

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Gregory Grim, *et al.* ,
Petitioners,

v.

Docket No. 13-1133

Eastern Electric, LLC.,
Respondents.

PETITIONERS' REPLY BRIEF

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On March 27, 2014 Respondent Eastern Electric, LLC. filed a Respondent's Response to Petitioners' Initial Brief ("Eastern Electric's Response" or "Response"). In accordance with this Court's Scheduling Order in this proceeding, this is the Petitioners' Reply thereto. The Response is structured in a manner that does not follow the organization of the Petitioners' Initial Brief (see Response footnote 3). For ease of reading, this Reply will attempt to follow the Responses' organization.

Argument

A. Eastern Electric's Reliance on Ms. Ferrell

Time and again throughout the Response the Respondent states that Eastern Electric relied upon the alleged statement of Ms. Krista Ferrell of the West Virginia Purchasing Division that the prevailing wage did not apply to the contract at issue because it was a maintenance contract. In fact, the Respondent states that, "it is undisputed in the record that Ms. Ferrell told Mr. Harlow [of Eastern Electric] that prevailing wage rates did not apply because the contract was a maintenance contract." (Respondent's Brief, p. 16 see also p. 17). This assertion is the Respondent's justification for the application of the honest mistake or error provision of the prevailing wage law. The problem with the Respondent's assertions is that these matters are disputed. The record reflects that Ms. Ferrell testified, under questioning by Respondent's counsel, that not only could she not recall if Eastern Electric or any bidders spoke with her regarding the applicability of prevailing wage to the contract at issue but that she could not say how she would have responded to such a question. (A.R. 243). To say that the existence and substance of a conversation with Ms. Ferrell is undisputed is simply inconsistent with the record of this proceeding.

Like the Circuit Court's and the Respondent's reliance on Mr. Parsons, (see Petitioners' Initial Brief, frnt 12), their reliance on Ms. Ferrell is an example of the Circuit Court violating this Court's

numerous holdings for Circuit Court consideration of motions of summary judgment including taking the record as a whole, not weighing issues of fact and not construing facts in the light most favorable to the opposing party.

Given the Respondent's focus on the purported conversation with Ms. Ferrell regarding a statement that the contract was for maintenance¹ and was therefore somehow not covered by the Prevailing Wage Act, this Court should note the clear wording of the key documents at issue in this proceeding demonstrate that the contract was for construction and repair of public facilities. As this Court is aware construction and repair of public facilities falls within the prevailing wage law of West Virginia.

As discussed in the Petitioners' Initial Brief (Initial Brief, pp. 10 -11), the Request for Quotation for the contract at issue was, "to provide electrical, construction, maintenance, and repair services..." The Contract/Purchase Order at issue incorporates the RFQ and states that the Contract is for "Repairs, Alterations, Modifications & Maintenance." (A.R. 61). It is clear that not only does the prevailing wage law include contraction and repairs but the clear wording of RFQ and Contract at issue states that the work to be accomplished includes construction and repair. To say that it was "reasonable for Respondent" to rely on the purported statement by Ms. Farrell that the contract was for maintenance in light of the clear language of the RFQ and the Contract and to award the Respondent Summary Judgment based on that reliance is a clear error that must be overturned.

¹ It is worth stating that there is nothing in the Prevailing Wage Act that provides that maintenance is not covered by the Act.

B. Honest Mistake and “Mandatory” Prevailing Wage Language²

The Respondent, asserts that the contract at issue does not provide for coverage by the West Virginia Prevailing Wage law. As noted in Petitioners’ Initial Brief the *back of every page* of the Purchase Order (A.R. 62) for the contract at issue in this matter states that not only do the laws of West Virginia apply, in language that parallels the RFQ, but in addition states:

COMPLIANCE: Seller shall comply with all Federal, State and local laws regulations and ordinances including, but not limited to, the prevailing wage rates of the WV Division of Labor. (Emphasis original)

As previously noted the record of this proceeding demonstrates that time and again the Petitioners performed identical work for the Respondent on other public projects and were paid the prevailing wage.³ Given the clear language of the Purchase Order as well as the Respondent’s expertise with paying prevailing wages for identical work on public projects, it is difficult to accept the Respondent’s argument and the Circuit Court’s holding that the Respondent’s violation of the laws of West Virginia is an honest mistake or error. In addition, the Respondent has provided no West Virginia law whatsoever that the provision of the prevailing wage law regarding an honest mistake or error is intended as a mechanism to completely block the application of the law.⁴ The Respondent has

