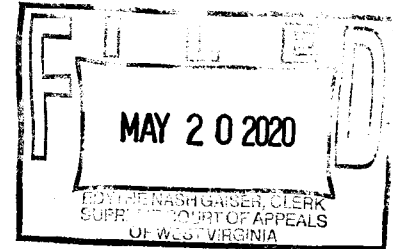


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 19-1126



MARY ZERFOSS,
Petitioner,

v.)

**HINKLE TRUCKING, INC., AND
GARY HINKLE,**
Respondents.

Appeal from an order
of the Circuit Court of Pendleton
County (17-C-7)

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Petitioner's Reply Brief

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TABLE OF CONTENTS

Table of Authorities.....	2
Argument.....	3
Conclusion.....	14
Certificate of Service.....	16

TABLE OF AUTHORITIES

State Cases

<i>Bartles v. Hinkle</i> , 196 W.Va. 381, 472 S.E.2d 827 (1996).....	12
<i>Gress v. Petersburg Foods, LLC</i> , 215 W.Va. 32, 592 S.E.2d 811 (2003).....	10
<i>Gum v. Dudley</i> , 202 W.Va. 477, 505 S.E.2d 391, Syl. pt. 5 (1987).....	8
<i>Hanlon v. Chambers</i> , 195 W.Va. 99, 464 S.E.2d 741 (1995).....	4
<i>Hanlon v. Chambers</i> , 195 W.Va. 99, 464 S.E.2d 741, Syl. pt. 3 (1995).....	5
<i>Hanlon v. Chambers</i> , 195 W.Va. 99, 464 S.E.2d 741, Syl. pt. 4 (1995).....	5
<i>Meadows v. Wal-Mart, Inc.</i> , 207 W.Va. 203, 530 S.E.2d 676, Syl. pt. 6 (1999).....	7
<i>Skaggs v. Elk Run Coal Co., Inc.</i> , 198 W.Va. 51, 479 S.E.2d 561, 584 (1996).....	4
<i>Robertson v. Opequon Motors Co.</i> , 205 W.Va. 560, 519 S.E.2d 843 (1999).....	6, 7
<i>Shaffer v. Ft. Henry Surgical Assoc., Inc.</i> , 215 W.Va. 453, 599 S.E.2d 876 (2004).....	10
<i>Walsh v. Jefferson Memorial Hosp.</i> , 214 W.Va. 385, 589 S.E.2d 507 (2003).....	10

Federal Cases

<i>Atchison v. Norvartis Pharm. Corp</i> , 2012 WL 851114 (S.D.W.Va. Mar. 13, 2012).....	9
<i>Byard v. Verizon W.Va., Inc.</i> , 2012 WL 1085775.....	6, 7

Codes

West Virginia Code § 5-11-1 et seq.....	6
West Virginia Code § 5-11-9(1).....	6
West Virginia Code § 21-5-1 et seq.....	8, 9
West Virginia Code § 21-5-3.....	9
West Virginia Code § 21-5-4.....	9, 10, 14
West Virginia Code § 21-5-4(b).....	9

West Virginia Code § 21-5-4(e).....9

West Virginia Code § 21-5-9.....6, 7

West Virginia Constitution, Section 10 of Article III.....12

Rules

West Virginia Rules of Civil Procedure, Rule 11.....12

West Virginia Rules of Civil Procedure, Rule 16.....12

West Virginia Rules of Civil Procedure, Rule 37.....12

West Virginia Rules of Civil Procedure, Rule 30(d).....10

West Virginia Rules of Civil Procedure, Rule 30(d)(3).....10, 11, 12

West Virginia Rules of Civil Procedure, Rule 30(d)(4).....14

West Virginia Rules of Civil Procedure, Rule 54(b).....8, 9

Other Authorities

Labor Management Relations Act § 301.....7

ARGUMENT

A. The trial court incorrectly found that Petitioner could not prove the workplace harassment was because of Petitioner's gender. The trial court violated the legal standard for granting summary judgment because a reasonable jury could find that Petitioner's gender was a motivating factor in the harassment of Petitioner.

