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)

Petitioner's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes

Rules

ASSIGNMENTS OF ERROR

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.

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

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.

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

STATEMENT OF THE CASE

Mary Zerfoss was one of two female truck drivers who worked for Respondent. A former boyfriend came to the workplace while Ms. Zerfoss was driving a truck on the road. Instead of warning Ms. Zerfoss, Respondent did nothing to defuse the potential conflict. One male co-employee, Tony Sites, went out to assist Ms. Zerfoss when she returned to the work place. Mr. Sites was shot and killed. Before the former boyfriend could kill Ms. Zerfoss, he turned the gun on himself and took his own life. The trial court found that Mary Zerfoss was thereafter harassed at work by her male co-workers because they blamed her for the death of Tony Sites. See Appendix, page 97. After the harassment became more than a reasonable person could endure, Ms. Zerfoss quit her job. Instead of paying Ms. Zerfoss all the wages she had earned, Respondent paid Ms. Zerfoss a pay rate that they calculated by "the seat of their pants". See Appendix, page 127. Respondent testified that they intentionally did not provide a statutory written notice of Ms. Zerfoss' pay rate because they did not want their employees to know the pay rate. See Appendix, pages 128-132 of Appendix. A two day trial began on October 1, 2019. The trial judge refused to allow Ms. Zerfoss to present evidence that Respondent violated the written notice provision of the statute because it would be unfair to Respondent. See Appendix, pages 133-135.

The trial court found that liquidated damages only applied to wages not paid for the immediately preceding pay period and then only for wages Respondents did not contest.

SUMMARY OF ARGUMENT

A. Adverse employment decisions based upon gender is illegal discrimination. Harassment of a female employee by male employees based upon the action of the female's former boyfriend creates a question of fact for a jury to decide whether the harassment was based on the female's gender.

B. Intentionally violating the Wage Payment and Collection Act to prevent employee's from knowing their rate of pay is relevant and probative to a claim to recover wrongfully withheld wages. Excluding such evidence because the evidence would prejudice Respondent is a misapplication of the law.

C. Violations of the Wage Payment and Collection Act for wrongfully withheld wages entitles a Plaintiff to liquidated damages.

D. It is a misapplication of the law to sanction an attorney for following Rule 30 of the West Virginia Rules of Procedure. Plaintiff suspended Ms. Zerfoss' deposition to protect a communication which was subsequently found to be a privilege communication.

ORAL ARGUMENT

Pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, Petitioner requests that oral argument be held in this matter because this case includes assignments of error in the application of settled law.

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, Petitioner requests that oral argument be held in this matter because: (1) this case involves issues of fundamental public importance.

ARGUMENT

A. Sexual Harassment

There were two female truck drivers while Mary Zerfoss worked for Respondent. On a regular basis males at the worksite made sexual comments regarding the female drivers. Both were harassed at work. Both of those females have filed lawsuits. Males were treated more favorably than the females. Male co-workers who treated Ms. Zerfoss fairly were accused of having sex with her. On one occasion, a male came to the worksite and shot a gun at Ms. Zerfoss. A co-worker, Tony Sites, who treated Ms. Zerfoss fairly, was considered by Respondents to be Ms. Zerfoss' "paramour". Mr. Sites was shot and killed at the workplace by the ex-boyfriend. Respondent required Ms. Zerfoss to continue to drive the truck which had several bullet holes in it. Mary Zerfoss was told by Gary Hinkle that Ms. Zerfoss' male co-workers wanted him to fire her. See Appendix, page 87. The other female complained to Gary Hinkle, regarding this treatment, but he did nothing. Male workers hired after Ms. Zerfoss were provided better trucks and given more preferred routes which made more wages, which violated Respondents' Handbook. The male mechanics at work would ignore Ms. Zerfoss' needs for assistance and would give preferential treatment to male employees. See pages 80 and 87 of Appendix.

The trial court found that the undisputed evidence demonstrates that the alleged mistreatment directed towards Plaintiff by her co-workers was because they blamed her for the death of a male co-worker, which resulted from a shooting perpetrated at Hinkle Trucking by Plaintiff's former boyfriend. See page 97 of Appendix. In other words, it was undisputed that Mary Zerfoss' male co-workers blamed Ms. Zerfoss for the death of a male employee who was shot by Ms. Zerfoss' former boyfriend.

