

---

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

---

No. 101476

**NATHANIEL ADKINS; JERRI ALLRED; TIM BLEVINS; JOHNNY R. BOWMAN;  
JOHN BOWMAN, II; DIANNE BRUBAKER; DARRELL CHAPMAN; JOHN COBURN;  
KENNETH GLOVER; WAYNE JARRELL; RUTH JONES; GARY LAMBERT;  
RONNIE MILLER; BONNIE MYERS; STEVEN RAPPOLD; JERRY RYDER; JEREMY  
SKIDMORE; KAREN SPENCE; GREGG STILTNER; JAMES VAUGHT; ELGIN  
WARD; and KEVIN WHITE, Plaintiffs Below/Respondents,**

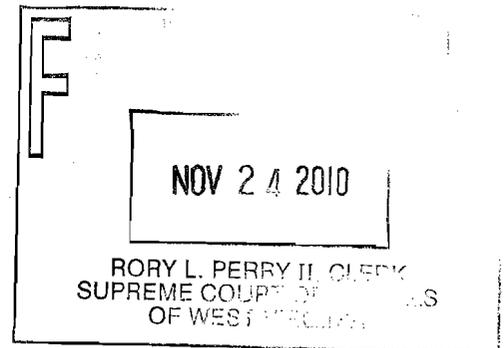
v.

**KIM WOLFE, in his capacity as CABELL COUNTY SHERIFF; the CABELL COUNTY  
SHERIFF'S OFFICE; the CABELL COUNTY COMMISSION; and the CABELL  
COUNTY CIVIL SERVICE COMMISSION, Defendants Below/Petitioners.**

---

Hon. F. Jane Husted, Judge  
Circuit Court of Cabell County  
Civil Action No. 04-C-1123

---



**RESPONSE TO PETITION FOR APPEAL**

Counsel for Petitioners:

Ancil G. Ramey, Esq. (WV Bar #3013)  
Steptoe & Johnson, PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588  
Telephone: (304) 353-8112

William T. Watson, Esq. (WV Bar #3951)  
P.O. Box 1371  
Huntington, WV 25715-1371  
Telephone: (304) 522-6454

Counsel for Respondents:

Michael S. Bailey, Esq. (WV Bar #8507)  
Bailey & Howard, PLLC  
642 Main Street, Suite 201  
P.O. Box 347  
Barboursville, WV 25504  
Telephone: (304) 736-0801

Respondents herein and Plaintiffs below, Nathaniel Adkins, *et al.* (hereinafter collectively referred to as the “Jail employees” or “employees”), by their attorney, hereby respond as follows to the Petition for Appeal filed by the Defendants below, the Cabell County Commission, the Cabell County Sheriff, and the Cabell County Civil Service Commission (hereinafter referred to as the “employers”).

**I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER COURT**<sup>1</sup>

This is an appeal from a Judgment Order entered pursuant to a jury verdict in the Cabell County Circuit Court in a Wage Payment and Collection Act (“WPCA”) case involving former Cabell County correctional officers (“employees”) who worked at the Cabell County Jail and filed suit against their employers after the county jail was closed and their jobs were terminated. The case revolved around sick leave benefits, which were undisputedly a fringe benefit provided to the employees by their employers, the Cabell County Sheriff and the Cabell County Commission. Specifically, after a two-day trial in which at least 12 witnesses testified and the jury had a full opportunity to hear about and review every one of the documents at issue here,<sup>2</sup>

---

<sup>1</sup> The Respondent notes that the Petition is completely out of line with the requirements of Rule 3(c) of the Rules of Appellate Procedure, which clearly and unambiguously provides for the form and content of a Petition:

A petition for appeal shall state the following *in the order indicated*:

- 1) the kind of proceeding and nature of the ruling in the lower tribunal;
- 2) a statement of the facts of the case;
- 3) the assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal; and
- 4) points and authorities relied upon, a discussion of law, and the relief prayed for.

W.Va. R. App. Proc. 3(c) (emphasis added). In the instant case, the Petition does not include any of these sections other than the assignment of errors and it is out of the order established by this Court. Furthermore, Rule 3(c) also limits the Petition to “fifty pages, inclusive of any addendum, but exclusive of the docketing statement.” *Id.* Here, the Petition, with exhibits, is fifty-six pages. Respondent also has no record of any motion to exceed page limitations. Accordingly, Respondent objects. This modified order and content of the Petition works an unfair disadvantage to responding parties who must either likewise ignore the Rules established by this Court, or comply with those Rules and take the risk of missing the opportunity to fully respond to the arguments of the petitioner.

<sup>2</sup> While Defendants allege that the Circuit Court somehow excluded the Compensation Affidavits, that suggestion is completely false. Judge Husted allowed those documents to be admitted, seen by the jury, and testified on. In fact, Judge Husted denied a Motion *in limine* filed by Plaintiffs’ counsel to exclude the same.

including those with which the Defendant employers are taking issue, the jury unanimously found that the former Jail employees were not made aware of and had no knowledge of any alleged, written or unwritten, policy of the employers to cancel all accrued sick leave benefits as of the last day of employment, thus making the employees entitled to such pay under the law.

This case involves, simply, a cleanly tried case in which the Defendants were unhappy with the outcome. The trial lasted for two days. No evidence was excluded from the jury's consideration during its deliberation. The Defendants made no objections during the trial of this matter. While Plaintiffs raised two objections, those rulings were not prejudicial to the Defendants nor are they relevant to the Petition before this Court.<sup>3</sup> Trial counsel jointly submitted numerous stipulations, which were made without objection. *See Stipulations*, a copy of which is attached hereto and made a part hereof as "Exhibit A;" *see also* specifically *Trial Transcript* at 53-57. Trial counsel also jointly prepared the jury instructions and the jury verdict form in this matter, with some minor modifications by the Judge, none of which were objected to. While Defendants' counsel did move for a directed verdict at the close of Plaintiffs' evidence, Defendants' counsel never renewed that motion nor did he make any other motion at the close of the evidence. Furthermore, the only post-trial motion made by the Defendants was a fatally insufficient motion for new trial based on the sole grounds that "[t]he jury's verdict was in contradiction to the weight of the evidence presented in the case." *Defendants' Motion for New Trial* ¶1, p. 1. Defendants raised no other alleged errors, mistakes, rulings, admissions, or

---

However, Judge Husted did provide a guiding instruction on how those affidavits could be used in light of the language of W.Va. Code § 21-5-10. *See Trial Tr.* at 344-45. That instruction was jointly drafted and jointly submitted without objection by the parties.

<sup>3</sup> One of Plaintiffs' objections was that the scope of Defendants' recross examination of witness James Johnson exceeded the scope of Plaintiffs' redirect examination, *see Trial Tr.* at 151, and the second objection involved an attempt to have the County manager, who has no education, background, training or experience in the law, to interpret and testify on the meaning of a statute, *see Trial Tr.* at 217. Both objections were effectively sustained.

omissions, and offered no other argument, support or explanation on their motion for new trial. The lower Court properly denied that motion, based on this Court's rulings in Chambers v. Smith, 198 S.E.2d 806, 810, 157 W.Va. 77, 82 (1973), which holds that '*Merely stating that 'The verdict is contrary to the evidence' has been held not to be sufficient to meet the requirements of stating the grounds with particularity.*' (quoting Steptoe v. Mason, 153 W.Va. 783, 172 S.E.2d 587) (emphasis added).

## II. SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS

This case involves the closing of the Cabell County Jail in December 2003 and the accompanying opening of the Western Regional Jail. Plaintiffs were all employed as correctional officers, or in some other capacity, at the Cabell County Jail at the time of the transition to the Western Regional Jail. Due to the opening of the Western Regional Jail, the Plaintiffs' positions with Defendants were all terminated. Their last day of employment was on or about December 15, 2003.

