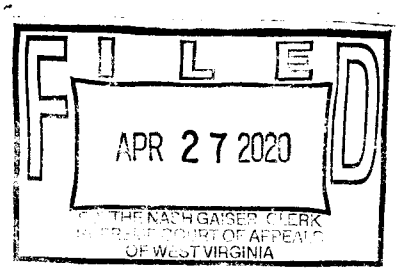
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 19-1126**




**MARY ZERFOSS,**
***Plaintiff Below, Petitioner,***

**v.**

**HINKLE TRUCKING, INC., and GARY HINKLE,**
***Defendants Below, Respondents.***

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**On Appeal from the Circuit Court of Pendleton County**
**Honorable H. Charles Carl, III, Circuit Judge**
**Civil Action No. 17-C-7**

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# RESPONDENTS' BRIEF

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# I. STATEMENT OF THE CASE

## A. STATEMENT OF FACTS

Petitioner was initially hired at Hinkle Trucking as a truck driver in February of 2011. (App. 249, 301, 311). On August 9, 2011, Petitioner's boyfriend, Delmus "Mark" Dye, who was not employed or in any way affiliated with Hinkle Trucking, unexpectedly drove to Hinkle Trucking's headquarters, shot and killed one of Petitioner's co-workers and "very good friends" named Tony Sites, and then fatally turned the gun on himself. (App. 292-300; 309-310). Although Petitioner was present and witnessed the shooting, she survived the incident unharmed. Needless to say, this murder-suicide was a very traumatic event for everyone at Hinkle Trucking. (App. 295-297).

After the shooting, Petitioner continued to work at Hinkle Trucking for another 2.5 years until January 29, 2014, when she resigned to go to work at Quality Supplier, which is another trucking company located in Keyser, West Virginia. (App. 301-304, Trial Trans., Vol. I at pp. 145-146). After working at Quality Supplier for just two months, Petitioner called Gary Hinkle, President of Hinkle Trucking, and pleaded to return to Hinkle Trucking, claiming she was not being treated well at Quality Supplier after they cussed her for being late on hauling a load. (App. 301-304; Trial Trans., Vol. I at pp 146-47; 219-220). Mr. Hinkle agreed to hire Petitioner back and offered her reemployment. (*Id.*). Petitioner worked at Hinkle Trucking a second time from March 31, 2014 until January 21, 2016 and then resigned again. (App. 304, 311; Trial Trans., Vol. I at pp. 147; 220-221).

When Petitioner was initially hired in early 2011, she interviewed with Gary Hinkle and Sonny O'Neil, who was Hinkle Trucking's dispatcher at the time. (Trial Trans., Vol. I at p. 214; Vol. II at pp. 17-18). During this meeting, Petitioner was verbally informed that she would be

paid on a "rate-per-ton" basis for her hauls – *i.e.*, a certain dollar amount for each ton of material she hauled to the customer's destination. (Trial Trans., Vol. I at p. 216; Vol. II at pp. 18-19). The specific dollar amount that Petitioner was paid per ton varied between the different destinations she was assigned to haul. (Trial Trans., Vol. I at pp. 216-218).[1] When Petitioner left and returned to Hinkle Trucking in 2014, she was rehired under the same terms. At all times throughout the entirety of her employment with Hinkle Trucking, Petitioner was paid on a rate-per-ton basis. (Trial Trans., Vol. I at pp. 221).

**B. PROCEDURAL HISTORY**

Petitioner filed this civil action on March 31, 2017, approximately fifteen months after she left Hinkle Trucking the second and final time. (App. 1-4; Trial Trans., Vol. I at p. 147).

In her Complaint, Petitioner asserted a claim under the West Virginia Human Rights Act, W.Va. Code § 5-11-1, *et seq.*, (WVHRA), alleging she was subjected to gender-based discrimination in the form of harassment while she was employed at Hinkle Trucking. (App. 1-4). Petitioner also advanced claims for breach of contract and violation of the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1, *et seq.* (WPCA). (*Id.*). Specifically, Petitioner averred that, instead of compensation on a rate-per-ton basis, she was verbally promised percentage-based compensation of 25% of the amount Hinkle Trucking was paid for her loads. (*Id.*). Petitioner alleged that Respondents failed to pay her all wages due throughout the course of her employment with Hinkle Trucking and asserted a claim under W.Va. Code § 21-5-3 of the WPCA. (*Id.*). Moreover, Petitioner averred that Respondents violated the requirements of W.Va.

[1] For example, if Petitioner hauled a load of lime from Greer's Germany Valley limestone quarry in Riverton, West Virginia, to a coal mine near Morgantown, she was paid $5.50 per ton of material she hauled. (Trial Trans., Vol. I, p. 110).

Code § 21-5-9 of the WPCA by failing to set forth her rate of pay in writing upon her hire.[2] (*Id.*).

