IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TODD JARRELL,
Plaintiff Below, Petitioner,

v.

FRONTIER WEST VIRGINIA, INC., et al.
Defendants Below, Respondents.

CASE NO. 20-0040
Civil Action No. CC-18-2019-C-31

RESPONDENTS' BRIEF

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I. ASSIGNMENT OF ERRORS

The Petitioner challenges the Circuit Court's finding that he failed to identify a substantial public policy to form the basis of a *Harless* wrongful discharge claim.

II. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The Petitioner's recitation of the factual background in this matter is incorrect. Petitioner was employed as a cable technician by the Respondents until an investigation confirmed that he had taken his Company-assigned bucket truck after normal business hours for personal use, without permission, to remediate an issue with bats at his home. App. 13. After discovering the bucket truck was missing, Respondents reported the truck stolen. App. 13. During Respondents' investigation of the incident, Petitioner admitted he had utilized company property without permission because he anticipated the Respondents would not have authorized its use. App. 19. Petitioner admitted to taking the vehicle and stated, "If I get fired, it was worth it." App. 19. At the time of the investigation into Petitioner's misuse of company property, it was noted that Petitioner was already on a final warning for a failed drug test. App. 19, 53. Following the conclusion of Respondents' investigation, Petitioner's employment was terminated on October 22, 2018.

B. PROCEDURAL BACKGROUND

Petitioner filed his Complaint in the Circuit Court of Jackson County, West Virginia on April 24, 2019, making a solitary claim for wrongful discharge in violation of the substantial public policy in the State of West Virginia, pursuant to *Harless v. First Nat'l Bank in Fairmont*, 162 W. Va. 116, 116 (1978), and its progeny. App. 2-22.

In response to Petitioner's Complaint, on June 12, 2019, Respondents Frontier, Jordan and Linkous filed a Rule 12(b)(6) Motion to Dismiss. App. 52-58. On July 3, 2019, Petitioner filed a response to the Motion to Dismiss. App. 59-67. On October 21, 2019, a hearing was held on Respondents' Motion to Dismiss. App. 79. On December 23, 2019, Respondents' Motion to Dismiss was granted. App. 81-89.

III. SUMMARY OF ARGUMENT

The Circuit Court properly granted Respondents' Motion to Dismiss in the underlying civil action because Petitioner failed to identify a recognized source of substantial public policy to form the basis of his sole underlying claim, a *Harless* public policy claim. Plaintiff has pled no facts alleging or relating to a violation of the cited statutory basis for his *Harless* claim. Moreover, this Court has explicitly held that criminal statutes of this State are not sources of public policy which would support a *Harless* wrongful discharge claim. In *Swears v. R.M. Roach & Sons, Inc.*, this Court held that the West Virginia statutes criminalizing embezzlement and larceny - W. Va. Code § 61-3-20 and § 61-3-13 - do not "form the basis for a possible violation of a substantial public policy." *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E.2d 1, 6-7 (W. Va. 2010). As this Court previously held in *Swears*, criminal statutes, of the type such as W. Va. Code § 61-3-49B cited by Respondent as the sole source of "public policy" underpinning his claim, are not, as a matter of law, a source of substantial public policy capable of supporting a *Harless* claim.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Respondents are of the position that oral argument is not necessary in this matter as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

V. ARGUMENT

In an extremely convoluted attempt to salvage his case, Petitioner contends that the Circuit Court erred when it granted Respondents' Motion to Dismiss his Complaint. Petitioner's circular and illogical arguments seek to have this Court find that *Swears* is not the settled law in West Virginia for no reason other than because the facts of *Swears* mirror the facts of his own case and serve as an absolute bar to his claim. In *Swears v. R.M. Roach & Sons, Inc.*, a case that is virtually identical to the facts of this case, this Honorable Court held that criminal statutes of this state did not constitute a substantial source of public policy, which would support a common-law wrongful discharge claim. *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 696 S.E.2d 1, 6-7 (W. Va. 2010). Therein, the plaintiff made reports to a supervisor that other co-workers were ostensibly violating criminal statutes prohibiting larceny and embezzlement. *Id.* at 3-4. The Court found that such criminal statutes alone did not "express a public policy component such that the statutes may form the basis for a possible violation of a substantial public policy to support a claim for wrongful discharge." *Id.* at 7. Further, the Court found "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*." *Id.* The *Swears* reasoning is directly on point and applicable to this case where the sole source of public policy upon which Petitioner bases his wrongful discharge claim is a single West Virginia criminal statute, of the same type relied upon by the plaintiff in *Swears*.

In short, *Swears* dealt with underlying factual allegations that are *virtually identical* to those pled by Plaintiff in the instant case – namely, reporting of alleged violations of West Virginia criminal statutes by co-workers to a supervisor. App. 7-17.

Here, Petitioner has presented no facts which would place his termination within the "limited exception" to the at-will employment doctrine in West Virginia. This Court has held that

"[t]he 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." *Id.* But it is well settled law that there must be a "substantial public policy" which would create an exception to the at-will employment doctrine and provide "specific guidance to a reasonable person" that the State of West Virginia intended to prohibit employment-related decisions from being motivated by an intention to contravene that public policy. Syl. Pt. 3, *Birthisel v. Tri-Cities Health Services Corp.*, 188 W.Va. 371, 424 S.E.2d 606, 606 (W. Va. 1992). This Court has repeatedly stated that:

> [t]o 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.

