

3/31

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON

**MICHELLE ISSACS,**

**Appellant/Plaintiff**

vs.

**Circuit Court of Berkeley County  
Civil Action No. 05-C-817**

**Docket Number: 090960**

**35284**

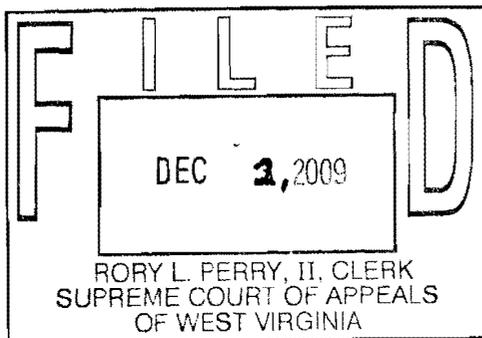
**DANIEL BONNER,**

**Appellee/Defendant.**

---

APPELLANTS BRIEF  
ON BEHALF OF MICHELLE ISAACS

---



SKINNER LAW FIRM

By: 

Andrew C. Skinner (WV Bar No. 9314)

Stephen G. Skinner (WV Bar No. 6725)

P.O. Box 487

Charles Town, WV 25414

(304) 725-7029

askinner@skinnerfirm.com

## TABLE OF CONTENTS

<b>I.</b>	<b>SUMMARY OF ARGUMENT</b>	<b>2</b>
<b>II.</b>	<b>NATURE OF PROCEEDING AND RULING BELOW</b>	<b>5</b>
<b>III.</b>	<b>STATEMENT OF FACTS</b>	<b>6</b>
<b>IV.</b>	<b>ASSIGNMENTS OF ERROR</b>	<b>10</b>
<b>V.</b>	<b>POINTS AND AUTHORITIES RELIED UPON</b>	<b>12</b>
<b>VI.</b>	<b>DISCUSSION OF LAW</b>	<b>14</b>
	<b>A. STANDARD OF REVIEW</b>	<b>14</b>
	<b>B. DISCUSSION</b>	<b>15</b>
	1. The Circuit Court of Berkeley County erred as a matter of law by ignoring the plain language of the employment policy.	15
	2. The Circuit Court of Berkeley County erred as a matter of law By interpreting the language of the employment agreement in favor of the employer rather than the employee.	22
	3. The Circuit Court of Berkeley County erred as a matter of law by disregarding the prior practice of the Appellee where the written employment policy was not explicit.	23
	4. The Circuit Court of Berkeley County erred in finding fraud by clear and convincing evidence.	32
	5. The Circuit Court of Berkeley County erred by misapplying the factors that courts must consider in awarding punitive damages when it awarded attorney fees.	40
	<b>C. CONCLUSION</b>	<b>47</b>
<b>VII.</b>	<b>RELIEF REQUESTED</b>	<b>48</b>

## I. SUMMARY OF ARGUMENT

An employment contract should be construed in favor of the employee. An employer must live with the terms that it sets for employment, whether written or unwritten, and it cannot use its discretion to alter those terms after an employee decides to leave its employ.

In this case, Appellee Bonner, an Inwood dentist, ignored the terms of employment that he established and then used his “discretion,” ex post facto, to alter the terms of employment. Specifically, Bonner ignored his own written employment policy by failing to pay Appellant Michelle Isaacs, a dental hygienist employee, for vacation time that even Bonner’s calculations show that she d earned. In addition, Bonner exercised unwarranted

“discretion” when he refused to pay Isaacs for vacation time accrued while on maternity leave, despite having paid for such vacation time after a previous maternity leave and despite other evidence that it was his policy to pay for such maternity leave. The West Virginia Division of Labor's Wage and Hour Section agreed with Appellant and asked Appellee to pay Appellant for this vacation pay, which he did.

Nevertheless, the trial court erred by ignoring the plain language of the employment policy and changing the meaning to disfavor the employee. In particular, the employment policy dictated that the employer would pay departing employees for *any* unused vacation *time* while the Plaintiff clearly had earned 4.2 hours of unused vacation, the lower court ignored the plain meaning of the employment policy and reinterpreted and misconstrued word “time” to mean “days”. The trial court then construed the policy so that it meant the employer would pay departing employees only for unused vacation

"days."

The trial court ignored the requirement that the plain language of a contract should not be construed. This had the effect of depriving Appellant of vacation time that even Appellee Bonner acknowledged she had earned. Moreover – and perhaps more importantly – the trial court construed the employment contract *in favor* of the employer, in direct contravention of long-established common law set by this Court.

Further, the trial court ignored the unwritten employment policy of the Appellee. Earlier in her employment with Appellee, Appellant Isaacs had taken and been paid for vacation as if she had earned vacation time while on maternity leave to have her first child. Appellant then had a second child and took a second maternity leave during the employment year in which she left Bonner's employment. After Appellant Isaacs ended her employment, Appellee refused to pay her for the vacation time she would have earned during this second maternity leave.

For an unwritten policy to be applied against an employee, it must be consistently applied and known by employees. Not only was the policy not consistently enforced with Appellant herself, but a pregnant employee who testified on behalf of Appellee stated that she believed she would be able to take and be paid for vacation as if she had been earning vacation while on maternity leave.

After altering the plain meaning of the employment policy and then constructing it in favor of the employer, the trial court went a step further and found that Appellant had committed fraud by filing a Request for Assistance ("RFA") with the West Virginia Division of Labor's Wage and Hour Section seeking pay for her unused vacation. Because the foundation for the fraud claim was built upon an incorrect interpretation of

the employment policy and upon ignoring the past practices of the employer, the conclusion that Appellant committed fraud was clearly erroneous: she was owed wages for unused vacation time when she left Appellee's Employment, she was not paid these wages, and she was entitled to file an RFA.

But even without predicate of the incorrect legal conclusions by the trial court, Appellant's Conduct clearly could not rise to fraud. The finding of fraud was based on Appellant's marking on a checking on the Request for Assistance form that there was no employment policy, even though the employment policy that was supposedly in place has not yet been found or produced by the employer, on writing that she was due vacation in an amount equal to the amount of vacation indicated on her paystub; and on the fact that she failed to provide the Wage and Hour Section with paystubs that the investigator testified that she had received Appellant Isaacs.

Finally, there was no valid basis for the imposition of punitive damages against Appellant Isaacs. Notwithstanding that there was no proper factual predicate, the trial court conceded that any alleged harm was minor and isolated and that Isaacs' financial condition was difficult. Nevertheless the trial court imposed a punitive damage award in a ratio of 34 to 1 in violation of Appellant Isaacs due process rights.

## II. NATURE OF PROCEEDINGS AND RULING BELOW

This is a Wage Payment and Collection Act (WVa Code § 21-5-1 et seq.) case originally filed pro se in the Magistrate Court of Berkeley County by Appellant Michelle Isaacs. Appellee Daniel Bonner removed the case to the Circuit Court of Berkeley County and filed a counterclaim alleging fraud. Appellant Isaacs' claim stems from the failure of Appellee to pay accrued vacation pay to Appellant upon her departure from his employment. Appellee's counterclaim alleged that Appellant's complaint filed with the Wage and Hour Section of the West Virginia Division of Labor was fraudulent because she sought wages that she knew were not due. An investigator in The West Virginia Division of Labor had previously found in favor of Appellant Isaacs, and Appellee paid before proceeding to an administrative hearing. The trial court conducted a bench trial, and nevertheless ruled against the Appellant on her statutory Wage Payment and Collection Act claim and found for the Appellee on his counterclaim for fraud. In addition to compensatory damages of \$1,016.60 and punitive damages of \$5,00.00, the trial Court awarded attorney fees of \$29,487.00 as an additional measure of punitive damages.

The trial court erred in its legal rulings and fact finding.

### III. STATEMENT OF FACTS

Appellant Michelle Isaacs is a dental hygienist. She was hired by Appellee Dr. Daniel Bonner, a dentist, to work at his Inwood, West Virginia, dental practice beginning November 1, 2000. *See* Stipulations of the Parties ("Stipulations"). Michelle Issacs worked for Bonner until July 14, 2004, when she left to work for another dentist. *Id.*; Tr. Trans. 130:8-23 (Oct 23, 2007).

Michelle Isaacs' was entitled to 64 hours of vacation per working year. At Bonner's practice, an employee's vacation is determined by that employee's "working year," which is based upon an employee's start date. Michelle Isaacs' working year started on November 1. *See* Stipulations.

During the eight months and fourteen days of the working year before her departure on July 14, 2004, Mrs. Isaacs took 3e paid vacation days, or 24 hours. *Id.* When she collected her final paycheck, there was no money included for unused vacation time. *Id.* Isaacs' final paystub from Bonner stated that she was due 64 hours of vacation. *See* Joint Exh. 1B, at 8.

Twice during her employment at Bonner's office, Isaacs took unpaid maternity leave. *See* Stipulations. The summer after returning to work from her first maternity leave, Isaacs took a vacation and was paid as if she had accrued vacation time for the entire working year, including while she was on maternity leave. Tr. Trans. 139:22-140:18 (Oct 23, 2007). Her second maternity leave happened during her last year with Bonner; during that three month maternity leave, she should have accrued two days of paid vacation. Unlike her first maternity leave, however, Bonner did not pay her for her unused vacation time as if she had accrued vacation while she was on maternity leave.