Respondent agrees that Ms. Zerfoss presented evidence that she was mistreated at work.¹ Respondent cite *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995), which apparently show Respondents agree with *Hanlon's* holdings.

It is difficult to understand Respondents' argument, but assuming that Respondent is arguing that the mistreatment of Ms. Zerfoss cannot be based on sex, such an assumption disregards the facts of this case. The parties agree that Ms. Zerfoss was mistreated at work because a man, Tony Sites, Respondents assumed was Ms. Zerfoss' "paramour", was shot and killed by a man shooting at Ms. Zerfoss. The facts missing from Respondents' argument is that Respondents believed Ms. Zerfoss was having an affair with Mr. Sites because they saw her sitting in a truck with Mr. Sites. Respondents even believed it would be suspicious if Ms. Zerfoss rode to lunch with her male attorney. However, when the corporate designated witness was questioned about male employee's affairs, Respondents testified that they did not get involved with employee's personal lives. Pages 78-83 of Appendix. *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561, 584 (1996) clarified that an "employer could quite honestly testify that it fired a female employee because of her job performance, yet the Plaintiff might still be able to establish "pretext" by proving that the employer subconsciously evaluated women differently. Also, if Respondents are asserting that Ms. Zerfoss must prove her *prima facie* case by a

¹ Respondents assert that mistreatment is not the same as harassment. It is unclear of the differences in the two terms for purposes of the Human Rights Act cases.

preponderance of the evidence, then *Hanlon* should not have been relied upon by Respondents. *Hanlon*, Syl. pt. 4, explains that although a Plaintiff must prove her case by a preponderance of the evidence to the jury, the showing at the summary judgment stage is *de minimis*.

Hanlon, Syl. pt. 3 held that once a prima facie case is shown, the case should go to the jury “unless the employer comes forward with evidence of a dispositive nondiscriminatory reason as to which there is no genuine issue and which no rational trier of fact could reject...”

Because Respondents testified that they did not get involved in male employees personal lives, only Ms. Zerfoss’ gender distinguishes her from her male co-workers. If a male had been sitting in a truck with Mr. Sites, there would not have been a negative assumption that he was Mr. Sites “paramour”. If a male had been suspected of being Mr. Sites “paramour”, it would not have mattered because Respondents did not get involved with employee’s personal lives. A rational juror could infer that Ms. Zerfoss’ gender played a part in the mistreatment of her. Likewise, Respondents have failed to come forward with a dispositive nondiscriminatory reason as to which no rational trier of fact could reject.

Respondents were allowed to demand strict moral conduct in the workplace, but not just for the females. Similarly, Respondents assumed a sexual affair based on a male and female sitting in a truck together. Most reasonable fact finders would reject an assumption that every man and woman sitting in a truck are “paramours”.

Gone are the days where an employer will admit to stereotypical thinking. However, it is clear from the evidence that males’ personal lives were not considered at the workplace. What separates Ms. Zerfoss from her co-workers, is her gender.

Respondents unfairly argue that no evidence was submitted to support Ms. Zerfoss’ assertion that males were treated more favorably than females. See Respondent’s footnote 6 at

page 13 of Response. The reason no such evidence was submitted to the circuit court at the summary judgment stage was because Respondents convinced the circuit court during discovery that sexual discrimination is different than sexual harassment. Pursuant to West Virginia Code § 5-11-1 et seq., discrimination based on gender is illegal. Because harassment interferes with the terms, condition and privilege of employment, sexual harassment violates West Virginia Code § 5-11-9(1). Sexual harassment is not separate from sexual discrimination, sexual harassment is sexual discrimination. Court's September 28, 2017 order.

B. The trial court prevented violations of the West Virginia Wage Payment and Collection Act from the jury's consideration.

Respondents' make two arguments: (1) "In reaching its Evidentiary Ruling, the circuit court corrected (sic) Determined that W.Va. Code § 21-5-9 is an Administrative Provision that Does Not Give Rise to a Private Cause of Action; and (2) "The Circuit Court Did Not Abuse Its Discretion in Concluding that Plaintiff Would be Unfairly Prejudicial, and Misleading to Introduce Evidence of an Administrative Violation of Section 9 (sic) the WPCA to the Jury". Both arguments will be addressed.