As established at Trial, the parties stipulated that "no written document containing any provision or language regarding what happens to an employee's sick leave benefits upon that employee's termination of employment was ever distributed to the plaintiff employees." Trial Transcript at 55; *see also* Exh. A. Furthermore, the parties stipulated that the only written policies ever provided to the employees in this matter were all contained in a three inch binder, identified as the "Cabell County Jail Policy and Procedure Manual for Correctional Officers," that the only written policies provided to Plaintiffs that pertained to sick leave were Jail Division General Order 11-2001 and Memo Log File #2002-005, and that none of these policies addressed what happened to those sick leave benefits at termination of employment. *See id.*, Exh. A.

With regards to Memo Log File #2002-005, a full copy of which is attached hereto and made a part hereof as "Exhibit B,"<sup>4</sup> former Jail Administrator James Johnson, the author of this February 15, 2002 memo, testified that the memo did not, nor was it intended to address what happened to sick leave benefits upon a correctional officer's termination of employment. *See* Testimony of James Johnson, Trial Tr. at 132. More importantly, the Memo itself, together with Mr. Johnson's testimony, establishes that the last sheet of that Memo purported to be the "Policy of the County of Cabell Commission" and did not include the language that Defendants quote so repetitively in their Petition (i.e., "When the services of an employee have been terminated, all sick leave credited shall be canceled as of the last working day with the department."). Accordingly, there is no dispute that the Plaintiff employees NEVER received that language in any written document.<sup>5</sup> Additionally, the facts here unequivocally establish that the Plaintiff employees were provided by their superior, Jail Administrator James Johnson, with a copy of a sheet purporting to be the County Commission's policy regarding sick leave.<sup>6</sup> Nevertheless, Defendants persist and insist, both in the case below and in their current Petition, that the Plaintiff employees should have somehow known to dig deeper for further language in that policy or be held to have known what the language of any such policy was if they didn't do so.

---

<sup>4</sup> While Defendants attach the Memo to their Petition as "Exhibit B," they noticeably omitted the last page of the Memo. Accordingly, a full copy as submitted to the Court as "Joint Exhibit No. 2," is attached hereto as "Exhibit B."

<sup>5</sup> While Defendants repeatedly assert that the Plaintiffs' case was founded on the proposition that they simply did not *read* the Employers' policy regarding what happened to sick leave benefits upon termination of employment, this assertion is completely false. In fact, the above stipulations and a review of Memo Log File #2002-005 itself demonstrate that the Plaintiffs never *received* the language. Thus, it is difficult for one to be held to have read and have knowledge of the contents of a document that they were admittedly, concededly, and undisputedly, never even provided.

<sup>6</sup> It should be noted that there is a discrepancy on the face of the documents between what Mr. Johnson provided as the County Commission Policy in Memo Log File #2002-005 and what the Cabell County Employee Personnel Handbook represents. *See* Joint Trial Exhibit No. 2 and Defendants' Trial Exhibit No. 4, p. 7. While they contain much of the same language, on their face, the two are laid out somewhat differently and have different page numbers at the bottom (p. 8 in the Memo Log File #2002-005 and page 7 in the Cabell County Employee Personnel Handbook).

Despite Defendants' repeated misrepresentation in their Petition that the Plaintiff employees "conceded that, except for retirees, no employee could accumulate and carry over more than thirty days of sick leave," Petition at 1, a review of the Trial transcript demonstrates the fallacy of this statement. In fact, this testimony was not developed at all during trial. The Plaintiffs testified only that they received the Memo Log File #2002-005, Trial Joint Exhibit No. 2, which was sent out by Jail Administrator James Johnson to address one particular employee's health condition and to let her know that she could only use 30 days of sick leave in any given year. *See* Testimony of James Johnson, Trial Tr. at 128-32. Defendants want this Court to take the leap in logic that the pertinent language from that Memo (i.e., "The carryover of the sick leave time for bona fide personal illness absences is limited to 30 days; provided, however, for retirement purposes there is unlimited carryover."), together with the Plaintiffs testimony that they received that Memo amounts to a concession that is somehow binding under the law. In fact, that document, on its face, only addresses two scenarios: "bona fide personal illness absences" and "retirement." Copious undisputed testimony and Stipulation No.5 definitively establishes that this language says nothing about what happens to sick leave upon termination of employment, nor was it intended to address what happened to sick leave benefits upon a correctional officer's termination of employment. *See, e.g.,* Testimony of James Johnson, Trial Tr. at 132.

Furthermore, at Trial, the undisputed testimony was that nothing was ever communicated to the Plaintiff Jail Employees at any point or in any form regarding what would happen to their sick leave benefits upon termination of employment. *See* Trial Tr. at 76-80, 85, 134-35, and 160, 163-64. In fact, former Jail Administrator James Johnson testified that he wasn't even aware of any such policy of the Cabell County Commission. *See* Testimony of James Johnson, Trial Tr.

at 133-35. This fact is confirmed by the Plaintiffs' testimony that they had no knowledge of any policy on behalf of the Defendants regarding the availability of sick leave to terminated employees, nor did they ever receive a copy of the County Commission's policy regarding sick leave, specifically any provision regarding the availability of sick leave to terminated employees. See Trial Tr. at 85, 134-35, and 160, 163-64; see also Affidavits of various Jail Employees, Plaintiffs' Trial Exhibits Nos. 4A-4V.

Defendants erroneously represent in their Petition that the Plaintiffs conceded at trial that no other County employee was ever paid sick leave. In fact, while the Plaintiffs did not identify anyone by name at trial who definitely received such benefits, Plaintiff employees cited scenarios in the prior record in which they believe former employees were paid sick leave benefits upon their termination, see Plaintiffs' Answers to Defendants' First Set of Interrogatories, No. 3 at p. 3, and all Plaintiffs allege that other former employees, such as the Plaintiffs in the above-styled action, would receive the benefit of their accumulated and unpaid sick leave upon retirement, and that they had operated under the same expectation prior to the filing of this lawsuit. See Affidavits of various Jail Employees, Plaintiffs' Trial Exhibits Nos. 4A-4V; see also Affidavit of Karen Cole, ¶6 at p 2, attached as "Exhibit H" to Defendants' Response to Plaintiffs' Renewed Motion for Summary Judgment. Moreover, as Plaintiff Johnny Bowman testified, he didn't know about any other former employee who had been paid sick leave upon termination, but he had no reason to have any such knowledge because he never asked anyone about it after they left employment. See Trial Tr. at 80, 110.

As mentioned above, while the Defendant employers have attempted to cast doubt on the decision of the jury and the lower Court by emphasizing over and over again the language from the "Cabell County Employee Personnel Handbook," they fail to point out that the employees

never received that handbook or the language of the policy contained therein. Accordingly, Petitioners' continual reference to that "Cabell County Employee Personnel Handbook" language is completely meaningless and irrelevant since the employees were admittedly never given that Handbook or any document incorporating the language from that Handbook as it pertains to sick leave. Nevertheless, the jury was permitted to see and review that "Cabell County Employee Personnel Handbook" and the language contained therein during their deliberation on this matter.

Moreover, while the Defendant employers have raised the question of how other former employees could allegedly "know" about the County's policy of never paying sick leave and produced six live witnesses and two stipulated witnesses who were all former correctional officers at the jail at some time prior to the closing of the County Jail (although none of them were employed there at the time the Jail actually closed) to corroborate this "knowledge," *see* Petition at 6, every single one of them testified that their knowledge and conclusion on the availability of sick leave was based on their own personal beliefs and assumptions and that none of them could identify a single conversation with these Plaintiffs or any other individual specifically addressing this particular issue:

[By Plaintiffs' Counsel Bailey, cross-examination of David Pennington]

Q. What I'm really referring to is the availability upon someone's termination. That issue never came up to you, is that correct?

A. I'm not going to say. It's been a long time. I'm not going to say that somebody didn't come in and raise Cain about it, I just don't recall, to be honest with you.

Q. And that would be the primary basis for your testimony, as far as it being knowledgeable, it just never came up, so you assumed people knew about it; is that a fair statement?

A. It's a fair statement if it didn't happen. That was back in the '60s and '70s, and it's been a long time. I just don't recall. I'm sure it came up, but I just can't place names and stuff.

Q. You have no personal knowledge, as you sit here today, no reason to testify that any of these officers that are plaintiffs in this lawsuit had any knowledge of such policy?

