

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MICHELLE ISAACS,
Appellant,

Vs.

Case No. 35284

DANIEL BONNER,
Appellee,

RESPONSE BRIEF ON BEHALF OF APPELLEE
DANIEL BONNER

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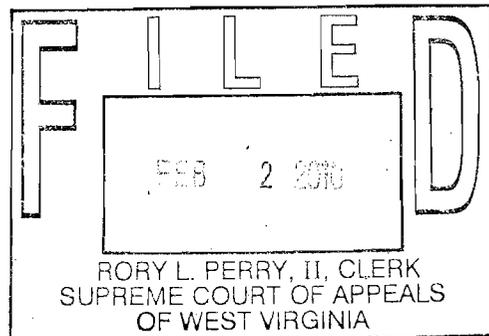


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I.

STATEMENT OF THE FACTS

Appellant Michelle Isaacs committed fraud when she intentionally made false claims for unpaid wages against her employer, Appellee Daniel Bonner. Appellant Michelle Isaacs acted in complete bad faith by intentionally presenting false information to the West Virginia Division of Labor's Wage and Hour Section and prosecuting a fraudulent lawsuit against her employer.¹

Appellant Michelle Isaacs knew she was not entitled to any amount of unused paid leave at the time of her departure from employment on July 14, 2004. At all times during her employment, Appellant was well aware of the paid leave policy of her employer Appellee Daniel Bonner. After her departure, Appellee Michelle Isaacs intentionally attempted to defraud Appellee by filing a false Request for Assistance with the West Virginia Division of Labor's Wage and Hour Section and prosecuting a lawsuit against her employer that was completely without merit.

By abusing the protections afforded to honest citizens under the West Virginia Wage Payment and Collection Act (West Virginia Code § 21-5-1 *et seq.*), Appellant Michelle Isaacs attempted to use the law to commit an injustice. Fortunately, after thoroughly evaluating the evidence and argument before it, the Circuit Court of Berkeley County, West Virginia did properly deny the relief requested in Appellant's complaint and did find that Appellant Michelle Isaacs had engaged in actions which constituted fraud.

The detailed factual basis for the rulings of the Circuit Court of Berkeley County, West Virginia is set forth as follows:

¹ Appellee Daniel Bonner wishes to preserve the objection made in Appellee's Response to Petition for Appeal which objected to Appellant's "Summary of Argument." Appellee objects to the "Summary of Argument" section set forth in Appellant's Brief for the reasons previously asserted. Further, Appellee respectfully notes that he has attempted to respond to said "Summary of Argument" in the section of Appellee's Response Brief entitled "Summary of Facts."

1. Appellant Daniel Bonner, DDS, is a dentist who has operated a private practice in Inwood, West Virginia since March, 1979. (Trial Tr. 6:6-16, Oct. 30, 2007; Trial Tr. 24:4-9, Nov. 16, 2007).

2. Appellant Michelle Isaacs became employed as a dental hygienist in Appellant's dental practice on November 1, 2000 and resigned from her employment on July 14, 2004. *See* Stipulations of the Parties ("Stipulations").

3. Throughout Appellant Michelle Isaacs' employment, she typically worked a four-day week. (Trial Tr. 130:15-23, Oct. 23, 2007.)

4. In late 1979 or early 1980, Appellant Daniel Bonner established, in writing, a paid leave policy for the employees of his dental practice. (Trial Tr. 9:24-10:11, Oct. 30, 2007; Trial Tr. 24:25-25:16, Nov. 16, 2007.)

5. The paid leave policy established in 1979/1980 was first published on a written notice that was kept at the reception desk in a drawer to which all employees had access. (Trial Tr. 35:2-6, 36:1-3, Oct. 30, 2007; Trial Tr. 26:16-24, Nov. 16, 2007.)

6. The terms of the paid leave policy, first established in 1979/1980, are as follows:

a. For an employee's first year of full-time employment, measured from the date of hire, employees of the dental practice earn no paid leave, for their second and third years of full-time employment, employees earn one week of paid leave, and for their fourth and subsequent years of full-time employment, employees earn two weeks of paid leave. (Trial Tr. 95:4-15, Oct. 24, 2007; Trial Tr. 74:13-75, 156:10-158:21, Oct. 30, 2007; Trial Tr. 26:8-15, 180:14-15, Nov. 16, 2007.);

b. The number of days in a week of paid leave is equal to the number of days that the employee is required to work each week. (Trial Tr. 141:2-9, Oct. 23, 2007.);

c. For each day of paid leave, employees receive eight hours of pay at their regular rate of pay. (Trial Tr. 29:12-30:7, Nov. 16, 2007.);

d. Employees are required to take paid leave in full-day increments: (Trial Tr. 189:19-22, Oct. 30, 2007; Trial Tr. 52:18-53:22, 111:25-112:10, Nov. 16, 2007.); and

e. Paid leave days must be used in the year in which they are earned and cannot be carried over into subsequent years. (Trial Tr. 233:20-24, Oct. 23, 2007; Trial Tr. 189-23-190:2, Oct. 30, 2007; Trial Tr. 12:16-13:2, 51:12-52:6, Nov. 16, 2007.)

7. Appellant Daniel Bonner explained the paid leave policy to all employees at the time of hiring. (Trial Tr. 157:13-17, Oct. 30, 2007; Trial Tr. 181:19-24, Nov. 16, 2007.)

8. On April 13, 2004, a staff meeting at Dr. Bonner's office was held and provided the employees with an opportunity to express their opinions and make suggestions for addressing any problems. (Trial Tr. 160:15-19, 199; 10-200:23, Oct. 23, 2007; Trial Tr. 160:1-12, 251:4-252:21, Oct. 30, 2007; Trial Tr. 36:5-15, Nov. 16, 2007.)

9. Appellant Michelle Isaacs did attend said April 13, 2004 staff meeting. (Trial Tr. 142:17-143:6, 157:15-162:15, Oct. 23, 2007.)

10. After the April 13, 2004 staff meeting, work immediately began on a comprehensive office policies manual to address all aspects of the office operations, including the employee leave policy. Trial Tr. 125:22-126:11, 203:21-205:11, 221:16-23, Oct. 23, 2007; Trial Tr. 164:4-25, 165:1-5, Oct. 30, 2007; Trial Tr. 29:5-11, 38:6-14, Nov. 16, 2007.)

11. At the latest, said office policies manual was completed by mid-May of 2004. (Trial Tr. 205:18-206:1, Oct. 23, 2007; Trial Tr. 34:8-11, 43:145:1, 167:5-168:1, 221:22-224:3, 254:18-25, Oct. 30, 2007; Trial Tr. 29:2-11, 40:8-18, Nov. 16, 2007.)

12. After completion of the updated office policies manual, Appellee Daniel Bonner announced at a staff meeting that all employees should review and sign said manual. (Trial Tr. 206:7-9, 226:3-13, 234:10-12, Oct. 23, 2007; Trial Tr. 45:18-25, 168:2-8, Oct. 30, 2007; Trial Tr. 40:19-41:7, Nov. 16, 2007.)

13. The completed office policies manual, as revised in mid-May, 2004, was placed on a table in the staff break room where it was accessible to all employees, including Appellant Michelle Isaacs. (Trial Tr. 206:4-11, Oct. 23, 2007; Trial Tr. 45:4-14, 168:13-21, 256:14-23, Oct. 30, 2007; Trial Tr. 31:17-33:7, Nov. 16, 2007.)

14. After completion, Appellant Michelle Isaacs asked another employee to have the manual for review. (Trial Tr. 255:14256:2, Oct. 30, 2007.)

15. The office polices manual included a single-page notice of the paid leave policy, which did not change in its terms from the 1979/1980 policy, but had been rewritten to include introductory and explanatory language and examples taken from the ADA model manual. (Trial Tr. 207:2-208:11, Oct. 23, 2007; Trial Tr. 169:1-170:4, Oct. 30, 2007; Trial Tr. 29:12-30:7, 31:5- 13, 37:1-3, Nov. 16, 2007.)

16. The paid leave policy established in the 1979/1980 policy manual remained unchanged in its material terms after the completion of the mid-May 2004 office polices manual. (Tr., 207:12-208:5, Oct. 23, 2007; Trial Tr. 208:17-22, Oct. 23, 2007; Trial Tr. 34:18-35:1, Oct. 30, 2007; Trial Tr. 35:21-25, Oct. 30, 2007; Trial Tr. 37:6-38:25, Oct. 30, 2007; Trial Tr. 169:15-171:11, Oct. 30, 2007; Trial Tr. 18:22-25, Nov. 16, 2007; Trial Tr. 26:8-9, Nov. 16, 2007; Trial Tr. 30:4-7, Nov. 16, 2007; Trial Tr., 33:19-15, Nov. 16, 2007.)

17. The only material term of the paid leave policy that has *ever* been changed since the 1979/1980 policy manual occurred in the late Summer of 2004, after Appellant Michelle Isaacs left the employ of Appellee Daniel Bonner on July 14, 2004; the material term changed in said paid leave policy increased the number of hours to be paid for a day from 8 hours to 9 hours. *Id.*

18. Appellant Michelle Isaacs knew and understood the paid leave policy during her employment and at the time of her departure. (Page 26, March 21, 2008 Judgment Order).

