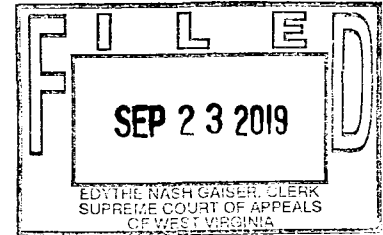


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 19-0407



JASON GREASER,

Petitioner,

v.

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

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

Respondents.

Petitioner's Reply Brief

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CORRECTION OF INACCURACIES AND OMISSIONS

Judge Carl was very clear that the only appealable issue in this case was whether the Wage Payment and Collection Act can as a matter of law support a retaliatory discharge claim (page 8 of Appendix). Rule 7 of the West Virginia Rules of Appellate Procedure requires that a party not list unnecessary parts of the record in the Appendix.

Detinburn's arguments suggest that Jason Greaser is a disreputable individual.

Jason Greaser corrects the inaccuracies and omissions of Detinburns' assertions regarding non-appealable issues of character and *prima facie* proof.

A. Character

1. Dettinburn's attack on Jason Greaser's character merges with the argument that the Wage Payment and Collection Act to be considered a public policy will lead to hordes of disreputable people filing frivolous law suits. Of course even if Jason Greaser was a disreputable person, he is still entitled to the protection of our public policies. Jason Greaser is not disreputable. Mr. Greaser worked for Dettinburn from April 2015 to December 2017 without any discipline of any kind.

Judge Carl stayed Diane Judy's case because she had filed a lawsuit and was harassed and constructively discharged as a result of her Wage Payment and Collection Act lawsuit.

Trooper Vaubel's testimony is not reliable. Judge Lynn Nelson, a former prosecutor, after hearing Trooper Vaubel's testimony because he found that "all the evidence collected by Trooper Vaubel relating to the tires allegedly stolen" was "unreliable and uncorroborated." Judge Nelson's dismissal of the criminal charges was not based on a technicality. Dettinburn's attempt to have this Court to rely upon evidence that Judge Nelson found unreliable and uncorroborated should be rejected.

ARGUMENTS

A. Overview

Dettinburn's response is a diversion to distract from Judge Carl's holding. Pages 4-8 of the Appendix shows Judge Carl's belief of the basis for this appeal. At page 6, Judge Carl found at subsection (e), "Here, Plaintiff contends that he was terminated because he had expressed intention to file a Wage Payment and Collection Act lawsuit against the

Defendants and/or because he had refused to implicate another former employee named Mark Lantz, who had previously filed a claim against the Defendants under the Wage Payment and Collection Act, in a theft of company property – a crime for which Plaintiff was arrested, charged, and remains under indictment”. Judge Carl never considered whether Defendants knew of Mr. Greaser’s intentions to file a lawsuit (a question of fact). Judge Carl never considered whether Mr. Greaser was of bad character.

Dettinburn’s attempt to characterize Mr. Greaser as an unworthy Plaintiff, is not relevant to Judge Carl’s holdings that the Wage Payment and Collection Act is not a substantial public policy. Dettinburn’s characterization of Mr. Greaser is not true. Irrespective of Dettinburn’s distractions, Mr. Greaser began working for Dettinburn in April 2015 (page 30 of Appendix). While he was employed, Dettinburn was not aware of any serious misconduct (page R184, lines 4-6 of Appendix).

Judge Nelson’s findings are not technicalities.

