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22-0386

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
(Docket No. _____)
(Petition for Writ of Prohibition in Wetzel County Civil Action No. 20-C-5)**

SCANNED

STATE OF WEST VIRGINIA ex rel.

ERx, LLC,

Petitioner,

v.

**In Prohibition Upon
Original Jurisdiction**

**The Honorable JEFFREY D. CRAMER,
Judge of the Circuit Court of Wetzel County;
KAYLA McELDOWNEY; and
DEVANN E. DOTY;**

Respondents.



PETITION FOR WRIT OF PROHIBITION

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CERTIFICATION

On this, the 17th day of May 2022, I hereby certify that the Appendix as a whole is sufficient to permit the Court to fairly consider the question presented in the Petition.



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I. QUESTION PRESENTED

Whether the lower court abused its power, exceeded its jurisdiction, and committed clear error when it failed to grant summary judgment to Petitioner on Respondents' claims against Petitioner for alleged violations of the West Virginia Human Rights Act, West Virginia Code Section 5-11-1, *et seq.* (2021) ("WVHRA"), because Respondents were never Petitioner's employees and because Petitioner is not a statutory "employer," as set out in West Virginia Code Section 5-11-3(d), or a statutory "person," as set out in West Virginia Code Section 5-11-3(a), such that Petitioner is not subject to liability to Respondents for alleged violation of the West Virginia Human Rights Act.

II. STATEMENT OF THE CASE

A. Jurisdiction

This Petition is filed pursuant to Article 8, Section 3 of the Constitution of West Virginia, which grants this Honorable Court original jurisdiction in prohibition; pursuant to West Virginia Code Article 1, Chapter 53; and pursuant to the provisions of Rule 16 of the West Virginia Rules of Appellate Procedure. W. Va. R. App. P. 16.

B. Procedural History

On or about February 8, 2020, Respondents Kayla McEldowney and Devann Doty (collectively "Respondents") filed a Complaint in the Circuit Court of Wetzel County, West Virginia, and subsequently filed an Amended Complaint (App. 25-39 (without exhibits)), a Second Amended Complaint (App. 44-58 (without exhibits)), and a Third Amended Complaint (App. 59-88 (with exhibits)) (collectively "Complaint") against Petitioner, ERx, LLC ("ERx"), and against ERx's Co-Defendants below: Wetzel County Hospital Association and Wetzel County Hospital, Inc. (collectively "WCH"), and Mark Samaan, M.D., who are not parties to this Petition.

According to the Complaint, in May 2018, Ms. McEldowney and Ms. Doty were WCH's nursing employees when Dr. Samaan began working as a physician in WCH's Emergency Department (ED). (App. 59-88.) **Respondents do not allege that ERx employed Ms. McEldowney or Ms. Doty.** (See App. 59-88.) **Moreover, Respondents do not allege that ERx had 12 or more employees in West Virginia at relevant times.** (See App. 59-88.) Respondents allege that, in May and June 2018, Dr. Samaan created a sexually hostile work environment for Respondents at WCH. (See App. 59-88.) The crux of Respondents' Complaint against ERx is that, since Dr. Samaan was ERx's independent contractor physician when Dr. Samaan sexually harassed Respondents at WCH, ERx is liable to Respondents (1) under the WVHRA and (2) under negligence-based theories related to the selection, supervision, and retention of Dr. Samaan as an ED physician at WCH. Respondents seek damages for lost wages, mental and emotional distress, punitive damages, attorneys' fees and costs, among other things. (See App. 59-88.) ERx timely answered, denying any wrongful conduct and asserting a Crossclaim against Dr. Samaan. (See App. 89-116.)

The parties engaged in extensive discovery, exchanging written discovery requests and responses.¹ (See App. 117-372) The parties also took numerous depositions, including depositions of all parties and several fact witnesses. (See App. 373-443.) Dr. Samaan initially failed to appear to give his deposition. (See App. 444-49.)

After the close of discovery, ERx timely filed "Defendant ERx, LLC's Motion for Summary Judgment" ("Motion"), arguing that there is no genuine issue of material fact and that ERx is entitled to judgment as a matter of law on Respondent's claims against ERx. (See App. 3-24, 40-43, 59-449.) On March 14, 2022, Respondents filed a Response in opposition to ERx's

¹ There were voluminous documents produced in discovery, so only cited documents are produced in the Appendix.

Motion. (See App. 488-767.) On March 18, 2022, ERx filed a Reply in support of its Motion. (See App. 768-785, 450-87, 711-766.) In addition, since had Plaintiffs filed numerous irrelevant, inadmissible, misleading, and unfairly prejudicial documents with Plaintiffs' Complaint and in opposition to ERx's Motion, ERx jointly moved the lower court to strike and not consider said documents; however, the lower court never ruled on said joint motion to strike. (See App. 849-55.)

On April 6, 2022, the lower court held a hearing to address, *inter alia*, ERx's Motion. (See App. 1-2, 789-847.) At the hearing, the lower court did not indicate how the court would rule but advised the parties that it anticipated a ruling within approximately one week. (See App. 829, 844.) On April 26, 2022, the lower court's law clerk sent an email to all counsel and *pro se* Dr. Samaan, announcing as follows: "Defendants, ERx and Wetzel Co Hospital's respective Motions for Summary Judgement are DENIED. There are genuine issues of fact." (App. 786.)

On May 13, 2022, the lower court entered "Order Denying Defendants' Motions for Summary Judgment," including as the only reasoning for denial of ERx's Motion "that there are genuine issues of material fact to be resolved with respect to Plaintiffs' claims." (App. 787-88.)

The instant Petition follows this adverse ruling.