Instead, he claimed that it was discretionary whether he paid employees vacation for the time they were on maternity leave. Tr. Trans. 20:10-27:4 (Oct. 30, 2007).

Q. So it's your discretion?

A. It is.

Q. Your policy is: I get to decide whether someone gets paid vacation if they go on maternity leave?

A. Probably that's as good a way of putting it as any.

Tr. Trans. 24:19-24 (Oct 30, 2007).

When Isaacs asked Bonner about the missing vacation pay, he denied any was due. Tr. Trans. 133:17-134:4 (Oct 23, 2007). Isaacs filled out and filed a Request for Assistance form from the Wage and Hour Section of the West Virginia Division of Labor. *See* Joint Exh. 1B. This form asked, "What amount of wages/fringes *do you feel* you are entitled to?" *Id.* at 3 (emphasis added). In response, Isaacs wrote "\$1472.00 – taxes," an amount equal to the 64 hours listed on her paystub. *Id.* Further, Isaacs checked the "No" block indicating that there was no written employment policy. *Id.* at 2.

Mary Beth McGowan, an investigator with the Wage and Hour Section, investigated Isaacs' claims. During this investigation, Ms. McGowan gathered documents and information from both Isaacs and Bonner's office.

Of the documents provided to Ms. McGowan by Bonner's office, there was a one-page excerpt from an employment policy; this page included a vacation policy. *See* Joint Exh. 1D, at 3. Bonner admitted that this particular one-page excerpt was not the written policy that was in effect at the time of Mrs. Isaacs' departure; the written policy Bonner claimed to be in effect at the time of Issacs' departure had been "lost." To this day, not a single copy has been found, either in paper or electronic format. Bonner did not inform Ms. McGowan that the written policy he provided was not the actual policy in effect at

the time of Michelle Issacs' departure.

Instead, the written vacation policy provided to Ms. McGowan was a modification to the lost policy that Bonner claimed was in effect when Michelle Isaacs left Bonner's employ. According to Bonner, this lost policy was started in April 2004 and finished in approximately May of 2004, just two months before Isaacs left. Tr. Trans. 43:1-45:1 (Oct 30, 2007). According to Bonner, both the lost policy and the policy provided to the Wage and Hour investigator were essentially identical in all material aspects to the unpublished policies that had been in effect at the office for years.

Bonner also sent a hand-written fact sheet to Ms. McGowan stating that Michelle Isaacs had taken 3 days of vacation that year, that she had been on maternity leave from November 1, 2003, through February 1, 2004, and that vacation days were not kept on the computer but instead were on a payroll printout.<sup>1</sup> See Joint Exh. ID., at 2.

Ms. McGowan determined that Bonner owed Isaacs 40 hours of past due vacation. This number was calculated by subtracting the three days of vacation that Michelle Issacs had taken from the eight days a year to which an employee in their fourth year was entitled.<sup>2</sup> Ms. McGowan sent a letter to Bonner dated January 12, 2005; the letter stated that the investigation determined Bonner owed Isaacs \$920.00 dollars. See

---

<sup>1</sup> This "fact sheet" also indicated that Issacs "missed" the week of July 5, 2004. However, it was Bonner who missed the week of July 5, 2004, due to *his* vacation; a dental hygienist is not permitted to work without a dentist present and therefore, Issacs had no choice but to "miss" work the week of July 4th. Tr. Trans. 81:9-84:24 (Oct 30, 2007).

<sup>2</sup> It appears likely that both Issacs and McGowan used the 64 hour figure not only because it was on the paystub, but also because another employee who had just left Bonner's employment had received two full weeks of pay upon her departure. Tr. Trans. 183:12-16 (Oct. 23, 2007). Issacs believed this two weeks pay was for vacation. Tr. Trans. 133:15-134:22 (Oct. 23, 2007). McGowan was likely aware of the two-weeks of pay because she has conducted an investigation into the matter. Tr. Trans. 15:10-20 (Oct. 23, 2007). Dr. Bonner, on the other hand, stated that the two weeks pay received by this other employee was severance pay and not vacation. Tr. Trans. 64:13-65:19 (Oct. 30, 2007).

Joint Exh. 1E. Bonner sent a letter with a check for \$96.60. *See* Joint Exh. 1F. The letter stated that Isaacs "after calculations, is entitled, at the very most, to 4.20 hours in paid vacation." *Id.*

Reopening her investigation, Ms. McGowan and her supervisor at the Wage and Hour Section determined Isaacs was actually due 48 hours of unpaid vacation. *See* Joint Exh. 1I, at 4. McGowan then sent a subpoena to Bonner, seeking further employment records of Isaacs. *See* Joint Exh 1G. Instead of complying with the subpoena, Bonner sent in a check for the full amount of money originally sought by the Wage and Hour Section, which was \$920.00. The Wage and Hour Section closed their case.

Isaacs then filed her claim pro se in Magistrate Court in Berkeley County to obtain liquidated damages due under the Wage Payment and Collection Act. *See* Complaint. In the counterclaim, Bonner alleged Isaacs had committed fraud when she answered the question on the Request For Assistance form, "What amount of wages/fringes do you feel you are entitled?" and when she checked "No" after the question "Does a written policy exist?"

#### IV. ASSIGNMENTS OF ERROR

1. In a Wage Payment and Collection Act claim, is it appropriate to construe an unambiguous written employment policy where the policy states that the employer will pay departing employees for all unused vacation time?

The trial court construed the policy so that the employer need only pay departing employees for unused vacation time so long as that time could be measured in whole days, thus denying the employee unused vacation that even the employer acknowledged had been earned.

2. In a Wage Payment and Collection Act claim, is it appropriate to construe a written employment policy in favor of the employer?

The trial court construed the policy so that the employee would lose unused vacation pay despite the fact that the employment policy stated that the employer will pay departing employees for all unused vacation time.

3. In a Wage Payment and Collection Act claim, is it appropriate to ignore the past unwritten employment practice of the employer where the employer had previously paid an employee for her vacation as if she had earned vacation while on maternity leave, where the employer never informed the employee he would not be paying her until after she informed him she was departing, and where another employee believed she would be paid vacation as if she earned vacation during maternity leave?

The trial court determined that the employer had an unwritten policy of exercising his discretion in determining whether to pay employees for vacation earned while on maternity leave, even though the employer never informed the employee he would not be paying her as he had following her first maternity leave.

4. In a counterclaim for fraud, was it clearly erroneous for the trial court to base its finding of fraud on the employee's answers to a Request for Assistance form filed with the Wage and Hour Section of the West Virginia Division of Labor stating that an employment policy did not exist; that the employee felt she was due the amount of vacation pay stated on her paystub; and on the employee's alleged failure to provide to the Wage and Hour Section paystubs showing zero vacation due, when the employee provided such paystubs to the Wage and Hour Section?

The trial court determined that the employee committed fraud by stating there was no written employment policy, by stating she was due the amount of vacation pay as recorded on the paystub provided by her employer, and by providing paystubs to the Wage and Hour investigator showing zero vacation was due.

5. In a counterclaim for fraud, was the trial court's determination that punitive damages in the amount of \$5,000.00 and punitive damages in the form of attorney fees in the amount of \$29,487.52 were justified where compensatory damages were only \$1,016. 60.

The trial court determined that punitive damages of \$34,587.52 were supported by the evidence, not excessive, and in comport with Appellant Issacs' due process rights.

## V. POINTS AND AUTHORITIES RELIED UPON CASES

### CASES

*Robertson v. B. A. Mullican Lumber & Mfg. Co, L.P.*, 208 W.Va. 1, 537 S.E.2d 317 (2000)  
*Public Citizen, Inc., v. First Nat'l Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996)  
*Phillips v. Fox*, 193 W.Va. 657, 458 S.E.2d 327 (1995)  
*Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W.Va. 97, 468 S.E.2d 712 (1996)  
*Bennett v. Dove*, 166 W.Va. 772, 277 S.E.2d 617 (1981)  
*Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W.Va. 266, 633 S.E.2d 22 (2006)  
*Lipscomb v. Tucker County Comm'n*, 206 W.Va. 627, 527 S.E.2d 171 (1999)  
*Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999)  
*Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000)  
*Mullins v. Venable*, 171 W.Va. 92, 297 S.E.2d 866 (1982)  
*Howell v. City of Princeton*, 210 W.Va. 735, 559 S.E.2d 424 (2001)  
*Gerver v. Benavides*, 207 W.Va. 228, 530 S.E.2d 701 (1999)  
*Bennett v. Neff*, 130 W.Va. 121, 42 S.E.2d 793 (1947)  
*Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004)  
*Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)  
*Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991)  
*TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992)

### STATUTES AND REGULATIONS

W.Va. Constitution Art 3, Section 17  
W.Va. Code § 21-5-1 et seq,  
W.Va. Code" 81. R § 42-5-14

### OTHER

*The St. Martin's Handbook*, 3d Edition (1996).