19. Appellant Michelle Isaacs knew of the adoption of the office policies manual in mid May, 2004, and had the opportunity to review it. (Page 8, March 21, 2008 Judgment Order).

20. Because the leave policy requires a year *of full-time employment* to earn the full measure of potential paid leave, the leave is calculated on a pro-rata basis for employees who do not work the entire year, due to separation from employment or otherwise. Trial Tr. 122:6-16, Oct. 30, 2007; Trial Tr. 190:3-11, Oct. 30, 2007.

21. As previously noted, Appellant Michelle Isaacs became employed as a dental hygienist in Appellee's dental practice on November 1, 2000.

22. Calculated from Appellant Michelle Isaacs' date of hire, the Appellee's first year of employment began on November 1, 2000, her second year of employment began on November 1, 2001, her third year of employment began on November 1, 2002, and her fourth year of employment began on November 1, 2003. (Page 4, March 21, 2008 Judgment Order).

23. Appellant Michelle Isaacs took an unpaid leave of absence for maternity from September 1, 2001, through January 31, 2002, and took another unpaid leave of absence for maternity from November 1, 2003 through January 31, 2004, from which she returned to full-time employment with the Appellant on February 1, 2004. (Stipulations).

24. Although Appellant Michelle Isaacs did not work the entirety of her second year of employment, having been on an unpaid leave of absence for the first three months of that year, Appellee allowed her to take a full week of paid leave. (Trial Tr. 47:17-48:6, Nov. 16, 2007.)

25. Under the paid leave policy, Appellant Michelle Isaacs was entitled to only three days of paid leave instead of a full week for her second year of employment because she was on unpaid leave for three months of the year. However, Defendant exercised discretion and permitted her to take the full week of paid leave that she would have earned for working the full year, and paid her

for more than the thirty-two hours pay that she would have earned for four days of paid leave. (Def.'s Ex. 12; Trial Tr. 47:19-48:6, 112:11-115:4, 140:19-141:20, Nov. 16, 2007.)

26. Appellee Daniel Bonner chose to pay the Plaintiff for the leave taken by her in her second year because he believed that the Appellant was experiencing financial difficulties and could not afford to be off without pay. (Trial Tr. 48:7-50:22, Nov. 16, 2007.)

27. As an employer, it is within the discretion of Appellee Daniel Bonner whether to give an employee additional days of paid leave or other considerations as incentives, as rewards for good performance, or in the event that special circumstances arise from an employee. (Trial Tr. 21:1-14, 69:20-70:3, 100:21-101:11, Oct. 30, 2007.)

28. From 1979 until the date of Appellant Michelle Isaacs' departure from Appellee's employee, no other employee except Appellant had ever been awarded paid leave for time during which an employee was on an unpaid leave of absence and did not render a year of full employment. (Trial Tr. 114:6-7, Oct. 30, 2007; Trial Tr. 152:18-153:11, Nov. 16, 2007.)

29. During Appellant Michelle Isaacs' third year of employment, Appellant worked for the entirety of her third year of employment and received one week of paid leave for that year. (Trial Tr. 149:6-8, Oct. 23, 2007; Trial Tr. 173:11-14, Oct. 23, 2007; Trial Tr. 220:11-17, Nov. 16, 2007.)

30. Up until 2002, Appellant Daniel Bonner had prepared all payroll records by hand. (Joint Ex. 5, 6; Def.'s Ex. 2-8; Trial Tr. 66:1-8, Nov. 16, 2007.)

31. In late 2002, Appellee Daniel Bonner began using the computer program QuickBooks for payroll data; said program would produce an itemized pay stub for each employee. *Id.*

32. The QuickBooks program allowed the entry of data for both used and available paid leave to appear on employee pay stubs, but Appellant did not use this QuickBooks feature for tracking employees' paid leave usage, opting instead to keep leave records by hand and later, by the

clock-in program. (Trial Tr. 211:8-12, Oct. 23, 2007; Trial Tr. 72:13-73:22, 173:8-174:3, Oct. 30, 2007; Trial Tr. 66:9-25, Nov. 16, 2007.)

33. Because QuickBooks was not used for tracking paid leave, the leave reporting spaces on all employees' pay stubs showed zeroes until the April 23, 2004 payroll. (Joint Ex. 5, 6; Def.'s Ex. 2-8; Trial Tr. 68:13-70:15, Nov. 16, 2007.)

34. For reasons unknown to Appellee Daniel Bonner, beginning with the pay stubs of April 23, 2004, amounts appeared on the pay stubs' available leave reporting spaces on all employee pay stubs, but the numbers did not accurately reflect the employees' available leave. (Joint Ex. 5, 6; Def.'s Ex. 2-8; Trial Tr. 175:2-176:1, 214:3-15, Oct. 23, 2007; Trial Tr. 68:13-70:25, 70:15-25, Nov. 16, 2007.)

35. Sixty-four hours available leave time incorrectly showed on Appellant's pay stubs from April 23, 2004 through her last paycheck, this amount never changed despite the fact that Appellant took three days of paid leave during that same period of time. (Joint Ex. 6; Stipulation.)

36. The Appellee's employees knew that their pay stubs did not provide the record of their paid leave usage and availability because the issue was discussed at morning staff meetings and also was a source of humor among employees, who teased the Defendant about his lack of computer skills. (Trial Tr. 211:13-212:21, Oct. 23, 2007; Trial Tr. 174:7-175:14, Oct. 30, 2007; Trial Tr. 67:1-68:3, 71:1-20, Nov. 16, 2007.)

37. The time showing on the pay stubs never changed, even when employees, including Appellant Michelle Isaacs, used paid leave days after the sudden appearance of the entry on the pay stubs. (Joint Trial Ex. 6; Defendant's Trial Ex. 2 through 8.)

38. Even though her pay stubs for all of 2003 displayed zeroes in the space for available leave time, Appellant took a full week of paid vacation in that year. (Trial Tr. 149:6-8, 173:1116, Oct. 23, 2007; Trial Tr. 220:11-19, Nov. 16, 2007.)

39. As such, Appellant Michelle Isaacs was aware that the pay stubs she was receiving were not used to report used and available paid leave as evidenced by the fact that even though Appellant's pay stubs throughout 2003 all showed no time available for paid leave, Appellant took and was paid for the one week of paid leave to which she was entitled during that period of time. (Trial Tr. 149:6-8, Oct. 23, 2007; Trial Tr. 173:11-14, Oct. 23, 2007; Trial Tr. 220:11-17, Nov. 16, 2007.)

40. After weighing the evidence before it, the Circuit Court of Berkeley County, West Virginia specifically found that the Appellant knew that her used and available leave was not tracked on the paystubs and that available leave time information on her pay stubs was not the accurate accounting of her available paid leave. (March 21, 2008 Judgment Order).

41. When Appellant Michelle Isaacs began her employment with Appellee, employees reported their hours for each pay period by writing down their total hours worked on post-it notes or other scraps of paper and giving them to the Appellee. (Trial Tr. 167:15-24, 209:14-19, Oct. 23, 2007; Trial Tr. 171:14-172:4, Oct. 30, 2007; Trial Tr. 58:17-59:12, Nov. 16, 2007.)

42. If an employee had taken any paid leave days during a pay period, those days also would be reported. (Trial Tr. 210:24-211:7, Oct. 23, 2007; Trial Tr. 139:10-14, Nov. 16, 2007.)

43. Appellee Daniel Bonner paid employees based upon the time reported to him by the employee. (Trial Tr. 168:1-23, Oct. 23, 2007; Trial Tr. 171:19-172:2, Oct. 30, 2007; Trial Tr. 58:17-59:12, Nov. 16, 2007.)

44. No evidence was ever presented that, under this self-report system, Appellee Daniel Bonner ever challenged or failed to pay Appellant, or any other employee, for the total amount of time or paid leave reported by the employee for a pay period. (Trial Tr. 168:1-23, 209:20-24, 210:14-23, Oct. 23, 2007; Trial Tr. 178:12-179:13, 263:11-21, Oct. 30, 2007; Trial Tr. 59:14-17, 62:18-63:13, Nov. 16, 2007.)

45. Appellee Daniel Bonner paid Appellant Michelle Isaacs for all hours turned in by her even though he began to suspect, shortly after her return from her second unpaid leave of absence, that she was turning in more hours than she was actually working. (Trial Tr. 154:7-155:7, Nov. 16, 2007.)

46. In fact, Appellant Michelle Isaacs actually was fraudulently adding a couple of hours onto her pay check each pay period; a fact she freely admitted to another employee of Appellee. (Trial Tr. 215:1-2, 219:6-8, Oct. 23, 2007.)

47. In response to Appellee Daniel Bonner's suspicions about Appellant Michelle Isaacs' time reports, Appellee began tracking her time for a pay period but before the pay period ended, Appellant discovered on Appellee's desk the paper on which Appellee was recording her hours and confronted Appellee about it. (Trial Tr. 168:24-169:17, Oct. 23, 2007; Trial Tr. 82:11-21, Oct. 24, 2007; Trial Tr. 59:21-62:4, 216:9-217:7, Nov. 16, 2007.)

