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NO. ~~33544~~

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMIE BACHIE,

Appellant,

v.

WHEELING ISLAND GAMING, INC., d/b/a
WHEELING ISLAND RACETRACK & GAMING CENTER
and MARK WEST, individually,

Appellee.

BRIEF ON BEHALF OF APPELLANT

Appeal Granted April 14, 2010

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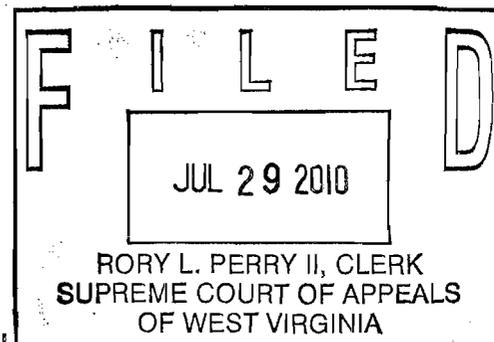


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To: The Honorable Justices of the Supreme Court of Appeals
of the State of West Virginia

I.

PROCEEDINGS AND NATURE OF RULINGS

This personal injury action that arose out of the hostile work environment that existed for Jamie Bachie as a result of unwanted sexual advances and physical touchings by her supervisor at Wheeling Island Gaming, Inc. At the beginning, her supervisor, Mark West, regularly massaged her shoulders and made sexual comments toward her, including inviting her to his home to sleep next to him in bed.

Mr. West was the Petitioner's supervisor for both her normal job in the Terrace Room and working banquets, which she worked for extra money.

Toward the end of September in 2003, Mr. West's sexual comments became more brazen and led to further unwelcome physical touching. Specifically, Mr. West requested Petitioner and two co-workers engage in a foursome. Thereafter, alone with Petitioner and Clara "Annie" Nice, Mr. West tried to "feel up" Ms. Bachie from behind, kissed her neck and tried to have the two women kiss. Despite apologizing the following day, Mr. West took Petitioner's tip cup and asked what she would do to get it back.

After the three women reported the incidents to Wheeling Island Gaming, Inc., Mr. West was suspended for three days with pay pending investigation. In addition, the women modestly requested that other management supervise the banquets in order for them to continue working and earn extra money. The request was denied.

The Petitioner continued to work for Wheeling Island Gaming, Inc. for a short period of time before resigning as a result Mr. West

supervisory role.

On the eve of trial, the defendants filed several Motions *in Limine* to exclude evidence. Specifically, they sought the exclusion of plaintiff's wage loss claim because she did not provide her tax returns through written discovery. However, at her deposition, Petitioner gave detailed testimony regarding her wage and employment history following her resignation at Wheeling Island Gaming.

At no time prior to filing the Motions *in Limine* did defendants indicate the written discovery responses were inadequate nor did the defendants file a motion to compel the information. The Circuit Court abused its discretion by eliminating Appellants wage loss claim.

During the discovery process, it became abundantly clear that no one knew the whereabouts of Clara "Annie" Nice, a material eyewitness. Mrs. Nice was located by Petitioner's counsel less than a week before trial. Mrs. Nice indicated, via affidavit, that she had been contacted and interviewed by counsel for the defendants approximately eight (8) month prior. Despite Petitioner's written discovery requesting the contact information for all individuals having knowledge about the Petitioners' allegations, the defendants never supplement the contact information of Mrs. Nice.

Defendants filed a motion for summary judgment. Despite finding genuine issues of fact in regard to Petitioners' hostile work environment claim, the Circuit Court erroneously granted summary judgment based on the lack of damages, including incidental damages.

II.

STATEMENT OF FACTS

Jamie Bachie began working at Wheeling Island Gaming in May of 2003 after being interviewed and hired by co-defendant/supervisor Mark West to work in the Terrace Room. Ms. Bachie previously worked for Mr. West's wife at McDonalds.

Shortly after the Petitioner began her employment at Wheeling Island Gaming, Mr. West initiated several conversation about her personal life, including her relationship with her boyfriend and the fact she had been previously raped (Petitioner believes Mr. West was privy to such information from his wife). The Petitioner thought these conversations were borderline inappropriate, but, shrugged it off as him trying to be a friend. [Deposition of Jamie Bachie, March 27, 2008, pgs. 21-23].

As time went on, Ms. Bachie realized that his actions more than him trying to be a friend. Ms. Bachie testified as follows:

"He at one point gave me his personal number to his office and told me like - he was like, "If you need anything, anything at all," and just the way he said it and looked at me made me feel uncomfortable. [Deposition of Jamie Bachie, March 27, 2008, pg. 23].

* * *

"[H]e would always be inviting me over to his house and saying that he would like for me to sleep in bed next to him." [Deposition of Jamie Bachie, March 27, 2008, pgs. 21 and 23].

Although she believed the comments to be sexual in nature and made her uncomfortable, she did not report it. [Deposition of Jamie Bachie,

March 27, 2008, pg. 24].

In addition, Mr. West's inappropriate behavior was observed by Clara "Annie" Nice on a regular basis. Mrs. Nice states that Mr. West frequently injected himself into conversations and would frequently opine that Ms. Bachie should leave her boyfriend. She also stated that Mr. West frequently and inappropriately caressed and massaged Ms. Bachie's back and shoulders. She observed how uncomfortable it made Ms. Bachie and she was surprised that customers eating in the Terrace Room did not complain. [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment].

However, all of the aforementioned sexual comments and inappropriate touching pale in comparison to the events that occurred in late September while Ms. Bachie, Mrs. Nice and Kimberly Nagy were setting up for a banquet (steak fry). The young ladies worked banquets to earn extra money.

As they were setting up for the banquet, Mr. West kept putting his arms around them and insisting that they go with him to see the dressing room. [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment; West Deposition Exhibit 4, 2nd page, May 20, 2008; Deposition of Kimberly Nagy, March 27, 2008, pg. 24; Deposition of Jamie Bachie, March 27, 2008, pg. 25].

At some point, he made the comment to all three ladies that they have a foursome. [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment; Deposition of Kimberly Nagy, March 27, 2008, pg. 29].

Toward the end of the set up, Mrs. Nice and Ms. Bachie asked to use the telephone to call for rides home. Mr. West let them into the dressing to use the phone. As Mrs. Nice used the phone, Mr. West followed Ms. Bachie into the bathroom area of dressing room. [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment; Deposition of Jamie Bachie, March 27, 2008, pg. 25].

