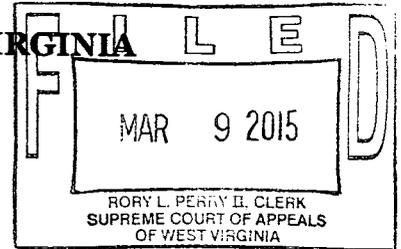


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**No. 13-1084**



**CONSTELLIUM ROLLED  
PRODUCTS RAVENSWOOD, LLC,**  
A Delaware Corporation and  
**MELVIN LAGER**  
**Defendants-Below,**  
**Petitioners,**

**v.**

**SHARON GRIFFITH and LOU ANN WALL,**  
**Plaintiffs-Below,**  
**Respondents.**

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Honorable Thomas C. Evans, III Judge  
Circuit Court of Jackson County  
Civil Action 11-C-26

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**RESPONDENTS' BRIEF UPON REHEARING**

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Respondents.**

**RESPONDENTS' BRIEF UPON REHEARING**

The *Order* granting the *Petition for Rehearing* provides that the parties may file a supplemental brief “specifying the precise facts that support their position on the issue of whether the wrongful conduct was based upon the plaintiffs’ gender rather than being directed at both men and women.” The Court also directed a review of the punitive damages award in light of its decision in Quicken Loans v. Brown, 2014 W.Va. LEXIS 1307 (Nov. 25, 2014.) Plaintiffs address each issue herein.

**I. The Facts Establish that Defendants’ Wrongful Conduct was Gender-Based Conduct Directed at Women**

The following facts and evidence supported the jury’s verdict that “Plaintiffs were subjected to unwelcome, gender-based, hostile or abusive employment environment” which was not directed at both men and women.

**A. *Analysis of the Suggestions/Comments and CEO Responses Posted by Defendants in October 2009***

Forty-three (43) “suggestions” or “comments” and CEO responses were posted at the company’s two entrance gates in October 2009. (*Defendants’ Exhibit 1, App. 1761-1770.*)

The vast majority of these were general comments that did not involve gender whatsoever.

However, the only four comments directed at women used derogatory and profane gender-specific language criticizing them. By contrast, no derogatory, gender-based slurs appeared in the single comment unquestionably concerning a male. No derogatory, gender-based descriptions were directed at other employees where gender was not apparent either. Gender based epithets and slurs were directed only at female employees. Moreover, the CEO's responses to the only four comments directed at women agreed with these gender-based insults without qualification, repudiation or correction. The CEO's responses to the comments about females in the plant differ drastically from responses made to all other comments.

Gender was not implicated or involved whatsoever in twenty-five of the forty-three comments posted. These twenty-five comments concerned general suggestions or questions, rather than complaints about any particular person.<sup>1</sup> Two other comments were directed at the CEO,<sup>2</sup> while two additional comments can best be described as nothing more than "nonsense comments."<sup>3</sup> Given the general nature of twenty-nine of the postings, they

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<sup>1</sup> Comments ##2, 5, 6, 9, 10, 11, 13, 15, 18, 24, 25, 26, 27, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 42, and 43 fall into the category of general complaints involving no particular persons, male or female. These comments covered a broad range of topics such as questions about burning trash (#10); the disposition of scrap aluminum (#11); use of furnaces (#27); college education (24); three-wheeled buggies (#33); to questions about the use of a gardening service at the plant (#35); smoking in the plant (#43) and comments about shifts (#5, #15, #31). (*App. 1761-1770.*)

<sup>2</sup> **Comment #4** stated: "Why do you hide up on that hill and now walk and talk to us like \_\_\_\_\_ manager. He even eat [sic] with us once."

**CEO Response:** "I don't hide anywhere. I walk and talk on the floor on a regular basis, sorry I haven't seen you yet." (*App. 1761.*)

**Comment #7**, the second comment regarding the CEO, stated: "Is this all you have to do answer questions? Is your job up for bid?"

**CEO Response:** "Do you think this comment is really helping? I am asking if you have a question to keep this business running. Get serious." (*App. 1762.*)

<sup>3</sup> **Comment #17** simply said "what the f \_\_\_\_!" to which the CEO replied "Do you think a comment like this is helping anyone?" (*App. 1764.*)

**Comment #20** asked "How many salaried drones does it take to produce a Lb of Plate? I don't know – you count them!"

**CEO Response:** "Do you think this comment is helping anything? Do you know the roles and responsibilities of the people you are commenting about?" (*App. 1765.*)

are irrelevant to the question posed by the Court, and any comparison of the comments directed at Plaintiffs with the twenty-nine general comments is comparing apples to oranges.

Fourteen of the October 2009 postings concerned personnel within the plant and were directed at specific employees. Gender was explicitly revealed in only five of those comments. At trial, the gender of another employee, a male was identified for a sixth comment. (*App. 1214-1216.*) Four of the postings revealing gender were directed at women; two of the six comments where gender was identified concerned males. As to these relevant comments – the two about men and four about women - a dramatic difference in the manner females are discussed versus males is evident.

Comment #3 was the only of the fourteen relevant posted comments which specifically identified a male. This comment and response stated (emphasis added):

**3.**

**EMPLOYEE COMMENT**

\_\_\_\_\_ foreman has a bad attitude when you ask about a truck that you bring in or one that has been sitting over there for 1 to 6 months. We need trucks to move metal not a smart a\_\_ answer from the \_\_\_\_\_ foreman. (*He cusses a lot, I don't like that.*)

**CEO RESPONSE**

**People have different personalities and react and interact differently with others. You are right, you should have the equipment you need with a straightforward respectful answer to your questions. Cussing is a bad habit and used too frequently by some folks. (*App. 1761.*)**

Trial testimony revealed that comment #1 also concerned a male employee (*App. 1214-1216*):

1.

**EMPLOYEE COMMENT**

There is a lot of dirty and bad batteries in the Battery shop and they also need water. What does the Battery Shop person do besides read magazines and ride around and sell gun raffle tickets. We need someone to take care of the batteries.

