IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1998 Term

No. 24434

BETTY A. TIERNAN,
Plaintiff Below, Appellant,

V.

CHARLESTON AREA MEDICAL CENTER, INC.,
A WEST VIRGINIA CORPORATION,
Defendant Below, Appellee.

Appeal from the Circuit Court of Kanawha County
Honorable Andrew MacQueen, Judge
Civil Action No. 95-C-327

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

Submitted: February 17, 1998
Filed: May 21, 1998

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE WORKMAN and JUSTICE STARCHER concur in part, dissent in part, and

reserve the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. "Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl. Pt. 3, *Fayette County Nat. Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997).

3. An at-will or otherwise employed private sector employee may sustain, on proper proof, a cause of action for wrongful discharge based upon a violation of public policy emanating from a specific provision of

the state constitution. Determining whether a state constitutional provision may be applied to a private sector employer must be done on a case-by-case basis, i.e., through selective incorporation and application.

4. 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.

5. 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).

Davis, Chief Justice:

This is an appeal by Betty A. Tiernan, appellant/plaintiff, (hereinafter "Ms. Tiernan") from two orders entered by the Circuit Court of Kanawha County granting summary judgment to Charleston Area Medical Center, appellee/defendant, (hereinafter "CAMC"). The plaintiff asserted numerous theories of liability regarding the termination of her employment by CAMC. The circuit court made the following rulings on those theories: that as a matter of law Ms. Tiernan's constitutional theories of liability

did not apply to a private employer; that Ms. Tiernan's statutory claims placed no genuine issue of material fact in dispute; and that the theories of breach of contract/detrimental reliance, tortious interference with a business relationship, and violation of statutory and regulatory public policies were not supported by evidence sufficient to raise genuine issues of material fact. Ms. Tiernan assigns error to each of the circuit court's rulings on her claims for recovery. We find that the circuit court correctly granted summary judgment on Ms. Tiernan's constitutional claims. We further find that the circuit court correctly granted summary judgment on Ms. Tiernan's claim for tortious interference with a business relationship; and that the circuit court's orders failed to present adequate findings for review by this Court on all remaining claims. Consequently, we affirm in part and reverse in part the circuit court's summary judgment orders.

I.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose as a result of Ms. Tiernan's discharge from employment by CAMC. Ms. Tiernan was employed as a nurse by CAMC from May

of 1985 to May 2, 1994. Prior to 1994, Ms. Tiernan had a good relationship with CAMC. She had an excellent work history and was part of CAMC's management staff.

On February 19, 1994, Ms. Tiernan wrote a letter to the editor of The Charleston Gazette. The letter was edited and published in the newspaper on February 23, 1994.[1] The letter criticized CAMC's budgetary

[1]The edited version of Ms. Tiernan's letter appeared in the newspaper as follows:

Readers' forum

Compassion will survive

Editor the Gazette:

This is a letter of appreciation to Charleston Area Medical Center for slowly but surely lowering morale in the work place to an unbelievable level; for cutting the nurses' merit raise scale from a ceiling of 8 percent to 4 percent annually; for decreasing their matching funds for our retirement accounts; for reducing the educational assistance and conference monies to employees who wish to pursue a higher level of learning and professionalism.

Thank you for losing sight of the fact that your employees have a life outside of CAMC; that we have homes, families and friends; that we need and are deserving of recuperative time away from this institution. Thank you, too, for creating in me a level of cynicism I never dreamed possible.

However, CAMC, there is one thing you cannot do. And that is destroy the compassion and caring I have for my patients and their families. I will continue to deliver the highest standard of care I possibly can. I will continue to respect and support my fellow nurses in their endeavors. I will

cut-backs. CAMC officials spoke with Ms. Tiernan about the letter and cautioned her to consult with CAMC in the future, before airing her views in the press. CAMC advised Ms. Tiernan that, as part of the management team, she had a duty to portray to the public and other staff members that management was united. Ms. Tiernan was informed that no repercussions would be taken against her for the letter.[2] A few weeks after the letter appeared in the newspaper, Ms. Tiernan was given an evaluation. Ms. Tiernan was rated by CAMC as "meets" or "exceeds" on each of the evaluation categories. The evaluation also noted that Ms. Tiernan needed to be more supportive of management. Ms. Tiernan was given a raise after the evaluation.

On May 2, 1994, CAMC scheduled a nonpublic meeting to discuss a planned merger or affiliation with St. Francis Health Care Systems, Inc.

> still feel the joy of a patient's healing and grieve for the ones we lose; and with my patients and families I will share a touch, a confidence and more than a few tears.
>
> But, CAMC, bear in your mind and corporate heart, I will not share these things with you.
>
> Betty A. Tiernan, R.N., 3711 Virginia Ave., City

[2]It appears that Ms. Tiernan informed CAMC that the newspaper did not print the real issue of concern she expressed in her unedited letter. That issue involved the on-call work policy for nurses. CAMC revised its on-call policy subsequent to Ms. Tiernan informing CAMC of her dissatisfaction with the on-call policy.

The meeting was to be televised on CAMC's internal, closed-circuit television station. The broadcast was specifically limited to viewing at television screens located at employee workstations. Furthermore, the broadcast was blocked from patient television. CAMC planned to hold a news conference immediately after the meeting to inform the general public of the proposed affiliation agreement. CAMC invited only specific upper and middle managers to the meeting. The invitation did not include members of the media.

Shortly after the meeting began, Ms. Tiernan entered the room where the meeting was being held accompanied by a newspaper reporter.[3] A CAMC employee standing at the door did not recognize Ms. Tiernan; but, recognized the reporter. The employee informed the reporter she could not enter the meeting. The reporter stated that she was invited by Ms. Tiernan. Ms. Tiernan and the reporter entered the meeting. Both Ms. Tiernan and the newspaper reporter had tape recorders and recorded the meeting.

[3] Ms. Tiernan initially took the newspaper reporter to one of the television broadcasting stations. However, because of apparent sound problems Ms. Tiernan decided to take the newspaper reporter to the actual meeting.