## VI. DISCUSSION OF THE LAW

### A. STANDARD OF REVIEW

This Court must apply different standards of review to different aspects of the instant appeal. This Court has said, "[i]n reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review" *Robertson v. B A Mullican Lumber & Mfg. Co, LP*, 208 W.Va. 1, 2-3, 537 S.E.2d 317, 318 (2000) (citing Syl. Pt 1, *Public Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996)).

Further this Court has stated that "[a]ppellate oversight is therefore deferential, and we review the trial court's findings of fact following a bench trial, including mixed fact/law findings, under the clearly erroneous standard. If the trial court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the trial court's findings of fact are not clearly erroneous and the correct legal standard is applied, its ultimate ruling will be affirmed as a matter of law." *Id.* (citing *Phillips v Fox*, 193 W.Va. 657, 662, 458 S.E.2d 327, 332 (1995)).

In the lower court's interpretation of the written employment policy – a purely legal question – this Court should apply a de novo standard of review. Similarly, this Court should review the legal effect of the employer's unwritten employment policies under the de novo standard.

This Court applies a clearly erroneous standard to the findings and conclusions

that Isaacs committed fraud.

Finally, this Court reviews "awards of punitive damages in the first instance to determine whether the facts and circumstances of the case at issue are sufficient to permit an award of such damages." Syl. Pt. 5, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). "In conducting a review of the propriety of punitive damages, we employ the criteria set forth above describing the situations in which punitive damages are proper. We next review such awards to ascertain whether the amount of punitive damages actually awarded by the jury is proper or whether such an award is excessive."

## **B. DISCUSSION**

### **1. The Circuit Court of Berkeley County erred as a matter of law by ignoring the plain language of the employment policy.**

The trial court, through its Judgment Order ("Order"), ignored the plain language of the Appellee's written employment policy.<sup>3</sup> Specifically, the trial court disregarded that the written employment policy specifically required the Appellee to pay departing employees for any unused vacation time. Instead, the Order changed the terms of the employment policy by holding that the employment policy only required the Appellee to pay departing employees for *whole days* of unused vacation.

Everyone agreed that Isaacs had at least 4.2 hours of vacation *time* accumulated when she left Bonner's employment. Bonner himself made this calculation when

---

<sup>3</sup> At trial, Issacs contested the existence of the written vacation policy. As noted above, the employment policy at issue – not a single copy of which can be found – was allegedly created in the two months prior to Mrs. Issacs' departure. Neither she, nor an employee who left during that two month period, nor an employee who was hired just before Mrs. Issacs left, were aware that this policy was ever in effect. The trial court, however, found that there was a policy and that it was in effect at the time of Issacs' departure. As a result, this Petition for Appeal is based upon the trial court's finding by a preponderance of evidence that there was a written vacation policy that was in effect. As described in the discussion, though even under the terms of the written policy, Bonner owed Issacs for unused vacation time, which he did not pay.

responding to the Wage and Hour Section investigator. *See* Joint Exhibit 1F (“Ms. Isaacs [sic] had already been paid for three vacation days (*see* enclosure of copied time sheets) and after calculations, is entitled, at the very most, to 4.2 hours in paid vacation.”).

He then concurred with this calculation at trial:

- Q. Or I guess maybe we can save some time. Do you agree that at the time she left, she was owed four point two hours of vacation?
- A. No. Not -was she owed that? No.  
She had accumulated four point two hours -but since we pay in full-day increments, she really was not owed that; no

Tr. Trans. 12:23-13:4 (Oct 30, 2007)

Thus, whether the employment policy allows Bonner to avoid paying for vacation time that he acknowledges Isaacs had earned is outcome - determinative. If the employment policy requires that all vacation time be paid to an employee, then Bonner failed to pay all wages due to Isaacs within the statutory time period of the Wage Payment and Collection Act. In addition, Bonner’s counter-claim for fraud would vanish, as that claim was predicated upon his position that he did not owe any vacation to Isaacs.

The trial court erred by construing the written employment policy when it was not ambiguous. The written employment policy states: “Employees who leave our practice will be paid for unused vacation *time* accrued for their calendar year, which is calculated from each individual’s date of hire.” (Emphasis added).

Despite the express words of the employment policy, the trial court held that the written employment policy meant that the employer was only required to pay for whole days of unused vacation. Inexplicably, the trial court wrote: “The policy plainly states that an employee will be paid for unused *days*.” Order, at 19 (emphasis in the original).

Changing the specific word "time" used in the employment policy to the term "days" violates the canon of contract interpretation requiring contracts containing unambiguous language to be construed according to their plain and natural meaning. *See, e.g., Fraternal Order of Police, Lodge No 69 v. City of Fairmont*, 196 W.Va. 97, 101, 468 S.E.2d 712,716 (1996) ("In construing the terms of a contract, we are guided by the common-sense canons of contract interpretation. One such canon teaches that contracts containing unambiguous language must be construed according to their plain and natural meaning." (citation omitted)).

Courts are not to rewrite contracts: "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Id.* (citing Syl. Pt 2, *Bennett v. Dove*, 166 W.Va. 772, 277 S.E.2d 617 (1981) (citations omitted)).

In *Fraternal Order of Police Lodge No. 69 v. City of Fairmont*, the police union had negotiated with the city to receive "a 4% per year wage increase." The union asserted the contract language was unambiguous and meant that union members were to receive a 4% raise every year. The City, on the other hand, asserted that it meant the union members were only to receive a one-time 4% increase. This Court rejected the City's argument, holding that the terms of the contract were unambiguous: union members were to receive a 4% raise each and every year of the contract.

In this case, the trial court acknowledged that a valid written instrument that expresses its intent clearly and unambiguously "is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Order, at 17

(quoting *Estate of Tawney v Columbia Natural Resources, LLC*, 219 W.Va. 266, 633 S.E.2d 22, 28 (2006)). Then the trial court correctly stated that the employment policy was not ambiguous and therefore required no interpretation. Order, at 18 ("In the case at bar, the Court concludes that the written paid leave policy is not ambiguous "). Despite these clear pronouncements, that Bonner's employment policy was clear and unambiguous and needed no interpretation, the trial court proceeded to interpret the written employment policy anyway by changing the term "unused vacation time" to "unused whole vacation days."<sup>4</sup>

That relevant paragraph of the written employment policy reads as follows:

We encourage you to take your vacation in one-week blocks (Vacation time may not be taken in blocks of less than one day.) Unused vacation days may not be carried over to subsequent years. Employees who leave our practice will be paid for unused vacation time accrued for their calendar year, which is calculated from each individual's date of hire. However if an employee leaves the practice and has taken vacation time that has not been earned, the employee will be responsible for reimbursing the practice. The money owed will be deducted from the employee's last pay check. For example, let's suppose you are in your fourth year of employment with us and therefore have two weeks of vacation for the year. You work six months of that year. Thus, you have one week of vacation time accrued. If you haven't taken them, you will receive payment for those days if you leave the practice.

See Joint Exh. 1D, at 3.

The second sentence of the paragraph, located in parentheses, is the basis for the lower court's transformation of "time" to "whole days." In its analysis of this employment policy, the trial court asserted that the policy "clearly conveyed" that "a

---

<sup>4</sup> It is clear why the Order states that the policy is unambiguous. As discussed more fully below, West Virginia law requires that employment policies be constructed in favor of employees. The Order attempts to circumvent that common law dictate by stating that there is no ambiguity. Without an ambiguity, there would be no need to construe the contract and thus no need to favor the employee. The problem is that the Order went on to construe the contract as if it were ambiguous when it decided that the term "time" really meant "whole days," changing its meaning so as to disfavor the Appellant. The law cannot be ignored by dressing it up and calling it something different.

departing employee will only be paid for the full days earned for the portion of the year worked." Order, at 19. The ostensible rationale for this view is the parenthetical sentence earlier in the paragraph which reads, "(Vacation time may not be taken in blocks of less than one day)." The trial court uses this sentence to conclude that vacation *always* paid out in full day increments, even upon departure.

However, this reading ignores the plain words of the vacation policy. The vacation policy states that departing employees will be paid for *any* unused vacation time. Whole days are only an issue when a current employee takes a vacation day. The parenthetical itself contemplates that vacation is earned as time, not as whole days; therefore, when the policy states it should be pay for vacation "time", it means what it says.

Indeed, the written vacation policy contains an internal logic that makes sense only *because* departing employees can be paid for any amount of time.

Specifically, the very first sentence encourages employees to go away for an entire week at a time. The next sentence is the parenthetical which the Order incorrectly used to justify its mistaken interpretation of the employment policy. *St. Martin's Handbook* on grammar, punctuation, and writing, states as follows: "Parentheses enclose material that is of minor or secondary importance in a sentence – material that supplements, clarifies, comments on, or illustrates what precedes or follows it." The sentence contained within the parentheses is meant to clarify the previous sentence: the employer would prefer that employees take an entire week off at a time, but employees have the choice of whether to do so or not; employees do not, however, have a choice to take partial days off instead of whole days.

The fact that the employer placed this sentence within parentheses indicates that it

is of lesser importance than the sentences that are not contained within parentheses. It would be improper to use a parenthetical sentence, which by definition is of secondary importance, to completely change the meaning of a primary sentence that is not even located adjacent to the parenthetical in the paragraph.