**CEO RESPONSE**

***I sure hope the person you reference starts taking their job seriously if what you say is true. This is a workplace – not a place to sell raffle tickets. Totally unacceptable.***

***I will look into the battery maintenance issue. (App. 1761.)***

There are no gender-based epithets or offensive descriptions of or language referring to the two male employees discussed in Comments #1 and #3. These complaints are described without resort to derogatory name-calling, at least none that can be discerned after redactions. This is not the case as to the four comments concerning women, #28, #29, #32 and #41:

28.

**EMPLOYEE COMMENT**

Ask \_\_\_\_\_ supervisor what he had his crew doing in Project Maintenance on Oct. 9<sup>th</sup> on evening shift! I understand Project has at least 3 extra buggies. One of their buggies was missing on that shift I understand. \_\_\_\_\_ (hourly employee) **and another lady** spent 4 hours hunting for that missing buggy. They (Project) had no supervision that evening; seems like don't need to be here especially on overtime looking for one of their extra buggies. They need to give up their extra buggies to Plate dept. maint. so they don't have to walk and carry their tools.

**CEO RESPONSE**

***This doesn't seem to be the best use of time or equipment. (App. 1766.)***

29.

**EMPLOYEE COMMENT**

Lazy a \_\_\_\_\_ (employee) was in here on overtime again on Saturday, 9<sup>th</sup> doing "NOTHING". Smoking cigarettes and drinking coffee again and sitting on **her** a \_\_\_\_\_ in the lunchroom. This is b\_\_\_\_s\_\_\_\_. And will be here on Sunday on double time 10<sup>th</sup> doing the same!

**CEO RESPONSE**

***We need everyone fully engaged and productive. (App. 1766.)***

32.

**EMPLOYEE COMMENT**

\_\_\_\_\_ (employee) (Project Maint) comes in on weekends to work (overtime) time and a half on Saturdays and double time on Sundays and sits on *her* a\_\_ both days in the lunchroom and does "Nothing." "This is b\_\_s\_\_." I am tired of carrying her big lazy a\_\_ around. This is not fair to the company or the union workers. If the *lazy worthless b\_\_* can't do the work *she* needs to stay home. *She* comes in here and drinks coffee and smokes cigarettes all weekend. Stop this s\_\_.

**CEO RESPONSE**

***As I responded to a similar comment, we need everyone to be fully engaged and productive. (App. 1760.)***

41.

**EMPLOYEE COMMENT**

Lazy a\_\_\_\_\_ (employee) doubled over today and sat on *her* worthless a\_\_ and done 'NOTHING' again! Smoked cigs and drank coffee 16 hrs.

**CEO RESPONSE**

***This kind of behavior is not going to contribute to our survival. Again, everyone fully engaged and productive, that's the key. (App. 1769.)***

The CEO's responses to profane, gender-based and derogatory comments directed at females differed dramatically from those made in response to comments criticizing male employees. For instance, in response to comment #3 complaining about and criticizing a male's performance at work, the CEO replied that workers should treat one another with respect! The CEO then lectured about cussing to someone whose profanity was redacted from his/her comment. The CEO voiced concern about treating co-workers with "respect," a concern not mentioned in any response to comments #28, #29 and #32 about Plaintiffs or in the response to the female referenced in comment forty-one (#41). Instead, the CEO agreed with the author of the complaints without correction, discussion or consideration of the gender-specific, derogatory and insulting nature of the language used about these female workers.

Similarly, as to comment number #1, the complaint that “the Battery Shop person” did nothing but “read magazines and ride around and sell gun raffle tickets” prompted this CEO Response: “I sure hope ***the person*** you reference starts taking ***their*** job seriously ***if what you say is true***. This is a workplace – not a place to sell raffle tickets. Totally unacceptable. ***I will look into the battery maintenance issue.***” First and most significantly, the CEO signaled that what was said might not be true. The CEO took care not to reveal the gender of the person discussed. Finally, he offered to investigate the issue. This response is radically different from agreeing with a complainant that the “lazy worthless b[itches]” sitting on their “fat, lazy a[sses]” need to be more “fully engaged and productive.”

In fact, not a single one of the other thirty-nine comments contain any gender-specific name calling such as the language directed at females in the four comments posted about women. As to the complaint identifying a male employee, while some colorful and/or descriptive term regarding the “\_\_\_\_\_ foreman” contained in comment #3 may have originally appeared, it was properly redacted and couldn’t be discerned, unlike the poorly redacted comments pertaining to women – comments #28, 29, 32 and 41.<sup>4</sup>

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<sup>4</sup> The other eight comments with no gender identification and also concerning complaints about employees were comments #8, #12, #14, #16, #19, #21, #22, and #23. None of these comments contain any gender-specific derogatory terms.

- Comment #8 is a complaint about the “half a\_\_\_” job the “janitors” did cleaning the locker room compared to the job formerly done for the guards. (*App. 1762.*)
- Comment #12 observed that “\_\_\_\_\_ Manager is a fair person who listens. A great asset to this cast house.” (*App. 1763*)
- Comment #14 - the author questions why the plant is “run so stupidly” and complains that he/she works for “idiots” but provides no additional information as to the identity of the “idiots.”
- Comment number 16 concerns a complaint that “4 hrs wrench time, 4 hrs a\_\_\_ time” did “not apply to all maintenance groups” and that some shifts did twice the workload of others; comment #16 also referred to the “b\_\_\_\_\_ and moaning” about prep time, and observed that if “the parts/tools/equipment/permits” were laid out and ready at the start of the job, more work would be done.
- Comment #19 asked for a “mait. Coordinator in Plate” and requested that “if you have one, please replace them!”
- Comment #21 complained about the “abuse of Quality Control.”