Once in the bathroom area, out of view of Mrs. Nice, Ms. Bachie testified about Mr. West's inappropriate behavior as follows:

"He touched me and he put his hands and was trying to feel me up and tried to turn my head so that I would kiss him. I told him no and I pushed him away." [Deposition of Jamie Bachie, March 27, 2008, pg. 26].

Even though Mrs. Nice could not see what happened in the bathroom area, her accounts corroborates Ms. Bachie's testimony. By way of affidavit, Mrs. Nice states as follows:

"Mr. West followed us into the dressing room and locked the door as he came in. As I used the telephone, Ms. Bachie walked into the bathroom area of the dressing room and Mr. West followed her.

As Ms. Bachie and Mr. West walked back into the area where I was, Mr. West was walking behind her with both of his arms around her. Ms. Bachie seemed very uncomfortable and upset." [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment].

Mr. West's outlandish behavior in the dressing room did not end there. Both Ms. Bachie and Mrs. Nice have a remarkably similar recollection of his actions. Ms. Bachie testified as follows:

"He took us into the dressing room and that's when he locked the door to the dressing room and he was getting very touchy with me and Annie and he took us and pushed us together as like he wanted us to kiss. He was trying to shove us together, and we you know, pushed away." [Deposition of Jamie Bachie, March 27, 2008, pg. 26].

By way of affidavit, Mrs. Nices' recollection of his behavior was stated as follows:

Mr. West then put his arms around the lower part of our backs and asked why we did not want to stay with him.

I told Mr. West that I had to leave and Ms. Bachie told him that she loved her boyfriend.

Mr. West would not let go of us and was trying to push us together with his face inches away from ours saying he wanted us to stay. [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment].¹

One could only hope, at the very least, after reflecting on his behavior and the ladies reaction, that Mr. West would be on his best behavior. However, the outrageous behavior continued the following day.

At the steak fry the following day, Mr. West was apologetic to the three young ladies for his behavior the previous night. However, later in the day began asking them to go into the dressing room with

¹ It should be noted, Kimberly Nagy had a similar experience with Mr. West in the same dressing room on this very same evening. Ms. Nagy's testimony recounting her experience is as followed:

"He said he was locking the door, I know he came up behind me, put his arms around me, he was hugging me from the - you know, in front of me, behind me, I can't remember exactly what order everything happened in. He put his hands up the side of my shirt. . . . he made a comment about me taking a shower." [Deposition of Kimberly Nagy, March 27, 2008, pg. 29-31].

him. [Exhibit 3 (October 5, 2003 written statement of Clara Nice) and Exhibit 4 (October 6, 2003 written statement of Kimberly Nagy) of Mark West Deposition, May 20, 2008; Exhibit A (October 5, 2003 written statement of Jamie Bache) of Plaintiff's Response to Defendants Motion for Summary Judgment; Deposition of Jamie Bache, March 27, 2008, pgs. 30-31; Deposition of Kimberly Nagy, March 27, 2008, pg. 33].

As Ms. Bache went into the banquet kitchen to get some coffee, Mr. West followed her. Ms. Bache testimony recounting her experience is as followed:

"He was in the kitchen and grabbed my tip cup and was holding it and was telling me I had to come and get it (indicating) and was just, you know making these looks at me and asking me what I would do to get the tip cup back."
[Deposition of Jamie Bache, March 27, 2008, pgs. 30-31; Exhibit A (October 5, 2003 written statement of Jamie Bache) of Plaintiff's Response to Defendants Motion for Summary Judgment].

Approximately one week later, the three woman were interviewed by Wheeling Island Gaming management regarding the events of that evening. Mr. West was suspended for three days with pay pending investigation. The women wanted to continue working banquets in order to earn extra money and modestly requested they be supervised by other management at said events. The request was denied and the end result was the women would be directly supervised by Mr. West. [Deposition of Jamie Bache, March 27, 2008, pgs. 36 and 44; Deposition of Kimberly Nagy, March 27, 2008, pg. 51].

Although Ms. Bache tried to continue working under these difficult circumstances, she resigned her position as a direct result of sexual conduct directed to her by Mr. West. [Exhibit C (November

21, 2003 Notice of Resignation of Jamie Bache) of Plaintiff's Response to Defendants Motion for Summary Judgment].

On September 1, 2005, by counsel, Ms. Bachie filed this civil action in the Circuit Court of Ohio County, West Virginia. Among other claims, Ms. Bachie alleged damages as a result of sexual harassment and/or a hostile work environment. [Plaintiff's Complaint filed September 1, 2005].

By August 2007, both the plaintiff and defendants exchanged written discovery in an effort to procure information regarding Ms. Bachie's claims.

Among other relevant inquiries, the plaintiff requested the following information:

"Please list the names and addresses and telephone numbers of any and all individuals who have knowledge of the facts and circumstances relevant to plaintiff's and/or defendants' claims or defenses in this matter." [Exhibit E (Interrogatory No. 2), Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* and Motion for Summary Judgment].

Although the defendants provided the names and contact information of several individuals, including Clara Annie Nice's grandmother, the defendants never provided the name or contact information of Clara Nice at anytime through the discovery process. [Exhibit E (relevant discovery responses from the defendants) of Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* and Motion for Summary Judgment].

The defendants, on the other hand, request, among other relevant information, the following information regarding Ms. Bachie's wage loss claim:

"Request No.: 4: All document which support any claims of lost income.

Request NO.: 11: Your Federal and State tax returns for the tax year 1995 through 2004."

The plaintiffs' respective responses to said requests were as follows:

"Response (Request No. 4): Plaintiff is not in possession of any documents which support plaintiff's claim that she lost income because all such documents are in the control and custody of the requesting party.

Response (Request No.: 11): Plaintiff is in the process of securing tax returns for the tax years 1995 through 2004 and will forward said tax returns to the Defendants upon receipt of the same. [Exhibit F, Defendant's Response to Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* and Motion for Summary Judgment].

The plaintiff reserved the right to supplement each and every written discovery answer and response.

