IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0407

JASON GREASER,
Plaintiff Below, Petitioner,

v.

GARY HINKLE and DETTINBURN TRANSPORT, INC.,
Defendants Below, Respondents.

On Appeal from the Circuit Court of Pendleton County
Honorable H. Charles Carl, III, Circuit Judge
Civil Action No. 17-C-9

BRIEF OF RESPONDENTS

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I. STATEMENT OF THE CASE

A. STATEMENT OF FACTS[1]

Petitioner Jason Greaser ("Mr. Greaser") worked for Dettinburn Transport, Inc. ("Dettinburn") as an at-will employee in the job of truck driver. (App. 115, 120). In late 2016, mechanics working at Dettinburn noticed that several truck tires were missing from the tire bay of Dettinburn's shop located in Petersburg, West Virginia. (App. 120, 199). Around this same time, Dettinburn's President and owner, Gary Hinkle, and his son, Travis Hinkle, began to receive word from members of the community that Mr. Greaser was "shopping around" tires for sale in the Mount Storm area. (*Id.*). Upon receipt of such information, Mr. Hinkle contacted the West Virginia State Police to report that some tires were missing from Dettinburn's shop and to convey what he had heard about Mr. Greaser shopping around tires. (*Id.*). In response, the West Virginia State Police dispatched Corporal Eric Vaubel to investigate. (*Id.*).

In the course of his investigation, Corporal Vaubel conducted several witness interviews, which ultimately led him to locate six of Dettinburn's tires in the possession of an individual who had unknowingly purchased the stolen property from Mr. Greaser for $200 per tire for a grand total of $1,200. (*Id.*). Corporal Vaubel verified that the recovered tires were, indeed, Dettinburn's tires by matching their unique tread pattern and serial numbers to a recent purchase by Dettinburn. Ultimately, Corporal Vaubel returned the tires to Dettinburn Transport as their rightful owner. Based upon his investigation, Corporal Vaubel arrested Mr. Greaser for the felony offense of grand larceny for the tire theft. (*Id.*). Upon his arrest, Mr. Greaser impliedly admitted to the tire theft when he excitedly uttered to Corporal Vaubel that he had "needed the

[1] Conspicuously, Mr. Greaser almost entirely avoids any discussion of the facts that underlie this appeal. Similarly, the *amici curiae* desperately urge this Court to "look beyond the facts of this particular case." Even a cursory review of the facts will demonstrate why this is.

money." (*Id.*).

Based upon Mr. Greaser's theft of the tires, his employment with Dettinburn was terminated on December 28, 2016, after he was arrested for grand larceny. (App. 121, 195, 199). The decision maker regarding Mr. Greaser's termination was Gary Hinkle as the President of Dettinburn Transport. (App. 195). When Mr. Greaser turned his company-issued truck back into Dettinburn upon his termination, it was discovered that the interior sleeper cabin of the truck contained distinct black scuff marks that were consistent with the tire tread pattern of the stolen tires. (App. 199). Subsequently, an eyewitness was located who had personally observed Mr. Greaser deliver the stolen tires in his Dettinburn truck to the location where they were recovered by Corporal Vaubel. (App. 260). Following his arrest, Mr. Greaser was indicted by a grand jury in Grant County for the felony offense of grand larceny for the tire theft.[2] (*Id.*).

Several months prior to his termination, on August 31, 2016, one of Mr. Greaser's fellow truck drivers at Dettinburn filed a lawsuit against the company under § 21-5-3(a) of the WPCA, alleging that Dettinburn owed him unpaid wages.[3] Several months *after* Mr. Greaser's termination – on either February 27 or March 14, 2017 – Gary Hinkle learned, for the very first time, that Mr. Greaser intended to file a similar WPCA lawsuit. (App. 183, 199). Mr. Hinkle learned of Mr. Greaser's intentions on such date when Mr. Greaser's attorneys telephoned Dettinburn's lawyers and informed them that they had been retained to represent Mr. Greaser and would be filing a WPCA claim on his behalf. (*Id.*). Prior to this date, Mr. Hinkle was

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[2] Despite the overwhelming evidence of his guilt, Mr. Greaser ultimately escaped prosecution for the theft of Dettinburn's tires based upon a questionable technicality. (App. 87-90). By Order dated May 28, 2019, Circuit Judge Lynn A. Nelson of Grant County ruled that *all* evidence collected by Trooper Vaubel regarding Mr. Greaser's theft of Dettinburn's tires would be suppressed at trial as "unreliable and uncorroborated" because the State had not retained custody over the tires and had returned them to Dettinburn. (*Id.*).

[3] Several other drivers employed by another trucking company owned by Gary Hinkle also filed similar lawsuits around this same timeframe.

unaware that Mr. Greaser intended to file a WPCA claim against Dettinburn. (*Id.*).

B. PROCEDURAL HISTORY

Subsequently, on May 1, 2017, Mr. Greaser filed the instant lawsuit against Dettinburn (and other defendants, including Gary Hinkle), advancing a claim under § 21-5-3(a) of the WPCA, contending that Dettinburn had not properly paid him all wages due throughout the course of his employment.[4] (App. 115-119). Pertinent to this appeal, Mr. Greaser also advanced a claim for retaliatory discharge under *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978) and its progeny, alleging that he was terminated, not for stealing tires, but instead for enforcing a substantial public policy of the State of West Virginia. (*Id.*). During the course of discovery, Mr. Greaser clarified his *Harless* claim, contending that he was falsely accused of stealing tires from Dettinburn and was pretextually terminated for the theft because he intended to enforce the WPCA against Dettinburn by filing an action under W.Va. Code § 21-5-3(a) regarding his wages. (App. 29, 257).

On January 9, 2019, Respondents moved for summary judgment. (App. 120-152). Regarding Mr. Greaser's wrongful discharge claim, Respondents argued that: (a) the civil provisions of the WPCA upon which Mr. Greaser was relying are not, and have not been recognized as, a substantial public policy sufficient to sustain a *Harless* claim, and (b) even if such provisions of the WPCA could sustain a *Harless* claim, summary judgment is, nevertheless, proper because the undisputed record evidence demonstrates that Gary Hinkle, as the decision-maker regarding Mr. Greaser's termination, only became aware of Mr. Greaser's intention to file

[4] W. Va. Code § 21-5-3(a) requires every employer to "settle with its employees at least twice every month and with no more than 19 days between settlements, unless otherwise provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services." W.Va. Code § 21-5-12 provides employees with a mechanism by which to sue for violations of W. Va. Code § 21-5-3(a).

a WPCA claim against Dettinburn several months *after* his termination.[5] (App. 141-150). Thus, Mr. Greaser's unknown intentions to sue Dettinburn under the WPCA could not have been the motivation for his discharge. (*Id.*). Respondents also argued that they were entitled to summary judgment as to Mr. Greaser's wrongful discharge claim because he had put forth no evidence of pretext. (App. 150).

The Trial Court heard oral argument on January 23, 2019. (App. 271). By Order entered March 29, 2019, Pendleton County Circuit Judge H. Charles Carl, III, entered summary judgment in favor of Respondents and against Mr. Greaser regarding his claim for wrongful discharge.[6] (App. 4-8). The Trial Court correctly recognized that the civil provisions of the WPCA upon which Mr. Greaser premised his wrongful discharge claim, namely W.Va. Code § 21-5-3(a), have not been recognized as a source of substantial public policy for purposes of *Harless*. (*Id.*). Moreover, the Trial Court correctly recognized that when this Honorable Court previously considered whether the WPCA could sustain a *Harless* claim, it carefully limited its holding, recognizing only the criminal provisions of the WPCA found in W.Va. Code § 21-5-5 as espousing a substantial public policy sufficient to sustain a *Harless* claim. (*Id.*). Finally, the Court noted that, in opposing Respondents' motion for summary judgment, Mr. Greaser cited no authority whatsoever to support his contention that a *Harless* claim could be predicated upon the civil provisions of the WPCA, such as W.Va. Code § 21-5-3(a). (*Id.*). The Trial Court made its

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[5] Respondents denied liability and sought summary judgment regarding Mr. Greaser's WPCA claim. Nevertheless, the Court denied Respondents' motion, finding that there were genuine issues of material of fact as to what the employment agreement was between Mr. Greaser and Dettinburn regarding his rate of pay. (App. 3).

[6] In the interim, on February 28, 2019, Mr. Greaser – apparently undeterred by the felony charge already pending against him – was arrested for yet other crimes involving his scam of "stealing and dealing." (App. 259-70). Specifically, Mr. Greaser was charged with the felonies of grand larceny and obtaining money by false pretenses after he reportedly stole a utility trailer valued at $2,000 from an energy company in Mount Storm, and then turned around and sold the stolen trailer, along with some scrap metal, to a local salvage company. (*Id.*).

ruling immediately appealable pursuant to Rule 54(b). (App. 8). This appeal followed on April 22, 2019.

As detailed *infra*, the Trial Court's ruling granting summary judgment in favor of Respondents as to Mr. Greaser's *Harless* claim was correct for multiple reasons, and, thus, should not be disturbed on appeal.