² On pages 22-23 the Respondent lists six alleged undisputed facts in the record. A fair reading of the six points finds that rather than facts the six are a mixture of statements about the law and assertions. Let us be clear, the Petitioners dispute each and every one of the six points. That is for example, the PWA law does not require mandatory language requiring contractors to pay the prevailing wage; the RFQ and the contract at issue include language regarding the applicability of the prevailing wage; the record is disputed regarding whether the Respondent asked Ms. Ferrell regarding coverage and what Ms. Ferrell would have responded; and the question of whether the Respondent did or should have relied on any statements by State employees given the Respondent’s history of paying prevailing wages to employees for the same work at issue in this proceeding; and many of these matters are genuine issues of fact that must be decided by a jury. As the Petitioner’s Initial Brief details, the Circuit Court erred in its application this Court’s holdings regarding the granting of motions for summary judgment and improperly granted Summary Judgment in the instant matter. The Respondent’s list is a clear demonstration of the Circuit Court’s errors.

³ See Petitioners’ Initial Brief p. 24

⁴ In support of the Respondent’s argument regarding mistakes, the Respondent cites a Massachusetts District Court Opinion in *McGrath, III v. ACT, Inc.* (No. 08-ADMS-400018, Nov. 25, 2008) As discussed in Petitioners’ Initial Brief, while the Opinion does not discuss the issue of mistakes, it does discuss the issue of whether an individual was due the Massachusetts prevailing wage. In *McGrath, III* there was a dispute as to the meaning of language regarding “prevailing labor and material rates” contained in a series of contracts. However, the Plaintiff failed to invoke Mass. Rules of Civil Procedure Rule 56(f) which would have permitted discovery on that issue prior to the consideration of a motion for summary judgment. Without the benefit of the facts uncovered during additional discovery at issue, it is impossible to

also failed to cite to any West Virginia law⁵ for the proposition that the prevailing wage law only applies where there is some particular specific language in the contract at issue⁶. The Respondent has not done so because there is no such law.

The Respondent looks to a strict reading of the statute in arguing that the “clear mandate” of the prevailing wage law is that without particular mandatory language is required for prevailing wage rates to be applicable to the work. (for example see Response 13) The Respondent is incorrect.

This is not the first time that this Court has been faced with an attempt to utilize a strict statutory analysis in an attempt to defeat the policy behind the prevailing wage law and its application. In *Affiliated Construction Trades Foundation v. The University of West Virginia Board of Trustees* (557 S.E.2d 863, 210 W.Va. 456 (2001)), this Court considered a situation where the Circuit Court had ruled that prevailing wage did not apply to the construction of a new WVU building because the project had not been bid and a public agency did not sign the contract for construction. In that matter, the Circuit Court looked to statutory interpretation for support. In response this Court held

determine how the Massachusetts Court would have ruled. The Massachusetts Opinion is therefore of little or no value in the instant matter. This is particularly true given the undisputed facts in the instant matter that the Petitioners undertook identical work for the Respondent on other public projects and where paid the prevailing wage for their efforts. In addition, the West Virginia Supreme Court in *Themeworks v. West Virginia Department of Labor* (No. 11-0884 June 8, 2012) stated that it looked to violations of the statute and not the contract in a situation regarding the failure to pay prevailing wages for prevailing wage work.

The Petitioners would note that it has long been the law of this State that “an individual should not be permitted to avoid obligations he undertook while laboring under a mistake of law.” (Syl. Pt 1, *Webb v. Webb*, 171 W.Va. 614, 301 S.E.2d 570, (1983))