“Having found that the State had a duty to preserve the requested evidence and that the State also breached this duty, the analysis continues as to remedy. First, the Court is directed to consider the extent of negligence or bad faith involved. With respect to negligence, the quality of evidence preservation is extremely poor and sadly par for the course in this investigation. Given the prior issue with the incriminating statement that did not merit mentioning the police report and the handling of the tire evidence, this Court find that the State has been extremely negligent in its investigation and evidence preservation in this matter. Second, the missing evidence is extremely important to both the State’s case in chief, and the Defendant’s ability to present a defense against the charge. The only evidence is the State’s witnesses against the Defendant and a few pictures of WVDOT number handwritten on the side of a tire. Anyone could have written the victim’s WVDOT number on the side of any tire and took a picture – this evidence is simply unreliable without some corroboration that is now lacking without the tires or better documentation of the recovered tires. Furthermore, Defendant is unable to counteract the State’s witnesses who will

claim that the tire patterns were unique and matched the tire tracks found inside the vehicle that the Defendant allegedly used to haul the tires away from the victim's shop. Defendant has no photographs of these physical evidentiary claims and all the physical evidence – tire and truck – are now unavailable to him. All of which places the Defendant at an unfair disadvantage.”

Dettinburn attempts to distract this Court from the only issue by claiming Mr. Greaser was charged with a crime. Dettinburn relies heavily upon facts contained in the criminal complaints. However Judge Lynn Nelson, the former prosecutor of Mineral County had harsh words for the arresting officer.

Judge Nelson, at pages 88-89 of the Appendix, found that pursuant to *State v. Osakalumi*, 194 W.Va. 758, 461 S.E. 2d 504 (1995), the officer breached his duty to preserve the evidence of the crime.

Judge Nelson found that the officer had been “extremely negligent” in his investigation and evidence preservation in this matter.

Judge Nelson found that the only evidence the State had was their witnesses and “a few pictures of a WVDOT number written on the side of a tire”, which anyone could have written on any tire and taken the picture. Judge Nelson found “this evidence is simply unreliable without some corroboration that is now lacking without the tires or better documentation of the recovered tires”.

Having heard the testimony of the officer as to his investigation, Judge Nelson found “that all evidence collected by Trooper Vaubel relating to the tires (photographs and statements) is unreliable and uncorroborated and will not come into the State’s case in chief” (page 90 of Appendix).

It is clear Judge Nelson did not believe Dettinburn’s version that Mr. Greaser stole the tires.

Dettinburn attempts to characterize Petitioner as a serious criminal. But for two (2) years Respondents had no problems with Petitioner. Judge Lynn Nelson found Trooper Vaubel's assertion collected from Respondents to be unreliable and uncorroborated.

Dettinburn attempts to discredit Judge Lynn Nelson, as allowing Petitioner to "ultimately escape prosecution for the theft of Dettinburn's tires based on a questionable technicality". Such desperate conduct should not be encouraged by this Court. The facts get in the way of Dettinburn's attack on Judge Nelson.

B. The only issue is whether the Wage Payment and Collection Act is the public policy of West Virginia

1. It is undisputed by both parties that the determination of the existence of public policy in West Virginia is a question of law.

2. West Virginia Code §21-5-3(a) requires that every employer in West Virginia must "settle with its employees" at least twice every month and no more than 19 days between settlements unless otherwise provided by special agreement, and "pay them the wages due", less authorized wage assignments, "for their work or services".

3. The clear purpose of the statute is to require employers to pay the wages due to employees for their work or services.

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

(a) that although an employer has an absolute right to discharge an at-will employee, that right must be tempered by the principle that where the employer's

motivation for the discharge is to contravene some substantial public policy, then the employer may be liable to the employee for damages occasioned by this discharge;

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

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

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

5. Respondents’ failure to pay Petitioner what he was owed pursuant to the employment contract was not a small mistake by the payroll office. Petitioner was told by his supervisor that he would be paid 25% of what the truck load paid (page 30 of Appendix). Cynthia Berg, who calculated Petitioner’s pay checks, had no idea what the drivers rate was based upon (page 31 of Appendix). Petitioner complained to his supervisor, Terry Dolly that he was not getting paid 25% of what the load paid and asked Cynthia Berg what the truck load paid, but Ms. Berg could not tell him (page 30 of Appendix). Petitioner was never told what the loads paid (page R206 of Appendix).

C. Discussion

Since West Virginia Code §21-5-3(a) is an established mandate of the legislature, a jury in Pendleton County should decide if Respondents retaliated against Petitioner, contrary to the statute in effectuating his termination.