II. SUMMARY OF ARGUMENT

In 1994, in the case of *Roberts v. Atkins*, 191 W. Va. 215, 444 S.E.2d 725 (1994), this Court had the opportunity to declare the WPCA, in its entirety, as a substantial public policy for purposes of *Harless*. It declined to do so. Instead, this Court expressly limited the application of *Harless* to the criminal provisions of the WPCA in § 21-5-5, and <u>only</u> § 21-5-5. The *Roberts* Court expressly emphasized the narrowness of its holding by stating that its recognition of W.Va. Code § 21-5-5 as being a permissible *Harless* predicate: "is in no way intended to unlock a Pandora's box of litigation in the wrongful discharge arena." *Roberts*, 191 W. Va. at 219-20, 444 S.E.2d at 729-30. Now, in this appeal, Petitioner Jason Greaser urges this Court to carelessly spring open the Pandora's Box that the *Roberts* Court took care to prudently bind shut, insisting that the civil provisions of the WPCA should be recognized as a sufficient basis upon which to sustain a *Harless* claim.[7] Inevitably, such a ruling would only serve to grease the wheels for increased litigation in this State.

Significantly, the WPCA contains no statement of public policy as to anti-discrimination or anti-retaliation. If our Legislature had desired to create a private cause of action for employees who were discharged for enforcing the WPCA's requirements, it could have easily

[7] In the proceedings below, Mr. Greaser always maintained that his *Harless* claim was predicated upon an alleged public policy espoused by W.Va. Code § 21-5-3(a), which he claims he sought to enforce against Dettinburn. Now, on appeal, Mr. Greaser has changed course, arguing that the alleged source of public policy emanates from W.Va. Code § 21-5-12.

included such a provision in the Act. The fact that the Legislature has not done so is telling, and this Court should refrain from injecting itself to create a cause of action where the Legislature's expression on the subject is deafeningly silent. To the extent this Court believes that employees should be permitted to bring an action against their employers for retaliatory discharge premised upon the WPCA, then the appropriate course is to exercise deference and allow the Legislature to statutorily enact such a protection.

Turning to the two assignments of error raised by Mr. Greaser, neither one sets forth any valid reason to disturb the Trial Court's ruling. First, Mr. Greaser argues that the Trial Court erred by not applying this Court's holding in Syllabus Point 11 of *Burke v. Wetzel County Commission*, 240 W.Va. 709, 815 S.E.2d 520 (2018), wherein the Court held: "To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions." (Petr's Br. at 3, 7-9).

Contrary to Mr. Greaser's assertion, the Trial Court's Order makes abundantly clear that it carefully considered this Court's holding in Syllabus Point 11 of *Burke*. Indeed, this very holding is quoted verbatim in the Trial Court's Order, along with a citation to the original case in which the holding was first rendered – *Birthisel v. Tri–Cities Health Services Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). (App. 5). Moreover, the Trial Court carefully analyzed the contours of the *Harless* doctrine, the four-factor test that is used to determine whether an employee has successfully presented a claim for wrongful discharge in contravention of substantial public policy, and prior decisions rendered by this Court and federal courts regarding the issue of whether the WPCA constitutes a source of substantial public policy sufficient to sustain a *Harless* claim. (App. 4-8). In sum, the Trial Court's decision is well-reasoned. As noted in the

Trial Court's Order, the burden was on Mr. Greaser to establish the existence of a substantial public policy; however, in opposing the Respondents' motion for summary judgment, Mr. Greaser advanced no legal support whatsoever for the notion that W.Va. Code § 21-5-3(a) constitutes a source of substantial public policy upon which a *Harless* claim may premised. (App. 28-43, 7).

In his second and final assignment of error, Mr. Greaser argues that the Trial Court erred in granting summary judgment on his wrongful discharge claim because his termination violated a substantial public policy espoused by Article III, Section 17 of the West Virginia Constitution. (Petr's Br. at 3, 10-11). The Court should decline to address this assignment of error because Mr. Greaser *never once* alleged or argued before the Trial Court that his *Harless* claim was premised upon a substantial public policy emanating from the West Virginia Constitution. And he certainly never cited Article III, Section 17 as being the basis for his *Harless* claim. Rather, Mr. Greaser has *always* maintained that his *Harless* claim is premised *solely* on a claimed violation of an alleged public policy espoused by the WPCA. (App. 28-43, 257).

This Court has repeatedly cautioned litigants that, as a general rule, it will not consider issues raised for the first time on appeal. Thus, Mr. Greaser cannot now entirely change his case theory and argue that the Trial Court erred by not allowing his *Harless* claim to proceed upon a substantial public policy contained in Article III, Section 17 when such an argument was never advanced in the proceedings below. For this reason, Mr. Greaser's second assignment of error should be summarily rejected.

For all these reasons, this Court should affirm the judgment below.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record, and oral argument would not significantly aid the decisional process. If the Court determines that oral argument is necessary, then argument under W. Va. R. App. P. 19 is appropriate because the appeal involves assignments of error in the application of settled law. The appeal is appropriate for disposition by memorandum decision under W. Va. R. App. P. 21.

IV. ARGUMENT

A. STANDARD OF REVIEW

As this is an appeal from the award of summary judgment, the standard of review is *de novo*. *See* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, CORRECTLY RULING THAT THE CIVIL PROVISIONS OF THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT HAVE NOT BEEN RECOGNIZED AS A SOURCE OF SUBSTANTIAL PUBLIC POLICY SUFFICIENT TO SUSTAIN A *HARLESS* CLAIM.

This appeal concerns only the Trial Court's decision granting summary judmgent in favor of Respondents regarding Mr. Greaser's claim for retaliatory discharge. The Trial Court correctly recognized that the civil provisions of the WPCA, upon which Mr. Greaser premised his wrongful discharge claim, have not been recognized as a source of substantial public policy for purposes of *Harless*. (App.4-7). Moreover, the Trial Court correctly recognized that when this Honorable Court previously considered whether the WPCA could sustain a *Harless* claim, it carefully limited its holding, recognizing only the criminal provisions of the WPCA found in W.Va. Code § 21-5-5 as espousing a substantial public policy sufficient to sustain a *Harless* claim. (*Id.*). Finally, the Court noted that, in opposing Respondents' motion for summary

judgment, Mr. Greaser cited no authority whatsoever to support his contention that a *Harless* claim could be predicated upon the civil provisions of the WPCA. (App. 28-43, 7).

Now, on appeal, Mr. Greaser argues that the Trial Court's Order should be overturned, contending that the WPCA is a proper predicate for his *Harless* claim.

1. ***In the Proceeedings Below, Mr. Greaser Failed to Carry His Burden of Demonstrating that the Civil Provisions of the WPCA Constitute a Substantial Public Policy Sufficient to Sustain a Harless Claim.***

In *Feliciano v. 7–Eleven, Inc.*, this Court announced four factors that courts should weigh to determine "whether an employee has successfully presented a claim of relief for wrongful discharge in contravention of substantial public policy[.]" The test requires the plaintiff to plead and prove the following elements:

> 1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element);
> 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element);
> 3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and
> 4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

210 W.Va. 740, 750, 599 S.E.2d 713, 723 (2001). "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 v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325 S.E.2d 111 (1984). In any *Harless* action, the burden rests on the plaintiff-employee to establish the existence of a substantial public policy. *See Roth v. DeFeliceCare, Inc.*, 226 W.Va. 214, 221, 700 S.E.2d 183, 190 (2010).

As this Court made clear in *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E.2d 1 (2010), a *Harless*-based action requires more than simply raising the spectre of a

potentially governing law: "The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates." *Swears*, 225 W.Va. at 705, 696 S.E.2d at 7. A plaintiff in a *Harless*-style action must specifically point to a statutory or regulatory provision which "expresses a public policy component such that the statute may form as the basis for a possible violation of substantial public policy to support a wrongful discharge." *Id.* Further, to support a public policy claim, the violation of the public policy must be "injurious to the public good." *Id.*; *see also*, *Shell v. Metropolitan Life Ins. Co.*, 183 W.Va. 407, 413, 396 S.E.2d 174, 180 (1990) (reiterating that where a statute is designed to protect one specific group and not a broad societal interest, there was no substantial public policy interest). Therefore, it has been stated that, "[i]t 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." *Tiernan v. Charleston Area Medical Center, Inc.*, 203 W.Va. 135, 141, 506 S.E.2d 578, 584 (1998) (internal citations omitted).

