

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 35309

BARRY SWEARS, Plaintiff - Appellant

vs.

R.M. ROACH & SONS, INC., Defendant – Appellee

The Honorable Christopher C. Wilkes, Judge
Circuit Court of Berkeley County
Case No.: 07-C-493

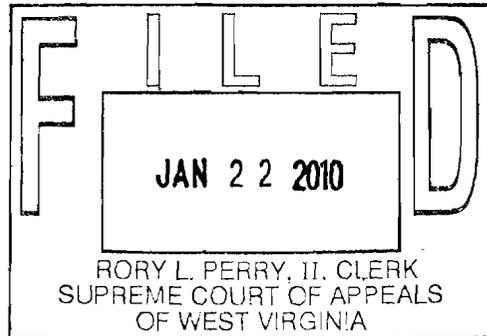
BRIEF OF APPELLEE

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KIND OF PROCEEDING AND NATURE OF CIRCUIT COURT'S RULING

Plaintiff, Barry Swears ("Plaintiff"), filed the within action in the Circuit Court of Berkeley County, West Virginia ("Circuit Court") on or around June 15, 2007, alleging wrongful termination arising out of the termination of his at-will employment with Defendant on or around January 31, 2006 (Complaint at ¶ 7). Notably, prior to his termination, Plaintiff resigned from his employment with Defendant effective December 30, 2005, having authored and submitted a resignation letter dated December 19, 2005 (A true and correct copy of Plaintiff's resignation letter was attached to Defendant's Rebuttal Memorandum in Support of Defendant's Motion for Summary Judgment as Exhibit "1"). Despite such fact, Plaintiff set forth various alleged public policies in his Complaint that he claims Defendant violated in an effort to have this Court disregard the at-will relationship between the parties. Plaintiff's Complaint contains a cause of action for alleged wrongful termination in violation of public policy (Count I) and a claim for punitive damages (Count II).

On or about January 9, 2009, Defendant filed its Motion for Summary Judgment, Memorandum in Support of Defendant's Motion for Summary Judgment and proposed Order of Court, respectfully requesting that the Circuit Court enter summary judgment in its favor on both counts of Plaintiff's Complaint. More specifically, Defendant requested that judgment be entered in its favor both on Plaintiff's claim for wrongful termination, since Plaintiff was an at-will employee and no public policy exists that would warrant an exception to the at-will relationship between the parties, and on Plaintiff's claim for punitive damages, since there is no independent cause of action for punitive damages. Plaintiff mailed his Response in Opposition

to Defendant's Motion for Summary Judgment to Defendant on or about February 3, 2009¹ and, on February 16, 2009, Defendant filed its Rebuttal Memorandum in Support of Defendant's Motion for Summary Judgment.

On February 24, 2009, the Circuit Court granted Defendant's Motion and entered summary judgment in its favor. Specifically, the Circuit Court found that Plaintiff was unable to prove that a clear and substantial public policy existed, a required element of his claim, since Plaintiff's allegations do not involve "a claimed violation of any public policy or anything that may be injurious to the public good, but merely an alleged violation of the financial interests of a private corporation" (February 24, 2009 Circuit Court Order Granting Defendant's Motion for Summary Judgment). The Circuit Court also entered summary judgment for Defendant on Plaintiff's claim for punitive damages, finding that no independent claim for such damages exists.

Plaintiff filed a Petition for Appeal with this Court on June 25, 2009 and Defendant filed its Response thereto on July 24, 2009. The Court granted Plaintiff's Petition and, accordingly, Plaintiff filed his Brief of Appellant with this Court on December 22, 2009.

Plaintiff is asking this Court to reverse the Circuit Court's decision and decide for the first time that terminating an employee for reporting criminal conduct violates a substantial public policy that would provide an exception to the at-will doctrine and a basis for his wrongful

¹ As set forth in Defendant's Motion for Enlargement of Time to File Rebuttal Memorandum to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment filed with the Circuit Court, although Plaintiff's Response was due by January 30, 2009 pursuant to the Circuit Court's Rule 22 Scheduling Order, such Response was postmarked February 3, 2009 and received by Defendant's counsel on February 6, 2009.

discharge claim (Brief of Appellant at p. 9).² Defendant respectfully requests that this Court affirm the Circuit Court's entry of summary judgment, as both the law of West Virginia and the facts before this Court clearly demonstrate that Plaintiff was an at-will employee and has not sufficiently alleged and is unable to prove that his termination violated a substantial public policy.

STATEMENT OF THE FACTS

Defendant was incorporated as a West Virginia corporation in 1957 (See Answer to Interrogatory 1 of Defendant's Answers and Responses to Plaintiff's First Interrogatories and Request for Production of Documents to Defendant served upon Plaintiff's counsel on or about September 5, 2008, attached to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment as Exhibit "A"). Defendant is principally owned by 3 brothers, Stanley, Steven and D. Scott Roach (Defendant's Answer to Interrogatory 1).

Plaintiff began his employment with Defendant in June 2002 as Controller (Complaint at ¶ 5). Plaintiff's employment with Defendant was at all times on an at-will basis and Defendant could terminate him at any time, with or without cause or notice (See acknowledgement signed by Plaintiff on June 7, 2002, attached to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment as Exhibit "B", and R.M. Roach & Sons, Inc. Employee Handbook, pertinent portions of which were attached to Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment as Exhibit "C").

Steven Roach, one of Defendant's owners and its Chief Operations and Financial Officer, created and operates a separate business, Sunfire Patio & Spa ("Sunfire") (Complaint at ¶ 8;

² Plaintiff is not seeking to appeal the Circuit Court's entry of summary judgment on his claim for punitive damages. See Brief of Appellant.

Defendant's Answer to Interrogatory 2). Plaintiff believed that the operation of Sunfire created a conflict of interest with Defendant, that Defendant lost business to Sunfire and that Sunfire had some of Defendant's inventory in its possession and reported his beliefs to members of Defendant's Board and Defendant's other owners, Scott and Stanley Roach (Complaint at ¶¶ 9 - 12). Plaintiff also believed that Sunfire was "improperly borrowing" Defendant's employees and reported his belief to Scott and Stanley Roach (Complaint at ¶ 13).