A. No, I can't testify to that. I agree with you.

Testimony of David Pennington, Trial Tr. at 241-42.

[By Plaintiffs' Counsel Bailey, cross-examination of Jim Scheidler]

Q. Okay. And with regards to your understanding of the sick leave days as you either use them or lose them or you get the benefit of them some other way in retiring?

A. Correct.

Q. Is the basis of that statement -- is it your assumption that that's true based on the fact that no one was ever paid those sick leave benefits?

A. Again, it was not only policy, but pretty much known throughout the agency overtime that you were never paid for them. At least in any occasions that I ever worked with any deputies that came and went under my --

Q. With regards to any of these plaintiff correctional officers, you can't testify as to what their knowledge may have been about any such policies, isn't that true?

A. I cannot testify to that, no.

Q. And with regards to any conversations, you never had any conversations with them telling them this is what happened to your sick leave benefits?

A. I did not, sir. No, sir.

Testimony of Jim Scheidler, Trial Tr. at 253-54; *see also* 259

[By Plaintiffs' Counsel Bailey, cross-examination of George Kaiser]

Q. You would admit, would you not, that there was no written policy that covered or told anybody what happened to their sick leave on termination?

A. I would agree with that.

Q. And with regards to your understanding, you've testified that you believe it was common knowledge. What was the basis of that belief?

A. Just word of mouth and people leaving.

Q. Just assumptions that you made on what you thought they might have known or why they acted in a certain way or didn't request things?

A. That's fair.

Q. Would that be a fair statement?

A. That's fair.

Q. So it's based on your assumption as to what somebody might have known or believed or thought not based on any conversation you had with them, isn't that true?

A. That's true.

Testimony of George Kaiser, Trial Tr. at 265-66.

[By Plaintiffs' Counsel Bailey, cross-examination of Larry Gay]

Q. Okay. And with regards to your indication that you believed it to be common knowledge among your coworkers that if you left, you could quit for some reason or were terminated, then you lost them, do you recall any specific conversations you had about that?

A. No, sir.

Q. Okay. So would it be safe then to say that you were basing that really on an assumption based on your own personal thoughts and beliefs?

A. As a group, yes, us working day to day, us guys that worked up on the floors.

Q. I'm talking about you specifically?

A. Yeah.

Q. You couldn't testify what any of the rest of them knew or didn't know?

A. No, sir.

Q. You couldn't testify as to what any of them believed or didn't believe?

A. No, sir.

Q. Your testimony is related solely to the fact that based on your belief at that time and your assumptions at that time, that that's why you thought they might have known?

A. Yes, sir.

Q. Okay. Not based on any specific conversation or any policy that you had ever seen?

A. No, sir.

Q. Okay. And is it your testimony today then that you don't recall ever having heard this or been told this by any of your supervisors at the time?

A. No, sir.

Testimony of Larry Gay, Trial Tr. at 279-80. see also 282

[By Plaintiffs' Counsel Bailey, cross-examination of Barry Lewis]

Q. Do you recall any of them talking specifically about, hey, when we leave or if we quit, then we lose the sick days?

A. No, sir.

Q. You don't remember that specific conversation with anybody that worked over there?

A. No, sir.

Q. Do you recall ever being told by any supervisor, Captain Bowman or anyone else, if you quit or you're terminated, you lose your sick days?

A. No, sir.

Q. You testified earlier there wasn't a written policy that covered it, correct?

A. Not that I'm aware of, no, sir.

Q. Is it [safe] to assume then that your knowledge that you had, that you've identified, that you use it or lose it, that that was based on assumptions -- whether it be your beliefs or what have you, it was based

on your personal assumptions and not any actual experience or conversation you had?

A. That's correct.

Testimony of Barry Lewis, Trial Tr. at 289-90. *See also* Testimony of Leah Lewis, Trial Tr. at 308.<sup>7</sup> Furthermore, multiple witnesses, including specifically Defendants' witnesses Larry Gay and Barry Lewis, testified that there were multiple policies within the Sheriff's office itself, *see* Trial Tr. at 278, 290-91, let alone within the county as a whole.

With regards to the Compensation Affidavits, while Defendants allege that the Circuit Court somehow excluded the Compensation Affidavits, that suggestion is completely false. Judge Husted allowed those documents to be admitted, seen by the jury, and testified on. In fact, Judge Husted denied a Motion *in limine* filed by Plaintiffs' counsel to exclude the same. However, Judge Husted did provide a guiding instruction on how those affidavits could be used in light of the language of W.Va. Code § 21-5-10. *See* Trial Tr. at 344-45. Additionally, Plaintiffs' clearly testified that they could not afford to not sign the affidavits in light of the fact that they would not be receiving paychecks for such extended periods and they had bills due and Christmas approaching within a couple weeks. *See* Trial Tr. at 84, 114-15, and 189. Furthermore, the Plaintiff employees were advised that they would not receive their final paychecks if they did not sign the Compensation Affidavits. *See id.*; *see also* Testimony of Karen Cole, Trial Tr. at 326.

---

<sup>7</sup> Since the other 2 former correctional officers offered by the Defendants, Terry McFann and Steve Vincent, testified only by Stipulation and that Stipulation stated that "their testimony would be factually similar to that of Larry Gay and Deputy Barry Lewis," Trial Tr. at 328, they are bound by the same testimony of "assumptions and beliefs" and having no personal conversation with any of the Plaintiff employees here regarding what happened to sick leave upon termination of employment.

### III. ARGUMENT – POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

The West Virginia Wage Payment and Collection Act (“hereinafter sometimes referred to as “WPCA”), W.Va. Code §§ 21-5-1 to 21-5-18, undisputedly controls the payment of wages and “fringe” benefits to employees. In fact, W.Va. Code §21-5-1(c) defines “wages” to “include then accrued fringe benefits capable of calculation and payable directly to an employee[.]” Furthermore, “fringe benefits” are defined to specifically include “sick leave.” *See* W.Va. Code §21-5-1(l). In interpreting the WPCA, the West Virginia Supreme Court has consistently held that, in the absence of clear provisions excluding or prohibiting the payment of sick leave as fringe benefits upon an employee’s termination of employment and in the absence of communication to and actual knowledge of the employees regarding any such policy, an employer is obligated to pay such benefits under the WPCA. *See Ingram v. The City of Princeton*, 208 W.Va. 352, 356; 540 S.E.2d 569, 573 (W.Va. 2000); *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (W.Va. 1999); *Howell v. The City of Princeton*, 210 W.Va. 735, 599 S.E.2d 424 (2001).

The case of *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (W.Va. 1999) represents the Court’s first interpretation of the WPCA. *See id.* at 212, 685. The Court in that case offered an in-depth analysis and interpretation of the statute itself, *see id.* at 212, 685, in holding that the payment of “fringe” benefits is controlled by the agreement between the employer and the employee, but that the terms of employment concerning the payment of unused fringe benefits to employees must be *express* and specific so that employees understand the amount of unused fringe benefit pay, if any, owed to them upon separation from employment.

*See id.* at 216, 689.<sup>8</sup> Additionally, the Court held that, because employers are generally responsible for the drafting of such employment policies, “any ambiguity in the terms of employment will be construed in favor of the employees.” *Id.* In discussing the most factually similar case considered there (Case No. 25329 – H. Vance Stewart v. Waco Scaffolding and Equipment Co.), the Court specifically upheld the grant of summary judgment to a plaintiff employee, affirming the lower court’s appropriately simple and straightforward ruling that:

“When a contract is silent on an issue, then, under the provisions of the [WPCA], unused but accrued sick leave is considered a fringe benefit and therefore wages under the [WPCA]; and, upon leaving employment – whether Plaintiff was terminated or laid off is not really an issue for this ruling – an employee is entitled to be compensated for that absent a controlling provision of a contract that says he is not entitled to it.”

Meadows, 207 W.Va. at 212, 530 S.E.2d at 685 (emphasis added).