Respondents' argument is that since this Court has never recognized this particular statute as a Legislative enactment which can support a *Harless* claim, this Court is powerless in recognizing the Legislative enactment now.

The amici curiae brief discusses how it defies credulity to conclude that the law recognizing the importance of the timely payment of wages was also intended to ensure that an employer could lawfully fire any employees foolish enough to assert his rights under that law. The public policy embodied in the statute would be undermined by actively discouraging employees from bringing claims for wages if doing so could result in the termination of their employment.

Contrary to Respondents' argument, this Court has expressly recognized that failing to pay employees as required by West Virginia Code §21-5-3(a), has serious consequences in the lives of West Virginia citizens who depend on receiving their regular pay to meet their families' expenses. See *Mullins v. Venable*, 171 W.Va. 92, 297 S.E. 2d 866 (1982).

The jurisprudence of this State is kept alive by five individuals who are elected by the hard working citizens of this State. This Court has never created an infallible list of Legislative enactments which may support a *Harless* claim. Instead, this Court has provided guidance for trial courts to determine what the substantial public policy of this State will be. If working West Virginians can be fired for asking for the wages that have been earned, then no reasonable citizen will question what they are paid. For the majority of the employers in West Virginia such a fact will not change their behavior. But for the shady unscrupulous employer, the incentive to cheat their employees will be irresistible.

Every time a *Harless* claim is challenged as to whether a public policy exists, the employer's argument is allowing an employee to be protected by the laws our Legislature

has enacted, will open “Pandora’s box” to a parade of horrible citizens attempting to have access to our judicial system.

Instead of arguing whether the Wage Payment and Collection Act can support a *Harless* claim, Respondents resort to clichés and stereotypes. Petitioner’s claim is that Respondents’ retaliated against him because he intended to seek redress under the Wage Payment & Collection Act. The trial court found that Diane Judy’s case is similar because she is also claiming that the Wage Payment and Collection Act is a public policy which can support a *Harless* claim. Therefore, Respondents’ conduct affects more than Petitioner.

At pages 78-79 of the Appendix, Judge Carl specifically found not only is Mr. Greaser’s right to file a retaliation claim at stake, but other employees rights are in jeopardy. Judge Carl stayed Diane Judy’s case pending the outcome of this case.

“THE COURT: What I found is that there is no West Virginia Supreme Court holding or statute that has found that a violation of the Wage Payment and Collection Act can sustain a *Harless* claim. I think I’m stating that correctly. It’s kind of a – from what I ruled in the Greaser case, that’s what my ruling was in that. And that this case since it involves the same issue as in the Greaser case that it will stay this case. The Defendant’s motion is granted. You can look at what he writes. If you’re not happy with it, I’m sure you’ll let me know.”

Since Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes¹ this Court should reject Detinburn’s invitation to decide anything other than the appealable issue, i.e., whether the Wage Payment and Collection Act can be the basis for a *Harless* claim.

¹ *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E. 2d 585, Syl. pt. 4 (2011)

Contrary to Respondents' argument, this Court can clarify that the Wage Payment and Collection Act is a legislative enactment, and allow a jury to determine if Petitioner was retaliated against by Respondents.

D. Dettinburns' Theories

1) The Wage Payment And Collection Act Is The Public Policy of West Virginia

Dettinburn claims that "Mr. Greaser made no effort whatsoever to argue that the civil provisions of the Wage Payment and Collection Act constitutes a substantial public policy sufficient to sustain a *Harless* claim". Dettinburn is not correct.

Mr. Greaser's Response In Opposition To Defendants' Motion for Summary and Memorandum of Law (pages 28-40 of Appendix) shows that Dettinburn is clearly misrepresenting the fact.

Mr. Greaser set forth several facts to support his Wage Payment and Collection Act claim (see pages 24-40 of Appendix).