On March 27, 2008, Ms. Bachie appeared pursuant to a proper notice of deposition. Among other relevant information, she testified about her work and wage history after she left Wheeling Island Gaming, Inc. A summary of her testimony regarding the same was as follows:

(1) she worked at Denny's for thirty to thirty-five hours per week at a rate of \$3.38 per hour and she worked at Denny's until 2007; (2) she briefly worked at the Sunoco on

top of Blaine Hill for two months for thirty to forty hours per week at a rate of \$6.00 per hour; and (3) she worked for JAK (a telemarketing company) from August of 2007 until December of 2007, when she went on maternity leave, at a rate of \$7.00 per hour. [Deposition of Jamie Bachie, March 27, 2008, pgs. 6-10].

At no time did the defendants file a motion to compel the wage and tax information nor did the defendant subpoena the records from any of the employers that the plaintiff clearly identified at her deposition. And, at no time did the defendants suggest the initial discovery answers were insufficient.

In addition, the deposition of Mark West and Kimberly Nagy were taken pursuant proper notice of deposition. As a result of the three depositions, it became clear that no one knew the whereabouts of Clara "Annie" Nice. [Deposition of Jamie Bachie, March 27, 2008, pgs. 15-16; Deposition of Kimberly Nagy, March 27, 2008, pg. 17; Deposition of Mark West, May 20, 2008, pgs. 140-141].

In December 2008, the defendants sent a correspondence asking for any additional information concerning her damage claim since her responses were filed. [Exhibit D, Defendant's Response to Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* and Motion for Summary Judgment].

On February 17, 2009, the defendants filed a motion for summary judgment.

On February 19, 2009, the defendants filed several motions *in limine*, including a Motion *in Limine* and Memorandum of Law to Exclude Evidence of Alleged Lost Wages. The motion was based, in large part, on the plaintiffs' failure to provide the requested tax returns or

other tangible information regarding her lost income claim.

[Defendant's Motion *in Limine* and Memorandum of Law to Exclude Evidence of Alleged Lost Wages].

On February 24, 2009, counsel for the parties attended a pretrial conference. At said conference, the circuit court excluded any evidence of lost wages, based largely in part on the plaintiffs failure to provide the aforementioned information.

Subsequently, plaintiff filed a motion requesting the court reconsider the exclusion of lost wage evidence, a response to defendant's summary judgment motion and two supplement responses to defendant's summary judgment motion.

During the week of March 16, 2009, the plaintiff was preparing for the upcoming trial in this matter. Through various searches, a last known address of Clara "Annie" Nice was found. Upon further inquiry, it was determined that she did, in fact, live at 1902 Wood Street, Wheeling, West Virginia. Upon interviewing Mrs. Nice, there was a surprising revelation about the defendants own failure to supplement its' discovery responses. By affidavit, Mrs. Nice stated as follows:

I have attached a signed copy of a colored photograph of the attorney, William Kolibash, that I met with in the summer of 2008. I was contacted by his firm and requested to come and speak with him.

I was asked questions about what I recall about the incident with myself, Jamie Bachie and Mark West. I was also shown a statement that I had written about the incident.

I told the attorney that what I had written was accurate and that would be how I would testify should the case go to trial.

I have not been contacted by any other attorney until March 17, 2009 when a person from Robinson Law Office came to my house. I was then served with a subpoena on March 19, 2009 to testify at trial on Wednesday, March 25, 2009.

I have been living at the same location, 1902 Wood Street, Wheeling, WV, since the first time I was contacted by Attorney Kolibash. [Exhibit F, Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion in Limine and Motion for Summary Judgment filed July 30, 2009].

Despite being requested to do so through written discovery, the defendants never provided the contact information for Clara "Annie" Nice.

On March 24, 2009, counsel for the parties came before the circuit court to address the pending motions. In regard to the motion to reconsider its earlier ruling, the hearing went as follows:

The Court: "And, well, first we can address the plaintiff's motion to reconsider the order enter on - well, that was - I don't know if the order was actually entered. I got it. It's endorsed "Pretrial Conference Order"; it's been endorsed by both parties, and I'll enter it as of today.²

Basically, the plaintiff wants this Court to reconsider all matters relating to the emotional distress claim and the motion in limine associated with that.

Is there anything else?"

Mr. Tsoras: "I think there was a motion for reconsideration on the wages, Judge."

The Court: "Lost wages, yeah. Okay. I've read the papers in regard to both of those. There is no reason to reconsider those. The rulings were made, quite frankly, because the plaintiff just simply has not properly disclosed the necessary witnesses to sustain claims in both areas.

² To date, according to the docket sheet, the Pretrial Conference Order was never entered by the Court.

The emotional distress claim should be supported by -particularly because of the report of Dr. Bailey - should be met with an expert witness. Same thing with the issue relating to wages.

I mean, just - plaintiff has just failed to be prepared. That's about as straightforward as I can make it, and, as a result of that, both claims, emotional distress claim and lost wages claim, have been dismissed."
[Transcript of March 24, 2009 Hearing on Defendant's Motion for Summary Judgment, pgs. 2-3].

Based upon the circuit courts refusal to reconsider it's earlier ruling, the only remaining issue before the court was the defendant's motion for summary judgment.

Despite finding triable issues of fact with regard to Ms. Bachie's hostile work environment claim, the circuit court wrongly granted summary judgment in favor of the defendants based on its' erroneous finding that there were no damages for the jury to consider, including incidental damages. The relevant portion of the hearing went as follows:

The Court: "I do believe it's different in regard to the hostile work claim. I think there are legitimate factual issues as to what happen here - now - which may have prompted Ms. Bachie to resign.

Am I correct that her employment tenure was a matter of months?"

Mr. Tsoras: "May of '03 to November of '03."

The Court: About four or five months, maybe, something?

Mr. Kolibash: "Correct."

The Court: "And, no question that she did resign; there's no dispute as to that; is that correct?"

Mr. Tsoras: "That's correct."

The Court: "Now, let's assume for our purposes now that she resigned because of what she felt was a hostile work environment; in other words, she was forced to resign. Let's assume that, or that'll be the issue that the jury would be asked to consider. What are her damages?" [Transcript of March 24, 2009 Hearing on Defendant's Motion for Summary Judgment, pgs. 4-5].

At this point, plaintiff's counsel began to list incidental damages - like humiliation, mental anguish, aggravation, inconvenience, embarrassment, or loss of dignity - but was effectively cut-off and told those damages were not in this case. The remaining relevant portion of the hearing went as follows:

Mr. Tsoras: "Damages would be humiliation, emotional -"

The Court: "That's fine. That's not in this case. It's not here. What damages are left in this case?"

Mr. Kolibash: "Our position now is that there are none."

