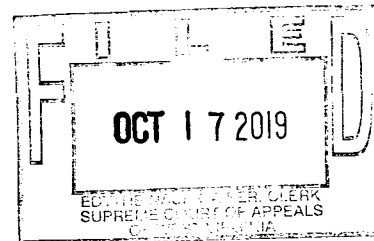


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 19-0407



**JASON GREASER,**  
Petitioner

v.)

**GARY HINKLE AND  
DETTINBURN TRANSPORT, INC.**  
Respondents

Appeal from an order  
of the Circuit Court of Pendleton  
County (17-C-9)

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**Petitioner's Amended Brief**

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## ASSIGNMENTS OF ERROR

A. The trial court erred by not applying the holding in *Burke v. Wetzel County Commission*, 240 W.Va. 709, 815 S.E. 2d 520, Syl. Pt. 11 (2018) which instructed trial courts to look to established precepts in, among other sources, legislative enactments to identify the source of public policy for purposes of determining whether a retaliatory discharge has occurred.

B. The trial court erred in denying Petitioner his constitutional right pursuant to Article III, Section 17 of the West Virginia Constitution to petition for redress of his grievance and seek access to the courts of this State by filing an action for Petitioner's expressed intention to file a Wage Payment and Collection Act (W.Va. Code §21-5-1 et seq.) against Respondents.

## STATEMENT OF THE CASE

Jason Greaser was a truck driver who worked for Respondents driving a truck. Eleven of Mr. Greaser's co-workers met with an attorney with the intention of filing a civil lawsuit to collect wages which Respondents had not paid them. Mr. Greaser expressed his intention to file a similar lawsuit. Respondents contacted a police officer and provided him with allegations that Mr. Greaser stole tires which led to Mr. Greaser's arrest. The criminal charges were subsequently dismissed by a separate trial court which found that the police officer's evidence was "unreliable and uncorroborated".

Respondents terminated Mr. Greaser's employment upon the pretext that he had stolen tires.

Mr. Greaser's Complaint asserted, in part, that Respondents had retaliated against him for attempting to enforce the public policy of West Virginia.

## SUMMARY OF ARGUMENT

A. The Wage Payment and Collection Act has existed since 1917. The statute is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld. *Farley v. Zapata Coal Corp.*, 167 W.Va. 630, 281 S.E. 2d 238 (1981); *Mullens v. Venable*, 171 W.Va. 92, 297 S.E. 2d 866, 869 (1982). Through the Wage Payment and Collection Act the Legislature has attempted to prevent employers from abusing their positions by compromising the wages of employees. *Britner v. Medical Security Card, Inc.*, 200 W.Va. 352, 489 S.E. 2d 734, 737 (1997).

B. West Virginia Code §21-5-12(a) guarantees an employee with the right to bring any legal action necessary to collect unpaid wages. Therefore Respondents' trumped up criminal charges which were subsequently dismissed because the evidence was "unreliable and uncorroborated," is the pre-text for Petitioner's termination.

Respondents violated several public policies by falsely accusing Petitioner. However for this brief, Respondents violated West Virginia Code §21-5-12(a) by terminating Petitioner for his expressed intent to file a civil action to collect the wages Respondent failed to pay him. Such a denial of Petitioner's access to the courts violates the West Virginia Constitution, Article III, §17.

## **ORAL ARGUMENT**

Pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, Petitioner requests that oral argument be held in this matter because this case includes assignments of error in the application of settled law.

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, Petitioner requests that oral argument be held in this matter because: (1) this case involves issues of fundamental public importance; and (2) this case involves a constitutional question of what statutes can support a wrongful retaliation discharge claim.