CAMC terminated Ms. Tiernan several hours after the meeting. CAMC's basis for termination was that Ms. Tiernan's conduct of bringing the newspaper reporter to a closed meeting was wrong and warranted dismissal. Ms. Tiernan invoked CAMC's appeal procedures. Her appeal was unsuccessful.

After termination, Ms. Tiernan secured per diem employment as a nursing supervisor with Arthur B. Hodges Center, Inc., (hereinafter "ABHC") a geriatric patient nursing home affiliated with CAMC.[4] When CAMC learned of Ms. Tiernan's employment with ABHC, CAMC contacted ABHC and informed ABHC that Ms. Tiernan was also working as a union organizer.[5] ABHC provided no further work for Ms. Tiernan upon learning of her union activities.

[4]The exact nature of CAMC's relationship with ABHC is not clear from the record. It appears that the Administrator of ABHC was actually employed by CAMC. However, it does not appear that CAMC controlled the hiring and termination decisions of ABHC.

[5]Ms. Tiernan was employed as a union organizer for a few months after losing her job with CAMC.

Ms. Tiernan filed suit against CAMC on February 2, 1995. Ms. Tiernan's complaint asserted (1) that her termination violated public policy embodied in the state constitutional right to free speech and association; (2) that in terminating her, CAMC breached their oral contract not to retaliate against her for publishing the February 19, 1994, letter and that she detrimentally relied upon the agreement; (3) that CAMC tortiously interfered with her business relationship with ABHC; and (4) that Ms. Tiernan's termination by/from CAMC resulting from inadequate patient to nurse ratio[6] was a matter of substantial concern and therefore violative of public policy.

After the parties conducted discovery, CAMC moved for summary judgment. The circuit court initially granted summary judgment to CAMC on Ms. Tiernan's constitutional theories and the theory of tortious interference with a business relationship. The circuit court reserved ruling on the other theories. Ultimately, the circuit court granted CAMC summary judgment on

[6]Ms. Tiernan was allowed to amend her complaint by court order on August 13, 1996, to add the claim that her termination resulted from her protests about inadequate patient-to-nurse ratios.

the remaining theories.[7] It is from the circuit court's two summary judgment orders that Ms. Tiernan now appeals.

II.

STANDARD OF REVIEW

This Court stated in syllabus point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), that "[a] circuit court's entry of summary judgment is reviewed de novo." We have held that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Of course, "[t]he mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under West Virginia Rule of Civil Procedure 56(c) by demonstrating that a legitimate jury question, i.e. a genuine issue

[7]The circuit court issued two separate orders granting the defendant summary judgment. Both orders were entered on September 30, 1996.

of material fact, is present." Syl. Pt. 1, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). This Court indicated in syllabus point 5 of *Jividen* that:

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

III.

DISCUSSION

A.

State Constitutional Free Speech Claim

Ms. Tiernan contended before the lower court that she was terminated because of the publication of her letter criticizing budgetary cuts by CAMC. The circuit court found as a matter of law that the Free Speech Clause of the state constitution does not apply to private employers.[8] Ms. Tiernan argues[9] that the basis for her firing violated a substantial public policy embedded in the state constitutional right to free speech[10] contained in W.Va. Const. Art. 3, Sec. 7.[11] In this case, Ms. Tiernan was an at-will

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[8]Ms. Tiernan did not argue before the circuit court, nor does she contend before this Court that the federal constitutional First Amendment right to free speech was a basis of public policy. *See Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (holding federal constitutional provision guaranteeing free speech does not extend to private conduct). Our analysis, therefore, is confined to the Free Speech Clause of the state constitution.

[9]Ms. Tiernan submitted her petition for appeal as her brief in this case. CAMC filed a response to the petition as well as an appeal brief. Ms. Tiernan filed a reply brief.

[10]Ms. Tiernan's brief does not address the argument regarding allegations in her complaint that her constitutional right to association was violated. Nor does the brief set forth an argument regarding the alleged denial of constitutional due process in failing to hold a pre-termination hearing. Issues not raised on appeal or merely mentioned in passing are deemed waived. *See* Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the brief on appeal may be deemed by this Court to be waived.").

[11]W.Va. Const. Art. 3, Sec. 7 provides in relevant part, that "[n]o law abridging the freedom of speech ... shall be passed[.]"

employee of a private sector employer. This Court has generally held that "[a]t will employees, as well as other employees, have certain protections in circumstances involving public policy." *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984). "A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syl. pt. 1, *Cordle.* CAMC argued that any public policy contained in the state constitutional Free Speech Clause is inapplicable to private sector employers. This issue is one of first impression for this Court.

Public Policy In General. Twenty years ago this Court held that "[t]he rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy princip[le], then the employer may be liable to the employee for damages occasioned by this discharge." Syl., *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). In syllabus point 2 of *Birthisel v. Tri-Cities Health Services Corp.*, 188 W.Va. 371, 424 S.E.2d 606 (1992),

we held that "[t]o 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." Numerous courts in other jurisdictions, in making a determination of whether a public policy standard has been violated, unanimously take the position that public policy has to be preexisting and germinate from constitutional, statutory or regulatory provisions or prior judicial decisions.[12] It was aptly stated

[12]*See Harrison v. Edison Brothers Apparel Stores*, 924 F.2d 530 (4th Cir. 1991); *White v. American Airlines*, 915 F.2d 1414 (10th Cir. 1990); *Travis v. Gary Community Mental Health Center*, 921 F.2d 108 (7th Cir. 1990); *Eldridge v. Felec Serv.*, 920 F.2d 1434 (9th Cir. 1990); *Short v. School Admin. Unit No. 16*, 612 A.2d 364 (N.H. 1992); *Hennessey v. Coastal Eagle Point Oil Co.*, 589 A.2d 170 (N.J.Super. 1991); *Smith v. Smithway Motor Xpress*, 464 N.W.2d 682 (Iowa 1991); *Bennett v. Hardy*, 784 P.2d 1258 (Wash. 1990); *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 551 N.E.2d 981 (Ohio 1990); *Chavez v. Manville Prod. Corp.*, 777 P.2d 371 (N.M. 1989); *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123 (Alaska 1989); *Griess v. Consolidated Freightways Corp.*, 776 P.2d 752 (Wyo. 1989); *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380 (Ark. 1989); *Peru Daily Tribune v. Shuler*, 544 N.E.2d 560 (Ind.Ct.App. 1989); *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989); *Wiltsie v. Baby Grand Corp.*, 774 P.2d 432 (Nev. 1989); *Berube v. Fashion Ctr.* Ltd., 771 P.2d 1033 (Utah 1989); *Cronk v. Intermountain Rural Elec. Ass'n*, 765 P.2d 619 (Colo.Ct.App. 1988); *Palmer v. Brown*, 752 P.2d 685 (Kan. 1988); *Mello v. Stop & Shop*, 524 N.E.2d 105 (Mass. 1988); *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225 (S.D. 1988); *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987); *Krein v. Marian Manor Nursing Home*,

in *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 380, 652 P.2d 625, 631 (1982), that:

