

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

I concur with the majority opinion insofar as it affirms the circuit court’s grant of summary judgment to the respondents on the petitioners’ gender discrimination, retaliatory discharge, and false light invasion of privacy claims. However, I dissent to the majority opinion insofar as it reverses the circuit court’s grant of summary judgment to the respondents on the petitioners’ whistle-blower claims.

While the bulk of the majority opinion on the petitioners’ whistle-blower claims is taken up exposing the flaws in the circuit court’s summary judgment order, the majority opinion ignores the chief flaw: the petitioners completely failed to offer evidence below to support their whistle-blower claims. In *Painter v. Peavy*, 192 W. Va. 189, 192 – 93, 451 S.E.2d 755, 758 – 59 (1994), this Court explained that “the party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence,’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). In addition, this Court has indicated that “mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial.” *Miller v. City Hosp., Inc.*, 197 W. Va. 403, 412, 475 S.E.2d 495, 504 (1996) (internal quotation marks and brackets omitted and citation omitted). The circuit

court's summary judgment order was proper because the petitioners offered nothing more than mere allegations to support their claims.

I believe that the circuit court correctly concluded that the petitioners cannot prevail on their whistle-blower claims because they cannot establish that they made a "good faith report" of an "instance of wrongdoing or waste," as those terms are defined in the Whistle-blower Law. "Waste" is defined in the Law as "an employer or employee's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision sources." W. Va. Code § 6C-1-2(f) (1988). The petitioners have not brought forth any evidence that the evaluation committee's scoring of the technical bid in this case resulted in substantial abuse, misuse, destruction, or loss of State funds. Instead, the petitioners speculated that the committee's scoring of the technical part of the bid *could* result in waste by causing a legal challenge, a need to re-score the bid, etc. Such speculation is nothing more than a mere allegation and is not sufficient to survive a summary judgment motion. Further, the Law defines "wrongdoing," in part, as "a violation which *is not of a merely technical or minimal nature.*" W. Va. Code § 6C-1-2(h) (emphasis added). The disagreement at issue was over the scoring of the *technical* part of a bid. Therefore, even if the petitioners had a good faith belief that the evaluation committee improperly scored the technical part of the bid, the petitioners have failed to produce evidence that the improper scoring of the bid constituted wrongdoing under the Law. Quite simply, the petitioners disagreed with how the committee scored the technical

part of the bid. Such a disagreement does not come close to providing a basis for a claim under the Whistle-blower Law. Accordingly, this Court should affirm the circuit court's summary judgment order with regard to the petitioners' whistle-blower claims.

In sum, the petitioners have wholly failed to offer sufficient evidence for a reasonable jury to find in their favor on their whistle-blower claims. Therefore, I dissent to the majority opinion insofar as it reverses the circuit court's grant of summary judgment to the respondents on these claims. Otherwise, I concur to the majority opinion insofar as it affirms the circuit court's grant of summary judgment to the respondents on the petitioners' gender discrimination, retaliatory discharge, and false light invasion of privacy claims.