The parties engaged in extensive discovery. (App. 136-150). Petitioner's deposition was set for January 9, 2018. (App. 27-28). After Petitioner's counsel improperly and unilaterally terminated her deposition, Respondents filed a motion for sanctions under W.Va. R. Civ. P. 37. (App. 27-46). The issue was thoroughly briefed, and the circuit court entered an Order on March 9, 2018, ordering the Petitioners' deposition be resumed forthwith and imposing monetary sanctions based upon the conduct of Petitioner's counsel. (App. 47-54, 55-57). Thereafter, Petitioner moved to void the March 9, 2018 Order, which was denied after further briefing. (App. 158-166, 167-169, 170-177, 178-179).

During the course of discovery, Respondents explored the factual basis of Petitioner's harassment allegations. According to Petitioner, she was "harassed" by some of her co-workers after Tony's murder. (App. 274-278). First, Petitioner testified that the mechanics ignored her and refused to work on her truck because they blamed her for Tony's death. (*Id.*). Second, Petitioner testified that shortly after the shooting, she was confronted by another female truck driver at Hinkle Trucking named Diane Judy, who was angry that Tony had been killed. (App. 256-265; 275-277). According to Petitioner, Ms. Judy drove past Petitioner when she was getting fuel at the fuel pump, gave her "the finger," cussed at her on the CB radio, and told her that she was coming back to "kick her ass." (*Id.*). Petitioner testified that Ms. Judy returned and verbally confronted her at the worksite while the mechanics stood by watching to see whether they were going to fight, which ultimately did not happen. (*Id.*). Petitioner testified that she believed that the mechanics and Ms. Judy treated her this way because they blamed her for Tony's murder. (*Id.*). Finally, Petitioner testified that when she returned to work after taking approximately two weeks off following the

[2] W.Va. Code § 21-5-9(1) provides, in pertinent part: "Every person, firm and corporation shall: (1) Notify his employees in writing, at the time of hiring of the rate of pay . . ."

shooting, she was required to drive the same truck she had previously driven, which contained a bullet hole from the shooting, until the truck was ultimately replaced. (App. 279-280). Petitioner contended that assigning her to drive this truck constituted harassment. This was the sum and substance of the evidence related to Petitioner's claim for gender-based harassment under the WVHRA.

After the close of discovery, Respondents filed a motion for partial summary judgment. (App. 230-373). After full briefing, the circuit court held a hearing on June 12, 2019. (App. 94-99). During the hearing and subsequently memorialized by Order dated July 25, 2019, the circuit court granted summary judgment in favor of Respondents as to Petitioner's gender-based harassment claim under the WVHRA. (*Id.*). The circuit court ruled that the record was devoid of any evidence demonstrating that the alleged mistreatment Petitioner experienced from her co-workers was based upon her sex. (*Id.*). Rather, the evidence demonstrated, and Petitioner admitted, that any mistreatment directed toward Petitioner by her co-workers was because they blamed her for Tony's murder by Petitioner's boyfriend. (*Id.*). Subsequently, by Order dated June 17, 2019, the circuit court ruled that Petitioner could not recover liquidated damages because her claim under the WPCA was pleaded and asserted under W.Va. Code § 21-5-3, not W.Va. Code § 21-5-4. (App. 384-389). The circuit court set Petitioner's remaining claims for trial.

Prior to trial, both parties filed various motions *in limine*. First, Petitioner filed a motion which was captioned as a motion to preclude Respondents from introducing testimony regarding ambiguity in Petitioner's employment agreement; however, what the Petitioner's motion really sought was to preclude Respondents from introducing *any* testimony about what Petitioner was told about how she would be paid upon her hire at Hinkle Trucking. (App. 204-207). After full briefing, the circuit court denied Petitioner's motion, ruling that both parties would be permitted

to testify to their belief of the verbal agreement regarding Petitioner's rate of pay. (App. 208-210, 94-99).

Additionally, Respondent moved *in limine* to preclude Petitioner from arguing to the jury that Respondents "violated" the notification requirements contained in W.Va. Code § 21-5-9. (App. 211-216, 380-383). In turn, Petitioner moved *in limine* to allow the introduction of evidence that Petitioner's rate of pay was not committed to writing upon her hire and argument that Respondents violated W.Va. Code § 21-5-9. (App. 94-99). The circuit court granted Respondents' motion and granted, in part, Petitioner's motion. (*Id.*). Specifically, the circuit court ruled that Petitioner was permitted to introduce evidence at trial of the *fact* that her rate of pay was not set forth in writing upon her hire; however, Petitioner would not be permitted to argue that W.Va. Code § 21-5-9 required it to be or that Respondents "violated" W.Va. Code § 21-5-9. (*Id.*).