In the proceedings below, Mr. Greaser made no effort whatsoever to argue that the civil provisions of the WPCA constitute a substantial public policy sufficient to sustain a *Harless* claim. Indeed, in opposing Respondents' motion for summary judgment, Mr. Greaser cited no legal authority to support his contention that the civil provisions of the WPCA encompass a substantial public policy for purposes of *Harless*. (App. 28-40, 13-23). In fact, Mr. Greaser did not address, at all, the Respondents' argument that the WPCA is insufficient to sustain a *Harless* claim. (*Id.*). He made no attempt to rebut the Respondents' argument that, when this Court considered in *Roberts v. Adkins*, 191 W. Va. 215, 444 S.E.2d 725 (1994) whether the WPCA

could sustain a *Harless* claim, it expressly limited such a claim to the criminal provisions of the Act found in W.Va. Code § 21-5-5 so as to avoid "unlock[ing] a Pandora's box of litigation in the wrongful discharge arena." (*Id.*). Likewise, Mr. Greaser made no effort to distinguish either of the federal cases cited by Respondents rejecting the WPCA as a a proper *Harless* predicate – *Baisden v. CSC-Pa, Inc.*, No. 2:08-cv-01375, 2010 WL 3910193 (S.D.W. Va. Oct. 1, 2010) (dismissing *Harless* claim predicated on WPCA) and *Wiley v. Asplundh Tree Expert Co.*, 4 F. Supp. 3d 840 (S.D.W. Va. 2014) (same).[8] (*Id.*).

This Court has previously refused to disturb a trial court's ruling in situations where, as here: (a) a petitioner made a less-than-nominal effort at the summary judgment stage to identify a substantial public policy; (b) failed to carry his burden of demonstrating that a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law; and (c) failed to supply the trial court with any legal authority to support his contention that a previously-unrecognized statute encompasses a substantial public policy for purposes of a *Harless*-type claim. *See, e.g., Kiefer v. Town of Ansted, W. Virginia*, No. 15-0766, 2016 WL 6312067, at *3 (W. Va. Oct. 28, 2016) (unpublished). Accordingly, this Court should summarily affirm the Trial Court's ruling.

2. *This Court Has Already Considered Whether the WPCA Constitutes a Substantial Public Policy Sufficient to Sustain a Harless-Style Cause of Action and Carefully Chose to Recognize Only the Criminal Provisions of the Act Set Forth at W.Va. Code § 21-5-5 as Being a Proper Predicate for Such Claims.*

Over twenty-five years ago, in *Roberts v. Adkins*, 191 W. Va. 215, 444 S.E.2d 725 (1994), this Court had the opportunity to declare the WPCA in its entirety a substantial public policy for purposes of supporting a *Harless* claim. It declined to do so. Instead, this Court

[8] Notably, Mr. Greaser failed to even timely file his response brief opposing Respondents' motion; yet, the Trial Court indulged Mr. Greaser and considered his untimely submission. (App. 200-202, 271).

expressly limited the application of *Harless* to § 21-5-5 of the Act, which gives rise to criminal penalties, and *only* § 21-5-5.

In *Roberts*, the major stockholder of the plaintiffs' employer owned a car dealership. 191 W. Va. at 216, 444 S.E.2d at 726. Rather than purchase a car from the stockholder's dealership, the plaintiffs opted to buy a car from another local dealership that was a direct competitor of the stockholder's dealership. *Id.* at 216-17, 444 S.E.2d at 726-27. Thereafter, the plaintiffs were fired because they had been "disloyal" in purchasing a vehicle from a competitor instead of buying from the stockholder's dealership. *Id.* The plaintiffs proceeded to file suit, arguing that their discharges violated a substantial public policy. *Id.*

In examining whether W.Va. Code § 21-5-5[9] could sustain a *Harless* claim, the Court explained the purpose of this statutory provision:

> West Virginia Code § 21-5-5 was originally enacted to alleviate the situation in which coal companies required miners to make their purchases at the company store, owned by the coal company, either by deducting said purchases from their wages or by being paid in company script which was spendable only at the company store.

Id. at 219, 444 S.E.2d at 729. The Court found that the Legislature intended in enacting § 21-5-5, not only to "denounce[] the unfair practices of the coal companies," but also to "***set forth*** . . . ***a***

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[9] W.Va. Code 21-5-5 provides as follows:

> If any corporation, company, firm or person shall coerce or compel, or attempt to coerce or compel, an employee in its, their or his employment to purchase goods or supplies in payment of wages due him or to become due him or otherwise, from any corporation, company, firm or person, such first named corporation, company, firm or person shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in the next preceding section. And if any such corporation, company, firm or person shall, directly or indirectly, sell to any such employee in payment of wages due or to become due him or otherwise, goods or supplies at prices higher than the reasonable or current market value thereof at cash, such corporation, company, firm or person shall be liable to such employee, in a civil action, in double the amount of the charges made and paid for such goods or supplies, in excess of the reasonable or correct value thereof in cash.

substantial public policy against such practice, which is evidenced by the legislature making such practice constitute a criminal misdemeanor." *Id.* (emphasis added). Upon this rationale, the Court concluded that W.Va. Code § 21-5-5 could sustain a *Harless* claim and held that "cause of action for wrongful discharge may exist under West Virginia Code § 21-5-5, for the retaliatory discharge of an employee because of the employee's purchase of goods from a competitor of a separate and distinct business owned by the employer, where the employee did not work for the employer's separate and distinct business and, where the purchased goods were in no way related to or within the scope of the employment." *Id.* at 220, 444 S.E.2d at 730.

Inasmuch as W.Va. Code § 21-5-5 is part of the WPCA, the Court could have easily used the opportunity afforded by *Roberts* to declare the WPCA, in its entirety, a permissible predicate for a *Harless* claim. However, the Court conspicuously declined to do so. Instead, the Court expressly tethered its ruling to W.Va. Code § 21-5-5 and no other section of the WPCA. The Court went out of its way to expressly emphasize the narrowness of its holding by cautioning litigants that its recognition of W.Va. Code § 21-5-5 as being a permissible *Harless* predicate: ***"is in no way intended to unlock a Pandora's box of litigation in the wrongful discharge arena.***" *Id.* at 219-20, 444 S.E.2d 729-30 (emphasis added).

Here, Mr. Greaser harnesses his wrongful discharge claim to the civil provisions of the WPCA, which have never been recognized as embodying a *Harless*-worthy public policy. Based solely on the fact that the Legislature chose to impose criminal sanctions for violations of W.Va. Code § 21-5-5, the *Roberts* Court concluded that the Legislature intended to set forth a substantial public policy that is sufficient to sustain a *Harless* action. *Id.* at 219, 444 S.E.2d at 729. In contrast, W.Va. Code § 21-5-3(a) provides no criminal penalties; rather, violations only give rise to civil remedies under W.Va. Code §§ 21-5-6 and 21-5-12. Thus, applying the same

logic previously employed by the Court in *Roberts*, it should conclude that the civil provisions of the WPCA do not set forth a substantial public policy that is sufficiently substantial to sustain a *Harless* action.

In support of his contention that a substantial public policy has already been recognized to exist in the WPCA by this Court, Mr. Greaser cites to the cases of *Mullins v. Venable*, 171 W.Va. 92, 297 S.E.2d 866 (1982); *State v. ex rel. Joseph v. Dostert*, No. 15988, 1983 WL 131194 (W.Va. Dec. 14, 1983) (unpublished); *Legg v. Johnson, Simmerman & Broughton, L.C.*, 213 W.Va. 53, 576 S.E.2d 532 (2002), and *Shaffer v. Ft. Henry Surgical Assocs., Inc.*, 215 W.Va. 453, 599 S.E.2d 876 (2004). In each of these cases, the Court made a passing remark about the WPCA reflecting a "public policy." Significantly, however, none of these cases involved a *Harless* claim. Therefore, any suggestion that the WPCA embodies a "public policy" fails to persuasively support Mr. Greaser's position. Stated differently, Mr. Greaser's reliance on the Court's remarks in *Mullins*, *Dostert*, *Legg*, and *Shaffer* is simply misplaced since the Court did not address in these cases whether the WPCA constitutes a substantial public policy for purposes of *Harless*.

Virtually every statute enacted by our Legislature reflects some public policy judgment about the rights and responsibilities of our citizenry. To extract a public policy exception to the at-will employment doctrine from each and every statute would effectively eviscerate that doctrine. Eventually, the exception would swallow the rule. Cognizant of this fact, the Court has been careful to diligently limit the application of *Harless*. Indeed, this Court has repeatedly cautioned that not all public policy considerations contained in statutes and regulations give rise to a *Harless* action. Rather, the appropriate analysis is whether a public policy is "substantial and clear" and implicates "the public health, safety, morals or welfare." *Birthisel v. Tri-Cities*

Health Servs. Corp., 188 W. Va. 371, 378, 424 S.E.2d 606, 613 (1992) (explaining that only public policy that is substantial and clear can sustain a retaliatory discharge claim); *Yoho v. Triangle PWC, Inc.*, 175 W. Va. 556, 561, 336 S.E.2d 204, 209 (1985) ("[O]nly 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"). Because the Court was not guided by this analytical framework in deciding *Mullins*, *Dostert*, *Legg*, or *Shaffer*, its passing statements in those decisions about the WPCA embodying a "public policy" are simply irrelevant to the inquiry at hand.

Moreover, it is significant that both *Mullins* and *Dostert* predate the Court's decision in *Roberts* by over a decade. Certainly, if this Court had viewed its decisions in *Mullins* and *Dostert* as unequivocally pronouncing that the WPCA, in its entirety, embodies a *Harless*-worthy public policy as Mr. Greaser contends, the Court would have surely relied upon and cited such decisions when it decided *Roberts*. However, there is no mention of either *Mullins* or *Dostert* in *Roberts*, suggesting that Mr. Greaser's reliance on these cases is desperately misplaced.