Plaintiff alleges in his Complaint that he was retaliated against after and as a result of his reporting such alleged conflict of interest and such alleged and other conduct (Complaint at ¶¶ 17-20). More specifically, Plaintiff alleges the following in Count I of his Complaint in attempted support of his claim for wrongful termination in violation of public policy:

- He was terminated in retaliation for his report that Steve Roach was engaging in alleged "improper conduct detrimental to the company" and conduct "in breach of Mr. Roach's fiduciary duties owed to the company and that amounted to misappropriation of company funds" in alleged violation of state statutory and common law (Complaint at ¶¶ 23-24); and
- His termination "violated substantial public policy principles governing fiduciary relationships, misappropriation of funds and corporate requirements and standards" (Complaint at ¶ 25).

In his Brief, Plaintiff alleges that he "discovered several issues, which he perceived to be serious fiscal misconduct by Steve Roach arising from his operation of his independent corporation Sunfire" (Brief of Appellant at p. 3).

Plaintiff claims in his Complaint that he is entitled to various damages as a result of his termination, including punitive damages (Complaint at ¶¶ 26, 29).

In his Response in Opposition to Defendant's Motion for Summary Judgment, Plaintiff did not dispute that the allegations of his Complaint regarding claimed breaches of fiduciary

duties and misappropriation of company funds are insufficient to constitute a public policy in support of either an exception to the at-will rule or his claim of wrongful discharge.³ Instead, Plaintiff for the **first** time alleged in his Response that he reported **criminal** conduct by Steve Roach and that his claimed termination for reporting such criminal conduct violated a substantial public policy. More specifically, Plaintiff alleged that Steve Roach “evaded” a debt he owed to the company and that such conduct “seemingly satisfies the elements for the crime of embezzlement,” or “constituted the crime of larceny,” both of which are codified in the West Virginia Criminal Code (Plaintiff’s Response in Opposition at p. 4). Notably, Plaintiff’s Complaint does not contain any allegations regarding criminal conduct and also does not include any reference to these criminal statutes as being the basis for a public policy exception to the at-will rule. Therefore, Defendant argued in its Rebuttal Memorandum that Plaintiff should not be permitted to add new allegations in an effort to offer a potential pool of mandates from which the Circuit Court was to find a public policy.

Despite such argument, the Circuit Court addressed Plaintiff’s allegations regarding criminal conduct in its Order and found that Plaintiff’s allegations that he was terminated for reporting criminal conduct did not violate a substantial public policy that would provide an exception to the at-will employment rule and a basis for Plaintiff’s claim (Order at pp. 7-8). Not only do Plaintiff’s allegations lack factual support in the record, but they also have no basis in the law of this State or any other state in this Circuit. As a result, the Circuit Court entered summary judgment in favor of Defendant. Defendant now respectfully requests that this Court affirm the Circuit Court’s entry of summary judgment in its favor.

³ Plaintiff also did not dispute that his claim for punitive damages should be dismissed if the Circuit Court entered summary judgment on his wrongful discharge claim.

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DISCUSSION OF THE LAW

A. Standard of Review

The matter before the Court is an appeal from an Order of the Circuit Court granting Defendant's Motion for Summary Judgment. This Court's review of such decision is *de novo*, as such review is of an entry of summary judgment by a circuit court. C & O Motors, Inc. v. W. Va. Paving, Inc., 2009 W. Va. LEXIS 40, * 5, 677 S.E.2d 905 (2009) (quoting Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)). Such review is also *de novo*, since such review is of a question of law decided by the Circuit Court – whether a public policy exception to the at-will employment doctrine exists. C & O Motors, 2009 W. Va. LEXIS at * 5-6, 677 S.E.2d 905 (citations omitted).

In undertaking a *de novo* review of the issues determined by the Circuit Court, the Court is to “apply the same standard for granting summary judgment as [was] applied by the [C]ircuit [C]ourt. . . .” Hatfield v. Painter, 2008 W. Va. LEXIS 77, * 10-11, 671 S.E.2d 453 (2008) (citing Painter, 192 W. Va. 189, 451 S.E.2d 755). Summary judgment is proper where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. W. Va. R.C.P. 56(c); Williams v. Precision Coil, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995); Painter, 192 W. Va. at 192, 451 S.E.2d at 758. Pursuant to Rule 56(c), summary judgment may be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. W. Va. R.C.P. 56(c).

The party opposing summary judgment must satisfy the burden of proof by offering more than a mere “scintilla of evidence,” and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. Painter, 192 W. Va. at 192-93, 451 S.E.2d at 758-59.

Further, “[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Painter, 192 W. Va. at 193, 451 S.E.2d at 759 (citation omitted).

A motion for summary judgment is “designed to affect a prompt disposition of controversies on their merits without resorting to a lengthy trial, if there essentially is no real dispute as to settling the facts, or if it only involves a question of law.” Williams, 459 S.E.2d at 335. The principal purpose of summary judgment “is to isolate and dispose of meritless litigation.” Painter, 192 W. Va. at 192, 451 S.E.2d at 758 (citation omitted).

B. Summary Judgment in Favor of Defendant on Plaintiff's Claim for Wrongful Termination was Proper, Since Plaintiff Was an At-Will Employee and No Public Policy Exists to Warrant an Exception to the At-Will Relationship

1. At-Will Employment Doctrine and Public Policy Exception in General

In West Virginia, it has been a long-established rule that, unless employment is for a fixed term, it is presumed that an employee is an at-will employee. Feliciano v. 7-Eleven, Inc., 210 W. Va. 740, 744, 559 S.E.2d 713, 717 (2001); Harless v. First National Bank, 162 W. Va. 116, 119-20, 246 S.E.2d 270, 273 (1978) (citing, e.g., Wright v. Standard Ultramarine and Color Co., 141 W. Va. 368, 382, 90 S.E. 2d 459, 468 (1955); Adair v. United States, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908)). Therefore, absent some exception to the at-will doctrine, an employee may be terminated at any time, with or without cause. Feliciano, 210 W. Va. at 744-45, 559 S.E.2d at 717-18 (quoting Kanagy v. Fiesta Salons, Inc., 208 W. Va. 526, 529, 541 S.E.2d 616, 619 (2000) (citation omitted)). Moreover, in this case, Plaintiff specifically acknowledged that his employment was at-will (See June 7, 2002 acknowledgement).

Since 1978, the West Virginia courts have recognized a public policy exception to the at-will rule. See Harless, 162 W. Va. at 124, 246 S.E.2d at 275 (public policy violation found where bank, in violation of state and federal consumer protection laws, intentionally overcharged customers on prepayment of installment loans and did not make proper rebates). The exception was stated by the Harless Court as follows:

The rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some **substantial public policy** principle, then the employer may be liable to the employee for damages occasioned by the discharge.