Therefore, Ms. Zerfoss established that she had been harassed. Ms. Zerfoss also established that "but for" Respondent's inference that the deceased was somehow romantically involved with Ms. Zerfoss, and the killer was aware of such an alleged involvement, the harassment would not have occurred. Therefore, if not for Ms. Zerfoss' gender the harassment would not have started.

The trial court did not distinguish between the co-workers conduct of sexual or non-sexual nature.

Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801, 810 (1996) found that at the summary judgment stage:

> **"the key inquiries are whether the mistreatment was directed at the Plaintiff because she was a woman and whether it was of such a nature, because of its seriousness or its pervasiveness, as to ruin the working environment for the Plaintiff."**

"Hostility" does not depend upon the conduct's aggressiveness quotient; rather it turns on what effect the conduct would have on a reasonable person. See *Constellium Rolled Products Ravenswood, LLC v. Griffith*, 235 W.Va. 538, 775 S.E.2d 90 (2015). It is not disputed that Mary Zerfoss was harassed at work.

Since it is undisputed that Petitioner is a female and her harassers were male, the only question for the trial court should have been was there an inference that the harassment was because Mary Zerfoss is a female. It is undisputed that Mary Zerfoss was harassed, in part, because her former boyfriend shot a male co-worker. It is impossible that such harassment was not because Ms. Zerfoss is a female. At the very least there is enough evidence to create an inference that Mary Zerfoss, a female, was harassed because her co-workers who were male, believed she was the cause of the death of a male co-worker. The "but for" test from *Conaway v. Eastern Assoc. Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986) was therefore established.

The corporate designated witness testified that the Defendant believed Ms. Zerfoss was having an affair with the murdered male co-worker because they had seen her setting in a truck with the deceased. See pages 80 and 81 of Appendix. Such a preposterous inference would be offensive to most reasonable people. However, the trial court adopted the silly inference as justification for the harassment. The trial court failed to explain why it would be acceptable to treat someone less favorable because they were friends with a member of the opposite gender.

Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E. 2d 161 (1995) noted that:

> **"the use of the "but for" language in *Conaway* may have been unfortunate, at least if it connotes that a Plaintiff must establish more than an inference of discrimination to make out a *prima facie* case."**

Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 479 S.E.2d 561, 584 (1996) pointed out the confusion courts and parties have regarding employment cases:

> **"The confusion on this point, we think, points to a larger problem in area of the law and that is the extent to which courts (including this one) and litigants often have been so preoccupied by the trees of *prima facie* case, pretext, shifting burdens, and other labels that they have not seen the forest of discrimination."**

Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741, Syl. pt. 3 (1995), and *Conrad supra* found that once a *prima facie* case has been shown, the case should go to the jury unless no rational trier of fact can reject the employer's reason for the adverse employment decision.

The trial court found that: "Plaintiff has failed to come forth with affirmative evidence that supports her claim." But the trial court then found that Mary Zerfoss was mistreated because she was a female. As warned in *Skaggs*, the court became so preoccupied by the trees of the *prima facie* case, pretext, shifting burdens, and other labels, that it could not see the forest of discrimination. However the facts as characterized by the trial court, show that Mary Zerfoss was harassed because she is a female.

Skaggs, Syl. pt. 7 found that "direct" evidence is not required to show intentional discrimination. *Skaggs*, footnote 30 discussed circumstantial evidence and noted:

> **"because intent to discriminate is a mental state and mind reading {is} not an acceptable tool of judicial inquiry, it may be the only true direct evidence of intent that will ever be available."**

Since it is undisputed that Mary Zerfoss's male co-workers treated her differently at work, and the reason was because of her former boyfriend shooting a male co-worker, a jury should decide if "but for" Mary Zerfoss' gender, she would not have been mistreated at work. It was not the job of the trial court to decide this issue of fact.

Skaggs, page 585, rejected any requirement that a Plaintiff in a Human Rights Act case must prove more than that her protected status played "a" role in the adverse employment decision and had a determinative influence on the decision. *Skaggs* recognized that there could be more than one motivating factor including bias or stereotypical thinking.

"Where the issue on an appeal from the circuit court is clearly a question of law involving an interpretation of a statute, this Court has applied a *de novo* standard of review. Findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*." *Thomas v. Morris*, 224 W.Va. 661, 687 S.E.2d 760, Syl. pt. 2 (2009); and *Mansville Personal Injury Settlement Trust v. Blankenship*, 231 W.Va. 329, 749 S.E.2d 329, Syl. pt. 1 (2013). Therefore this issue must be reviewed under a *de novo* standard.