In sum, this Court already considered whether the WPCA could sustain a retaliatory discharge claim. In deciding to recognize the criminal provisions in W.Va. Code § 21-5-5 as an appropriate *Harless* predicate, the Court painstakingly made clear that its holding was limited to that section of the WPCA and no others. Since deciding *Roberts*, this Court has maintained that *Harless* is to be applied narrowly. Allowing a *Harless* claim to proceed upon the civil provisions of the WPCA in W.Va. Code § 21-5-3(a) will only serve to eviscerate the at-will doctrine and encourage myriad meritless lawsuits against employers of his State.

3. *In Advocating for the Civil Provisions of the WPCA to be Recognized as a Source of Substantial Public Policy, Mr. Greaser is Urging this Court to Expand the Harless-Style Cause of Action Beyond its Foundational Roots.*

Despite having failed to cogently advance such an argument before the Trial Court, Mr. Greaser now implores this Court, on appeal, to declare that the civil provisions of the WPCA can sustain a *Harless* claim for retaliatory discharge. In so advocating, Mr. Greaser is urging this Court to expand *Harless* beyond its foundational roots. As discussed herein, the *Harless*-style cause of action was originally created to address situations where an employee is discharged for altruistically acting in the public's interest by reporting, exposing, or refusing to participate in unlawful conduct by his employer that is injurious to the public health, safety, or welfare. The *Harless*-style cause of action was not created to protect employees acting upon a purely personal or proprietary self-interest. Likewise, *Harless* was never intended to reach purely private disputes between an employer and employee that lack broader societal ramifications for the public at large. Recognizing a *Harless* claim based on the civil provisions of the WPCA will in no way further any public interest; rather, doing so will only serve to grease the wheels for increased litigation in this State.

a. The Harless Claim Was Created as a Limited Exception to the Employment At-Will Doctrine to Create Retaliatory Discharge Protection for Employees Who Report and Endeavor to Stop Publicly-Injurious, Unlawful Conduct by His Employer.

This Court first recognized a cause of action for wrongful discharge in violation of public policy as a limited exception to the employment at-will doctrine in 1978. In *Harless*, this Court held:

> The 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 principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syl., *Harless v. First National Bank in Fairmont*, 162 W.Va 116, 246 S.E.2d 270 (1978). The plaintiff in *Harless* alleged that he was discharged from his employment at a bank because he had reported and endeavored to stop his employer's intentional violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code § 46A-1-101, *et seq.* (WVCCPA). *Id.*, 162 W.Va. at 118, 246 S.E.2d at 272. More specifically, the employee was allegedly discharged for endeavoring to thwart his employer's illegal practices of intentionally overcharging customers on installment loans and not making proper rebates – all of which violated the protections afforded by the WVCCPA. *Id.*, 162 W.Va. at 125, 246 S.E.2d at 275-76. In recognizing a cause of action under these circumstances, this Court examined the WVCCPA and concluded that, by its enactment, the Legislature intended to protect consumers of credit in this State in their dealings with lending institutions. *Id.*, 162 W.Va. at 125-26, 246 S.E.2d at 276. This Court rationalized that such manifest public policy would be frustrated if lending institutions were free to lawfully discharge employees who, for the benefit of the citizens that the WVCCPA was designed to protect, sought to ensure compliance with the Act. *Id.*

b. Since Its Creation, Application of Harless Has Generally Been Limited to Scenarios Where an Employee is Discharged for Reporting, Exposing, or Refusing to Participate in Unlawful Conduct by His Employer that is Injurious to the Public.

Since creating the *Harless*-style cause of action in 1978, this Court has, with few exceptions, been careful to limit its bounds to scenarios where, like the plaintiff in *Harless*, an employee is discharged for selflessly acting in the public's interest by reporting, exposing, or refusing to participate in unlawful conduct by his employer that is injurious to the public health, safety, or welfare. The following cases are illustrative of the trend in this Court's rulings:

- In *Collins v. Elkay Mining Co.*, 179 W.Va. 549, 371 S.E.2d 46 (1988), this Court ruled that the West Virginia Mine Safety Act, W.Va. Code § 22A-1A-20, constitutes a substantial public policy sufficient to sustain a *Harless* claim by an coal miner who was allegedly discharged for refusing to falsify certain safety reports related to a safety inspection.
- Several years later, in *Lilly v. Overnight Transp. Co.*, 188 W. Va. 538, 425 S.E.2d 214 (1992), this Court recognized the statutory requirements of W.Va. Code §§ 17C-15-1(a), 17C-15-31 and 24A-5-5(j) as being a source of substantial public policy sufficient to sustain a *Harless* claim by a truck driver who was allegedly terminated for refusing to operate a truck on public highways that he believed to be unsafe due to brake failures.
- Thereafter, in *Page v. Columbia Natural. Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996), this Court has held that "[i]t is against substantial public policy of West Virginia to discharge an at-will employee because such employee has given or may be called to give truthful testimony in a legal action." Relying on W.Va. Code §§ 61-5-1 and 61-5-2 (criminalizing willful perjury and false swearing, as well as procuring another to do so) and W.Va. Code § 61–5–27 (prohibiting witness intimidation), the Court concluded that the public at large has an interest in the integrity of the judicial system, the administration of justice, and the unobstructed search for truth. *Id.*
- Subsequently, in *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997), this Court ruled that regulations promulgated by the West Virginia Board of Health, specifically, W.Va. C.S.R. § 64–12–14.2.4, constitute a substantial public policy sufficient to sustain a *Harless* claim by a hospital registered nurse who was allegedly

constructively discharged for reporting concerns that her employer maintained inadequate staffing levels to safely care for patients.

- Thereafter, in *Kanagy v. Fiesta Salons, Inc.*, 208 W. Va. 526, 541 S.E.2d 616 (2000), this Court found that the regulations set forth at W.Va. C.S.R. § 3-5-3.1 constitute a substantial public policy sufficient to sustain a *Harless* claim by a hair salon manager who was allegedly terminated for disclosing to a Board of Barbers and Cosmetologists investigator that her supervisor was unlawfully practicing cosmetology on citizens of this State a without a license.
- In *Brown v. City of Montgomery*, 233 W.Va. 119, 755 S.E.2d 653 (2014), this Court ruled that the West Virginia Human Rights Act, W.Va. Code § 5-11-1, *et seq.*, constitutes a substantial public policy sufficient to sustain a *Harless* claim by an employee who was allegedly discharged for refusing to participate in unlawful retaliation directed by his employer against a fellow employee who had sued the employer for racial discrimination.
- Most recently, in *Frohnapfel v. ArcelorMittal USA LLC*, 235 W. Va. 165, 772 S.E.2d 350, (2015), this Court ruled that certain requirements under the West Virginia Water Pollution Control Act, W.Va. Code § 22-11-1, *et seq.*, constituted a substantial public policy sufficient to sustain a *Harless* claim by an employee who was allegedly discharged for reporting permit violations by his employer that had the potential harm to a water source used by members of this State's citizenry.

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Importantly, the common theme of all of these cases is that the affected plaintiff was allegedly terminated for acting upon a selfless interest for the greater good of society at large, as opposed to a purely personal, private, or proprietary interest for his own concern. It is axiomatic that purely private disputes that lack broader social ramifications do not state a cause of action

under *Harless*. To invoke *Harless*, a plaintiff is required to show that the retaliatory discharge at issue harms a broader segment of society beyond just himself. Along these lines, this Court has announced that it will "exercise restraint" when determining whether a substantial public policy exists for purposes of *Harless* and has expressly instructed that:

> 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.

Yoho v. Triangle PWC, Inc., 175 W. Va. 556, 561, 336 S.E.2d 204, 209 (1985) (quotation omitted) (emphasis added). *See also, Shell v. Metropolitan Life Ins. Co.*, 183 W.Va. 407, 413, 396 S.E.2d 174, 180 (1990) (reiterating that where a statute is designed to protect one specific group and not a broad societal interest, there is no substantial public policy interest). Moreover, this Court has explicitly directed trial courts to "proceed cautiously" when considering whether a public policy exists that is sufficiently substantial to sustain a *Harless* claim. *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 141, 506 S.E.2d 578, 584 (1995).