Id. (emphasis added). Thus, "a cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination." Feliciano, 210 W. Va. at 745, 559 S.E.2d at 718. The requirement that the policy be a "substantial public policy" "was intended 'to exclude claims that are based on insubstantial considerations.' " Caudill v. CCBCC, Inc., 2009 U.S. Dist. LEXIS 72719, * 21 (S.D. W. Va. Aug. 17, 2009) (citation omitted).

Notably, the determination of the existence of such a public policy is " 'a question of law, rather than a question of fact for a jury.' " Feliciano, 210 W. Va. at 744, 559 S.E.2d at 717 (quoting Cordle v. General Hugh Mercer Corp., 174 W. Va. 321, 325 S.E.2d 111, at syl. pt. 1 (1984)). Therefore, the question of whether or not Plaintiff in this matter was terminated in contravention to a substantial public policy of West Virginia was properly decided by the Circuit Court on summary judgment.

In order to identify sources of public policy to determine whether a retaliatory discharge has occurred, West Virginia courts are to " 'look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions.' " Bowe v. Charleston Area Med. Center, Inc., 189 W. Va. 145, 149, 428 S.E. 2d 773, 777 (1993) (plaintiff

failed to identify any constitutional provision, legislative enactment, legislatively approved regulations, or judicial opinion that established a public policy in contravention of which she was discharged) (quoting Birthisel v. Tri-Cities Health Servs., 188 W. Va. 371, 424 S.E.2d 606, at syl. pt. 2 (1992)). It has been noted that courts are to “proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.” Tiernan v. Charleston Area Med. Ctr., Inc., 203 W. Va. 135, 141, 506 S.E.2d 578, 584 (1998). In addition, “despite the broad power vested in the courts to determine public policy,” courts are to “exercise restraint” when using such power. Tiernan, 203 W. Va. at 141, 506 S.E.2d at 584. See also, Shell v. Metropolitan Life Ins. Co., 183 W. Va. 407, 413, 396 S.E. 2d 174, 180 (1990) (“We have exercised the power to declare an employer's conduct as contrary to public policy with restraint . . . , and have deferred to the West Virginia legislature because it ‘has the primary responsibility for translating public policy into law’ ”) (citations omitted).

“ ‘Inherent in the term “substantial public policy” is the concept that the policy will provide specific guidance to a reasonable person.’ ” Bowe, 189 W. Va. at 149, 428 S.E.2d at 777 (quoting Birthisel, 424 S.E. 2d at syl. pt. 3). Therefore, in order for a public policy to be substantial, it “must not just be recognizable as such but must be so widely regarded as to be evident to employers and employees alike.” Feliciano, 210 W. Va. at 745, 559 S.E.2d at 718.

More specifically, a “ ‘ “ ‘[p]ublic policy’ is that principle of law which holds that no person can lawfully do that which has a tendency to be **injurious to the public or against public good** even though no actual injury may have resulted therefrom in a particular case to the public.” ’ ” Feliciano, 210 W. Va. at 745, 559 S.E.2d at 718 (emphasis added) (quoting Cordle, 174 W. Va. at 325, 325 S.E.2d at 114 (quoting Allen v. Commercial Cas. Ins. Co., 131 N.J.L. 475, 477-78, 37 A.2d 37, 39 (1944)) (internal quotations and citations omitted)). The rationale

behind the public policy exception is that “protecting the employee from discharge is necessary to uphold a **substantial public interest**.” Wounaris v. West Virginia State Coll., 214 W. Va. 241, 247, 588 S.E.2d 406, 412 (2003) (citation omitted). Therefore, it has been held 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, 203 W. Va. at 141, 506 S.E.2d at 584 (citing Mamlin v. Genoe, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941)). See also, Brooks v. Bell Savings & Loan Ass’n, 29 Cal. App.4th 565, 593, 34 Cal. Rptr. 2d 785, 797 (1994) (“The discharge must affect a duty which inures to the benefit of the public at large rather than to a particular employer or employee”) (citations omitted).

Based upon these principles, the Court in Feliciano recognized the following to be necessary for proof of a claim of relief for wrongful discharge in contravention of substantial public policy:

- (1) **[Whether 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) [Whether] dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the *jeopardy* element);
- (3) [Whether t]he plaintiff’s dismissal was motivated by conduct related to the public policy (the *causation* element); and
- (4) [Whether t]he employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

210 W. Va. at 750, 559 S.E.2d at 723 (citations omitted) (emphasis added).

The requirement of a clearly mandated public policy has been explained by the Supreme Court of Illinois:

In a common law retaliatory discharge action, the requirement of a "clearly mandated public policy" is essential because, in its absence, [an employer] retains the right to fire noncontractual employees at will. . . . Adherence to a narrow definition of public policy, as an element of a retaliatory discharge action, maintains the balance among the recognized interests. Employees will be secure in knowing that their jobs are safe if they exercise their rights according to a clear mandate of public policy. Employers will know that they may discharge their at-will employees for any or no reason unless they act contrary to public policy. Finally, the public interest in the furtherance of its public policies, the stability of employment, and the elimination of frivolous lawsuits is maintained.

Turner v. Memorial Med. Ctr., 2009 Ill. LEXIS 931, * 18 (Ill. June 18, 2009) (citations omitted).

2. **Whether an Employee's Internal Report of a Possible Breach of Fiduciary Duty, Possible Misappropriation of Corporate Monies or Possible Violation of a Criminal Statute Regarding Embezzlement or Larceny Falls Within Narrow Public Policy Exception**

Plaintiff in this action has alleged that he was retaliated against and terminated in violation of public policy. Therefore, Plaintiff is required to prove as an element of his cause of action that a clear and substantial public policy actually existed. Feliciano, 210 W. Va. at 750, 559 S.E.2d at 723; Harless, 162 W. Va. at 124, 246 S.E.2d at 275. As Plaintiff failed to set forth any recognized and valid public policy exception, summary judgment was properly entered in favor of Defendant.

a. No Substantial *Public* Policy Alleged or Proven

i. Alleged Violation of Corporate Fiduciary Duties and Misappropriation of Corporate Funds

Notably, the only allegations regarding any alleged public policy that Plaintiff has set forth in his Complaint in support of his claim for wrongful termination do not involve any substantial **public** policy. As set forth above, Plaintiff claims in his Complaint he was terminated in retaliation for his report that Steve Roach was engaging in alleged “improper conduct **detrimental to the company**” and conduct “in breach of Mr. Roach’s fiduciary duties **owed to the company** and that amounted to misappropriation of **company funds**” in alleged violation of state statutory and common law (Complaint at ¶¶ 23-24) (emphasis added).⁴ He further claims that his termination “violated substantial public policy principles governing fiduciary relationships, misappropriation of funds and **corporate** requirements and standards” (Complaint at ¶ 25) (emphasis added).

