

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 22-0185

Jayson Nicewarner, *et al.*,  
Plaintiffs Below, Petitioners,

v.

City of Morgantown,  
A municipal corporation,  
Defendant Below, Respondent.

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**BRIEF OF AMICUS CURIAE  
PROFESSIONAL FIRE FIGHTERS OF WEST VIRGINIA  
SUPPORTING REVERSAL OF DECISION BELOW**

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## **INTRODUCTION**<sup>1</sup>

This brief focuses on the first Assignment of Error alleged by the Firefighters in their Opening Brief (“FF Br.”): whether firefighters’ holiday pay should be computed on the basis of a regular 24-hour workday, as the governing statute requires, *see* W. Va. Code § 8-15-10a (the “Holiday Pay Act” or the “Act”), or whether holiday pay should be capped at the number of hours spent working on the actual holiday. *See* FF Br. at 1. Amicus, like the Firefighters, believes that the former is correct, based on the language of the Act, governing precedent of this Court, and considerations of public policy. These issues are addressed in turn below.<sup>2</sup>

Several facts should be emphasized at the outset. As the Firefighters explained (and the lower court held), it is undisputed that all firefighters work a 24-hour shift starting at 8:00 a.m. *See* FF Br. at 16; *see also* JA 145. It is also undisputed that, for regular workdays, firefighters are paid for all 24-hours of each shift. JA 146 (City’s Motion for Summary Judgment stating that “in according with

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<sup>1</sup> No counsel for any party authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of the brief. The lead plaintiff in this case, Jayson Nicewarner, is the Secretary-Treasurer of the PFFWV. This brief, however, is filed by the PFFWV, which has a strong institutional interest in advancing the interests of all professional firefighters in the State of West Virginia.

<sup>2</sup> Amicus agrees with the Firefighters on the other issues presented in this case: namely, whether paid time off under the Holiday Pay Act constitutes a “wage” within the meaning of the West Virginia Wage Payment and Collection Act; whether the trial court erred in applying laches; and whether the court also erred in failing to apply a five-year statute of limitations. Amicus endorses those arguments but does not repeat them here.

the Fair Labor Standards Act, firefighters are paid for the entirety of their shift, regardless of sleep and meal times.”) (citation omitted)).

This practice reflects the fact that firefighters are on-duty during all hours of their shift, even when they are not actively fighting fires (or saving lives in some other fashion). Except for time spent sleeping and at meals, firefighters are actively involved in various work-related tasks during the remaining portion of their shifts, such as facility maintenance, exercise, and training. All this time, moreover, is time spent away from family and friends—and at constant risk of being called up to respond to an emergency. Thus, firefighters are not allowed to spend their “off” hours at home; just like soldiers, they *live* at work. And, just like soldiers, firefighters are paid for all 24 hours of their shift, as they should be.

When firefighters show up for work on a holiday, they start at 8:00 a.m. and stay through the entire day and night, leaving at 8:00 a.m. the next morning. No part of the holiday is available for activities with friends and family. No part of that day is available for religious observance or relaxation. Put simply, *no* part of the holiday is spent like a holiday. Instead, the *entire* holiday—and the eight hours immediately following it, from midnight to 8:00 a.m.—is spent protecting public safety.

Recognizing that the Legislature wanted to compensate firefighters for their extraordinary service to citizens of this State, Judge Faircloth of the 23rd Judicial Circuit interpreted the Holiday Pay Act as requiring firefighters who work on a holiday (or whose regular leave day falls on a holiday) to receive, “at a minimum, either compensation *equal to their shift*, or monetary compensation at a rate of *one*

*and one-half times their regular rate of pay.” Stroop v. City of Martinsburg, Case No. CC-02-2018-C-209, J.A. 328 (emphasis added).*

In keeping with this ruling, many municipalities in the State of West Virginia interpret this straightforward language to mean that firefighters who work *any* part of a holiday are entitled to receive a holiday premium of either 24 hours of compensation time or 36 hours of monetary compensation at their regular rate of pay. See FF Br. at 11-12. That’s what the statute plainly requires, and what the City now pays its firefighters.<sup>3</sup>