## ARGUMENT

### A. Public Policy

This Court explained what constitutes a “public policy” to support a *Harless* claim in *Feliciano v. 7-Eleven, Inc.*, 210 W.Va. 740, 559 S.E. 2d 713, 718-719 (2001). In reviewing basic employment law, this Court explained:

(a) that although an employer has an absolute right to discharge an at-will employee, that right must be tempered by the principle that where the employer’s motivation for the discharge is to contravene some substantial public policy, then the employer may be liable to the employee for damages occasioned by this discharge;

(b) one of the fundamental rights of an employee is the right not to be the victim of a “retaliatory discharge”, that is a discharge where the motivation of the employer is in contravention of a substantial public policy;

(c) a cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his employer acted contrary to substantial public policy in effectuating the termination; and

(d) the trial court should look to established precepts in our Constitution, legislative enactments, legislatively approved regulations and judicial opinions.

This Court in *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E. 2d 561, 585 (1996), confronted the confusion some trial courts had in employment law cases. This Court observed that trial courts and litigants have been preoccupied by the trees of the *prima facie* cases but they have not seen the forest of disparate treatment.



This Court in considering wrongful discharge cases has consistently made it clear that the trial courts should look to established precepts in statute and not just findings in judicial opinions.

The trial court in this case found that since there were no judicial opinions that found that West Virginia Code §21-5-1 et seq., was a legislative enactment, Petitioner had no cause of action.

At page 24 of the hearing transcript (page 18 of Appendix) the trial court found that it is unsettled in the law as to whether West Virginia Code §21-5-1 et seq., is an established legislative precept. The trial court at page 26 of the hearing transcript (page 20 of Appendix) concluded that the absence of a finding from this Court or a legislative enactment or statute making the Wage Payment and Collection Act the substantial public policy, then the Court could not find that the established legislative enactment was a substantial public policy of this State. The trees of the wrongful discharge law had obscured the forest of what a *Harless* case required.

*Feliciano* found that the right to defend yourself was a substantial public policy which prevented a retaliatory discharge. There were no statutory enactments or judicial opinions which set forth that defending yourself was a substantial public policy. Instead of adopting a list of legislative enactments to fit into a *Harless* claim, this Court gave trial courts the flexibility to think on their own. It would be impossible for this Court to anticipate every employer's motivation for termination and then provide an exhaustive list for trial courts to follow.

The finding that a statute is a public policy in a *Harless* case does not establish liability. Petitioner must still prove that the motivation of the employer was Petitioner's stated intention to file a Wage Payment and Collection Act civil action. That question must be answered by a jury.

It is not disputed that the Wage Payment and Collection Act is a long standing public policy which was enacted by our Legislature. It also cannot be disputed that the Wage Payment

and Collection Act was enacted to protect working men and women from having the wage they earned wrongfully withheld from them, and as such, creates a substantial public policy. See *Mullins v. Venable*, 171 W.Va. 92, 297 S.E. 2d 866, page 871 (1982); and *Shaffer v. Fort Henry Surgical Associates, Inc.*, 215 W.Va. 453, 599 S.E. 2d 876, page 882 (2004).

The trial court relied, in part, on *Hartman v. White Hall Pharmacy, LLC*, 112 F Supp. 3d 491 (N.D.W.Va. 2015). In *Hartman*, page 497, the Federal Court found a strong argument that the WPCA establishes a substantial public policy and cited *Mullins v. Venable*, 171 W.Va. 92, 297 S.E. 2d 866, 871 (1982); *Legg v. Johnson, Simmerman & Broughton, L.C.*, 213 W.Va. 53, 576 S.E. 2d 552, page 537 (2002); and *Shaffer v. Fort Henry Surgical Associates, Inc.*, 215 W.Va. 453, 599 S.E. 2d 876, page 881 (2004).

The trial court correctly found in its March 26, 2019 Order at page 5, c., that to be a substantial public policy, the policy must be regarded as the public policy by the employer. Respondents' Rule 30(b)(7) witness testified that the corporation was not only aware of the WPCA but it placed posters within the workplace. The Rule 30(b)(7) deponent also testified that it would expect other businesses within the state to abide by the provisions of the WPCA. The trial court then tortuously concluded that since the West Virginia Supreme Court has not yet recognized the WPCA as a source of substantial public policy upon which a *Harless* claim may be premised, Petitioner cannot prevail. The trial court cannot see the forest for the trees.