A jury trial was held on October 1 and 2, 2019. (Trial Transcript Vol. I & II). Consistent with its pre-trial ruling, the circuit court permitted Petitioner to repeatedly introduce evidence of the fact that her rate of pay was communicated to her verbally and was not reduced to writing upon her hire; however, the circuit court disallowed evidence or argument regarding the requirements of W.Va. Code § 21-5-9 or that Respondents "violated" such statutory requirements. (App. 94-99; Trial Trans., Vol. II at pp. 4-6).

Ultimately, Petitioner failed to prove that she was not paid all wages due under the terms of her employment agreement with Hinkle Trucking as required to prevail on her claims for breach of contract and violation of W.Va. Code § 21-5-3. Therefore, the jury returned a verdict in favor of Respondents. (Trial Trans., Vol. II at p. 107). The instant appeal followed the circuit court's denial of Petitioner's post-trial motions during a hearing held on November 13, 2019.

## II. SUMMARY OF ARGUMENT

Regarding Petitioner's first assignment of error, the circuit court properly granted summary judgment in favor of Respondents as to Petitioner's claim for gender-based harassment under the WVHRA. The record was devoid of any evidence that Petitioner was harassed because of her sex. Indeed, the undisputed record evidence, including Petitioner's own testimonial admissions, demonstrate that Petitioner was *not* subjected to harassment by her co-workers because of her sex; rather, any alleged mistreatment was because Petitioner's co-workers blamed her for the murder of Tony Sites committed by Petitioner's boyfriend. Given the absence of any evidence that Petitioner was harassed because she is a female, which is required to sustain a claim for gender-based harassment under the WVHRA, the circuit court correctly entered summary judgment in Respondents' favor.

As to Petitioner's second assignment of error, the circuit court did not abuse its discretion in disallowing Petitioner to introduce evidence and argument during trial that Respondents "violated" W.Va. Code § 21-5-9. The circuit court correctly recognized that Section 9 of the WPCA is an administrative provision subject to enforcement only by the Commissioner of Labor. Section 9 does not create a private cause of action and has no identified remedy or damages. Moreover, the circuit court recognized the potential danger that the jury could be confused and misled into improperly rendering a verdict and imposing liability against the Respondents based solely upon a finding that they violated the technical, administrative requirements of W.Va. Code § 21-5-9 without actually considering whether Petitioner successfully proved that she was owed unpaid wages under her employment agreement and that Respondents violated Section 21-5-3 of the WPCA. After applying the balancing test of W.Va. R. Evid. 403, the circuit court prohibited evidence or argument that Respondents "violated" W.Va. Code § 21-5-9. The circuit court did,

however, permit Petitioner to introduce evidence, *ad nauseum*, of the *fact* that her rate of pay was not set forth in writing. The circuit court's decision was sound and without error.

Regarding Petitioner's third assignment of error, in which she challenges the circuit court's ruling that she was not entitled to recover liquidated damages, such point is moot because Petitioner failed to prove liability for unpaid wages against Respondents at trial. Accordingly, any ruling by this Court on her third assignment of error, which pertains only to damages, would constitute an impermissible, advisory opinion. Regardless, the circuit court did not error in ruling that Petitioner was not entitled to liquidated damages because she pleaded and asserted her claim under W.Va. Code § 21-5-3, not W.Va. Code § 21-5-4.

Finally, as to Petitioner's fourth and final assignment of error, in which Petitioner appeals the circuit court's imposition of monetary sanctions under W.Va. R. Civ. P. 37, the circuit court did not abuse its discretion in sanctioning Petitioner's counsel. Such ruling was warranted and justified given the conduct of Petitioner's counsel in improperly and unilaterally terminating Petitioner's deposition.

For all these reasons, this Court should affirm the judgment below.[3]

## III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record, and oral argument would not significantly aid the decisional process. If the Court determines that oral argument is necessary, then argument under W. Va. R. App. R. 19 is appropriate because the appeal involves assignments of error in the application of settled law. The appeal is appropriate for disposition by memorandum decision under W. Va. R. App. R. 21.

[3] Notably, Petitioner's does not challenge the jury's verdict as an assignment of error in this appeal.

## IV. ARGUMENT

The circuit court diligently set for the basis for its rulings in written orders and on the record, and, as discussed herein, those rulings were correct, proper, and without error.

### A. STANDARD OF REVIEW.

The standard of review for Petitioner's first and third assignments of error, which pertain to the circuit court's summary judgment rulings in favor of Respondents, is plenary. "A circuit court's entry of summary judgment is reviewed *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State: It is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves a question of law." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995). (internal quotations and citations omitted). Once a motion for summary judgment is made under W.Va. R. Civ. P. 56, "the nonmoving party *must* take the initiative, and *by affirmative evidence*, demonstrate that a genuine issue of fact exists." *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335 (emphasis added). "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter*, 192 W. Va. at 192-93, 451 S.E.2d at 758-59 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Moreover, this Court has made clear that "[u]nsupported speculation is not sufficient to defeat a summary judgment motion." *Williams*, 194 W. Va. at 61, 459 S.E.2d at 338.