⁵ The Respondent looks to, *Foundation for Fair Contracting. LTD v. NJ State Department of Labor* (720 A.2d 619 (1998)) for the proposition that the language included in the RFQ and the Purchase Order was insufficient to require the payment of the prevailing wage.(Response, pp. 11-12) However, the Superior Court in New Jersey was faced with a very different situation than in the instant matter. In *FAF* the District Court was faced with a contract where no public entity was a party thereto and attempted to address the question as to whether such a contract was covered by the prevailing wage law. In the instant matter, the State of West Virginia was a party to the contract at issue and the Respondents were well aware of the situations where prevailing wage law applies. The New Jersey decision where there was no public entity party is not of value in the instant matter. (See in *Affiliated Construction Trades Foundation v. The University of West Virginia Board of Trustees* (557 S.E.2d 863 (2001)) wherein the West Virginia Supreme Court as addressed a similar situation)

⁶ The Respondent argues that it is undisputed that “the State uses the following mandatory language in contracts when prevailing wages apply” (Response, p.10). The record reflects rather that Ms. Ferrell would insert certain “boiler plate language” in construction contracts. (A.R. 241). That testimony does not make the insertion of such language a precondition for the application of the prevailing wage.

that, while certainly the language of the statute was one step in an analysis, it was not the only step. This Court held that statutory language was the starting point and the legislative intent underlying the statute is a critical second step of any statutory analysis. This Court stated:

In making its summary judgment ruling, the lower court, consistent with established principles of statutory interpretation, looked to the language of the statutes to resolve the laborer-related issues of wages and bidding. *See In re Greg H.*, 208 W.Va. 756, 760, 542 S.E.2d 919, 923 (2000) (stating that "[i]n interpreting a statute, the initial focus is, of course, upon the statutory language itself"); *accord Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W.Va. 691, 696, 527 S.E.2d 802, 807 (1999) ("In any search for the meaning or proper applications of a statute, we first resort to the language itself."). *While the statutory language is clearly the starting point of any issue of statutory interpretation, the legislative intent underlying the statute is the critical second step of any statutory analysis.* (ACT *supra* at 873, emphasis added)

This Court then held that, while the public agency may not be a signatory to the contract for the construction of a public improvement, the prevailing wage law would still apply. This Court stated that it would read into the statutory language certain requirements in the interest of upholding the laudatory policy advanced by the wage act of establishing a floor for the workers engaged in construction for the public's benefit. This Court held it would turn back neat legal maneuvers that undercut the overarching duties, responsibilities and rights that the West Virginia Legislature intended. This Court held:

Implicit in our holding regarding the factors to consider in evaluating whether a "public improvement" exists for prevailing wage purposes is a recognition that the term "public authority," like the term "public improvement," cannot be used as a shield to prevent the wage act from operating when the public entity for whom the construction is being performed is not a party to a contract. It only stands to reason that if the wage act was intended to extend to those workers who are doing work on behalf of a public authority, then the mere lack of a signature by that public authority to a contract should not be permitted to operate in such a fashion to circumvent the intent of this state to fairly compensate those laborers. We acknowledge that the wage act, as currently written, clearly hinges its operation on the existence of a contract having been signed by a public authority. *See* W.Va. Code § 21-5A-6. Barring statutory amendment to section six to include language indicating that an entity acting on behalf of a "public authority" can sign a contract which invokes the protections of the wage act, we feel compelled to read in such language in the

interest of upholding the laudatory policy advanced by the wage act of establishing a floor for the workers engaged in construction for the public's benefit. See W.Va. Code § 21-5A-2; see also *Banker v. Banker*, 196 W.Va. 535, 543-44, 474 S.E.2d 465, 473-74 (1996) (noting that "in interpreting the terms of our ... statutes specifically, we, in the past, have taken care not to undermine the statutes' fundamental goals" and that "we consistently have turned back neat legal maneuvers attempted by litigants that were not in keeping with overarching duties, responsibilities, and rights that the West Virginia Legislature intended"); *State v. Elder*, 152 W.Va. 571, 575, 165 S.E.2d 108, 111 (1968) (*Id.* 878)

The instant matter is no different. The Respondent in this matter is attempting a neat legal maneuver that is not in keeping with the overarching duties, responsibilities and rights that the West Virginia Legislature intended in enacting the Prevailing Wage Act. If this Court finds it necessary to consider the statutory analysis put forward by the Respondent and if the analysis does not fall of its own weight, the Petitioners urge this Court to take the critical second step and to uphold the fundamental public policy of this State regarding the protection of working people and to reject the Decision by the Circuit Court.