As evidenced by the allegations of the Complaint itself, Plaintiff’s action against Defendants does not involve a claimed violation of any public policy or anything that may be injurious to the public good, but merely an alleged violation of the financial interests of a **private corporation**. Steve Roach, as a **private** employee, does not owe a fiduciary duty to the public at large. See United States v. ReBrook, 837 F. Supp. 162, 171 (S.D. W. Va. 1993) (defendant employed by state government; “**public** employee owes a fiduciary duty to the public”) (emphasis added), cert. denied, 516 U.S. 970 (1995). Instead, as an officer of Defendant, a

⁴ Plaintiff does not address these allegations in his Brief, but only appears to rely upon the claimed possible violation of a criminal statute, which was first alleged in his Response to Defendant’s Motion for Summary Judgment. In order to thoroughly address the insufficiency of Plaintiff’s allegations and Plaintiff’s failure to make a sufficient showing of the existence of a substantial public policy principle, an essential element of his claim, Defendant has addressed these allegations in this Brief.

corporation, Steve Roach is required to act in the best interests of the corporation, a **private** entity. See W. Va. Code § 31D-8-842. Plaintiff's Brief also makes clear that no **public** policy has been asserted, as Plaintiff has merely argued that Mr. Swears should be protected from retaliatory discharge because the alleged "criminal misconduct" "injured both the Company and its Principals" (Brief of Appellant at p. 10). Plaintiff did not identify, and cannot identify, any constitution, statute, regulation or other authority that might provide a basis for these claims.

Indeed, other courts have specifically held that claims like Plaintiff's did not involve a public policy that constituted an exception to the at-will employment doctrine and upon which a wrongful discharge claim could be based. In Schwenke v. Wayne-Dalton Corp., 2008 Ohio App. LEXIS 1236, ** 2, 4-7 (Ohio. Ct. App. Mar. 27, 2008), appeal denied, 891 N.E.2d 771 (Ohio 2008), the plaintiff-employee alleged that he questioned the president and chief financial officer of the defendant-employer about allegedly inappropriate accounting practices and misappropriations of corporate assets and was terminated as a result. The plaintiff-employee alleged that his termination violated public policy because such a termination "allows a company and/or individuals that are improperly and/or wrongfully conducting business to discharge an employee who raises concerns and/or objections to potential unlawful activity." Schwenke, 2008 Ohio App. LEXIS at ** 2, 7-8.

The trial court found for the plaintiff-employee and the defendant-employer appealed, arguing, *inter alia*, that the trial court erred in initially denying its motion for summary judgment, because the plaintiff-employee "did not meet or satisfy the elements necessary to establish a viable public policy claim." Schwenke, 2008 Ohio App. LEXIS at ** 7-8, 9. The plaintiff-employee argued on appeal that there is "a public policy in support of not firing an employee . . .

in retaliation for reporting inappropriate accounting procedures or misappropriation of corporate assets.” Schwenke, 2008 Ohio App. LEXIS at ** 15.

The Court of Appeals of Ohio agreed with the defendant-employer and found that the trial court should have entered summary judgment in favor of the defendant-employer, since plaintiff’s allegations did not satisfy the “clarity” element needed for a public policy exception to the at-will doctrine, as the plaintiff-employee did not establish that his termination was in violation of a clear public policy. Schwenke, 2008 Ohio App. LEXIS at **17-18. The Ohio court noted:

[the plaintiff-employee] did not identify any constitution, statute or regulation that might provide a basis for his claims. Nor did [he] cite or present the trial court with any legal authority in support of his argument that his termination violated public policy. [He] merely alleged that he questioned [the defendant-employer] about alleged inappropriate accounting practices and misappropriation of corporate assets and was fired and that his firing violated public policy.

Schwenke, 2008 Ohio App. LEXIS at ** 15-16. As set forth in the concurring opinion, the plaintiff-employee’s “best argument” was that “the fiduciary duty which exists between a corporation and its directors and its shareholders warrants recognition as a public policy exception to the at-will employment doctrine.” Schwenke, 2008 Ohio App. LEXIS at ** 19. The concurring judge noted: “I know of no case law, nor has Appellee identified any, which has recognized the breach of that fiduciary duty rises to the level of a matter of public policy.” Id.

In another similar case, Norman v. Recreation Centers of Sun City, Inc., 752 P.2d 514, 516, 517 (Ariz. Ct. App. 1988), the plaintiff-employee, who was the operation supervisor of the defendant-employer, alleged that his termination came within the public policy exception to the at-will rule. More specifically, the plaintiff-employee claimed that he was fired because one of the defendant-employer’s new members of the board of directors was “going to get” the plaintiff-

employee's former supervisor and his "cronies," which included the plaintiff-employee, "out of there." Norman, 752 P.2d at 516, 517. The plaintiff-employee argued that this reason for his termination was "contrary to the public policy that requires a director to act in accordance with those fiduciary duties that he owed to the members or shareholders." Norman, 752 P.2d at 517 (citation omitted).

The court noted that Arizona's Supreme Court has been "careful to point out . . . that the public policy exception only applie[s] to a 'singularly public purpose,' and not to a 'merely private or proprietary' interest." Norman, 752 P.2d at 517 (citation omitted). See also Spence-Parker v. Delaware River and Bay Auth'y, 2009 U.S. Dist. LEXIS 75187, * 39 (D. N.J. Aug. 21, 2009) ("limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee"). Considering the plaintiff-employee's argument, the court concluded that, even if he were fired as a result of a breach of the director's fiduciary duty, his termination would not fall within the public policy exception to the at-will rule. Norman, 752 P.2d at 517-18. In support of its determination, the court cited a case out of Oregon in which the court "refused to recognize a cause of action for an employee who claimed that he was wrongfully discharged for exercising his statutory right as a stockholder to examine the books of his corporate employer" and in which the "Oregon court found that the right claimed by the employee was 'not one of public policy, but the private and proprietary interest of the stockholders, as owners of the corporation.'" Norman, 752 P.2d at 518 (citing Campbell v. Ford Indus., Inc., 546 P.2d 141 (Or. 1976)).

ii. **Alleged Possible Violation of Criminal Statutes Regarding Embezzlement and Larceny**

Even considering the alleged possible violation of criminal statutes regarding embezzlement and larceny, Plaintiff remains unable to prove, however, that his termination violated a substantial **public** policy principle. As with the claimed misappropriation of corporate funds and claimed breach of fiduciary duties, any alleged possible violation of criminal statutes regarding embezzlement and larceny also involves the theft of **corporate** monies, not **public** monies. Therefore, factually, the alleged possible criminal conduct does not involve any injury to the public or the public good or any substantial public interest, such as public health, safety, morals or welfare. See Wounaris, 214 W. Va. at 247, 588 S.E.2d at 412; Feliciano, 210 W. Va. at 745, 559 S.E.2d at 718; Tiernan, 203 W. Va. at 141, 506 S.E.2d at 584.