The Court: "I don't see anything. So even if you survive the motion for summary judgment, the issue - and I do believe, I do believe that there is a claim that is triable under Jividen versus Law. I do."

I think that that's - although there's a dispute as to what happened, I mean, it is - there are - if you read these cases, the whole host of cases - I don't want to tick them off - West Virginia Supreme Court has basically said that the first prong, let's call it, of prima facie case the plaintiffs have proven in employment discrimination cases is de minimis, really de minimis.

Then you go through the whole dynamic. And I think that, if there was a legitimate - if we had a damage claim here, that would be enough to try. We could try that issue as to whether or not there a hostile work environment, and the jury would be asked to make that determination, which prompted the resignation. They also have to require that.

But there are no damages here. So with that in mind, I think there is enough to deny the motion for summary judgment on the hostile work environment, but then you get beyond that and: So what?

So the motion for summary judgment of the defendant on all issues is granted, and the plaintiff's exception can be saved to the ruling. There's nothing left to try."
[Transcript of March 24, 2009 Hearing on Defendant's Motion for Summary Judgment, pgs. 5-6]

On July 30, 2009, the plaintiff filed a Motion to Reconsider, Rescind or Modify the Order of the Court Granting Defendant's Motion *in Limine* and Motion for Summary Judgment. The Defendants file a response to said motion on November 18, 2009. The parties appeared before the circuit court on November 20, 2009 to argue said motions.

Although an order from the March 24, 2009 hearing was endorsed by both parties, the circuit court indicated he had not received it and refused to rule on the motions pending before it.

An order was endorsed by both parties, signed by the circuit court and entered on November 20, 2009. In arriving at its decision, the trial court wrongfully excluded evidence of lost wages for plaintiffs' apparent failure to supplement wage loss information and tax returns. The trial court abused its discretion by entertaining defendants' request for such sanctions as the defendants never filed a motion to have the court order said discovery and, thus, failed to meet its initial burden of establishing noncompliance.

The circuit court compounded its error by granting summary judgment despite finding genuine issues of fact to be tried on liability. The trial court wrongfully determined that there were no damages for the jury to consider despite genuine issue of fact to be tried with respect to incidental damages.

III.

ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT ABUSED ITS' DISCRETION IN EXCLUDING PLAINTIFF'S WAGE LOSS CLAIM PRIOR TO THE DEFENDANTS FILING A MOTION FOR A COURT ORDER COMPELLING THE INFORMATION BEFORE SEEKING DISCOVERY SANCTIONS

- B. THE TRIAL COURT ABUSED ITS' DISCRETION IN EXCLUDING PLAINTIFF'S WAGE LOSS CLAIM AS THE PERTINENT CONSIDERATIONS DO NOT WARRANT SUCH A SANCTION

- C. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT CONCERNING THE PLAINTIFF'S INCIDENTAL DAMAGES

IV.

POINTS AND AUTHORITIES RELIED ON

A.

Syllabus Points

1. "If a party believes insufficient answers are given to interrogatories served under W.Va.R.Civ.P. 26(b)(4)(A)(i), the proper procedure under the rule is to file a motion to compel more complete answers pursuant to W.Va.R.Civ.P. 37(a)(2). Syl. Pt. 1, Nutter v. Maynard 183 W.Va. 247, 395 S.E.2d 491 (1990).

2. "The imposition of sanctions by a circuit court under W. Va. R. Civ. P. 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion." Syl. Pt. 2, Hadox v. Martin, 209 W.Va. 180, 544 S.E.2d 395 (2001).

3. "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. Pt. 1, Hadox v. Martin, 209 W.Va. 180, 182, 544 S.E.2d 395, 397 (2001).

4. "Generally, under Rule 37 of the Rules of Civil Procedure to

trigger the imposition of sanctions where a party refuses to comply with a discovery request, the other party must file a motion to have the court order discovery. If the discovery order is issued and not obeyed, then the party may seek sanctions under Rule 37(b) of the Rules of Civil Procedure." Syl. Pt. 3, Mills v. Davis, 211 W.Va. 569, 567 S.E.2d 285 (2002) quoting Syl. Pt. 1, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983).

5. "The party seeking sanctions under *W.Va.R.Civ.P.* 37(b) has the burden of establishing noncompliance with the circuit court's order to provide or permit discovery." Syl. Pt. 5, Doulamis v. Alpine Lake Property Owners Ass'n, Inc., 184 W.Va. 107, 108, 399 S.E.2d 689, 690 (W.Va., 1990).

6. "In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case." Syl. Pt. 2, Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996).

7. "Factors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e)(2) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the

ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded. Syl. pt. 5, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983).

8. The due process clause of the West Virginia Constitution, Art. 3, § 10, requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Syl. Pt. 1, Bartles v. Hinkle, 196 W. Va. 381, 472 S.E.2d 827 (1996).

9. "A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

10. "Summary judgment is viewed with suspicion and, on appeal, facts are to be construed in the light most favorable to party opposing motion." Syl. Pt. 1, Hicks v. Chevy, 178 W.Va. 118, 358 S.E.2d 202 (1987).

11. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. Co. Of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).

12. "To establish a claim for sexual harassment under the West Virginia Human Rights Act, W.Va.Code, 5-11-1, et seq. , based upon a hostile or abusive work environment, a plaintiff-employee must prove 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 imputable on some factual basis to the employer." Syl. Pt. 5, Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995).

13. "A statutory claim brought under the West Virginia Human Rights Act s, W.Va.Code §§ 5-11-1 to -21 (Repl.Vol.2002), to establish sexual harassment **does not require proof of psychological injury.**" Syl. Pt. 6, Akers v. Cabell Huntington Hosp., Inc. 215 W.Va. 346, 349, 599 S.E.2d 769, 772 (W.Va.,2004). [emphasis supplied].

14. "Lay or expert testimony that the plaintiff in a sexual harassment case suffered resulting mental anguish, aggravation, inconvenience, humiliation, embarrassment, or loss of dignity will support an award by the jury or other fact finder of incidental noneconomic damages." Syl. Pt. 7, Akers v. Cabell Huntington Hosp., Inc. 215 W.Va. 346, 349, 599 S.E.2d 769, 772 (W.Va.,2004).

B.

Authorities

Cases

Akers v. Cabell Huntington Hosp., Inc. 215 W.Va. 346, 599 S.E.2d 769 (W.Va.,2004).

Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996).

Dobson v. Eastern Ass'd Coal Corp., 188 W.Va. 17, 24, 422 S.E.2d 494, 501 (1992)

Doulamis v. Alpine Lake Property Owners Ass'n, Inc., 184 W.Va. 107, 399 S.E.2d 689) (W.Va.,1990).

Gardner v. Gardner, 144 W.Va. 630, 110 S.E.2d 495 (1959).

Hadox v. Martin, 209 W.Va. 180, 544 S.E.2d 395 (2001).

Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995).

Hicks v. Chevy, 178 W.Va. 118, 358 S.E.2d 202 (1987).

Mills v. Davis, 211 W.Va. 569, 567 S.E.2d 285 (2002).

Moore v. Mustoe, 47 W.Va. 549, 552, 35 S.E. 871, 873 (1900).

Nutter v. Maynard 183 W.Va. 247, 395 S.E.2d 491 (1990).

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Pracer v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983).

Province v. Province, 196 W.Va. 473, 473 S.E.2d 894 (1996).

Seymour v. Pendleton Community Care, 209 W.Va. 468, 549 S.E.2d 662 (W.Va.,2001).

State Human Rights Comm'n v. Pearlman Realty Agency, 161 W.Va. 1, 239 S.E.2d 145 (1977)

Other Authorities

West Virginia Constitution, Art. 3, § 10.

West Virginia Human Rights Act s, W.Va.Code §§ 5-11-1 to -21.

West Virginia Rules of Civil Procedure, Rule 26.

West Virginia Rules of Civil Procedure, Rule 34.

West Virginia Rule of Civil Procedure, Rule 37.

V.

STANDARD OF APPELLATE REVIEW

Ruling on the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. Pt. 1, Hadox v. Martin, 209 W.Va. 180, 182, 544 S.E.2d 395, 397 (2001).

The circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

VI.

DISCUSSION OF LAW

As indicated in the Statement of Facts, the principal theory of liability in this case is a hostile work environment claim brought about by the ongoing inappropriate sexual behavior of Mark West, a supervisor, toward his employee, Jamie Bachie, which directly and proximately led to her resignation.

Not long after Ms. Bachie began her employment at Wheeling Island Gaming, Inc., Mr. West frequently injected himself into her conversations. Specifically, he would initiate conversations about her personal life. At one point, he even suggested she come to his home and sleep next to him in bed. Mr. West behavior was frequently observed by the Petitioner's co-worker, Clara "Annie" Nice. Mrs. Nice witnessed him inappropriately caressing and massaging Ms. Bachie's back and shoulders. Mrs. Nice observed Ms. Bachie's uncomfortableness and was surprised patrons eating in the Terrace Room did not complain.

Toward the end of September 2003, Mr. West's actions turned more aggressive. Specifically, he stated that he, Ms. Bachie, Mrs. Nice and Kimberly Nagy have a foursome. In addition, while just out of sight of Mrs. Nice, he tried to "feel up" Ms. Bachie from behind, kissed her neck and turned her head in an effort to kiss her. As Mrs. Nice observed Ms. Bachie coming out of the other room, Mr. West's arms were still around her from behind. She could easily see the Ms. Bachie was very upset and uncomfortable.

Thereafter, Mr. West put his arms around both woman, told them that he wanted them to stay with him and pushed them together like he wanted them to kiss.

As a result of these inappropriate actions and the inaction of Wheeling Island Gaming, Inc., Ms. Bachie resigned in November of 2003.

As pointed out in the Statement of Facts, the wrongful outcome of this case has nothing to do with the merits.

During written discovery the defendants requested information about Ms. Bachie's wage loss claim and tax returns. In her 2005 response to both requests, the plaintiff indicated the information was not in her possession, custody and control.

In March of 2008, Ms. Bachie gave detailed deposition testimony regarding her wage and work history after she resigned at Wheeling Island Gaming, Inc. At no time after her 2005 written discovery responses or after her March 2008 deposition did the defendants request release authorizations nor attempt to subpoena the information from any of the employers which she clearly identified in her deposition.

In addition, the defendants never filed a motion to have the circuit court order the discovery. Instead, the defendant stood by and cried "prejudice" on the eve of trial. Moreover, the defendants came before the circuit court requesting this equitable relief with unclean hands.

Early in the discovery process, the plaintiff requested the contact information for any and all persons having knowledge about the facts and circumstances relevant to her claims. In the summer of 2008, after all of the depositions were taken, counsel for the defendants met and interviewed Clara Nice. Despite having knowledge that no one knew the whereabouts of Clara Nice, and that she was a

material eye witness, the defendants never supplemented her contact information.

The trial court made several findings in support of granting appellee's summary judgment. The Order contains multiple errors, the most obvious was the trial court's failure to recognize, despite its dismissal of the appellant's emotion distress and loss wage claims, that genuine issues existed to be tried concerning plaintiff's incidental damages - mental anguish, humiliation, embarrassment and loss of dignity. [Conclusion 4, pg. 3 of the Order of November 20, 2009].

Furthermore, the trial court abused its discretion in excluding the appellants lost wage claim despite detailed testimony regarding her work and wage history after her resignation.

The trial court incorrectly entertained the appellee's motion to exclude the evidence despite never filing a motion to have the court order the discovery. Further, the court failed to consider that the plaintiff was never in possession and control of the documents that the defendants could have procured through available discovery mechanisms. Lastly, whether the exclusion is under Rule 26(e)(2) or Rule 37, the court abused its' discretion as this isolated occurrence does not warrant such a sanction.

A.

Discovery Sanctions

Before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct." Syl. Pt. 2, Mills v. Davis, 211 W.Va. 569, 567 S.E.2d 285 (2002) quoting Syl. pt. 1, Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996).

"In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate." Syl. Pt. 2, Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996).

1.

**The Trial Court Abused Its'
Discretion Addressing Sanctions Under Rule 37**

Based upon the record, it is unclear whether the circuit court excluded the evidence pursuant to Rule 37 or pursuant to Rule 26(e)(2) for the plaintiffs' failure to provide the requested tangible evidence concerning her wage loss claim. However, there is no finding of a failure of the plaintiff to supplement her discovery responses in the

March 24, 2009 hearing or in the November 20, 2009 Order.