B. <u>Respondent's Admitted Violation of the Statute</u>

West Virginia Code § 21-5-9 requires employers to notify their employees, in writing, at the time of hire, of the employee's rate of pay. The trial court prevented evidence of this violation

of the statute to be heard by the jury. Fortunately the trial court explained the reasoning behind its decision:

> **"THE COURT: Before we bring the jury in, I want to go over something on the record with counsel before we start today just in order to prevent any questions later on today, this issue with the 21-5-9 with the Wage Pay and Collection Act, what my rulings were. "To better explain where I'm coming from on that and put it on the record, before we have to go through this 25 times today, you know, when I analyze this, I looked at the Wage Pay and Collection Act – and, of course, your claim under 21-5-3 and your breach of contract claimed – 21-5-9, as I read the law under the *Byard* case, and my ruling was based on that, that this is an administrative enforcement statute for 21-5-9. It's squarely within the purview of the Commissioner of the West Virginia Department of Labor, and that's in the *Byard* case; so there is no private legal remedy with that.**
>
> **This claim that you're proceeding under in 21-5-3, of course, we're going through under the West Virginia Wage Pay and Collection Act case, which is what you filed it under, and there is a breach of contract case. As I see this case, this is a dispute over what the terms of the employment agreement were between your client and the Defendants. And, to me, the jury needs to decide that, as they would any other contract, based upon the evidence of what happened at the time as we've presented. You have presented your case as to what Ms. Zerfoss's claims are, what – what was said and done and how the parties have acted. The Defendants have been able to do that.**
>
> **Also recognizing that the agreement is not in writing, I have let you inquire, cross-examine, argue, everything except say that that is a violation of the Wage Pay and Collection Act under 21-5-9. And maybe I haven't explained it sufficiently enough in my mind where I'm coming from on it. But, to me, if you do a balancing test under 401 and 403, that the prejudicial impact of explaining to a jury or trying to explain to the jury that, yes, they violated 21-5-9, even though that's just an administrative remedy, and then having them still try to interpret what the contract is based on the evidence and what the – what the agreement was, what Mary says, what Travis says, what Gary says would be impossible. It would not be fair to try to do that. That's where I'm coming from.**
>
> **MS. DITRAPANO FAIRLESS: I have a question. So when you – when we instruct the jury, the violation of the Wage**

Payment and Collection Act is the fact that they didn't pay the Plaintiff what she was owed.
And – then if she's not paid what she's owed and she no longer works there, she's entitled to liquidated damages?

THE COURT: Under 21-5-3, she's not. That's 21-5-4. There is no – there is no evidence here that they never paid her twice a month. There is no evidence they didn't pay her. There was – from what I've heard in the evidence, there was no dispute until after her employment was terminated. There was no claim for $19,400 that they could have paid timely. I mean, this didn't arise until – the way I've seen this, it's 15 months later is when there is a claim for what she is saying was unpaid based on their oral contract. So because of that, that's why I – have at it with the oral – it's not in writing. She –

MS. DITRAPANO FAIRLESS: Because she didn't know."

Rule 403 of the West Virginia Rules of Civil Procedure allows a trial court to exclude relevant evidence if its probative value is "substantially outweighed" by a danger of unfair prejudice. Of course, all evidence is prejudicial to one of the parties. In attempting to conduct the balancing test of Rule 403 (page 134 of Appendix), the trial court found that it would not be fair to explain to the jury that Respondent violated the statute and then have the jury try to interpret what the agreement was.

At the Rule 30(b)(7) deposition, the corporate designee testified that Respondent did not provide the statutory required written notice because:

"The trucking industry is a real competitive industry, and we don't want our rate of pay, out in the general public for everyone to discuss. If they have a question, all they have to do is come ask us to find the rate."
See Appendix, page 128.

The corporate designee admitted it was an intentional decision not to provide their employees with the required information. See page 128 of Appendix.

However, Mary Zerfoss was prohibited from informing the jury that Respondent was required by law to provide the information but intentionally decided not to follow the statute.

Robertson v. Opequon Motors Co., 205 W.Va. 843, 519 S.E.2d 843 (1999) found that the written notice provision of the statute is necessary so that the employee does not have to attempt to hit a moving target every pay day.