Syl. Pt. 2, *Birthisel*, 424 S.E.2d at 606. In other words, there must be some statute, constitutional provision, regulation, or judicial opinion which articulates the "substantial public policy" that would allow Plaintiff to pursue his *Harless* claim. As this Court has clearly indicated, W. Va. Code § 61-3-49B cannot serve as that basis. Thus, Plaintiff is unable to point to a substantial public policy to serve as the basis for his *Harless* wrongful discharge claim.

This Court further enforced its position regarding the fundamental elements of a *Harless*-based action in *Blanda v. Martin & Seibert, L.C.*, wherein it reiterated that a criminal statute does not constitute a substantial public policy under *Harless* where an employee reported suspected criminal conduct and claims to have been retaliated against as a result. *Blanda v. Martin & Seibert, L.C.*, 242 W. Va. 552, 562, 836 S.E.2d 519 (W. Va. 2019). "Courts are to 'proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the

subject.'" *Blanda*, 242 W. Va. at 562 (*citing Tiernan v. Charleston Area Medical Center, Inc.*, 203 W.Va. 135, 141, 506 S.E.2d 578 (W.Va. 2019). Providing very clear guidance, the Court reiterated in *Blanda* that claims of the very type cited by the Petitioner here do not constitute a *Harless*-based claim and it declined to further expand the common law substantial public policy exception. *Id.* at 562.

The *Blanda* Court refrained from recognizing criminal statutes as sources of substantial public policy as it acknowledged that to do so would have far-reaching and harsh equitable considerations. Specifically, the Court found "[t]o recognize as a source of substantial public policy . . . would, as Respondents contend, make employers deputized enforcers of our criminal statutes in order to avoid *Harless*-type liability and "throw open the floodgates of litigation by allowing an employee to confer protected status on himself or herself by merely making an allegation of illegal conduct by a co-worker to a supervisor, no matter how serious, spurious, or unsupported it may be.'" *Id.* To recognize the "public policy" for which Petitioner now argues would be to effectively impose criminal law enforcement duties on private employers, when the legislature of this State has not indicated, in any way, that it intended to do so.

Moreover, there is no prior legislative or judicial expression on the statute at issue. Even if this Court disregarded the clear precedent established by both *Swears* and *Blanda*, Petitioner's position that he was terminated as the result of his reporting of alleged violations of West Virginia Code § 61-3-4B two (2) years prior to his termination is unconvincing as he remained employed for years after reporting the alleged misdeeds of his coworkers and never alleged that he was terminated for his own refusal to engage in illegal activity. Indeed, the Court explained in *Swears* that the criminal statutes of the State of West Virginia may serve as the basis for a wrongful discharge claim ***only*** when the case involves an allegation that the employee was discharged for

refusing to engage in illegal activity himself – rather than, as is the case here and in *Swears*, merely reporting the alleged criminal violations by others to the employer. *Id.* at 6-7; 8, fn. 9.

The Respondents reiterate that, in both *Swears* and *Blanda*, this Court held that criminal statutes **do not** serve as the basis for a potential violation of substantial public policy to support a claim of wrongful discharge claim. In his brief, the Petitioner expresses his sincerely held, albeit legally flawed, belief that West Virginia Code § 61-3-4b *should* be recognized as a source of substantial public policy because it is "exceedingly specific." But, despite the statute's alleged specificity, it cannot serve as a substantial public policy necessary to prevail on a *Harless* wrongful discharge claim under the law in light of the clear precedent established by *Swears* and *Blanda*. In a frantic Hail Mary attempt to distinguish his own case from *Swears*, Petitioner further alleges that the Court's holding in *Swears*, is not in fact, the holding. While Petitioner spends most of his brief attempting to convince this Court that the Circuit Court misunderstood the *Swears* decision, Petitioner has not cited (and cannot cite) a single case in which this Court has recognized a criminal statute of the type relied upon by Petitioner as the proper source of public policy upon which a *Harless* wrongful discharge claim may be based. Simply put, no such authority exists and this Court's prior decisions in *Swears* and *Blanda* are fatal to Petitioner's claims, as a matter of law.

Petitioner's claim fails as a matter of law and this Court should affirm the Circuit Court's ruling.

VI. CONCLUSION

The Circuit Court did not err in granting Respondents' Motion to Dismiss. Petitioner's *Harless* claim is baseless and without merit and should not have been permitted to proceed in light of this Court's clear authority in identifying meritorious bases for claims of violation of substantial public policy. For the reasons noted above, Respondents urge this Court to uphold its prior ruling

and continue to limit the wrongful discharge in violation of public policy exception to the at-will employment rule to situations where the employer has violated a clearly mandated public policy.

The Respondents, Frontier West Virginia, Inc., Daniel Jordan and Michael Linkous, therefore, pray that this Court affirm the Circuit Court's decision upon its own merits.

Dated: July 25, 2022

Respectfully submitted,

FRONTIER OF WEST VIRGINIA, INC.
DANIEL JORDAN
MICHAEL LINKOUS

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FRONTIER WEST VIRGINIA, INC., a West Virginia corporation, DANIEL JORDON and MICHAEL LINKOUS,

Defendants Below, Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2022, a true and correct copy of the foregoing *Respondents' Brief* was served via U.S. First Class Mail, postage prepaid, upon the following counsel of record:

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