C. Statement of Fact

This case arises from Dr. Samaan's alleged sexual harassment of Respondents while they were WCH's employees. (See App. 59-88.) In 2018, ERx and WCH were parties to an "Exclusive Staffing Agreement for Hospital Emergency Department." (App. 264-278.) Under that Agreement, ERx provided administrative support to WCH by recruiting licensed independent contractor physicians to offer to WCH to staff WCH's ED, and WCH determined whether said physicians met WCH's credentialing and other requirements to put them on the ED schedule. (See App. 264-278, 390-95, 409-10, 427-30, 432-35.) WCH had "the right to follow its own Medical

Staff By-Laws in regard to credentialing of any Physician or Practitioner recruited by ERx.” (App. 266.)

In regard to background checks and credentialing of physicians offered by ERx to WCH, the Agreement placed the responsibility on WCH:

(c) Physician and Practitioner Background Checks. Hospital shall have primary responsibility for conducting all background checks for all Physicians and practitioners prior to granting medical staff or allied professional privileges. ERx shall provide to Hospital any information regarding candidates for positions as Department Physicians or Practitioners which ERx knows of upon general inquiry and reasonably deems relevant as to granting of privileges. The submission of the candidate's application for privileges satisfies this requirement for disclosure by ERx.

(App. 268, 390-95, 427-30, 432-35.)

Under the Agreement, WCH had the right to request removal of a physician from the ED schedule. (App. 266.) If ever WCH desired to “restrict, suspend, place on probation or terminate, on a temporary or permanent basis, any Physician or Practitioner with or without cause,” WCH was to make such request in writing to ERx, and, after such written request was made, “[a]ction thereon by ERx [was to] be taken within a reasonable period of time.” (App. 266.)

In or about March 2018, Dr. Samaan applied to ERx as an independent contractor physician by submitting a Medical Provider Application to ERx. (See App. 256-57.) On his Application, Dr. Samaan answered “No” to 13 background and licensure questions, including an answer of “No” as to whether Dr. Samaan’s medical license in any state had ever been limited, denied, suspended or revoked and an answer of “No” as to whether any allegation or claim of sexual misconduct had ever been made against Dr. Samaan. (App. 256-57.) ERx had no knowledge that Dr. Samaan’s representations to ERx were anything other than true, and ERx relied upon WCH to perform formal credentialing of Dr. Samaan. (See App. 390-95.) In addition to ERx asking Dr. Samaan these 13 background and licensure questions, on March 28, 2018, ERx made a reasonable inquiry about Dr. Samaan by performing an online query for a report on Dr. Samaan from the National Practitioner

Data Bank (“NPDB”), which is widely considered the best source for adverse information about a physician.² (See App. 450.) Since federal law makes all NPDB reports confidential (with violations punishable by a civil penalty of up to \$10,000), ERx is precluded from producing the content of the NPDB’s report on Dr. Samaan. (See App. 450.) However, the fact that ERx made the query and obtained the NPDB’s *one-page report* on Dr. Samaan is not confidential and is evidenced by the ERx’s Privilege Log. (See App. 450.) Thus, ERx absolutely performed a reasonable inquiry about Dr. Samaan by inquiring federal repository to which licensing boards, states, providers, and others are required under federal law to report adverse actions and information about practitioners like Dr. Samaan. (See App. 450.)

In or about April 2018, Dr. Samaan and ERx entered into an “Independent Contractor

² The NPDB is an entity created pursuant to federal law. See 45 C.F.R. § 60.1, *et seq.* (2021). According to the NPDB’s website:

The [NPDB] is a web-based repository of reports containing information on medical malpractice payments and certain adverse actions related to health care practitioners, providers, and suppliers. Established by Congress in 1986, it is a workforce tool that prevents practitioners from moving state to state without disclosure or discovery of previous damaging performance. Federal regulations authorize eligible entities to report to and/or query the NPDB. Individuals and organizations who are subjects of these reports have access to their own information. The reports are confidential, and not available to the public. The NPDB assists in promoting quality health care and deterring fraud and abuse within health care delivery systems.

Available at <https://www.npdb.hrsa.gov/topNavigation/aboutUs.jsp>. Federal law mandates certain reporting to the NPDB, including, but not limited to, medical malpractice payments, licensure and certification actions taken by states and medical boards, adverse actions taken against clinical privileges, civil judgments, and negative actions or findings taken by peer review organizations or private accreditation entities. See, e.g., 45 C.F.R. §§ 60.7-60.13. The NPDB’s repository may contain information about “sexual perversion” of a practitioner. See, e.g., *Goodrich v. Teets*, 510 F. Supp. 2d 130 (D.D.C. 2007). Hospitals are required to query the NPDB when a physician applies for clinical privileges and every two years thereafter. 45 C.F.R. § 60.17.

NPDB reports are confidential. 45 C.F.R. § 60.13. While the mere fact that a report was made or obtained is not confidential, the information within the report is confidential:

Information reported to the [NPDB] is considered confidential and shall not be disclosed outside the Department of Health and Human Services. Persons and entities which receive information from the NPDB either directly or from another party must use it solely with respect to the purpose for which it was provided. Any person who violates this provision shall be subject to a civil money penalty of up to \$ 10,000 for each violation.

Wahi v. Charleston Area Med. Ctr., Inc., 562 F.3d 599 (4th Cir. 2009) (citing 45 C.F.R. § 60.13).