48. Partly because of his suspicions about Appellant's time reporting, Appellee put into use a time-tracking program in April of 2004 and required each employee to clock in and clock out on an office computer each day or for periods of absence during a day. This clock-in program generated a time report for each employee at the end of each pay period. (Def.'s Ex. 1; Joint Ex. 4; Trial Tr. 214:16-216:9, Oct. 23, 2007; Trial Tr. 77:2-9, Oct. 24, 2007; Trial Tr. 172:3-15, 175:15-177:9, Oct. 30, 2007; Trial Tr. 54:3-55:24, 62:5-12, Nov. 16, 2007.)

49. On or about July 12, 2004, Appellant gave a month's notice of her intent to leave her employment with Appellee. (Trial Tr. 131:4-15, Oct. 23, 2007; Trial Tr. 221:21-222:5, Nov. 16, 2007.)

50. However, despite giving one month's notice of her intent to leave, Appellant abandoned her employment on July 14, 2004. *Id.*

51. As such, Appellant Michelle Isaacs resigned from Appellee's employ effective July 14, 2004. (Stipulations of the Parties).

52. Appellant retrieved her final paycheck on the next regular payday. (Trial Tr. 133:15-16, Oct. 23, 2007; Trial Tr. 261:20-24, Oct. 30, 2007; Trial Tr. 74:1013, Nov. 16, 2007.)

53. No compensation for unused, accrued paid leave was included in Appellant Michelle Isaac's last paycheck because, under the terms of the leave policy which had been in place for Appellant's practice since 1979/1980, Appellant had used all of the paid leave days that she had earned as of her last day of employment. (Trial Tr. 133:18-23, Oct. 23, 2007.)

54. In an attempt to fraudulently extract money not owed, Appellee Michelle Isaacs intentionally chose to make a false claim for unpaid leave with the West Virginia Division of Labor's Wage and Hour Section (hereinafter, "Wage & Hour"). (Page 27, March 21, 2008 Judgment Order.)

55. On or about July 26, 2004, Appellant filed a verified "Request for Assistance," that is, a complaint, with Wage & Hour, asserting that at the time of her resignation from the Appellee's employ, she was not paid for all of her accrued paid leave in her final paycheck. (Stipulations; Joint Trial Ex. 1-B.)

56. On her verified Request for Assistance (hereinafter, "RFA") form, Appellee falsely claimed that she was owed for 64 hours of accrued paid leave, as shown on her last pay stub, and checked the box indicating that no written leave policy existed while she was employed. (Joint Ex. 1-B)

57. In further support of her claim for unpaid vacation-pay wages, Appellant Michelle Isaacs attached to her RFA a handwritten statement in which she asserted, *inter alia*, that in her last paycheck, she "had been shorted [her] vacation pay for the previous week," that in the previous years that she worked for the Appellee, the "hours available according to you pay stub are available at

anytime," and that she was informed by other employees that the day after her resignation, an employee handbook had been started in order for Appellant not to have to pay her, all of which Appellant consciously and actually knew to be false. (Joint Ex. 1-B.)

58. Appellant's RFA was assigned to Mary Beth McGowan (hereinafter, "McGowan", a field officer for Wage & Hour, who works from her home in Martinsburg, West Virginia. (Trial Tr. 13:21-23, Oct. 23, 2007).

59. After reviewing the RFA, McGowan contacted Appellee Daniel Bonner by telephone to advise him of Appellant's claim and to request the "company policy on vacation and payroll records showing vacation pay received by complainant." (Joint Ex. 1-I at 09/13/04; Trial Tr. 48:15-22, Oct. 23, 2007.)

60. Under facsimile cover page dated October 5, 2004, Appellee Daniel Bonner forwarded to McGowan a fact sheet providing pertinent data, the leave policy prepared for the May 2004 office policies manual (with the later change to 9 hours for a vacation day already appearing thereon), and time sheets for Appellant for pay periods in which paid leave days were taken during her last anniversary year of employment. (Joint Ex. 1-D.)

61. Under facsimile cover page dated October 5, 2004, Appellee Daniel Bonner forwarded to McGowan the information requested by her, although by that time the paid leave policy had already been changed to 9 hours of pay per paid leave day. (Joint Trial Ex. 1-D.)

62. The written leave policy provided to Wage & Hour on October 5, 2004 is the same written leave policy that was in place at the time of Appellant's departure from employment on July 14, 2004 except for the modifications in the policy made in the late Summer of 2004 which changed the number of hours of pay for paid leave day from 8 hours to 9 hours and added introductory language. (Trial Tr. 38:21-43:13, Oct. 30, 2007).

63. Appellant does not deny that, upon making this change to the written leave policy in the late Summer of 2004, that Appellant disposed of his previous copy of the written leave policy as a matter of course and without any intent to conceal any information. (Trial Tr. 40:3-14, Oct. 30, 2007).

64. Appellant Michelle Isaacs intentionally provided McGowan with pay stubs she knew to be erroneous and used said paystubs to attempt to extract money from Appellant Daniel Bonner. (Page 27, March 21, 2008 Judgment Order).

65. After reviewing the paystubs intentionally provided by Appellant Michelle Isaacs, McGowan incorrectly concluded that Appellant was due forty hours of vacation pay, for a total of \$920.00. (Joint Ex. 1-I at 12/21/04.) McGowan later testified that she believed the pay stubs provided by Appellant Michelle Isaacs were all of the pay stubs that Appellant had in her possession, but admitted that if she had seen all of the pay stubs entered into evidence in this trial, her conclusion about the validity of the available leave data appearing on those pay stubs provided by Appellant would have been different. (Trial Tr. 78:20-79:5, Oct. 23, 2007; Trial Tr. 83:21-84:8, Oct. 23, 2007.)

66. On the basis of McGowan's determination that Appellee Daniel Bonner owed Appellee forty hours of unpaid vacation time, Larry Walker (hereinafter, "Walker"), Director of Wage & Hour, on January 12, 2005, sent to Appellee Daniel Bonner a "demand for wages" of \$920.00, which represented wages for forty hours at Plaintiff's then hourly rate of \$23.00 per hour. (Joint Ex. 1-E; Joint Ex. 1-I at 01/19/05.)

67. Said January 12, 2005 "demand for wages" advised Appellee Daniel Bonner that "Failure to respond may result in the addition of liquidated damages as required in § 21-5-4(e) ... [of \$5,520.00]" and that if Appellee Daniel Bonner disagreed with the determination, he could request a meeting within five days of receipt of the demand. (Joint Trial Ex. 1-E.)

68. Within the permitted five days response time, Appellee Daniel Bonner responded, disputing the demand for wages, explaining the basis of his dispute, and stating that, at the very most, Appellant was entitled to 4.20 hours² for which he enclosed a check, adding that, "If check does not close this case, then I request a hearing." (Joint Ex. 1-F.)

69. On February 10, 2005, Wage & Hour served Appellee Daniel Bonner with a subpoena *duces tecum* demanding that Appellant produce all pay records for Appellant's entire period of employment at the Division of Labor's Charleston, West Virginia offices within 72 hours, pursuant to West Virginia Code § 21-5- 11(a) and (b). (Joint Trial Ex. 1-G.)

70. Upon receiving the subpoena as aforesaid, Appellee Daniel Bonner concluded that he was not going to receive the hearing that he had requested in his response letter of January 21, 2005. (Trial Tr. 94:20-95:1, Nov. 16, 2007)

71. After receiving said subpoena, McGowan assured both Appellee and his administrative staffer, Barb Campbell, that if Appellee paid the demanded sum of \$920.00, that the claim would be fully and finally resolved. (Trial Tr. 186:7-187:23, Oct. 30, 2007; Trial Transcript, 99:4-9, Nov. 16, 2007)

72. On the basis of McGowan's assurance of finality, and without ever admitting that he owed Appellant Michelle Isaacs any sum, Appellee Daniel Bonner paid the \$920.00 in order to bring the matter to a close. (Trial Tr. 104:2-105:6, Nov. 16, 2007).

² Because the leave policy required paid leave to be taken in a minimum of full-day increments, the Appellant had no legitimate demand for compensation for part of a day not yet fully earned at the time of her departure. Nonetheless, the Appellant in this appeal wrongfully asserts that this offer to settle the claim is an admission on the part of the Appellee that the Appellant had 4.2 vested hours of paid leave. This argument violates the rule that offers in pursuit of settlement is not admissible as evidence of liability or admissions of fault, W.V.R.E. 408, and the agreement of the parties through pre-trial submissions which agreed this was an issue before the Circuit Court. For purposes of this appeal, the fact that Appellee paid said money to Wage & Hour is completely irrelevant.

73. Despite the representations made to Appellant by Wage & Hour, the Appellant Michelle Issacs initiated an action for statutory liquidated damages and fraudulently sought to obtain money from Appellant which was not owed by abusing the laws of this State. (Trial Tr. 101:4-8, Oct. 23, 2007.)

74. At trial, evidence was admitted that proved that Appellant Michelle Isaacs was abusing the legal process in bringing said action for statutory liquidated damages when she admitted to another employee of Appellee Daniel Bonner that her only intention of proceeding with the lawsuit was to “get back” at the Appellee’s wife. (Trial Tr. 193:3-15, Oct. 30, 2007.)

75. Among other findings, the Circuit Court of Berkeley County, West Virginia found that Appellant Michelle Isaacs had intentionally provided Wage & Hour with a paystub that she knew was erroneous. (Page 27, March 21, 2008 Judgment Order).

