IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-1084

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC, a Delaware corporation, and MELVIN LAGER

Defendants-Below, Petitioners

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

v.

SHARON GRIFFITH and LOU ANN WALL,

Plaintiffs-Below, Respondents.

Honorable Thomas C. Evans, III, Judge
Circuit Court of Jackson County
Civil Action No. 11-C-26

REPLY BRIEF OF THE PETITIONERS

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I. STATEMENT OF THE CASE

Petitioners, Constellium Rolled Products Ravenswood, LLC ["Ravenswood" or "Company"], and Melvin Lager ["Mr. Lager"][collectively as "Defendants"], faithfully set forth the evidence introduced at trial in their opening brief and will not reiterate the same herein, but will limit their discussion to aspects of the brief ["Reply Brief"] of Respondents, Sharon Griffith ["Ms. Griffith"] and Lou Ann Wall ["Ms. Wall] [collectively as "Plaintiffs"], that substantially and materially deviate from the evidence introduced at trial.

For example, although Plaintiffs' brief references "gender discrimination," the record reflects that their ultimate claim was one of hostile work environment because, as they concede, they suffered no adverse employment decision based upon their gender or anything else, but have continued to work in their jobs as they always have done. Reply Brief at 2.

Plaintiffs describe the suggestion box as a "disastrous failure," Reply Brief at 2, but as discussed in Petitioners' opening brief, Brief of Petitioners at 27-29, there was substantial evidence that other than this lawsuit, the suggestion box served as a useful mechanism for encouraging open discussion of issues between labor and management.

The manner in which Plaintiffs include the handwritten comments of their coworker and former defendant, Larry Keifer ["Mr. Keifer"], in their brief may make it appear that Mr. Keifer's unredacted handwritten comments were made public, Reply Brief at 4-7, but the evidence was, as Plaintiffs' brief appears to acknowledge elsewhere, that the comments were redacted, typed with the redactions, and posted in redacted form. App. 1050-1052. Otherwise, the redactions would have been meaningless.

The Plaintiffs' brief also makes it appear that the actual redacted comments appear in the brief, but the actual comments appear at App. 1756, 1758, and 1760.

Moreover, Plaintiffs' brief makes it seem as if every one of the redacted comment cards posted made some offensive gender reference, but only one of the three comment cards displayed "lazy worthless b_____," Reply Brief at 5, the other contained no offensive gender references, but referenced "lazy a__" and "Lazy a__ _____," Reply Brief at 6 and 7.

Even though Plaintiffs' brief makes it appear as if there was collective outrage when the redacted comment cards were posted, when Ms. Wall initially learned of the posting of the redacted comments of their coworker, Mr. Keifer, it was being done in a "joking" manner. Reply Brief at 8 ("the guys were joking back there. They were joking with me . . . ."). Moreover, Ms. Griffith was not even at the plant at the time, but was on vacation. Id.

Plaintiffs also make an allegation in their brief that even after the redacted comments cards were removed from the company's bulletin board, they "remained on the company's 'intranet' computer system," Reply at 9, but the testimony referenced was merely that at some point, the witness could not recall when, the information was on the company's intranet, App. at 1127-1128, and there was no evidence that anyone other than this single employee observed the information on the company's internal computer system.

The most egregious error in Plaintiffs' presentation of the evidence, however, is their assertion that the following occurred:

> Afterwards, SHARON GRIFFITH and LOU ANN WALL became "the subject of all kind and manner of comments" around the plant. . . . For instance, a sign was placed on LOU ANN WALL's fork truck referring to her as a "fat whore." . . . When she reported it and the union got involved, a handwriting expert was called in and everyone on her crew was forced to give handwriting samples by repeatedly writing "the fat whore." This analysis was inconclusive and the process was painstakingly embarrassing and counter-productive. . . . The very next day, someone put up a sign at the computer station where she was working that said "suck me raw." . . . As LOU ANN WALL described it, "It's just – I just feel like they don't want us there. They don't want to talk to us, it is just – the

> whole relationship with my coworkers has changed. . . . ." Ms. Wall filed suit because she "felt like it was the only way to get this to stop."