At the jury trial, Respondent asserted that the parties agreed to a rate of pay which Respondent paid. Mary Zerfoss testified that she was told that she would be paid a different rate than what Respondents allege she was told. In other words, Respondents created a moving target by making the issue "he said, she said", instead of a written notice.

In *Lipscomb v. Tucker County Comm'n*, 206 W.Va. 627, 527 S.E.2d 171 (1999), this court found that it was reversible error to allow the employer in a Wage Payment and Collection Act case to explain ambiguities it created in the employment contract.

Respondent admits to violating the statute because they did not want their employees to know the pay rate. Respondent intentionally created the ambiguities to benefit themselves which violated the requirements of the statute. Simple equity would prevent a party from intentionally violating a statute and then benefiting from that violation of the statute. Had the trial court followed *Lipscomb supra*, Respondents should not have been allowed to submit evidence of the meaning of the ambiguities they created. Had Respondent followed the law and provided the written notice, there could not have been a disagreement as to Ms. Zerfoss' rate of pay. The probative value of the statutory violation substantially outweighed any unfair prejudice of Respondent's intentional violation.

"Where the issue on an appeal from the circuit court is clearly a question of law involving an interpretation of a statute, this Court has applied a *de novo* standard of review. Findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend

ordinary factual determinations, must be reviewed *de novo*." *Thomas v. Morris*, 224 W.Va. 661, 687 S.E.2d 760, Syl. pt. 2 (2009); and *Mansville Personal Injury Settlement Trust v. Blankenship*, 231 W.Va. 329, 749 S.E.2d 329, Syl. pt. 1 (2013). Therefore this issue must be reviewed under a *de novo* standard.

C. Liquidated Damages

West Virginia Code § 21-5-4 punishes an employer who refuses to pay its employee's wages due for work that the employer performed prior to separation of employment. The statute reads, in part:

> **"Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting."**

It must be noted that the statute uses the words "shall" and "pay all wages earned by the employee at the time of quitting."

The trial court found that the statute must be interpreted narrowly to mean the statutory provision covers only the pay period immediately preceding the termination of employment, not all wages earned, and the statute limits recovery to only those wages the employer does not dispute. The Court's interpretation is not what the statute says. *Citynet LLC. v. Toney*, 235 W.Va. 79, 772 S.E. 2d 36, 49 (2015) held:

> **"[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."**
>
> **"[W]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."**

> **"A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning."**
>
> **"The West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld."**
>
> **"Because it is remedial legislation, the WPCA must be construed liberally in order to accomplish the purposes for which it was intended."**

The case law of this state is devoid of any suggestions that cases brought pursuant to the Wage Payment and Collection Act must be interpreted to protect employers who wrongfully withhold wages from their employees.

The penalty section of the Wage Payment and Collection Act may appear harsh to employers who wrongfully withhold wages earned by working people. However, the remedy for reasonable employers who follow the statute is to continue to follow the law.

The corporate designee testified at the Rule 30(b)(7) deposition that Respondent intentionally violated the Wage Payment and Collections Act when it was deemed to be convenient for them. This is not a case for this court to legislate new law. Respondent's proposed amendment to the statute does not follow the design of the statute to protect working people. Instead, Respondents' proposed legislative amendment would hinder working people's collection of wages. Instead of a fine edge to a change in the statute, Respondent's interpretation would bluntly limit recovery of wrongly withheld wages. At a legislative subcommittee, protection of innocent bookkeeping errors could be discussed. However, the courts are not the forum for such legislation. Courts should refrain from legislating new law. If the Wage Payment and Collection

Act is to be changed, then the statutory language should come from the Legislature and not this court.

This court has uniformly held that the Wage Payment and Collection Act is remedial legislation intended to protect working people and must be allowed a liberal construction to accomplish the purpose of the statute. *Shaffer v. Ft. Henry Surgical Assoc., Inc.*, 215 W.Va. 453, 599 S.E.2d 876, page 881, Syl. pt. 3 (2004); *Citynet, LLC v. Toney*, 235 W.Va. 79, 772 S.E.2d 36, Syl. pt. 6 (2015); and *Grim v. Eastern Electric*, LLC, 234 W.Va. 557, 767 S.E.2d 267, Syl. pt. 7 (2014). There are no such cases which hold that an employer who intentionally violates the statute, "must" be protected.