"Generally, under Rule 37 of the Rules of Civil Procedure to trigger the imposition of sanctions where a party refuses to comply with a discovery request, the other party must file a motion to have the court order discovery. If the discovery order is issued and not obeyed, then the party may seek sanctions under Rule 37(b) of the Rules of Civil Procedure." Syl. Pt. 3, Mills v. Davis, 211 W.Va. 569, 567 S.E.2d 285 (2002) quoting Syl. Pt. 1, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983).

Furthermore, "the party seeking sanctions under *W.Va.R.Civ.P.* 37(b) has the burden of establishing noncompliance with the circuit court's order to provide or permit discovery." Syl. Pt. 5, Doulamis v. Alpine Lake Property Owners Ass'n, Inc., 184 W.Va. 107, 108, 399 S.E.2d 689, 690) (W.Va.,1990).

A prerequisite to seeking Rule 37 sanctions when a party believes answers to interrogatories are insufficient "is to file a motion to compel more complete answers pursuant to *W.Va.R.Civ.P.* 37(a)(2)." Syl. Pt. 1, Nutter v. Maynard 183 W.Va. 247, 395 S.E.2d 491 (1990).

The record in this matter clearly indicates that these defendants failed to compel more complete answers. As a result, the defendants failed to meet its burden of establishing noncompliance.

The trial court abused its' discretion by entertaining sanctions against the plaintiff for her failure to provide the requested tangible evidence of her wage loss claim as the defendants never filed a motion for the court to order the discovery, and therefore, the defendant failed to meet its burden of establishing noncompliance.

**The Trial Court Abused Its' Discretion By
Excluding Plaintiffs' Wage Loss Claim Pursuant to Rule 37**

It is clear that the decision to exclude the plaintiff's wage loss claim stems from the plaintiffs' failure to provide tangible evidence of wage loss and/or her tax returns. [November 20, 2009 Order Granting Defendant's Motions *in Limine* and Motion for Summary Judgment; Transcript of March 24, 2009 Hearing on Defendant's Motion for Summary Judgment].

In considering a motion to reconsider its' decision to exclude the wage loss claim, it has been held that:

WHEREUPON, the Plaintiff, by counsel, presented her motion to Reconsider and Rescind the Order of the Court Granting Defendants' Motion *in Limine* to Exclude Evidence of Alleged Lost Wages and hearing argument from counsel for the parties on the same, the Court hereby **DENIES** the Motion because Plaintiff has not properly disclosed the necessary documents and witnesses, expert or otherwise, pursuant to Defendants' discovery requests and the Court deadlines to prove a claim for lost wage damages.

This Honorable Court has long recognized that West Virginia court rules allocate significant discretion to the trial court in making evidentiary and procedural rulings. Syl. Pt. 1, Hadox v. Martin, 209 W.Va. 180, 182, 544 S.E.2d 395, 397 (W.Va.,2001). However, that discretion is not without limits.

The record cannot be reasonably disputed that the plaintiff did not provide tangible evidence of wage loss or her tax returns when she answered discovery in December of 2005. She did indicated she did not have possession of the information. [Exhibit F, Defendant's Response

to Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* and Motion for Summary Judgment].

Further, it cannot be disputed that the plaintiff testified about every employer she worked for following her resignation at Wheeling Island Gaming, Inc. during her deposition. And, the plaintiff testified about her pay rate and hours worked for each employer. [Deposition of Jamie Bachie, March 27, 2008, pgs. 6-10].

And, it cannot be disputed that the defendants never filed a motion to have the trial court order the wage and tax information, request authorizations for the release of said information or subpoena the records from any of the employers clearly identified at her deposition. And, at no time did the defendants suggest the initial discovery answers were insufficient.

The defendants did send one non-specific correspondence toward the end of discovery which concerned the plaintiffs damage claims. The pertinent part is as follows:

According to the scheduling Order in this case, the discovery period end on January 9, 2009. Since the plaintiff answers to Wheeling Island's discovery requests were filed approximately three years ago, I would ask you supplement those responses. Of particular, interest would be any additional information that your client can supply concerning her damage claim and any additional information that your client can supply concerning her damage claim and any additional medical treatment that she may have received since your responses were last filed. [Exhibit D, Defendant's Response to Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* and Motion for Summary Judgment]. [emphasis supplied].

Not only is the letter not suggestive of insufficient discovery

responses, it does not even specifically request the information that defendants cried "prejudice" about less than two months later.

In order to determine what will constitute an appropriate sanction under Rule 37, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case." Syl. Pt. 2, Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996).

Based upon the foregoing pertinent consideration, the plaintiffs' failure to provide the requested information did not warrant the exclusion of her wage loss claim.

The seriousness of any wrongful conduct attributed to the plaintiff is minimal. This is not a situation that the plaintiff refused to provide information upon the repeated requests from the defendants. In fact, the defendants never even suggested the discovery responses were inadequate nor did it specifically request the documents.

Any impact on the administration of justice would favor the defendants. In essence, the only evidence of lost wages would be through witness testimony. As skilled as defense counsel are in this case, the testimony would have to withstand questioning regarding her failure to provide the requested evidence.

Moreover, since the defendants stood back and did nothing for over three years to procure the information, despite available discovery mechanisms, it cannot be argued there was a pattern of

wrongdoing.

Lastly, although the following was never addressed in any motion, the following mitigating circumstances are common knowledge throughout the legal community in Ohio County, West Virginia. Upon filing the complaint, plaintiff counsel's law office had four practicing attorneys, one of which was part-time. In the beginning of 2006, Jacob Robinson, Esq. was diagnosed with cancer and spent much of 2006 and the beginning of 2007 in treatment. Two months following Mr. Robinsons' diagnosis, the wife of the lead trial attorney, Ronald Zavolta, Esq., was diagnosed with cancer and underwent a similar course of treatment. By the end of 2007, the office had four full-time attorneys and the same part-time attorney. In February of 2008, the lead trial attorney, Mr. Zavolta, and the part-time attorney, Erika Klie, Esq. left the firm. In addition, one of four paralegals resigned her position.

The plaintiff is not trying to make excuses for her failure to procure the requested information, however, mitigating circumstances is a pertinent consideration and the aforementioned information is common knowledge in the Ohio County, West Virginia legal community.

The trial court abused its' discretion by improperly applying the pertinent consideration under Rule 37 when it excluded the plaintiff's wage loss claim. Like the facts in Hadox, the exclusion of the plaintiff's wage loss claim was not justified. 209 W.Va. 180, 185-186.