Applying such guidance, this Court has declined to extend the reach of *Harless* to purely private disputes between employers and employees that lack broader societal ramifications for the public at large. For example:

- In *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E.2d 1 (2010), this Court declined to recognize a *Harless* claim where an employee claimed that he was terminated for raising internal concerns with his employer that an owner of the company was committing serious fiscal misconduct possibly rising to the level of embezzlement and/or larceny. In rejecting the employee's attempt to elevate his internally-raised concern for possible criminal conduct to the level of a substantial public policy, this Court explained that the allegations constituted an alleged violation of the financial interests of a private

corporation. *Id.* Critically, however, the allegations did not involve anything that might be injurious to the public good. *Id.*

- More recently, in *Kiefer v. Town of Ansted, W. Virginia*, No. 15-0766, 2016 WL 6312067 (W. Va. Oct. 28, 2016) (memorandum decision), this Court declined to recognize a *Harless* claim where an employee claimed that he was terminated for issuing a document request to his employer under the West Virginia Freedom of Information Act, W.Va. Code § 29B-1-1, *et seq.* (FOIA). In *Kiefer,* the plaintiff sent a FOIA request to his employer, a local town, seeking certain financial and other information of the town in an effort to investigate possible criminal irregularities in the town's finances. *Id.* The employee unsuccessfully argued before this Court that "because FOIA helps to expose government misconduct and malfeasance regarding public funds, which is pertinent and of great importance to the citizens of the community, the county, and the state," it should be recognized as encompassing a substantial public policy for purposes of a *Harless*-type claim. *Id.*

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By their very nature, disagreements between an employer and an individual employee about wages are purely private. Such disputes do not touch upon "public health, safety, morals or general welfare." *See, e.g., Yoho v. Triangle PWC, Inc.*, 175 W.Va. 556, 561, 336 S.E.2d 204, 209 (1985). To the extent that such disputes have any effect on the citizenry collective, such impact is indirect and incidental, at best. To apply *Harless* in such situations would greatly expand the doctrine beyond its foundational roots and, in turn, jeopardize the at-will doctrine.

Applying this very rationale, other state courts considering this issue have routinely rejected their state wage payment laws – which are similar to our WPCA – as a proper predicate

for a retaliatory discharge action.[10] For example, in *Booth v. McDonnell Douglas Truck Servs.*, 401 Pa.Super. 234, 242, 585 A.2d 24, 28 (1991), the Superior Court of Pennsylvania rejected the Pennsylvania Wage Payment and Collection Law (PAWPCL) as being sufficient to sustain a claim for wrongful discharge, noting that "the public policy claimed to have been violated must go to the heart of a citizen's rights, duties, and responsibilities, or the discharge is not wrongful." The plaintiff alleged that his employer fired him after he complained to management that he was owed certain commissions that the employer disputed he was entitled to receive. *Id.*, 401 Pa.Super. at 237, 585 A.2d at 27. The plaintiff argued, *inter alia,* that his discharge violated public policy embodied in the PAWPCL because the PAWPCL provides statutory protection to the compensation due employees under their contract with the employer. *Id.*, 401 Pa.Super. at 242-43, 585 A.2d at 28. The Superior Court rejected the plaintiff's argument, explaining:

> To adopt [the employee's] position would mean that any time an employee is discharged due to a dispute over compensation due him, the employer would be liable because it asserted its position. It is true that [an employee] has a right to attempt to enforce the contract as he sees it. It is just as true that [the employer] has [a] right to resist what it views to be overreaching by [the employee]. [The employer] has another right: to discharge . . . an at-will employee . . . . for no reason or any reason. We refuse to hold that an employer who exercises that right because of a dispute over compensation due the employee is liable for wrongful discharge.

Id., 401 Pa.Super. at 244-45, 585 A.2d at 29. *See also, Donaldson v. Informatica Corp.*, 792 F. Supp. 2d 850, 860 (W.D. Pa. 2011) (the public policy exception to at-will employment does not extend to wage payment-related retaliatory discharge claims); *Redick v. Kraft, Inc.*, 745 F.Supp. 296, 304 (E.D.Pa. 1990) ("[W]hile the policy in favor of paying one what he has earned is highly desirable, it is not one that 'strikes at the heart' of our social structure.").

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[10] This Court routinely consults the decisions of other state courts when contemplating whether to recognize a new basis for a retaliatory discharge claim under *Harless*.

Likewise, in *McGrath v. CCC Info. Servs., Inc.*, 314 Ill.App.3d 431, 436, 731 N.E.2d 384, 388 (2000), the Appellate Court of Illinois declined to recognize a claim for wrongful discharge premised upon the Illinois Wage Payment and Collection Act (IWPCA). In *McGrath*, the plaintiff was terminated after he refused his employer's demand to withdraw a lawsuit that he had filed against the company asserting violations of the IWPCA related his eligibility for certain conditional stock options and annual bonus payments. *Id.*, 314 Ill.App.3d at 433,731 N.E.2d at 386. Following his termination, the employee amended his complaint by adding for retaliatory discharge on the theory that his termination violated a public policy espoused by the IWPCA. *Id.* On appeal, the Appellate Court of Illinois ruled that any policy concerns that underlie the IWPCA are insufficient to support a claim for retaliatory discharge. *Id.*, 314 Ill.App.3d at 440, 731 N.E.2d at 391. The court rationalized that any policy concerns underlying the IWPCA are purely "economic," concern "private and individual" rights, and do not "strike at the heart of social rights, duties, and responsibilities as is required to maintain a retaliatory discharge action." *Id.*

Similarly, in *Malone v. Am. Bus. Info.*, 262 Neb. 733, 740, 634 N.W.2d 788, 793 (2001), the Supreme Court of Nebraska ruled that the Nebraska Wage Payment and Collection Act, which contains similar provisions to our WPCA, "does not represent a very clear mandate of public policy which would warrant recognition of an exception to the employment-at-will doctrine."

This Court should likewise conclude that, the civil provisions of the WPCA do not warrant recognition of an exception to the employment-at-will doctrine. Again, disagreements between an employer and an individual employee about wages are purely private and, by their very nature, do not implicate any public interest, such as health, safety, or general welfare.

c. *The Only Occasions on Which Harless Has Been Applied to Employment Statutes Concerning Individual Employee Rights, Have Been With Respect to Statutes that Create Substantive Rights and Contain an Explicit Statement of Public Policy Regarding Anti-Retaliation.*

Inevitably, Mr. Greaser will argue that the *Harless* doctrine is not nearly as limited as the Respondents advocate. Respondents anticipate that Mr. Greaser will attempt to garner support for the proposition that WPCA is a proper *Harless* predicate by pointing to the several occasions in which this Court has permitted a *Harless* claim to proceed upon an employment statute that concerns individual employee rights, as opposed to the health, safety, or welfare of the public. As discussed below, these circumstances have been limited, and the WPCA is readily distinguishable from the employment statutes that have been recognized as a proper *Harless* predicate.

- First, in *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980), the Court ruled that the West Virginia Workers' Compensation Act (WVWCA), W.Va. Code § 23-1-1, *et seq.*, constitutes a substantial public policy sufficient to sustain a *Harless* claim by an employee who is discharged in retaliation for seeking workers' compensation benefits. The Court observed that the Act at § 23-5A-1 contains an express prohibition against discrimination and confers substantive rights upon employees.[11] *Id.*
- Next, in *McClung v. Marion Cty. Comm'n*, 178 W. Va. 444, 449, 360 S.E.2d 221, 226–27 (1987), the Court ruled that the West Virginia Minimum Wage and Maximum Hours Standards Act ("MWMHSA"), W.Va. Code § 21-5C-1, *et seq.*, constitutes a substantial public policy sufficient to sustain a *Harless* claim by an employee who is discharged in

[11] Specifically, W.Va. Code § 21-5C-7(a) provides: "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter."

retaliation for filing a lawsuit against her employer for unpaid overtime compensation. Of significance, the Court noted that the MWMHSA sets forth substantive wage, hour, and overtime standards, and it contains an express anti-retaliation provision.[12] *Id.*

- Finally, in *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997), the Court ruled that the West Virginia Human Rights Act (WVHRA) constitutes a substantial public policy sufficient to sustain a *Harless* claim by an employee who experiences sexual harassment and is retaliatorily discharged as a result, even if the employee works for an employer with less than twelve employees. The Court observed that the WVHRA at § 5-11-2 expressly creates substantive rights against discrimination, *i.e.*, the right to equal opportunity in employment without regard to either sex, race, age, handicap, religion or national origin. *Id.* Further, the Act at §5-11-9(7)(C) expressly prohibits retaliation.[13] *Id.*

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The common critical features shared by the three employment statutes involved in *Shanholtz*, *McClung*, and *Williamson* is they all: (a) create substantive rights for employees *and*

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[12] Specifically, W.Va. Code § 21-5C-7(a) provides:

> (a) Any employer who willfully discharges or in any manner willfully discriminates against any employee because such employee has made complaint to his employer, or to the commissioner, that he has not been paid wages in accordance with the wage and hour provisions of this article, or because such employee has instituted or is about to institute any civil action, or file any petition or criminal complaint against the employer by reason of the provisions of this article, or because such employee has testified or is about to testify in any administrative proceeding, civil action, or criminal action under this article, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars.

[13] Specifically, W.Va. Code § 5-11-9(7)(C) provides: "It shall be an unlawful discriminatory practice . . . [e]ngage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article."

(b) contain an explicit statement of public policy by the Legislature as to anti-retaliation. Significantly, the WPCA has neither of these key components.