(1) Enforcement of West Virginia Code § 21-5-9

Conspicuously missing from Respondents' argument is a response to *Robertson v. Opequon Motors, Inc.*, 205 W.Va. 560, 519 S.E.2d 843 (1999) which held that the Wage Payment and Collection Act requires an employer to notify an employee of the rates of pay, and any changes to that rate, to spare workers from trying to hit an ever-moving target.

Respondents' rely almost exclusively upon *Byard v. Verizon W.Va., Inc.* 2012 WL 1085775, to assert that the written notice requirement contained within West Virginia Code § 21-5-9, is not relevant in a case to collect unpaid wages. Respondents' argument is

misleading and lacks the candor this Court deserves. *Byard*, page 14, found that the Plaintiff's claim for unpaid wages was completely pre-empted by § 301 of the Labor Management Relations Act. Once the Wage Payment and Collections Act case for unpaid wages was dismissed, the Federal Court found that a violation of the record keeping provisions of West Virginia Code § 21-5-9 does not directly concern "unpaid wages". See page 17 of *Byard*. The Federal Court then clarified that although the compliance of the written notice requirements of West Virginia Code § 21-5-9 can be a relevant consideration in a Wage Payment and Collection Act action, it does not illuminate whether an employee has a right to sue directly for a record keeping violation if the unpaid wages claim has been dismissed. *Byard*, page 18, found that by its terms, the Wage Payment and Collections Act limits private causes of action under the statute, and the accompanying right to file directly to employees who seek to collect a claim for unpaid wages. The trial court, based upon Respondents assertions, allowed evidence that § 21-5-9 had been violated, but prohibited Ms. Zerfoss from explaining that such a failure to notify Ms. Zerfoss was prohibited by the Wage Payment and Collections Act to spare workers from trying to hit an ever-moving target. See *Robertson*. Respondents admit that they did not provide their employees written notices of their pay rate at any time. Even though the question for the jury was what was Ms. Zerfoss' pay rate, they were not allowed to hear that Respondents' violated the statutory mandated written notice.

(2) Relevance of Ms. Zerfoss' Pay Rate

Meadows v. Wal-Mart, Inc., 207 W.Va. 203, 530 S.E.2d 676, Syl. pt. 6 (1999) held that this Court should construe any ambiguity in the terms of employment in favor of

employees. It is relevant to the terms of Ms. Zerfoss' employment that Respondents' violated the statute which mandated that her pay rate be in writing.

Gum v. Dudley, 202 W.Va. 477, 505 S.E.2d 391, Syl. pt. 5 (1987) held:

“The general duty of candor requires attorneys be honest and forthright with courts; that attorneys refrain from deceiving or misleading courts either through direct representations or through silence; and this duty is owed to courts during all aspects of litigation.”

Respondents silence violated the duty of candor to this Court.

C. The trial court wrongly found that liquidated damages only apply to the pay period immediately preceding the termination of employment and such damages are limited to wages the employer does not dispute.

Respondents first argue that Rule 54(b) of the West Virginia Rules of Civil Procedure does not apply. Rule 54(b) states:

“Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties”

Mary Zerfoss had three claims for relief: (1) violation of West Virginia Code § 21-5-1 et seq.; (2) discrimination; and (3) breach of contract. See pages 1-3 of Appendix. The trial court dismissed Ms. Zerfoss' claim for liquidated damages and allowed Ms. Zerfoss' claim for a

violation of the Wage Payment and Collection Act to proceed to trial. Therefore, the trial court's order of June 17, 2019 did not adjudicate all the claims, rights, and liabilities.

Respondents do not provide any rationale for ignoring Rule 54(b).

Next, Respondents misstate Ms. Zerfoss' complaint. Contrary to Respondents' factual assertions, Ms. Zerfoss "pleaded and asserted her Wage Payment and Collections Act claim" under West Virginia Code § 21-5-1 et seq. See paragraph number 12 found at page 2 of the Appendix.

Ms. Zerfoss did assert that she was not paid her promised pay as required by West Virginia Code § 21-5-3. See paragraph number 10 of page 2 of Appendix. Ms. Zerfoss' breach of contract claim asserts that Respondents breached their contract by not paying her the money promised for her services.