In fact, not a single other comment or suggestion posted ever directed any profane name at a male or other person, or used epithets, gender-specific or otherwise to describe that person. Despite being a predominantly male work force, only the comments directed at women, including the three directed at Plaintiffs included gender-specific name-calling and derogatory gender-based profanity. Defendants admitted these postings “could have been redacted more effectively” and readily permitted everyone at the plant to conclude they referred to Plaintiffs as they were only two women in the seventeen (17) person Project Maintenance department. (*App. 1029-1030; 1063, 1072, 1083, 1614 at ¶ p.*) The comments labeling Plaintiffs as lazy worthless bitches, laying around on their fat asses, and resorting to the gender-specific epithet of “bitch” stand out among all other comments posted by the CEO. These were the only comments of this type which were reproduced and posted by the CEO for all to see, and as such they unquestionably support the jury’s finding of a gender-based hostile work environment.

***B. The Aftermath of the Posting of Comments About Plaintiffs***

Contrary to the Company’s position at trial and throughout appeal, the posting of the comment cards and about Plaintiffs and the CEO’s responses was not a single, isolated incident of name-calling. The Company argued that these comments were a minor annoyance, failing to rise to the level of sexual harassment and that posting these comments did not contribute to creating a hostile work environment. However, contrary to the Company’s claims, evidence at trial showed that these comment cards were far more than a minor annoyance. The comments were copied and distributed throughout the workplace,

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- Comment #22 asked why there was such a “high ratio of salary to hourly employees.”
  - Comment #23 questioned why plate was a separate maintenance area since “1 foreman for 4 employees” seemed like poor management.

Obviously, none of these comments resort to the type of gender-based derogatory language and name calling at issue in the postings involving the Plaintiffs and the other woman. None of these comments enable identification of gender on their face.

causing Plaintiffs to be ostracized and isolated. These comments, implicitly endorsed when the CEO's failed to condemn them or the language used within them, created a hostile work environment condoned and ignored by the Company. The comments were posted on the entry gates of the plant, were posted on the intranet, and were copied and distributed throughout the plant. Plaintiffs were singled out based on their gender, and ridiculed because of it. They were subjected to mockery, innuendo, and a hostile work environment where they were shunned and subjected to dangerous work conditions because they were women. The Company and its CEO created the perception that it was open season on the Plaintiffs because of their gender, and the evidence makes it absolutely clear that the Plaintiffs did suffer serious consequences.<sup>5</sup>

Former union representative Ron Barton observed the comment cards being passed around the lunchroom table and knew about the removal of cards posted throughout the

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<sup>5</sup> Sharla Rose, a female worker at the plant saw the comment cards on the company intranet and described the response to the comment cards concerning Plaintiffs. (*App. 1124-1126.*)

Q: Were the posting that were about these ladies still up to the intranet after – I mean, was it – did you see them on that computer thing after you'd seen them up on the bulletin board? Q: Was it the subject of talking around the plant—

A: Oh, yes, sir.

Q: --these postings? Did you see these postings anywhere other than on the gate bulletin board?

A: Yes, I did

Q: Where?

A: It was – it's been so long ago, I can't remember, but it was time later that it was on the company's intranet.

Q: What is the intranet?

A: It is like a in-base internet within the company.

Q: So some kind of computer system?

A: Correct.

Q: But just not out in the world, but inside the plant?

A: Right.

A: Right

Q: Do you know how long after that?

A: No. (*App. 1124-1126.*)

Ms. Rose also heard "different people" discussing these comments, and testified without objection that the posting of these comments, available on the company intranet for all to continue to read, created a hostile work environment for both women. (*App. 1121-1122; 1130.*)

plant. (*App. 1194.*) According to Mr. Barton, “[i]t became almost a class thing, almost male against female.” (*App. 1190.*) Further, Mr. Barton testified at length regarding the work environment for Plaintiffs before and after “the cards went up.” (*App. 1191-1192.*) While the Company’s argues that Ron Barton was unclear about the document posted in the plant as claimed in the *Petition for Rehearing*, no fair reading of this testimony supports this claim.<sup>6</sup> And the jury was of course free to accept or reject this evidence of the plant wide distribution of CEO Lager’s comment cards, evidence admitted with no objection from the Company

The evidence also revealed that Plaintiffs’ work environment significantly changed after the comment cards were posted. (*App. 1283-1285.*) Plaintiff Lou Ann Wall suffered an on-the-job injury after male co-workers refused to work with her as a “fire watch” while she welded. (*App. 1283-1284; 1290, 1292, 1302-1303*) Paul Spence, an “air conditioning guy” and a “grievance man” told the jury that “in this incident in which Ms. Wall wasn’t given a fire watch, she ended up getting injured.” (*App. 1290, 1292, 1302-1303.*) Plaintiffs were no

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<sup>6</sup> Ron Barton testified as follows regarding the comment cards:

Q. And is it true that you had a chance to observe that before the cards went up? In other words, how they interacted before that with these ladies?

A. Absolutely.

Q. And what type of relationship and what – how did they interact before the cards went up?

A. I can only describe it as – before the comments, before the letters, that it was a friendly atmosphere, where everyone got along. Afterwards, it was almost a total shunning by some of the employees.

After several more questions, Mr. Barton was asked about the posting of the comment cards:

Q: Let me ask regarding **these postings**, Mr. Barton, have you seen these anywhere other than the plant gate?

A. Yes.

Q. Where else?

A. **They** were passed around on lunch tables. *I’ve seen them* kind of like, taped to the walls in the shower room. I have received phone calls, personally, in my shop. Unfortunately a lot of people knew me from where I was at the plant a long time, plus the grievance man for so many years, and they would tell me, “Ron, we found **more of these**. We took them down and destroyed them.” These were people that, you know, didn’t want to be a part of it. But someone, I have no idea who, **was circulating it**, whatever. I have no idea who, but yes, **it was circulated** throughout the plant.

Q: So not only were **they** at the gates, they were circulated in the lunch rooms, they were posted at showers, **they** were put up around the plant – is that correct?

A. That is correct. (*Emphasis added*). (*App. 1194.*)

longer assigned to work with their male co-workers. As Lou Ann Wall explained, “[s]ince this stuff’s been going on, it is always they assign me and [Sharon Griffith] to work together, where we used to work in a crew with the guys. So they’re putting, like on separate jobs and keeping us isolated.” (*App.* 1285.) The Company did not object to this testimony, and introduced no evidence to the contrary.

