharging her for testifying before the Council and for appearing as an expert witness for plaintiffs in medical malpractice cases, Children's Hospital has retaliated against her for exercising her right to free speech. Such retaliation, according to Ms. Carl, is contrary to the public interest because it chills the exercise of fundamental rights.
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> [Judge Schwelb continues in *Carl*]
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> > We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. *For our generation, the substance of life is in another [person's] hands.*
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> > F. TANNENBAUM, A PHILOSOPHY OF LABOR 9

(1951) (emphasis in original). Because of this economic dependence on the part of employees, the at-will doctrine effectively "forces the non-union employee to rely on the whim of his employer for [the] preservation of his livelihood." *Blades* [Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum.L.Rev. 1404], 1405 [(1967)]. This dependence "tends to make him a docile follower of his employer's every wish," *id*., and may inhibit him from speaking his mind freely if what he would like to say differs from that which the employer would like to hear.

The "central commitment of the First Amendment ... is that debate on public issues should be uninhibited, robust and wide open." *Bond v. Floyd*, 385 U.S. 116, 136, 87 S.Ct. 339, 349, 17 L.Ed.2d 235 (1966) (citation omitted). "It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail...." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969). . . . If an employee like Ms. Carl places her livelihood in jeopardy by speaking out on an issue of public concern, then the "market-place of ideas" is not uninhibited in any realistic sense. The ultimate victory of the forces of truth, which is supposed to emerge from free and open debate, then becomes a far more iffy prospect.

For these very reasons, the Supreme Court has recognized that although the First Amendment plays no direct role in cases not involving governmental action, "statutory *or common law* may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others." *Hudgens* [*v. NLRB*], 424 U.S. [507], 513, 96 S.Ct. [1029], 1033 (emphasis added). Indeed, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources *is essential to the welfare of the public*." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424-25, 89 L.Ed. 2013 (1945) (emphasis added). The public interest is thus disserved by "repression of [freedom of expression] by private interests." *Id*. (footnote omitted).

These principles are profoundly relevant to at-will doctrine jurisprudence.

* * *

Ms. Carl's right to express herself freely is not the only interest to be considered in this case. The calculus must also embrace Children's Hospital's perspective. If an employee conducts herself in a manner which significantly impairs her employer's interests, then her claim loses much of its force.

* * *

If Children's Hospital can demonstrate that this case is analogous to *Korb* [*v. Raytheon Corp.,* 410 Mass. 581, 574 N.E.2d 370 (1991)], and that this type of exercise of First Amendment rights by a probationary non-management employee could significantly harm the Hospital's financial interest, then this will constitute a formidable defense. . . .

In relation to any proceedings on remand, the court and jury should be required to

> balance the interests of the employee, the employer, and the public. Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees.

Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505, 511 (1980). We add the obvious: the public also has an interest in the free expression of ideas on political and other issues.

In *Novosel* [*v. Nationwide Ins. Co.,* 721 F.2d 894 (3d Cir. 1983)] , the Court of Appeals remanded the case to the district court with directions to conduct a four-part inquiry:

1. Whether, because of the speech, the employer is prevented from efficiently carrying out its responsibilities;

2. Whether the speech impairs the employee's ability to carry out [her] own responsibilities;

3. Whether the speech interferes with essential and close

working relationships;

4. Whether the manner, time and place in which the speech occurs interferes with business operations.

721 F.2d at 901 (citation omitted). I would add to the first of these categories "or from pursuing its business interests.". . .

In those cases in which an employer has a persuasive business justification for discharging an employee, it is unlikely that he will be held liable for damages under the standard that I suggest. It is possible, of course, that in a close case, the employer will stay his hand, and will keep on an employee who has spoken out, even under circumstances in which the court might sustain a discharge if the controversy were to go to trial. That, however, is not too steep a price to pay for alleviating the harshness of an especially restrictive judge-made doctrine. . . . Even if the adoption of the exception I propose were to result in the retention, from time to time, of a legally dismissable employee, the world will not end on that account. Indeed, this result might, in the long run, promote the achievement of the free marketplace of ideas which differentiates our democracy from less enlightened forms of governance.

It should not be an inexorable principle of our law that he who pays the piper must always call the tune. The relatively modest departure from the at-will doctrine suggested in this opinion will not render the employer defenseless. It will, however, help to free the law from a judicially imposed albatross which has not served us well.

702 A.2d at 182-186.

The majority opinion's broad new rule in Syllabus Point 4 inexplicably prejudges such cases, and in so doing precludes this Court from engaging in our customary case-by-case development of the common law of retaliatory discharge.