It is well established that the WPCA does not create any substantive rights for employees. Indeed, it has been routinely recognized that the Act "does not create any substantive statutory right to wages or other forms of compensation; rather, it merely provides a statutory vehicle for employees to recover earned wages from an employer who has breached an underlying obligation to provide such compensation." *Byard v. Verizon W. Virginia, Inc.*, No. 1:11-cv-132, 2012 WL 1085775, at *4 (N.D.W. Va. Mar. 30, 2012).[14] Likewise, and seemingly even more significant, the WPCA does not contain any statement of public policy by the Legislature regarding anti-discrimination and/or anti-retaliation as to its civil provisions. *See generally*, W.Va. Code § 21-5-1, *et seq.*[15]

In the absence of such critical features, the civil provisions of the WPCA should not be recognized as proper *Harless* predicate. Doing so would be a stark departure from the precedent of this Court and a dramatic expansion of the *Harless* exception to the at-will doctrine to find that the civil provisions of the WPCA can sustain a wrongful discharge claim. Allowing a

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[14] *See also*, *Adkins v. Am. Mine Research, Inc.*, 234 W. Va. 328, 332, 765 S.E.2d 217, 221 (2014) ("[T]he WPCA itself does not create a right to compensation. Rather, it provides a statutory remedy when the employer breaches a contractual obligation to pay earned wages."); *Robertson v. Opequon Motors, Inc.*, 205 W.Va. 560, 566, 519 S.E.2d 843, 849 (1999) (noting that the WPCA "does not establish a particular rate of pay"); *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 216, 530 S.E.2d 676, 689 (1999) ("The WPCA does not create a right to fringe benefits."); *Gregory v. Forest River, Inc.*, 369 F. App'x 464, 469 (4th Cir. 2010) (noting that the WPCA "regulates the timing and payment of wages" but does not "establish how or when wages are earned."); *Barton v. Creasy Co. of Clarksburg*, No. 89–2170, 1990 WL 36773, at *2 (4th Cir. 1990) (per curiam) (noting that the WPCA does not create any substantive "entitlement[ ] to pay or wages").

[15] Mr. Greaser and the *amici curiae* both direct the Court's attention to § 21-5-12 of the WPCA, arguing that such provisions certainly reflect the Legislature's intent for the WPCA, in its entirety, to be a substantial public policy. To the contrary, W.Va. Code § 21-5-12 merely provides a mechanism by which to enforce the provisions of the Act, such as W.Va. Code § 21-5-3(a). W.Va. Code § 21-5-12 contains no expression of public policy regarding anti-retaliation sufficient to create an exception to the doctrine of at-will employment under *Harless*.

Harless claim to proceed under the civil provisions of the WPCA in the absence of a clear statement of public policy by the Legislature regarding anti-retaliation, would only serve to usurp the role of the Legislature. Recognizing that the concept of "public policy" is notoriously resistant to precise definition, this Court has repeatedly cautioned that the power to declare an employer's conduct as contrary to public policy is to be exercised with due deference to the Legislature as the primary organ of public policy in the State. *See generally Collins v. AAA Homebuilders, Inc.*, 175 W.Va. 427, 428, 333 S.E.2d 792, 793 (1985) (noting that the West Virginia legislature "has the primary responsibility for translating public policy into law"). Similarly, other courts have cautioned that judges should venture into the area of declaring public policy, if at all, with great care and due deference to the judgment of the legislative branch, in order to avoid the risk of mistaking their own subjective values, morals, and predilections for public policy, which deserves recognition at law through the legislative process. Along these lines, this Court has warned that, "[a]n issue which is fairly debatable or controversial in nature is one for the legislature and not for this Court." *Yoho*, 175 W. Va. at 561, 336 S.E.2d at 209.

Applied here, if the Legislature had desired to create a private cause of action for employees who were discharged for invoking the WPCA's enforcement mechanisms, it could have easily enacted an anti-retaliation provision similar to that found in the MWMHSA and the Fair Labor Standards Act at 29 U.S.C. § 215(a)(3). The fact that the Legislature has not done so is telling, and the Supreme Court should not inject itself to create a cause of action where the Legislature's expression on the subject is deafeningly silent. Were it truly the Legislature's desire to give anti-retaliation protections to employees who invoke the WPCA's enforcement mechanisms, it has certainly had plenty of opportunities to do so inasmuch as the Act has been

amended numerous times in recent years.[16] Yet, the Legislature has conspicuously remained silent, declining to enact an anti-retaliation provision or even inject any statement of public policy against retaliation under the WPCA.

4. *The Petitioner is Urging this Court to Carelessly Spring Open the Pandora's Box that the Roberts Court Took Care to Prudently Bind Shut.*

As discussed *supra*, when this Court previously considered whether the WPCA could sustain a *Harless* action, it carefully elected to recognize only the criminal provisions contained in § 21-5-5 and firmly cautioned that its decision was "in no way intended to unlock a Pandora's box of litigation in the wrongful discharge arena." *Roberts*, 191 W. Va. 219-20, 444 S.E.2d 729-30. By advocating for the civil provisions of the WPCA to be sanctioned as a proper *Harless* predicate, Mr. Greaser is urging this Court to carelessly spring open the Pandora's Box that the *Roberts* Court took care to prudently bind shut.

Recognizing the civil provisions of the WPCA as a proper *Harless* predicate will do nothing to ensure that employees are properly paid their wages due. Employers will not be more or less motivated to ensure that employees are timely and properly paid for their work knowing that they are unable to lawfully discharge employees who invoke W.Va. Code § 21-5-3(a). Either an employer is going to properly pay its employees, or it is not.

On the other hand, recognizing the civil provisions of the WPCA as a proper *Harless* predicate will only serve to eviscerate the at-will doctrine by providing yet another avenue for costly litigation against West Virginia employers. Prior Justices of this Court have recognized the problem of recklessly expanding the *Harless* doctrine without being mindful of the consequences: "[I]t is unjust to the economic system to foster nuisance suits which will undermine efficiency, raise costs, and destroy morale by leaving inferior employees in place

[16] Notably, all of these amendments have been designed to make the Act less draconian for employers.

because employers fear litigation." *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 313, 270 S.E.2d 178, 183 (1980) (Neeley, J., concurring). Should the Court adopt the position advocated by Mr. Greaser, employers of this State will be forced to retain employees solely because he or she has, at some point during the course of the employment relationship, raised a complaint, concern, or even just a question that arguably touches upon the requirements of W.Va. Code § 21-5-3(a), due to fear of costly litigation. If this Court elects to recognize W.Va. Code § 21-5-3(a) as a proper *Harless* predicate, then arguably any employee who has ever complained about any sort of glitch with their paycheck could be a potential *Harless* plaintiff in the event they are later discharged – regardless of how minor, technical, and innocent the payroll error was and regardless of how quickly the employer corrected the error. Under to the position advocated by Mr. Greaser (and the *amici curiae*), the mere fact that the employee *complained* about a payroll error would give him a right to sue under *Harless* in the event of a subsequent discharge.

The first problem with recognizing the requirements of W.Va. Code § 21-5-3(a) as a *Harless* predicate is that innocent payroll errors are a ubiquitous and inevitable occurrence – and far more common than the scenarios imagined by the *amici curiae*, where an employer intentionally withhholds undisputedly owed wages from an employee. Indeed, Respondents believe it would be rare, if not impossible, to find a West Virginia employer that has been in business for any amount of time and hasn't made a mistake in adminstering payroll from time to time, resulting in a technical violation of W.Va. Code § 21-5-3(a). Flawless administration of payroll is an unreasonable and unrealistic expectation to impose upon employers. Mistakes happen. Sometimes when errors occur, they are isolated and purely clerical; other times, errors

are systemic and widespread, impacting an employer's entire workforce.[17] Occasionally, payroll errors are even outside an employer's control, such when issues arise with their bank that is responsible for processing direct deposits. Yet, if Mr. Greaser's position is adopted, when such errors inevitably occur, each and every impacted employee would be immediately insulated from a subsequent discharge (even where termination is supported by legitimate, ironclad grounds) if the employer fears that the employee will challenge his termination under *Harless* by claiming that the discharge was somehow related to the employee's reaction to a payroll error. This is a chilling effect on employers.

Another problem with recognizing the requirements of W.Va. Code § 21-5-3(a) as a *Harless* predicate is that employees regularly raise internal questions, concerns, complaints, and gripes regarding their pay, *even when they are not actually owed any unpaid wages*:

- Sometimes employees advance internal complaints over the employer's calculation of their wages, bonus, or commission earnings.
- Other times, payroll disputes arise because an employee failed to properly prepare or submit paperwork that is required to determine his wages due for the pay cycle, resuting in a paycheck that is less than the employee expected to receive.
- In some situations, employees simply ask HR for an explanation of how their wages and withholdings were calculated to arrive at the net amount reflected in their paycheck.
- In other situations, employees challenge the employer's calculation of their wages and the amount of their paycheck, only to ultimately receive confirmation that the employer's calculation is, in fact, correct.
- Sometimes an employee will demand – either mistakenly or deliberately – to be paid amounts that he is not actually owed and which the employer steadfastly and correctly disputes.

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[17] Indeed, if a WPCA-based *Harless* claim is recognized by this Court, each and every one of the 8,000+ state employees who is ever discharged from his or her employment at any point in the future could be a potential *Harless* plaintiff in light of the pending statewide WPCA class action.