Reply Brief at 11-12. In other words, Plaintiffs' brief presents to this Court the following chronology:

- The redacted comment cards were posted in October 2009
- "Afterwards," Plaintiffs became the subject of "all kind and manner of comments"
- "For instance," a "sign was placed on LOU ANN WALL's fork truck referring to her as a 'fat whore'"
- This "fat whore" incident, which took place "after" the redacted comment cards were posted in October 2009, prompted a company investigation including a handwriting expert which Plaintiffs have attempted to lead this Court to believe exacerbated the abuse
- And, after that company investigation which took place "after" the redacted comment cards were posted in October 2009, "someone put up a sign at the computer station where she was working that said 'suck me raw'"
- Consequently, in order to stop the continued abuse, including the "fat whore" and "suck me raw" incidents, which took place "after" the redacted comment cards were posted in October 2009, Plaintiffs filed suit because they "felt like it was the only way to get this to stop"

Not only is the story told by Plaintiffs in their Statement of the Case, it is reiterated through their brief: "Plaintiffs suffered discrimination, abuse, and harassment based upon their gender, including receiving notes referring to one of them as 'the fat whore' and another note stating 'suck me raw,'" Reply Brief at 19; "A note calling Ms. Wall 'the fat whore' was left on her buggy, and the next day, another note stating 'suck me raw' was found at her computer station," Reply Brief at 23.

The only problem with Plaintiffs' story is that their own evidence at trial was that all of the foregoing **occurred years before October 2009** and that both Plaintiffs testified that until October 2009, **there was no hostile work environment.**[1]

Ms. Wall explained why she did not complain about the posting of the redacted comment cards in October 2009 by offering testimony regarding someone posting a sign saying "the fat whore" on her fork truck years earlier. App. 1245. She testified that after she complained about the sign, "the company and the union got involved and the company called in a handwriting expert" to try to determine the author of the sign. Id. She stated that the expert said the testing was "inconclusive" and the day after the company's handwriting expert performed the testing, someone else posted a sign stating "Suck me raw" on her computer station. App. 1246.

Directly contrary to what Plaintiffs have presented to this Court regarding the timing of these incidents, however, this was Ms. Wall's sworn testimony at trial:

> Q. Ms. Wall, you spoke in your direct examination about prior issues, signs that were placed on equipment and things like that. Those things happened years ago, didn't they?
>
> A. Yes, sir.
>
> Q. **In fact, they happened more than five years ago, at least.**
>
> A. **Yes, sir.**
>
> Q. **Some of them were as long as 15 years ago.**

[1] Indeed, Ms. Wall described the atmosphere at the plant as friendly towards female workers: "I've been there so long I consider – I mean, it was like working with family. The older guy's like your dad. I mean it was just cutting up and joking. I mean, I would say we got along well." App. 1230. Likewise, Ms. Griffith admitted that she had no complaint regarding the existence of any hostile work environment prior to the posting of a redacted version of Mr. Keiffer's comments: "Most of them, young men in there, are my son's age. And I – I had no problems with them . . . Some of them I like more than others, but they were like family to me." App. 1306-1307.

A. **Yes, sir.**

MR. SLAUGHTER: Your Honor, no further questions for this witness.

MR. AUVIL: Nothing further, your Honor.

App. at 1288-1289 (emphasis supplied).

In the closing arguments of Plaintiffs' counsel, App. 1485-1499 and App. 1526-1532, there is not a single reference to what they have represented to the Court occurred "after" the posting of the redacted comment cards in October 2009 and precipitated the filing of the lawsuit, but actually occurred years earlier.

There are three simple explanations for why there was no such reference: (1) the undisputed evidence was that these incidents **occurred years prior to October 2009**; (2) Plaintiffs admitted **there was no hostile work environment prior to October 2009**; and, most importantly, (3) **the trial judge who was listening to closing arguments had heard Ms. Wall admit that the incidents had occurred five to fifteen years prior to October 2009** and **both Plaintiffs testify that there was no hostile work environment prior to October 2009.**

Defendants will leave to this Court's judgment whether it believes there has been multiple, intentional misrepresentations of the evidence in Petitioners' brief in an effort to convince the Court that the "fat whore" and "suck me raw" incidents occurred after the redacted comment cards were posted and, in part, precipitated this litigation.[2]