But the circuit court here disagreed. In the court’s view, despite the language requiring “compensation equal to their shift,” firefighters working 24-hour shifts are only entitled to receive a holiday premium for *part* of their shift. The court specifically held that firefighters are entitled only to time off “equal to the time spent at work *during the holiday* or the time they would have worked *during the holiday—not* for the full length of their shift.” JA 1262 (emphasis added). The court reasoned that because all firefighter shifts start at 8:00 a.m.,

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<sup>3</sup> Prior to this suit, the City merely compensated all firefighters for 12 hours of holiday pay, despite the fact that their actual shifts are 24 hours and regardless of the amount of time the firefighter actually worked on the holiday. JA 1255. Shortly after this lawsuit was filed, the City changed its policy to grant firefighters “24 hours of leave for each legal holiday in each calendar year”—which is exactly what Amicus believes the statute requires. There’s no reason to think, however, that the City’s capitulation is permanent. As the lower court here explained, the City “voluntarily adopted this Resolution in January 2020 to avoid ongoing disputes with its employees during the pendency of this lawsuit—not in acquiescence to Plaintiffs’ legal claims.” JA 1255. And because this lawsuit encompasses claims going back at least five years, the Firefighters still have a live dispute with the City as to the proper measure of pay under the Act.



only the first 16 hours of any given shift occurs on the actual legal holiday (which ends at midnight). Construing the Act as only requiring compensation for time spent working *on the actual holiday*, the court capped holiday pay at 16 hours, even though the shift that starts on a holiday necessarily lasts a full 24 hours.

In Amicus’s view, that result violates the plain language of the Holiday Act and contravenes governing precedent. If affirmed, it will have a devastating impact on firefighter morale—with attendant adverse effects on public safety. Firefighters deserve to receive the full measure of the holiday pay afforded them by the Legislature—no more, no less. The lower court’s decision to the contrary should be reversed.

## **ARGUMENT**

### **I. THE CIRCUIT COURT’S RULING VIOLATES THE LETTER AND SPIRIT OF THE HOLIDAY PAY ACT.**

When presented with a matter of statutory interpretation, the Court “look[s] first to the statute’s language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” *Grim v. E. Elec., LLC*, 767 S.E.2d 267, 280 (W. Va. 2014) (citing *State ex rel. Roy Allen S. v. Stone*, 474 S.E.2d 554, 560 (W. Va. 1996)); *see also* Syl. Pt. 3, *Tribeca Lending Corp. v. McCormick*, 745 S.E.2d 493 (2013) (“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.”).

When there is uncertainty as to the meaning of a statute, the statute is ambiguous and must be evaluated to give effect to the intent of the Legislature.

See *Dale v. Painter*, 765 S.E.2d 232, 238–39 (2014) (citations omitted). In determining the Legislature’s intent, this Court “[is] mindful that [a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part . . .” *Id.* (citing Syl. pt. 5, *State v. Snyder*, 63 S.E. 385 (1908)).

Here, there is no uncertainty as to the meaning of the Holiday Pay Act. As the *Stroop* Court held, it plainly requires that firefighters be compensated for their full 24-hour shift, not just the portion of the shift spent on an actual holiday. See J.A. 328.

The Act specifically says that:

if any member of a paid fire department is required to work during a legal holiday ... or if a legal holiday falls on the member’s regular scheduled day off, he or she shall be allowed *equal time off* at such time as may be approved by the chief executive officer of the department under whom he or she serves *or, in the alternative, shall be paid at a rate not less than one and one-half times his or her regular rate of pay* ...

W. Va. Code § 8-15-10a (emphasis added). The italicized language says that for firefighters who are “required to work on a holiday” (or if the holiday falls on the firefighters’ regular time off), they “shall” be afforded *either* “equal time off” or “a rate not less than one and one-half his or her regular rate of pay.”

The term “equal time off” cannot mean anything other than a full 24 hours, *because that is the length of a firefighter’s shift*. And the term “one and one-half [the] regular rate of pay” cannot mean anything other than 36 hours of pay for 24 hours of work, because—again—that is a firefighter’s “regular rate for pay” for its



ordinary shift. In Amicus's view, the language simply does not permit any other result.