If the majority's approach is too broad, how should we review the circuit court's grant of summary judgment against Ms. Tiernan on her free speech retaliatory discharge claim?

We should formulate a rule that is more narrowly tailored to the actual inquiry that Ms. Tiernan's case presents. Such narrow tailoring would first recognize that the conduct that Ms. Tiernan alleges led to her termination was essentially public criticism of her employer -- but was not "whistle blowing," which the majority acknowledges is protected. A narrowly tailored rule that is appropriately sensitive to the legitimate interests of employers and employees might hold that discipline or termination for speech that is injurious to the employer, workplace or work responsibilities, and is not whistle blowing or otherwise specifically protected by law (human rights, etc.), is ordinarily an unactionable employer prerogative, absent exceptional circumstances.

However, if a private employer fires, disciplines or discriminates against an employee for speech that is not clearly and substantially related to legitimate employer

interests, we should recognize that a very different case is presented. In such cases, the public policy promoting free speech and vigorous public discourse on matters of public concern that is embedded in constitutional guarantees[3] *may* protect an employee from retaliatory employer conduct.

Whatever narrower rule we might adopt, we definitely should *not* rule out the possibility, as the majority opinion does, that employees who are terminated for speech that is not substantially related to their employer's legitimate concerns may use the court system to protect and vindicate their right -- indeed, their civic duty -- to participate fully in our democracy by exercising their right to free speech.

Although a narrower rule might not yield a better result for Ms. Tiernan, such an approach would be fairer to employers and employees in other circumstances, and, therefore, would be a better approach for this Court to take.

I would reverse the circuit court's grant of summary judgment against Ms. Tiernan on her free speech retaliatory discharge claim, and remand the claim for reconsideration by the circuit court under a narrower standard.

[3]The facts of the instant case show how freedom of speech and freedom of the press may be interconnected.

III.
Blacklisting

In Syllabus Point 5, the majority adopts a new rule that gives employers *carte blanche* the right to maliciously use "the truth" to injure a former employee -- even when the employee's situation is none of the employer's concern. The majority's new rule would also apply to the same sort of malicious conduct by one business against another business. I strongly dissent to the adoption of such a rule.

Ms. Tiernan alleges that after she was fired, her first employer (truthfully) told her next employer (and possibly other potential employers) that Ms. Tiernan was a pro-union activist, causing Ms. Tiernan to lose her job and experience difficulty finding other work.

A common name for this sort of conduct -- by employers or by unions -- is "blacklisting." Ms. Tiernan sought recovery for her injuries from this alleged blacklisting conduct by asserting a claim against her first employer for tortious interference with business relations.

Our longstanding rule governing tortious interference is found in *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983), Syllabus Point 2:

> To establish prima facie proof of tortious interference, a plaintiff must show:
> (1) existence of a contractual or business relationship or expectancy;
> (2) an intentional act of interference by a party outside that relationship or expectancy;

(3) proof that the interference caused the harm sustained; and

(4) damages.

If a plaintiff makes a prima facie case, a defendant may prove justification or privilege, affirmative defenses. Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper.

The majority opinion's Syllabus Point 5 actually modifies *Torbett,* by holding that interference which takes the form of literally truthful statements can *never* be found to be improper:

> In the context of tortious interference with a business relationship, one who intentionally causes a third person not to perform a contract or not to enter into a prospective business relation with another does not interfere improperly with the other's business relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice. Restatement (Second) of Torts § 722 (1979).

Syllabus Point 5, *Tiernan v. CAMC*, ___ W.Va. ___, ___ S.E.2d ___, (1998), No. 24434,

May 22, 1998.

With this modification of *Torbett*, this Court has adopted a rule stating that any interference in business relations -- no matter how unwarranted, odious, intermeddling, officious, vicious, harmful, devastating or offensive -- must in all cases be immunized, simply because the interferer uses literally "truthful information" as his or her weapon of choice in carrying out the interference. Such a rule is far too broad, as the following examples demonstrate.

What if a maliciously anti-union person or entity compiled and circulated a clandestine "blacklist" of known pro-union workers to employers, with the hope and intent of interfering with and injuring these workers in their employment relationships? If the list was accurate and contained only "truthful information," the compiler and circulator of the list (under the protection of Syllabus Point 5 of the majority opinion) would have no liability for tortious interference, even if the circulation of the list accomplished the circulator's intent of causing grievous harm to the workers and their families.