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[2] Not only does Plaintiffs' brief repeatedly represent that the "fat whore" and "suck me raw" incidents took place "after" the posting of the redacted comment cards and precipitated the lawsuit, it also admittedly references evidence "not presented to the jury" in footnote five, but fails to explain that the evidence was excluded by the trial judge **because Plaintiffs' counsel stated on the record, after Defendants' objection to the evidence: "I'm withdrawing the question, discontinuing the line of inquiry."** App. 1208 (emphasis supplied). Now, not only are Plaintiffs relying in their appellate brief on evidence they conceded was never admitted or considered by the jury, **they are relying on evidence their counsel abandoned in the face of Defendants' objection.** Again, Defendants leave to this Court's sound judgment its consideration of references in Plaintiffs' brief to evidence not only never admitted at trial, but withdrawn by Plaintiffs' counsel.

II. SUMMARY OF ARGUMENT

Essentially, Plaintiffs' argument is that because the jury awarded them a verdict, they are entitled to affirmance of that verdict on appeal, but obviously a jury verdict based upon evidence that even in a light most favorable to prevailing party cannot be sustained on appeal if that evidence fails to satisfy the legal standards for recovery. Here, Plaintiffs' brief conspicuously avoids any meaningful argument relative to the legal standards for hostile work environment claims and the award of punitive damages.

With respect to hostile work environment, Plaintiffs' brief weakly argues that cases supporting Defendants' arguments are distinguishable or are federal decisions and should be ignored by this Court. Respectfully, however, Defendants submit that state law should not be ignored and that merely because well-reasoned decisions applying identical hostile work environment standards have been authored by federal courts is hardly a convincing reason to ignore those decisions, which is what Plaintiffs have elected to do in their brief.

The evidence in this case woefully fails to satisfy the standards adopted by this and other courts for hostile work environment claims. Likewise, this same evidence plainly falls short of the evidence required by this Court in punitive damages cases.

Accordingly, Defendants request that this Court apply the law it has announced in both hostile work environment and punitive damages cases and set aside the verdict.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Understandably, Plaintiffs oppose any oral argument. Reply Brief at 19-20. Even though they cite not a single case in which evidence this feeble has been held to sustain not only a hostile work environment verdict, but also a punitive damages verdict, they contend that "resolution of the issues . . . is definitely answered by well settled jurisprudence," citing this Court's decisions in *Fairmont Specialty Services v. Human Rights Comm'n*, 206 W. Va.

86, 522 S.E.2d 180 (1999), and *Sheetz, Inc. v. Bowles Rice McDavid Graf & Love, PLLC*, 209 W. Va. 318, 547 S.E.2d 256 (2001), Reply Brief at 19, upon which Defendants extensively relied in their opening brief and continue to so rely.

Defendants urge that it is precisely because this case so dramatically departs from this Court's "well-settled jurisprudence," including not only *Fairmont Specialty*, and *Sheetz*, but *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995); *Frame v. JPMorgan Chase*, 2013 WL 3184755 (W. Va.)(memorandum); *Erps v. Human Rights Comm'n*, 224 W. Va. 126, 680 S.E.2d 371 (2009); *Ford Motor Credit Co. v. Human Rights Comm'n*, 225 W. Va. 766, 696 S.E.2d 282 (2010); *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463 (1998); *PAR Elec. Contractors, Inc. v. Bevelle*, 225 W. Va. 624, 695 S.E.2d 854 (2010); *CSX Transp., Inc. v. Smith*, 229 W. Va. 316, 729 S.E.2d 151 (2012); *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991); and *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), as well as a host of other federal court decisions.

Evidence of posting redacted comments by a coworker that were immediately removed when Plaintiffs complained plainly fails the four-part test for hostile work environment under *Hanlon* and its progeny, and similarly fails the "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others" test for punitive damages under *Mayer* and its progeny.

Other than *Fairmont Specialty*, supra, which is an ancestry discrimination case, not a gender discrimination case, Plaintiffs rely on not a single case, federal or state, in which any court has held that evidence even remotely similar to the evidence in this case satisfies the standards for either a hostile work environment or punitive damages.