With regard to the assertion that certain mandatory language is required for prevailing wage coverage, the Respondent fails to address the holding of this Supreme Court of Appeals in *Themeworks v. West Virginia Department of Labor* (No. 11-0884 June 8, 2012) the Circuit Court in that matter was correct in looking to the work performed pursuant to the prevailing wage law and not to the contract at issue therein. In the instant matter, the Respondent violated the prevailing wage law, a law that cannot be overridden by contract provisions.

The Respondent attempts to support the argument by looking to the Supreme Court in California in *Lusardi Construction Co. v. Aubury* (1 Cal.4th 980 (Cal. 1992))⁷ cited by the Petitioners for the holding that to permit public entities and contractors to exempt construction projects by not including certain contract language would "reduce the prevailing wage law to merely an advisory expression of the Legislature's view." (*Id.* at 987). The Respondent argues that the "central holding" of the *Lusardi* Court

⁷ The Petitioners note that there are alternative citations as follows:, 4 Cal Rptr. 2d 837 842 P.2d 645

is that the employer in that instance was not liable for additional penalties. (Response, p. 19). What the Respondent fails to note is that between the two quotes cited by the Respondent that California Supreme Court looked to a provision of California Code that cannot be found in the West Virginia Code. In this regard, the California Court stated:

This conclusion comports with this state's policy, reflected in Civil Code section 3275, that when a party incurs a loss in the nature of a forfeiture or penalty, but makes full compensation to the injured party, he or she may be relieved from the forfeiture or penalty except when there has been a grossly negligent, willful or fraudulent breach of a duty. California courts have applied this principle when necessary to accomplish substantial justice. (See *Valley View Home of Beaumont, Inc. v. Department of Health Services* (1983) 146 Cal.App.3d 161, 168, 194 Cal.Rptr. 56.)⁸ (*Id.* at 997)

The Respondent's assertion regarding the central holding of The California Court is simply incorrect and not applicable to the issues before this Court.

C. West Virginia Code § 55-2-12 Applies to Torts

In support of the Circuit Court's assertion that two year statute of limitations found in West Virginia Code § 55-2-12 is appropriate for this prevailing wage act, the Respondent looks to this Court's decision in *McCourt v. Oneida Coal Co., Inc.* 188 W.Va. 647, 651, 425 S.E.2d 602, 606 (1992) and the District Court's decision in *Turley v. Union Carbide Corp.*, 618 F.Supp. 1438 (S.D.W.Va.1985) *Turley v. Union Carbide Corp.*, 618 F.Supp. 1438 (S.D.W.Va.1985) What the Respondent and the Circuit Court failed to acknowledge is that this Court held in *McCourt* that the at-will employment issues raised therein "sounded in tort" and was therefore subject to the two year statute of limitations found in West Virginia Code § 55-2-12. This Court also included the District Court's *Turley* decision in its discussion.

⁸ The California Court went on to note that some courts have refused to impose civil penalties where a party acted in good faith and with a reasonable belief in the legality of his or her actions. Of course the instant matter does not concern the imposition of civil money penalties and the Petitioners contend that the record does not support a finding that the Respondent acted in good faith.

The Court's conclusion that these principles govern is supported by *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980), where the Court held that an action brought by an at-will employee on the ground that he was discharged in contravention of some public policy principle sounded in tort and was subject to the two-year limitation period provided in W.Va.Code, 55-2-12. The conclusion is also supported by *Turley v. Union Carbide Corp.*, 618 F.Supp. 1438 (S.D.W.Va.1985), where the Court recognized that an action based upon discrimination cognizable under the West Virginia Human Rights Act is subject to the two-year limitation period under W.Va.Code, 55-2-12, and *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 285 S.E.2d 679 (1981), where this Court found that a fraudulent misrepresentation action brought by an employee is sufficiently related to a tort action for fraud and deceit so that the two year statute of limitations applies.

In the instant matter, the Respondent and the Circuit Court have applied the tort based statute of limitations to the statutory based prevailing wage. The Circuit Court clearly erred in taking such an action and the Respondent's attempts at justification are of no usefulness.

D. The Circuit Court Error Holding that the PW is the Exclusive Remedy

As noted in the Petitioners' Initial Brief, the Circuit Court erred in holding that the prevailing wage law was the exclusive remedy for the Petitioners' claims. (Initial Brief, p. 22). The Circuit Court merely makes a bold assertion without any supporting law whatsoever and its Order must therefore be overturned.