More importantly, as Bonner admitted, the purpose for requiring employees to use their vacation time in full days was so that scheduling would be easier. Trial Tr. 28:3-23 (Oct 30, 2007). ("Q. So the reason you wanted your employees to take vacation in full days was for scheduling purposes? A. Sure. Q. So that you didn't have to go into a lot of extra planning: Who can cover this time while that person is gone? A. Right."). But in the circumstance where an employee leaves employment, scheduling a temporary replacement for that employee is no longer an issue; working for a partial day is obviously not a viable option for a former employee. Therefore, the very rationale articulated by the employer for the whole-day requirement disappears. Although employees may be difficult to schedule for partial days, money for a departing employee can easily be figured in smaller increments.

The next sentence –“Unused vacation days may not be carried over to subsequent years” – also fits into the vacation policy scheme. If an employee can only use whole days at a time, then the employee cannot end a year with anything other than whole days. Therefore, there would be no need to worry about carrying over partial days.<sup>5</sup>

---

<sup>5</sup> As she testified in trial, Issacs believed that carrying over days from previous years was appropriate. Tr. Trans. 148:23-150:10 (Oct. 23, 2007). The belief was based on her understanding that another employee had done so. *Id.* That employee testified at trial, however, that she had not carried over any time from one year to the next. Tr. Trans. 11:5-12:7. The point is that Isaacs *believed* this other employee had carried over time.

In the next sentence – the relevant sentence to the dispute – the employment policy uses time instead of whole days because an employee is almost always going to leave employment with vacation time that does not end in a whole-day increment. Indeed, the only way to leave employment *without* a whole-day increment is to leave employment on one of eight particular days each year, a partial year anniversary date. For example, an employee would lose vacation pay unless they left after exactly 1 ½ months, when an employee who receives two weeks of vacation a year would have 1 whole day, or after exactly 3 months, when this employee would have 2 whole days, or after exactly 4 ½ months, when the employee would have 3 whole days of vacation, or after exactly 6 months, when an employee would have 4 whole days of vacation, and so on. If an employee leaves on any other date, they would be left with partial days of vacation. In other words, employees would be left with unused vacation *time* that has to be measured in an increment other than a whole day. The vacation policy handles this by paying those employees who leave for their partial days.

Further, the very words of the sentence at issue indicate that vacation time can be accrued in increments other than full day blocks. The sentence reads, “[v]acation *time* may not be taken in blocks of less than one day.” Discussing vacation in terms of time indicates that vacation is earned in units of time, not in units of days. This is especially true where both are discussed in the same sentence and are discussed in such a manner as to make it clear that they are not being used interchangeably. In other words, if vacation cannot accrue in increments of less than full day blocks, there is no purpose in discussing vacation time at all.

The terms of the written vacation policy were not ambiguous. Indeed, the written

vacation policy had an internal consistency that makes sense only when the words are given their natural meaning. Where the policy specifies whole days, it means whole days; where the policy specifies time, it means any amount of time, not just days. This interpretation is confirmed by the example contained within that paragraph of the vacation policy: "For example, let's suppose you are in your fourth year of employment with us and therefore have two weeks of vacation for the year. You work six months of that year. Thus, you have one week of vacation time accrued. If you haven't taken them, you will receive payment for those days if you leave the practice." The second-to-last sentence states that the employee has vacation *time* accrued, thus containing the use of "time" throughout. The next sentence does use the term "days," but that is because the example used six months, meaning that nice round numbers would result in whole days of vacation time.

Appellee's employment policy is clear and unambiguous. Unfortunately, the trial court ignored the employment policy's requirement that departing employees such as Isaacs must be reimbursed for any unused vacation time. In this case, everyone agrees Issacs was owed at least 4.2 hours for which she was never paid.

The trial court's error in interpreting an unambiguous provision of a written employment policy was outcome-determinative because it allowed the employer to avoid paying its employee for unused vacation pay to which she was entitled. To compound matters, the trial court used its incorrect interpretation of the written employment policy as the foundation for a finding that Appellant had committed fraud by filing a Wage and Hour claim against the Appellee.

**2. The Circuit Court of Berkeley County erred as a matter of law by interpreting the language of the employment agreement in favor of the employer rather than the employee.**

In construing the term "time" in the written employment policy to mean "whole days," the trial court interpreted the employment policy so as to disfavor the employee. This Court's clear precedent requires that ambiguous employment contracts must be construed in favor of employees. *See* Syl. Pt. 2, *Lipscomb v Tucker County Comm'n*, 206 W.Va. 627, 527 S.E.2d 171 (1999); Syl. Pt. 6, *Meadows v. Wal-Mart Stores, Inc*, 207 W.Va. 203, 530 S.E.2d 676 (1999); Syl. Pt. 3, *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000) ("Terms of employment concerning the payment of unused fringe benefits to employees must be express and specific so that employees understand the amount of unused fringe benefits, if any, owed to them upon separation from employment. Accordingly, this Court will construe any ambiguity in the terms of employment in favor of employees.")

In *Lipscomb*, this Court stated, "[w]here an employer prescribes in writing the terms of employment, any ambiguity in those terms shall be construed in favor of the employee." Syl. Pt. 2, *Lipscomb*, 206 W.Va. 627. The reason that ambiguous terms are construed in favor of an employee is that "[t]he West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld." *Id.* Syl. Pt. 3 (quoting *Mullins v. Venable*, 171 W.Va. 92, 94, 297 S.E.2d 866, 869 (1982)). Further, "employers have great latitude in dictating the terms of employment." *Id.* at 63. In addition, "[t]he employer, probably with professional help, has had the opportunity to give each term or condition a specific, carefully chosen, and well-defined meaning." *Id.* In other words, because the

employer gets to dictate the terms of the employment agreement, the employer must live with the terms he dictates. Where those terms are capable of more than one meaning or such doubtful meaning that reasonable minds might be uncertain or disagree, it is the employee who shall receive the benefit of the doubt.

In this case, the lower court disregarded this requirement by favoring the employer. The lower court changed the conditions under which a departing employee would be paid for unused vacation. Under the policy as written, the employee should have been paid for all unused vacation time. Under the policy as construed by the lower court, the employee would only be paid for unused vacation time if the amount of unused vacation time happened to be calculated in a whole-day increment, something that would benefit the employer in nearly every instance as that condition would occur only eight days per year. The effect of the lower court's action was to favor the employer – the author of the employment policy – over the employee.

This improper contractual interpretation violates West Virginia's clear public policy. The trial court's error in interpreting an employment contract so as to disfavor an employee allows the employer to avoid paying its employee for unused vacation pay. To compound matters, the trial court used its unlawful interpretation of the written employment policy as a springboard for a finding that Appellant committed fraud by filing a Wage and Hour claim against the Appellee.

**3. The Circuit Court of Berkeley County erred as a matter of law by disregarding the prior practice of the Appellee where the written employment policy was not explicit.**

The lower court erred by finding Mrs. Isaacs was not owed wages for unused vacation pay when the written policy was silent on the issue of whether

employees accrue vacation time while on maternity leave, another employee's understanding was that vacation would be earned while on maternity leave, the employer's past practice was to pay Isaacs under similar circumstances, and the employer provided no notice of any changes to this policy.

Q. [.....] Was it your practice, [ ..] the first time that Mrs. Isaacs had a child, a baby, while she was your employee, did you not pay her as if she had never been gone on maternity leave?

A. I did.

Q. Okay. And isn't it your intention to pay Mrs. Wolfe [a then-current employee who was pregnant at the time of trial] as if she had never been gone?

A. We haven't discussed it. I probably will.

Q. Okay. But isn't that her understanding of the policy?

A. I don't know whether it's her understanding of the policy, or whether it's an assumption on her part I can't speak for how she, you know, her understanding of the policy.

Q. You don't have a written policy on it?

A. We've been over that before.

Q. But you do have a practice; correct?

A. Yes

Q. The practice was to pay Mrs. Isaacs the first time.

A. I believe she is the first person I paid on maternity leave; yes.

Q. And so what we're getting at now is that you did not pay her the second time?

A. I did not.

Q. And you did that because you didn't feel like it?

A. She left

Q. Is that right?

A. I don't believe she earned it the second time. She was leaving the practice.

Q. And you made your own admission about that; correct? It was based on your own whim?

A. Not my own whim

Q. Well what was it then?

A. Employee-

Q. What was the standard that you used?

A. Employee contribution.

Q. Based upon what? What standard do you use to determine employee contribution?

A. Their performance.

Q. And who tests their performance?

A. Probably me.

- Q. Okay. So it was up to you?  
A. It was.  
Q. Whatever you felt like?  
A. Correct

Tr. Trans. 113:10-115:6 (Oct 30, 2007).

In particular, Isaacs claimed she was due unused vacation pay for vacation accrued while she was on maternity leave from November 1, 2003, through February 1, 2004. It is undisputed that the written vacation policy is silent as to maternity leave. Tr. Trans., 22:3-5 (Oct. 30, 2007). It is also undisputed that Mrs. Isaacs was paid for vacation she accrued during her first maternity leave in late 2001 and early 2002, the first time she had a baby while employed by Bonner. Tr. Trans., 20:24-22:2 (Oct. 30, 2007); 139:22-140:18 (Oct 23, 2007). Moreover, another employee of Bonner's testified that when she returned from her impending maternity leave she believed she would be due vacation as if she had not been on maternity leave. Tr. Trans., 227:14-229:21 (Oct 23, 2007).