The standard of review for Petitioner's second and fourth assignments of error is more limited. In *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995), this Court held that a circuit court's evidentiary and procedural rulings are reviewed under an abuse of discretion

standard:

> The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Syl. Pt. 1, *McDougal*. As explained herein, the circuit court did not abuse its discretion in its evidentiary ruling with regard to Petitioner's attempt to argue a violation of W.Va. Code § 21-5-9 before the jury or with respect to its imposition of monetary sanctions for the conduct of Petitioner's counsel at her deposition.

**B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS REGARDING PETITIONER'S CLAIM FOR GENDER-BASED HARASSMENT UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT.**

In her first assignment of error, Petitioner argues that the circuit court erred in granting summary judgment in favor of Respondents as to her claim for gender-based harassment under the WVHRA. As discussed herein, the circuit court correctly found that Petitioner's claim for gender-based harassment could not withstand summary judgment because she failed to identify any record evidence creating a reasonable inference that the conduct she claimed to constitute harassment[4] – *i.e.,* the mechanics ignoring her and refusing to work on her truck, the confrontation by Diane Judy, and driving a truck with a bullet hole – was based upon her sex as required to sustain a claim

[4] Contrary to Petitioner's representations in her Brief, it was *not* undisputed, and the circuit court did *not* find, that Petitioner was subjected to harassment. *See Petitioner's Brief* at pp. 5, 9. Rather, the circuit court found that "the undisputed evidence demonstrates that any *alleged mistreatment* directed towards Plaintiff by her coworkers was because they blamed her for the death of a male coworkers, which resulted from a shooting perpetrated at Hinkle Trucking by Plaintiff's former boyfriend." (App. 97) (emphasis added).

under the WVHRA.[5] (App. 94-97).

To establish a claim for gender-based harassment under the WVHRA based upon a hostile or abusive work environment, a plaintiff-employee must prove that: (1) the subject conduct was unwelcome; (2) it was based on the plaintiff's sex; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputable on some factual basis to the employer." Syl. Pt. 5, *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995). Regarding the second element, which is sometimes referred to as the "causation element," it is well established that, "in order for a plaintiff to prevail on a claim for gender discrimination or sexual harassment it must be proven that the alleged wrongful conduct was based on the plaintiff's sex." *Hanlon*, 195 W.Va. at 99, 464 S.E.2d at 741. Indeed, Petitioner was required to adduce evidence showing that she was "singled out because of her sex" and that "but for the fact of her sex, she would not have been the object of harassment." *Conrad v. ARA Szabo*, 198 W. Va. 362, 372, 480 S.E.2d 801, 811 (1996). "The key inquiry is whether the mistreatment was directed at the plaintiff because she was a woman . . ." *Id.* at 371, 810. "[A] plaintiff must ultimately prove the causation element as part of [her] . . . prima facie case. If [s]he cannot offer evidence tending to prove that [s]he was harassed because of [her] sex, as opposed to some other reason, [her] claim fails." *Willis v. Wal-Mart Stores, Inc.*, 202 W. Va. 413, 418, 504 S.E.2d 648, 653 (1998).

This Court has repeatedly recognized that summary judgment is required where a plaintiff alleging gender-based harassment fails to advance evidence demonstrating that the conduct about which she complains was based on her sex. *See, e.g., Egan v. Steel of W. Virginia, Inc.*, No. 15-0226, 2016 WL 765771, at *6 (W. Va. Feb. 26, 2016) (affirming entry of summary judgment for

[5] Again, contrary to Petitioner's representations in her Brief, the circuit court did not find that Petitioner "was mistreated because she [is] a female." *See Petitioner's Brief* at p. 10.

the employer where the plaintiff failed to show that the conduct about which she complained was directed towards her because of her gender); *cf.*, *Johnson v. Killmer*, 219 W. Va. 320, 326, 633 S.E.2d 265, 271 (2006) (affirming entry of for the employer where the plaintiff failed to show that the conduct about which she complained was directed towards her because of her age).

Petitioner freely admitted that the reason why the mechanics treated her the way they did was because they blamed her for the shooting death of Tony Sites by Petitioner's boyfriend. (App. 276). In particular, Petitioner testified:

> Q: Do you have any reason to believe why the mechanics would not work on your truck in August or September 2011??
>
> A: Why? I can assume why. I can't tell you. I don't know what their reason is, but I could assume.
>
> Q: Why do you assume?
>
> A: I assume it's because of what happened with Tony. They were blaming me for Tony.
>
> Q: Is that the only reason why you believe the mechanics would not work on your truck?
>
> A: I believe so.