The Court subsequently confirmed and clarified its holding in the cases of Ingram v. City of Princeton, 208 W.Va. 352, 540 S.E.2d 569 (2000) and Howell v. The City of Princeton, 210 W.Va. 735, 738, 599 S.E.2d 424, 427 (2001). Most importantly, the Court held that implicit in the “express” requirement, each employee must have actual knowledge of the employer’s policy. *See* Howell v. The City of Princeton, 210 W.Va. 735, 738, 599 S.E.2d 424, 427 (2001). Additionally, any ambiguity in the terms of an employment contract or agreement must be construed in favor of employees. *See id.* Accordingly, under well-settled West Virginia law, without an express policy made clear to every employee that sick leave benefits were not payable upon an employee’s termination, any and all ambiguities in an employment relationship would

---

<sup>8</sup> Interestingly, the Meadows decision involved five consolidated cases on appeal, 4 of which included specific provisions eliminating the availability of such benefits upon an employee’s termination of employment. *See id.* at 217-219, 690-692. In the fifth case (Case No. 25329 – H. Vance Stewart v. Waco Scaffolding and Equipment Co.), however, involving facts almost identical to the present case, the Court affirmed the lower court’s grant of summary judgment to the employee plaintiff, finding that the inclusion of the controlling handbook policy into the record and that policy’s silence on the issue of unused sick leave was sufficient evidence to warrant the grant of summary judgment to the plaintiff employee and award him his sick leave pay. *See* Meadows, 207 W.Va. at 222-223, 530 S.E.2d at 695-696.

be construed against the employer and in favor of the employee, resulting in the payment of sick leave benefits. See Howell v. the City of Princeton, 210 W.Va. 735, 599 S.E.2d 424 (2001), and Ingram v. City of Princeton, 208 W.Va. 352, 540 S.E.2d 569 (2000) (while the Ingram case reversed the lower court's ruling in favor of the plaintiff employee, the Court there based its ruling on the fact that the plaintiff employee had actual knowledge of the defendant employer's policy regarding sick leave benefits).

Howell was decided after Ingram but both cases involved the same employer as a Defendant in the same lower court. In Howell, the lower court dismissed Plaintiff employees' complaints based on this Court's ruling in Ingram. However, this Court set the record straight yet again. In explaining the holding and ruling in the Ingram case, this Court reasoned as follows: "Mr. Ingram admitted on cross-examination that he was fully aware that the City had an unwritten policy of not paying unused sick leave to separated officers. Under *Meadows* and *Ingram* this unwritten policy would be sufficient to defeat the claim asserted by the Officers, if the record clearly illustrated that the Officers were aware of the policy." Howell v. the City of Princeton, 210 W.Va. 735, 738, 599 S.E.2d 424, 427 (2001) (emphasis in original). In stunningly appropriate language for the instant case, this Court went on to specifically find that "facts must be developed to determine whether or not the [employer] had an unwritten policy of never paying unused sick leave and, if so, *whether or not each officer knew* that the [employer] had an unwritten policy of never paying unused sick leave to separated officers." Howell, 210 W.Va. 735, 738, 599 S.E.2d 424, 427 (2001) (emphasis added).

While Defendants attempt to contort the holding in Gress v. Petersburg Foods, LLC, 215 W.Va. 32, 592 S.E.2d 811 (2003), into an expansion of the Ingram case to require some affirmative statement or representation by the employer of an employee's entitlement to

contested benefits, *see* Petition at 17-20, this suggestion cannot withstand even a basic reading of the Gress opinion. In fact, Gress involves a lower court's grant of summary judgment to a plaintiff employee on the pertinent issue of vacation pay based on the lower Court's finding that the employment policy was silent on the issue of what happened to unused vacation days at the conclusion of employment. In reversing the lower Court's grant of summary judgment, this Court found that "there is no dispute that the appellant's [employer's] employees, including [plaintiff] Mrs. Gress, were aware that the appellant had a practice of only allowing workers to take vacations in five-day increments." Gress, 215 W.Va. at 37, 592 S.E.2d at 816. Consequently, since Plaintiff Gress offered no evidence to dispute that the employer had a consistently applied unwritten policy of not paying employees for partial weeks of unused vacation at time of discharge, Ingram gave the employer a valid defense. *See id.* Importantly, and contrary to the Defendants' assertion that Gress expands the protection offered in Ingram, this Court stated "**Applying Ingram** to facts of the case at hand, in their reversal of the lower Court's grant of summary judgment. Conversely, the holding from Gress, actually supports the proposition that "a consistently applied *unwritten* [emphasis in original] employment policy regarding the payment of fringe benefits could support an employer's defense against a WPCA suit **when the unwritten policy was known by employees.**" Gress v. Petersburg Foods, LLC, 215 W.Va. 32, 36, 592 S.E.2d 811, 815 (2003) (emphasis added).

Moreover, Defendants' analysis focuses solely on the proposition that the employer must provide some affirmative statement or representation that such fringe benefits were *payable* upon termination of employment. *See* Petition at 17, 24. However, the body of this Court's rulings clearly demonstrates that this analysis is lacking. In fact, Defendants' themselves quote, with emphasis, the following language from Howell: "under *Meadows*, there must be an "express"

understanding between employers and employees regarding the payment *or nonpayment* of unused fringe benefits....” Howell, 210 W.Va. 735, 738, 599 S.E.2d 424, 427 (2001) (additional emphasis added); *see also* Petition at 23. Thus, Defendants completely gloss over the nonpayment aspect of the controlling law and lose sight of the fact that the caselaw simply requires that the employer make known to the employee under what conditions his or her fringe benefits are payable. If the employer fails to do so, as in the present case, then all ambiguities are to be resolved in favor of the employees. Most telling and completely contrary to the Defendants’ provided analysis, is this Court’s affirmation, as set forth above, of the following language from one of the lower courts in Meadows:

“When a contract is silent on an issue, then, under the provisions of the [WPCA], unused but accrued sick leave is considered a fringe benefit and therefore wages under the [WPCA]; and, upon leaving employment – whether Plaintiff was terminated or laid off is not really an issue for this ruling – *an employee is entitled to be compensated for that absent a controlling provision of a contract that says he is not entitled to it.*”

Meadows, 207 W.Va. at 212, 530 S.E.2d at 685 (quoting Case No. 25329 – H. Vance Stewart v. Waco Scaffolding and Equipment Co.) (emphasis added). Thus, Defendants’ analysis is unreasonably narrow and restricted.

In the present case, and in stark contrast to all of the other cases that this Court has taken up regarding WPCA claims, the lower Court did not grant summary judgment<sup>9</sup> but allowed a jury to be the finder of fact as to whether or not the Plaintiff employees knew about the Defendant employers’ alleged policy of never paying unused sick leave at the termination of employment. All the other cases before this Court were decided on a lower court’s grant of summary judgment or other dispositive motion or a bench trial. In fact, the lower Court here followed the exact instruction that this Court provided to the lower Court in Howell when this

---

<sup>9</sup> In fact, the lower Court denied summary judgment motions filed by both parties on numerous occasions.

Court remanded that case. This Court did not hold that the Howell plaintiffs were not entitled to payment for fringe benefits, but rather that the “facts must be developed to determine whether or not the [employer] had an unwritten policy of never paying unused sick leave and, if so, *whether or not each officer knew* that the [employer] had an unwritten policy of never paying unused sick leave to separated officers.” Howell v. the City of Princeton, 210 W.Va. 735, 738, 599 S.E.2d 424, 427 (2001) (emphasis added). A jury has already answered this factual question with a resounding and unanimous NO, they did not know.

While the Defendants want this Court to believe that this case has far-reaching implications and that it either changes the law or will impact the law regarding employers and employees from this point forward, nothing could be farther from the truth. Here, the Defendants thought enough about the topic and importance of drafting a specific written policy to identify what happened to sick leave benefits upon termination of employment, as contained in the Cabell County Employee Personnel Handbook. The employer was permitted and encouraged to do this under this Court’s holdings in Meadows (nothing in the WPCA prevents employers from ... providing ... that unused fringe benefits will not be paid upon separation from employment.”). Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 216; 530 S.E.2d 676, 689 (W.Va. 1999). However, Defendants importantly and undisputedly failed to distribute, disseminate, or discuss this policy with their employees, namely Plaintiffs here. Had they done so, this case would never have happened. There is no need to establish new law nor to look outside the body of caselaw that this Court has already adopted on this topic to determine the appropriate outcome of this case, as the jury did.