Defendants assert that CEO Lager’s response to the three comment cards regarding Wall and Griffith (referring to them as “lazy, worthless bitches” and commenting about their “big lazy ass[es]”) was appropriate and that the majority’s finding to the contrary is “incorrect.” (*Petition for Rehearing* at 2.) Yet CEO Lager reluctantly admitted at trial that the language about Plaintiffs in the comment cards he himself had posted had “no place in any workplace in America.” (*App.* 1085.) Despite acknowledging this fact, CEO Lager took no action whatsoever to repudiate these types of “sexist” comments, to rebuke the author’s use of such language and in fact, endorsed them in his responses. Indeed, the suggestion box did not continue long thereafter and was abandoned by Defendants. (*App.* 1756; 1759; 1760.)<sup>7</sup>

As was accurately noted by the majority in the *Memorandum Opinion*, “...CEO Lager played an important role in the manner in which these comment cards changed the respondents’ workplace.” Constellium Rolled Products Ravenswood, LLC v. Sharon Griffith and Lou Ann Wall, p. 5, No. 13-1084 (W.Va. 2014). The majority correctly concluded that “CEO Lager participated in, created, and permitted a work environment for the respondents to continue that was hostile to them, specifically on account of their gender.” *Id.* at 5-6.

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<sup>7</sup> At trial, Defendants admitted that comments like those about Plaintiffs would not be posted by the Company any longer. (*App.* 1072.) CEO Lager said he “had learned his lesson” and he had stopped “post[ing] everything”. (*App.* 1098- 1100.) By 2010, the suggestion box went by the wayside as the comments submitted became fewer and fewer. (*Id.*)

(App. 1030; 1032; 1088; 1092; 1128-1130; 1143-1144; 1183, 1185, 1188; 1194; 1223, 1242, 1239-1240; 1247; 1249-1250; 1285; 1308-1313.)

Despite the Company's disagreements regarding the evidence presented, "[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." Constellium Rolled Products Ravenswood, LLC v. Sharon Griffith and Lou Ann Wall, No. 13-1084 (W.Va. 2014).

Furthermore, the Company now attempts to convince this Court to overturn its own decision, the trial court's rulings and the jury's verdict based on a deliberate misreading of the record. Defendants failed to take any steps to exclude or rebut damaging evidence of their misconduct at trial, yet now ask this Court to overlook their failure to preserve objections to evidentiary questions raised at trial. The Company and CEO Lager have offered nothing new or persuasive regarding the ruling of this Court as to gender-based hostility directed against Plaintiffs, findings amply supported by the record.

## ***II. Punitive Damages and Quicken Loans Inc. v. Brown***

Plaintiffs were each awarded \$250,000 in compensatory damages and \$250,000 in punitive damages. Plaintiffs were also awarded a total of \$60,105.50 for attorney fees and a total of \$8711.06 for costs expended in this litigation. (App. 1627.) Pursuant to *Order* of this Court, Plaintiffs address Quicken Loans, Inc., v. Brown, 2014 W.Va. LEXIS 1307 (Nov. 25, 2014) (Quicken II) as this case pertains to the punitive damages awarded in this case. At the outset it should be noted that nothing in Quicken II requires any modification of the punitive damages awarded to Plaintiffs.

In Quicken II, this Court reiterated the review required for any award of punitive damages:

Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendants' actions. Under West Virginia's system for an award and review of punitive damages, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal. Syl. pt. 2, Garnes v Fleming Landfill, Inc., 186 W.Va. 656, 4134 S.E.2d 897 (1991).

**A. *Defendants have waived any objection as to the constraints on the jury's discretion imposed by the trial court.***

As for "the constraints" on the "jury's discretion" in this case, the trial court's charge to the jury outlined in meticulous detail the factors that the jury could and could not consider with regard to compensatory and punitive damages. (*App. 911-917.*) While Defendants argued that the jury should not be permitted to consider punitive damages in this case, "there was no objection to the content of the instruction concerning punitive damages given" by the trial court. (*App. 1611 at ¶4.*) The trial court's instruction regarding punitive damages conformed precisely to the directives set forth in Garnes. Defendants also raised no objection regarding the jury's instruction in its appeal to this Court and accordingly, no additional discussion regarding the constraints imposed on the jury's discretion is warranted as Defendants have waived any objection regarding the instruction outlining the jury's discretion in awarding punitive damages.<sup>8</sup>

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<sup>8</sup> The trial court's extensive instructions regarding punitive damages are found in the *Appendix* at 911-917. Defendants did not object to any aspect of instructions regarding punitive damages. These instructions included an explanation that "punitive damages should bear a reasonable relationship to the harm that is likely to occur from defendant's conduct as well as to the harm that actually has occurred, and that "[if] the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small." (*App. 915-916.*) The jury was instructed about how to determine the reprehensibility of defendants' conduct, including "how long the defendants continued in their actions, whether Defendants were aware that its actions were causing or were likely to cause harm, whether it attempted to conceal or cover up its actions or the harm caused by them, and whether the defendants made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once liability became clear to it." (*App. 916.*) The jury was instructed that if Defendants profited from their wrongful conduct, punitive damages should remove the profit. (*App. 916.*) The jury was informed that "as a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages" and that "the financial position of the Defendants corporation is relevant to the issue of punitive damages." Thus, the jury was instructed as to all pertinent factors outlined in Garnes and approved most recently in Quicken II.

***B. The Jury was Properly Permitted to Consider Punitive Damages***

Quicken II offers no guidance as to whether the jury was properly permitted to consider an award of punitive damages in the instant case. This is because the plaintiff's right to seek punitive damages was not challenged by the defendant in Quicken II. Accordingly, Quicken II focused largely on whether the punitive damages were excessive.