But even if the Holiday Pay Act were ambiguous (it is not), the circuit court's decision should still be reversed because it contravenes the Act's core purpose: to provide additional compensation for firefighters who routinely risk life and limb while working on holidays when most of the country's workforce is at home with friends and family. *See Dale v. Painter*, 765 S.E.2d 232, 238 (2014) (holding that when statute is ambiguous, it must be construed to give effect to Legislative intent). In light of the legislative goals underlying the Holiday Pay Act, the only sensible reading of the law is that firefighters are entitled to receive a premium for *all* the hours worked during any given shift that begins on a holiday. After all, it is the fact of having to work *on a holiday* that the Legislature deemed worthy of compensation; the fact that a shift starts at 8:00 a.m. on a holiday and then spills over onto the next calendar day does not make a firefighters' sacrifice any less worthy of compensation.<sup>4</sup>

This interpretation of the Act is also consistent with how the City calculates payrolls for firefighters. As the Firefighters explained (FF Br. at 17), a firefighter's 24-hour shift is considered *one day* for purposes of payroll, sick days, bereavement

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<sup>4</sup> But even if the lower court is correct that the City is only required to compensate fire fighters for 16 hours of a 24-hour shift, it is undisputed that the City spent decades only paying its firefighters a holiday premium based on *12* hours of their shifts. *See* n.2, *supra*. At a minimum, Petitioners should be compensated for that underpayment, which is unlawful even by the lower court's reasoning.

days, and vacations days, among others, even though the shift spans more than one calendar day. *Id.* (citing JA 1033 lines 15-19). So, for example, when a firefighter takes a sick day, it is counted as only *one* sick day for payroll purposes, even though that “day” actually spans a 24-hour period encompassing *two* days. Amicus agrees with Petitioners that, “[b]ecause the 24-hour shift in Morgantown has always been considered one day for these purposes, it should also be considered one day for purposes of calculating Holiday Pay, meaning the firefighters should be compensated with paid time off based on the entire 24-hour shift.” *Id.*

That’s consistent with *Stroop v. City of Martinsburg*, Case No. CC-02-2018-C-209, which reached a result opposite from that of the circuit court here. *See* J.A. 324-31. There, as here, the plaintiffs were professional West Virginia firefighters employed by a city fire department, as well as recent retirees of that department. J.A. 328. There, as here, the plaintiffs were required to work 24-hour shifts. *Id.* And there, as here, their municipal employer (the City of Martinsburg) had failed for decades, “and continues to fail,” to compensate its firefighters with the minimum holiday pay mandated by the West Virginia Code. *Id.* As the court put it, the City “did not provide its firefighters with twenty-four (24) hours compensation time or thirty-six (36) hours pay for each legal holiday.” *Id.* at 329. On these facts, *Stroop* found that “if a firefighter works *any part of a Holiday*, that firefighter shall receive 36 hours of pay or 24 hours of paid time off. If the firefighter does not work the Holiday, the firefighter is to receive 36 hours of pay or 24 hours of paid time off.” *Id.* at 328 (emphasis added).

In so ruling, the *Stroop* court emphasized that “[t]he West Virginia Legislature recognizes the service and sacrifice of firefighters and has enacted a statute requiring enhanced holiday pay to acknowledge and compensate firefighters.” *Id.* at 330. Based on this, the court concluded that the firefighters were entitled to 24 hours compensation time or 36 hours pay for each legal holiday, regardless of whether some part of a shift spilled over onto the following day. *Id.* at 329.

In Amicus’s view, that holding was correct because it is faithful to both the language *and* spirit of the Act. The lower court’s holding was neither, nor is it compelled by any contrary decision of this Court, as we now explain.

## **II. THE CIRCUIT COURT’S RULING IS NOT MANDATED BY PULLANO OR ANY OTHER DECISION OF THIS COURT.**

In contrast to *Stroop*, the circuit court here held that, because that firefighters’ shifts “carry over into the following calendar day,” they are only entitled to “time off for each legal holiday equal to the time spent at work during the holiday or the time they would have worked during the holiday—not for the full length of their 24-hour shift.” JA 1262.