In an effort to rescue the Circuit Court, the Respondent looks to a Northern District of West Virginia decision *Westfall v. Kendall International, COU, LLC* (No. 1:05-cv-00118, Feb. 15, 2007) for the proposition that the Petitioners cannot look to the Wage Payment and Collections Act because the prevailing wage law is the exclusive remedy. (Response, p. 34). Of course, what the Respondent fails to note, is that, as Judge Goodwin held, Courts have long held that the FLSA provides the exclusive remedy for enforcing rights created under the FLSA such as overtime. (*Id.* p. 27). However, in the

instant matter, of course, the issue of enforcing rights created under the FLSA is not at issue and thus the Respondent's reliance on FLSA exclusivity is of no relevance⁹.

The Respondent raises an issue regarding the statute of limitations that the Respondent notes was not addressed in the Circuit Court's Order at issue in this proceeding. (Response pp. 31 – 33). This issue concerns the continuing claim doctrine and the West Virginia prevailing wage law. The Respondent argues that the Petitioners' claims are barred by the purported two year statute of limitations because the claims last accrued in May of 2009. The Respondent argues that time period for a claim for violations of prevailing wage begin each payday when the employee is not paid correct wages due. In this regard, the Court should note that as discussed herein the statute of limitations for the prevailing wage is three years and the statute of limitations for violations of the WPCA is five years and as such the Respondent's argument is of no value.

It is also long been the law of this State that, "A statute of limitations begins to run no sooner than the date all the elements of a cause of action entitling a party to recover in fact exists." (*Limpscomb v. Tucker County Commission*, 197 W.Va. 84, 89 (1996)) In the instant matter, there has been no finding of

⁹ For the first time in this matter the Respondent briefly looks to Syl pt. 2 of *Lynch v. Merchants' Nat'l Bank*, 22 W.Va. 4554 (1883) in support of the assertion that the prevailing wage law is the exclusive remedy for the Petitioners' claims. The Respondent's reliance is misplaced. As the United States District Court for the District of Columbia as noted the language in *Lynch* arises only in the context of the exhaust of administrative remedies which is not at issue herein. The District Court held,

The broad language in *Lynch* belies two fundamental points. First, the concept of exclusivity of remedies proscribed in *Lynch* in practice arises only in the context of statutes that provide administrative remedies for wrongful termination claims. See *Sturm v. Bd. of Educ. of Kanawha Cnty.*, 672 S.E.2d 606, 611 (W. Va. 2008) (noting the purpose of the exclusivity doctrine is to preserve and respect agency expertise and discretion); *Wiggins*, 357 S.E.2d at 747-48 (analyzing whether administrative remedies for retaliatory discharge after reporting mine safety violations preclude common law wrongful termination suits). Thus, in most cases, the focus is not on whether a civil suit is entirely precluded, but whether the plaintiff must exhaust administrative remedies before resorting to the Courts. E.g., *Collins v. Elkay Min. Co.*, 371 S.E.2d 46, 48-49 (W. Va. 1988); *Price v. Boone Cnty. Ambulance Auth.*, 337 S.E.2d 913, 915-916 (W. Va. 1985). *Boone v. Mountainmade Foundation*, Civil Action No. 08-1056 (CKK) April 30, 2012.

Likewise the Respondent reliance in Syl. Pt. 7 of *Harless v. First National Bank in Fairmont* (169 W.Va. 7673 (1982)) is also misplaced. As this Court is well-aware in *Harless* it was addressing matters related to torts and the interplay between a tort claim of outrageous conduct and a tort claim of retaliatory discharge. As noted at other points herein, the issues in the instant matter do not concern torts.

fact by a jury as to when that event actually occurred. The record includes uncontested testimony that while they were working for the Respondent pursuant to the contract at issue the Petitioners asked the Respondent about the lack of prevailing wages being paid. The uncontested testimony states that they were told that the wages being paid were because it was a maintenance contract and that Respondent's lawyers had reviewed the contract at issue and that it was legal. (A.R. 94-95). The record also is uncontested that it was not until during the investigation by the West Virginia Division of Labor occurred that Petitioners were informed that the work they performed required the prevailing wage to be paid. (A.R. 96-97). The question of when the Petitioners' causes of action accrued is a question of fact that must be decided by a jury and the Respondent's attempt to by-pass the jury process must be denied¹⁰.