In a factually similar case, Hayes v. Eateries, Inc., 1995 Okla. LEXIS 129, * 4 905 P.2d 778, 781 (Okla. 1995), the plaintiff, an at-will employee, claimed that he was wrongfully terminated for reporting possible theft of property and embezzlement from his employer. The trial court and court of appeals both found that the plaintiff failed to state a claim upon which relief could be granted. Hayes, 1995 Okla. LEXIS at * 6, 905 P.2d at 781. On *certiorari*, the Supreme Court of Oklahoma affirmed, finding as follows:

an employee, in reporting such a crime committed by a co-employee **against the interest of his employer** to outside law enforcement officials is not seeking to vindicate a public wrong where the victim of the crime could in any real or direct sense be said to be the general public, as where crimes or violations of health or safety laws are involved. Thus, the situation here must also be distinguished from those where sister jurisdictions have protected "whistleblowing" activity geared toward the good faith reporting of infractions by the employer or co-employees of rules, regulations or the law pertaining to the **public** health, safety or general welfare. Palmer v. Brown, 242 Kan. 893, 752 P.2d 685, 689-690 (1988) (outside reporting of Medicaid fraud of employer);

See also, White v. General Motors Corporation, 908 F.2d 669, 671-672 (10th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991) (applying Kansas law) (internal reporting to GM management of various defects in brake installations); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (internal reporting geared toward employee's efforts to ensure that his employer's products complied with applicable state law relating to labeling and licensing); Harless v. First National Bank in Fairmont, 162 W. Va. 116, 246 S.E.2d 270 (1978) (internal reporting geared toward employee's efforts to require his employer, a bank, to comply with consumer credit and protection laws). These latter situations must be distinguished from those which involve merely private or proprietary interests because to support a viable tort claim the public policy must truly be public, rather than merely private or proprietary. Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250, 256-257 (1986). We believe here the situation involves only the private or proprietary interests of the employer-employee relationship, not the direct interests of the general public as where the reporting involves the criminal wrongdoing of the employer or a co-employee perpetrated against the interests of the general public.

Hayes, 1995 Okla. LEXIS at * 24-26, 905 P.2d at 786-77.

The court further noted that it was the employer's money or property that was stolen and concluded:

Here we can see no such overriding public interest, but merely the private and/or proprietary interests of the employer in its relationship with the employee as to whether the employer wishes to pursue in the first instance a criminal complaint against the accused co-employee.

Hayes, 1995 Okla. LEXIS at * 28, 905 P.2d at 788. The court noted that such decision is "primarily a private business decision." Id. The court went on to add:

Although we might think it would actually be contrary to good business decision-making for an employer to terminate an employee for uncovering co-employee embezzlement and reporting it to the company hierarchy, and we might even think it is morally wrong, the [law] does not protect an employee from his employer's poor business judgment, corporate foolishness or moral transgressions, but only protects the employee from termination by

the employer when such discharge has violated a clear mandate of public policy.

Hayes, 1995 Okla. LEXIS at * 30, 905 P.2d at 788. The facts and allegations in this case, including the alleged possible violation of a criminal statute regarding embezzlement or larceny, similarly only involve private, proprietary interests, and not a public policy.

Plaintiff argues in his Brief that "prohibiting criminal conduct constitutes a substantial public policy of West Virginia," and that Steve Roach's "act of deleting from the company books a debt that he owed to the Company . . . seemingly satisfies the elements for the crime of embezzlement" or the "crime of larceny," both of which are codified in the West Virginia Code (Brief of Appellant at p. 9). Plaintiff also argues that "[i]t goes without saying that embedded in the public policy of prohibiting theft is the public policy of exposing individuals engaged in such conduct." Id. Plaintiff further alleges that he should be "protected from retaliatory discharge" in order to "maintain and protect the substantial public policy of prohibiting the commission [sic] of criminal acts" (Brief of Appellant at p. 10). These generalized allegations, however, are not enough. See, e.g., Turner, 2009 Ill. LEXIS at * 9-12 (plaintiff's allegations that employer discharged him in retaliation for reporting alleged patient charting discrepancy, which he claimed violated a broad, generalized public policy of "patient safety" set forth in standards and a state statute, not enough to identify a specific expression of public policy).

Merely citing two statutes that exist in the West Virginia Code will not provide the required substantial public policy principle. As noted by the Supreme Court of Illinois:

the mere citation of a constitutional or statutory provision in a complaint⁵ will not, by itself, be sufficient to state a cause of action for retaliatory discharge. Rather, an employee must show that the discharge violated the public policy that the cited provision clearly mandates.

⁵ Again, it should be noted that Plaintiff did not allege any violation of a criminal statute in his Complaint.

Turner, 2009 Ill. LEXIS at * 15 (citations omitted). In noting that "[e]ven violations of a statute may be insufficient to allow a suit for wrongful termination," a Connecticut appeals court has held:

If every violation of every public policy were to be recognized as permitting a lawsuit . . . , the general rule of non-liability for groundless termination of at-will employees would be subsumed by this exception. Indeed, it is the statutorily pronounced public policy of this state to reduce unemployment, General Statutes § 31-32a(a). Every discharge of any at-will employee would violate that public policy. The appellate case law wisely counsels that only certain important violations of public policy will form the basis for a cause of action

Knofla v. E. Conn. Health Network, Inc., 2009 Conn. Super. LEXIS 3151, * 2-3 (Conn. Super. Ct. Dec. 1, 2009). Therefore, it is not enough that Plaintiff allege a possible violation of a existing criminal statute.