IV. ARGUMENT

A. STANDARD OF REVIEW

Plaintiffs do not dispute that the standard of review of the denial of a motion for judgment as a matter of law in a hostile work environment case is *de novo*. Syl. pt. 1, *CSX Transp.,* supra. Reply Brief at 20. Nor do Plaintiffs dispute that the standard of review of an award of punitive damages in a hostile work environment case is *de novo*. Syl. pt. 14, *CSX Transp.*, supra. Reply Brief at 21.

Plaintiffs cite Syllabus Point 2 of *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009), for the proposition that upon review of a trial court's denial of a motion for judgment as a matter of law the standard is that such denial is "entitled to great respect and weight" and that it will only be reversed on appeal if the trial court "acted under some misapprehension of the law or the evidence," Reply Brief at 21, but the Court's actual holding in Syllabus Point 2 of *Fredeking* was as follows:

> When this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the West Virginia Rules of Civil Procedure [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving.

Inexplicably, none of the language in Plaintiffs' brief which they attribute to Syllabus Point 2 of *Fredeking* is actually found in that syllabus point. Moreover, Defendants embrace the standard of review actually found in this Court's opinion and even considering the actual evidence presented at trial in a light most favorable to Plaintiffs, such evidence failed to satisfy this Court's hostile work environment or punitive damages standards.

B. THE TRIAL COURT ERRED BY FAILING TO GRANT JUDGMENT AS A MATTER OF LAW TO DEFENDANTS ON PLAINTIFFS' CLAIMS OF HOSTILE WORK ENVIRONMENT WHERE THE EVIDENCE, EVEN CONSIDERED IN A LIGHT MOST FAVORABLE TO PLAINTIFFS, FAILED TO PROVE THAT DEFENDANTS' CONDUCT INVOLVED "UNWELCOME SEXUAL ADVANCES, REQUESTS FOR SEXUAL FAVORS, AND OTHER VERBAL OR PHYSICAL CONDUCT OF A SEXUAL NATURE HAV[ING] THE PURPOSE OR EFFECT OF UNREASONABLY INTERFERING WITH AN INDIVIDUAL'S WORK PERFORMANCE OR CREATES AN INTIMIDATING, HOSTILE, OR OFFENSIVE WORKING ENVIRONMENT;" THAT IT "WAS BASED ON THE SEX OF THE PLAINTIFF[S]; OR THAT IT WAS "SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER THE PLAINTIFF[S'] CONDITIONS OF EMPLOYMENT AND CREATE AN ABUSIVE WORK ENVIRONMENT"

Plaintiffs do not disagree that without evidence that "(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputed on some factual basis to the employer," under *Hanlon*, there can be no liability for a hostile work environment. Reply Brief at 22.[3]

When presented with an opportunity to identify the evidence of record supporting a finding of hostile work environment, the ten-page section of Plaintiffs' brief contains not a single substantive reference to the record. Reply Brief at 22-31.

With respect to Defendants' reliance on this Court's recent opinion in *Frame*, supra, Plaintiffs correctly note that one reason for the affirmance of summary judgment to an employer in a hostile work environment case was because the alleged harasser was the same gender as the plaintiff, but Defendants relied on *Frame* for two completely different reasons: (1) it set forth legal principles which undermine Plaintiffs' claim of hostile work

[3] In their brief, Plaintiffs inexplicably include an extended discussion of legislative rules promulgated by the Human Rights Commission, Reply Brief at 25, but this case was litigated in Circuit Court, not the Human Rights Commission. And, more importantly, the rules quoted in Plaintiffs' brief either have the same standard for proof of a hostile work environment case contained in *Hanlon* and its progeny, or reference "hostile or physically aggressive behavior," which has nothing to do with this case.

environment and (2) it involved conducted by a supervisor much more outrageous than the isolated posting of redacted coworker comment cards.

For example, contrary to Plaintiffs' efforts to have this Court disregard federal precedents, this Court reiterated in *Frame* that, "'[w]e have consistently held that cases brought under the West Virginia Human Rights Act, W. Va. Code, 5–11–1, et seq., are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise. E.g., *West Va. University v. Decker*, 191 W. Va. 567, 447 S.E.2d 259 (1994); *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986).' *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482–483, 457 S.E.2d 152, 159–160 (1995)." Id. at *2 n.2.