76. Among other findings, the Circuit Court of Berkeley County, West Virginia found that Appellant Michelle Isaacs had made a false claim by which she successfully obtained a payment from Appellant for which she was not owed. (Page 27, March 21, 2008 Judgment Order).

77. Among other findings, the Circuit Court of Berkeley County, West Virginia found that Appellant Michelle Isaacs’ conduct was intentionally fraudulent as she persisted in bringing the case to trial. (Page 27, March 21, 2008 Judgment Order).

II.

STATEMENT OF THE CASE

The parties to the underlying proceeding voluntarily chose to have the claims raised in the parties' respective pleadings heard upon a bench trial in the Circuit Court of Berkeley County, West Virginia. The singular claim raised in Appellant's Complaint sought recovery of statutory liquidated damages in the amount of \$6,210.00; said claim was based on a false assertion that Appellee Daniel Bonner had failed to pay Appellant Michelle Isaacs a portion of unused leave when Appellant left her employment. *See* West Virginia Code § 21-5-4(e). As noted above, the Appellant's sole request was for liquidated damages as Appellee had previously paid the total amount of One Thousand Sixteen Dollars and Sixty Cents (\$1,016.60) to Wage & Hour based on Appellant's fraudulent claim for unpaid wages.

Appellee Daniel Bonner did timely file an Answer to said Complaint which denied that Appellee was owed any money for unpaid wages and was therefore not entitled to recover statutory liquidated damages. Further, Appellee Daniel Bonner asserted a Counterclaim alleging that Appellee was entitled to recover attorney's fees and punitive damages as Appellant Michelle Isaacs had knowingly engaged in fraud by making a false claim for unpaid wages to Wage & Hour for the purpose of extorting monies for which she was not entitled.

Prior to trial, the parties did submit separate Pre-trial Memorandums and did jointly stipulate to certain facts. As noted in Appellant Michelle Isaacs's Pretrial Memorandum, the parties conducted "limited written discovery" and "no depositions were conducted by the parties prior to trial." Pursuant to the pretrial submissions and

joint stipulations, the parties did agree that the issue of whether Appellee Daniel Bonner actually owed *any* money for unpaid wages would be decided by the Circuit Court of Berkeley County, West Virginia.

A four (4) day bench trial was held over the course of the following dates: October 23, 2007, October 24, 2007, October 30, 2007, and November 16, 2007. During said bench trial, testimony was taken from several witnesses and several exhibits were entered into evidence. The parties were freely given leave to present evidence and argument during said bench trial. The Honorable Gray Silver III presided over all four (4) days of the bench trial and all subsequent hearings.

After completing the evidentiary portion of the parties' bench trial, the parties agreed to submit proposed orders to the Circuit Court setting forth proposed factual findings and legal conclusions. Upon review of said proposed orders, the Circuit Court did craft its own thirty-one (31) page final "Judgment Order" which was entered on March 21, 2008; said Judgment Order did deny Appellant Michelle Isaacs' claim for statutory liquidated damages and did find in favor of Appellee Daniel Bonner on the issues raised in his Counterclaim. Said March 21, 2008 Judgment Order did set forth, with sufficient detail, the Circuit Court's reason and logic in reaching its decision.

Among other findings, the Court did find that Appellant Michelle Isaacs had knowingly made a false claim for money that she was not owed. Pursuant to said March 21, 2008 Judgment Order, Appellee Daniel Bonner was awarded compensatory damages in the amount of One Thousand Sixteen Dollars and Sixty Cents (\$1,016.60) and punitive damages in the amount of Five Thousand Dollars (\$5,000.00). The Circuit Court further Ordered that Appellant Daniel Bonner prepare an itemization of legal costs, including

reasonable attorney's fees and Appellee Michelle Isaacs was ordered to file a Response to Appellee's itemization. As such, the parties did file written submissions upon the issue of costs and attorneys fees.

On June 19, 2008, a post-trial hearing on the issue of costs and attorneys fees was held. At said hearing, the parties did argue their respective position on the issue of costs and attorneys fees. On July 31, 2008, an "Addendum to Judgment Order: Order Awarding Attorney Fees and Costs" was entered. Based on the fraudulent and bad faith actions of Appellant Michelle Isaacs, the Circuit Court did Order that Appellant Michelle Isaacs pay Appellee Daniel Bonner the amount of Twenty-Nine Thousand Four Hundred Eighty-Seven Dollars and Fifty-Two Cents (\$29,487.52) for attorney's fees and costs herein.

Appellee Daniel Bonner asserts that the Circuit Court was correct in awarding Appellee compensatory damages, Appellee's attorney's fees and costs, and assessing punitive damages against Appellant, but contends the Circuit Court was incorrect in characterizing its award of attorney's fees and costs as punitive damages. As the ultimate award of damages was correct despite the improper characterization of attorney's fees and costs as punitive damages, Appellee asks that the total amount awarded be affirmed upon appeal.

Appellant Michelle Isaacs does appeal the final "Judgment Order" entered by the Circuit of Berkeley County, West Virginia on March 21, 2008 and subsequent "Addendum to Judgment Order: Order Awarding Attorney Fees and Costs: entered by the Circuit Court of Berkeley County, West Virginia on July 31, 2009.

Appellee Daniel Bonner does respectfully ask that the ultimate Findings of Fact and Conclusions of Law of the Circuit Court of Berkeley County, West Virginia be affirmed and that the previous award for compensatory damages, punitive damages, and attorney's fees and costs, in the amount of \$35,504.12 be affirmed by this Honorable Court.³ Appellee Daniel Bonner does assert a cross assignment of error because the Circuit Court was incorrect in characterizing its award of legal fees and costs as a punitive damage. Again, Appellee asks that this Honorable Court not disturb the amount awarded by the Circuit Court but that it be affirmed on the correct legal ground.

³ Said monetary award is comprised of the following: Compensatory Damages in the amount of \$1,016.60; Punitive Damages in the Amount of \$5,000.00; and Legal Fees and Costs in the amount of \$29,487.52.

III.

RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

Appellant Michelle Isaacs asserts five assignments of error, all of which are disputed by Appellee Daniel Bonner as misstatements of the law, misstatements of the relevant underlying facts, or both.

APPELLEE'S CROSS ASSIGNMENT OF ERROR

Pursuant to Rule 10(f) of the West Virginia Rules of Appellate Procedure, Appellee Daniel Bonner respectfully asserts that the Circuit Court of Berkeley County, West Virginia was correct in awarding Appellee's attorney's fees but did incorrectly characterize said award of attorney's fees as punitive damages.

IV. POINTS AND AUTHORITIES

CASES

<i>Barnett v. Wolfolk</i> , 149 W.Va. 246, 140 S.E.2d 466	23, 40
<i>Boyd v. Goffoli</i> , 216 W. Va. 552, 608 S.E.2d 169	41, 42, 43, 44
<i>Brown v. Gobble</i> , 196 W. Va. 559, 474 S.E.2d 489.....	23, 34
<i>Farley V. Zapata Coal Corp.</i> , 167 W.Va. 630, 281 S.E.2d 238.....	43
<i>Garnes v. Fleming Landfill, Inc.</i> , 186 W. Va. 656, 413 S.E.2d 897.....	45
<i>Howell v. City of Princeton</i> , 210 W.Va. 735, 559 S.E.2d 424.....	30
<i>In re Queen</i> , 196 W. Va. 442, 446, 473 S.E.2d 483, 487.....	38
<i>Ingram v. City of Princeton</i> , 208 W.Va. 352, 540 S.E.2d 569.....	30
<i>McConaha v. Rust</i> , 219 W.Va. 112, 632 S.E.2d 52.....	23
<i>Meadows v. Wal-Mart, Inc.</i> , 207 W. Va. 203, 530 S.E.2d 676.....	25, 26, 28
<i>Petition of Wood</i> , 123 W.Va. 421, 427, 15 S.E.2d 393, 396.....	36
<i>Public Citizen, Inc. v. First Natl. Bank in Fairmont</i> , 198 W. Va. 329, 480 S.E.2d 538	23
<i>Sherwood Land Co. v. Municipal Planning Comm'n of the City of Charleston</i> , 186 W. Va. 590, 413 S.E.2d 411.....	23, 40
<i>Torbett v. Wheeling Dollar Savings & Trust Co.</i> , 173 W. Va. 210, 314 S.E.2d 166.	41
<i>TXO Production Corp. v. Alliance Resources Corp.</i> , 187 W. Va. 457, 419 S.E.2d 870	40, 41, 44, 45

WEST VIRGINIA STATUTES

W. Va. Code § 21-5-1, <i>et seq.</i>	17, 25, 26, 39, 42
Rule 10(f) of the West Virginia Rules of Appellate Procedure.....	21
Rule 52 of the West Virginia Rules of Civil Procedure.....	23, 34

V.

STANDARD OF REVIEW

In all actions tried upon the facts without a jury, "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Rule 52 of the West Virginia Rules of Civil Procedure; *Brown v. Gobble*, 196 W. Va. 559, 474 S.E.2d 489 (1996).

The Supreme Court of Appeals of West Virginia has set forth the following standard in reviewing the findings and conclusions of the Circuit Court after a bench trial:

In 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.

Syl. Pt. 1., *McConaha v. Rust*, 219 W.Va. 112, 632 S.E.2d 52 (citing Syl. Pt. 1, *Public Citizen, Inc. v. First Natl. Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996)).