E. WPCA and Prevailing Wages

The Respondent asserts that the WPCA is a remedial statute and does not create the right to receive prevailing wages. (Response, p. 35). In support of this assertion, the Respondent looks to *Barton v. Creasey Co. of Clarksburg*, (900 F.2d 249 (4th Cir. 1990)) an unpublished opinion¹¹ which has no relevancy in the instant matter because it concerned the preemption of state law due to the need to interpret a collective bargaining agreement.

Likewise, the Respondent's reliance on *Johnson v. Prospect Waterproofing* (813 F.Supp. 2d 4 (D.D.C. 2011)) in support of the assertion is not relevant because the District Court's decision turned on the fact that the federal Davis-Bacon Act does not provide for a private right of action and that the employees therein could not bypass the exclusive administrative remedy contained in the federal Davis-Bacon Act.

¹⁰ The Petitioners would also note that as discussed above, it is also uncontroverted that the Respondent failed to pay the Petitioners the correct wages by the statutory time set out in West Virginia Code § 21-5-4(c) upon their resignation from employment with the Respondent and the Petitioners' claims were brought within five years of that violation of the law.

¹¹ It should be noted that the unpublished Opinion carries this Notice: "Fourth Circuit I.O.P. 36.6 states that citations of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit."

In the instant matter, the West Virginia prevailing wage law and the West Virginia Wage Payment and Collection Act both provide for private rights of action. In fact, the West Virginia law provides for both administrative remedies and private rights of action.¹² Again, this Court can learn nothing from the D.C. District Court in this matter.

The Wage Payment and Collection Act has been violated in the instant matter because the Respondent failed to pay the “wages due” – including fringe benefits - to the Petitioners in accordance with the law¹³. The wages and fringe benefits due to the Petitioners are the prevailing wage rates set in accordance with the law by the West Virginia Division of Labor. The Petitioners’ allegations in this regard are supported by the record and nothing the Respondent has argued could cause this Court to hold in any other manner than for the Petitioners.¹⁴

The law of this State is very clear that the statute of limitations for bringing actions under the WV Wage Payment and Collection Act, as the Petitioners have done here, is five years. (*Goodwin v. Willard*. 185 W.Va. 321, (1991)). The Petitioners’ claims are all timely and the statute of limitations defense raised by the Respondent must fail.

The Respondent closes its Response with a series of assertions that are inconsistent with the facts of this case and the law of this state. The Respondent argues that the liquidated damages provisions of the Wage Payment and Collection Act only apply to violations of West Virginia Code § 21-5-4 and therefore the Petitioners are not entitled to those damages, presumably because the

¹² The West Virginia Supreme Court has held that under the WPCA an employee may initiate a claim pursuant to the administrative procedure set out in the law or by filing a complaint directly in circuit court. (*Beichler v. WTU at Parkersburg* (226 W.Va. 321, Syl. Pt. 3 (2010))).

¹³ The Respondent looks to *Conrad v. Charles Town Races, Inc.* (521 S.E.2d 537, 206 W.Va. 45 (1999)) and *Taylor v. Mutual Mining, Inc.* (543, S.E.2d 313, 209 W.Va. 32 (2000)) for the proposition that the damages that the Petitioners’ seek to recover do not constitute wages within the meaning of the WPCA (Response pp 36-37). The Petitioners’ discussed the inapplicability of these decisions to the instant matter in their Initial Brief (pp. 30-31) and will not repeat that argument herein.

¹⁴ The West Virginia Supreme Court of Appeals has consistently held that the WPCA is “remedial legislation designed to protect working people and to assist them in collection of compensation wrongly withheld.” (*Mullins v. Venable*, 171 W.Va. 92, 297 S.E.2d 866, 869 (1982) looking to *Farley v. Zapta Coal Corp.*, 176 W.Va. 630 (1981)).