Arguably, all of these examples touch upon the employer's obligation under W.Va. Code § 21-5-3(a) to "settle with its employees at least twice every month . . . and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services." Certainly, *Harless* could not have been intended to encompass every wage-related dispute or discussion that an employee has with an employer.

It seems dangerously troublesome and devastating to the at-will doctrine to restrict an employer's ability to lawfully end an employment relationship in situations where the employee demands to be paid amounts that he is not actually owed. Or, to limit an employer's ability to lawfully end an employment relationship in circumstances where there is a fundamental disagreement between the employer and employee regarding their agreement as to pay and the employee demands to be paid wages he is not actually owed. Yet, this would be a real consequence of adopting the position advocated by Mr. Greaser.[18]

Mr. Greaser and the *amici curiae* urge this Court to recognize an exceedingly broad cause of action, covering employees who even just *complain* about perceived violations W.Va. Code § 21-5-3(a). For the reasons set forth above, such a cause of action would be unruly and unmanageable. If this Court is inclined to permit W.Va. Code § 21-5-3(a) to serve as a *Harless* predicate, then Respondents urge this Court to carefully define and limit the cause of action. Otherwise, the required "clarity" element is impermissibly lacking. *See, e.g., Birthisel,* 188 W.Va. at 377, 424 S.E.2d at 612 (recognizing that an employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.). If this Court is at all inclined to permit § 21-5-3(a) to serve as a *Harless* predicate, Respondents respectfully urge this Court to strictly limit the cause

[18] Moreover, because the *Harless* cause of action extends to constructive discharges, even employees who were not terminated, but instead elected to quit because of such disputes, would be able to advance a claim.

of action to situations in which an employee is fired because he *filed a lawsuit* against his employer to recover *undisputedly owed* unpaid wages.

C. Even if the Civil Provisions of the WPCA Do Constitute a Source of Substantial Public Policy Sufficient to Sustain a *Harless* Claim, the Trial Court's Order Granting Summary Judgment in Favor of Respondents Should, Nevertheless, be Affirmed on Multiple Other Grounds.

This Court has repeatedly announced and embraced its authority to "affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).[19]

Here, this Court should affirm the Trial Court's ruling granting summary judgment in favor of Respondents as to Mr. Greaser's *Harless* claim because: (1) the undisputed record evidence demonstrates that Gary Hinkle, as the decision-maker regarding Mr. Greaser's discharge only learned of Mr. Greaser's intentions to file a WPCA suit against Dettinburn *after* he was terminated; and (2) Mr. Greaser failed to offer any evidence of pretext regarding the Respondents' stated reason for his discharge, *i.e.*, his theft of company property.[20]

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[19] *Accord Sherwood Land Co. v. Mun. Planning Comm'n of City of Charleston*, 186 W. Va. 590, 592–93, 413 S.E.2d 411, 413–14 (1991); *McJunkin Corp. v. West Virginia Human Rights Comm'n*, 179 W.Va. 417, 369 S.E.2d 720 (1988); *Weirton Ice & Coal Co. v. Weirton Shopping Plaza, Inc.*, 175 W.Va. 473, 334 S.E.2d 611 (1985); *N.C. v. W.R.C.*, 173 W.Va. 434, 317 S.E.2d 793 (1984); *Chambers v. Sovereign Coal Corp.*, 170 W.Va. 537, 295 S.E.2d 28 (1982); *Environmental Prods. Co., Inc. v. Duncan*, 168 W.Va. 349, 285 S.E.2d 889 (1981); *Wilkinson v. Searls*, 155 W.Va. 475, 184 S.E.2d 735 (1971). *See also*, *Murphy v. Smallridge*, 196 W.Va. 35, 36–37, 468 S.E.2d 167, 168–169 (1996) ("An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support."); *Longwell v. Hodge*, 171 W.Va. 45, 47, 297 S.E.2d 820, 822 (1982) ("We agree with the Circuit Court, and affirm its decision, although for different reasons than those expressed by the lower court.").

[20] In the proceedings below, Mr. Greaser was unclear as to whether he intended to proceed under the mixed-motive theory or the pretext theory and oftentimes conflated the two theories. (App. 28-40). Thus, Respondents addressed both theories in moving for summary judgment, recognizing that both theories may be simultaneously presented in a *Harless* action per this Court's holding in *Page*.

1. ***The Trial Court's Decision Should Be Affirmed Because the Undisputed Record Evidence Demonstrated that Mr. Hinkle, the Decision-Maker Regarding Mr. Greaser's Discharge, Had No Knowledge that Mr. Greaser Had Any Intention Sue Dettinburn under the WPCA Until Well After His Termination.***

A plaintiff advancing a *Harless* claim under the mixed-motive theory must prove by a preponderance of the evidence that a forbidden intent was a motivating factor in the adverse employment action. *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. at 378, 390, 480 S.E.2d 817, 829. Preliminarily, the plaintiff must establish *both* the existence of a substantial public policy *and* that his termination was motivated by an unlawful factor contravening that policy. *Id.* Once a plaintiff has met his burden, liability will then be imposed on the employer unless it proves by a preponderance of the evidence that termination would have occurred even in the absence of the unlawful motive. *Id.*

Similarly, a plaintiff advancing a claim for retaliatory discharge under the pretext theory must initially establish a prima facie case by proving that: (1) he engaged in activity implicating a substantial public policy; (2) his employer was aware of his activity; (3) he was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation); (4) that discharge followed his protected activities within such period of time that the court can infer retaliatory motivation. Syl. Pt. 4, *Frank's Shoe Store v. West Virginia Human Rights Commission,* 179 W.Va. 53, 365 S.E.2d 251 (1986). If successful, the burden of production then shifts to the employer to come forward with a legitimate, non-retaliatory reason for its actions. *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 71–72, 479 S.E.2d 561, 581–82 (1996). Once the employer meets this burden of production, the presumption raised by the prima facie case is rebutted, and the onus is once again on the employee to prove that the employer's proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment

action. *Id.* Under the pretext theory, at all times the burden of proof or the risk of nonpersuasion on the issue of whether the employer intended to retaliate remains on the plaintiff. *Id.*

Under either theory, a plaintiff must ultimately come forth with evidence demonstrating that his employer was motivated by his conduct related to the substantial public policy at issue in making the decision to terminate his employment. *See Feliciano v. 7-Eleven, Inc.*, 210 W.Va. 740, 750, 599 S.E.2d 713, 723 (noting that the plaintiff must prove his dismissal was motivated by conduct related to the public policy at issue); *Page*, 198 W. Va. at 387, 480 S.E.2d at 826 (emphasis in original) (the plaintiff in a *Harless* action has the burden to prove *prima facie* that the discharge occurred *because* of the violation of that substantial public policy). Implicit in an employee's burden of proof is the necessity of showing that the decision-maker had knowledge of the employee having engaged in some form of protected conduct; without knowledge of such protected conduct there can obviously be no intention to retaliate upon such conduct.

Respondent argued to the Trial Court that summary judgment was appropriate as to Mr. Greaser's retaliatory discharge claim because there was no evidence that Gary Hinkle, who was the decision maker regarding Mr. Greaser's termination, had any knowledge that Mr. Greaser intended to file a WPCA claim against Dettinburn at the time Mr. Hinkle decided to discharge Mr. Greaser in December 2016. (App. 53-69, 147-150). Indeed, the undisputed record evidence demonstrated that Gary Hinkle only became aware that Mr. Greaser intended to file a WPCA lawsuit several months after his termination, when Mr. Greaser's attorneys contacted Dettinburn's counsel on either February 27 or March 14, 2017 and informed them that Mr. Greaser may be filing suit. (App. 183, 199). Further, Plaintiff readily admitted that he only spoke with Gary Hinkle once during the course of his employment, and the conversation had nothing to do with his wages. (App. 148, 156-157). Finally, and fatally, Mr. Greaser admitted

that he was unable to testify that Mr. Hinkle was aware that Greaser intended to file a WPCA suit prior to the date of his termination in December 2016. (App. 148-149, 165-166).

In endeavoring to oppose Respondents' motion for summary judgment, Mr. Greaser argued that he had "expressed desires" to file a WPCA lawsuit against Dettinburn while he was employed there.[21] In support of such argument, Mr. Greaser cited to his own deposition testimony that: (1) he had previously complained to the dispatcher at Dettinburn, Terry Dolly, about his pay; and (2) he had shared his intentions of filing a WPCA lawsuit with three of the mechanics at Dettinburn's shop. (App. 28-43).

Respondents easily countered Mr. Greaser's arguments in this regard. First, Respondents pointed to Mr. Greaser's testimonial admission that he never once complained to Gary Hinkle about his pay, and the fact that there is as no evidence that: (a) Mr. Dolly ever conveyed Mr. Greaser's complaints about his pay to Gary Hinkle; or that (b) Gary Hinkle otherwise knew of Mr. Greaser's complaints to Dolly about his pay. (App. 183, 199, 230, 236). Likewise, Respondents pointed to Mr. Greaser's admission that he was unable to testify that Gary Hinkle knew, at the time he decided to terminate Mr. Greaser for the tire theft, that Greaser was considering filing a WPCA lawsuit. (App. 165-166).