> In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public

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415 N.W.2d 793 (N.D. 1987); *Ambroz v. Cornhuskers Square Ltd.*, 416 N.W.2d 510 (Neb. 1987); *Wandry v. Bull's Eye Credit Union*, 384 N.W.2d 325 (Wis. 1986); *Payne v. Rozendaal*, 520 A.2d 586 (Vt. 1986); *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985); *Boyle v. Vista Eyewear*, 700 S.W.2d 859 (Mo.Ct.App. 1985); *Bowman v. State Bank*, 331 S.E.2d 797 (Va. 1985); *Wagenseller v. Scottsdale Memorial Hospital*, 141 Ariz. 370, 710 P.2d 1025 (1985); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985); *Jones v. Memorial Hosp. Sys.*, 677 S.W.2d 221 (Tex.Ct.App. 1984); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984); *MacDonald v. Eastern Fine Paper, Inc.*, 485 A.2d 228 (Me. 1984); *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 652 P.2d 625 (1982); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Davis v. Louisiana Computing Corp.*, 394 So.2d 678 (La.Ct.App. 1981); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Gay Law Students Ass'n v. Pacific T&T Co.*, 595 P.2d 592 (Cal. 1979); *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54 (Idaho 1977); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).

> policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.

In *Cordle*, 174 W.Va. at 325, 325 S.E.2d at 114, this Court quoted approvingly the observation made in *Allen v. Commercial Casualty Ins. Co.*, 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944), that:

> Much has been written by text writers and by the courts as to the meaning of the phrase "public policy." All are agreed that its meaning is as "variable" as it is "vague," and that there is no absolute rule by which courts may determine what ... contravene[s] the public policy of the state. The rule of law, most generally stated, is that "public policy" is that principle of law which holds that "no person can lawfully do that which has a tendency to be injurious to the public or against public good

...” even though “no actual injury” may have resulted therefrom in a particular case “to the public.” It is a question of law which the court must decide in light of the particular circumstances of each case.

We noted in *Yoho v. Triangle PWC, Inc.*, 175 W.Va. 556, 561, 336 S.E.2d 204, 209 (1985), that:

> The power to declare an action against public policy is a broad power and one difficult to define. “No fixed rule can be given to determine what is public policy. (citations omitted). It is sometimes defined as that principle of law under which freedom of contract or private dealings are restricted by law for the good of the community--the public good.” *Higgins v. McFarland*, 196 Va. 889, 894, 86 S.E.2d 168, 172 (1955). Nevertheless, despite the broad power vested in the courts to determine public policy, we must exercise restraint when we use it[:]
>
> The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community so declaring. *Mamlin v. Genoe*, 340 Pa. 320, 325, 17 A.2d

407, 409 (1941).

In contrast to the issue of public policy, an issue which is fairly debatable or controversial is by nature better left for legislative determination.

Public Policy And Wrongful Discharge. In reviewing public policy wrongful discharge cases by this Court, we have found the vast majority of our cases involved public policy that was clearly articulated by statutes[13] or common law. In fact, in a recent decision by this Court, *Tudor v. Charleston Area Medical Center, Inc.*, ___ W.Va. ___, ___ S.E.2d ___, (No. 23948, Dec. 16, 1997), we recognized public policy emanating from a state regulation on hospital patient care as providing the basis for a constructive discharge claim. In *Cordle* we recognized a public policy claim emanating

[13]*See Williamson v. Greene*, ___ W.Va. ___, 490 S.E.2d 23 (1997); *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996); *Roberts v. Adkins*, 191 W.Va. 215, 444 S.E.2d 725 (1994); *Reed v. Sears, Roebuck & Co., Inc.*, 188 W.Va. 747, 426 S.E.2d 539 (1992); *Lilly v. Overnight Transp. Co.*, 188 W.Va. 538, 425 S.E.2d 214 (1992); *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W.Va. 144, 423 S.E.2d 547 (1992); *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W.Va. 57, 422 S.E.2d 624 (1992); *Davis v. Kitt Energy Corp.*, 179 W.Va. 37, 365 S.E.2d 82 (1987); *Wiggins v. Eastern Associated Coal Corp.*, 178 W.Va. 63, 357 S.E.2d 745 (1987); *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980).

from the common law right of privacy as a basis for a wrongful discharge involving an employee who refused to take an employer polygraph test. *See also Twigg v. Hercules Corp.*, 185 W.Va. 155, 406 S.E.2d 52 (1990) (where we held it was contrary to public policy emanating from the common law right of privacy for an employer to require an employee to submit to drug testing).