(App. 276). Likewise, Petitioner admitted that Ms. Judy told her during their confrontation that she was upset with her because of Tony's death. (App. 260). Specifically, Petitioner testified:

> Q: Did Diane tell you why she was upset?
>
> A: Yes.
>
> Q: What did she say?
>
> A: She was mad because of what happened to Tony.

(App. 260). The circuit court correctly recognized that such admissions were fatal to Petitioner's gender-based harassment claim. (App. 94-97).

Subjecting an employee to undesirable treatment merely because they are believed to have been the cause of a deadly workplace shooting is not unlawful harassment under the WVHRA. This Court has been unequivocal in its stance that the WVHRA, like its federal counterpart in Title VII, *only* protects employees against harassment that is based upon a legally-protected status or activity. In other words, our anti-discrimination statute is not a generalized civility code that guarantees employees a workplace free of all offensive behavior. Indeed, this Court has cautioned:

> Notwithstanding the wide-spread adoption of anti-discrimination measures and increased appreciation of their societal value, the courts cannot remove all vestiges of offensive behavior from the workplace.
>
> Ideally, every workplace would be free of insult, ridicule, and personal animosity, and all workers would be treated with respect, courtesy, and decency. Such a world, if it is ever to exist, cannot be manufactured by courts. [The WVHRA] does not purport to dictate the exact manner or behavior employers must exhibit toward employees. It simply provides a level playing field for groups that traditionally were disadvantaged.

*Willis v. Wal-Mart Stores, Inc.*, 202 W. Va. 413, 419, 504 S.E.2d 648, 654 (1998) (citation omitted). Similarly, in *Johnson, supra,* this Court observed:

> [A]n unfortunate fact of life is that the modern workplace is sometimes a rough and tumble environment, where pettiness, inconsideration and discourtesy reign . . . Abusive conduct in the workplace, if not based on a protected class, is not actionable under [discrimination laws]. These [laws] prohibit discrimination and are not civility codes.

*Johnson*, 219 W. Va. at 326, 633 S.E.2d 265 at 271 (insertions in original) (citation omitted).

Inasmuch as the record evidence undisputedly demonstrates that Petitioner was ignored by the mechanics and confronted by Ms. Judy because they blamed her for the shooting committed by her boyfriend and Tony Sites's resulting death, her WVHRA claim fails. There is absolutely no evidence that unwelcome, severe or pervasive conduct was directed towards Petitioner because she is a female; rather, Petitioner's own admissions demonstrate that the mechanics and Ms. Judy

treated her like they did for another reason, which is not a protected status under the WVHRA, and therefore, not actionable.

In her Brief, Petitioner argues that discriminatory animus was established based merely upon the fact that she "is a female and her harassers were male[.]" *Petitioner's Brief* at p. 9. This argument is factually inconsistent with the record because Diane Judy, who allegedly "harassed" Petitioner, is also female. Further, Petitioner argues that "because her former boyfriend shot a male co-worker[,] [i]t is impossible that such harassment was not because Ms. Zerfoss is a female." *Id.* Such a tenuous supposition is too much of a stretch to be a reasonable inference for summary judgment purposes. *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, n. 10, 459 S.E.2d 329, 337, n. 10 (1995) (noting that a court "need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences.").[6] The mere detail that the shooter and the victim in this murder-suicide were both males is a legally inconsequential fact which does not support a reasonable inference of gender discrimination.

In sum, there was no evidence presented to the circuit court – direct or circumstantial – that Petitioner suffered harassment based upon her gender. To the contrary, and according to Petitioner's own testimonial admissions, the animosity that the mechanics and Ms. Judy harbored and expressed towards Petitioner was because they blamed her for Tony's murder that was perpetrated by Petitioner's boyfriend. (App. 260, 276). Therefore, the circuit court correctly entered summary judgment in Respondents' favor as to Petitioner's gender-based harassment

[6] In her Brief, Petitioner asserts that "on a regular basis, males at the worksite made sexual comments regarding the female drivers." *Petitioner's Brief* at p. 8. This was not argued before the circuit court at the summary judgment stage, and Petitioner has cited to no record evidence that supports this assertion. Likewise, Petitioner asserts that, [m]ales were treated more favorably than the females," and "[m]ale workers hired after Ms. Zerfoss were provided better trucks and given more preferred routes which made more wages." *Id.* Again, this was not argued before the circuit court at the summary judgment stage, and Petitioner has cited to no record evidence that supports this assertion.

claim in accordance with the Rule 56 framework set forth in *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995). (App. 94-99). Accordingly, this Court should affirm the circuit court's decision.[7]

### C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING PETITIONER FROM INTRODUCING EVIDENCE OF THE TECHNICAL, ADMINISTRATIVE REQUIREMENTS OF SECTION 21-5-9 OF THE WAGE PAYMENT AND COLLECTION ACT OR ARGUING TO THE JURY THAT THE RESPONDENTS "VIOLATED" SUCH REQUIREMENTS.