Agreement for Medical Care Providers.” (See App. 258-63.) The “Independent Contractor Agreement for Medical Care Providers” stated, among other things, that Dr. Samaan was not ERx’s employee and that ERx did not control Dr. Samaan’s practice of medicine:

9. RELATIONSHIP BETWEEN THE PARTIES

- A. Provider is an independent contractor of ERx, and ERx does not have the right nor the authority to control, direct, or supervise Provider’s practice of medicine or the exercise of Provider’s medical judgment.
- B. Provider represents and warrants that Provider shall practice medicine, provide health care services, and carry out professional responsibilities under this Agreement using Provider’s medical judgment and in conformance with the national standard of care which may include and/or be informed by the standards established by ACEP, AMA, and/or the Hospital.
- C. Provider does not have the status of an employee and is not entitled to participate in arrangements, plans, or distributions by ERx pertaining to or in connection with any pension, stock, bonus, profit sharing or similar benefit plans provided to employees of ERx.

(See App. 260.) Under the “Independent Contractor Agreement for Medical Care Providers,” Dr. Samaan was in control of his practice of medicine and promised to perform his duties to the best of his professional abilities; to cooperate with WCH personnel; to adhere to WCH’s rules and regulations, medical staff guidelines, and by-laws; and to maintain the highest ethical and moral standards. (See App. 258-63, 405-6.)

Importantly, Dr. Samaan was never an employee of ERx; rather, Dr. Samaan was an independent contractor physician. (See App. 238-40, 258-63, 397-98.) In fact, **ERx had zero employees in West Virginia**, only a few employees working as office staff in ERx’s Tennessee office. (See App. 238-40, 388-89, 397-98, 403-4.) **Respondents have offered no evidence that ERx had 12 or more employees in West Virginia at any relevant time, such that this material fact is uncontested.** (See App. 238-40, 258-63, 388-89, 397-98, 403-4.)

In or about April 2018, Dr. Samaan was offered to WCH to staff WCH’s ED as a physician pending WCH’s determination that Dr. Samaan met WCH’s credentialing and other requirements for WCH’s medical staff. (See App. 258-63, 264-78.) While credentialing documents are privileged by statute, WCH indeed appears to have performed extensive credentialing on Dr. Samaan starting on or about March 29, 2018. In or about May 2018, WCH determined that Dr. Samaan met WCH’s credentialing and other requirements for WCH’s medical staff and issued

temporary privileges to Dr. Samaan to work as an ED physician at WCH. (*See App. 258-63, 279-83, 284.*)

For six weeks in May and June 2018, Dr. Samaan was an independent contractor physician scheduled to work in WCH's ED, with his first shift on May 6th and his last shift beginning on June 19th and ending at 7:00 a.m. on June 20th. (*See App. 258-63, 258-63, 412.*) Dr. Samaan's ED supervisor was ED Medical Director, William Trusnovic, M.D., who was an independent contractor of ERx but supervised by WCH's Chief of Medical Staff, Donald Blum, M.D.; and Dr. Blum and WCH's CEO, Brian Felici, were responsible for ensuring that Dr. Samaan complied with WCH policies forbidding disruptive behavior involving members of the medical staff. (*See App. 411-12, 430-31.*) While Dr. Trusnovic generally supervised the ED and managed problems arising in the ED, Dr. Trusnovic was not present in the ED at all times and did not control the other ED physicians' practice of medicine. (*See App. 744-45, 747-48.*) Dr. Trusnovic's ED shifts may have briefly overlapped with some of Dr. Samaan's ED shifts at change-of-shift, but Dr. Trusnovic did not observe any offensive conduct by Dr. Samaan. (*See App. 747-48.*) ERx maintained broad power to fill shifts on WCH's ED schedule and to remove Dr. Samaan from the ED schedule but ERx had no power of control over Dr. Samaan's practice of medicine. (*See App. 258-78.*)

In May and June 2018, Respondents were nurses and employees of WCH. (*See App. 59-88, 118, 121.*) **ERx did not employ Respondents.** (*See App. 59-88, 118, 121; 238-39.*) **This material fact is uncontested.** (*See App. 59-88, 118, 121; 238-39.*)

Starting in or about mid-May 2018, while Respondents were working at WCH, Plaintiffs had interactions with Dr. Samaan which made Respondents uncomfortable and culminated in complaints to WCH administration in or about mid- to late-May 2018. (*See App. 128-29, 147-48, 375-77, 380-85.*) In regard to Ms. Doty, in or about mid-May 2018, Dr. Samaan complimented

her beauty and attractive figure and asked her for a date. (*See App. 128-29, 375-77.*) During interactions with Ms. Doty, Dr. Samaan did not use vulgar language and only touched her once when he used his finger to point to a cross tattoo on her wrist and tell her it was like his own cross tattoo. (*See App. 128-29, 375-77.*) Starting in or about mid-May 2018, Ms. Doty complained to WCH that Dr. Samaan was sexually harassing her. (*See App. 128-29, 375-77.*) In regard to Ms. McEldowney, Dr. Samaan asked her if she and her husband had an open relationship, asked her whether she would cheat on her husband, and indicated to her that he wanted to go on a date with her. (*See App. 380-85.*) Besides working with Dr. Samaan in WCH's ED, Ms. McEldowney had no contact with Dr. Samaan and Dr. Samaan never touched Ms. McEldowney. (*See App. 147-48.*) Starting on or about June 4, 2018, Ms. McEldowney complained to WCH about Dr. Samaan's inappropriate comments, and, on June 12, 2018, Ms. McEldowney complained to WCH that she did not feel comfortable working with Dr. Samaan. (*See App. 147-48.*)

After receiving Respondents' complaints about Dr. Samaan in or about mid- to late-May 2018, WCH undertook a rapid, professional investigation. (*See App. 424-26, 436-39.*) Specifically, WCH's CEO Brian Felici delegated investigative authority to WCH's Chief Nursing Officer, Shannon Smith, and to WCH's Director of Operations, Vincent Tad Greene, who met with Respondents about their complaints, discussed the complaints with Dr. Trusnovic, and interviewed other WCH employees. (*See App. 413-14, 417-18, 424-26, 432-39.*) Dr. Trusnovic had not observed any of the alleged offensive conduct by Dr. Samaan and had no authority to remove Dr. Samaan without personally observing Dr. Samaan perform some egregious act. Dr. Trusnovic instructed Dr. Samaan to provide him with a written response to the complaints and, in the meantime, to just do his job in the ED. (*See App. 747-48.*)

On or about June 13th, there were discussions between WCH and ERx about removing Dr.