Moreover, contrary to Plaintiffs' argument that use of the term "bitch" is inherently gender-based, this Court repeated in *Frame* that, ""workplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17,] 25 [1993], 114 S. Ct. [367], 372 [126 L.Ed.2d 295] (Ginsburg, J., concurring).' *Willis v. Wal–Mart Stores, Inc.*, 202 W. Va. 413, 416, 504 S.E.2d 648, 651 (1998) (quoting *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998))." Id.

Finally, contrary to Plaintiffs' efforts to have this Court ignore evidence that Plaintiffs themselves engaged in conduct directed towards male employees similar to that of which they complained at trial, this Court concluded in *Frame* that a hostile work environment

plaintiff "'must have adduced evidence to show that but for the fact of her sex, she would not have been the object of harassment.' See *Conrad*, 198 W. Va. at 372, 480 S.E.2d at 811." Id.

It is understandable why Plaintiffs want to dismiss *Frame* by noting that both the supervisor and employee were female, but the legal principles articulated in *Frame* apply with equal force in this case.

As to Plaintiffs' argument that the posting of comment cards containing references to "lazy worthless bitches" and "big lazy asses" are more egregious, Reply Brief at 23, than a supervisor kissing male customers, telling male employees that she was a sex addict, talking to male employees about oral sex and crotchless pantyhose, and generally discussing her sexual encounters with whomever would listen, *Frame*, supra at *3, Defendants respectfully submit that such speaks for itself.

Finally, Plaintiffs' argument that their case is different because the plaintiff in *Frame* was appealing a summary judgment order while Plaintiffs are defending a jury verdict, Reply Brief at 24, carries little weight when the appellate standard of review is *de novo* in both cases.[4] Defendants are not attacking the jury's verdict, but are attacking the trial court's failure to grant Defendants judgment as a matter of law.

Plaintiffs do not dispute that there was substantial evidence at trial that male employees had also been the subject of derogatory comment cards. Reply Brief at 24. Plaintiffs dismiss this evidence by arguing that "there were over a thousand male employees at the plant and very few women," Reply Brief at 24, but how can management's directing explicit sexual comments to both male and female employees in *Frame* not constitute a

[4] See Syl. pt. 1, *CSX Transp.*, supra; Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

hostile work environment, but posting negative comment cards about both male and female employees constitute a hostile work environment in this case?

Plaintiffs complain that, "While the information published was redacted, the CEO did not remove the details of the comments which allowed Defendants' employees and third parties (of which there was no evidence at trial) to identify Plaintiffs," Reply Brief at 26, but in *Frame*, the manager directed explicit sexual comments to both male and female employees in their presence.

With respect to *Erps*, supra at 129-130, 680 S.E.2d at 374-375, where this Court was presented evidence, as in this case, of an isolated incident of one coworker's use of inappropriate language directed towards another coworker which it determined not to satisfy the *Hanlon* standard for a hostile work environment, Plaintiffs argue that, "The CEO's public endorsement and publication of this type of derogatory commentary distinguishes this case . . . ." Reply Brief at 26.

But, the CEO never used offensive language. No one in management used offensive language. And, it is undisputed that the offensive language was redacted from the comment cards before they were posted and the redacted comment cards were taken down immediately upon receipt of a complaint by the union.

Plaintiffs' complaint, like in *Erps*, concerns language used by a coworker, not anyone in management, and it is hard to be persuaded that their coworker's offensive language was "endorsed" by management when management redacted the offensive language, which obviously came from one of Plaintiffs' coworkers, before it was posted.

Moreover, contrary to Plaintiffs' argument that "CEO Lager did not in any manner correct, disavow or disown the gender-specific curse words directed at Plaintiffs," Reply

Brief at 28, the evidence was undisputed that the redacted comment cards were immediately taken down upon receipt of the union's complaint.