What Judge Carl did find was that Mr. Greaser "advanced no legal support for the notion that the civil provisions of the Wage Payment and Collection Act specifically West Virginia Code §21-5-3, constitute "a source of substantial public policy upon which a *Harless* claim may be premised" (page 7 of Appendix).

Just because the language is close to the Judge's order does not permit Dettinburn to misrepresent the facts. Mr. Greaser did present facts that the Wage Payment and Collection Act is the public policy of West Virginia.

2) **The Basis Of A Harless Claim Is Legislative Enactments**

Dettinburn claims that this Court has already considered whether the Wage Payment and Collection Act constitutes a substantial public policy sufficient to sustain a *Harless*-style cause of action. Dettinburn relies upon *Roberts v. Adkins*, 191 W.Va. 215, 444 S.E. 2d 725 (1994). However, nothing in the *Roberts* opinion ever mentions, let alone discusses, the pay provisions of the Wage Payment and Collection Act at issue in this case.

Ironically *Roberts* found, at least part of the Wage Payment and Collection Act, to be the substantial public policy of this state.

Roberts is a narrow decision which involves a single issue: “whether a cause of action for wrongful discharge exists where an employer fires an employee because the employee purchases a product from the employer’s competition”. West Virginia Code §21-5-5 is unrelated to the wage payment provisions at issue in this case. Any suggestion that this Court ruled on the issues presented in this case when it issued its decision in *Roberts* is without any support in the *Roberts* opinion.

Dettinburn even argues that this Court could have easily used the opportunity presented in *Roberts* to decide issues not before the Court. Such an approach would violate a basic rule of jurisprudence, i.e. courts only decide the case before it, not some case that might come before it on some future date. See *Huston supra*.

Regardless, Dettinburn’s interpretation of *Roberts* stretches the limits of a good faith argument. *Roberts*, page 728, found that this Court has recognized numerous causes of action under *Harless* and protecting employees would not open a “Pandora’s Box”.

Roberts at page 729, discussed that the Wage Payment and Collection Act was enacted to protect coal miners from the threat of losing, or actual loss of his or her job.

3) **Recognizing The Wage Payment And Collection Act As The Substantial Public Policy Of This State Would Not Go Beyond The Foundation Of *Harless* (Pages 16-28 of Brief)**

Dettinburn claims that Mr. Greaser is “urging this Court to expand *Harless* beyond its foundational roots” (page 16 of Brief). Their argument is that *Harless* only applies where the employee is fired for asserting rights that affect the public at large. However, the Wage Payment and Collection Act recognizes that the payment of wages in a timely manner to people who have monthly financial obligations, is one of concern because it creates a right in employees to receive their wages in a timely manner. The Legislature recognized the importance of these rights by legislating a legislative plan to provide for civil actions by employees and the Commissioner of Labor. It seems illogical to conclude that the Legislature created rights of employees to timely receive payments on wages as a matter of state law and created causes of actions to assert those rights, but protected the rare employer who would fire an employee who asserted his rights.

Likewise, the legislature has been aware of *Harless* claims for many years and has had many opportunities to amend the Wage Payment and Collection Act to protect employers who fire employees they expect will assert their rights under the law.

Contrary to Dettinburn’s fear that allowing Mr. Greaser to prove his retaliatory discharge will not open “Pandora’s Box” (see *Roberts supra*). The issue is simple, can an employee rely upon the law that he or she will be timely paid the wages due to them.

4) **Recognizing Individual's Rights Will Not Open Pandora's Box**

Detinburn argues that since innocent payroll errors are “ubiquitous and inevitable occurrences”, employees should not be protected from the intentional withholding of wages due to employees. Mr. Greaser is only contending that employers should not fire employees who raise reasonable concern about the timing and amount of their pay.

Mr. Greaser's claim is not an unworthy, frivolous claim. The withholding of the wages he had earned was not a simple mistake.