Samaan from the ED schedule by the end of June 2018, but WCH did not request that Dr. Samaan be removed from the ED schedule at that time. (*See App. 419-21, 440-43.*) From the time WCH received written complaints about Dr. Samaan, the investigation took approximately two to three weeks, and, on or about June 20th, WCH decided that Dr. Samaan should be replaced and asked ERx to remove Dr. Samaan from the ED schedule following his June 19th overnight shift ending at 7:00 a.m. on June 20th. (*See App. 396-402, 412, 419-21; 438-43.*) Prior to Dr. Samaan's last shift starting on June 19th, "there was no action by WCH, or on its behalf by anyone else, to remove Dr. Samaan from the work schedule in the [ED]." (*See App. 415-16.*) Even though WCH's June 20th request to ERx was not in writing, ERx immediately complied by removing Dr. Samaan from the ED schedule as of June 20th and finding an appropriate replacement for the remainder of the ED shifts. (*See App. 421, 442-43.*)

III. SUMMARY OF ARGUMENT

ERx respectfully petitions this Honorable Court for a rule to show cause and, ultimately, a writ of prohibition which effectively precludes the Honorable Jeffrey D. Cramer, Judge of the Circuit Court of Wetzel County, West Virginia, from conducting any further proceedings in Wetzel County Civil Action No. 20-C-5 before granting ERx's Motion, in part, and dismissing, with prejudice, Respondents' WVHRA claims against ERx. This Petition addresses one order of the Honorable Jeffrey D. Cramer: the Order of May 13, 2022, denying ERx's Motion.

The lower court should have granted summary judgment to ERx on Respondents' WVHRA claims because there is no genuine issue of material fact and because ERx is entitled to judgment as a matter of law on WVHRA claims. There is no genuine issue of material fact that Respondents were WCH's employees, not ERx's employees, and that ERx had zero employees in West Virginia at all relevant times. Respondents produced no evidence to support their bald allegation that ERx

was Dr. Samaan's employer (or Dr. Trusnovic's or anyone else's in West Virginia). Accordingly, there is no genuine issue of material fact: ERx was not Respondents' employer, and ERx had fewer than 12 (zero) employees in West Virginia.

As a matter of law, since ERx was not Respondents' employer, ERx is not liable to Respondents for any alleged violation of the WVHRA. Since ERx had fewer than 12 employees in West Virginia at all relevant times, ERx does not qualify as a statutory "employer," as set out in West Virginia Code Section 5-11-3(d). Likewise, since ERx is not a statutory "employer," ERx also does not meet the WVHRA's definition of a statutory "person," as set out in West Virginia Code Section 5-11-3(a). It follows that ERx is not subject to liability for an alleged violation of the WVHRA either as an "employer" or as a "person," and the lower court should have granted summary judgment to ERx on all WVHRA claims. While the WVHRA protects employees from workplace harassment, the WVHRA does not provide for vicarious liability to be imputed to a non-employer like ERx - with zero employees in West Virginia - for alleged sexual harassment of two women who were not even ERx's employees. For all these reasons, the lower court abused its power, exceeded its jurisdiction, and committed clear error when it failed to grant summary judgment to ERx on Respondents' WVHRA claims against ERx, and the requested writ of prohibition should issue.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, oral argument is not necessary to decide this Petition because the law is clear. *See* W. Va. R. App. P. 18(a).

V. ARGUMENT

A. The standard of review applicable to the instant petition is abuse of power and exceeding legitimate jurisdictional power.

West Virginia Code provides that a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W. Va. Code § 53-1-1. In determining whether a lower court has exceeded its legitimate powers, this Court considers the following five factors:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression.

State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 40, 829 S.E.2d 35, 40 (2019) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)). Not all factors must be present for a writ to issue; however, “the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.*

In applying these factors to the instant Petition, it is apparent that a writ should issue to correct the erroneous order of the lower court that denied ERx’s Motion. First, the lower court’s order was clearly erroneous as a matter of law and, based upon this Honorable Court’s prior decisions, is an oft repeated error. With the WVHRA, the West Virginia Legislature prohibited discriminatory conduct in a manner which does not apply businesses which do not require the use of more 12 employees in West Virginia, such that the WVHRA plainly does not apply to businesses with zero employees in West Virginia. Second, the lower court abused its power and exceeded its legitimate jurisdictional power by disregarding that, while the WVHRA provides for

employer liability where an employee is sexually harassed in her workplace, the WVHRA does not apply to a non-employer third-party like ERx – which was not Respondents’ employer and which had no employees in West Virginia. ERx may not be found vicariously liable to Respondents for the conduct of its independent contractor, Dr. Samaan, in harassing Respondents, and ERx may not be found liable to Respondents for allegedly “aiding and abetting” in Dr. Samaan’s harassment of Respondents. Third, clarification of the WVHRA’s lack of applicability to a non-employer third-party, which did not even employ the persons allegedly harassed and did not have 12 or more employees in West Virginia, is important not only to ERx, which has been bearing the expense of defending itself against Respondents’ WVHRA claims for more than 18 months, but also is important to innumerable other small businesses which should not be forced to defend WVHRA claims when the West Virginia Legislature intended the WVHRA to be inapplicable to them.