**A. THE CIRCUIT COURT'S "FAILURE" TO AWARD DEFENDANTS JUDGMENT AS A MATTER OF LAW WITH REGARDS TO THE CABELL COUNTY COMMISSION'S EMPLOYEE PERSONNEL HANDBOOK POLICY ON SICK LEAVE WERE CLEARLY SUPPORTED BY THE FACTS AND CONTROLLING CASELAW IN THIS MATTER WHERE THE PLAINTIFF EMPLOYEES HAD A 3 INCH HANDBOOK ON POLICY AND PROCEDURE THAT DID NOT INCLUDE THE REFERENCED LANGUAGE AND WHERE THE PLAINTIFF EMPLOYEES WERE PROVIDED WITH A PAGE PURPORTING TO BE THE COUNTY COMMISSION POLICY THAT DID NOT REFERENCE OR INCLUDE THE REFERENCED LANGUAGE.**

Thus, while the Defendant employers attempt to dress up their assignments of error in this case, the fact is that the Defendants are simply unhappy with the jury's verdict. They did nothing below to preserve any alleged error and they are relying on this Court to overturn or remand this case to give them another shot. To accomplish this, the Defendants have relied on half-truths, lawyer speak and outright misrepresentations of both facts and law regarding this case. More specifically, the Defendants are required to refer, on multiple occasions, to alleged "undisputed" facts and to alleged "concessions" by the Plaintiff employees that were either never developed in the case or that Plaintiffs actually never conceded at trial. Moreover, Defendants contort the law of this case into an employer-favored law which places the burden on the employee to not only read every policy ever implemented by the employer, even if the policy is not disseminated to that employees' particular job classification, but also effectively shifts the burden of the "policy drafter" from the employer to the employee by construing ambiguities in favor of employers. This position is not only completely contradictory to the WPCA and interpreting caselaw, but it also completely flies in the face of common contract law and sound public policy. To place such burdens on individual employees when they are neither responsible for setting the policies, nor for drafting the policies, nor for disseminating the policies is incomprehensible. In fact, the employees' primary, if not only, role in the process is to "accept

or reject [the] conditions” set by the employer. Meadows. This Court clearly had it right when it said, in no uncertain terms, that “any ambiguity in the terms of employment will be construed in favor of the employees.” Meadows.

Additionally, any such unwritten policy could not possibly be considered “consistently applied” when the sick leave benefits were undisputedly payable upon retirement “(1) to either increase the years of service or (2) to pay for additional months of health insurance coverage.” Affidavit of Karen Cole, Exh. H. to Defendants’ Response. This fact alone creates an expectation in the minds of employees that they may receive the benefit of the sick leave and makes it available to some upon termination of employment (i.e., retirement) but not available to others, thus demonstrating the very model of “inconsistent application.” Additionally, as set forth above, and unlike the plaintiff employee in the Ingram case, the Plaintiff employees here all believed that some former employees had been paid sick leave benefits upon their termination of employment, and, at a minimum, that former employees would receive the benefit of their accumulated and unpaid sick leave upon retirement. *See* Plaintiffs’ Answers to Defendants’ First Set of Interrogatories, No. 3 at p. 3; *see also* Affidavits of various Jail Employees, Plaintiffs’ Trial Exhibits Nos. 4A-4V; *see also* Affidavit of Karen Cole, ¶6 at p 2, attached as “Exhibit H” to Defendants’ Response to Plaintiffs’ Renewed Motion for Summary Judgment.

Despite the fact that it is totally irrelevant, unsupported, and inadmissible, Defendants ask this Court to draw a conclusion from the fact that there were various other former jail employees who did not join in this lawsuit, implying that there was some underlying knowledge of a supposed policy that prevented them from doing so. However, based upon information, knowledge and belief, there were approximately 34 jail employees working at the time of the

jail's closing in December 2003.<sup>10</sup> Since 22 of these former employees are Plaintiffs here, that leaves only 12 who did not join the lawsuit. Given Defendants' supposition as to why they may not have joined, despite the fact that their reasoning bears absolutely no relevance to this case whatsoever, based upon information, knowledge and belief, two (2) actually had no sick time left or owed time for sick leave taken, four (4) others had only between 6.5 and 14 sick days remaining, and several, if not all, of the remaining six (6) were applying for jobs with the Sheriff's office, one of the Defendants to this lawsuit. Thus, it could just as easily, if not more believably, be presumed that the former employees who did not join the suit either did not have enough of an interest to warrant their involvement in the case or they perceived that they might be looked upon less favorably in their applications for employment with the Sheriff's office. See Plaintiffs' Reply Memorandum in Support of Their Renewed Motion for Summary Judgment at 4-5.

The lower Court provides the best explanation of its reasoning for denying the Defendants' Motion for new trial in the 4/2/10 hearing when its stated:

Mr. Watson, I am going to deny your motion. I do find that the language contained in *Chambers* is very specific. And I don't think that just the fact that the verdict is contrary to what you believe the evidence to have shown is sufficient to give you a new trial. I do believe that the evidence was conflicting. That they gave it the weight that they felt it was deserved and it was completely a judgment call on the part of the jury or else I would have directed a verdict. I didn't do so. I thought it was a matter left to the jurisdiction of the jury and that they did render a verdict that they felt was fair and equitable.

4/2/10 Hrg. Tr. at 4.

---

<sup>10</sup> While there may have been several other employees, such as Barry Lewis, who left shortly before the jail closing, our records indicate that only 34 were actually still employed as of the last day that the jail was open.

**B. THE CIRCUIT COURT'S ADMISSION OF AND INSTRUCTIONS REGARDING THE COMPENSATION AFFIDAVITS IN THIS MATTER WERE APPROPRIATE UNDER THE LAW AND THE COURT NEVER RULED THAT SUCH AFFIDAVITS WERE INVALID UNDER THE WAGE PAYMENT AND COLLECTION ACT.**

Defendants' Petition, as in the case below, relies on the Plaintiffs' execution of the compensation affidavits at the time that they received their last paychecks as apparently establishing some sort of waiver or release of other monies owed, in clear contradiction of the law. In fact, on a review of such documents, it is clear that the documents were drafted in compliance with W.Va. Code §7-7-10.<sup>11</sup> Under that section of the Code, the County Commission was required to procure, collect, and maintain such affidavits from elected county officials, assistants, deputies, and employees. However, the thrust of that section seems to be more focused on the rendering of services and the lack of any obligation to a third party for the job itself or any job-related benefits. Most importantly, the section and the affidavits do not discuss the payment of sick leave benefits specifically, nor do they even address the issue of fringe benefits generally. Notwithstanding the fact that those Compensation Affidavits are silent as to the specific issue of sick leave, W.Va. Code § 21-5-10 specifically prohibits the application of those affidavits as releases or waivers of additional monies owed. In fact, § 21-5-10 states, in pertinent part, that "no provision of [the WPCA] may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void." W.Va. Code § 21-5-10. Accordingly, Defendants' reliance on these affidavits to demonstrate Plaintiffs' acknowledgment of full payment for services is totally

---

<sup>11</sup> Interestingly, this code section and the requirement for compensation affidavits was repealed by an act of the legislature in 2004. Thus, while the affidavits were still required at the time of Plaintiffs' departure from Defendants' employment, the affidavits are no longer required, and it is questionable as to whether or not Defendants would have even required such affidavits after this section was repealed mere months later.

contradicted by the clear language of this statute. Moreover, the statute does not allow an employee to impliedly waive, as Defendants argue,<sup>12</sup> by their silence at the time of payment of other final wages their rights to any additional monies. Furthermore, given the applicable case law which requires an express policy regarding the availability of sick leave benefits upon termination of employment and/or actual knowledge of the substance of such a policy, these affidavits cannot be used to create an issue of fact simply by their existence because they are altogether silent as to the issue of sick leave benefits.