This Court has stated that the "[t]erms of employment concerning the payment of unused fringe benefits to employees must be express and specific so that employees understand the amount of unused fringe benefit pay, if any, owed to the them upon separation from employment." *See Ingram v. City of Princeton*, 208 W.Va. 352, 357, 540 S.E.2d 569, 574 (2000) (citing *Meadows v Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999)).

Where a written employment policy is silent, courts look to the past practices of the employer to determine the unwritten terms and conditions of the employment agreement. *Id.* For the unwritten terms and conditions of employment to be used to avoid paying an employee fringe benefits, the unwritten employment policy must be express and specific enough for the employee to understand what unused fringe benefits she will

be paid. *Id.*

In this case, Mrs. Isaacs was due 16 hours of vacation for the three months she was on maternity leave. She was not paid these 16 hours – because her employer *admittedly did not feel like paying her*. An employer's whim is neither express, nor specific.

Under West Virginia law, an unwritten policy must be consistently applied. *Howell v. City of Princeton*, 210 W.Va. 735, 738, 559 S.E.2d 424, 427 (2001). In this case, Bonner admitted that he did not consistently enforce his unwritten policy. Tr. Trans. 116:24-118:9 (Oct 30, 2007) ("Q. So you did not consistently enforce that unwritten policy? A. No, Sir").

Moreover, an unwritten policy must be known by the employee. *See Howell*, 210 W.Va. at 738. Mrs. Isaacs testified that she had taken vacation after maternity leave and been paid.

- Q. Okay. Did you take maternity leave with your first child?  
A. Yes.  
Q. How much time did you take?  
A. My first child, I was put on bed rest September of '04 -August, September of '01, had my son in November. I returned to work in February of '02  
So-  
Q. Okay. So you returned to work in February of '02. Did you take vacation in the summer of '02?  
A. Yes.  
Q. That would have been your second year of employment?  
A. Yes.  
Q. So, how much vacation did you take that summer?  
A. I took one week.  
Q. Did Dr. Bonner's office ever inform you that you weren't entitled to take that vacation?  
A. No.  
Q. Or that you were only entitled to a portion of your vacation?  
A. No. I took one week to go to southern West Virginia to visit family. It was paid; it was never questioned.

Tr. Trans., 139:16-24, 140:1-18 (Oct 23, 2004).

Even Bonner admitted that Isaacs had been paid for vacation after her first maternity leave.

Q. What is your policy on your employees. Do they earn vacation while on maternity leave?

A. Generally not, but it's kind of in my discretion. I mean, I think you'll find that Mrs. Isaacs - possibly, again, I would have to go through all the records that we have here. But when she was pregnant the first time her vacation which was - and I'd agree - she was paid for the full week, for the, you know, more than the eight hours, etcetera, etcetera. So it depends on, you know, discretion and how I feel about the employee. I - if anything, I will overpay versus underpay.

And a whole lot depends too, Mr. Skinner, on how long the employee has been there, what type of employee - so it's my discretion. I can always up my benefits versus lower them.

Q. Do you agree that the first time Mrs. Isaacs went on maternity leave that she earned and was able to take all her vacation.

A. I didn't say she earned it. I said she was probably paid for it.

Q. Okay. So you paid her for vacation that she would have accumulated, accrued, or vested, while she was on maternity leave?

A. That's - I didn't say that at all. I said she was paid for vacation; not necessarily that she deserved it. That she had accrued (Phonetic) - you know, incurred (phonetic) it while she was on maternity leave. Like I said, she was paid for it.

Tr. Trans. 20:24-22:2 (Oct 30,2007).

Likewise, Gretchen Wolfe, an employee of Bonner who was pregnant at the time of trial, testified that she believed she would receive her full vacation pay as if she were not going to be gone on maternity leave.<sup>6</sup> Tr. Trans. 227:14-229:21(Oct. 23, 2007).

6

Q. Okay. But, before your year runs out, you plan on taking all six of your vacation days? Is that right?

A. Yes.

Q. Okay. Now did Dr. Bonner or anyone tell you that you're not entitled to all of your vacation because you're going on maternity leave?

A. He did not.

Q. Have you read the vacation policy?

A. Yes.

Q. Does it say anything about that?

A. About not being entitled because of maternity leave?

Despite Bonner's past practice with Isaacs and despite what his current employee Wolfe believed his policy was on whether vacation was earned while on maternity leave, he refused to pay Isaacs vacation pay that she earned while on maternity leave.

Bonner testified that his employment policy with regard to paying employees for vacation accrued during maternity leave was entirely discretionary.

Q. Your policy is: I get to decide whether someone gets paid vacation if they go on maternity leave?

A. Probably that's as good a way of putting it as any.

Q. Okay.

A. Again, it depends on the employee. A lot is contingent upon my decision of it.

Q. What do you mean, it depends upon the employee? Is there a –

A. A good employee is more likely to get vacation pay than a bad employee – or, as you – maternity leave, etcetera.

Q. Okay. Do you consistently apply that policy to each and every employee?

A. I don't have to.

Q. Say again?

A. I don't have to. It's just, you know, it's very seldom – this is the first case I've ever had where an employee has been, you know, disgruntled over things. Other than Sharon Perry, which happened almost back-to-back. You know, in 25 years, there's never been a problem.

Q. Why do you think it's at your discretion?

A. I think I'm the one who writes the checks.

Tr. Trans. 24:21-26:20 (Oct. 30, 2007).

An employment policy that is admittedly dependent upon the employer's whim is not a policy that is “express and specific enough for the employee to understand.”

Moreover, an unwritten employment policy that is unknown by employees is not enforceable against those employees. *See Howell*, 210 W.Va. at 738 In *Howell*, this Court held that there must be an affirmative showing that an employee knows about the

---

Q. That's right?

A. No.

Tr. Trans. 229:9-21 (Oct. 23, 2007).

existence of a policy. In this case, the trial court found that Bonner never told Isaacs that he would treat her differently after her second maternity leave. Order, at 24.

In the instant case, the past practice of the employer was to pay Mrs. Isaacs for vacation accrued on a previous maternity leave. Therefore, the unwritten employment policy was, in fact, express, specific and known by the employee – she was entitled to vacation pay for the vacation she accrued while on maternity leave. The only way to change this policy would have been to provide proper notice, which not even Bonner asserts was done.

The imperative from this Court is that the terms of employment must be express and specific "so that employees understand the amount, if any, of the fringe benefits owed to them upon separation from employment." *Meadows*, Syl. Pt. 6, 207 W.Va. 203. In the instant case, under Bonner's so-called policy of discretion, Isaacs could not possibly have known what fringe benefits were owed to her until *after* her employer exercised his discretion, which was not until after Isaacs left his employment.

Despite the absence of a written policy on maternity leave, despite the past practice, and despite not informing Isaacs that she would be treated differently, the trial court's Order contains the following statement: "[T]he Court concludes that Bonner had a consistent policy of using his discretion whether to allow an employee to accrue paid leave while on maternity leave."

The clear and disturbing implication of this statement is that employers are not subject to their own employment policies, whether written or unwritten, so long as they declare after the fact that they are using their discretion. The Order attempts to couch this discretion in terms of a "bonus." Because it is undisputed that employers can award

bonuses to employees, the Order attempts to shoehorn fringe benefits into this exception to the rule that wages and other fringe benefits are subject to the terms of an employment policy. Bonuses, whether in the form of cash or paid time off, is certainly something that is subject to an employer's whim – unless of course, there is a policy on bonuses. And bonuses can be given to some and not other employees.

However, employers are required to furnish to their employees "an itemized statement of wages to include hourly rate, overtime rate, bonus and incentive pay, plus the amount deducted from the employee's pay." W.Va. Code. St. R. § 42-5-14.2. In other words, an employer must inform an employee when she is receiving a bonus so that there is no mistaking it. In this case, it was only during trial that Isaacs learned her vacation after her first maternity leave was a bonus. Bonner's response that his employees are smart enough to figure out when they receive a bonus violates the law and is insufficient to allow a violation of an unwritten employment policy. Tr. Trans. 142:15-144:12 ("Q. So what you're telling me is that you don't tell people that you're giving them a bonus? You leave it up to them to figure it out? A. Most of the time, yes. [.]").

Having fringe benefits being determined by an employer's unfettered discretion is exactly what the Wage Payment and Collection Act is designed to prevent. Unfettered discretion is anathema to West Virginia policy and fundamental fairness. West Virginia law requires that for an unwritten employment policy to be enforced against an employee, the policy must be express, specific, and known by the employee.

As agreed by Bonner, the written policy did not discuss maternity leave. Moreover, Bonner never discussed it with his employees. By paying Michelle Isaacs vacation pay as if she earned vacation during her first maternity leave, Bonner created an

employment policy of paying for vacation time accrued during maternity leave. By not changing that policy by giving proper notice, Bonner firmly established that policy.