B. The lower court abused its power, exceeded its jurisdiction, and committed clear error in denying ERx’s Motion because it is undisputed that Respondents are not ERx’s employees and that ERx had zero (less than 12 employees) in West Virginia, such that ERx is not a statutory “employer” or “person” and may not be found liable to Respondents under the WVHRA.

The WVHRA provides for *employer liability* where that employer’s employee is sexually harassed in the workplace. Since ERx was not Respondents’ employer and had zero employees in West Virginia, ERx is not subject to the WVHRA, and the lower court abused its power, exceeded its jurisdiction, and committed clear error in failing to grant summary judgment to ERx on Respondents’ WVHRA claims.

The WVHRA prohibits discrimination in public and private employment on the basis of sex. *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995). The WVHRA “**imposes on employers a duty** to ensure, as best they can, that their workplaces are free of sexual harassment

that creates a hostile or offensive working environment.” *Conrad v. ARA Szabo*, 198 W. Va. 362, 370, 480 S.E.2d 801, 809 (1996) (citing *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995) (emphases added)).

“To establish a claim for sexual harassment under the [WVHRA] based upon a hostile or abusive work environment, a **plaintiff-employee** must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the **plaintiff’s conditions of employment** and create an abusive work environment; and (4) **it was imputable on some factual basis to the employer.**” Syl. Pt. 5, *Hanlon*, 195 W. Va. 99, 464 S.E.2d 741 (emphases added). The WVHRA contains the following definitions:

The term “**employer**” means . . . **any person employing twelve or more persons within the state** for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year: Provided, That such terms shall not be taken, understood or construed to include a private club.

W. Va. Code § 5-11-3(d) (emphases added). “**To be an ‘employer’ under subsection (d), a person must have been employing 12 or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed.**” *Williamson v. Greene*, 200 W. Va. 421, 427, 490 S.E.2d 23, 29 (1997) (emphases added).

The WVHRA also prohibits a “person” from engaging in acts which aid and abet an unlawful act of discrimination. W. Va. Code § 5-11-9(7). Under Section 5-11-9(7), it is an unlawful discriminatory practice for any “person” to do the following:

Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to **aid, abet**, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section.

Id. (emphasis added). Under the WVHRA, the “term ‘person’ means one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons.” W. Va. Code § 5-11-3(a). For liability under Section 5-11-9(7), a statutory “person” must actually “engage in” some conduct. *See id.* at § 5-11-9(7).

The term “person” in the context of the WVHRA has been clarified to mean **employees and employers, as well as fellow-employees and supervisors**. *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 730, 461 S.E.2d 473, 476-78 (1995) (holding that a plaintiff employee had a WVHRA cause of action against a **fellow-employee or supervisor**, considered a “person” under the WVHRA, for aiding and abetting the employer in discrimination against the employee); *Conrad*, 198 W. Va. at 370, 377-78, 480 S.E.2d at 816-17 (holding that the WVHRA’s use of “person” means **employees/fellow employees and employers**); *St. Peter v. AMPAK-Div. of Gatewood Prods.*, 199 W. Va. 365, 373-374, 484 S.E.2d 481, 489-90 (1997) (holding that an employee had a WVHRA cause of action against a **fellow employee who aided or abetted an employer** in engaging in unlawful discriminatory practices).

A small business employer with less than 12 employees “cannot be deemed a statutory ‘person’ for purposes of relying on the Act’s authority to make an award of fees and costs at the discretion of the trial court.” *Kalany v. Campbell*, 220 W. Va. 50, 58, 640 S.E.2d 113, 121 (2006). In *Kalany*, the plaintiff had filed a civil action against her employer, Herman Campbell of Irene’s Bar, because Mr. Campbell had “grabbed her against her will and kissed her on the lips” and because Mr. Campbell later told the plaintiff that she was permanently laid off after the plaintiff’s husband complained to Mr. Campbell about his conduct. *Id.* at 52-53, 640 S.E.2d at 115-16. The *Kalany* plaintiff asserted, among other things, causes of action for hostile work environment and

retaliatory discharge under the WVHRA and causes of action for common law sexual harassment, retaliatory discharge, and battery. *Id.* at 53, 640 S.E.2d at 116. Since Mr. Campbell had less than 12 employees, the trial court found that Mr. Campbell did not meet the statutory definition of “employer” and that the WVHRA was inapplicable. *Id.* The trial court granted summary judgment to Mr. Campbell on all WVHRA claims but submitted to the jury the common law sexual harassment, retaliatory discharge, and battery. *Id.* The jury found in the plaintiff’s favor only as to her common law retaliatory discharge claim and awarded her \$7,824 for past lost wages. *Id.* The plaintiff filed a motion for attorney’s fees and costs based on the jury’s award of damages for common law retaliatory discharge, and the trial court awarded the plaintiff \$57,332.50 in attorney’s fees and \$2,762.56 under the WVHRA. *Id.* at 53-54, 640 S.E.2d at 116-17.

On appeal, the *Kalany* Court addressed, among other things, the trial court’s erroneous decision that Mr. Campbell met the WVHRA’s definition of “person” to be liable for attorney’s fees and costs under the WVHRA. *Id.* The *Kalany* Court cited to Section 5-11-3(a) for the WVHRA’s definition of “person”: “Under the [WVHRA], a ‘person’ is defined as: ‘one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons.’” *Id.* at 57 n.12, 640 S.E.2d at 120 n.12 (internal citation removed). The Court found as follows:

To come within the provisions of the [WVHRA] for purposes of a fee award, the trial court reasoned “that Herman Campbell is a ‘person’ subject to the [WVHRA].” Having deemed [Mr. Campbell] a “person” for purposes of the [WVHRA’s] provisions, the trial court proceeded to award attorney’s fees and costs against him “as a statutory ‘person’, for his reprisal against Patty Kalany for reporting the kiss to her husband, pursuant to *W.Va. Code* § 5-11-9 and § 5-11-3.”