It should also be noted that the four cases Plaintiff cites in support of his argument that terminating an employee for reporting a crime by a co-worker, supervisor or member of management violates public policy are not binding upon this Court. Moreover, despite Plaintiff's contention, the Arizona court in Vermillion v. AAA Pro Moving & Storage, 146 Ariz. 215, 704 P.2d 1360 (Ct. App. Div. 2 1985), did not find that the plaintiff's termination for merely reporting a violation of the Arizona criminal code violated a public policy and, thus, warranted an exception to the at-will doctrine. Instead, the court in Vermillion found an exception to exist where the employee was **ordered** by his employer to conceal a theft by his employer, but chose to report such theft and was terminated. 146 Ariz. at 216, 704 P.2d at 1361. Application of such exception would only be warranted where an employee is forced to choose between his or her job and violating the law, which has not been alleged in this matter. In addition, in Willard v. Paracelsus Health Care Corp., 681 So.2d 539 (Miss. 1996), cert. denied, 530 U.S. 1215 (2000), the conduct at issue was clearly forgery and, as is set forth more

completely below, no crime actually occurred in this matter. See Wheeler v. BL Development Corp., 415 F.3d 399, 403 (5th Cir.) (plaintiffs' "attempt to equate an employee's 'good faith effort' in reporting illegal activity, which is protected under the common law exception, with a good faith *belief* that illegal activity is taking place is misplaced"), cert. denied, 546 U.S. 1061 (2005).

Overall, the case before the Court is not like others where West Virginia courts, including this Court, have found a public policy that warranted an exception to the long-standing at-will rule. See, e.g., Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111, 506 S.E.2d 554 (1997) (court recognized public policy emanating from state regulation on hospital patient care as providing basis for constructive discharge claim); Lilly v. Overnight Transp. Co., 188 W. Va. 538, 422 S.E.2d 214 (1992) (wrongful discharge cause of action where employee discharged in retaliation for refusing to operate a motor vehicle with unsafe brakes; "legislature intended to establish a clear and unequivocal public policy that the public should be protected against the substantial danger created by the operation of a vehicle in such an unsafe condition as to endanger the public's safety"); Cordle, 174 W. Va. 321, 325 S.E.2d 111 (court recognized public policy derived from common law right of privacy as basis of wrongful discharge claim of employee who refused to take lie detector test); Allman v. Chancellor Health Partners, Inc., 2009 U.S. Dist. LEXIS 44501, * 17 (N.D. W. Va. May 26, 2009) (court denied defendant's motion to dismiss because legislative rules invoked by plaintiff implicated medical welfare concerns for the elderly, a vulnerable population). See also Tiernan, 203 W. Va. at 141-42, 506 S.E.2d at 584-85 ("the vast majority of our cases involved public policy that was clearly articulated by statutes or common law").

Therefore, it is clear that summary judgment in favor of Defendant was proper, as no substantial public policy has been or can be properly alleged or proven.

b. No Refusal to Engage in Illegal Activity

As stated above, as Plaintiff concedes, the West Virginia Supreme Court of Appeals has never held that terminating an employee for reporting criminal conduct violates a substantial public policy that would provide an exception to the at-will doctrine and a basis for his wrongful discharge claim (Brief of Appellant at p. 9). In fact, no courts of the states comprising the Fourth Circuit have recognized such an exception. Instead, any such exception based upon criminal activity has been limited to situations where an employee refuses to engage in illegal activity. DeGirolamo v. Sanus Corp. Health Systems, No. 90-2146, 1991 U.S. App. LEXIS 12281, * 5 (4th Cir. June 17, 1991) (recognizing that abusive discharge tort is limited in scope and only applies “ ‘to situations involving the actual refusal to engage in illegal activity . . . ’ ”) (applying Maryland law); Hammond v. Taneytown Vol. Fire Co., 2009 U.S. Dist. LEXIS 95183, * 6 (D. Md. Oct. 13. 2009) (“Maryland courts have found a clear mandate of public policy to be violated only in very limited circumstances: (1) ‘where an employee has been fired for refusing to violate the law or the legal rights of a third party . . . ’ ”); Jordan v. Town of Front Royal, No. 5:07CV00101, 2008 U.S. Dist. LEXIS 46533, *5-6 (W.D. Va. June 16, 2008) (Supreme Court of Virginia finds circumstance in which claims sufficient to satisfy public policy exception when employer terminates employee for refusing to commit a criminal act); Greene v. Quest Diagnostics Clinical Laboratories, Inc., 455 F. Supp.2d 483, 489 (D. S.C. 2006) (South Carolina Supreme Court recognizes action for wrongful discharge when employer requires employee to violate a criminal law as a condition of maintaining employment).

Other states' appellate and Supreme courts have similarly required that an employee be instructed to violate the law by his or her employer in order for a wrongful discharge action to stand. See McCall v. Southwest Airlines Co., 2010 U.S. Dist. LEXIS 2522, * 33-34 (N.D. Tex. Jan. 12, 2010) (under Texas law, narrow public policy exception " 'covers only the discharge of an employee for the *sole* reason that the employee refused to perform an illegal act' "); Baker v. Tremco Inc., 2009 Ind. LEXIS 1494, * 6-7, 917 N.E. 2d 650 (Ind. Dec. 1, 2009) (public policy exception extended to include " 'separate but tightly defined exception to the employment at will doctrine' when an employer discharges an employee for refusing to commit an illegal act for which the employee would be personally liable"); Welsh v. Pheonix Transp. Svcs., LLC, 2009 Ky. App. LEXIS 137, * 13 (Ky. Ct. App. Aug. 14, 2009) ("an employee claiming wrongful discharge due to a refusal to violate the law must show an affirmative request to him/her by the employer to violate the law. Stated otherwise, a claim of wrongful discharge in violation of a well-defined public policy will not stand when an employee has never been instructed to violate the law by her employer").

The fact that the West Virginia Supreme Court has required a "substantial" public policy to warrant an exception to the at-will employment rule demonstrates the narrowness of such exception and such exception should not be broadened. The other courts of this Circuit have also held that the public policy exception is narrow. Hammond, 2009 U.S. Dist. LEXIS 95183 at * 6 ("Maryland courts have found a clear mandate of public policy to be violated only in very limited circumstances"); Schuler v. Branch Banking & Trust Co., 2009 U.S. Dist. LEXIS 94043 (W.D.N.C. Oct. 8, 2009) ("North Carolina courts have recognized that '[t]he public policy exception to the employment-at-will doctrine is a 'narrow exception' . . ."); Smith v. Interactive Financial Marketing Group, LLC, 2009 Va. Cir. LEXIS 45 (Va. Cir. Ct. July 21, 2009) (Virginia

Supreme Court has held that this is a narrow exception) (citing Rowan v. Tractor Supply Co., 263 Va. 209, 559 S.E.2d 709 (2002)).