There is no incentive for an unscrupulous employer to pay wages if the only remedy for the working people of this state is to file a lawsuit to collect what is due to them. The Legislature recognized that a penalty for withholding wages was necessary to protect working people. Although the right to sue for wages unlawfully withheld may always be available for well paid employees, most employees, do not have an attorney on retainer and can not afford to hire one on an hourly basis. The traditional solution of a contingent fee would be ineffective for lower paid employees because if the recovery is low, then the fee is low. Plus if wages are unlawfully withheld then the employee has less disposable income. The only reasonable interpretation of § 21-5-4 is that an employee must be paid all the wages earned by that employee.

The purpose of § 21-5-4 is to provide an incentive to the few employers who refuse to follow the law. Such bad actors should not benefit by breaking the law.

"Where the issue on an appeal from the circuit court is clearly a question of law involving an interpretation of a statute, this Court has applied a *de novo* standard of review. Findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. However, ostensible

findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*." *Thomas v. Morris*, 224 W.Va. 661, 687 S.E.2d 760, Syl. pt. 2 (2009); and *Mansville Personal Injury Settlement Trust v. Blankenship*, 231 W.Va. 329, 749 S.E.2d 329, Syl. pt. 1 (2013). The standard of review should be de novo and the trial court's attempt to create new law should be reversed.

D. Sanctions

During the deposition of Mary Zerfoss, Respondent questioned Ms. Zerfoss regarding documents she had given her attorney prior to the deposition. Mary Zerfoss' attorney asserted an attorney-client privilege. After Respondents persisted in their inquiry regarding the protected conversations, and after repeated warnings that the deposition would be suspended, Petitioner suspended the deposition and filed a motion with the Court pursuant to Rule 30(d)(3) of the West Virginia Rules of Civil Procedure. Respondent in response, filed a Motion for Rule 37 Sanctions for Improper Unilateral Termination of Plaintiff's Deposition. The trial court granted Respondent's motion and ordered Ms. Zerfoss to surrender the notebooks she was browsing prior to her deposition to the Discovery Commissioner, Patrick Henry III, for an in camera review for the purpose of determining whether the information contained therein is, in fact, protected by the attorney-client privilege. Page 56 of Appendix.

The Discovery Commissioner concluded that the documents were prepared by the client 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 opposing counsel. Page 59 of Appendix. The Discovery Commissioner recommended granting Ms. Zerfoss' Motion for a Protective Order, and deemed the dispute to be in good faith and recommended that the costs

be borne equally by the parties. The trial court, without a hearing,[1] disagreed with the Discovery Commissioner's conclusions and found that Respondent's lawyer was properly questioning Ms. Zerfoss with respect to the information contained in her notebooks. Additionally the trial court found "if Plaintiff's counsel had allowed defense counsel to ask their proper questions, then this issue would not have necessitated the involvement of the Discovery Commissioner."

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.**

Policarpio v. Kaufman, 183 W.Va. 258, 395 S.E.2d 502, Syl. pt.1 (1990) held:

> **"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."**

Rule 30(d)(3) of the West Virginia Rules of Civil Procedure uses the word "shall" which is mandatory. *Policarpio* sets forth the appropriate procedure to protect a privilege during deposition testimony. The Discovery Commissioner concluded that the documents constituted a privileged communication outside the scope of proper inquiry by opposing counsel. The trial court did not disagree. In other words, Mary Zerfoss and her counsel followed the rules and the case law.

The trial court sanctioned Mary Zerfoss and her attorney for following the rules, without a hearing. The rationale of the trial court was:

> **"The Court finds that if Plaintiff's counsel had allowed defense counsel to ask their proper questions, then this issue would not have necessitated the involvement of the Discovery Commissioner."**

[1] It is an abuse of discretion for a trial court to impose sanctions without permitting an opportunity to be heard at a hearing on the reasonableness of the sanctions. *Czaja v. Czaja*, 208 W.Va. 62, 537 S.E.2d 908 (2000); *Davis v. Rutherford*, 2015 WL 1740930 (not reported in S.E.2d); and *Diggins v. The River Ridge Property Owners Ass'n, Inc.*, 2012 WL 5232237 (not reported in S.E.2d).

The trial court ignored the Discovery Commissioner it appointed, but instead the trial court speculated as to what would have happened if Ms. Zerfoss had not followed the law.

It is undisputed that the documents were protected by the attorney-client privilege. Mary Zerfoss expected her attorney to protect her privilege.[2] The trial court's justification for sanctioning Ms. Zerfoss was speculative. It was just as likely that had Respondent's lawyer been allowed to continue, Ms. Zerfoss would have inadvertently waived her privilege. Respondent had the ability to file a Motion to Compel but they did not. Instead, Respondent requested Ms. Zerfoss be punished for following the law.