In *McClung v. Marion County Commission*, 178 W.Va. 444, 360 S.E.2d 221 (1987), this Court addressed the question of public policy emanating from the state constitution as a basis for a wrongful discharge action by an at-will government employee. In *McClung* the plaintiff was employed by the county commission as the dog warden for Marion County. During his employment the plaintiff failed to respond to three telephone calls involving animals. As a result of the conduct, the plaintiff was suspended for five days without pay. On the last day of his suspension the plaintiff filed an action against the county commission for its failure to pay him overtime wages. Within a few days after the plaintiff brought his action for overtime wages, the county commission terminated the plaintiff's employment. The plaintiff subsequently amended his complaint to add a claim for retaliatory

discharge. A jury trial was held. A verdict was returned in favor of the plaintiff. The trial court set aside the jury verdict and granted judgment notwithstanding the verdict to the county commission. The trial court was of the opinion that the plaintiff was an employee at will and that the evidence did not support his retaliatory discharge claim. On appeal this Court was asked to determine whether public policies emanating from the state constitutional right to petition for redress of grievances under W.Va. Const. Art. III, Sec. 16 and the right to seek access to the courts of this state under W.Va. Const. Art. III, Sec. 17, formed the basis for a wrongful discharge action by an at-will employee terminated for exercising the aforementioned rights by filing an action for overtime wages. This Court responded to the question by holding:

> One of the fundamental rights of an employee is the right not to be the victim of a "retaliatory discharge," that is, a discharge from employment where the employer's motivation for the discharge is in contravention of a substantial public policy.... Certainly it is in contravention of

> substantial public policies for an employer to discharge an employee in retaliation for the employee's exercising his or her state constitutional rights to petition for redress of grievances (W.Va. Const. Art. III, Sec. 16) and to seek access to the courts of this State (W.Va. Const. Art. III, Sec. 17) by filing an action ... for overtime wages.

McClung, 178 W.Va. at 450, 360 S.E.2d at 227. Ultimately, we reversed the trial court in *McClung* and reinstated the jury verdict. In doing so, we observed as a general matter that "[a] public officer or public employee, even one who serves at the will and pleasure of the appointing authority, may not be discharged in retribution for the exercise of a constitutionally protected right, unless a substantial governmental interest outweighs the public officer's or public employee's interest in exercising such right." *Id.* Citing, *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708, 716-17 (1983); Syl. pt. 2, *Woodruff v. Board of Trustees*, 173 W.Va. 604, 319 S.E.2d 372 (1984); Syl. pt. 3, *Orr v. Crowder*, 173 W.Va.

335, 315 S.E.2d 593 (1983), cert. denied, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

In *Woodruff v. Board of Trustees of Cabell Huntington Hosp.*, 173 W.Va. 604, 319 S.E.2d 372 (1984), fourteen former employees of Cabell Huntington Hospital were terminated after distributing leaflets critical of cutbacks by the hospital, as well as other issues. The employees sought a writ of mandamus compelling reinstatement. The employees argued that their terminations were violative of their state and federal constitutional rights to free speech, as well as other constitutional guarantees. We initially observed in *Woodruff* that "[t]he United States Supreme Court has long held that public employees may not 'be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [institutions] in which they work.'" *Id.* 173 W.Va. at 609, 319 S.E.2d at 377, quoting, *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811, 817 (1968). Citing, *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Branti v. Finkel*, 445 U.S.

507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). In making the decision to grant the relief sought by the employees this Court stated:

> Unquestionably, the distribution of leaflets is an activity protected under constitutional free speech guarantees. In *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 83 L.Ed. 949, 954 (1938), Chief Justice Hughes, writing for a unanimous Court, observed, "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history attest." Since *Lovell*, the United States Supreme Court has continued its staunch protection of the right of citizens to distribute leaflets and other printed matter.

Woodruff, 173 W.Va. at 609, 319 S.E.2d at 377-78, citing, *States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 84 L.Ed. 869 (1943); *Schneider v. State*, 308 U.S. 147, 164, 60 S.Ct. 146, 152, 84 L.Ed. 155, 166 (1939).

In *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), the plaintiff filed a complaint alleging, among other things, that she was given a terminal one year contract by the defendants, a public community college and its officials, as a result of her criticism of remodeling plans for the college's facilities. The plaintiff contended that her firing violated her right to free speech under the First Amendment. A trial was held. The jury returned a plaintiff's verdict. The defendants appealed. On appeal, defendants argued that plaintiff failed to prove her criticism of defendants was a substantial or motivating factor in her being given a terminal contract. We observed in *Orr* "that under *Pickering v. Board of Education*, 391 U.S.

563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights." *Orr,* 173 W.Va. at 343, 315 S.E.2d at 601. *Orr* noted that even under *Pickering* the right to free speech is not absolute. In *Orr*, we listed the limitations imposed on the right of free speech:

> First, speech, to be protected, must be made with regard to matters of public concern. Second, statements that are made "'with the knowledge [that they] ... were false or with reckless disregard of whether [they were] ... false or not,'" are not protected. Third, statements made about persons with whom there are close personal contacts which would disrupt "discipline ... or harmony among coworkers" or destroy "personal loyalty and confidence" may not be protected.

Orr, 173 W.Va. at 343, 315 S.E.2d at 601-602 (internal citations omitted).

This Court ultimately affirmed the jury verdict in the case. In doing so we formulated an allocation of the burden of proof on a free speech claim in syllabus point 4:

> In a suit under 42 U.S.C. Sec. 1983, where the plaintiff claims that he was discharged for exercising his First Amendment right of free speech, the burden is initially upon the plaintiff to show: (1) that his conduct was constitutionally protected; and (2) that his conduct was a substantial or motivating factor for his discharge. His employer may defeat the claim by showing that the same decision would have been reached even in the absence of the protected conduct.

See also Gooden v. Board of Appeals of West Virginia Dept. of Public Safety, 160 W.Va. 318, 234 S.E.2d 893 (1977) (state trooper's discharge for criticizing state police violated First Amendment right of free speech).

None of this Court's prior decisions applied public policy

emanating from the state constitution to a wrongful discharge case involving a private sector employee. Ms. Tiernan contends that our decision in *Mace*[14] suggests that public policy emanating from the state constitution may form the basis for a wrongful discharge action by a private sector employee. The decision in *Mace* relied upon public policy emanating from a statute. We did however cite in syllabus point 9 of *Mace* syllabus point 3 of *McClung*:

> In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The

[14]Ms. Tiernan also agues that our decision in *Bowe v. Charleston Area Medical Center, Inc.*, 189 W.Va. 145, 428 S.E.2d 773 (1993) (per curiam), suggests this Court would in an appropriate case allow public policy emanating from the state constitution to form the basis of a wrongful discharge by a private sector employee. Per curiam opinions are not to be cited as authority. *See Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4 (1992).

> employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct.

We agree with Ms. Tiernan's analysis. *Mace* suggests that a cause of action for wrongful discharge by a private sector employee *may* be based upon public policy emanating from the state constitution. We make clear today that, an at-will or otherwise employed private sector employee may sustain, on proper proof, a cause of action for wrongful discharge based upon a violation of public policy emanating from a specific provision of the state constitution. Determining whether a state constitutional provision may be applied to a private sector employer must be done on a case-by-case basis, i.e., through selective incorporation and application.[15]

[15]The approach that we take in determining which of the state constitutional guarantees apply to private sector employers, is analogous to the approach taken by the United States Supreme Court in its determination of the application of specific clauses in the Bill of Rights to states. The doctrine of selective incorporation was developed by the United States Supreme Court in the 1960's, as a tool for absorbing one-by-one individual guarantees of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, in order to hold them applicable to the states. Nelson Lund, *Federalism and Civil Liberties*, 45 U. Kan. L. Rev. 1045, 1070 (1997). *See also Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Ker v. California*, 374 U.S.

By so holding, we must now review this case to determine whether Ms. Tiernan can sustain a cause of action for wrongful discharge based upon a violation of public policy because of the exercise of free speech. The 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

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23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The selective incorporation doctrine interprets the Due Process Clause as encompassing only those rights deemed fundamental under an "ordered liberty" standard. The ordered liberty standard includes substantive as well as procedural rights and is not limited to rights established by historical usage at the time of the federal constitution's adoption. The ordered liberty standard may encompass rights that extend beyond the specific Bill of Rights guarantees, as well as rights found within those guarantees. The selective incorporation doctrine focuses on the total guarantee rather than on a particular aspect presented in an individual case. It assesses the fundamental nature of the guarantee as a whole rather than any one principle based on the guarantee. Selective incorporation judges the guarantee as a whole and produces a ruling that encompasses the full scope of the guarantee. Under selective incorporation, when a guarantee is found to be fundamental, due process "incorporates" the guarantee and extends to the states the same standards that apply to the federal government under that guarantee. Thus, under selective incorporation a ruling that a particular guarantee is within the ordered liberty concept carries over to the states the "entire accompanying doctrine" interpreting that guarantee. The selective incorporation doctrine directs a court to test the fundamental nature of a right within the context of that common law system of justice, rather than against some hypothesized system or a foreign system growing out of different traditions. The question to be asked, is whether a right is necessary to an Anglo-American regime of ordered liberty. Consistent with this approach, the United States Supreme Court gives considerable weight to the very presence of a right within the Bill of Rights because that presence reflects an important body of opinion as to the need for such a right in a common law system. Jerold H. Israel, *Selective Incorporation: Revisited*, 71 Geo. L.J. 253, 290-292 (1982).

sector employees who criticize or disagree with policies or other lawful actions taken by their private sector employers. To support her claim, Ms. Tiernan turns to federal cases. Ms. Tiernan cites the decision in *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3rd Cir. 1983), wherein the Third Circuit held that public policy emanating from the free speech clause of Pennsylvania's constitution was applicable to private sector employers.

In *Novosel* the plaintiff brought a wrongful discharge action in federal court against his former private sector employer. The plaintiff alleged that the sole reason for his discharge was his refusal to participate in the employer's lobbying effort and his privately stated opposition to the employer's position. The United States District Court for the Western District of Pennsylvania, granted the employer's motion to dismiss finding no cause of action. The issue on appeal was whether or not public policy emanating from the free speech clause of Pennsylvania's constitution and the First Amendment was applicable to a private employer. Initially, the Court of Appeals canvassed principles involving infringement on the First

Amendment right of free speech and stated:

> An extensive case law has developed concerning the protection of constitutional rights, particularly First Amendment rights, of government employees. As the Supreme Court has commented, "[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment--including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983). The Court in *Connick*, however, also observed the constitutional repudiation of this dogma: "[f]or at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Id. at 1687, citing *Branti v. Finkel*,

445 U.S. 507, 515-516, 100 S.Ct. 1287, 1293-1294, 63 L.Ed.2d 574 (1980); *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). Thus, there can no longer be any doubt that speech on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102

S.Ct. 3409, 3426, 73 L.Ed.2d 1215 (1982), quoting *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980).

Novose1, 721 F.2d at 899.

After canvassing prior law involving the discharge of public employees for exercising their constitutional rights, *Novose1* concluded:

> Although [the plaintiff] is not a government employee, the public employee cases do not confine themselves to the narrow question of state action. Rather, these cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities. In dealing with public employees, the cause of action arises directly from the Constitution rather than from common law developments. The protection of important political freedoms, however, goes well beyond the

> question whether the threat comes from state or private bodies. The inquiry before us is whether the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law. While there are no Pennsylvania cases squarely on this point, we believe that the clear direction of the opinions promulgated by the state's courts suggests that this question be answered in the affirmative.

Novose1, 721 F.2d at 900.

The Court of Appeals remanded the case to the district court with instructions that it utilize the following test to determine the sufficiency of plaintiff's claim:

> 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 his 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.

Novosel, 721 F.2d at 901.

Ms. Tiernan concedes that *Novosel* is dubious authority today. *Novosel* interpreted, without precedent, the constitution of Pennsylvania as providing public policy applicable to a private sector employer. Since the decision in *Novosel* the Supreme Court of Pennsylvania has disapproved of *Novosel's* interpretation of its constitution. *See Paul v. Lankenau Hospital*, 569 A.2d 348 (Pa. 1990).[16] Moreover, the Third Circuit has

[16] In *Martin v. Capital Cities Media, Inc.*, 354 Pa.Super. 199, 223-225, 511 A.2d 830, 842-843 (1986), the plaintiff alleged wrongful discharge by a private employer based upon public policy found in the free speech clause of Pennsylvania's constitution. In rejecting plaintiff's attempt to impose constitutional public policy on the private employer, the Court held:

> In the instant case, the employer was a private business entity, not a government agency. The public policy involved was the freedom of commercial speech[.] The legitimate business reason for the discharge is to be found in the employer's right to discharge an employee he perceives to be disloyal.
>
> Our holding instantly does not diminish the right of freedom of speech. But freedom of speech is subject to numerous constraints that render it a less-than absolute right in practice. The rights of others sometimes clash with and restrict one's freedom of speech. Just as one does

explicitly retreated from *Novosel's* interpretation of Pennsylvania's constitution. *See Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3rd Cir. 1992) (stopping short of overruling *Novosel*, but making clear Pennsylvania Supreme Court would not apply constitutional public policy to a private employer). Additionally, "*Novosel* has been described as the most far-reaching extension of the public policy doctrine and as a dramatic break with precedent because prior cases had unanimously required that government action be present in order for a constitutional violation to exist." Lisa Bingham, *"Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions,"* 55 Ohio St. L.J. 341, 350 n.39 (1994).