Unsurprisingly, the court did not attempt to reconcile this holding with the actual language of the Holiday Pay Act. Instead, the court based its decision on *Pullano v. City of Bluefield*, 342 S.E.2d 164 (1986), which the court deemed “binding precedent” on this issue. JA 1262. But *Pullano* is factually distinguishable on the issue presented here. *See* FF Br. at 17-19.

*Pullano*, like the circuit court here, held that the City of Bluefield was within its rights to pay its firefighters only 16 hours of premium holiday pay. See *id.* at 206. In so holding, however, *Pullano* was careful to “emphasize that the method adopted by the city is acceptable under W. Va. Code, 8–15–10a, *but is not necessarily the method required of all municipalities under this statute.* In particular, the sixteen-hour figure utilized by the city was based on its work schedule.” *Id.* at 206 n.12 (emphasis added). “Other municipalities,” the Court observed, “obviously have different work schedules.” *Id.*

Despite this, the lower court here held that *Pullano* controls this case because in both cases the firefighters work 24-hour shifts starting at 8:00 a.m. See JA 1272. In so ruling, the court failed to afford sufficient consideration to the fact that, *unlike* in *Pullano*, the Petitioners’ 24-hour shift is “considered one calendar day for all purposes.” *Id.* (citation omitted). Thus, the record in *Pullano* revealed that there, *unlike here*, each 24-hour firefighting shift was actually paid as *two separate days* for payroll purposes. See FF Br. at 18 (citing JA 369).<sup>5</sup>

Notably, there was no factual development in *Pullano* on this point at all, unlike in *Stroop* and in this case (see FF Br. at 17), that for all other purposes (sick

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<sup>5</sup> As Petitioners specifically observe (FF Br. at 18), “the Appellant’s Brief in *Pullano* ... clearly stated on Page 10 that each 24-hour shift was actually paid as two separate days for payroll purposes. ... There was no factual development in *Pullano* like there was in Martinsburg and there is here in Morgantown, that for all other purposes (sick day, vacation day, assignment day, military time, bereavement day) the City of Bluefield treated the 24-hour shift as one day. But it was developed that Bluefield actually paid the shift as two days.”

day, vacation day, assignment day, military time, bereavement day) the City of Bluefield treated the 24-hour shift as one day—it did not.

But in the City of Morgantown, firefighters' 24-hour shifts are treated as occurring on *one calendar day* for all purposes *except* the Holiday Pay Act. Thus, in Morgantown, when a firefighter takes sick leave for his 24-hour shift, it is only counted as a single sick day. But when it comes to holiday pay, the fact that a shift spans two days suddenly becomes paramount in the City's view—and the City used that fact to justify limiting firefighters pay to only 12 hours—a figure that is itself arbitrary given that firefighters actually work 16 hours on any given holiday.

This type of picking and choosing is contrary to letter and spirit of the Holiday Pay Act. Given that the City of Morgantown has a practice of treating firefighter shifts as one day for all other purposes, they should be required to use the same approach when it comes to the provision of holiday pay under the Act. That is the only fair and consistent approach—and, as argued above, it is the only approach consistent with the actual language and purpose of the governing statute.

### **III. THE CIRCUIT COURT FAILED TO TAKE PROPER ACCOUNT OF THE UNIQUE SACRIFICES MADE BY FIREFIGHTERS.**

The lower court's ruling is particularly intolerable in light of the extreme dangers of firefighting and its associated negative impact on firefighter's health, both mental and physical. As one source notes, "[f]irefighting is one of the most dangerous and stressful occupations in the world ... [P]utting out fires is not the only requirement of their job; often, firefighters must respond to motor vehicle



accidents, burn victims, severely injured victims, and violent deaths. On the job, it's very likely that firefighters will face a number of different traumatic situations.”<sup>6</sup>