Plaintiffs also do not dispute their "admitted use of rough language in the workplace," Reply Brief at 29, which included the following: "I've heard them say the word bitch, and shit, and damn, and actually heard them call each other lazy bitches," App. 1039; Ms. Wall's admission that not only did she use the word "bitch" in the workplace in conversation, she had referred to herself in the workplace using that term, App. 1286; Ms. Griffith's admission that she carried toolboxes with stickers which read, "Support bitching" and "Thou shall not bitch," App. 1322-1324; Mr. Whitt's testimony that, "Ms. Wall has called me an A-hole before;" "she asked him [her husband] to come over and kick my A;" "she [Ms. Griffith] said that her mom called her a shit-stirring B, and was joking around about it and telling everybody," App. 138; Mr. Whitt's testimony that Ms. Wall had touched him in an inappropriate manner and when he complained, referred to him as a "queer," App. 1383-1384; Mr. Whitt's testimony that Ms. Wall "grabbed me by the butt, one hand on each cheek and kind of squeezed or kneaded it like that and said something about me having a tight butt or something like that," App. 1398; and Mr. Brown's testimony that both Plaintiffs referred to him as "a little baldheaded prick most of the time," App. 1403.

Incredibly, with respect to the language not only attributed to them by their coworkers, but admitted by Plaintiffs, they argue, "Defendants also confound gender-based pejorative name-calling with use of profanity in the workplace." Reply Brief at 29. Apparently, Plaintiffs can use the words "bitch," "asshole," "queer," and "prick" in the workplace without creating a hostile work environment because they constitute "profanity," but not "gender-based pejorative name-calling," but if management posts redacted comment cards for a couple of days using the terms "bitches" or "asses" a hostile work environment

which they both conceded did not exist until the redacted comment cards were posted instantly springs to life that can be corrected not by removing the comment cards from the company bulletin board, but by hunting down the coworker responsible and disciplining him for submitting comments which everyone understood would be redacted before their posting.

The other not so subtle fact apparently lost on Plaintiffs is that it was not the use of the word "bitch," which though apparently used by Plaintiffs to refer to themselves and male employees, might have a gender-specific connotation, that offended Plaintiffs; rather, it was their coworker's accusation that they were "lazy" and "worthless" that imparted the real sting, and one coworker's opinions, or even management's opinions, regarding an employee's work ethic is hardly the type of gender-based comment required by this Court in *Hanlon* and its progeny.

With respect to the substantial federal authority relied upon by Defendants supporting their argument that the evidence in this case simply failed the threshold test for hostile work environment, Plaintiffs state, "[T]his Court has stated that the West Virginia Human Rights Act . . . provides an 'independent approach' to the law of discrimination that 'is not mechanically tied' to federal discrimination cases. *Stone v. St. Joseph's Hospital* . . . ," Reply Brief at 27, but what this Court actually stated in *Stone* was, "[T]he West Virginia Human Rights Act, as created by our Legislature and as applied by our courts and administrative agencies, represents an independent approach to the law of **disability discrimination** that is not mechanically tied to federal **disability discrimination jurisprudence**." *Stone v. St. Joseph's Hospital of Parkersburg*, 208 W. Va. 91, 106, 538 S.E.2d 389, 404 (2000)(emphasis supplied).

This Court was careful in *Stone* not only to explain the differences between the federal and state law of **disability discrimination**, but ultimately adopted a minority federal

approach: "In summary, there is substantial authority in state disability discrimination law for the approach to 'protected person' status that we have seen in our state law **and in some federal cases.**" Id. at 108, 538 S.E.2d at 406 (emphasis supplied). Accordingly, even in **disability discrimination** cases, this Court considered federal authority.

Critically, in the instant case, Plaintiffs cite no federal court authority contrary to the federal court authority relied upon by Defendants nor do they cite any contrary state court authority.[5]

Indeed, the sole substantive authority relied upon by Plaintiffs is *Fairmont Specialty*, supra, Reply Brief at 27, but that case undermines rather than supports Plaintiffs' arguments for several reasons.

First, Plaintiffs' brief purports to quote "Syllabus Pt. 8" of *Fairmont Specialty*, Reply Brief at 27, but there is no Syllabus Point 8 in *Fairmont Specialty*. Rather, the language quoted by Plaintiffs is from footnote eight and in this footnote, despite Plaintiffs' clear implication to the contrary, this Court does not identify "bitch" as automatically constituting a "gender slur" of an "aggravated nature."