Nevertheless, as to the availability of punitive damages to Plaintiffs, the Circuit Court conducted an exhaustive, "meaningful and adequate" post-trial review of the punitive damages award. This analysis of the propriety of punitive damages conformed in all respects to the requirements of "Mayer v. Frobe, 40 W.Va. 246, 22 S.E.58 (1895) and its progeny" including Garnes v Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). (See, *Order Re: Defendants' Post-Trial Motions and Plaintiff's Motion for Attorney Fees*, App. 1610-1628.) The issue of punitive damages was thoroughly briefed, a hearing was held, and arguments were presented regarding Defendants' motion to set aside the punitive damages award. (App. 919-938; 941-953; 982-986; 1629-1723.)

The Circuit Court's *Order* upholding the punitive damages awarded by the jury examined in detail the bases for rejecting Defendants' arguments regarding the availability of punitive damages, and discussed in detail how the Garnes factors were satisfied and justified affirming the punitive damages award. Additionally, as required by Quicken II, the trial court evaluated the evidence concerning the factors submitted to the jury as well as: (1) the costs of litigation; (2) any criminal sanctions imposed on the defendant for his conduct; (3) any other civil actions against the same defendant, based on the same conduct; and (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. Quicken II, *supra* at 48.

### ***C. The Trial Court's Review***

Dealing first with the factors considered by the jury, the trial court found that the evidence was sufficient for the jury to reasonably find and determine that:

- Three comment cards were submitted in October 2009 referring to Plaintiffs as “lazy worthless bitches” and “lazy asses.” (*App.1620.*)
- The comments cards were reviewed, redacted and posted by the CEO in a manner which permitted identification of Plaintiffs, the only two women in a seventeen person work department. “Further, the type of language used in these comment cards in reference to female employees is in and of itself evidence of a hostile work environment based on gender...” (*App.1620, 1622.*)
- The Company acknowledged that redactions “could have been done more effectively.” (*App. 1621.*)
- The comment cards were published on the company bulletin board and the company’s intranet and copies were also circulated and posted in the plant. The comment cards were removed from the bulletin board after the union complained. (*Id.*)
- The cards were discriminatory based upon Plaintiffs’ gender and the derogatory and sexist nature of the comments was not repudiated by the Company. (*App. 1620-1621.*)
- Both women were greatly upset, embarrassed and humiliated by the posting of these derogatory comments. The posting of the comments caused Plaintiffs to be the subject of discussion and scuttlebutt around the plant. “Thus, the relationship of harm likely to occur from posting such comment cards and the harm that actually occurred according to Plaintiffs’ evidence supports punitive damages.” (*App. 1621.*)
- Following the posting of the cards, Plaintiffs’ work environment deteriorated. “For three years since the incident preceding trial, the Plaintiffs underwent great emotional stress.” (*App. 1621.*)
- The company did not attempt to determine who made the comments; and when determined, the Company did nothing to investigate or correct the situation.
- “[T]he undisputed evidence was that the Defendants did absolutely nothing to either investigate or correct the problems resulting from the CEO’s endorsement of such negative comments about Plaintiffs once Defendants were aware of those problems. Contrary to Defendants’ argument that a review of the undisputed evidence demonstrates conclusively that no reasonable jury could have found for Plaintiffs on this claim, quite the converse is true. A reasonable jury could conclude from the evidence presented that Defendants – through its Chief Executive Officer and other members of management – participated in, created and permitted to exist a work environment for Plaintiffs which was hostile to them, specifically on account of their

gender. Defendants then did nothing to investigate this work environment once brought to their attention and finally did nothing to correct this hostile work environment.” (*App. 1622, ¶17.*)

- The facts in the case supported the jury’s conclusion that Defendants’ conduct “was calculated and unfair to Plaintiffs” and did “not point so strongly and overwhelmingly in favor of Defendants as to lead to the conclusion that the jury was wrong...” (*App. 1623, ¶19.*)

In addition to these facts, Defendants “undertook no action to meet” their legal duty “to provide a workplace free from such hostility,” and instead “helped to create such an environment.” Accordingly, the court below determined that “the jury could have properly concluded that Defendants’ posting of this information was motivated by malice and criminal indifference to Plaintiffs’ rights and without regard to any basic notion of fairness” and that Plaintiffs had “met the first hurdle of sustaining the jury’s award of punitive damages.” (*App. 1622-23.*) The court-below also determined that the jury “had sufficient evidence before it to conclude that Defendants’ conduct was reprehensible and warranted the imposition of punitive damages.” (*App. 1624-1625, ¶29.*)

With regard to the amount of punitive damages awarded, the trial court observed that while no monetary losses were suffered by plaintiffs, the jury was entitled to conclude that “plaintiffs were severely harmed by the conduct of Defendants” since they “regularly worked in a work environment rendered hostile by the discriminatory animus fueled by gender.” (*App. 1623, ¶21.*) Further, “[t]he ratio of punitive to compensatory damages was 1 to 1 which is well within the acceptable range prescribed by the West Virginia Supreme Court of Appeals” was “reasonable in light of the financial position of the Defendant according to the evidence presented at trial.” (*App. 1623, ¶22.*)

As to additional factors reserved for the court rather than the jury, the court-below found that “Defendants were not subjected to any criminal sanctions nor other civil liability...” (*App. 1624, ¶28.*) Further, the Defendants’ “damaging conduct” continued “for

an extensive period of time through and preceding the trial of this matter” with “no reasonable offers of settlement or attempts to correct its wrongful conduct” reflected in the record, either pretrial or post-trial. (*App. 1625, ¶¶30, 31.*) Plaintiffs also incurred “substantial costs in the prosecution of this action . . . totaling over eight thousand seven hundred dollars (\$8711.00) to date.” (*App. 1625, ¶32.*) “Based on the totality of the evidence,” the trial court concluded that “the punitive damages award is not excessive and is hereby sustained.” (*App. 1625, ¶33.*) Finally, the Defendants’ argument that Plaintiffs were prohibited from recovering punitive damages for emotional distress and mental anguish was rejected pursuant to Sheetz, Inc. v. Bowles, Rice McDavid Graf & Love, PLLC, 209 W.Va. 318, 547 S.E.2d 256 (2001). *Id.*