It is well established, that in cases tried "without the aid of a jury, the trial court, and not the appellate court, is the judge of the weight of the evidence." *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996).

The Supreme Court of Appeals of West Virginia, on appeal, may "affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syllabus, *Sherwood Land Co. v. Municipal Planning Comm'n of the City of Charleston*, 186 W. Va. 590, 413 S.E.2d 411 (1991), quoting, Syll. Pt 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965)

VI.
ARGUMENT

I. THE CIRCUIT COURT CORRECTLY APPLIED THE PLAIN LANGUAGE OF THE PAID LEAVE POLICY

The Circuit Court of Berkeley County, West Virginia correctly applied the plain language of the paid leave policy. In her first assignment of error, Appellant Michelle Isaacs improperly argues that the word “time”, as used in said policy, requires the Appellee to pay departing employees unused vacation time by the hour. This interpretation is completely wrong and defeats the clear intent of the document as a whole.

The relevant language contained within Appellee’s employment policy states as follows: “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.” Joint Trial Ex. 2. An explanation of “Vacation time” is set forth in the policy as follows: “(Vacation time may not be taken in blocks of less than one day.)” Joint Trial Ex. 2. Further, the last sentence of the Vacation section of the employment policy states that “[i]f you haven’t taken them, you will receive payment for those days if you leave the practice.” As such, based on the plain language of the policy, in its March 21, 2008 Judgment Order, the Circuit Court properly found that “[t]he policy plainly states that an employee will be paid for unused *days*.” (Page 19, March 21, 2008 Judgment Order).

Beyond the plain language of the employment policy, Appellant’s argument must fail as said argument is not only contrary to the evidence in the case, it is contrary to the law of this State.

The Wage Payment and Collection Act, W. Va. Code § 21-5-1, *et seq.* and relevant case law decided by this Honorable Court defeat Appellant's argument. The terms of the Wage Payment and Collection Act which are relevant to this case appear as follows:

The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: *Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.*

West Virginia Code § 21-5-1(c) (emphasis added).

Fringe benefits, which include paid leave, which are accrued, capable of calculation, and payable directly to an employee must be paid at the time an employee resigns as part of said employee's final paycheck. It is well established that the Wage Payment and Collection Act does not create a right to fringe benefits. *Meadows v. Wal-Mart, Inc.*, 207 W. Va. 203, 216, 530 S.E.2d 676, 689 (1999). However, if fringe benefits are offered, an "employer is free to set the terms and conditions of employment and compensation, including fringe benefits." *Id.* An employer who offers fringe benefits is also allowed to set forth the eligibility and vesting requirements for paying said fringe benefits.

Pursuant to W. Va. Code § 21-5-1(c) (1987), whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term "wages" are determined by the terms of employment and not by the provisions of W. Va. Code § 21-5-1(c). Further, the terms of employment may condition the vesting of a fringe benefit right on eligibility requirements in addition to the performance of services, and these terms may provide that unused fringe benefits will not be paid to employees upon separation from employment.

Syl. Pt. 5, *Meadows v. Wal-Mart*, 207 W.Va. 203, 530 S.E.2d 676.

Under the Wage Payment and Collection Act, fringe benefits will only be payable if said benefits have both “accumulated and vested” at the time of an employee’s separation from employment. *Id.* at 207 W.Va. 217, 530 S.E.2d 676.

As previously noted, the employment policy clearly states that “(Vacation time may not be taken in blocks of less than one day.)” Joint Trial Ex. 2. In the instant case, Appellant Michelle Isaacs wrongfully argues that she was entitled to 4.2 *hours* of accumulated paid leave. By applying the law to the facts of this case, Appellant’s first argument must fail as the established eligibility and vesting requirements of Appellee’s paid leave policy do not allow Appellant to be compensated for 4.2 *hours* of paid leave. Simply, if the time could not be exercised as paid leave, then it is not compensable when the employee separates from employment. *See* West Virginia Code § 21-5-1(c).

Further, Appellee Daniel Bonner respectfully asserts that the first argument asserted in Appellant’s Brief does misconstrue the factual evidence set forth in record below.⁴ The most glaring instance of these factual misrepresentations occurs when Appellant states that “[e]veryone agreed that Isaacs had at least 4.2 hours of vacation *time* accumulated when she left Bonner’s employment.” Appellant’s Brief at 14. In this instance, Appellant Michelle Isaacs attempts to misconstrue a limited portion of Appellee Daniel Bonner’s quoted testimony by claiming that Appellee actually agreed that Appellant Michelle Isaacs was owed 4.2 hours of vacation time when in fact, his clear testimony indicated that Appellee denied this claim. Trial Tr. 12:23-13:4 Oct. 30, 2007.

⁴ Appellant Michelle Isaacs improperly persists in denying that there was a written policy in force during the course of her employment. Appellant further improperly and continually implies that Appellee Daniel Bonner has acted inappropriately because he could not produce the actual physical “copy” of the written vacation policy in place when Appellant abandoned her employment on July 14, 2004. Suspiciously, Appellant does persist in making this argument but cites no authority whatsoever which requires Appellee to produce said documentation at trial.

In the very exchange quoted by the Appellant, Appellee Daniel Bonner repeatedly testifies that Appellant was not owed any paid leave at the time she separated from employment as leave was only to be paid in full-day increments. Appellant's misconstruing of the testimony in her brief is another clear example as to why great deference must be given to the trial court when reviewing findings of fact made during a bench trial.

Based on the applicable law and the facts at issue, it is clear that the Circuit Court of Berkeley County, West Virginia correctly applied the plain language of the paid leave policy.

II. THE CIRCUIT COURT CORRECTLY APPLIED THE EXPRESS TERMS OF THE WRITTEN POLICY AND DID NOT INTERPRET SAID POLICY IN FAVOR OF EITHER PARTY

The Circuit Court of Berkeley County correctly applied the express terms of the written policy and did not interpret said policy in favor of either party.

Appellant wrongfully asserts that the Circuit Court of Berkeley County "interpreted" the employment policy to disfavor the employee. Specifically, Appellant claims that the term "time" was improperly construed to mean "whole days." This argument must fail.

In order to accept Appellant's argument, this Honorable Court is asked to find the terms of the written policy ambiguous and therefore subject to interpretation. Although Appellant cites much case law in her argument, Appellant fails to cite any precedent or evidence proving that the employment policy language is ambiguous. As previously noted, the Circuit Court in this case specifically found that "[t]he policy plainly states that an employee will be paid for unused *days*." (Page 19, March 21, 2008 Judgment Order).

Appellant has simply failed to meet her burden of proving that the Circuit Court's finding that the employment policy was unambiguous was clearly erroneous.

The rule requiring employment contracts to be construed in favor of the employee does not apply to an employment contract that expresses its intent clearly and unambiguously. All case law cited by Appellant applies the rule that before an employment policy can be construed in favor of an employee and "ambiguity" must first exist. Syl. Pt. 6, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). If ambiguity does not exist, then its terms must be followed without construing said policy in favor of the employee.

It is clear that Appellee's employment policy is not ambiguous and clearly makes it known that paid leave under the policy can only be taken in "blocks of one day." Joint Trial Ex. 2. Appellant's brief is totally void of any evidence or argument which even suggests that the language in the policy is unclear or ambiguous.

III. THE CIRCUIT COURT PROPERLY CONCLUDED THAT APPELLANT WAS NOT OWED WAGES FOR UNUSED VACATION PAY AS APPELLEE CORRECTLY APPLIED THE EXPLICIT TERMS OF THE EMPLOYMENT POLICY AT ISSUE

The Circuit Court of Berkeley County properly found that Appellee's employee policy was correctly applied and that Appellant was not owed any wages for unused vacation pay at the time of her separation from employment. Further, the Circuit Court specifically found that Appellant had not established a prior practice of allowing employees to accrue paid leave while on maternity leave.

In her third assignment of error, Appellant Michelle Isaacs attempts to exploit a single instance in 2002 when Appellant did allow her to accrue paid leave for which she was not entitled.

The first prong of Appellant Michelle Isaacs's argument improperly asserts that Appellee's employment policy is not "express and specific" regarding accruing of paid leave while an employee is on "maternity leave." Specifically, Appellant Michelle Isaacs argues that because Appellee's employment policy does not discuss the accruing of fringe benefits while an employee is on "maternity leave" that Appellee's past practices must be looked at to determine whether she is owed any compensation for paid leave accrued when an employee takes an unpaid leave of absence for maternity purposes.

This argument must fail as Appellee's employment policy makes it clear that employees will not earn paid leave during an unpaid leave of absence for time not worked no matter what the reason; a finding of fact specifically made by the Circuit Court. Page 3, March 21, 2008 Judgment Order. The Circuit Court properly concluded that, under Appellee's employment policy, "an employee does not earn paid leave while on an extended unpaid leave of absence, such as maternity leave." Page 19, March 21, 2008 Judgment Order. As further support for Appellee's argument, prior to trial, Appellant stipulated and admitted that the time she was not working during 2003-2004 was an "unpaid leave of absence." *See Stipulations of the Parties.* Based on the foregoing, it is clear that the first prong of Appellant Michelle Isaacs' argument must fail as Appellee's employment policy is clear that paid leave will not be earned for *any* unpaid leave of absence.