Again, Defendants' Petition on this issue really boils down to whether or not the Compensation Affidavits provide additional evidence which would permit the conclusion that the Plaintiffs knew or should have known of the alleged policy on sick leave or that they were deemed to have effectively waived or released any rights to additional monies by remaining silent on the issue at the exit interviews and at the time of payment on other final wages. The law says no and the jury, after having an opportunity to review these affidavits said no as well. Accordingly, Defendants' Petition should be denied.

**C. THE CIRCUIT COURT'S AWARD OF DAMAGES IN EXCESS OF THIRTY DAYS WAS SUPPORTED BY THE CONTROLLING CASELAW, THE FACTS AS DETERMINED BY THE JURY, AND BY THE DEFENDANTS' FAILURE TO ADVOCATE THIS INTERPRETATION OF MEMO LOG FILE #2002-005 UNTIL WELL AFTER THE TRIAL WAS OVER.<sup>13</sup>**

- 1. The Defendants here never advocated nor interpreted the attachment to Memo Log File #2002-005 as a limitation on available sick leave before or during the trial of this matter – only after Defendants lost the trial on the merits.***

---

<sup>12</sup> In their Petition, Defendants argue that if the Plaintiffs felt they were entitled to additional monies in the form of sick leave, they should have brought it up at their exit interview, and since they did not, by their silence, they apparently impliedly waived or released any claim to additional monies. However, W.Va. Code § 21-5-10 cuts squarely against such a conclusion or implication.

<sup>13</sup> The lower Court provides a well-reasoned explanation of its holding in the Judgment Order at pp. 5-7.

With regards to the Defendants' position regarding the limitation of Plaintiffs' sick leave days to 30 based upon the language of the attachment to Memo Log File #2002-005, it is important to point out that the Defendants' position was not only completely missing from every stage of this matter, including their Responses to the Requests for Admissions, but it should be further noted that Plaintiffs' counsel addressed the issue in Plaintiffs' Pre-trial memo:

Plaintiffs' accrued sick leave and pay rates as of the date of their termination of employment in December 2003 have all been established by Admissions on the part of the Defendants. *See Defendants' Response to Plaintiffs' First Set of Request for Admissions*, a copy of which is attached hereto and made a part hereof as "Exhibit A."

\* \* \*

**Additionally, the amount of damages that each Plaintiff would be entitled to is undisputed and is a purely mathematical calculation based on the controlling statutory and other applicable law, *in light of Defendants' admissions*, and is strictly an application of the law should the jury find the facts in the Plaintiffs' favor.** As such, and based on the controlling case law, Plaintiffs would submit that the only questions of fact to be decided by the jury are the question as set forth below:

## **II. CONTESTED ISSUES OF FACT**

1. Did the Defendant employers have an *unwritten* policy regarding what happened to sick leave benefits upon the termination of an employee's employment?
2. Did the Plaintiff employees have *actual knowledge* of any such alleged unwritten policy regarding what happened to sick leave benefits upon the termination of their employment?
3. Those listed by any other party to this litigation, as supported by the applicable law and facts of the case.

Plaintiffs' Pre-Trial Memo at 3-4 (emphasis added). Despite this obvious reference to the use of the admitted accrued sick leave numbers, at no point prior to or during the trial did Defendants ever express any disagreement with this position, and in fact, voiced their concurrence with this position to both Plaintiffs' counsel and the Judge on numerous occasions. In fact, Defendants did not even address the issue in their initial Response to Plaintiffs' Motion for the Establishment

of Damages and were forced to file an Amended Response to raise this position for the first time in this case. In fact, this topic was discussed in detail at the April 2, 2010 hearing on the Plaintiffs' Motion for Establishment of Damages and on Defendants' Motion for a New Trial:

MR. BAILEY: ... with regards to the language we're referring to [from the attachment to Memo Log File #2002-005], it says the carryover of sick leave for bona fide personal illness absences is limited to 30 days, provided, however, for retirement purposes there is unlimited carryover of sick leave time. It would certainly be within the province of someone who would be looking at that, if it were appropriate to say, well, if they took sick leave time during any one year, which is what Mr. Johnson testified to, that was the purpose of his memo that day. You can't take more than 30 days in any one year as sick leave. That was the purpose of the memo. With regards to that, though, Your Honor, I think it really is a red herring here that basically they're trying to change the rules of the game after the game is over. They've admitted by the request for admissions, which under the rule are established as definitive here now. They've admitted what the accrued sick leave was for each plaintiff. *There was no dispute in all of the representations to the Court and to counsel before this trial. There was no dispute as to the amount of the damages. It was purely mathematical. If this was ever going to be an issue, it should have been an issue prior to this trial. To come back now and say, oh, it should be limited to 30 days because this one document could be interpreted this way, I think that's -- not only is it inappropriate, it's highly prejudicial to my clients.* So, with regards to the 30 days, Your Honor, I think it bears absolutely no significance to what the Court is considering today.

THE COURT: Let's talk about that a minute. Mr. Watson, I have to admit I'm really -- I'm concerned with this issue.

MR. WATSON: Well, Your Honor --

*THE COURT: It was my understanding and I asked numerous times on whether or not the figures that you gave to the Court and that you agreed to stipulation were the figures that you considered to be the damages in this case and you all said yes. He's right. It was never ever raised that you were going to submit certain figures to the jury and then later when you came to me, you were going to change them.*

MR. WATSON: Your Honor --

THE COURT: I mean, I know where you're coming from.

MR. WATSON: Absolutely.

*THE COURT: I'm kind of like him. If you were going to take that posture, you should have done it before we did the trial.*

4/2/10 Hrg. Tr. at 10-12 (emphasis added).

*MR. BAILEY: Your Honor, I think you hit on it exactly. It never came out at trial. It never came out before trial. The first time I have ever heard of this position was in this brief –*

*THE COURT: Me, too.*

*MR. BAILEY: -- that the defendants have filed.*

THE COURT: And it's giving me trouble because of the fact that -- if I hadn't (*sic*) had it addressed to me before, I would have made some provision. The stipulated figures that you sent them, I would have never allowed those figures to even go to them.

4/2/10 Hrg. Tr. at 14 (emphasis added).

THE COURT: I'm really troubled by this. I mean it should have been raised before this ... but procedurally wise I don't know that I can go back and change the history of the trial now. Based upon something that you probably should have done during the trial or in the motions in limine to get this matter straight and resolved for me.

MR. WATSON: Well, again, as you have indicated, you know, you're not saying how to try the case, but from my perspective this was an issue that would be argued before you at this time and under this motion to establish damages.

THE COURT: And I might agree with that and not have any problem, if we hadn't sent those figures back to them that indicated their entire sick leave time.

MR. BAILEY: Your Honor, I think that's the basis of this proposition. Is that everyone except for perhaps the defendants was operating under the same belief that the Rule 36 says specifically, quoting, any matter admitted under this rule is established.

THE COURT: I know. I know.

MR. BAILEY: There were admissions on file that each of the plaintiffs' accrued sick leave days are this.

THE COURT: And I have to admit that is what the admission stated. And there was no caveat, but, we're limiting it only to 30 days of this. They had 50 days, but they only get 30.

MR. WATSON: Well, but our position was, here's the question. We admitted to what they said, because that was the right thing to do, because we checked and the figures were accurate based on the time sheets. The pay rate was accurate based on the time sheets. But we -- our position was we're just admitting that because you've requested the admissions, but we're not saying because of that you're going to get paid everything. I mean our whole position was you don't get anything and I'm not going to -- at least I don't think that I'm responsible to argue to this jury, hey, but if you find for them -- I don't want to plant that seed in their mind -- only give them 30 days. That's not their role. That's your role.

*THE COURT: That would have been my role before the figures went to the jury. If you were going to make that argument, you should have made it before we allowed that stipulation to go to the jury. You should have said, Judge, this is -- just like you're doing right now. This is my position. We agree that so and so has 80 days. So and so has 60 days. But they're only going to be entitled when it comes down to you assessing damages to 30 days. And that's the only amount I want to go to the jury. And you didn't do it.*

MR. WATSON: Well, the reason we didn't do it was because the -- of the way the interrogatory was asked and the requests for admissions we responded accordingly.