Second, *Fairmont Specialty* is an **ancestral hostile work environment** case, not a **gender hostile work environment** case. Indeed, in Syllabus Point 2 of *Fairmont Specialty*, this Court held, "**To establish a claim for ancestral discrimination**, under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999) based upon a hostile or abusive work environment, a plaintiff-employee must prove that: (1) that the subject conduct

[5] Moreover, as recently as in *Frame*, supra at *2, n.2 (W. Va.)(memorandum), this Court reiterated, "'[w]e have consistently held that cases brought under the West Virginia Human Rights Act, W. Va. Code, 5–11–1, et seq. , are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise. E.g., *West Va. University v. Decker*, 191 W. Va. 567, 447 S.E.2d 259 (1994); *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986).' *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482–483, 457 S.E.2d 152, 159–160 (1995)."

was unwelcome; (2) **it was based on the ancestry of the plaintiff**; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and (4) it was imputable on some factual basis to the employer." (emphasis supplied). So, Plaintiffs' argument that, "this Court has previously found that 'bitch' constitutes a 'gender slur,' that on its face clearly denigrates a person on the basis of gender," Reply Brief at 27, relying on *Fairmont Specialty*, is simply wrong.

Third, this Court held in Syllabus Point 3 of *Fairmont Specialty* that, "When such instances of **aggravated discriminatory conduct** occur, the employer must take swift and decisive action to eliminate such conduct from the workplace." (emphasis supplied). Here, the conduct was the isolated posting for a few days of the redacted comments of a coworker that were immediately removed upon a complaint by the union, which was (1) not "aggravated" and (2) acted upon by the company in a "swift and decisive" manner.

In contrast, in *Fairmont Specialty*, the employee complained that (1) a coworker was "cussing me and calling me a Mexican bitch and telling me he wasn't going to do what a Mexican told him to do;" (2) he called her a "Mexican bitch" and threw labels on her desk; (3) she alleged that she had "made 100 complaints" regarding being called a "Mexican bitch;" (4) she also reported "cussing and general obnoxious behavior;" (5) her coworker responded to management's efforts to counsel him about the behavior by stating that he did not "give a f***. I can do what I want;" (6) her coworker threatened "to knock [her] down" and make sure she "never came up;" (7) her coworker later stated, "it would be the last time" the plaintiff "complained about him;" and (8) her coworker also referred to her as a "fat Mexican bitch" on numerous occasions after being counseled by management; and where the harassment, which took place over a period of nineteen months, not two or three days.

Finally, this Court's opinion in Fairmont Specialty was decided 3-2, with Justice Davis, joined by Justice Maynard, dissenting, stating:

> Despite the clear pronouncement in *Meritor* that employers should not be held automatically or strictly liable for hostile work environment cases, the majority's decision appears to do just that. 477 U.S. at 72, 106 S. Ct. 2399. As FSS perceptively cautioned, the majority's decision to uphold the Commission's findings puts this State's employers on notice that unless they immediately terminate any employee found to have used, even on a single occasion, any derogatory term based on race, gender, ethnicity, ancestry, or other protected classification, they will be found to be in violation of this State's anti-discrimination laws. And we wonder why it is so difficult to attract new employers to this State?

Id. at 103, 522 S.E.2d at 197. Here, of course, the circumstances are even more egregious for employers from the perspective that all Defendants did was post for a few days the redacted comments of Plaintiffs' coworker directed not towards their gender, but their work ethic.

As noted in Defendants' original brief, there is substantial state and federal authority in support of their argument that Plaintiffs' evidence failed as a matter of law. In their brief, in contrast, Plaintiffs offer no authority, federal or state, in which any court has affirmed a hostile work environment under circumstances even remotely similar to those presented in this case. Consequently, this Court should set aside the verdict and direct entry of judgment for Defendants where Plaintiffs' evidence was woefully insufficient.

C. THE TRIAL COURT ERRED BY ALLOWING PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES TO GO TO THE JURY AND THEN BY FAILING TO EITHER SET ASIDE OR SUBSTANTIALLY REDUCE THE JURY'S AWARD OF PUNITIVE DAMAGES BECAUSE THE EVIDENCE FAILED TO SATISFY STANDARDS ADOPTED BY THIS COURT IN *MAYER V. FROBE*, 40 W. VA. 246, 22 S.E. 58 (1895), AND ITS PROGENY.

Plaintiffs do not disagree that without evidence of "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others" under *Mayer*, there can be no award of punitive damages. Reply Brief at 33.

Moreover, Plaintiffs concede, "'A wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages' Syl. pt. 3, *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W. Va. 670, 74 S.E. 943 (1912)." Reply Brief at 33.