***D. Appellate Review of Punitive Damages***

Turning to the appellate court’s role in evaluating punitive damages, in Quicken II, the standard for the *de novo* review of punitive damage awards previously established in Garnes v Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991) and Perrine v. E. I. DuPont De Nemours and Co., 225 W.Va. 482, 694 S.E.2d 815 (2010), Syl. pt. 5 was reaffirmed:

Upon petition, the Supreme Court of Appeals of West Virginia will review all punitive damages awards. In its review of the petition, the Court will consider the same factors that it requires the jury and the trial judge to consider, and all petitions must address each and every factor set forth in case law with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review state. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

In attacking the punitive damages awarded, Defendants first challenged the availability of punitive damages to Plaintiffs as they did below and asserted that “the evidence failed to satisfy standards adopted by this Court in Mayer v. Frobe, 40 W.Va. 246,

22 S.E. 58 (1895) and its progeny.” (*Defendants’ Brief* at 37; *Reply Brief* at 17.) Defendants further argued that Plaintiffs suffered no “grievous harm;” that no evidence was presented establishing that defendants’ conduct was “reprehensible,” or regarding defendants’ “financial condition.” Defendants also pointed out that no “criminal sanctions” were imposed and there were no other “civil actions ...based on the same conduct” against Defendants according to the record. *Defendants’ Brief* at 39. Finally, Defendants argued that awarding punitive damages in addition to damages for “emotional distress” was “inappropriate.” *Id.*<sup>9</sup>

As previously noted herein, Quicken II offers no additional guidance as to the threshold question of whether the jury was properly permitted to consider punitive damages. Plaintiffs have outlined the Circuit Court’s exhaustive, “meaningful and adequate” post-trial review of the punitive damages award and its analysis of the propriety of punitive damages in line with the guidelines established in Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 and Garnes v Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991).

As Plaintiffs previously noted, “[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.” *Syl. pt. 4, Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58. *Accord Syl. pt. 1, O’Brien v. Snodgrass*, 123 W. Va. 483, 16 S.E.2d 621 (1941). Defendants continue to argue that their actions do not warrant punishment or support a punitive damage award of any amount. (*Defendants’ Brief* at 38.) Defendants minimized their conduct and argued that

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<sup>9</sup> Any other challenges or issues not already raised by Defendants in the original appeal, such as the constitutional challenges discussed and addressed in Quicken II, are deemed waived. Quicken Loans, Inc. v. Brown, 2014 W.Va. LEXIS 1307, \*64 (Nov. 25, 2014) (Quicken II).

they merely “insufficiently redacted” the comment cards which “inadvertently subjected” Plaintiffs to “a brief period of unwanted attention.” (*Id.*) These explanations were soundly rejected by the jury. As the trial court observed, “looking at the evidence ***in the light most favorable to the defense***, the CEO was negligent in doing this. That is in the best light.” (*App. 1424.*) Of course, the jury was not bound to evaluate the evidence presented by the Defendants in that manner, nor is this Court.

Plaintiffs have thoroughly briefed this aspect of Defendants’ challenge in their initial *Brief* at pp. 32-35. Plaintiffs will accordingly address whether the punitive damages award is excessive in light of Quicken II which outlined the factors to be considered:

When a trial or appellate court reviews and award of punitive damages for excessiveness under Syllabus points 3 and 4 of Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (199), the court should first determine whether the amount of the punitive damages award is justified by aggravating evidence including, but not limited to: (1) the reprehensibility of the conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff. The court should then consider whether a reduction in the amount of the punitive damages should be permitted due to mitigating evidence including, but not limited to: (1) whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant’s conduct; (2) whether punitive damages bear a reasonable relationship to compensatory damages; (3) the cost of litigation to the defendant; (4) any criminal sanctions imposed on the defendant for his conduct; (5) any other civil actions against the same defendant based upon the same conduct; (6) relevant information that was not available to the jury because it was unduly prejudicial to the defendant and (7) additional relevant evidence. Quicken II, *supra* at 49.

***E. Evaluation of Aggravating Factors***

***(1) Reprehensibility of Conduct***

Defendants argue that no evidence supports a finding that their conduct was reprehensible. However, Plaintiffs established that Defendants' "showed no concern for any of the consequences of its conduct" until trial. Defendants have also "refused to concede that it engaged in any improper or illegal conduct" as was also the case with the defendant, Quicken Loans. Quicken II, *supra* at 55. Just as defendant Quicken Loans argued, Defendants assert that "there was no physical harm," to Plaintiffs and that "the conduct at issue was one-time conduct." *Id.* Quicken Loans also argued that this single instance of wrongdoing was not sanctioned by any officer or corporate policy, an argument unavailable to Defendants herein given the direct participation of the CEO in the posting of the comment cards regarding Plaintiffs.

In Quicken II, this Court rejected each and every one of these arguments made by Quicken Loans regarding the reprehensibility of its conduct. While acknowledging that the conduct at issue posed no threat of physical harm, this Court considered the length of time Quicken Loans continued its misconduct against plaintiff – eight months time. By contrast, in the instant case, there was physical harm after the hostile work environment led to an on-the-job injury of Plaintiff Wall. This hostile environment persisted and had continued for three years at the time of trial. Defendants herein knew or should have known of the potential for harm when the union asked them to take down these postings. In fact, at trial CEO Lager acknowledged his mistake in posting the comments directed at Plaintiffs. Yet, Defendants have made no effort to "make amends" or offer settlement. Just as in Quicken II, "[t]his is not a close issue. The majority of the reprehensibility considerations weigh

against” Defendants. Quicken II, supra at 55. The conclusion that Defendants’ conduct was “reprehensible” was the correct one and is amply supported by the record.

**(2) Whether Defendants Profited From their Conduct**

Defendants have made no argument regarding this factor and accordingly have waived any challenge on this basis. Plaintiffs did not contend Defendants profited and the court-below did not make a finding that they had.