THE COURT: You know as well as I do you could have qualified your answer to that interrogatory. You're a great attorney. There's no way you would have known that you could have done that. I think you just missed it.

MR. WATSON: Well, if I did, it certainly was -- was not in my mind.

THE COURT: I know it was inadvertent and I know that's probably not what you thought, but I'm stuck with what the record is.

4/2/10 Hrg. Tr. at 16-18 (emphasis added).

*THE COURT: I was like Mr. Bailey. I thought this was resolved that if they got -- it was my understanding and correct me if I'm wrong. If we need to make Jo do the transcript we will. I hate to do that to her, but it was my understanding that the figures that you submitted to the jury were the figures that I would use for damages with regard to the lost sick leave. The only thing that was going to be left up to me was the*

*reasonable attorney fee. That was my entire understanding of the only thing that I would have to decide. Because I thought you all said you stipulated to the amounts. I know I asked you several times, so you all are agreeing this is the figures that will be used for damages, and you both went yes.*

*MR. BAILEY: Yes, Your Honor.*

*MR. WATSON: My recollection -- and I could be wrong, but I -- if I implied that, that wasn't the case, because I was in a position that they weren't going to decide anything as to damages, that you were --*

*THE COURT: And that's why I am -- we'll go back and maybe I can have her do the motions in limine. I'm pretty sure that's where we raised it and you all said, well, we've agreed on these figures. And these are the figures that are the damages figures. I'm almost positive. Now, if I'm wrong, I'll be glad to be wrong, but that's my recollection of it.*

*MR. BAILEY: Your Honor, that would be my recollection of it as well. I don't know if it was a motion in limine or somewhere else. I think it took place on several occasions.*

*THE COURT: I was going to say, I'm sure we addressed it before the trial started. I know we addressed it in the motions in limine, because I have got some notes on it. And I've got, "They stipulated on the damages. I will calculate attorney fees." And that's my notes.*

4/2/10 Hrg. Tr. at 21-22 (emphasis added).

Accordingly, Defendants' identification of this issue at this stage of the proceedings and under these circumstances under the guise of their claim that "we thought this was subject to argument in front of the Judge after the trial" is disingenuous at best and is certainly not supported by any statement or filing ever made by Defendants at any point prior to their Amended Response to Plaintiffs' Motion for Establishment of Damages, which was filed outside of the time frame for any proper post-trial motions here when "damage control" became of greater concern. Accordingly, Defendants waived any such alleged error by not raising it until well after the fact.

## 2. *Defendants Admitted the Number of Accrued Days Early in the Case*

Furthermore, this argument fails to account for the fact that Defendants explicitly admitted that these were the correct number of “accrued” sick leave days for each Plaintiff in their “Responses to Requests for Admissions.” They did not contend that the identified number of days were incorrect in light of the language of joint exhibit 2 (which was offered, identified and known well in advance of Defendants’ Responses to the Requests for Admissions) nor did they offer any caveats, affirmative statements, or explanations regarding their admissions. They filed unqualified admissions that the identified days were “accrued” by each of the Plaintiffs. They never moved the lower Court to withdraw or modify any such admission. As set forth under W.Va. R. Civ. P. 36(b), “[a]ny matter admitted under this rule is conclusively established.” Defendants cannot now change the rules after the game is played to modify the outcome.

## 3. *The Language of the Policy is Ambiguous at best.*

Moreover, Defendants refer to inconclusive language about the carryover of sick leave for “bona fide personal illness absences” in a joint exhibit as dispositive of the issue of whether or not these Plaintiffs were entitled to their full sick leave pay. This position is preposterous. First, Plaintiffs here did not use the days for “bona fide personal illness absences” and thus, are not subject to any such limitation. Second, the jury made no attempt to clarify or question the Court regarding this matter even though they made a full review of the document and heard copious testimony on the document. Interestingly, Defendants never even pointed to this language at the trial of this matter as persuasive or important in any way. Accordingly, the Memo policy, on its face, addresses only two scenarios regarding sick leave: “bona fide personal illness absences” and “retirement.” The document mentions absolutely nothing about any other scenarios, including specifically, termination of employment. In fact, the Defendants did not

even interpret this document as a limitation until more than six years of litigation and the completion of trial. This fact, in and of itself, lends credence to the ambiguity of the provision itself and the construing of such ambiguity in favor of the Plaintiff employees as set forth under the law.

**4. *Defendants' Interpretation is Contrary to Jury's findings and verdict.***

Finally, Defendants' position that knowledge of this language should result in a limitation of the Plaintiffs' benefits is completely contrary to the jury's verdict. In fact, if Plaintiffs would have had knowledge of such a limitation as it related to their claim, then the jury would likely have found that the Plaintiffs "knew" of Defendants' policy. Here, the jury absolutely, unequivocally decided that the Plaintiffs had NO knowledge of any policy of the Defendants related to sick leave or what happened to it on termination. The law itself favoring employees in this situation, where it is unclear and unknown as to the employer's policy, clearly dictates a decision in favor of the Plaintiffs on this issue.

**D. GIVEN THE LANGUAGE OF THE CONTROLLING WPCA STATUTE AND CONTROLLING CASELAW AND THE JURY'S FINDING IN FAVOR OF THE PLAINTIFF EMPLOYEES, THE CIRCUIT COURT WAS, AT THE LEAST, WELL WITHIN ITS DISCRETION AND PRIOR GUIDANCE PROVIDED BY THIS COURT TO IMPOSE STATUTORY PENALTIES AND ATTORNEY FEES.**

Under WV Code § 21-5-4, an employer is obligated to pay an employee's wages, including all accumulated fringe benefits, not later than the next regular payday. By failing to pay the due and owing accumulated fringe benefits and wages by the next regular payday, the employer becomes liable for liquidated damages in the amount of each employee's regular pay for each day the employer is in default, up to and including thirty (30) days wages, as a statutory

penalty. *See* WV Code § 21-5-4(e) (as codified at the time of termination of employment).<sup>14</sup> The statutory language makes the payment of such liquidated damages mandatory. (“If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation *shall*, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default,” up to thirty days. W.Va. Code § 21-5-4(e). Nothing in Defendants’ Petition addresses why they allege this mandatory award of statutory liquidated damages is inappropriate other than their apparent attempt to pull it under the “special circumstances” language of Farley v. Zapata Coal Corp., 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981), which not only doesn’t apply to the mandatory statutory damages award, but also doesn’t rise to the level of special circumstances identified in Farley.

Furthermore, the “Wage Payment and Collection Act” provides that an employer in default under the provisions of the act is generally obligated to pay the plaintiff’s reasonable attorney’s fees and costs, including interest. *See* WV Code § 21-5-12. As the lower Court pointed out:

Clearly the Legislature intended that prevailing workers could recover fees under the Act. As this Court has observed in *Hollen v. Hathaway Electric Inc.*, 584 S.E.2d 523 (2003), “the purpose of the fee shifting under the Act is that the opportunity to recovery attorney's fees makes it much more likely that the provisions of the Act will be enforced, and that those it seeks to aid will be able to benefit from its protections:

We feel that costs, including attorney fees, should be awarded to prevailing plaintiffs as a matter of course in the absence of special circumstances which would render such an award unjust. Both the Wage Payment and Collection Act and our mechanics' lien statutes are designed to protect the laborer and act as an aid in

---

<sup>14</sup> Since then, the Legislature has seen fit to increase the liquidated damages to treble damages, *see* WV Code § 21-5-4(e) (as now codified), a change which would have increased the verdict here by nearly 2-3 times. By changing the liquidated damages, the Legislature has demonstrated the importance it places upon the payment of these wages and other benefits.

the collection of compensation wrongfully withheld. Working people should not have to resort to lawsuits to collect wages they have earned. When, however, resort to such action is necessary, the Legislature has said that they are entitled to be made whole by the payment of wages, liquidated damages, and costs, including attorney fees. If the laborer were required to pay attorney fees out of an award intended to compensate him for services performed, the policy of these statutes would be frustrated.