Additionally, the immunity for "truthful information" malicious interference that is created by the majority's new rule also applies to inter-business conduct. What if a restaurant's business competitor were to maliciously hire pickets to parade on the public sidewalk outside the restaurant, and (truthfully) proclaim to potential patrons that the restaurant owner's spouse works in a controversial women's clinic? Or that the restaurant's owner has been treated for a mental illness?

In such cases, under *Torbett*, a jury could decide if the interference was improper. But under the broad language of Syllabus Point 5, such conduct would be absolutely immune from liability no matter how unjustified the conduct or how grievous the harm caused by the interference -- simply because the information used for an interfering purpose was literally truthful.

The broad rule of Syllabus Point 5 is not necessary or fair. And in fact, the majority opinion does not suggest that fairness or necessity supports for adoption of the rule. The majority's sole rationale for holding that "truthfulness is an absolute defense to tortious interference" is that this is the position suggested by the *Restatement (Second) of Torts* Sec. 772.[4]

This is not a good enough reason for changing our established rule. The *Restatement* is not "the law." It is a collection of suggestions offered to courts by a group of legal scholars.

This Court has adopted some of the *Restatement* formulations, either in whole or with some modification, almost always after making a reasoned determination that the *Restatement* formulation will hopefully be fairer and more useful than existing

[4]The majority suggests that it is acting "[c]onsistent with our reasoning in *Torbett*." ___ W.Va. at ___, ___ S.E.2d at ___, slip. op. at 33. However, in *Torbett* this Court acknowledged and recited the *Restatement's* general tortious interference formulation, but chose *not* to adopt it, stating: "[w]e have relied upon the Restatement for guidance in outlining elements of and defenses to improper interference *but, of course, are not tied to its categories and definitions*." *Torbett*, 173 W.Va. at 216, 314 S.E.2d at 172 (emphasis added). Moreover, truthfulness as a defense to tortious interference was not an issue in *Torbett*.

formulations of the law. *See, e.g., City of Keyser v. Foster*, ___ W.Va. ___, ___ S.E.2d ___ (1997), No. 24001, December 15, 1997 (adopting the *Restatement* formulation of *res ipsa loquitur*); *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989) (following *Restatement* approach in nuisance cases); *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978) (adopting *Restatement* formulation of intentional infliction of emotional distress).

In other instances, we have considered but not adopted the *Restatement* formulation. *See, e.g.,* Syllabus Point 7, *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666, (1979) (declining to adopt the *Restatement* formulation in product liability cases). *See also* note 4, *supra* (noting that this Court in *Torbett* declined to adopt the *Restatement* tortious interference language.)

In the instant case, the majority opinion does not discuss the purported merits of the *Restatement* 772 formulation. The majority is apparently following the lead of the other courts that the majority opinion acknowledges have adopted 772, while failing "to clearly articulate the basis for so doing." ___ W.Va. at ___, ___ S.E.2d at ___, slip. op. at 32.

The comments to the *Restatement* acknowledge that the law of tortious interference is unsettled. The comments also reflect the fact that a substantial number of courts and jurists have taken the position that truth is not always an absolute defense in tortious interference cases.

For example, the position that the communication of truthful information

may in some circumstances be held to be improper interference is taken by courts not only in Utah, *Pratt v. Prodata, Inc.*, 885 P.2d 786 (Utah 1994) and Pennsylvania, *Collincini v. Honeywell, Inc.* 411 Pa. Super. 166, 601 A.2d 292 (Pa. Super. 1991) *appeal denied*, 530 Pa. 651, 608 A.2d 27 (1992), *cert. denied*, 506 U.S. 869, 113 S. Ct. 199, 121 L.Ed.2d 141 -- as cited in the majority opinion -- but also in Rhode Island, *C.N.C. Chemical Corp v. Pennwalt*, 690 F. Supp. 139 (D.R.I. 1988); Ohio, *Carman v. Entner*, 1994 WL 28633, No. 13978, Feb. 2, 1994 (Ohio App. 2 Dist.) (unpublished); and Illinois, *Stonestreet Marketing Services, Inc. v. Chicago Custom Engraving, Inc.*, 1994 WL 162824, No. 93-C-1785, April 28, 1994 (U.S.D.C. N.D.Ill.) (unpublished).

The court in *C.N.C., supra,* said that "the general rule that communicating truthful information does not constitute 'improper' interference should not be viewed as absolute." 690 F.Supp. at 143.

The *Stonestreet, supra,* court stated that:

> . . . the truthful nature of the communications simply entitles Defendants to a qualified or conditional privilege which is a defense unless the jury concludes Defendants abused the privilege or took action motivated by desires other than the interest protected by the privilege.

Slip op. at 6, note 2.