It cannot be disputed that West Virginia Code § 21-5-4(e) makes an employer liable for "liquidated damages if the employer fails to pay an employee the wages due for work that the employee performed prior to her separation of employment". See West Virginia Code § 21-5-4(b).

Respondents rely upon *Atchison v. Norvartis Pharm. Corp.*, a non-reported Federal case which did not deal with the facts of this case and is nevertheless not binding or instructive to this Court.

Respondents' also claim mistakenly that Ms. Zerfoss did not assert a claim under West Virginia Code § 21-5-4 and refer this Court to pages 384-389 of the Appendix. Respondents failed in their duty of candor not to advise this Court that the trial court understood Ms. Zerfoss' position. Paragraph 3 of the June 17, 2019 order, page 385 of the Appendix states:

"In response, Plaintiff argues that because Defendants never paid Plaintiff what they agreed to pay her, West Virginia Code § 21-5-4 has been violated. Plaintiff further argues that she stated her claim arose under "West Virginia Code § 21-5-1 et seq." and, therefore, her claim includes West Virginia Code § 21-5-4."

The purpose of the Wage Payment and Collection Act is to protect working people and assist them in the collection of compensation wrongfully withheld, and should be construed liberally to benefit the intended recipients. *Shaffer v. Fort Henry Surgical Assoc., Inc.*, 215 W.Va. 453, 599 S.E.2d 876 (2004); *Gress v. Petersburg Foods, LLC*, 215 W.Va. 32, 592 S.E.2d 811 (2003); and *Walsh v. Jefferson Memorial Hosp.*, 214 W.Va. 385, 589 S.E.2d 507 (2003).

Although a strict interpretation of the Wage Payment and Collection Act may lead to Respondents' position, the overwhelming law in West Virginia is that a liberal interpretation of the statute is warranted.

Ms. Zerfoss' case was that she was not paid what she was promised. West Virginia Code § 21-5-4 requires employers to pay their employees fully at the time the employment ended. Respondents did not pay Ms. Zerfoss for her services she rendered and liquidated damages are warranted.

D. The trial court sanctioned Petitioner for following the Rules of Civil Procedure.

Respondents do not address Ms. Zerfoss' Rule 30(d)(3) Motion which was filed to protect the attorney-client privilege. Rule 30(d)(3) states in part:

“Upon the demand of the objecting party... the taking of the deposition shall be suspended for the time necessary to make a motion for an order.”

This court found:

“The appropriate initial procedure for a deponent who believes a deposition is being conducted improperly is to suspend the deposition under Rule 30(d) of the West Virginia Rules of Civil Procedure and promptly apply to the court for an order to terminate the deposition or to limit its scope.”

Ms. Zerfoss' deposition took place on February 2, 2018. It started at 9:58 a.m. and was terminated at 1:12 p.m. The Rule 30(d)(3) Motion was made on February 15, 2018. Ms. Zerfoss

promptly applied, in less than a week, to the court for protection. On March 9, 2018, the trial court denied Ms. Zerfoss' Motion and referred the question to the discovery commissioner in this case to determine whether the information in question was protected by the attorney-client privilege. Pages 55-57 of Appendix. The discovery commissioner concluded that the documents were prepared by Ms. Zerfoss for the purpose of memorializing issues to be discussed with counsel at a later time and therefore constituted privileged communication outside the scope of proper inquiry by Respondents' lawyer. Page 59 of Appendix.

Respondents admit that a purpose of their inquiry was to see if Ms. Zerfoss would waive her privilege.

It is uncontested that Ms. Zerfoss' attorney objected and instructed Ms. Zerfoss not to answer several times before terminating the deposition to present her Rule 30(d)(3) Motion. Respondents were informed that the notes in question was information intended to go to her attorney and that she had provided the notes to her attorney. Respondents were warned that repeated questioning after learning that the notes were intended for her attorney appeared to be intended to annoy and harass Ms. Zerfoss. Respondents persisted in their improper conduct.