Appellant Michelle Isaacs's second prong of her argument asserts that because Appellant's unwritten policy is "silent" regarding maternity leave that the past practices of Appellee must be looked at to determine whether Appellant is entitled to paid leave for which she did not earn. Appellant wrongfully contends that Appellee Daniel Bonner has

consistently applied the unwritten policy of allowing employees to accrue paid vacation leave while on maternity leave. For support, Appellant relies on opinions wherein this Honorable Court enforced standing, unwritten policies, consistently applied over a period of time. *See, e.g., Ingram v. City of Princeton, 208 W.Va. 352, 540 S.E.2d 569 (2000); Howell v. City of Princeton, 210 W.Va. 735, 559 S.E.2d 424 (2001)*. However, the facts of this case are distinguishable from the factual scenarios set forth in said opinions as Appellee Daniel Bonner did not, over a period of time, consistently apply a standing, unwritten policy of allowing employees to accrue paid leave while taking an unpaid leave of absence if said leave of absence was for maternity purposes.

In 2002, Appellee Daniel Bonner made a single exception to his employment policy by allowing Appellant to exercise paid leave that was not accrued or vested. In the 28 years Appellant Daniel Bonner employed persons at his dental practice, this singular incident where Appellant Daniel Bonner allowed an employee to accrue a week of paid leave for which she was not entitled did not create an unwritten policy consistently enforced nor did it entitle Appellant Michelle Isaacs to further attempt to fraudulently benefit from this single act of kindness.

In her argument, Appellant asks this Court to find the testimony of Gretchen Wolfe, an employee of Appellee Daniel Bonner at the time of trial, as persuasive evidence in support of Appellant's argument. Appellant contends that because employee Gretchen Wolfe speculated that she may accrue a week of paid leave during her maternity leave this may be considered proof of a consistently enforced unwritten policy. Appellee Daniel Bonner does not deny he testified that employee Gretchen Wolfe would be taking an unpaid leave of absence for maternity and that he would *probably* extend to her the

full measure of paid leave despite the fact that she would not accrue said benefit as she would not be working. However, Appellee Daniel Bonner's intent to *possibly* give employee Gretchen Wolfe an incentive bonus at some point in the future cannot be considered persuasive evidence that Appellee Daniel Bonner had engaged in a standing practice of paying employees for paid leave while employees are on maternity leave. Further, Appellee Daniel Bonner was unequivocal that employee Gretchen Wolfe was an exceptional employee whose contribution to the practice made her a valuable asset and, when the time came for her to take maternity leave, it is possibility that Appellee Daniel Bonner may give her a week of unearned paid leave as an incentive bonus.

At trial, further evidence was presented to prove the employees of Appellee Daniel Bonner understood that employees do not accrue paid leave during an unpaid leave of absence, including maternity leave. During cross examination by Appellant's counsel, employee Karen Smith gave the following testimony which clearly indicates that Appellee does not consistently engage in an unwritten policy which allows employees to accrue paid leave while on maternity leave:

Q: Okay, so next year, starting next June, you get another two weeks vacation?

A: Well I'm not going to be working on maternity leave so I won't accrue any then.

Q: Okay. When will you start – how much vacation will you get that next year?

A: Will I get that next June?

Q: Yes.

A: I guess minus 12 weeks.

Q: And what makes you say that?

A: Because you only get it when you work.

Q: And where does that come from?

A: The manual.

Trial Tr. 285:3-15, Oct. 30, 2007.

Appellant Michelle Isaacs improperly asks this Honorable Court to establish dangerous and unreasonable precedent. Appellant seeks to create a rule whereby if an employer does grant an employee a fringe benefit, not accrued or vested, on a *single* occasion, said employer is now consistently required to deviate from the employment policy in the future and consistently grant said employee the same fringe benefit not accrued or vested. This is not the standard that is required by law nor is it logical.

After listening to all of the evidence before it, the Circuit Court properly found that Appellee Daniel Bonner had, in one instance in 2002, allowed Appellant paid leave that had not been earned "because she was at that time a good employee whom he believed was having financial difficulties following her unexpectedly long maternity leave." Page 21-22, March 21, 2008 Judgment Order. The Circuit Court further properly concluded that Appellee Daniel Bonner considered this instance of granting Appellant paid leave that was not earned as a bonus and that an employer has discretion to award bonuses to employees. Page 24, March 21, 2008 Judgment Order. Appellant's policy of discretion to award bonuses that were not accrued or vested was consistently applied and said policy of discretion was known by Appellant. Page 24, March 21, 2008 Judgment Order.

Appellant asks this court to reject the idea that an employer has the discretion to award additional compensation or benefits to reward good performance or to provide an incentive for continued good service to business. Appellant seeks to outlaw a practice that is both common and lawful, but more importantly, beneficial to employees. As long

as an employer does not deprive an employee of benefits that are vested and due, an employer has the flexibility and discretion to reward an employee if said employer should so choose. The law is not offended when an employer exercises his judgment to reward or accommodate the needs of an employee.

The Circuit Court properly concluded that Appellant Michelle Isaacs was not owed wages for unused vacation pay under the terms of Appellee's employment policy as employees do not earn paid leave for time spent on an unpaid leave of absence.

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT APPELLANT MICHELLE ISAACS HAD ACTED FRAUDULENTLY

The Circuit Court correctly found, by clear and convincing evidence that Appellant Michelle Isaacs had engaged in fraud.

Appellant Michelle Isaacs committed fraud in an attempt to seek illicit financial gain. Fortunately, after hearing testimony from several witnesses and reviewing several exhibits, the Circuit Court properly found that Appellant engaged in fraud.

In her brief, Appellant Michelle Isaacs argues that the Circuit Court's finding of fraud would have a "chilling effect" on employees seeking assistance from the Wage & Hour Section of the Division of Labor. Appellee Daniel Bonner respectfully disagrees with this contention. The only "chilling effect" the Circuit Court's finding would have would be to prevent employees from fraudulently bringing false claims against their employers and improperly abusing the protective laws of the Wage Payment and Collection Act. As such, if an employee seeks a fraudulent claim against an employee for illicit financial gain by using the Wage Payment and Collection Act, if the trial court finds fraud has occurred by clear and convincing evidence, that employee should be subjected to punitive damages and attorney's fees.

As previously noted, in cases tried without a jury, “findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Rule 52 of the West Virginia Rules of Civil. Further, without the aid of a jury, the trial court, and not the appellate court, is the judge of the weight of the evidence.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). In this case, the record is replete with evidence that Appellant committed fraud; said evidence was properly weighed and considered by the Circuit Court.

Appellant Michelle Isaacs initially attempts to dismiss the Circuit Court’s finding of fraud by assuming the Circuit Court had solely considered evidence presented at trial that alleged Michelle Isaacs had not been a truthful person and had “padded” her hours while employed by Appellee. Trial Tr. 190:18-20, Oct. 30, 2007. Appellant Michelle Isaacs lodged no objection to this evidence being introduced at trial as either irrelevant or overtly prejudicial. Further, Appellant’s counsel actually elicited testimony on the issue of Appellant padding her hours. Trial Tr. 219:11-13, Oct. 30, 2007. All of the evidence regarding Appellant’s truthfulness was properly presented to the Circuit Court as the Judge is bound by law to evaluate the credibility of the witnesses.

Beyond the issues of Appellant’s credibility presented at trial, evidence was presented at trial that proved Appellant Michelle Isaacs committed actual fraud and sought to abuse the protections afforded by the Wage Payment and Collection Act and the legal system. Appellant Michelle Isaacs had actual knowledge that the “available leave” showing on the paystubs she provided to Wage & Hour was incorrect and did not accurately reflect the paid leave time that was available to her at the time of her separation from

employment. However, Appellant chose to present these paystubs in order to obtain compensation for which she was not entitled. Having successfully deceived Wage & Hour, Appellant was able to secure payment of lost wages from Appellee Daniel Bonner. After receiving said ill-gotten wages, Appellant sought another fraudulent windfall by initiating a civil action against Appellee by seeking statutory liquidated damages again asserting as facts things known to her to be false.

The evidence is unequivocal that until April 23, 2004, none of the Appellant's pay stubs had ever shown anything but zeroes for used and available leave, and that this was not the means used by Appellee Daniel Bonner to track paid leave. Nonetheless, Appellant knowingly and intentionally provided paychecks to Wage & Hour to make a claim that she was owed and not paid sixty-four (64) hours of paid leave at the time of her departure although Appellant Michelle Isaacs had all of her previous paystubs in her possession at the time she made the fraudulent claim:

Q: So, you did have some others?

A: I have every pay stub, yes.

Q: Excuse me?

A: I have all pay stubs.

Q: you have all your pay stubs?

A: From the time I started working.

Trial Tr. 176:19-24, Oct. 30, 2007.

In short, Appellant's clear intent was to exploit the information she knew to be false so as to obtain from Appellee, through Wage & Hour, compensation to which she knew she was not entitled. When confronted with the clear falsity of her allegations at trial,

Appellant Michelle Isaacs tried to backtrack and rehabilitate her own testimony, claiming, *inter alia*, that she thought that the 64 hours on the pay stub reflected that she had carried over a week of paid leave from her previous employment year. Of course, these sudden alternative explanations could not bear even minimum scrutiny.