*Hartman* page 497 found that there is a strong argument that the WPCA establishes a public policy in West Virginia. Therefore the Federal Court certified the legal question to this Court.<sup>1</sup>

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<sup>1</sup> Petitioner believes and therefore asserts that *Hartman* was settled prior to this Court ruling upon the issue.

**B. Retaliation for Redressing Grievances**

West Virginia Code §21-5-12(a) guarantees an employee the right to bring any legal action necessary to collect unpaid wages. Article III, §17 of the West Virginia Constitution provides every West Virginian the constitutional right to petition for redress of grievances and seek access to the Courts. The trial court identified that Petitioner had expressed his intentions to file a WPCA lawsuit. Regardless of whether West Virginia Code §21-5-1 et seq. is a legislative enactment, the constitutional rights under Article III, §17, of the West Virginia Constitution have been recognized as a substantial public policy. *Burke v. Wetzel County Commission*, 240 W.Va. 709, 815 S.E. 2d 520, page 538 (2018).

*Burke v. Wetzel County Commission*, 240 W.Va. 709, 815 S.E. 2d 520, pages 538-539 (2018) concluded that “{c}ertainly it is 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. §16) and to seek access to the court of this State (W.Va. Const. Art. III, §17) by filing an action pursuant to W.Va. Code §21-5C-8 (1975) for overtime wages. The trial court in this case found that Petitioner contends that he was terminated because he had expressed intentions to file a WPCA (§21-5-1 et seq.) lawsuit against Respondents.

This Court has never limited *Harless* claims to a pre-determined list of public policies which are protected by *Harless*. Indeed *Burke* explained that to identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to, among other things, legislative enactments.

West Virginia Code §21-5-12(a) guarantees an employee the right to bring any legal action necessary to collect unpaid wages. Article III, §17 of the West Virginia Constitution provides

every West Virginian the constitutional right to petition for redress of grievances and seek access to the Courts. At page 6 of its Order (page 6 of Appendix) the trial court identified that Petitioner had expressed his intentions to file a WPCA lawsuit. Regardless of whether West Virginia Code §21-5-1 et seq. is a legislative enactment, the constitutional rights under Article III, §17, of the West Virginia Constitution have been recognized as a substantial public policy. *Burke v. Wetzel County Commission*, 240 W.Va. 709, 815 S.E. 2d 520, page 538 (2018). Such a right to file a civil suit is also protected by the West Virginia Constitution.

## CONCLUSION

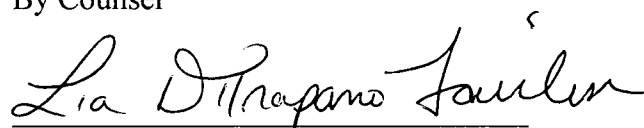
Employment cases are complicated civil cases. Throughout this State, abuse and neglect cases plus criminal cases are increasing making it difficult for trial courts to focus on civil matters.

If the trial court was right that this Court must identify a statute as a public policy prior to filing a *Harless* claim, then this Court should add West Virginia Code §21-5-1 et seq. to the list.

To retaliate against an employee for seeking access to our courts violated Article III, §17 of the West Virginia Constitution.

PETITIONER

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## CONCLUSION

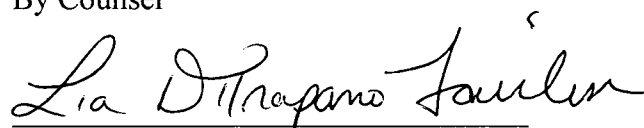
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A handwritten signature in cursive script that reads "Lia DiTrapano Fairless".

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