**The Trial Court Abused Its' Discretion By
Excluding Plaintiffs' Wage Loss Claim Pursuant to Rule 26(e) (2)**

"Factors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e) (2) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded. Syl. Pt. 5, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983).

The defendants cannot claim, even by the most attenuated argument, that it is surprised with respect the plaintiff's wage loss claim. The Appellant testified in detail about her work and wage history following her resignation. [Deposition of Jamie Bachie, March 27, 2008, pgs. 6-10].

As previously stated, the plaintiff would be the party prejudiced by the lack of any tangible wage loss information at trial, not the defendants. Therefore, as to the defendants, there was no prejudice to cure them of.

Additionally, the record is void of any evidence that the plaintiff acted in bad faith or with a wilfulness. Lastly, the practical importance of not having the information at trial would go to the weight of the plaintiff's wage loss claim.

Simply put, the only party disadvantaged by the lack of tangible

evidence documenting her wage loss claim is the plaintiff herself.

And, as hereinafter discussed, any transgression to be placed upon the plaintiff for her failure to supplement her discovery is de minimis compared to the defendants own transgressions.

The trial court abused its' discretion by going beyond excluding the tangible evidence in this case, it eliminated her entire wage loss claim, despite the plaintiff's ability to provide testimony.

4.

The Defendants Requested Equitable Relief with Unclean Hands and Have Been Unjustly Enriched

As previously noted, when determining an appropriate sanction, a court shall be guided by equitable principles. Syl. Pt. 2, Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996). And, this state has long recognized that "equity never helps those who engage in fraudulent transactions, but leaves them where it finds them" Province v. Province, 196 W.Va. 473, 473 S.E.2d 894 (1996) (quoting Moore v. Mustoe, 47 W.Va. 549, 552, 35 S.E. 871, 873 (1900)). This doctrine has been expressly and specifically made a part of the organic law in this State. Id.

As indicated in the Statement of Facts, the defendants were aware that none of the individual deposed in this case knew the whereabouts of Clara "Annie" Nice, a material eye witness to Mark West inappropriate actions toward Ms. Bachie. Fortunately, she was located by the plaintiff about a week before trial. Upon interviewing Mrs. Nice, it became known that she was contacted and interviewed by the

defendants in the summer of 2008. [Exhibit F, Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion in Limine and Motion for Summary Judgment filed July 30, 2009].

In addition, the plaintiff requested, through written discovery, that requested the "addresses and telephone numbers of any and all individuals who have knowledge of the facts and circumstances relevant to plaintiff's and/or defendants' claims or defenses in this matter." [Exhibit E (Interrogatory No. 2), Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion in Limine and Motion for Summary Judgment].

Although, the defendants did provide the names and contact information of several individuals, including Clara Annie Nice's grandmother, they never provided the name or contact information of Clara Nice at anytime through the discovery process, nor did it supplement the information. [Exhibit E (relevant discovery responses from the defendants) of Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion in Limine and Motion for Summary Judgment].

Not only did the defendants fail to supplement Mrs. Nice's contact information, it had the audacity in a motion *in limine* to suggest "there is no proof that any such incidents actually occurred."

[Defendant's Motion in Limine and Memorandum of Law to Prohibit Admission of Rule 404(b) Evidence, ¶ 6; see also Exhibit 3 (October 5, 2003 written statement of Clara Nice) of Mark West Deposition, May 20, 2008].

Furthermore, the defendants failure to acknowledge its' interview with Mrs. Nice did not end with this case.

On May 22, 2009, defense counsel and plaintiff's counsel came before the Honorable Martin Gaughan for a status/scheduling conference in the case styled Kimberly Nagy v. Wheeling Island Gaming, Inc, et. al., Civil Action No.: 05-C-467. During said conference, defense counsel advised the Court that the defendants "want to depose one additional witness listed by and recently found by the Plaintiff." [Exhibit I (endorsed proposed Agreed Order) of Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* and Motion for Summary Judgment].

Courts in equity in this state has long recognized that, "[t]heir hands may be unclean, but it is the duty of a court of equity to permit them to clean them when it can do so, and not permit such uncleanness to continue as a stench in the nostrils of the people." Gardner v. Gardner, 144 W.Va. 630, 110 S.E.2d 495 (1959).

The trial court abused its' discretion in not considering the motions for reconsideration pending at the November 20, 2009 hearing. As such, the defendant have remained unjustly enriched while the uncleanness continues to stench to nostrils of Ms. Bachie.

B.

Summary Judgment

Summary judgment is not a substitute for a trial of an issue of fact but rather is a determination that as a matter of law there is no issue of fact to be tried. George v. Blosser, 157 W.Va. 811, 204 S.E.2d 567 (1974). "Summary judgment is viewed with suspicion and, on appeal, facts are to be construed in the light most favorable to party opposing motion." Syl. Pt. 1, Hicks v. Chevy, 178 W.Va. 118, 358 S.E.2d 202 (1987).

It is often said that the function of a summary judgment is to pierce the boiler plate of the pleading and evaluate the party's proof in order to determine whether a trial is actually required. Poweridge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W.Va. 692, 474 S.E.2d 872 (1996).

When considering a motion for summary judgment, this Court has held:

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. Co. Of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).

1.

Genuine Issues of Material Fact

"To establish a claim for sexual harassment under the West Virginia Human Rights Act, W.Va.Code, 5-11-1, *et seq.*, based upon a hostile or abusive work environment, a plaintiff-employee must prove 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 imputable on some factual basis to the employer." Syl. Pt. 5, Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995).

The circuit court, clearly indicated it found genuine issues of fact to be tried regarding the plaintiff's sexual harassment claim. Specifically, the court stated as follows:

The Court: "I do believe it's different in regard to the hostile work claim. I think there are legitimate factual issues as to what happen here - now - which may have prompted Ms. Bachie to resign.

The Court: "I do believe that there is a claim that is triable under Jividen versus Law. I do.

I think that that's - although there's a dispute as to what happened, I mean, it is - there are - if you read these cases, the whole host of cases - I don't want to tick them off - West Virginia Supreme Court has basically said that the first prong, let's call it, of prima facie case the plaintiffs have proven in employment discrimination cases is de minimis, really de minimis. [Transcript of March 24, 2009 Hearing on Defendant's Motion for Summary Judgment, pgs. 5-6].