Although Bonner was free to change that employment policy essentially at any time, he had to do so in express and specific terms. Indeed, the Wage Payment and Collection Act and its regulations require that he do so at least one pay period in advance of the change and that he must do so in writing. *See* W.Va. Code St. R § 42-5-14.1 ("Any changes in such rate, time, term or place shall be furnished to employees in writing or by posted notice in a place or places where all employees would observe it on a daily basis at least one(1)full pay period prior to the effective date of such change.") No such notice regarding maternity leave was ever posted.

As pointed out by this Court, fringe benefits are not "gratuities." Instead, fringe benefits are integral components of a compensation package bargained for and agreed upon by the parties. One expects that both employers and employees strive for a fair exchange in the employment market place. A factor the employee undoubtedly considers when gauging the fairness of an employment offer is the value of the benefits the employer offers in addition to take home pay. Conversely, the employer also takes into account the cost of fringe benefits when determining the salary or hourly wage rate it will offer its prospective employees. Obviously, if fringe benefits such as vacation and sick pay were absent from the compensation package, wages would be higher.

*Meadows*, 207 W.Va. at 216.

In determining whether she would continue to work at Bonner's office, Mrs. Isaacs, assessed the value of her compensation package. After she received vacation as if she had accrued vacation during her first maternity leave, her assessment of Bonner's compensation package included the accrual of vacation during maternity leave.

At no time did Bonner ever change this policy – at least until after she informed him she was leaving his practice and wanted to be paid for her vacation. This is clearly contrary to West Virginia law.

**4. The Circuit Court of Berkeley County erred in finding fraud by clear and convincing evidence.**

When Bonner removed Isaacs' *pro se* claim from magistrate court to circuit court, he also filed a counter-claim alleging that Isaacs "knowingly made a false report to the Division of Labor for the purpose of extorting from the Defendant additional pay to which the Plaintiff knew that she was not entitled." *See* Plaintiff's Trial Exh. 1, at 2-6 ("Affirmative Defenses, Answer and Counterclaim").

The foundation upon which the trial court's finding of fraud was built was the finding that Isaacs was not due *any* vacation pay. The trial court based this finding on its faulty interpretation of Bonner's written employment policy and on its improper acceptance of Bonner's policy of discretion in awarding vacation pay in contravention of his past practice of paying such vacation.<sup>7</sup> As discussed above, the trial court erred as a

---

<sup>7</sup> Clearly, the lower court did not believe Mrs. Isaacs' testimony. The trial court has the obligation of weighing the credibility of witnesses, and such credibility determinations should not normally be overturned on appeal. The interesting question is why did the lower court determine that Isaacs' testimony was not credible. One possible explanation is that a fellow employee testified that Isaacs had confided in her that she padded her hours when she self-reported the number of hours she had worked. *See* Order, at 11, para. 52. Moreover, Bonner testified that he himself began to suspect that Isaacs had not accurately reported her hours to him. *See* Order at 10, para 51. This testimony perhaps caused the lower court to view Mrs. Isaacs with a jaundiced eye. However, the paystubs showing how much Isaacs was paid indicate that she was actually seeking, on average, less money than the other employee working the same job. Specifically, Gretchen Wolfe -- the employee who testified that Mrs. Isaacs had confided in her that she had padded her hours -- testified that Isaacs should have reported approximately 72 to 73 hours per two-week pay period. Tr. Trans. 88:5-10. (Oct. 24, 2007). However, when this witness reviewed Ms. Isaacs actual paystubs, there was no question that Isaacs had actually reported less hours than expected. Tr. Trans. 87:9-92:2 (Oct. 24, 2007). Indeed, from January 3, 2003 until October 24, 2003, when she began maternity leave, Isaacs averaged 58.53 hours per two week pay period that she reported to Bonner. *See* Joint Exh. 5. This is obviously well below the 72 or 73 hours that would have been expected. When she returned after maternity leave, beginning with her first full pay period in February 2004 through her departure, Isaacs averaged 69.78 hours per two week pay period. *See* Joint Exh. 6. Interestingly, the period when Isaacs was paid for more hours worked encompassed the time *after* a clock-in system was implemented, which should be less susceptible to padding of hours. Tr. Trans. 90:10-22 (October 24, 2007). Thus, the

matter of law, and Isaacs was due at least 20.2 hours of vacation pay.<sup>8</sup> Because she was due some vacation pay when she filed her Request for Assistance, she cannot be found liable for fraud.

Even assuming *arguendo* that the lower court's interpretation of Bonner's written and unwritten policies was correct, the lower court erred in finding fraud.

The trial court decided that the evidence was clear and convincing that Isaacs' behavior in three instances was fraudulent: (1) where she indicated on her Request for Assistance filed with the West Virginia Wage and Hour Section that she "felt" she was due 64 hours of vacation pay; (2) where she indicated on the same RFA that there was no written employment policy; and (3) where she failed to provide earlier paystubs showing zero hours of vacation to the Wage and Hour Section investigator. Order, at 26.

The specific question on the RFA was "What amount of wages/fringes do you feel you are entitled to?" See Joint Exh. 1B, at 3. In response, Isaacs wrote "\$1472.00-taxes." That figure represents 64 hours of wages. As a basis for this figure, Isaacs testified that she had used the pay stub provided by her employer, which stated she was due 64 hours of employment. Tr. Trans. 147:11-20 (Oct. 23, 2007). Isaacs acknowledged during her testimony that she did not know exactly how much vacation she was due, and she acknowledged that she did not track all of her vacation hours. Tr. Trans. 147:21-148:22 (Oct 23, 2007). As a result, she put on the RFA the 64 hours that Bonner had put on her

---

allegations that Isaacs had padded her hours were shown to be simply wrong by a look at the raw data; it appears, however, that the lower court was somehow tainted by these allegations of misconduct, unfounded though they were.

<sup>8</sup> She had earned at least 4.2 hours even by Bonner's calculations, and she had earned 16.0 hours from her three months on maternity leave. Although Appellant also contested whether she was due more hours based upon her understanding of the vacation policy, the court determined that the written policy was in effect, thus eliminating her claims for more hours. Under the then applicable version of the Wage Payment and Collection Act, it does not matter how much in wages were wrongfully withheld. The only question is whether any were not paid; if so, liquidated damages of thirty days pay are due. In this case thirty days pay is \$6,210 (30 x \$23 x 9 hrs.).

pay stub.

Isaacs also testified that she thought she was due her full two weeks of vacation as if she had worked for the full year, as that was her understanding of what happened with another employee who had left the practice a few months before Isaacs. Tr. Trans. 183:12-16 (Oct 23, 2007). Bonner himself admitted that this employee had sought two weeks of vacation and that he had paid this employee for two weeks, although he described the payment as severance rather than vacation. Tr. Trans. 64:13-65:19 (Oct. 30, 2007) ("Q. So she asked for two weeks vacation, and you gave her two weeks of pay? A. I did."). Moreover, Isaacs testified she was due two weeks of vacation for 2003, not simply one week, and she thought she could carry over the unused week to 2004. Tr. Trans. 148:15-150:10, 173:2-16 (Oct 23, 2007).

As an initial point, it is inconceivable that an employee could be found liable for fraud by putting on a form that she *felt* that she was entitled to the same amount of vacation pay as her employer had put on her pay stub. Indeed, West Virginia law requires that employers provide an itemized statement of wages, to include hourly rate, overtime, rate bonus, and incentive pay, plus the amount deducted from the employee's pay. *See* W.Va. Code St. R. § 42-5-14.2. Where the law imposes a duty on an employer, an employee should be entitled to rely upon the employer's fulfilling that duty. Mrs. Issacs was entitled to receive an accurate paystub and to rely on it.

Bonner's position was that the amount of vacation listed on all of his employees' pay stubs was wrong because he was computer-illiterate. Tr. Trans. 70:16-71:11 (Nov 16, 2007). He also believes that his employees all knew the amount of vacation listed on their paystubs was incorrect. *Id.* However, it is the duty of the employer to track fringe

benefits such as vacation pay. *See* W.Va. Code. St. R. § 42-5-14. An employer should not be allowed to violate the law and then blame the employee for his own failures.

It is also inconceivable that an employee would be found liable for fraud by placing a checkmark next to the word "No" after the question, "Does a written policy exist" when the employer himself could not provide a single copy of that written policy to (1) the Wage and Hour Section investigator within just a few months of Isaacs' departure; (2) to Isaacs during discovery; or (3) to the trial court during trial. The only written policy provided at any point was one admittedly created *after* Mrs. Isaacs left.

Moreover, three former employees of Bonner testified that there was not a written policy in effect at the time they were employed there. Rebecca Dunn worked for Bonner from February 1999 to April 2004. Tr. Trans. 122:12-13 (Oct 23, 2007). She testified that she never saw a written employment policy while she was there, and that she was not aware of any written vacation policies. Tr. Trans. 122:24-123:8. Ms. Dunn did testify that she had helped start gathering information for an employment policy as she was leaving, but that it was not completed before she left in late April 2004. Tr. Trans. 125:22-126:18.