**(3) Financial Position of Defendants**

Defendants assert that there was no evidence regarding their financial position, an aggravating factor also addressed in Quicken II. This contention is inaccurate as evidence of Defendants’ financial circumstances and ability to pay was elicited from Defendant Lager by Defendants. Defendant Mel Lager testified he was paid a salary of \$234,600 per year as CEO of Constellium. (*App. 1364.*) At the time of trial, Defendant Lager no longer worked for Constellium, but he remained on a twelve month “salary continuation plan” at the same salary. (*App. 1094-1095; 1364-1366.*)<sup>10</sup> Defendant Lager also received a bonus earned in 2011 and paid to him in 2012 in the approximate amount of \$127,400 as well as another \$56,000 per the employment agreement in place with Constellium. (*App. 1366-1367.*) Finally, Mr. Lager received an additional \$14,000 for consulting work performed for Constellium during 2012, and he was careful to note he had sustained a loss of \$16,000 in his “K-1, which was part of a company that [he] had some ownership in” although this loss had nothing to do with his income from Constellium. (*App. 1368.*) Mr. Lager also acknowledged that he had an agreement with Constellium that he would not be

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<sup>10</sup> Defendant Lager left Constellium when new owners purchased the company, not as the result of this lawsuit or any disciplinary action. (*App. 1094-1095.*)

personally paying any verdict rendered against him in the case. (*App. 1372-1373.*)<sup>11</sup> CEO Lager also revealed that during the fall of 2009, the company was for sale and was later sold. No other evidence regarding Defendants' financial information was presented to the jury.

In evaluating whether Defendants have "the ability to pay a fair and reasonable punitive damage award within the confines of Garnes," it is plain from this testimony that Defendants do. Quicken II, *supra* at 59. The testimony of former CEO Lager reflected that in 2009, Defendants paid their CEO over \$234,000 per year. Defendants continued to pay CEO Lager this salary a year after he left Defendants' employ, while Defendants presumably paid their current CEO as well. The other payments and bonuses paid to Defendant Lager totaled an additional \$183,400, for a grand total of \$418,000 paid to Defendant Lager after he left the employ of Defendants. That did not include the \$14,000 received for "consulting work."<sup>12</sup>

Obviously if Defendants have the ability to pay an additional \$418,000 to a former employee in a single year, 2012, while continuing to pay its current CEO, Defendants have the ability to pay the punitive damage award to Plaintiffs.

#### ***(4) Encouragement of fair and reasonable settlements***

Defendants have also made no challenge regarding this factor and accordingly have waived any objection on this basis. However, Defendants have had and continue to have "an opportunity to resolve this matter by way of settlement." Quicken II, *supra* at 61.

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<sup>12</sup> Indeed, while not discussed by the trial court, the fact that Defendants continued to "consult" with Defendant Lager is a circumstance which also points to Defendants' complete failure to recognize the wrongfulness of Mr. Lager's conduct and its indifference to its civil obligations to Plaintiffs and other workers in the plant.

However, “there is no evidence before this Court that [Defendants have] ever shown any interest in settling this matter with Plaintiffs.” *Id.* Accordingly, the trial court properly determined that Defendants made no reasonable offer of settlement at any time and considered this circumstance in affirming the award of punitive damages.

**(5) *The cost of litigation to the plaintiffs***

Again, Defendants have made no challenge regarding this factor and have waived any such challenge. The court below determined that there were “substantial costs” incurred by Plaintiffs in excess of \$8000 and awarded attorney fees in the total amount of approximately \$60,000.

**F. *Evaluation of Mitigating Factors***

**(1) *Reasonable Relationship to Harm***

Defendants assert that Plaintiffs suffered no “grievous harm” and are therefore barred from recovering punitive damages. Citing Tudor v. Charleston Area Medical Center, 203 W.Va. 111, 506 S.E.2d 554 (1997), Defendants reason that “where there has been a substantial award of emotional distress damages” without “any physical trauma or medical or psychiatric proof of mental trauma,” allowing punitive damages and emotional distress constitutes “impermissible double recovery.” This notion was rejected in Sheetz, Inc. v. Bowles, Rice McDavid Graf & Love, PLLC, 209 W.Va. 318, 547 S.E.2d 256 (2001). Nevertheless, Defendants attempt to bootstrap this argument by reasoning that without more than emotional distress, and when considering other enumerated factors from Garnes, punitive damages are inappropriate in this case. (*Defendants’ Brief at 39.*)

As observed in Quicken II, consideration of this mitigating factor leads to the following inquiry: “Punitive damages should bear a reasonable relationship to the harm

that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendants' actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater." Quicken II, supra at 64.

Defendant Quicken Loans argued that the "only legitimate harm" suffered by the plaintiff was the loss of \$18,000, measured by the restitution ordered. Quicken Loans reasoned that the punitive damage award of \$2,168,188 was 124 times the amount of the restitution award, an unacceptable ratio. Rejecting that argument, this Court instead focused on the potential harm to plaintiff and other consumers, including re-payments over the life of the loan which would total over \$500,000. Additionally, when adding attorney fees to the compensatory damage award, the ratio of punitive damages to compensatory damages was 3.53 to 1, within a constitutionally acceptable range. Quicken II, supra, 67.

Punitive damages are available in employment cases in West Virginia. Haynes v. Rhone Poulenc, 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999).<sup>13</sup> However, the evaluation or measure of harm in this case, a hostile work environment case, will of necessity require different considerations than the Quicken II contract case where fraud and money damages were at issue. In the instant case, the harm suffered by Plaintiffs, characterized by the court-below as "severe," was put into economic terms by the jury. This harm included three

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<sup>13</sup> In Haynes v. Rhone Poulenc, 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999), the Court considered punitive damages in a discrimination case and noted that: "[T]he question that a court must ask itself, in determining whether a jury can consider an award of punitive damages (in a case where they are legally permissible) is: Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could . . . reach[] a verdict against the [defendant] on the issue of punitive damages. Alkire v. First Nat. Bank of Parsons, 197 W. Va. 122, 129, 475 S.E.2d 122, 129(1996). Haynes v. Rhone Poulenc, 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999).

years of emotional distress caused by working in a gender-based hostile environment, as well as an on-the-job injury to Plaintiff Lou Ann Wall. The jury valued this harm at \$250,000 for each plaintiff. The emotional distress suffered by Plaintiffs was not imaginary. It was confirmed by a number of witnesses who testified regarding Plaintiffs' demeanor following these events. Accordingly, the harm suffered by Plaintiffs is amply documented in the record, is legitimate harm, and supports the punitive damages awarded to each Plaintiff.