Petitioners did not allege a violation of that section. The Respondent is incorrect. First, the Complaint alleges generally that the Respondent failed to comply with the West Virginia Wage Payment and Collection Act (West Virginia Code § 21-5-1 *et. seq.*) and thus it incorporates all of the Respondent's violations of that Act. Secondly, while it is a fact that the record of this proceeding is clear that the Respondent failed to pay the Petitioners the correct wage in violation of West Virginia Code § 21-5-3, it is also uncontroverted that the Respondent failed to pay the Petitioners the correct wages by the statutory time set out in West Virginia Code § 21-5-4(c)¹⁵ upon their resignation from employment with the Respondent. The Respondent has violated both provisions of the Act so even if the Respondent's reading of the Act is correct the Petitioners are entitled to damages for all the violations. The Respondent has cited no law that challenges the Petitioners' argument that they are entitled to pursue and be compensated for every violation of the WPCA.¹⁶ The Respondent has cited no such law because no such law exists.

Conclusion

The Petitioners performed construction work on public buildings in Charleston, West Virginia. These buildings included the Capital building and the Governor's Mansion. The

¹⁵ W. Va. Code § 21-5-4(c) states: "(c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

¹⁶ The Respondent looks to a U.S. District Court (S.D. W.Va.) Memorandum Opinion & Order in *Atchison v. Novartis Pharmaceuticals Corporation* (Civil Action No.: 3:11-0039, March 13, 2012) for assistance. The District Court Order cited is a partial summary judgment on the Plaintiff's West Virginia Code §21-5-3(a) allegations and does not involve the Plaintiff's West Virginia Code §21-5-4 allegations. Thus it is of no assistance to this Court in that the Petitioners in the instant matter are asking for Summary Judgment on all of the Respondent's violations of the Act. In addition, the Respondent looks to Recommended Findings of Fact and Conclusions of Law and Order in a West Virginia Division of Labor case (*W.Va. Div. of Labor v. Coyne Textile Sers.*, DOL Case No. 01-0707/51229) Once again, the Hearing Examiner was faced solely with alleged violations of West Virginia Code §21-5-3. The question of violations of West Virginia Code §21-5-4 was not before the Hearing Examiner in that the employees at issue had not left their employment. Thus, the issue before this Court, where there are violations of both provisions of the Act was not addressed in the Hearing Examiner Recommendations cited by the Respondent.

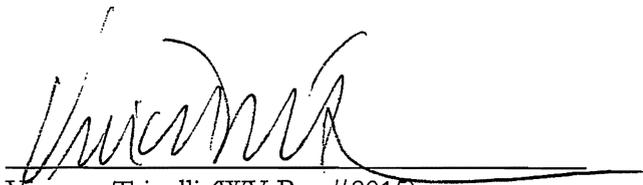
Petitioners were not paid the statutory mandated prevailing wage rates. The Circuit Court held that the Petitioners have no avenue to receive the wages that are mandated by the law of this State. The Circuit Court's Order granting the Respondent's Motion for Summary Judgment erred in numerous ways detailed in the Petitioners' filings before this Court.

The Circuit Court's Order is a Christmas tree of gifts to contractors and public officials who wish to violate the law. According to the Circuit Court the Petitioners claims must be dismissed because: the prevailing wage statute must follow the tort statute of limitations; certain specific boiler plate language was not included in the contract at issue; and to force the Respondent to pay the Petitioners the correct wage would be an absurd and unfair result. If those things are not enough, the Circuit Court held, with considering the record as a whole, that it had to be a honest mistake or error by the Respondent and that the Petitioners are the parties to pay the entire cost of that alleged mistake.

If the Circuit Court's Order is upheld, the law and policy of this State concerning working men and women would be seriously undercut. If the Circuit Court's Order is upheld, the law regarding review of motions of summary judgment would be drastically altered. The Petitioners' pray that this Court reverse the Circuit Court's Order and permit this matter to return to the Circuit Court so that they can obtain the relief that the law of this State permits.

Respectfully submitted this 15th day of April, 2014.

Petitioners,
By Counsel

A handwritten signature in black ink, appearing to read 'Vincent Trivelli', is written over a horizontal line that extends across the page.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Gregory Grim, *et al.* ,
Petitioners,

v.

Docket No. 13-1133

Eastern Electric, LLC.,
Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on April 15, 2014 a true and correct copy of the **Petitioners' Reply Brief** were served upon the following via hand delivery to the following attorney and address:

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