*Farley v. Zapata Coal Corp.*, 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981); accord, *Taylor v. Mutual Min., Inc.*, 209 W.Va. 32, 543 S.E.2d 313 (2000) (*per curiam*). The Court went on to hold: "An employee who succeeds in enforcing a claim under W.Va. Code Chapter 21, article 5 should ordinarily recover costs, including reasonable attorney's fees unless special circumstances render such an award unjust." *Farley* at syl. pt. 3.

Judgment Order at 13. Thus, the lower Court was not only within its discretion to award Plaintiff employees attorney fees, but the guidance from the Legislature and this Court indicates that such an award is appropriate.

Merely not planning or budgeting for it, as the Defendants claim, is not a sound or sufficient reason for avoiding the imposition of the fees as contemplated under the "special circumstances" language of Farley. In fact, none of the supposed "circumstances" cited by Defendants are any different than those any other employer would be facing, and many of them are completely inaccurate or false representations. Specifically, all of the Plaintiffs testified that they did address this matter prior to their separation from employment through their attorney. See Trial Tr. at 113-15, 161-63, 186-89. Additionally, contrary to Defendants' representations, the Plaintiffs sent a letter, produced in discovery below, to Civil Service Commission President R. Lee Booten, II on December 5, 2003, approximately ten days before Plaintiffs' employment was terminated, advising Defendants of Plaintiffs' intention to pursue this matter. See letter from Bailey to R. Lee Booten, II of 12/5/03 and the response letter from R. Lee Booten, II to Bailey of 12/8/03, collectively attached hereto and made a part hereof as

“Exhibit C.” Furthermore, Plaintiffs would contest the representations that “no one had ever received these fringe benefits,” and no one had ever relied upon the existence of these fringe benefits,” as completely contrary to the trial testimony received. In fact, it was undisputed at trial that a number of former employees had received these benefits in retirement, and Plaintiffs believed, in other circumstances, and the Plaintiffs further testified that they were all relying on the existence and availability of these benefits, either in retirement, or in use throughout their careers. Of further note, Defendant employers conceded the appropriateness of attorney’s fees in the April 2, 2010 hearing regarding the establishment of damages, wherein they stated: “[w]e will concede the case law says that under the matters such as this, that the attorney is entitled to attorney fees, but then the issue becomes one of reasonableness.” 4/2/10 Hrg. Tr. at 8. Accordingly, Defendants’ attempt to invoke the “special circumstances” language of Farley is misguided and factually unsupported.

**E. PROCEDURALLY, DEFENDANTS FAILED TO PRESERVE ANY OF THESE ISSUES FOR APPEAL BY MAKING JOINT STIPULATIONS, FILING JOINT AND MUTUALLY AGREED UPON JURY INSTRUCTIONS AND JURY VERDICT FORM, BY FAILING TO MOVE FOR DIRECTED VERDICT AND/OR JUDGMENT AS A MATTER OF LAW AT THE CONCLUSION OF THE EVIDENCE, AND BY FAILING TO FILE A PROPERLY SUPPORTED MOTION FOR NEW TRIAL WITHIN TEN DAYS OF THE JURY’S VERDICT OR OF ENTRY OF THE JUDGMENT ORDER.**

“[I]t is well settled law and the courts adhere to the longstanding rule that introduction of evidence [after refusal a party’s motion for directed verdict made at the close of his opponent’s case] constitutes a waiver of the objection to the sufficiency of the evidence unless the motion for a directed verdict is renewed after all of the evidence is in.” Chambers v. Smith, 198 S.E.2d 806, 809, 157 W.Va. 77, 80 (1973); *see also* R. Civ. P. 50. In this case, upon a review of the Trial record, it becomes apparent that the Defendants moved for directed verdict at the close of

Plaintiffs' evidence, *see* Trial Tr. at 202-03, but failed to renew that motion at the close of all evidence. *See* Trial Tr. at 327-379. Likewise, Defendants made one post-trial motion for a new trial within ten days of the jury verdict but cited as its sole grounds that "[t]he jury's verdict was in contradiction to the weight of the evidence presented in the case." Defendants' Motion for New Trial ¶1, p. 1. Defendants provided no specifics or particulars in their motion other than this basic statement. Defendants raised no other alleged errors, mistakes, rulings, admissions, or omissions, and offered no other argument, support or explanation on their motion for new trial. The lower Court properly denied that motion, based on this Court's rulings in Chambers v. Smith, 198 S.E.2d 806, 810, 157 W.Va. 77, 82 (1973), which holds that '*Merely stating that 'The verdict is contrary to the evidence' has been held not to be sufficient to meet the requirements of stating the grounds with particularity.*' (quoting Steptoe v. Mason, 153 W.Va. 783, 172 S.E.2d 587) (emphasis added). Defendants did not renew any such post-trial motions nor did they make any other motions after the entry of the lower Court's Judgment Order on June 24, 2010. Accordingly, Defendants cannot now raise the issue of failure to award them judgment as a matter of law, as alleged in their first assignment of error. Furthermore, given Defendants' hand in and joint submission of the jury instructions, jury form, and stipulations here, Defendants cannot take issue with the instruction on the Compensation Affidavits, as they ellege in their second assignment of error. Consequently, Defendants' Petition should be refused.

**F. ORAL ARGUMENT ON THIS MATTER IS UNNECESSARY BECAUSE IT DOES NOT TOUCH ON ANY NEW LEGAL ISSUES NOR DOES IT INVOLVE ANY LEGAL INTRICACIES THAT REQUIRE FURTHER DEVELOPMENT.**

Because, as set forth above, this case presents no matters of first impression under the controlling law, this case is not appropriate for oral argument or presentation. In fact, despite Defendants' vague and general proclamation that the case presents matters of first impression,

they do not point to nor identify one issue that they deem to be a matter of first impression. Instead, the Defendants want this Court to believe that this case has far-reaching implications and that it either changes the law or will impact the law regarding employers and employees from this point forward. Nothing could be farther from the truth. Here, the Defendants thought enough about the topic and importance of drafting a specific policy to identify what happened to sick leave benefits upon termination of employment, as contained in the Cabell County Employee Personnel Handbook. The employer was permitted and encouraged to do this under this Court's holdings in Meadows (nothing in the WPCA prevents employers from ... providing ... that unused fringe benefits will not be paid upon separation from employment."'). Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 216; 530 S.E.2d 676, 689 (W.Va. 1999). However, Defendants importantly failed to distribute, disseminate, or discuss this policy with at least some of their employees, namely Plaintiffs here. Had they done so, this case would never have happened. There is no need to establish new law nor to look outside the body of caselaw that this Court has already adopted on this topic to determine the appropriate outcome of this case, as the jury did. The lesson to this employer and to any other employer, as gleaned from the existing caselaw, is to actually distribute and make known to your employees those policies you create regarding their employment. Accordingly, Respondents would object to same and hereby request that this Court deny Petitioners request for oral argument and issue its Order denying the Petition and/or affirming the decision of the lower court.

#### **IV. CONCLUSION**

Respondents, Plaintiff employees below, therefore pray, based upon the foregoing and the record below, that this Court refuse the Petition for Appeal in this matter and issue its Order denying the Petition and/or affirming the decision of the lower court.

**NATHANIEL ADKINS, JERRI ALLRED,  
TIM BLEVINS, JOHNNY R. BOWMAN,  
JOHN BOWMAN, II, DIANNE BRUBAKER,  
DARRELL CHAPMAN, JOHN COBURN,  
KENNETH GLOVER, WAYNE JARRELL,  
RUTH JONES, GARY LAMBERT,  
RONNIE MILLER, BONNIE MYERS,  
STEVEN RAPPOLD, JERRY RYDER,  
JEREMY SKIDMORE, KAREN SPENCE,  
GREGG STILTNER, JAMES VAUGHT,  
ELGIN WARD, and KEVIN WHITE**

By Counsel

*Michael S. Bailey*

Michael S. Bailey, Esquire (WV Bar #8507)  
Gregory L. Howard, Jr., Esquire (WV Bar #7725)  
BAILEY & HOWARD, PLLC  
642 Main Street, Suite 201  
P.O. Box 347  
Barboursville, WV 25504  
(304) 736-0801

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**