In her second assignment of error, Petitioner argues that the circuit court erred in prohibiting her from introducing evidence and argument at trial that Respondents violated W.Va. Code § 21-5-9.

Prior to trial, Respondent moved *in limine* to preclude Petitioner from arguing to the jury that Respondents violated the notification requirements contained in W.Va. Code § 21-5-9. (App. 211-216). In turn, Petitioner moved *in limine* to allow the introduction of evidence that Petitioner's rate of pay was not committed to writing upon her hire and argument that Respondents violated W.Va. Code § 21-5-9. The circuit court granted Respondents' motion and granted, in part, Petitioner's motion. (App. 97-98). Specifically, the circuit court ruled that Petitioner was permitted to introduce evidence at trial of the *fact* that her rate of pay was not set forth in writing upon her hire, but she would not be permitted to argue that W.Va. Code § 21-5-9 required it to be or that Respondents "violated" W.Va. Code § 21-5-9. (*Id.*). The circuit court rationalized:

> The Court believes [the lack of a written notification regarding Plaintiff's rate of pay upon hire] needs to go against the Defendants. The Court finds it is wholly proper for Plaintiff to introduce evidence that the employment contract was not reduced to writing. However, Plaintiff shall not introduce evidence or argument that Section 21-5-9 of the WPCA was violated.

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[7] Moreover, summary judgment should also be affirmed on the additional basis that any alleged harassment Petitioner experienced after Tony's 2011 shooting death during her first stint of employment with Hinkle Trucking, which lasted until January 29, 2014, is time barred by the operative two-year statute of limitations. (App. 249-50).

(App. 97). In so ruling, the circuit court accepted Respondents' argument that Section 9 of the WPCA is an administrative provision that is subject to enforcement only by the Commissioner of Labor and does not create a private cause of action. (App. 94-99, 211-216). Moreover, at the Respondents' urging, the circuit court applied the balancing test of W.Va. R. Evid. 403 and recognized the potential danger that the jury could be confused and misled into improperly rendering a verdict and imposing liability against the Respondents based solely upon a finding that they violated the technical, administrative requirements of W.Va. Code § 21-5-9 without actually considering whether Petitioner successfully carried her burden of proving that she was owed unpaid wages under her employment agreement and that Respondents violated Section 21-5-3 of the WPCA. (*Id.*).

At trial, consistent with its pre-trial ruling, the circuit court permitted Petitioner to repeatedly introduce evidence of the fact that her rate of pay was communicated to her verbally and was not committed to writing upon her hire; however, the circuit court disallowed evidence or argument regarding the technical, administrative requirements of W.Va. Code § 21-5-9 or that Respondents "violated" such requirements. (Trial Trans., Vol. II at pp. 4-6).

As discussed herein, the circuit court's evidentiary ruling on this issue was correct and did not constitute an abuse of discretion.

***1. In Reaching its Evidentiary Ruling, the Circuit Court Corrected Determined that W. Va. Code § 21-5-9 is an Administrative Provision That Does Not Give Rise to a Private Cause of Action.***

The WPCA provides a combination of administrative and private remedies. *See generally* W. Va. Code § 21-5-1, *et seq.* On the administrative side, the WPCA is enforced by the Commissioner of the West Virginia Division of Labor. *See* W. Va. Code § 21-5-11; W. Va. C.S.R. § 42-5-1, *et seq.* In enacting the WPCA, the West Virginia Legislature included a private remedy

but *only* for claims to collect unpaid wages. Indeed, in W.Va. Code § 21-5-12 (a), the Act provides that covered employees "whose wages have not been paid" may commence a civil action to "collect a claim." The Act does not provide a private cause of action for the recordkeeping and notification requirements set forth in W.Va. Code § 21-5-9.

In *Byard v. Verizon W.Va., Inc.*, No. 1:11-cv-132, 2012 WL 1085775, *16 (N.D. W. Va. Mar. 30, 2012), the United States District Court for the Northern District of West Virginia examined the WPCA and ruled that W.Va. Code 21-5-9 is an administrative provision that is subject to enforcement only by the Commissioner of Labor but does not create a private cause of action that may be enforced by commencing a civil action. In *Byard*, several employees filed suit against their employer, alleging among other things, that the employer violated § 21-5-9 of the WPCA by "fail[ing] to keep accurate records of all hours worked." *Id.* at *17. The district court found that § 21-5-9, which served as the basis for plaintiffs' cause of action, "does not directly concern 'unpaid wages.'" *See id.* Instead, the *Byard* court explained that Section 21-5-9 directs employers to make proper records related to employees, for which the employee has no private cause of action:

> By its terms, the WPCA limits private causes of action under the statute, and the accompanying right to file directly in state court, to employees who seek to "collect a claim" for unpaid wages. Importantly, violations of W. Va. §§ 21-5-3 and 21-5-4, wage provisions clearly enforceable by the employees through W. Va. Code § 21-5-12, have clearly-defined statutory remedies, which include damages for these unpaid wages. Violations of W. Va. Code § 21-5-9, in contrast, have ***no identified remedy or damages***.
>
> The plain language of the WPCA and accompanying regulations place administration and enforcement of W. Va. Code § 21-5-9 squarely within the purview of the Commissioner. ***To the extent the plaintiffs have any sort of claim arising from this provision, a fact far from clear, it is not one that they are entitled to privately enforce or bring to court in the first instance.***

*See id.* at *18 (citations and quotations omitted) (emphasis added). In sum, the district court in *Byard* ruled that not all violations under the WPCA constitute claims to "collect" unpaid wages that give rise to filing a private right of action in circuit court under W.Va. Code § 21-5-12. The court held that for other statutory violations, such as infractions of the recordkeeping and notification requirements of W.Va. Code § 21-5-9, remedy rests *solely* with the Commissioner of Labor and the administrative processes of the Division of Labor. *See Byard*, 2012 WL1085775 at *18.[8]

Relying upon the holding in *Byard* and adopting its rationale, which is firmly grounded in the statutory text of the WPCA, the circuit court correctly concluded that Petitioner did not have a private right of action to seek redress for a violation of W.Va. Code § 21-5-9 before the jury. (Trial Trans., Vol. II, pp. 4-6). The circuit court based its evidentiary ruling, in part, on such determination. (*Id.*).

### 2. *The Circuit Court Did Not Abuse Its Discretion in Concluding that It Would be Unfairly Prejudicial, Confusing, and Misleading to Introduce Evidence of an Administrative Violation of Section 9 the WPCA to the Jury.*

Additionally, the circuit court based its evidentiary ruling upon the application of W.Va. R. Evid. 403. (*Id.*). Rule 403 of the West Virginia Rules of Evidence allows a trial judge to exclude evidence if "its probative value is substantially outweighed by a danger of unfair prejudice . . . ." W. Va. R. Evid. 403. "It is well settled that evidence is unfairly prejudicial only if it will induce

[8] Additionally, this Court has previously held that liability under the WPCA is not established by an employer's failure to reduce to writing an agreement concerning wages and benefits. Specifically, this Court has ruled that an employment agreement as to wages and benefits "may take the form of a consistently applied ***unwritten*** policy." *Adkins v. Am. Mine Research, Inc.*, 234 W. Va. 328, 332, 765 S.E.2d 217, 221 (2014) (citing *Ingram v. City of Princeton,* 208 W.Va. 352, 357, 540 S.E.2d 569, 574 (2000) (emphasis added); *Gress v. Petersburg Foods, LLC,* 215 W.Va. 32, 37, 592 S.E.2d 811, 816 (2003) ("When employers have a consistently applied unwritten policy, employers have the protection offered by *Ingram* against a claim under the Wage Payment and Collection Act.")).

the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented." Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 4-3(B)(1), 4-38, 39 (4th ed. 2000). Moreover, this Court has repeatedly stated that "[g]reat latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury." Syl. Pt. 8, *Mackey v. Irisari,* 191 W.Va. 355, 445 S.E.2d 742 (1994); Syl. Pt. 2, *State v. Kennedy,* 162 W.Va. 244, 249 S.E.2d 188 (1978); *Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 639-40, 520 S.E.2d 418, 427-28 (1999) (emphasis added).

In applying the Rule 403 balancing test, the circuit court recognized the potential dangers of interjecting evidence of a violation of the technical, administrative requirements of W.Va. Code § 21-5-9 into the trial of Petitioner's claim under W.Va. Code § 21-5-3. (Trial Trans., Vol. II, pp. 4-6). The circuit court accepted Respondents' argument that the jury could be confused and misled into improperly rendering a verdict and imposing liability against the Respondents based solely upon a finding that they violated Section 21-5-9 of the WPCA without actually considering the question they were tasked with deciding – *i.e.*, whether Petitioner proved that she was owed unpaid wages under her employment agreement and that Respondents violated Section 21-5-3 of the WPCA. (*Id.*; App. 98, 211-216)

Ultimately, the circuit court split the difference, ruling that Petitioner would be permitted to introduce evidence of the mere *fact* her rate of pay was not set forth in writing upon her hire at Hinkle Trucking but prohibited her from arguing that W.Va. Code § 21-5-9 required it to be or that Respondents "violated" W.Va. Code § 21-5-9. (App. 97). During the course of trial, the circuit court again announced such ruling on the record, explaining its concern that the jury would

be unable to separate and distinguish the requirements of Section 21-5-3 from those contained in Section 21-5-9, and therefore, could be confused and misled into finding Respondents liable for a violation of Section 21-5-3 based solely upon a finding of non-compliance with Section 21-5-9:

> 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 interpret what the contact 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.