The Virginia Supreme Court has specifically held:

[w]hile virtually every statute expresses a public policy of some sort, we continue to consider this exception to be a 'narrow' exception and to hold that 'termination of an employee in violation of the policy underlying any one [statute] does not automatically give rise to a common law cause of action for wrongful discharge.'

Smith, 2009 Va. Cir. LEXIS at * 14 (citing Rowan, 263 Va. at 213. 559 S.E.2d at 711). It has been noted that the Virginia Supreme Court has only recognized that claims are sufficient to constitute a common law action for wrongful discharge under the public policy exception in 3 instances: 1) an employer violates a policy enabling the exercise of an employee's statutorily created right; 2) public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy; and 3) discharge based on the employee's refusal to engage in a criminal act. Smith, 2009 Va. Cir. LEXIS at * 14-15 (citation omitted). Moreover, the Virginia Supreme Court has held that "only the violation of two types of statutes may give rise to a viable wrongful discharge claim: 1) a statute explicitly stating it expresses a public policy of the Commonwealth or 2) a statute that implicitly expresses an established state public policy which is designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general that the discharge violates. Smith, 2009 Va. Cir. LEXIS at *15 (citations omitted). In addition, "even if a statute falls into one of these two categories, 'an employee must be a member of the class of persons that the specific public policy was designed to protect.'" Id. (citations omitted).

Thus, this Court should not expand the public policy exception to include complaints of possible violations of the criminal laws of this state. To do so would mean that almost any violation of a state statute would create an actionable public policy and would give at-will employees a cause of action, putting them on an equal footing with contracted employees and, thus, eroding the at-will employment doctrine. If the court were to permit at-will employees who are terminated to pursue wrongful discharge litigation based upon internal reports of alleged violations of criminal statutes by others they work with, it could result in the filing of countless actions based upon any one of the criminal statutes embodied in the West Virginia Code, including statutes like those Plaintiff raises in this matter, which do not contain any expression of public policy by the legislature.

c. No External Reporting

As set forth above, Plaintiff alleges that he reported Steve Roach's conduct internally to "the other two principals in the company," Scott and Stan Roach (Brief of Appellant at p. 3). Plaintiff did not, however, make any report to any outside authority, including law enforcement, regarding any alleged criminal or other conduct by Steve Roach. Courts have held that the public policy exception does not apply where employees internally report alleged illegal conduct to their employers. See Greene, 455 F. Supp.2d at 490-91. In Greene, the court found that the plaintiff was unable to point to any law or other source that constituted a clear public policy "supporting the rights of employees to internally report potentially illegal conduct to their superiors," and granted the defendant-employer's motion for summary judgment. 455 F. Supp.2d at 490, 491. Thus, summary judgment was appropriate in this case.

C. **In the Alternative, Even If a New Exception to the At-Will Doctrine Were Created For Reporting Criminal Conduct, Such Exception Should Not Be Applied in This Matter**

1. **Courts Have Required an Actual Violation of the Law**

As stated above, research has not revealed any reported case in this State or the surrounding states in which a **purported** violation of a criminal statute was found to violate West Virginia public policy and support a claim for wrongful discharge. In fact, courts have required that an actual violation must have occurred. The United States Court of Appeals for the Third Circuit has noted:

The employee's good intentions are not enough to create a cause of action for wrongful discharge If an employee can avoid discipline whenever he reasonably believes his employer is acting unlawfully, it is the employee, not the public, who is protected by the good intentions. A company acting within the law is presumed to pose no threat to the public at large. The creation of a cause of action based on an employee's reasonable belief about the law would leave a private employer free to act only at the sufferance of its employees whenever reasonable men or women can differ about the meaning or application of a law governing the action the employer proposes. The effect such a rule might have on corporate governance and the efficient operation of private business organizations is not significant. On reason and authority, we therefore conclude that a clear violation of public policy depends on an actual violation of law.

Clark v. Modern Group Ltd., 9 F.3d 321, 332 (3d Cir. 1993) (summary judgment for employer affirmed despite plaintiff's argument that public policy exception should extend to cases in which an employee reasonably believes employer requested him or her to perform an unlawful act and is discharged for objecting to performing such act), rehearing denied, 9 F.3d 321 (3d Cir. 1993). See also Natale v. Winthrop Resources Corp., No. 07-4686, 2008 U.S. Dist. LEXIS 54358, * 34 (E.D. Pa. July 9, 2008) (dismissing wrongful discharge claim because no actual violation of law and public policy exception limited solely to when employee objects to a course of action that employer is taking that is clearly illegal); Greene, 455 F. Supp.2d at 489 (citing

Antley v. Shepherd, 340 S.C. 541, 551, 532 S.E.2d 294, 299 (Ct. App. 2000) (declining to extend exception to situations where employee terminated for refusing to do something he believed would, but did not in fact, violate the law), aff'd in part, 349 S.C. 600, 564 S.E.2d 116 (2002) (modified regarding different issue)); Wheeler, 415 F.3d at 403-404 (summary judgment for employer affirmed and plaintiffs precluded from recovering under public policy exception because they failed to come forth with evidence of actual criminal activity).

2. No Actual Violation of the Law Occurred in This Case

As provided above, Plaintiff has argued that Steven Roach's alleged conduct in this matter "seemingly satisfies the elements for the crime of embezzlement," or "constituted the crime of larceny," both of which are codified in the West Virginia Criminal Code (Brief of Appellant at p. 9). Both common sense and a review of the elements of each of these crimes, however, make clear that nothing criminal occurred in this matter.

The West Virginia embezzlement statute, W. Va. Code § 61-3-20, involves the fraudulent conversion and appropriation of money or property. See State v. Frasher, 164 W. Va. 572, 576, 265 S.E.2d 43, 46 (1980). To be guilty of such crime, "one must 'convert' to his own use the money or goods entrusted to his care." State v. DeBerry, 75 W. Va. 632, 636, 84 S.E. 508, 510 (1915). Conversion is an "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another" DeBerry, 75 W. Va. at 636-37, 84 S.E. at 510. Similarly, the crime of larceny, the penalties for which are set forth at W. Va. Code § 61-3-13, is the " 'unlawful and felonious stealing, taking and the carrying away of the personalty of another of some value with felonious intent on the part of the taker to deprive the owner of his property permanently.' " Crow v. Coiner, 323 F. Supp. 555, 560 (N.D. W. Va. 1971) (quoting State v. Pietranton, 137 W. Va. 477, 482-83, 72 S.E. 617, 620 (1952)).