Id. at 57, 640 S.E.2d at 120 (internal citation removed). On appeal, Mr. Campbell argued that “given the trial court’s initial determination of the [WVHRA’s] inapplicability based on Mr.

Campbell's failure to meet the statutory definition of an 'employer,' its subsequent conclusion that Mr. Campbell fell within the [WVHRA's] definition of a 'person' is simply 'absurd, unjust and unreasonable.'" *Id.* The *Kalany* Court agreed with Mr. Campbell:

[Mr. Campbell] argues that this ruling defies the rule of statutory construction that counsels against statutory nullity. Specifically, [Mr. Campbell] suggests that if the statutory definition of "person" was intended to broadly encompass all individuals, then the [WVHRA's] separate reference to acts of discrimination committed by "any person, employer, . . ." would have no meaning and thereby nullify all significance to the numerous terms that follow the word "person" in West Virginia Code § 5-11-9(7). We agree.

Id. at 57 n.13, 640 S.E.2d at 120 n.13. Noting that it could not be seriously disputed that Mr. Campbell was an employer, just not an employer of at least 12 employees to make him subject to the WVHRA, the *Kalany* Court explained that the trial court had been "reaching in trying to bring Mr. Campbell within the parameters of the [WVHRA] by characterizing him as 'person' subject to the [WVHRA's] provisions." *Id.* The *Kalany* Court explained, "[T]here is a rational basis for enacting state and federal legislation which addresses prohibited discriminatory conduct in a manner that does not apply to employers whose business interests do not require the use of more than a minimal number of employees." *Id.* The *Kalany* Court reversed the trial court's award of attorney's fees and costs under the WVHRA, holding as follows:

Mr. Campbell, as an employer who does not come within the protections of the [WVHRA] based on the minimal number of employees he hires, cannot be deemed a statutory "person" for purposes of relying on the [WVHRA's] authority to make an award of fees and costs at the discretion of the trial court.

Id. at 58, 640 S.E.2d at 121. The *Kalany* Court announced a new point of law in Syllabus Point 2:

An employer who does not come within the protections of the [WVHRA], based on the minimal number of employees he hires, cannot be deemed a statutory "person" for purposes of relying on the [WVHRA's] authority to make an award of fees and costs at the discretion of the trial court.

Id. at 52, Syl. 640 S.E.2d at 115 (emphases added).

Sixteen days after the lower court heard oral argument on ERx's Motion, but well before the lower court denied ERx's Motion, this Honorable Court issued a new opinion which establishes that ERx may not be found liable as a statutory "employer" or "person" under the WVHRA, such that the requested writ of prohibition is warranted. *See Pajak v. Under Armour, Inc.*, No. 21-0484, 2022 W. Va. LEXIS 307 (W. Va. April 22, 2022).

In *Pajak*, this Honorable Court answered a certified question from a federal district court, reformulated as follows:

May an entity that does not meet the West Virginia Human Rights Act definition of "employer," as set out in West Virginia Code § 5-11-3(d) (eff. 1998), be potentially liable to its own employee as a "person," as defined in West Virginia Code § 5-11-3(a), for an alleged violation of West Virginia Code § 5-11-9(7) (eff. 2016)?

First noting that the district court had already determined the defendant, Under Armour, did not meet the statutory definition of "employer" under Section 5-11-3(d), i.e., lacking the minimum 12 employees in West Virginia), this Court described its task: "simply to determine, in the context of an employee/employing entity, whether the term "person" as used in West Virginia Code § 5-11-9(7) is intended by the Legislature to include an entity, such as Under Armour, that does not meet the WVHRA definition of "employer." *Id.* at *9. **The West Virginia Legislature gave the term "employer" a specific definition when used in the WVHRA, and "[t]hat definition includes 'any person,' but only when such person meets the remaining criteria set out in the definition, i.e., 'employing twelve or more persons within the state' during the requisite period of time and not being a private club."** *Id.* at *14-15 (quoting W. Va. Code § 5-11-3(d) (emphasis added)). Therefore, the *Pajak* Court concluded that **"the plain language of the definition of 'employer' itself excludes a 'person' when that person does not meet the remaining elements of the**

definition, but necessarily includes ‘any person’ that does meet those elements.” *Id.* at *15 (emphasis added). This Court explained, “To find otherwise would ignore a plaintiff’s status as an employee and allow such an employee to circumvent the Legislature’s plain intent that only employing entities who meet the WVHRA definition of ‘employer’ are subject to liability thereunder.” *Id.* (citing *Kalany*, 220 W. Va. at 58, 640 S.E.2d at 121 (observing a rational basis for prohibiting discriminatory conduct “in a manner that does not apply to employers whose business interests do not require the use of more than a minimal number of employees”)). Therefore, the *Pajak* Court answered the certified question in the negative and issued a new Syllabus Point:

An entity that does not meet the West Virginia Human Rights Act definition of “employer,” as set out in West Virginia Code § 5-11-3(d) (eff. 1998), may not be potentially liable to its own employee as a “person,” as defined in West Virginia Code § 5-11-3(a), for an alleged violation of West Virginia Code § 5-11-9(7) (eff. 2016).

Id. at *2 (emphasis added).