Another former employee, Bridget Green testified that there was a rough draft of an office manual, but that it was never put into effect. Ms. Green started working for Bonner on April 26, 2004, just as Rebecca Dunn was leaving, and stopped working for Bonner on August 31, 2006. Tr. Trans. 210:6-10 (Nov. 16, 2007). Ms. Green testified that when she started working for Bonner, there was no written office manual.

Tr. Trans. 212:1-5 (Nov 16, 2007). She acknowledged that a rough draft was developed, but that it was "a couple of months" after she started before she saw this rough draft. Tr. Trans. 212:6-19 (Nov 16, 2007). Moreover, it was her understanding that the rough draft

never became effective. Tr. Trans. 212:20-213:3 (Nov. 16, 2007). Further, she testified that Dr. Bonner never announced that the vacation policy was in effect. Tr. Trans. 213:4-6 (Nov. 16, 2007).

Finally, Michelle Isaacs herself testified that there was no written vacation policy while she was employed by Bonner. Tr. Trans. 134:23-135:21,141:21-142:11 (Oct 23, 2007). She did acknowledge that the office started to compile an employment policy while she was there, but she stated this policy was never finished before her departure. Tr. Trans. 143:15-144:22 (Oct 23, 2007).

Bonner's position at trial was that this written vacation policy was started in April 2004, completed in May 2004, and made effective immediately by his announcement at a morning staff meeting. Tr. Trans. 43:1-44:16 (Oct 30, 2007). However, this position is belied by Bonner's earlier assertions in response to discovery requests. In response to Request for Production No. 1(i), which sought "complete copies of all written office policies and employment policies in effect during Michelle Isaacs employment by the Defendant," Bonner responded as follows:

There are no documents in the custody, possession or control of the Defendant that would satisfy Request No. 1(1).

During the period of the Plaintiff's employment there was an office manual which contained such information as job descriptions, hours of operation, employee leave policy, and standard procedures for various office activities. This manual was prepared and put into use in late 2002-early 2003. During the time that this manual was in use, it was signed by all employees, and was kept on a table in the staffroom of the officer where it was accessible at all times.

In February of 2005, the dental practice moved into a new building. The manual was allowed to remain on the staff room table until the end of the move so that it would remain accessible to employees. When the Defendant and/or his staff went to retrieve the manual to take it to the new office, it was gone. Since the dental practice moved into the new building in February of 2005, the office manual has not been found. Employees of the Defendant have made diligent efforts to find the office manual, but have been unsuccessful.

Plaintiff's Exh, 2, at 6-7 ("Defendant's Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Daniel P Bonner") (emphasis added).

Thus, Bonner's story about the existence of the written vacation policy changed during the litigation.

The only people to testify that there was a written vacation policy in place at the time Mrs. Isaacs left Bonner's employment were Bonner and his current employees. In other words, every person who testified that a written policy existed was economically dependent upon Bonner. Those who testified that a written policy did not exist were independent and had no employment or other relation to either Bonner or to Isaacs.

Although a trial court sitting as finder of fact should be given deference in its findings of fact, this deference does not mean a trial court's findings can be clearly erroneous. It is one thing to weigh the credibility of witnesses and determine by a mere preponderance of the evidence that a written employment policy did exist. Indeed, much of this appeal is predicated upon the trial court's finding by a preponderance of the evidence that the employment policy existed. It is an entirely different matter to find an employee liable by clear and convincing evidence for checking a box on a form that no written policy existed – *when* the employee had the opportunity to provide this written policy to the Wage and Hour investigator before she concluded her investigation and where the policy cannot be located to this day. The only two independent witnesses to testify stated that it was not in effect when they were there or when Isaacs was leaving.

Critically, a finding of fraud must be clear and convincing. There is a "high burden of proof necessary to establish fraud." *Gerver v Benavides*, 207 W.Va. 228, 530 S.,E2d 701,705 (1999), "Fraud is never presumed and when alleged it must be established

by clear and distinct proof." *Id.* quoting Syl. Pt., 5, *Bennett v. Neff*, 130 W.Va. 121, 42 S.E.2d 793 (1947). In this case, the clear and convincing standard could not have been met and thus the trial court's findings are clearly erroneous.

Perhaps most importantly, the lower court based, to a great extent, its determination that Mrs. Isaacs had committed fraud on its belief that Mrs. Isaacs had only sent to Ms. McGowan pay stubs showing she was due 64 hours of vacation pay. Order, at 27. Specifically, the lower court stated, "Plaintiff's credibility is further shaken by the fact that when Ms. McGowan requested pay stubs from the Plaintiff, the Plaintiff sent only the ones that showed sixty-four hours. Plaintiff did not send Ms. McGowan any of the paystubs that predated April 23, 2004, which were the pay stubs that showed zero available leave time. The Court finds incredulous Plaintiff's testimony that Ms. McGowan did not request any pay stubs that predated April 23, 2004." *Id.* Further, the lower court stated, "[t]he Court concludes that Plaintiff's attempt to rehabilitate the claim made in her RFA is heavily outweighed by the sixty-four hours suddenly appearing on her pay stub and by her mailing only certain pay stubs to Ms. McGowan."

But these findings are *directly contradicted by Ms. McGowan's own testimony*. Ms. McGowan specifically testified that Mrs. Isaacs had sent a paystub showing zero hours of vacation:

Q. Okay. When you say, "at the time," does it not make sense to you now?

A. That's all the information I had. It ended up later on, I couldn't get any more payroll information from the company but Michelle did have three or four other pay stubs that she sent to me prior to her last one and, on those pay stubs - I think there's one in April that shows no vacation taken or balance. Then, the next one shows no vacation taken and 64 hours balance. Then it stays - the 64 stays on there with no hours taken, just the 64 balance.

Tr. Trans. 31:10-19 (Oct 23).

Ms. McGowan confirmed that she had received from Isaacs a paystub showing zero hours of vacation:

- a. Okay. That was just something I picked up on. Just that she worked and then the same thing I saw before. She has no sick used or available, no vacation used or available and, then, all of a sudden, she has 64 hours in April.

Tr. Trans. 82:10-13 (Oct 23).

The very basis for the lower Court's finding of fraud – that Isaacs did not send any paystubs showing zero hours of vacation to Ms. McGowan – was patently contradicted by Ms. McGowan herself, who testified twice that she had received at least one paystub showing zero vacation time.

Where the lower Court must find by clear and convincing evidence that there was fraud, and the very basis cited by the lower Court for the fraud is contradicted by the testimony of the person who supposedly relied on the fraud, the finding of fraud is clearly erroneous.

Of great importance, if permitted to stand, this finding of fraud would have a chilling effect on workers who are unjustly denied compensation by their employers. Would any employee dare file a Request for Assistance with the Wage and Hour Section if a response could subject them to devastating punitive damages awards? Michelle Isaacs was found liable for fraud because she stated no written vacation policy existed - and the employer still cannot produce a copy of that policy. Moreover, she was found liable for fraud for stating that she was due the amount of vacation listed on her paystub. Bonner was required by law to furnish to each employee an itemized statement of wages. Where the employer is incapable of accurately informing his employees of their wages, the

employee should not be punished for the employer's incompetence.

**5. The Circuit Court of Berkeley County erred by misapplying the factors courts must consider in awarding punitive damages when it awarded attorney fees.**

Even assuming *arguendo* that Isaacs should be liable for punitive damages as a result of the finding of fraud, the punitive damages in the form of punitive damages and attorney fees were exceedingly large. The lower court awarded \$1,016.60 plus interest in compensatory damages and \$5,000.00 in punitive damages to Bonner. Following a later hearing, incredibly, also the lower court awarded Bonner his legal costs and fees in the amount of \$29,487.52.

The general rule in West Virginia is that, "each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." *Boyd v Goffoli*, 216 W.Va 552, 569, 608 S.E.2d 169, 186 (2004) (quoting Sy1 Pt. 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)). The lower court relied upon the exception for fraud, which allows for the imposition of attorney costs and fees as *an element of punitive damages*. See Addendum to Judgment Order: Order Awarding Attorney Fees and Costs, at 5 ("Addendum").

The lower court correctly realized that an award of attorney fees must be considered pursuant to the prevailing principles governing awards of punitive damages; however, the lower court erred by incorrectly applying those principles when it awarded \$34,487.52 in punitive damages against Isaacs.

When this Court reviews a punitive damages award, it considers the same factors that the fact-finder below is to consider. *Boyd*, 216 W.Va. at 563, 608 S.E.2d at 180.

These factors are those set out in Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991) and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992). *Id.*

The factors as outlined by Syllabus Point 3 of *Garnes*, along with how the lower court incorrectly applied them, are as follows:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

In the instant case, the harm that occurred was minor: \$1,016.60. Moreover, the harm was economic – no one suffered any physical injuries. As acknowledged by the trial court, "[t]he Plaintiff's conduct was not so reprehensible as to warrant a large punitive damage award, because in part she caused economic harm as a result of an isolated incident. The Plaintiff did not cause harm to the health and safety of others." Judgment Order, at 29. As a result, any punitive damages award should have been relatively small.