Finally, Plaintiffs acknowledge that the trial court described Ravenswood's CEO as "negligent," not fraudulent, malicious, oppressive, wanton, willful, or reckless. Id. at 34. Obviously, "negligent" conduct does not warrant the imposition of $500,000 in punitive damages in this case, particularly where the compensatory damages award had no economic component, but consisted exclusively of $500,000 for general emotional distress damages.

Setting aside rhetorical hyperbole, when presented with an opportunity to identify the evidence of record supporting a $500,000 punitive damages award, the seven-page section of Plaintiffs' brief defending such award contains not a single substantive reference to the record. Reply Brief at 32-38.

Rather, Plaintiffs rely exclusively not on evidence, but on argument: "These comments and the CEO's apparent endorsement of this disparagement signaled to Plaintiffs' co-workers that it was open season on the two women since even the CEO had arguably agreed that they were lazy, worthless bitches." Reply Brief at 34.

"Apparent," "signaled," and "arguably," are hardly descriptions of actual record evidence supporting a $500,000 punitive damages award and there was absolutely no evidence that anyone was emboldened after the redacted comment cards by Plaintiffs' co-worker was posted to harass Plaintiffs in any manner whatsoever. Instead, the evidence was that the chill Plaintiffs felt thereafter was as a consequence of suing their co-worker over the comment cards.

The Plaintiffs also argue in support of the $500,000 punitive damages award that, "The dangers inherent in the suggestion box 'policy' adopted by the Defendants were obvious to anyone who considered them for a moment, so obvious that the union lobbied the employer not to start this policy, warning Defendants that there would be adverse consequences. Such adverse consequences in fact, followed in short order." Reply Brief at 34.

First, the Court will notice that there is no reference to the evidentiary record in support of these statements which does not surprise Defendants because there was no such evidence. Second, as discussed in Defendants' initial brief, there was substantial evidence that although the policy resulted in this unfortunate incident, it had generally been beneficial and encouraged a productive dialogue between labor and management.

Second, Plaintiffs complain that "Defendants undertook no investigation and no corrective action to resolve the problems Plaintiffs experienced despite Defendants' legal obligation to do both," Reply Brief at 35, but no legal authority is cited in support of the assertion that an employer has a legal obligation to conduct an investigation and punish an employee who submits a comment card that is redacted by management. Moreover, it is difficult to understand how management's failure to conduct an investigation and punish the author of the comment cards warrants $500,000 in punitive damages where (1) the redacted comment cards were immediately removed as soon as the union asked for them to be moved and (2) neither Plaintiff nor anyone else for that matter ever indicated that removal of the redacted comment cards was insufficient; that Plaintiffs continued to suffer emotional distress after they were removed; or that anyone desired an investigation and/or punishment.

The standards this Court has established for the imposition of punitive damages from *Mayer*, supra, are high. Even if "wrongful," which Defendants respectfully dispute, the

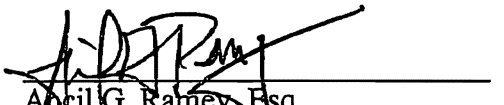
posting of redacted comment cards "without malice" constituted no basis for award of punitive damages. Syl. pt. 3, *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W. Va. 670, 74 S.E. 943 (1912).

V. CONCLUSION

Defendants, Constellium Rolled Products Ravenswood, LLC, and Melvin Lager, respectfully request that this Court reverse the judgment of the Circuit Court of Jackson County and either enter judgment for defendants on the hostile work environment claims by plaintiffs, Sharon Griffith and Lou Ann Wall, or in the alternative, on their claims for punitive damages.

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC, a Delaware corporation, and MELVIN LAGER

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014, a true and accurate copy of the foregoing **REPLY BRIEF OF THE PETITIONERS** was mailed to counsel for all other parties to this appeal, as follows:

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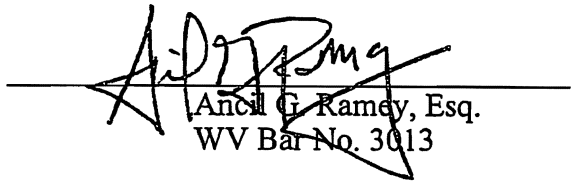

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