Harmonizing the law applicable to this case unavoidably leads to the following logical conclusion: If a small business employer is not subject to liability under the WVHRA as an “employer” because it does not employ the requisite minimum of 12 persons in West Virginia *may not be potentially liable as a “person” to its own employee*, certainly a business with zero employees in West Virginia is not subject to liability under the WVHRA as an “employer” because it obviously does not employ the requisite minimum of 12 persons in West Virginia and may not be potentially liable as a “person” to a non-employee. *See id.*; *Kalany*, 220 W. Va. at 58, 640 S.E.2d at 121. In summary, while the WVHRA creates a right of action by an employee against that employee’s employer, including fellow employees and supervisors, for conduct allegedly violative of the WVHRA, including aiding and/or abetting unlawful discriminatory practices, the WVHRA does not create a right of action against a non-employer third party for conduct allegedly

violative of the WVHRA, including aiding and/or abetting unlawful discriminatory practices by an independent contractor in sexual harassment of someone else's employee in another employer's workplace. *See* W. Va. Code § 5-11-1, *et seq.*; *Williamson*, 200 W. Va. 421, 490 S.E.2d 23; *Holstein*, 194 W. Va. 727, 461 S.E.2d 473; *Conrad*, 198 W. Va. 362, 480 S.E.2d 801; *St. Peter*, 199 W. Va. 365, 484 S.E.2d 481; *Kalany*, 640 S.E.2d 113; *Pajak*, 2022 W. Va. LEXIS 307.

The lower court abused its power, exceeded its jurisdiction, and committed clear error by failing to grant summary judgment to ERx on Respondents' WVHRA claims (1) because Respondents were never ERx's employees, such that Respondents have no right of action under the WVHRA against ERx, a non-employer third party to Respondents, and (2) because ERx is not subject to liability under the WVHRA as an "employer," since it did not employ the requisite minimum of 12 persons in West Virginia at any relevant time, and may not be potentially liable as a "person" under the WVHRA.

It was clear error for the lower court to deny ERx's Motion with the only explanation being "genuine issues of fact" without any finding of fact material to Respondents' WVHRA claims against ERx. There are very few facts which are material to the legal determination of whether ERx is a statutory "employer" subject to the WVHRA, and those material facts are either undisputed or without genuine issue. It is undisputed that ERx was not Respondents' employer. Respondents were employed by WCH when Dr. Samaan allegedly sexually harassed them and created a hostile work environment for them at WCH. In addition to these undisputed facts, which by themselves should have led the lower court to conclude that Respondents have no right of action under the WVHRA against ERx, there is no genuine issue that ERx had zero employees in West Virginia - only a few employees in its Tennessee office. Without a doubt, ERx did not have the statutory requisite of 12 or more employees in West Virginia at all relevant times. Dr. Samaan

was an independent contractor pursuant to the “Independent Contractor Agreement for Medical Care Providers,” under which Dr. Samaan was in control of his practice of medicine and promised to perform his duties to the best of his professional abilities; to cooperate with WCH personnel; to adhere to WCH’s rules and regulations, medical staff guidelines, and by-laws; and to maintain the highest ethical and moral standards. Even if Dr. Samaan could be considered an “agent” of ERx, as Respondents have contended, Dr. Samaan is just one individual. Thus, there is no genuine issue of fact material to Respondents’ WVHRA claims against ERx: ERx was not Respondents’ employer, and ERx did not have 12 or more employees in West Virginia.

In light of these material facts, and under the plain language of the WVHRA and common law clarifying the application of the WVHRA, including *Holstein*, *Hanlon*, *Williamson*, *Kalany*, and *Pajak*, the lower court committed clear error by failing to grant ERx’s Motion as to Respondents’ WVHRA claims against ERx. Since ERx is not Respondents’ employer, Respondents have no right of action against ERx under the WVHRA. The WVHRA provides for employer liability because an employer controls an employee’s working environment, but a non-employer third party does not control an employee’s working environment. ERx is not subject to the WVHRA because ERx did not have the statutory requisite of 12 or more employees in West Virginia at all relevant times and, as a result, is not a statutory “employer.” Since the plain intent of the WVHRA is that only employing entities who meet the statutory definition of “employer” are subject to liability under the WVHRA, ERx (a non-employer third party to Respondents) is not subject to liability under the WVHRA.

Additionally, the lower court clearly erred by failing to grant summary judgment to ERx since Respondents never could prove all four of *Hanlon*’s elements of a sexual harassment claim against ERx. *Hanlon*’s fourth element requires Respondents to prove that Dr. Samaan’s conduct

is imputable to Respondents' employer. Since Respondents' employer was WCH, not ERx, Respondents could only ever prove that Dr. Samaan's conduct is imputable to WCH. Respondents could never prove *Hanlon*'s fourth element against ERx because ERx was not Respondents' employer. Under *Hanlon* analysis, the lower court clearly erred in not granting ERx's Motion as to Respondents' WVHRA claims.

Likewise, the lower court committed clear error by failing to grant summary judgment to ERx as to Respondents' claims that ERx purportedly aided or abetted in discriminatory practices which violate the WVHRA. Respondents' "aiding and abetting" claims against ERx fail as a matter of law because ERx is not a statutory "employer" or "person" subject to the provisions of the WVHRA. Again, ERx is a third party, neither Respondents' employer nor a fellow employee or supervisor. The WVHRA's use of "person" applies to employers and fellow employees/supervisors but has never been applied to a non-employer third party who allegedly aided and abetted the sexual harassment of an independent contractor. Under *Holstein*, *Hanlon*, *Williamson*, *Kalany*, and *Pajak*, since ERx is not a statutory "employer" subject to liability under the WVHRA, ERx may not be deemed a statutory "person" for purposes of the WVHRA's provisions. *Holstein* clarified that a "person" a plaintiff may sue under the WVHRA includes the plaintiff's fellow employee or supervisor who engaged in acts which aided and abetted the plaintiff's employer in unlawful discriminatory practices, but ERx is not Respondents' employer or Respondents' fellow employee or supervisor which engaged in any conduct at WCH. And *Kalany* showed that, even though Mr. Campbell was the plaintiff's employer, Mr. Campbell was not subject to the provisions of the WVHRA because Mr. Campbell had fewer than 12 employees in West Virginia and could not be deemed a statutory "person" as a result. All the more since ERx was not Respondents' employer, ERx is not subject to the WVHRA because ERx had zero

employees in West Virginia and may not be deemed a statutory “person” as a result. Finally, *Pajak* makes abundantly clear that an entity like ERx, which does not meet the WVHRA’s definition of “employer” in Section 5-11-3(d), may not be potentially liable to its own employee (let alone Respondents who were not ERx’s employees) as a “person,” as defined in Section 5-11-3(a), for an alleged aiding and abetting violation of West Virginia Code § 5-11-9(7).