In addition to the physical hazards of fighting fires, including a far higher risk of dying from cancer than the general population,<sup>7</sup> firefighters are repeatedly responding to other emergencies, where they are exposed to horrible scenes of tragedy, natural disaster, and search and rescue operations. An International Association of Firefighters (“IAFF”) poll of 7,000 firefighters found that exposure to trauma has led to numerous mental health problems among firefighters. Nineteen percent of respondents indicated they had thoughts of suicide as a result of their job, while 27% admitted to substance abuse related to their job.<sup>8</sup>

One of the many challenges firefighters and other first responders face as a result of their public service is post-traumatic stress disorder (“PTSD”). It is estimated that 20% of firefighters in the United States suffer from PTSD compared to 3.5% of the general public.<sup>9</sup> One source reports that “prevalence rates [for

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<sup>6</sup> See <https://www.firefighternation.com/firerescue/firefighters-and-trauma/>.

<sup>7</sup> See <https://www.cdc.gov/niosh/newsroom/feature/firefighter-cancer-awareness.html> (explaining that firefighters’ exposure to dangerous chemicals causes far higher cancer rates than in the general population).

<sup>8</sup> See <https://www.nbcnewyork.com/news/local/firefighters-mental-health-survey-ptsd/1809926/>.

<sup>9</sup> See <https://www.firerescue1.com/health-wellness/articles/new-study-estimates-20-percent-of-firefighters-paramedics-have-ptsd-6zyvMnUZ7sWwZib6/>.



PTSD] are ... comparable to that of combat veterans.”<sup>10</sup> Unfortunately, this growing trend among firefighters seems to be on the rise.

Last year, the U.S. Fire Administration published a study that examined the effects of repeated exposure to trauma on firefighters.<sup>11</sup> According to the study, repeated exposure to traumatic events are a greater cause of mental health disorders like PTSD than one single event. The study also found that repeated exposure to trauma leads to desensitivity, irritability and flashbacks.

The study also reported that firefighters experience higher rates of depression than in the general population; higher rates of alcohol use and binge drinking compared to the general population; and “secondary trauma” or “compassion fatigue” from repeated exposure to trauma, including symptoms such as sleep disorders, avoidance behaviors, and feelings of helplessness that are associated with PTSD. *Id.*

Unfortunately, firefighters often do not seek treatment for job-related mental health issues. The IAFF poll found that 81% of respondents were fearful of being seen as weak or unfit for duty if they sought mental health treatment. Another 71% said they have not used treatment services provided by their department.

The main takeaway from these studies is gravely concerning. Firefighters are experiencing PTSD and other mental health issues associated with their jobs,

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<sup>10</sup> See <https://www.firefighternation.com/firerescue/firefighters-and-trauma/>.

<sup>11</sup> See <https://www.usfa.fema.gov/blog/ci-011718.html>.

but are not seeking treatment. PTSD and mental health issues among firefighters is now one of the greatest threats facing these brave public servants.

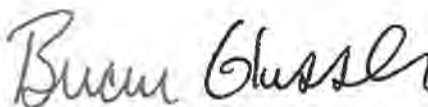
In light of the high risk of firefighting and its attendant physical and mental costs on firefighters, it is no surprise that the West Virginia Legislature decided to afford firefighters extra compensation in the form of the Holiday Pay Act. The lower court's refusal here to allow firefighters the full measure of their pay under the Act is not only an affront to the brave men and women who fight fires every day; it is also thwarts the will of the Legislature.

### **CONCLUSION**

For the foregoing reasons, Amicus respectfully requests that the decision below be reversed and that this Court construe the Holiday Pay Act as requiring that for each legal holiday, all firefighters must receive, at a minimum, a holiday premium equal to a full 24-hour shift, or monetary compensation at a rate of one and one-half times their regular rate of pay for a 24-hour shift.

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## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of **BRIEF OF AMICUS CURIAE PROFESSIONAL FIRE FIGHTERS OF WEST VIRGINIA SUPPORTING REVERSAL OF DECISION BELOW** were served upon the following by placing the same in the regular United States Mail *and* via electronic mail on this 22<sup>nd</sup> day of July 2022:

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