This Court in *Mills v. Davis*, 211 W.Va. 569, 567 S.E.2d 285, Syl. pts. 2, 3, and 4 (2002) held:

> **Syl. 2. 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.**
>
> **Syl. 3. Generally, under Rule 37 of the Rules of Civil Procedure to trigger the imposition of sanctions where a party refuses to comply with a discovery request, the other party must file a motion to have the court order discovery. If the discovery order is issued and not obeyed, then the party may seek sanctions under Rule 37(b) of the Rules of Civil Procedure.**
>
> **Syl. 4. 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**

[2] Ms. Zerfoss was not sanctioned for the way her attorney ended the deposition, but only that he ended the deposition.

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."

The trial court identified the alleged misconduct as Mary Zerfoss suspending the deposition to submit a motion pursuant to Rule 30(d)(3) to protect Ms. Zerfoss' attorney-client privilege. The trial court appointed a Discovery Commissioner to determine the issue. The Discovery Commissioner found that a privilege existed and the questioning was outside the scope of proper inquiry by opposing counsel. Page 59 of Appendix. A motion to compel was never filed by Respondent. The trial court failed to address Mary Zerfoss' due process rights under Section 10 of Article III of the West Virginia Constitution.

Since Rule 37 sanctions generally require a motion to compel to sanction a party's refusal to comply with a discovery request (*Mills*, Syl. pt. 3), Respondent skipped this step and filed their motion to sanction Ms. Zerfoss and her attorney. However, Respondent does make some unflattering observations of Ms. Zerfoss' attorney.

Describing Ms. Zerfoss' attorney as having a face as "red as a tomato", is a reference to Ms. Zerfoss' attorneys heart problems. Although not in this case but in *Greaser v. Dettinburn Transport, Inc., et al.*, Sup. Ct. No. 19-0407, Respondents' lawyer made fun of this serious condition which had previously required open heart surgery.

The trial court's justification for the sanction was purely speculation and premature. A motion to compel should have been addressed first. Such a motion would have failed because the attorney-client privilege existed. Sanctioning a party for following the mandates of the Rules of Civil Procedure and the case law of this State, should be reversed.

"Where the issue on an appeal from the circuit court is clearly a question of law involving an interpretation of a statute, this Court has applied a *de novo* standard of review. Findings of fact

are reviewed for clear error and conclusions of law are reviewed *de novo*. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*." *Thomas v. Morris*, 224 W.Va. 661, 687 S.E.2d 760, Syl. pt. 2 (2009); and *Mansville Personal Injury Settlement Trust v. Blankenship*, 231 W.Va. 329, 749 S.E.2d 329, Syl. pt. 1 (2013).

The trial court's speculation should be reviewed *de novo*.

CONCLUSION

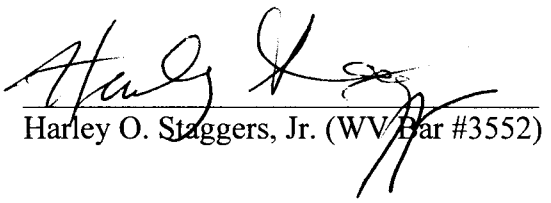
A. It is undisputed that Mary Zerfoss' male co-workers wanted her out of the work place. The trial court found that Mary Zerfoss was harassed at work because of the action of her ex-boyfriend. Mary Zerfoss' gender is the only relationship to the killer. Therefore a question of fact exists as to whether Mary Zerfoss was harassed because of her gender and summary judgment on the issue was inappropriate.

B. The requirement that an employer provided an employee with a written notice of the employee's rate of pay is the law in West Virginia. An intentional violation of a statute is probative in a case to enforce the statute.

C. The trial court's interpretation of West Virginia Code § 21-5-4 violated the spirit of the Wage Payment and Collection Act and attempted to legislate new law in an improper forum.

D. A party should not be sanctioned for following the law.

PETITIONER
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARY ZERFOSS
Petitioner,

v. **Docket No. 19-1126**

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

CERTIFICATE OF SERVICE

I, Harley O. Staggers, Jr., a practicing attorney, hereby certifies that a true copy of the **Petitioner's Brief and Petitioner's Appendix** has been served by United States Mail postage prepaid, on this the 13th day of March, 2020 upon the following:

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