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not have the right to shout "fire" in a crowded theater, so too, the theater owner surely has the right to discharge an usher if he is the one who shouted "fire."

An employer also has the right to discharge an employee for certain speech which is protected by the Constitution. Even when the Constitution allows one to speak freely, it does not forbid an employer from exercising his judgment to discharge an employee whose speech in some way offends him.

The prevailing view among the majority of courts addressing the issue is that state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims.[17] *See Johnson v. Mayo Yarns, Inc.*, 126 N.C.App. 484 S.E.2d

[17] Ms. Tiernan cited in her brief, without discussion, the decision in *Jones v. Memorial Hosp. Sys.*, 677 S.W.2d 221 (Tex.Ct.App. 1984). Ms. Tiernan suggests that *Jones* permits a private employee to bring a wrongful discharge action against a private employer premised upon the free speech public policy found in the constitution of Texas. *Jones* does not stand for such a proposition. The employee in *Jones* was a nurse who was terminated by her employer, after writing an article which was disapproved by her employer. The employee argued that her termination was an infringement upon her state constitutional right to free speech. The trial court granted summary judgment for the employer finding that the state constitutional right to free speech did not apply to employment per se. The appeals court recognized a cause of action based upon the state constitutional right to free speech. The appeals court relied upon United States Supreme Court precedent involving government employers. The appeals court specifically reversed and remanded the case for further proceedings to determine whether the employer was a public hospital or purely private hospital. Implicit in the reversal of *Jones* was a determination that if on remand it was proven that the hospital was a private hospital, the employee did not have a free speech cause of action. In fact, the court of appeals subsequently explicitly stated that *Jones* did not extend the public policy emanating from the state constitutional free speech to private employers. In *Albertson's, Inc., v. Ortiz,* 856 S.W.2d 836, 840 (Tex.Ct.App. 1993), the court of appeals held that *Jones* was not "authority for the proposition that article I, section 8 provides a cause of action for damages against a private entity, when that question was never before the court. We likewise decline to recognize a compensatory cause of action to redress a wholly private entity's infringement of free-speech rights guaranteed by the state constitution."

Additionally, Ms. Tiernan cited in her reply brief the case of *Carl v. Children's Hospital*, 702 A.2d 159 (D.C.C.App. 1997) (per curiam) (en banc). *Carl* does not stand for the proposition urged by Ms. Tiernan. The employee in *Carl* was a nurse who was fired by the defendant hospital. One of the claims asserted by the employee was that she was wrongfully discharged because of her testimony before the Council of the District of Columbia, on matters conflicting with her employer. The trial court dismissed the case

840 (1997); *Drake v. Cheyenne Newspapers, Inc.*, 891 P.2d 80 (Wyo. 1995); *Albertson's, Inc., v. Ortiz*, 856 S.W.2d 836 (Tex.Ct.App. 1993); *Shovelin v. Central N.M. Elec. Coop. Inc.*, 850 P.2d 996 (N.M. 1993); *Prysak v. R.L. Polk Co.*, 193 Mich.App. 1, 483 N.W.2d 629 (1992); *Booth v. McDonnell-Douglas Truck Serv.*, 585 A.2d 24 (Pa.Super 1991); *Korb v. Raytheon Corp.*, 410 Mass. 581, 574 N.E.2d 370 (1991); *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354 (Ill. 1985); *Gil v. Metal Service Corp.*, 412 So.2d 706 (La.App. 4 Cir. 1982); *Chin v. AT&T*, 410 N.Y.S.2d (1978). *See also Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (constitutional provision guaranteeing free speech does not extend to private conduct). It was persuasively said in *Truly v. Madison General Hospital*, 673 F.2d 763, 767 (5th Cir. 1982), that "one does not always insure his own retention in employment by wrapping oneself in the first amendment and launching attacks on one's employer from within its folds. At some point, while the employer

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on the grounds that only one public policy exception existed to cover termination of at-will employees. The Court of Appeals found that the trial court committed error in finding that only one public policy could be invoked in a wrongful discharge case by an at-will employee. The majority per curiam opinion remanded the case to determine whether public policy emanating from specific code provisions of the District of Columbia was violated by the termination of the employee, because of her testimony before the Council of the District of Columbia. *Carl* did not address the First Amendment right to free speech and the defendant hospital was a private institution.

has no right to control the employee's speech, he does have the right to conclude that the employee's exercise of his constitutional privileges has clearly over-balanced his usefulness and destroyed his value and so to discharge him." (Citation omitted.)

Other than the *Novosel* decision, Ms. Tiernan has cited no persuasive authority supporting her argument that public policy emanating from constitutional free speech is applicable to private employers. Further research has failed to uncover any state court that has so applied state constitutional free speech principles to private employers. Likewise, we have discovered no federal court which applies the First Amendment Free Speech Clause to private employers. However, research did reveal that the State of Connecticut has appropriately addressed the inquiry. The issue was answered in the state code of Connecticut. In Conn. Gen. Stat. Ann. § 31-51q (1987), it states:

> Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge

> on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.[18]

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[18]For decisions interpreting the statute *see D'Angelo v. McGoldrick*, 685 A.2d 319 (Conn. 1996); *Urashka v. Griffin Hospital*, 841 F.Supp. 468 (D.Conn. 1994). *See also, Cotto v. United Technologies Corporation, Sikorsky Aircraft Division*, ___ A.2d ___, 1998 WL 232953 (No. 16670, May 12, 1998 Conn.App.) ("An employee's right as a citizen to participate in discussions concerning matters of public importance on or off the work site of the employer cannot be converted into a right guaranteed by the federal or

state constitution to express a grievance about the working conditions of employment").