Mr. Greaser complained several times about his pay. The payroll clerk did not know how the rate was calculated for each drivers pay. Diane Judy was one of those employees and Judge Carl stayed her retaliatory discharge case until the issue of whether the Wage Payment and Collection Act can sustain a *Harless* claim is resolved. Judge Carl found that Mr. Greaser contended that he was terminated because he had expressed intentions to file a Wage Payment and Collection Act lawsuit against Detinburn and/or because he had refused to implicate another former employee in a theft of company property – a crime for which Mr. Greaser was arrested, charged, and remains under indictment (pages 6-7 of Appendix). This Court has given guidance to trial courts in how to evaluate motions to dismiss a frivolous action. But if this Court immunizes employers from suits for retaliation against employees who raise issue about their pay, then there exists no further judicial review to benefit employees.

5) **Judge Carl's Order Is Strictly A Legal Issue**

Respondents do not dispute that the question for this Court is whether an employer can legally terminate an employee who brings statutory authorized legal action to collect unlawfully withheld wages.

Strangely Respondents argue that Petitioner is attempting to assert something other than his right to bring a legal action to collect his unpaid wages.

A *Harless* claim requires a substantial public policy and a retaliation that thwarts that public policy. Petitioner meets the first part of the *Harless* requirement by identifying the Wage Payment and Collection Act. The illegal conduct of Respondents is the denying Petitioner his right to file a lawsuit.

Rule 7(e) of the West Virginia Rules of Appellate Procedure states, in part, "The parties must not list unnecessary parts of the record for inclusion in the Appendix, because the entire record is available to the Court." Since Judge Carl's decision was strictly legal, it would be unfair to decide this case on questions of fact not necessary for the decision of the legal issue.

Burke v. Wetzel County Commission, 240 W.Va. 209, 815 S.E. 2d 520, 538-539 (2018), although it involved a public employee, concluded that it is a violation of public policy 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 and to seek access to the courts or this State by filing an action for overtime wages.

This case and the *Burke* case both involve retaliation for lawsuits involving wages. It would be inconsistent to hold that overtime wages are protected but not regular wages.

6) **Mr. Greaser's Legal Argument Logically Involves His Right To A Civil Trial**

Respondents argue (pages 33-36 of Respondent's Brief) that (1) Mr. Hinkle's self-serving statements must be believed; and (2) Respondents' pretext must be believed. Respondents' argument is premature since the only issue is the legal issue. West Virginia Code §21-5-12 gives Mr. Greaser the right to bring any civil action necessary to collect a Wage Payment and Collection Act case. Also West Virginia Code §21-5-10 prohibits the provisions of the Wage Payment and Collection Act of being waived. The only inference that can be drawn is that the provisions cannot be waived because the provisions are important public policies. If Mr. Greaser was discharged in retaliation for his intentions to file a Wage Payment and Collections Act civil lawsuit, then the substantial public policy which gives Mr. Greaser the right to file such a lawsuit is violated. And the prohibition against waiving his rights, demonstrates that those rights are important to protect working men and women.

CONCLUSION

A. The Wage Payment and Collection Act, West Virginia Code §21-5-1 et seq. is a legislative enactment. Failure to pay employees as required by the Wage Payment and Collection Act has serious consequences in the lives of West Virginia citizens who depend on receiving their regular pay to meet their families' expenses. Pursuant to *Feliciano* and *Burke*, the Wage Payment and Collection Act constitutes a public policy which can support a retaliatory discharge *Harless* case.

B. *Burke supra* allowed for a retaliatory discharge action for overtime wages. It would be inconsistent to allow civil actions to collect overtime wages but deny civil actions to collect regular wages.

C. Judge Carl limited this appeal to the question of whether the Wage Payment and Collection Act can force the basis for a *Harless* case. Dettinburns' attempt to characterize Jason Greaser as not worthy of the protections of West Virginia public policies is inappropriate and should be rejected.

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CERTIFICATE OF SERVICE


I, Harley O. Staggers, Jr., a practicing attorney, hereby certifies that a true copy of the **Petitioner's Reply Brief** has been served by United States Mail postage prepaid, on this the 23rd day of September, 2019 upon the following:

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