In summary, since there is no genuine issue of material fact and since ERx is neither statutory “employer” nor “person,” ERx clearly is not subject to the WVHRA as a matter of law. The lower court committed clear error by not granting summary judgment to ERx on Respondents’ WVHRA claims.

VI. CONCLUSION

Therefore, for all the reasons stated in ERx’s Motion, in ERx’s Reply in support of its Motion, and in this Petition, the lower court abused its power, exceeded its jurisdiction, and committed clear error in denying ERx’s Motion for Summary Judgment. ERx is not a statutory “employer,” such that ERx is not subject to the WVHRA, and ERx may not be potentially liable as a “person” to Respondents either. To the degree that Respondents seek redress for alleged workplace sexual harassment, they are not without a potential source of recovery since they also sued their employer, WCH. The requested writ of prohibition should be issued, prohibiting the Honorable Jeffrey D. Cramer, Judge of the Circuit Court of Wetzel County, from proceeding further in Civil Action No. 20-C-5, without first granting summary judgment to ERx as to Respondents’ WVHRA causes of action against ERx and dismissing, with prejudice, Respondents’ WVHRA causes of action against ERx.

WHEREFORE, ERx respectfully requests expedited relief from this Honorable Court, namely that this Court (1) address the Order entered by the Honorable Jeffrey D. Cramer, Judge

of the Circuit Court of Wetzel County, West Virginia, on May 13, 2022, in Wetzel County Civil Action No. 20-C-5, denying ERx's Motion; (2) issue a rule to show cause in prohibition, staying all further proceedings in Wetzel County Civil Action No. 20-C-5, *see* W. Va. R. App. P. 16(j); and (3) issue a writ of prohibition which effectively precludes Judge Cramer from conducting any further proceedings in Wetzel County Civil Action No. 20-C-5 before granting summary judgment to ERx as to Respondents' WVHRA causes of action against ERx and dismissing, with prejudice, Respondents' WVHRA causes of action against ERx. ERx also requests any such further relief this Honorable Court deems appropriate.

Respectfully submitted this 17th day of May 2022.

**Petitioner, ERx, LLC,
By Counsel:**



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VERIFICATION

**STATE OF TENNESSEE,
COUNTY OF KNOX, to-wit:**

Robert Devrnja, M.D., Manager of ERx, LLC, after being first duly sworn upon his oath, deposes and says that, as Manager for Petitioner ERx, LLC, in the instant matter, he has personal knowledge of the facts asserted in the instant Petition for Writ of Prohibition or, to the extent he does not have personal knowledge, he believes, based upon information and belief, the facts asserted in the instant Petition are true.



Robert Devrnja, M.D.
Manager of Petitioner, ERx, LLC

Taken, subscribed and sworn to before me this 11th day of May 2022.

My commission expires

April 7, 2026

[seal]



Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
(Docket No. _____)
(Petition for Writ of Prohibition in Wetzel County Civil Action No. 20-C-5)

STATE OF WEST VIRGINIA ex rel.

ERx, LLC,

Petitioner,

v.

**In Prohibition Upon
Original Jurisdiction**

**The Honorable JEFFREY D. CRAMER,
Judge of the Circuit Court of Wetzel County;
KAYLA McELDOWNEY; and
DEVANN E. DOTY;**

Respondents.

CERIFICATE OF SERVICE

- I.** I do hereby certify that, on this 17th day of May 2022, I timely served Respondent, the Hon. Jeffrey D. Cramer, Judge of the Circuit Court of Wetzel County, West Virginia, a person who should be served with a rule to show cause should such be issued, with a true and accurate copy of the "Petition for Writ of Prohibition" and of the "Appendix to Petition to Writ of Prohibition," by depositing a true and accurate copy thereof in the United States mail, overnight and certified service, postage pre-paid, addressed as follows:

Hon. Jeffrey D. Cramer
Judge of the Circuit Court of Wetzel County, West Virginia
2nd Judicial Circuit
Marshall County Courthouse
600 Seventh Street
Moundsville, West Virginia 26041
Respondent

- II.** I do hereby certify that, on this 17th day of May 2022, I timely served Respondents, Kayla McEldowney and Devann Doty, persons who should be served with a rule to show cause should such be issued, with a true and accurate copy of the “Petition for Writ of Prohibition” and of the “Appendix to Petition to Writ of Prohibition,” by depositing a true and accurate copy thereof in the United States mail, overnight and certified service, postage pre-paid, addressed to Respondents’ counsel as follows:

Walt Auvil (W. Va. Bar No. 190)
Kirk Auvil W. Va. Bar No. 12953)
Anthony Brunicardi (W. Va. Bar No. 13593)
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, West Virginia 26101
Counsel for Respondents, Kayla McEldowney and Devann Doty

- III.** I do hereby certify that, on this 17th day of May 2022, I timely served other parties to the case with a true and accurate copy of the “Petition for Writ of Prohibition” and of the “Appendix to Petition to Writ of Prohibition,” by depositing a true and accurate copy thereof in the United States mail, overnight and certified service, postage pre-paid, addressed to the party or to the party’s counsel as follows:

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