The Connecticut statute is the only legislative effort in the nation to extend the full gamut of constitutional principles to private employers. This Court believes that it is necessary for the legislature of this state to determine, and so state that public policy emanating from the state constitutional Free Speech Clause is applicable to private employers. Therefore, we hold, that 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.[19] Insofar as the circuit court granted summary judgment to CAMC on Ms. Tiernan's Free Speech Clause cause of action, that basis for summary judgment is affirmed.

[19]This holding does not invalidate nor impact upon the state's whistle-blower laws. *See* W.Va. Code § 6C-1-1, et seq. The whistle-blower laws present an independent statutory basis for liability should an employer retaliate against an employee for reporting wrongdoing or waste, as those terms are defined by statute. In this case, Ms. Tiernan does not contend that her statutory rights under our whistle-blower laws were violated.

B.

Tortious Interference With Business Relationship

Ms. Tiernan next argues that CAMC interfered with her employment relationship with ABHC by causing her termination.[20] In its summary judgment order, the circuit court listed alternative reasons for granting CAMC's summary judgment on this theory. The circuit court found: 1) that CAMC had authority to control ABHC and therefore CAMC could not be said to interfere with itself; 2) that CAMC furnished truthful information to ABHC; and 3) that even if CAMC was a stranger to ABHC, the information given to ABHC by CAMC regarding Ms. Tiernan was truthful and therefore an absolute defense. For these reasons the circuit court granted CAMC summary judgment on Ms. Tiernan's theory of tortious interference with a business relationship.

[20]Ms. Tiernan's employment with ABHC appears to have been that of an at-will employee. The existence of an at-will employment relationship does not insulate a defendant from liability for tortious interferences. *See Toney v. Casey's General Stores, Inc.*, 460 N.W.2d 849, 853 (Iowa 1985); *Europlast, Ltd. v. Oak Switch Systems, Inc.*, 10 F.3d 1266, 1274 (7th Cir.1993). The tort of interference with a business relationship does not require that the relationship be evidenced by an enforceable contract. *See Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126 (Fla.1985); *Northern Plumbing & Heating, Inc. v. Henderson Bros., Inc.*, 83 Mich.App. 84, 93, 268 N.W.2d 296 (1978). Until an employee is actually terminated, the at-will employment remains valid and subsisting, and third persons may not improperly interfere with it. *See* Restatement (Second) of Torts § 766 cmt. g. (1979).

In syllabus point 2 of *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983), we discussed the necessary requirements to prove a prima facie case of tortious interference in an employment relationship along with the factors that may show the interference was proper:

> 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 difficulty with the circuit court's granting summary judgment on this claim, is that material issues of fact were in dispute with respect to the court's initial reason for granting summary judgment. Those disputed issues of fact were actually resolved by the circuit court. For example, as to the issue of CAMC's control of ABHC, there is clearly disputed evidence explaining the relationship between CAMC and ABHC. There is evidence in the record suggesting that CAMC controlled ABHC.[21] There is also evidenced by officials at ABHC that CAMC had no authority to decide hiring and termination matters for ABHC.[22] The circuit court disregarded these disputed

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[21]The brief of CAMC contends that:

> ABHC operated under a management agreement with CAMC. Clearly, CAMC is not a stranger to the relationship between ABHC and Tiernan.

[22]A director of nursing at ABHC, Joyce L. Durham, testified at a deposition regarding hiring as follows:

> Q. So if I understand it then, you and Mr. Byrd and Ms. Gouhin, as you were making a hiring decision, you viewed yourselves as Arthur B.

issues and concluded that CAMC and ABHC were synonymous. The circuit court reasoned alternatively that the information provided by CAMC was truthful. Therefore, regardless of the relationship between CAMC and ABHC, Ms. Tiernan's claim failed.

This Court has never addressed the issue of whether truth, in and of itself, bars a claim for tortious interference with a business relationship. Under *Torbett* "honest, truthful *requested* advice" may shield a defendant from liability on a claim for tortious interference with a business relationship. However, the Restatement (Second) of Torts § 772 (1979) states the following regarding the giving of advice:

> Advice as Proper or Improper Interference
>
> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual

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Hodges as a separate entity not connected in that sense with CAMC.

A. We always had, yes.

Q. And did you always make hiring decisions in that same way, that is, with consideration of what was good for Arthur B. Hodges?

A. Independent of CAMC, yes, we did.

relation with another does not interfere improperly with the other's contractual relation, by giving the third person

(a) *truthful information*, or

(b) honest advice within the scope of a request for the advice.

(Emphasis added.) A majority of the courts which have interpreted and adopted § 722 of the Restatement have held that truth is an absolute bar to a claim for tortious interference with a business relationship.[23] Other courts have rejected the § 722 of the Restatement. *See Pratt v. Prodata, Inc.*, 885 P.2d 786, 790 (Utah 1994) ("we reject defendant's call to adopt truthfulness as an absolute defense to the tort of intentional interference with prospective economic relations"); *Collincini v. Honeywell, Inc.*, 601 A.2d 292, 295 (Pa.Super. 1991) (rejecting unrequested truth as a bar to action).

Courts adopting the Restatement's position have failed to clearly

[23]*See Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089 (11th Cir. 1994); *In re American Continental/Lincoln Sav. & Loan*, 884 F.Supp. 1388 (D.Ariz. 1995); *Francis v. Dun & Bradstreet, Inc.*, 3 Cal.App.4th 535, 4 Cal.Rptr.2d 361 (1992); *Prazma v. Kaehne*, 768 P.2d 586 (Wyo.1989); *C.R. Bard v. Wordtronics Corp.*, 561 A.2d 694 (N.J.Super. 1989) *Wabash R. Co. v. Young*, 69 N.E. 1003 (Ind. 1904).

articulate the basis for so doing. Likewise, this Court's decision in *Torbett* provides no real explanation as to why we failed to adopt, in its entirety, § 722 of the Restatement and instead limited "truth" as a defense, to "honest, truthful *requested* advice." We believe *Torbett's* formulation is correct within the confines of that case. The *Torbett* decision focused only on § 722(b). *Torbett* did not address § 772(a).