It is axiomatic that, in order to prove that an employer was unlawfully motivated to retaliation based upon an employee's conduct related to a substantial public policy, there must be evidence that the employer was aware of such conduct at the time the discharge decision was made. Mr. Greaser came forth with no evidence to refute Mr. Hinkle's steadfast insistence he

[21] Mr. Greaser also attempted to advance a contention that he was retaliatorily discharged because he refused to falsely implicate another driver, who had previously filed a WPCA action against Mr. Hinkle, in the tire theft. (App. 29). However, such argument was easily debunked by reference to Mr. Greaser's own testimony wherein he admitted that no one ever asked him to falsely implicate the other driver, and he had no factual basis for contending that Respondents had wanted him to do so. (App. 65-69, 249-252).

had no knowledge of Mr. Greaser's supposed intentions to file a WPCA claim at the time he decided to discharge Mr. Greaser in December 2016. It is self-evident that, without knowledge that Mr. Greaser intended to invoke the WPCA against Dettinburn, Mr. Hinkle could not have terminated Mr. Greaser for such unknown intentions. Accordingly, summary judgment as to Mr. Greaser's retaliation claim must be affirmed.

2. ***The Trial Court's Decision Should Also be Affirmed on the Grounds that Petitioner Failed to Proffer Any Evidence of Pretext Regarding the Respondents' Stated Reason for His Termination.***

Again, based on this notion that this Court may affirm a correct judgment of the lower court on any legal ground disclosed by the record, Respondents argue that summary judgment should be affirmed on the grounds that Mr. Greaser failed proffer any evidence demonstrating that the stated reason for his termination – his theft of company property – was pretextual.

Before the Trial Court, Mr. Greaser proffered *no evidence* of pretext. Rather, Mr. Greaser baldly argued that, because retaliatory discharge claims involve questions of motive, a jury should decide whether or not his theft of company property was the true reason for his discharge. (App. 39-40). Inasmuch as Respondents satisfied their burden of coming forth with a legitimate, non-retaliatory reason for Mr. Greaser's termination, which was supported by ample, undisputed evidence, his claim must fail in the absence of evidence of pretext. *See, e.g., Fuller v. Bd. of Governors of W. Virginia State Univ.*, No. 15-0973, 2016 WL 3369566 (W. Va. June 17, 2016) (memorandum decision) (affirming summary judgment as to *Harless* claim where employee had proffered no evidence of pretext and identified no question of material fact). Accordingly, summary judgment as to Mr. Greaser's retaliation claim must be affirmed.

D. PETITIONER CANNOT CHANGE THE THEORY OF HIS CASE ON APPEAL AND ARGUE FOR THE FIRST TIME THAT HIS WRONGFUL DISCHARGE CLAIM SHOULD HAVE SURVIVED SUMMARY JUDGMENT BASED UPON A PREVIOUSLY UNASSERTED PUBLIC POLICY ESPOUSED BY ARTICLE III, SECTION 17 OF THE WEST VIRGINIA CONSTITUTION.

Finally, Mr. Greaser spends the second half of his Petitioner's Brief arguing that the Trial Court erred in granting summary judgment on his wrongful discharge claim because his termination from Dettinburn violated a substantial public policy espoused by Article III, Section 17 of the West Virginia Constitution. Relying upon this Court's recent decision in *Burke v. Wetzel County Commission*, 240 W.Va. 709, 815 S.E.2d 520 (2018), Mr. Greaser argues that this Court has recognized that it contravenes substantial public policy for an employer to discharge an employee in retaliation for the employee's exercise of his constitutional rights to seek access to the courts of this State under Article III, Section 17 of the West Virginia Constitution.

Initially, Mr. Greaser's arguments for reversal are improper on the basis that he *never once* alleged or argued before the Trial Court that his *Harless* claim was premised upon his constitutional rights under Article III, Section 17. Rather, Mr. Greaser has *always* maintained that his *Harless* claim is premised *solely* upon an alleged public policy espoused by the WPCA. This Court has repeatedly cautioned litigants: "Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal." *Mayhew v. Mayhew*, 205 W. Va. 490, 506, 519 S.E.2d 188, 204 (1999).[22] Thus, Mr. Greaser cannot now entirely change his case theory and argue that the Trial Court erred by not allowing his *Harless* claim to proceed upon a substantial public policy contained in Article III, Section 17

[22] *See also, Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999); *Koffler v. City of Huntington*, 196 W.Va. 202, 207 n. 6, 469 S.E.2d 645, 649–650 n. 6 (1996); *Shrewsbury v. Humphrey*, 183 W.Va. 291, 395 S.E.2d 535 (1990); *Cline v. Roark*, 179 W.Va. 482, 370 S.E.2d 138 (1988); Syl. Pt. 2, *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987); *Trumka v. Clerk of the Circuit Court of Mingo County*, 175 W.Va. 371, 332 S.E.2d 826 (1985); Syl. Pt. 2, *Duquesne Light Co. v. State Tax Dept.*, 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert denied*, 471 U.S. 1029, 105 S.Ct. 2040 (1985); *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974); Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).

when such an argument was never advanced in the proceedings below. For these reasons, Mr. Greaser's second assignment of error and the arguments advanced in Section B of his Petitioner's Brief in should be summarily rejected.

Even if the Court were to consider Mr. Greaser's arguments regarding Article III, Section 17, they, nevertheless, fail based upon one simple fact: he was *not* a public employee but instead a private sector employee of Dettinburn. Contrary to Mr. Greaser's arguments, this Court has never held that a citizen's constitutional right under Article III, Section 17 of the West Virginia Constitution can sustain a *Harless* action by a private sector employee. Rather, as discussed herein, the only occasions on which this Court has recognized Article III, Section 17 as a permissible basis for a *Harless* claim have dealt with public employees.

First, in *McClung v. Marion County Comm'n*, 178 W.Va. 444, 360 S.E.2d 221 (1987), the Court held that 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, § 16) and to seek access to the courts of this State (W.Va. Const. Art. III, § 17) by filing an action against his employer to recover unpaid overtime wages. However, the plaintiff in *McClung* was a public employee – a dog catcher employed by the Marion County Commission.

More recently, in *Burke v. Wetzel County Commission*, 240 W.Va. 709, 727-28, 815 S.E.2d 520, 538-39 (2018), this Court reiterated its holding in *McClung*, again recognizing that a public employee may premise a *Harless* claim upon a violation of his constitutional rights in Article III, Sections 16 and 17. As was the case in *McClung*, the plaintiff in *Burke* was a public employee – a field appraisal supervisor employed by the Wetzel County Assessor's Office. *Id.* at 715, 815 S.E.2d 526.

Here, Mr. Greaser was *not* a public employee but instead a private sector employee of Dettinburn. Thus, the Court's holdings in *McClung* and *Burke* are simply inapplicable and do not provide a basis for overturning the Trial Court's Order.[23]

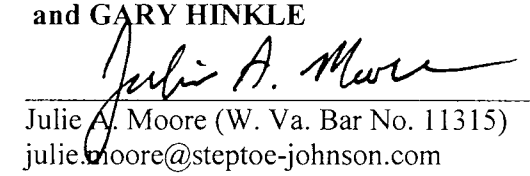
V. CONCLUSION

WHEREFORE, Respondents respectfully request that the judgment of the Circuit Court of Pendleton County be **AFFIRMED**.

[23] In *Tiernan v. Charleston Area Med. Center, Inc.*, 203 W.Va. 135, 144, 506 S.E.2d 578, 587 (1998), this Court considered whether a private sector employee could sustain a *Harless* claim based upon based upon the West Virginia Constitution. The Court ruled that "an at-will or otherwise employed private sector employee may sustain, upon 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." However, the Court limited its holding by stating that it would selectively determine on a case-by-case basis whether or not public policy emanating from specific provisions of the state constitution may be applied to private sector employers. *Id.*, 203 W.Va. at 145, 506 S.E.2d at 588. Ultimately, the Court demonstrated its reluctance to sanction a *Harless* claim by a private sector employee based upon the West Virginia Constitution, suggesting that: "in the absence of a specific state statute expressly imposing a public policy from the state constitution[ ] . . . upon private sector employers," no cause of action will exist. *Id.*, 203 W.Va. at 148, 506 S.E.2d at 591. Here, Mr. Greaser has not identified any specific state statute expressly imposing upon private-sector employers a public policy emanating from Article III, Section 17 related to the subjects of retaliation and the WPCA. Thus, applying the rationale in *Tiernan*, Mr. Greaser cannot invoke Article III, Section 17 to advance a *Harless* claim against Dettinburn.

Respectfully submitted this 3rd day of September 2019.

DETTINBURN TRANSPORT, INC., and GARY HINKLE



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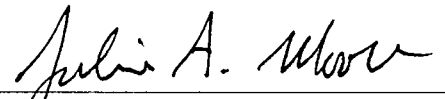

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