In *Carman supra,* the court said:

> No Ohio case-law exists that produces any bright-line test to determine whether the Entners should avoid liability for tortious interference with a contract where the same statement producing the liability is not actionable under as [sic] slander of title. However, we do not think, as a matter of public

> policy, that individuals may escape liability on the basis that otherwise clear and unprivileged threats are constructed from statements that are literally true. It has been recognized in Pennsylvania that although truth is an absolute defense in defamation actions, "truth is not a defense to intentional interference with contractual relations." *Collincini v. Honeywell, Inc.* (1991), 601 A.2d 292, 296, *appeal denied*, 608 A.2d 27, *certiorari denied*, 113 S. Ct. 199.
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> We find that the existence of a privilege to interfere with a contract depends essentially on whether the interfering party has a need to interfere with the contract. The rule is that where there is no need to interfere with a contract to protect a genuine legal right, even truthful statements, calculated to interfere with the contract, are actionable. The exception is where the interfering party has a bona fide belief that the contract will impair or destroy his genuine legal rights.
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> Under the above rule and exception, the connection between truth and privilege is a question of fact. And the burden of proving the defense of a privilege to interfere clearly rests with the defendant.
>
> Proving the truth of all express statements made to parties to the contract may not always be sufficient to show that the defendant was privileged to interfere with the contract.

Slip op. at 7-8 (citations and footnote omitted).

> The court in *Pratt, supra* stated:
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> [W]e reject defendants' call to adopt truthfulness as an absolute defense to the tort of intentional interference with prospective economic relations.

885 P.2d at 790.

Additionally, the dissenting opinion in *Four Nines Gold, Inc., v. 71 Const., Inc.*, 809 P. 2d 236 (Wyo. 1991), by Chief Justice Urbigkit, states in part:

> "The privilege [of truth] is conditional and if the occasion were used not to give *bona fide* advice, but to injure the plaintiff for any ulterior reason, the defendant should lose his privilege and therefore fail in his defense."
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> * * *
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> Truthfulness when said to be some kind of excuse for harmful action cannot be extracted from propriety and justification.

Id. at 249-250 (citations omitted).

The foregoing cases and language provide persuasive authority and reasoning in support of the position that "truthful information" should not be an absolute defense to tortious interference. Additionally, the following language from *Florida Star v. B.J.F.*, 491 U.S. 524, 532, 109 S.Ct. 2603, 2608-09, 105 L. Ed.2d 443, 454-55 (1989) is pertinent to the issue of the wisdom of approving of truthfulness as an absolute defense. The Supreme Court said in *Florida Star*:

> Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that *the future may bring scenarios which prudence counsels our not resolving anticipatorily.*

Id. (emphasis added).

What rule would be better than Syllabus Point 5 of the majority opinion? A simple, reasonable, middle-ground and fair approach would hold that the truthfulness of an interfering statement is a legitimate "factor" under Syllabus Point 2 of *Torbett* to be considered along with all other circumstances in evaluating the propriety of any

interference. Syllabus Point 2 of *Torbett* states, in part:

> Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, *or other factors that show the interference was proper.*

(Emphasis added.)

This approach would allow a tribunal to give consideration to the concerns that underlie the *Restatement* 772 formulation -- and would avoid the *Restatement*'s grant of blanket immunity in all cases where a party's maliciously interfering statement is literally true.

Under such a rule, a jury could consider the truthfulness of Ms. Tiernan's former employer's interfering statements, along with all of the other circumstances of the interference, in determining whether the former employer's conduct was or was not improper interference with Ms. Tiernan's business relations.[5] This would be fair.

For the foregoing reasons, I strongly dissent to the majority's new Syllabus Point 5, and to the affirmance of the circuit court's grant of summary judgment against Ms. Tiernan on her tortious interference claim. I would reverse and remand for Ms.

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[5]We discussed the respective roles of judges and juries, in evaluating allegedly improper conduct in employer - employee relations, in *Travis v. Alcon Laboratories*, ___ W.Va. ___, ___, note 7, ___ S.E.2d ___, ___, note 7 (1998), Slip op. at 15-16, note 7, No. 24207, May 21, 1998.

Tiernan's claim to be considered under *Torbett*, with an appropriately narrow rule that allows truthfulness to be considered as one of the relevant factors in deciding whether her employer's interference with Ms. Tiernan's business relationships was improper.

IV.
Conclusion

I would reverse the circuit court's grant of summary judgments on the appellant's claim for free speech retaliatory discharge and her claim for interference with a business relationship. I concur in the majority's reversal of summary judgment of the appellant's other causes of action.