As further proof of Appellant's fraudulent conduct, Appellant checked the box on her Request for Assistance form indicating that no written leave policy existed while she was employed. Joint Ex. 1-B. In said written Request for Assistance, Appellant further attached a handwritten statement in which she asserted, in the previous years that she worked for the Appellant, the "hours available according to you pay stub are available at anytime," and that she was informed by other employees that the day after her resignation, an employee handbook had been started in order for the Appellant not to have to pay her, all of which the Appellant consciously and actually knew to be false. (Joint Ex. 1-B.)

As the Circuit Court rightly concluded, Appellant's attempts to rehabilitate herself only provided further proof of her actual awareness of the falsehoods that she had knowingly perpetrated. Appellant simply was not credible, and as noted previously, credibility determinations are entitled to particular deference by this Honorable Court because a cold record can never surpass the opportunity for original observation. *See Petition of Wood*, 123 W.Va. 421, 427, 15 S.E.2d 393, 396 (1941)("The trial court heard the witnesses, observed their demeanor and is in a far better position to pass upon the weight and credibility of their testimony than this Court.").

Not only was Appellant's intent fraudulent, but it was vindictive. At trial, further evidence of fraud was admitted that proved that Appellant Michelle Isaacs was not bringing the instant lawsuit in good faith. At trial, an employee of Appellee Daniel

Bonner testified that Appellant Michelle Isaacs had blatantly admitted that her only intention of proceeding with the lawsuit was to “get back” at the Appellee’s wife. Trial Tr. 193:3-15, Oct. 30, 2007.

In Appellant’s brief, Appellant continues to wrongfully and inappropriately make an issue of the fact that Appellee Daniel Bonner lost a copy of the written employment policy manual when he moved offices in February, 2005; over seven months after Appellant ceased employment with Appellee. Not only is this assertion disingenuous, but appears to be solely made for the purpose of attempting to minimize the Circuit Court’s finding of fraud against Appellant Michelle Isaacs and cast some shadow of illicit behavior upon Appellee.

Appellant Michelle Isaacs left the employee of Appellant Daniel Bonner on July 14, 2004. As previously noted, in mid-May 2004, a written office policies manual was created and made available to Appellant Michelle Isaacs. The paid leave policy set forth in said manual included policy language which mirrored Appellant’s 1979/1980 written policy but included introductions and explanatory language from the ADA model manual. In the late summer of 2004, after Appellant had separated from employment, a minor change to the written paid leave policy was made which changed the number of hours to be paid to an employee per day from 8 hours to 9 hours. This was the only material change to the written manual that was in place at the time of Appellant’s employment. Admittedly, Appellee Daniel Bonner did not keep a physical copy of the older manual that was in place at the time Appellant was employed. In October, 2004, Appellant Daniel Bonner forwarded a copy of the updated written leave policy to Wage & Hour which showed the written policy language that Appellant knew to be in place

during her employ with the only material change being the change from 8 to 9 hours. In February, 2005, Appellee Daniel Bonner moved offices and during the move the office policy manual was lost and could not be located.

Appellant continues to wrongfully imply the loss of the written policy manual in place in July, 2004 and the failure to locate said manual prior to the trial held in October, 2007 somehow supports Appellant's argument that no fraud was committed. This argument defies all logic and reason as credible evidence was admitted at trial that proved Appellant Michelle Isaacs had access to written employment manual. Appellant's argument regarding the loss of the written manual in February, 2005 is nothing more than a "red herring" and lends absolutely no merit to the arguments set forth in her brief.

The overwhelming weight of all of the evidence gave the Circuit Court little choice but find that Appellant Michelle Isaacs had engaged in fraud. To find otherwise would have been erroneous under the substantial evidence rule. "Substantial evidence' is more than a scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996).

The Circuit Court best summarized its thoughts regarding the fraudulent acts of Appellant as follows:

This Court had no preconceptions about the case, but as the case developed during the trial, it became clear that there had been actual, intentional fraud on the part of the Plaintiff. 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 Court feels badly for the Plaintiff, as well as the Defendant. However, feeling badly for the Plaintiff does not alter the outcome in the case.

Page 9, July 31, 2008 Addendum to Judgment Order.

The Circuit Court correctly found, by clear and convincing evidence that Appellant Michelle Isaacs had engaged in fraud and did with particularity set forth the basis for said finding of fraud in its March 21, 2008 Judgment Order and July 31, 2008 Addendum to Judgment Order.

V. THE CIRCUIT COURT WAS CORRECT IN ITS ULTIMATE MONETARY AWARD TO APPELLEE DANIEL BONNER BUT DID INCORRECTLY CHARACTERIZE APPELLEE'S AWARD OF ATTORNEY'S FEES AS PUNITIVE DAMAGES

The Circuit Court was correct in awarding Appellee Daniel Bonner his attorney's fees but was incorrect in characterizing said award of attorney's fees as punitive damages.

Appellant Michelle Isaacs intentionally committed fraud in an attempt to seek illicit financial gain. A majority of said acts of fraud were committed in order to abuse the legal process and circumvent the protections afforded by the West Virginia Wage Payment and Collection Act, W. Va. Code § 21-5-1, *et seq.*

After hearing all of the evidence, the Circuit Court did deny the relief requested by Appellant Michelle Isaacs and did find in favor of Appellee Daniel Bonner on his Counterclaim. As such, Appellee Daniel Bonner was awarded the following monetary damages:

\$1,016.60 for compensatory damages for monies paid to Appellant but not owed
\$5,000.00 in punitive damages
\$29,487.52 in attorney's fees
\$35,504.12 total monetary award

Based on the fraudulent and bad faith actions of Appellant Michelle Isaacs, it was correct and appropriate for the Circuit Court to award punitive damages and attorney's fees to Appellee Daniel Bonner in addition to compensatory damages. However, over the objection of Appellee Daniel Bonner, the Circuit Court did choose to improperly

characterize its award of attorney's fees as "punitive damages." To the extent that the Circuit Court erred, it was in awarding Appellee's attorney's fees as a measure of *punitive damages*. The Circuit Court was correct, but for the wrong reason. As such, this Honorable Court must affirm the judgment of the Circuit Court as there is a correct, alternative legal ground which supports Appellee's theory of recovery. *See Syllabus, Sherwood Land Co. v. Municipal Planning Comm'n of the City of Charleston*, 186 W. Va. 590, 413 S.E.2d 411 (1991), *quoting*, Syll. Pt 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

Support for Appellee Daniel Bonner's contention that an award of attorney's fees should have been granted as a special damage can be found in the decision of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 468, 419 S.E.2d 870, 881 (1992) *affirmed by* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). In *TXO Production Corp.*, this Honorable Court upheld an award of punitive damages *and* a separate award of attorney's fees based on the abuse of legal process of the losing party. *Id.* This Honorable Court ruled that attorney's fees were available as an element of special damages where the real injury was the cost of the prevailing party having to come to court to vindicate his rights based on the losing party's fraudulent behavior. *Id.*

Admittedly, the Court in *TXO Production Corp.* made its determination that attorney's fees were available as special damages pursuant to an action for slander of title, but the same principles should be applied to the facts of this case.⁵ *See* Syl. Pt. 6,

⁵ The TXO Court cited Restatement (Second) of the Law of Torts § 624 (1977), insofar as the tort of slander of title is a form of the tort of injurious falsehood. *See, also Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W. Va. 210, 216, 314 S.E.2d 166 (1984)(where the Court, citing Prosser on Torts (4th ed. 1971), notes that injurious falsehood is among the recognized actions for wrongs against economic interests).

TXO Production, Corp., 187 W. Va. 457, 419 S.E.2d 870 (Attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title).

TXO Production, Corp. is the most analogous case to the instant proceeding as the compensatory damages awarded in said case consisted of an award for attorney's fees expended *and* a separate award for punitive damages. In this case, Appellee Daniel Bonner's attorney's fees should have been awarded as a measure of special compensatory damages based on the Circuit Court's determination that Appellant Michelle Isaacs had abused the legal system by fraudulently subjecting Appellee to false claims at both the administrative level and Circuit Court trial level. As a measure of compensatory damages, Appellee Daniel Bonner should recover his attorney's fees in defending Appellant's fraudulent action.

Appellant Michelle Isaacs will most certainly argue that this Honorable Court should not affirm the Circuit Court's separate award of attorney's fees and punitive damages based on this Honorable Court's ruling in *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004). In *Boyd*, this Honorable Court did determine that the purpose of assessing an award of attorney's fees and costs against a losing party found to have committed fraud is punitive in nature. *Id.* at 216 W.Va. at 569, 608 S.E.2d at 187. After making said determination, this Honorable Court did affirm the Circuit Court's ruling to deny the prevailing party a separate award of attorney's fees as the sizable, separate award of punitive damages was enough to deter future fraudulent conduct. *Id.* However, the facts of the *Boyd* decision are distinguishable from the facts of the instant proceeding.

In *Boyd*, the fraudulent acts of the losing party were limited to simple acts of fraud and the trial court did not find that the losing party had abused the legal system. In this case, a majority of the acts of fraud perpetrated by Appellant Michelle Isaacs were designed to abuse the legal system while committing additional fraud upon Appellee Daniel Bonner.