However, the court granted the defendants summary judgment because the it erroneously held there were no damages for the jury to consider. The court held as follows:

"Then you go through the whole dynamic. And I think that, if there was a legitimate - if we had a damage claim here, that would be enough to try. We could try that issue as to whether or not there a hostile work environment, and the jury would be asked to make that determination, which prompted the resignation. They also have to require that.

But there are no damages here. So with that in mind, I think there is enough to deny the motion for summary judgment on the hostile work environment, but then you get beyond that and: So what?

So the motion for summary judgment of the defendant on all issues is granted, and the plaintiff's exception can be saved to the ruling. There's nothing left to try."
[Transcript of March 24, 2009 Hearing on Defendant's Motion for Summary Judgment, pgs. 5-6]

When asked what his client's damages were in light of the fact the circuit court erroneously dismissed the plaintiff's wage loss claim, plaintiff's counsel began to list incidental damages but was told those damages were not in this case. The remaining relevant

portion of the hearing went as follows:

Mr. Tsoras: "Damages would be humiliation, emotional -"

The Court: "That's fine. That's not in this case. It's not here. What damages are left in this case?"

Mr. Kolibash: "Our position now is that there are none."

The Court: "I don't see anything."

Separate and apart from any evidence of psychological or medical injury, a successful plaintiff in a sexual harassment case is entitled to recover what are referred to as incidental damages for embarrassment; humiliation; loss of dignity and personhood; and emotional distress. See Syllabus, State Human Rights Comm'n v. Pearlman Realty Agency, 161 W.Va. 1, 239 S.E.2d 145 (1977); see also Dobson v. Eastern Ass'd Coal Corp., 188 W.Va. 17, 24, 422 S.E.2d 494, 501 (1992).

Of more importance is the fact "[a] statutory claim brought under the West Virginia Human Rights Act s, W.Va.Code §§ 5-11-1 to -21 (Repl.Vol.2002), to establish sexual harassment **does not require proof of psychological injury.**" Syl. Pt. 6, Akers v. Cabell Huntington Hosp., Inc. 215 W.Va. 346, 349, 599 S.E.2d 769, 772 (W.Va.,2004). [emphasis supplied].

Upon filing her complaint on September 1, 2005, the plaintiff, as part of her damage claim, requested the following relief:

"Plaintiff Bachie has suffered humiliation, annoyance, inconvenience, embarrassment, a diminution in her ability and capacity to enjoy a normal life, emotional and mental distress, and loss of personal dignity." [Plaintiff's Complaint filed September 1, 2005, ¶ 27(c)].

Unlike evidence of psychological or medical injury, an award for incidental damages does not require expert testimony. This Court has held:

"Lay or expert testimony that the plaintiff in a sexual harassment case suffered resulting mental anguish, aggravation, inconvenience, humiliation, embarrassment, or loss of dignity will support an award by the jury or other fact finder of incidental noneconomic damages." Syl. Pt. 7, Akers v. Cabell Huntington Hosp., Inc. 215 W.Va. 346, 349, 599 S.E.2d 769, 772 (W.Va.,2004).

In addition, there is not only sufficient credible evidence to withstand summary judgment, but to support a jury award for incidental damages. Both the plaintiff and her co-worker, Clara Nice testified to how upset and uncomfortable Mr. West's unwanted behavior made the plaintiff.

A summary of some Ms. Bachie's testimony about the affect his action had on her are as follows:

- A:** "Okay.
Because in the past he had made sexual comments toward me and I felt uncomfortable and so when he was referring to taking us into this dressing room, I felt uncomfortable once again just by the looks her gave." [Bachie Depo, pg. 20-21].

- A:** "So he would always be inviting me over to his house and saying he would like for me to sleep in bed next to him. . . . it made me very uncomfortable. [Bachie Depo, pg. 21 and 23].

- A.** "He at one point gave me his personal number to his office and told me like - he was like, 'If you need anything, anything at all,' and just the way that he said it and the way he was looking at at me made me feel very uncomfortable." [Bachie Depo, pg. 23].

- A.** "It was the night before we all went to Human Resources, because I was working. I was very upset

because Mark was there, Mr. West was there. I was very upset about what had happened during the setup and the banquet and I just started crying and they had to call my boyfriend to come pick me up and I had to leave work." [Bachie Depo, pg. 20-21].

By way of affidavit, the statement given by Clara Nice support Ms. Bachie's testimony as she observed how upset and uncomfortable his action made her. Mrs. Nice's recounts the following:

She also stated that Mr. West frequently and inappropriately caressed and massaged Ms. Bachie's back and shoulders. She observed how uncomfortable it made Ms. Bachie and she was surprised that customers eating in the Terrace Room did not complain. [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment].

As Ms. Bachie and Mr. West walked back into the area where I was, Mr. West was walking behind her with both of his arms around her. Ms. Bachie seemed very uncomfortable and upset." [Affidavit of Clara Nice, Exhibit E of Plaintiff's Second Supplemental Response to Defendants Motion for Summary Judgment].

The trial court clearly committed error by granting summary judgment based its erroneous belief, that there were no damages for the jury to consider. Clearly, genuine issue of fact exist to be tried regarding the Appellant's incidental damages.

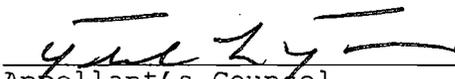
VII

Relief Requested

Appellant respectfully prays that the trial court's order of November 20, 2009, denying Plaintiff's Motion to Reconsider, Rescind or Modify the Order of Court Granting Defendants' Motion *in Limine* with respect to plaintiff's lost wage claim be reversed. Further, Appellant respectfully prays that the trial court's order granting Appellee's Motion for Summary Judgment be reversed. Further, the Appellant respectfully prays that the trial court be directed to enter an order reinstating the Appellant wage lost claim and that the trial court be directed to enter an order denying Appellee's Motion for Summary Judgment with respect to lost wages and incidental damages in that the trial court abused its discretion and genuine issues of material fact exist and for such further relief as this Court deems just and proper.

Respectfully submitted,
JAMIE BACHIE

By:


Appellant's Counsel

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(W. Va. I.D. No. 3133)

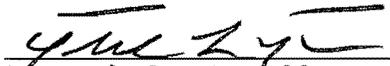
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CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF ON BEHALF OF aPPELLANT** was had upon the parties herein by hand delivering a true copy thereof, this 28th day of JULY, 2010, to the following:

William A. Kolibash, Esq
Richard N. Beaver, Esq
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