As for potential harm to Plaintiffs or others, females working in this environment and subjected to this treatment would be similarly distressed by such work conditions. Potential harm also includes more serious physical on-the-job injuries if females are isolated and segregated in their job duties as occurred in this case. Possible harm could also include loss of earnings and benefits through constructive discharge since many workers would refuse to endure this environment. For all of these reasons, Quicken II does not require further consideration of this factor.

**(2) *Relationship of punitive damages to compensatory damages***

Defendants did not raise this issue on appeal and accordingly have waived any challenges regarding this factor. The trial court correctly observed that the 1 to 1 ratio of punitive damages to compensatory damages in this matter was well within the limits set forth by this Court in Garnes. In fact, when attorney fees are added to compensatory damage awards as this Court required in Quicken II, the ratio drops to .89 to 1. Because the multiplier is below even a single digit, "there is a presumption that the award is reasonable and proportional." Quicken, II supra. at 67.

**(3) *The cost of litigation to the defendants***

Defendant offered no evidence and made no challenge regarding this factor. The trial court made no findings regarding this factor.

**(4) *Criminal sanctions imposed on defendants for this conduct***

There was no evidence that Defendants were subjected to criminal sanctions for this conduct. The trial court properly noted the absence of this evidence and weighed this factor in reaching its decision in this matter. (*App. 1749, ¶28.*)

**(5) *Other civil actions against the same defendants based upon the same conduct***

There was no evidence offered to the court that other civil actions were brought against Defendants based on this type of conduct. The trial court did, however, properly note the absence of this evidence and weighed this factor in reaching its decision in this matter. (*App. 1749, ¶28.*)

**(6) *Relevant information unavailable to the jury because it was unduly prejudicial to the defendant and***

**(7) *additional relevant evidence***

Defendant offered no other evidence and made no challenge regarding these factors. The trial court made no findings regarding these factors.

In summary, Defendants presented insufficient mitigating evidence warranting any decrease of the award herein. Defendants' first apology to Plaintiffs was before the jury at trial. Defendants admitted they knew Plaintiffs had been held up to scorn and ridicule due to its actions, yet did nothing to correct the situation for over three years before trial. In fact, despite the *faux* apology, at trial, Defendants called three of Plaintiffs' male coworkers

to testify at trial that the derogatory statements made about the Plaintiffs and posted at the plant gates by Defendants, were accurate. In other words, Defendants claimed Plaintiffs were, in fact, fat ass, lazy worthless, bitches. Though these same epithets weren't uttered on the witness stand, the clear purpose of the Defendants' case-in-chief was to prove the truth of the comments directed at Plaintiffs.

This evidence was overwhelmingly contradicted by other male coworkers who testified that Plaintiffs were long-serving, loyal and hard-working employees, who suffered enormous backlash after the derogatory comment cards about them were posted by Defendants. Far from conduct justifying mitigation or *remittitur*, such conduct supports the award by the jury, upheld by the Circuit Court and affirmed on appeal by this Court. It should not be disturbed.

### ***III. Conclusion***

The majority correctly determined that “a jury had evidence before it from which it could have reasonably found that the respondents were subjected to a hostile work environment on the basis of their gender.” Constellium Rolled Products Ravenswood, LLC, v. Griffith, 2014 W.Va. LEXIS 1089, 9 (2014). Punitive damages were properly considered and awarded by the jury, and were consistent with the evidence of the case. As the majority concluded in that regard:

With respect to this specific case, CEO Lager's intentional publication of the comment cards with identifiable and derogatory information regarding the Respondents, along with his responses which failed to repudiate the derogatory and sexist nature of the comments, was sufficient for the jury to reasonably find and determine that an award of punitive damages was justified. Further, Constellium made no attempt to determine who had made the derogatory comments. Once the author confessed, he was not disciplined in any manner. The

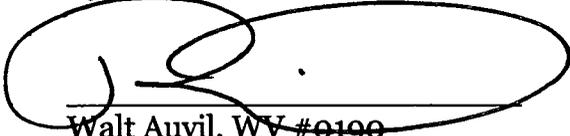
gender based language in the comment cards imposes upon Constellium a duty to investigate and take effective action to correct the problem. *Syl. Pt. 3*, in part, Fairmont Specialty Servs. v. WV Human Rights Comm'n., 206 W.Va. 86, 522, S.E. 2d 180 (1999) Constellium Rolled Products Ravenswood, LLC, v. Griffith, 2014 W.Va. LEXIS 1089, 15 - 16 (2014).

Plaintiffs respectfully request that the verdict of the jury be affirmed once again.

Respectfully submitted,

LOU ANN WALL  
SHARON GRIFFITH  
Plaintiffs-Below, Respondents

By Counsel,

A handwritten signature in black ink, appearing to be 'Walt Auvil', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**No. 13-1084**

**CONSTELLIUM ROLLED  
PRODUCTS RAVENSWOOD, LLC,  
A Delaware Corporation and  
MELVIN LAGER  
Defendants-Below,  
Petitioners,**

**v.**

**SHARON GRIFFITH and LOU ANN WALL,  
Plaintiffs-Below,  
Respondents.**

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Plaintiffs/Respondents in the above-styled matter hereby certifies that on the 9<sup>th</sup> day of March, 2015, he served the foregoing Plaintiffs' Brief Upon Rehearing upon Ancil G. Ramey and Christopher Slaughter, counsel for Defendants, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

Ancil G. Ramey, Esq.  
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