Notably, despite Plaintiff's allegations in his Response on summary judgment and in his Petition and Brief before this Court, there is no evidence here that suggests any criminal conduct occurred. In fact, the nonsensical nature of Plaintiff's argument is demonstrated by the mere fact that Steve Roach was one of Defendant's principal owners and could not have converted or stolen from himself. Moreover, as the Affidavit of Scott Roach, Defendant's President, makes clear, Steve Roach was authorized to purchase the subject inventory from Defendant and to remove the finance charges from the Sunfire account. Defendant did not suffer a loss in profits that can in any way be attributed to Sunfire (the Affidavit of Scott Roach ("Roach Affidavit") was attached to Defendant's Rebuttal Memorandum in Support of Defendant's Motion for Summary Judgment as Exhibit "2"; Complaint at ¶ 10). At no time did Sunfire improperly have "in its possession approximately \$15,000.00 worth of [Defendant's] inventory" (Complaint at ¶ 11; Roach Affidavit at ¶ 6). To the contrary, it was jointly decided by Defendant's three principal owners that Sunfire could purchase the subject inventory, some of which had been on display in Defendant's showroom, at Defendant's cost (Roach Affidavit at ¶ 6). Although the invoice was not paid on time⁶ due to Steve Roach's belief that he should not have to pay for some of the items of inventory, as they were outdated or damaged, it was eventually invoiced by Defendant to Sunfire and paid by Sunfire (Roach Affidavit at ¶ 7). At no time was Steve Roach required by Defendant to personally pay for, nor did he personally pay for, the subject inventory (Roach Affidavit at ¶ 9). Therefore, Steve Roach did not fraudulently or feloniously take the subject inventory, but was specifically permitted and authorized to do so.

⁶ It should be noted that, although Plaintiff told Steve Roach and Defendant's other principal owners that the invoice for the subject inventory had not been paid, the fact that the invoice was not paid on time was a fact that was readily available and would have been reported by the accounting department, and not a fact that only Plaintiff could have "alerted" Defendant's principal owners and Board to, as alleged in Plaintiff's Complaint (Complaint at ¶ 12; Roach Affidavit at ¶ 8).

The finance charges for the inventory were initially charged to the Sunfire account, but Steve Roach removed them from the account consistent with usual company practices. As Defendant's Chief Operating Officer and Chief Financial Officer, Steve Roach had the authority, and did not need approval from anyone else at the company, to do so (Roach Affidavit at ¶ 10).⁷ Since he was authorized to do so, his conduct was not unlawful and no conversion occurred.

In addition, contrary to Plaintiff's belief, no conflict of interest existed or exists between Sunfire and Defendant (See Complaint at ¶ 9; Roach Affidavit at ¶ 4). The companies' key product divisions are different (See Roach Affidavit at ¶ 4). Sunfire sells hearth, patio, and spa equipment, such as hot tubs, and does not either sell or provide heating fuel to its customers for any of the products it sells or have any involvement in the operation of convenience stores (See Roach Affidavit at ¶ 3). Sunfire is actually one of Defendant's customers and is a source of potential customers to Defendant (See Roach Affidavit at ¶ 4).

Since no crime was actually committed by Steve Roach regarding Sunfire or the subject inventory, the Court should not apply any expansion of the public policy exception of the long-standing at-will doctrine to this matter.

3. Plaintiff Had No Reasonable or Good Faith Basis for Believing That a Violation of the Law Occurred

Plaintiff's claim for wrongful discharge should also fail because Plaintiff lacks any reasonable or good-faith argument that Steve Roach's conduct constituted a crime. Murcott v. Best Western International, Inc., 198 Ariz. 349, 358, 9 P.3d 1088, 1097 (2000) (cited by

⁷ It should also be noted that, just as the information regarding the payment of the invoice was readily available, so was any information regarding the reversal of the finance charges, and such fact was not something Plaintiff "discovered" (See Complaint at ¶ 15; Roach Affidavit at ¶ 10).

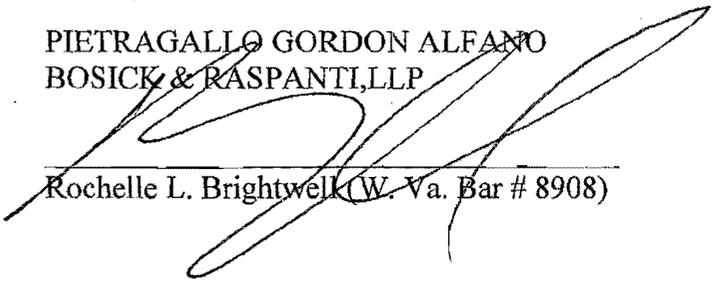
Plaintiff) (recognizing argument by employer that employee “lacked a good-faith belief that its conduct violated federal and state antitrust laws,” but found such argument was waived).

RELIEF PRAYED FOR

Therefore, since no genuine issue of material fact exists as to whether a substantial public policy exception to the at-will doctrine is present, summary judgment in favor of Defendant, R. M. Roach & Sons, Inc., was proper and this Court should affirm the Circuit Court's entry of summary judgment for Defendant.

Respectfully submitted,

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Dated: January 20, 2010

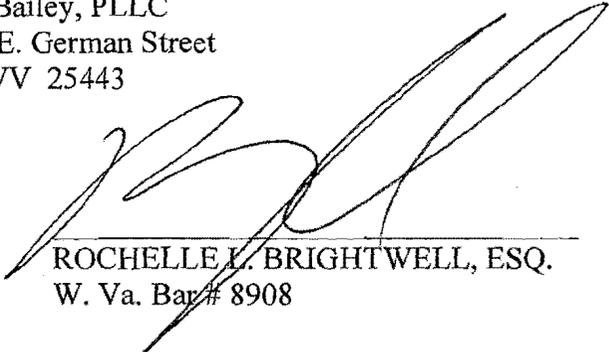
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

BARRY SWEARS,)
)
 Plaintiff-Petitioner,) No. 35309
)
 vs.)
)
 R.M. ROACH & SONS, INC.,)
)
 Defendant – Respondent.)

CERTIFICATE OF SERVICE

A true and accurate copy of the BRIEF OF APPELLEE was served upon the following parties by regular U. S. Mail, postage prepaid, this 20th day of January, 2010:

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