Most notably, Appellant Michelle Isaacs intentionally sought to defraud the Wage & Hour Section of the West Virginia Division of Labor by submitting fraudulent information to said agency in an attempt to use public resources to seek illicit financial gain. The beginning of Appellant's pursuit of illicit gains starts with the Appellant's abuse of process by filing a Request for Assistance with Wage & Hour and attempt to use said agency to fraudulently collect money she was not owed. Appellant's continued abuse of the legal process continued when she prosecuted a false claim for liquidated damages pursuant to West Virginia Code § 21-5-4(e) in the Circuit Court of Berkeley County, West Virginia. Appellant Michelle Isaacs did waste the resources of the public by pursuing a fraudulent claim at the administrative level and the Circuit Court level.

As noted by the Circuit Court in its July 31, 2008 Addendum to Judgment Order, "it was the [Appellant] who was "in the driver's seat" all the way in pursuing false claims through a trial in this Court." Further, evidence was presented at trial which proved that Appellant's sole motivation in pursuing this lawsuit was for vindictive purposes in order to "get back" at Appellee Daniel Bonner's wife. Trial Tr. 193:3-15, Oct. 30, 2007.

By simply reviewing the record, it is clear that Appellant Michelle Isaacs committed a majority of her fraudulent actions by abusing the legal system. Because the fraudulent actions of Appellant Michelle Isaacs are so interwoven with the legal system and

predicated on a bad faith prosecution of a civil claim, said fraudulent actions are distinguishable from the actions of the losing party in *Boyd*. Based on the aforementioned distinguishing factors, the award of attorney's fees granted to Appellant for defending a bad faith action centered around an abuse of the legal system should be affirmed as said award of attorney's fees should be considered a special compensatory damage separate from the award of punitive damages in this case and similar in nature to the separate damage award granted in *TXO Production, Corp.*

Surprisingly, Appellant Michelle Isaacs has requested that *she* be awarded her attorney's fees if this Court were to reverse the decision of the Circuit Court by claiming she is entitled to said award of attorney's fees pursuant to the Wage Payment and Collection Act, West Virginia Code § 21-5-1 *et seq.*⁶

The Circuit Court's award of attorney's fees to Appellee Daniel Bonner should be upheld but should be characterized as a special compensatory damage as the Appellant's fraudulent actions were specifically designed to abuse the legal system to obtain illicit financial gains by prosecuting a bad faith legal action against Appellee Daniel Bonner.

VI. IF IT IS DETERMINED THE CIRCUIT COURT APPROPRIATELY CHARACTERIZED ITS AWARD OF ATTORNEY'S FEES AS PUNITIVE DAMAGES SAID RULING SHOULD STILL BE AFFIRMED

If this Honorable Court does determine that the Circuit Court of Berkeley County appropriately characterized Appellee's award of attorney's fees as punitive damages, said award should be affirmed as application of the appropriate legal theories to the facts of this case require the same.

⁶ Appellee Daniel Bonner seeks to make it know that he objects to Appellant's implication that if this Honorable Court were to reverse the decision of the Circuit Court for any reason that Appellant is automatically entitled to an award of her attorney's fees. Specifically, Appellee Daniel Bonner notes that a trial court holds some modicum of discretion, especially when special circumstances exist, to award attorney's fees to a party prevailing under the Wage Payment and Collection Act. *See* West Virginia Code § 21-5-1; Syl. Pt. 1 *Farley V. Zapata Coal Corp.*, 167 W.Va. 630, 281 S.E.2d 238 (1981).

In Appellant Michelle Isaacs' Brief, Appellant attempts to set aside the award of attorney's fees by arguing that it was inappropriate for the Circuit Court to assess punitive damages and that the total award of punitive damages, including attorney's fees, did not bear a reasonable relationship to the compensatory damages awarded as the ratio of such was 34 to 1. Said ratio was based on the combined punitive damages award of \$34,487.52⁷ in comparison to the compensatory damages award of \$1,016.60. Appellant Michelle Isaacs does improperly argue that the 5 to 1 ratio cap for punitive damages should have been used by the Circuit Court to limit damages. Syl. Pt. 6. *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169. This argument must fail for many reasons.

First, it should be noted that because the Circuit Court properly found by clear and convincing evidence that Appellant had acted with "evil intentions" by committing fraud. Based on this finding, the 5-to-1 ratio Appellant seeks institute is in applicable:

The 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.* Syllabus Point 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *affirmed by* 509 U.S. 443, 113 S.Ct. 2711, 125 L.E.2d 366 (1993) (emphasis added).

In this case, it is clear that Appellant Michelle Isaacs acted with actual evil intention. The actions of Appellant Michelle Isaacs are to be considered "real mean" as opposed to "real stupid." *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 474-475, 419 S.E.2d 870, 887-888 (1992), *affirmed by* 509 U.S. 443, 113 S.Ct.

⁷ \$29,487.52 for attorney's fees characterized as punitive damages
\$5,000.00 straight punitive damages award

2711, 125 L.E.2d 366 (1993). Based on the findings of the Circuit Court, there is no way to determine that Appellant Michelle Isaacs acted with anything but actual evil intention.

Second, even if it is determined that Appellant Michelle Isaacs did not act with evil intention, the compensatory damages in this case should be considered negligible, thus allowing the Circuit Court to award damages in excess of the 5 to 1 ratio set forth in *Boyd*. The Circuit Court properly determined that because the compensatory damages in this case were only \$1,016.60, said actual compensatory damages are to be considered negligible, thus allowing for higher ratio punitive damages to be awarded. Page 8. July 31, 2008 Addendum to Judgment Order. Further, the Circuit Court went on to conclude that even an award of \$5,000.00 to \$10,000.00 in compensatory damages would have been negligible. *Id.*

Third, this Honorable Court's jurisprudence regarding punitive damages would not be offended by affirming the Circuit Court's award of \$34,487.52.⁸ After applying the factors set forth in Syllabus Points 3 and 4 *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1992), it becomes clear that the total amount of the Circuit Court's award of punitive damages should be affirmed. In crafting its July 31, 2008 Addendum to Judgment Order, the Circuit Court set forth with great particularity why the \$34,487.52 award of punitive damages is correct. Appellee Daniel Bonner does agree with the findings of fact made in said Order.

In support of its punitive damages award, the Circuit Court found as follows: Appellant Michelle Isaacs' conduct was intentionally fraudulent; the Circuit Court consciously kept the \$5,000.00 punitive damage award low in order to accommodate the

⁸ \$29,487.52 for attorney's fees characterized as punitive damages
\$5,000.00 straight punitive damages award

anticipated post-trial proceedings regarding Appellee's attorney's fees; an award of \$5,000.00 or even \$10,000.00 would be considered negligible; Appellee was forced to suffer through a lengthy and costly defense to avoid a statutory liquidated damages award found not to be owed; Appellant continued her fraudulent conduct for almost three (3) years and visited stress upon all parties involved; Appellee's reputation as an employer, as well as his resources, were threatened by Appellant's false claim; the harm caused by Appellant's fraudulent actions was not limited to Appellee; Appellant's fraudulent use of the legal administrative process by Wage & Hour was a misuse of a service provided by the public; Appellant's subsequent pursuit of a civil action in Circuit Court taxed the resources of Wage & Hour as agency personnel were forced to travel and spend time in Court; Appellant was aware that her fraudulent actions were likely to cause harm; Appellant attempted to conceal or cover up her fraudulent actions; Appellant had opportunity to settle the lawsuit but chose not to do so; the parties agreed Appellee's cost of litigation was reasonable; Appellant has committed a clear wrong; Appellant's current financial situation does not create such a hardship so as not to award Appellee punitive damages; and Appellant acted with actual evil intention.

Based on the foregoing, if this Honorable Court refuses to determine that the Appellee's award of attorney's fees are not special compensatory damages, then the Appellee's \$34,487.52 award of punitive damages should still be upheld. However, if Appellee Daniel Bonner's claim for attorney's fees is to be set aside by this Honorable Court, the Circuit Court's award of \$5,000.00 in punitive damages should nevertheless be upheld.

VII.

CONCLUSION AND RELIEF REQUESTED

Appellant Michelle Isaacs intentionally committed fraud and did falsely attempt to abuse the legal system in order to seek illicit financial gain. Appellant Michelle Isaacs did not meet her burden of proving that she was owed any award of statutory liquidated damages pursuant to West Virginia Wage Payment and Collection Act (West Virginia Code § 21-5-1 *et seq.*

Having found that Appellant had committed fraud in the bringing of her claims, the Circuit Court not only Ordered the Appellant to repay the funds improperly secured through Wage & Hour, but also awarded punitive damages, which included Appellee's attorney's fees and costs. The Circuit Court was correct in awarding the Appellee his attorney's fees and costs. The Circuit Court should, however, have awarded attorney's fees as a special compensatory damage, not punitive damage, and this Honorable Court should sustain the award on that basis.

The relief requested by Appellant, being unsupported by the whole of the record below, should be denied.

Respectfully submitted,
Daniel Bonner
Appellee



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MICHELLE ISAACS,
Appellant,

Vs.

Case No. 35284

DANIEL BONNER,
Appellee

CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Appellee, do hereby certify that I have served a true and accurate copy of the foregoing RESPONSE BRIEF ON BEHALF OF APPELLEE DANIEL BONNER, upon the following by United States mail, first class postage prepaid, at addressed as follows on this 1st day of February, 2010:

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