The trial court's March 9, 2018 order granted Respondents' Motion for Sanctions and denied Ms. Zerfoss' Rule 30(d)(3) motion. Pages 55-57 of Appendix. The trial court's order failed to identify the alleged wrongful conduct.

The subsequent April 27, 2018 order found that the discovery commissioner's findings were wrong. Specifically the trial court found that Respondents' lawyer was properly questioning Ms. Zerfoss

“to explore whether a privilege existed with respect to the information contained in her notebooks and, if so, whether such privilege was waived when Plaintiff reviewed the notebooks in anticipation of her deposition while waiting for her attorney to

arrive. Defense counsel did not ask questions about the contents of the notebooks. Plaintiff's counsel would not allow inquiry to establish a record of the facts and circumstances surrounding the creation of the information contained in Plaintiff's notebooks. Then, Plaintiff's counsel terminated the deposition."

The trial court's order overlooked Ms. Zerfoss' deposition testimony that the information she wrote in her notebook was information she intended to go to her attorney, and that she provided the information to her attorney. See page 27 of Respondents' Response. The facts and circumstances surrounding the creation of the information contained in her notebook was that Ms. Zerfoss wrote in her notebook information she intended to go to her attorney, and Ms. Zerfoss gave the information to her attorney.

This Court has held:

"Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.

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

The alleged wrongful conduct was protecting information Ms. Zerfoss intended to go to her attorney. The trial court did not explain why following Rule 30(d)(3) constituted sanctions.

Respondents remaining arguments are curious and difficult to respond to in a meaningful way. First, Respondents mention that Ms. Zerfoss' attorney was approximately thirty minutes late after a two hour trip from his office over mountains with varying degrees of cell phone services, in January. Apparently, Respondents are attempting to justify why they were miffed at Ms. Zerfoss' attorney.

Respondents argue in footnote 12 of their response that Ms. Zerfoss' attorney was sanctioned seven years ago in a different case, in a different circuit, and a different judge, with different parties and different lawyers. The case cited by Respondents was not reported in S.E.2d.

Ms. Zerfoss' attorney has been an attorney for forty-three years. The fact that Respondents found another incident of sanctions against him, is not relevant to the facts of this case. Apparently, Respondents purpose of this argument was to insinuate prior bad acts prove that protecting the attorney client privilege is suspicious. Out of a four hour and fourteen minute deposition experience, Respondents rely only upon seven minutes and forty seconds of the transcript.

Hopefully, this Court will disregard Respondents' attack on Mr. Zerfoss' attorney.

CONCLUSION

A. Males in the workplace were treated more favorably than Ms. Zerfoss, therefore, the jury should have been allowed to decide if discrimination occurred.

B. Respondents intentionally withheld information which the Wage Payment and Collection Act required. Respondents then profited from their illegal conduct. Respondents' violation of the statute was relevant to the terms of Ms. Zerfoss' employment.

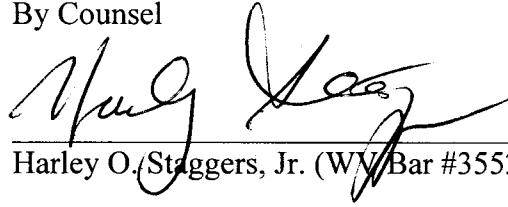
C. West Virginia Code § 21-5-4 provides for liquidated damages when an employer fails to pay an employee within a defined time after the employment is terminated. Respondents did not pay Ms. Zerfoss what they promised.

D. Ms. Zerfoss' attorney followed the mandate of Rule 30(d)(4) and was sanctioned for following the rules.

A new trial should be provided.

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By Counsel



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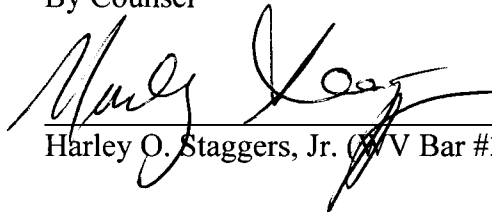
I, Harley O. Staggers, Jr., a practicing attorney, hereby certifies that a true copy of the **Petitioner's Reply Brief** has been served by United States Mail postage prepaid, on this the 14th day of May, 2020 upon the following:

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