In the instant proceeding there is no evidence showing that the communication by CAMC with ABHC was for the purpose of giving "advice" about Ms. Tiernan.[24] The communication was "truthful information" regarding what CAMC knew about Ms. Tiernan.[25] Therefore, the applicable provision of the

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[24]The affidavit of Michael A. King, Senior Vice President for Health Services at CAMC, states in relevant part:

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> 16. Sometime later I was informed that Ms. Tiernan was working for a union as an organizer. Around that time I also learned that Ms. Tiernan had been hired as a per diem nurse supervisor at Arthur B. Hodges Center.
>
> 17. I asked the Administrator at Arthur B. Hodges whether she knew that Ms. Tiernan was a union organizer. I did not direct or suggest to anyone at Arthur B. Hodges that any employment action be taken against Ms. Tiernan.

[25]The affidavit of Sandra Dee Vaughan, Administrator for ABHC, states in relevant part:

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> 3. In August 1994, it was brought to my attention that Ms. Tiernan was simultaneously working as a union organizer and as a nursing

Restatement in the instant case is § 772(a), not § 772(b). The comment to § 772(a) states that truthful information is an absolute bar to a claim of tortious interference "whether or not the information is requested." Ms. Tiernan does not dispute that the information given was truthful. Consistent with this Court's reasoning in *Torbett*, we now adopt § 722 of the Restatement in its entirety. Therefore, the circuit court's alternative grounds for granting summary judgment on the tortious interference claim was correct.[26]

C.

The Remainder of Ms. Tiernan's Assignments of Error

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supervisor.

4. I found this situation disturbing. Joyce Durham, the Director of Nursing at ABHC stated she would not schedule Ms. Tiernan to work anymore.

[26]The Court understands the seemingly harsh result of adopting in totality § 722 of the Restatement. However, Ms. Tiernan had other alternative causes of action by which she could have asserted her claim for wrongful termination based upon union activity. Discrimination by an employer based upon a person's union activity is actionable under 29 U.S.C. § 158. *See Performance Friction Corporation v. National Labor Relations Board*, 117 F.3d 763 (4th Cir. 1997). *See also*, W.Va. Code § 21-1A-1, et seq.; *United Maintenance & Mfg. Co., Inc. v. United Steelworkers of America*, 157 W.Va. 788, 798, 204 S.E.2d 76, 83 (1974) ("When a dispute is subject to the NLRB jurisdiction, a state is preempted from acting to enforce private or public rights"). The record does not indicate if a cause of action was ever filed against ABHC for its role in terminating Ms. Tiernan. However, it seems quite clear from the facts of this case that a prima facie action existed for violation of the above laws prohibiting discrimination resulting from union activity.

Ms. Tiernan contends that the circuit court committed error by granting CAMC summary judgment on her claims for breach of oral contract, detrimental reliance, and violation of public policy embodied in statutes and regulations regarding political activity and adequate patient care.[27] The orders granting summary judgment on these remaining causes of action do not state the basis for the circuit court's decision on each of them. This Court held in syllabus point 3 of *Fayette County Nat. Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997), that "[a]lthough our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." The circuit court's orders on the remaining issues do not meet the standard articulated in *Lilly*. Therefore, we reverse and remand

[27]In this appeal Ms. Tiernan alleges that public policy emanating from W.Va. Code § 21-1A-3 (1996), protected her from termination. CAMC contends that this statute was not raised below by Ms. Tiernan. In fact, the record demonstrates that Ms. Tiernan failed to raise this statutory argument. Therefore, we decline to address that assignment of error. "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).

the remaining issues for the circuit court to enter an order on those issues that comports with the mandate of *Lilly*.[28]

IV.

CONCLUSION

[28] The order which disposed of Ms. Tiernan's claim for breach of contract, detrimental reliance and statutory and regulatory public policy read as follows:

JUDGMENT ORDER

This matter came on to be heard this 26th day of August, 1996, upon the appearance of the Plaintiff, BETTY A. TIERNAN, by and through WALT AUVIL, her attorney, and the Defendant, CHARLESTON AREA MEDICAL CENTER, INC., by and through DINA MOHLER and STEPHEN A WEBER, its attorneys.

WHEREUPON, the Court proceeded to hear the arguments of counsel upon the Defendant's Motion for Summary Judgment of the Plaintiff's First Amended Complaint; at which time, the Court did take the matter under advisement to consider further of its ruling upon said Motion.

And the Court having pronounced its ruling by teleconference with ELIZABETH A. PYLES appearing for and on behalf of WALT AUVIL, counsel for Plaintiff and DINA MOHLER, counsel for Defendant, on the 30th day of August, 1996, it is hereby accordingly ORDERED that the Defendant's Motion for Summary Judgment be granted as to all counts in the Plaintiff's Complaint and First Amended Complaint.

To all of which adverse rulings, counsel for the Plaintiff objects and excepts.

In view of the foregoing discussion and analysis this Court (1) affirms that part of the circuit court's orders granting CAMC summary judgment on Ms. Tiernan's constitutional claims[29]; (2) afffirms that part of the circuit court's orders granting CAMC summary judgment on Ms. Tiernan's claim for tortious interference with a business relationship; and (3) reverse and remands for entry of *Lilly* findings for that part of the circuit court's orders granting CAMC summary judgment on Ms. Tiernan's claims for breach of contract, detrimental reliance, and violation of statutory and regulatory public policies.

Affirmed in Part; Reversed in Part;

and Remanded.

[29]Ms. Tiernan raised and briefed only the issue of her state constitutional right to free speech. The circuit court's ruling on Ms. Tiernan's other constitutional issues, (due process and right of association), is affirmed by this opinion solely on the grounds that Ms. Tiernan waived those issues before this Court by failing to raise and brief those matters. *See* Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").