Even though the trial court considered \$10,000 "negligible," it simultaneously believed \$1,000 in harm was sufficient to warrant large punitive damages. Addendum, at 6.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

In this case, it is hard to imagine how the Appellee's actions can be considered reprehensible. All she did was put a check next to the "No" after the question whether a written employment policy was in effect, ask for the amount of vacation pay commensurate with the number of hours her employer put on her paystub, and provide several copies of paystubs to the Wage and Hour investigator. Moreover, when she listed the amount of vacation pay equal to her hours of vacation, it was in response to the question, "What amount of wages/fringes do *you feel* you are entitled to?" If punitive damages are to be awarded, they must be small, especially considering the fact that the employer who was supposedly defrauded by Isaacs failed to maintain a copy of his own written employment policy, and he violated the law by not accurately informing his employee of how much vacation she was due. Indeed, if she was wrong, he was as much to blame as she was.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

At most, Isaacs' "profit" was \$1,016.60. Punitive damages of \$5,000 - the 5 to 1 ratio espoused in *TXO* - would have been sufficient to discourage future bad acts.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

Including the attorney fees that were imposed as a measure of punitive damages, the punitive damages do not bear a reasonable relationship to compensatory damages. Instead of a 5-to-1 ratio, the ratio became 34-to-1, well outside the norms for punitive damages and in violation of Appellant Isaacs' due process rights.

(5) The financial position of the defendant is relevant.

As pointed out by the Court, "Plaintiff has a limited financial position." Judgment Order; at 30. The only evidence of Isaacs' financial condition was her current wage rate and hours and the existence of a bankruptcy filing. Using her then-current wage rate and hours, Isaacs made \$49,920 before taxes; she and her husband filed for bankruptcy in July 2004.<sup>9</sup> Def's Exh. 9. An imposition of over \$29,000 in attorney fees and costs, in addition to \$6,016 in compensatory and punitive damages, would be financially devastating to the Isaacs.

The factors as outlined by Syllabus Point 4 of *Garnes*, along with how the lower Court incorrectly applied them, are as follows:

- (1) The costs of the litigation;

The lower Court and both parties agreed that the costs of this particular litigation were reasonable.

- (2) Any criminal sanctions imposed on the defendant for his conduct;

There were no criminal sanctions imposed on Isaacs for her conduct.

- (3) Any other civil actions against the same defendant, based on the same conduct;

There have never been any allegations that Michelle Isaacs ever engaged in the similar alleged conduct. Indeed, the trial Court agreed that this was an isolated incident: "[t]he Plaintiff's conduct was not so reprehensible as to warrant a large punitive damage award, because in part she caused economic harm as a result of an isolated incident. The Plaintiff did not cause harm to the health and safety of others." Judgment Order, at 29.

---

<sup>9</sup> Mrs. Isaacs is currently a stay-at-home mother with her three young children. She and her husband, a special education teacher and football coach, returned to their hometown of Hico since the Petition for Appeal was filed.

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

It is impossible to state that a clear wrong has been committed. Indeed, during settlement negotiations, Bonner offered money to Isaacs. Although many factors play into whether a party makes a settlement offer, the very fact that Bonner offered any money at all to Isaacs suggests that it was not at all clear that there was a clear wrong.

Syllabus Point 15 of *TXO* states that "[t]he outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5-to-1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional." Syl. Pt. 15, *TXO Production Corp v Alliance Resources Corp.*, 187 W.Va. 457, 466, 419 S.E.2d 870 (1992).

This Court in *Boyd* considered whether attorney fees in a fraud case were appropriate and reaffirmed that a ratio of 5-to-1 is generally appropriate when awarding punitive damages, unless certain other factors were present. In this case, compensatory damages were \$1,016.60. Adding the punitive damages to the award of attorney fees as an aspect of punitive damages means that total punitive damages in this case are \$34,487.52. This creates a ratio of 34-to-1, well above the level stated in *TXO Production Corp.*, 187 W.Va. at 466. Although there is no bright-line ratio, there must be extenuating factors to rise above the 5-to-1 ratio.

The *Boyd* decision is extremely instructive with regards to the instant case. The plaintiff in *Boyd* was awarded \$75,000 in compensatory damages and \$250,000 in

punitive damages. Citing the exception to the rule on attorney fees for fraud cases, the plaintiff sought \$45,562.50 in attorney fees and \$3,621.13 in costs. The circuit court determined that the defendant should not have to pay attorney fees and costs because the punitive damages already awarded were sufficient to deter future fraudulent conduct. This Court agreed with the circuit court's reasoning, stating that the defendant had been "sufficiently discouraged from future fraudulent conduct by the sizable punitive damages awarded." In *Boyd*, the ratio was 3.3-to-1. In this case, the ratio would be over ten times the ratio in *Boyd*.

More importantly, in this case, the lower court found that the simple determination that Mrs. Isaacs had committed fraud was sufficient to determine that she had evil intentions and therefore that the use of a higher multiplier than the 5-to-1 multiplier discussed in *TXO* and reaffirmed in *Boyd* was justified. Addendum, at 8. The problem with this line of reasoning is that *Boyd* itself involved fraud. By the trial court's reasoning, that fraud also should have constituted evil intentions and would have justified a higher ratio than 5-to-1. Thus, the lower court's statement that because the instant case involved fraud, it involved evil intent and therefore required an extraordinary multiplier is circular and without basis in this Court's punitive damages jurisprudence.

Further, the trial court erred in its determination of what ratio to use. Instead of applying a ratio of punitive damages to compensatory damages, as required by *TXO*, the trial court applied a ratio of attorney fees to a combination compensatory and "normal" punitive damages. In its Addendum, the trial court determined that the ratio it was applying was 6-to-1. Addendum, at 8-9. In actuality, the ratio was 34-to-1.

In its determination of the propriety and amount of punitive damages, the lower court applied various other factors as well. One factor was whether Isaacs attempted to conceal or cover up her actions. The lower court stated on page 7 of the Addendum that it found that Isaacs did attempt to conceal or cover up her actions until the entry of the original Judgment Order in March 2008. Further, the lower court found that Isaac's conduct was "intentionally fraudulent" because "[s]he persisted in bringing this case to trial." In essence, the lower court used the very fact that Isaacs used the court system to punish her. In Article 3, Section 17, the West Virginia Constitution guarantees access to its courts: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." To punish Isaacs for using the court system and to assert that she attempted to conceal or cover her actions by prosecuting the lawsuit – during the discovery process, whose very purpose is to uncover concealment – is contrary to public policy.

Indeed, the trial court imposed punitive damages for the very fact that Isaacs brought this lawsuit. Addendum, at 9 ("And yet, it was the Plaintiff who was 'in the driver's seat' all the way in pursuing false claims through a trial in this Court."). The finding of wrongdoing in the trial court was based on Isaacs' submission of the RFA to the Wage and Hour Section – it was *not* based on the filing of the complaint that triggered the instant lawsuit. Thus, the Court is imposing punitive damages on Mrs. Isaacs despite the fact that filing the lawsuit was not one of the acts of fraud for which she was found liable.

### C. CONCLUSION

Appellant Michelle Isaacs was not paid for vacation time that she had earned while employed by Appellee Daniel Bonner. Bonner refused to pay this fringe benefit despite the fact that the written employment policy explicitly stated that all unused vacation time would be paid to the employee upon departure. The trial court erred by construing the written employment agreement even though it was not ambiguous and then erred again when it construed the agreement in favor of the employer rather than the employee. Further, the trial court erred by ignoring the unwritten employment policy of the employer and instead holding that vacation pay should be determined at the employer's discretion. The trial court erred again in determining that Isaacs was liable for fraud where her alleged wrongdoings were (1) marking that a written employment policy did not exist – and the employer could not produce this written employment policy; (2) filling out a Request For Assistance form indicating that she was due the same amount of vacation pay was on her paystub; and (3) failing to provide copies of her paystubs showing a change in vacation accounting methods – even though the employee provided them. Further, the trial Court erred in imposing punitive damages and in imposing an excessive punitive damages award.

## **VII. RELIEF REQUESTED**

WHEREFORE, based upon the foregoing, Appellant respectfully requests this Honorable Court to reverse the trial court's rulings concerning Appellant's Wage Payment and Collection Act; to order Appellee to pay liquidated damages as required by W.Va. Code § 21-5-1 et seq.; to remand to the trial court for a determination of attorney fees as required by W.Va. Code § 21-5-1 et seq.; to reverse the trial court's finding that Appellant was liable for fraud; to reverse the trial court's award of punitive damages and attorney fees in favor of Appellee; and to remand to the trial court for further consideration.

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**AT CHARLESTON**

**MICHELLE ISSACS,**

**Appellant/Plaintiff**

**vs.**

**Circuit Court of Berkeley County  
Civil Action No. 05-C-817  
Docket Number: 090960**

**DANIEL BONNER,**

**Appellee/Defendant.**

**CERTIFICATE OF SERVICE**

I, Andrew C. Skinner, counsel for the Appellant, do hereby certify that I have mailed a true copy of the foregoing Appellant's Brief upon the following persons, by mailing the same by U.S. Mail, postage prepaid, this 2<sup>nd</sup> day of December, 2009:

Linda Gutsell, Esquire  
107 North College Street  
Martinsburg, WV 25401

Christopher Prezioso, Esquire  
Lutrell & Prezioso PLLC  
211 West Burke Street  
Martinsburg, WV 25401



Andrew C. Skinner