(Trial Transcript, Vol. II at p. 5).

Consistent with such ruling, the circuit court allowed Petitioner to introduce evidence of the fact that her rate of pay was not put in writing, and Petitioner took full advantage of such ruling by:

- mentioning that her rate of pay was not put in writing on three separate occasions during her opening statement (Trial Trans., Vol. I at pp. 105-107);
- eliciting direct testimony from Petitioner six different times about the fact that her rate of pay was not put in writing upon her hire at Hinkle Trucking (Trial Trans., Vol. I at pp. 120, 122, 123, 128, 130, 131);
- twice inquiring of Hinkle Trucking's payroll administrator, Cindy Kisamore, about the lack of a written notice of Petitioner's rate of pay (Trial Trans., Vol. I at pp. 165, 176);
- asking eight different questions of Hinkle Trucking's President, Gary Hinkle during cross-examination about the lack of a written notice of Petitioner's rate of pay (Trial Trans., Vol. I at pp. 197, 198, 199, 225, 226, 227, 228);
- questioning Gary Hinkle's son, Travis Hinkle, on cross-examination about the lack of a written notice of Petitioner's rate of pay (Trial Trans., Vol. II at pp. 14-15); and
- cross-examining Hinkle Trucking's former dispatcher, Sonny O'Neil about the lack of a written notice of Petitioner's rate of pay (Trial Trans., Vol. II at pp. 20).[9]

[9] Additionally, Petitioner repeatedly attempted to inject evidence of § 21-5-9 into the trial in direct

Moreover, the circuit court explained on numerous occasions during trial that it was construing the absence of a writing against Respondents and in favor of Petitioner in ruling upon objections:

- "I let you bring in there *ad nauseam* today on the fact that it's not in writing, and I have let you inquire on that." (Trial Trans., Vol. I, pp. 137-138).
- "Well, we've hammered that [*i.e.*, the fact that Petitioner's rate of pay was not committed to writing] today." (Trial Trans., Vol. I, p. 181).
- "You have the right to argue under the – as I permitted you, that it's not in writing, that – take whatever inference they want from that, but I'm not going to use [WPCA poster]. This has language 'the Wage Payment and Collection Act,' so now we've – I have ruled on this until I'm blue in the face." (Trial Trans., Vol. I, p. 182).
- "And you can argue had it been in writing, maybe that wouldn't have happened . . . That's not saying it's a violation of the Act because it's not in writing. You can make whatever how you want with it." (Trial Trans., Vol. I, p. 184).
- "Also, recognizing that the agreement is not in writing, I have let you inquire, cross-examine, argue, everything except say that it is a violation of the Wage Payment and Collection Act under 21-5-9." (Trial Trans., Vol. II, p. 5).

In sum, the *only* thing Petitioner was not permitted to do at trial was introduce evidence regarding the technical, administrative requirements of W.Va. Code § 21-5-9 or argue that Respondents "violated" such provision.

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violation of the circuit court's pre-trial evidentiary ruling. (Trial Trans., Vol. I at pp. 136-143, 177-185). Petitioner also tried to circumvent the circuit court's rulings by introducing a WPCA poster, which stated that an employee's rate of pay shall be put in writing. (Trial Trans., Vol. I at pp. 177-185). Petitioner even admitted that the purpose of introducing the WPCA poster was to show "that there is a provision in there that says that the employee is supposed to be notified." (Trial Trans., Vol. I, pp. 178-179). Worse, Petitioner's counsel blurted out in front of the jury in response to an objection that "[t]he Wage Payment and Collection Act requires it to be in writing." (Trial Trans., Vol. I at p. 136). Notably, this statement was blurted out in response to a relevancy objection when Petitioner's counsel asked Petitioner what she did with her paycheck. *Id.* Such statement was totally non-responsive to the objection and, as such, appeared to have been a deliberate attempt to defy the circuit court's evidentiary ruling. Such behavior necessitated a conference in chambers where the circuit court admonished Petitioner's counsel for violating its ruling. (Trial Trans., Vol. I at pp. 136-141).

On appeal, Petitioner argues that she should have been permitted to interject the requirements of W.Va. § 21-5-9 into the trial of this matter and, in particular, tell the jury that "the law required" her rate of pay to be put in writing and Respondents "violated by law" by failing to do so. *Petitioner'* Brief at p. 13. The only conceivable purpose for wishing to introduce such evidence is to manipulate the jury into returning a verdict in Petitioner's favor on her claim under W.Va. Code § 21-5-3 by confusing them and misleading them. Again, if the jury was informed that Respondents "violated" the WPCA's administrative requirements, then they would have been naturally inclined to impose liability based upon that violation rather than the issue at hand – *i.e.,* whether Respondents properly paid Petitioner's wages pursuant to their employment agreement or whether they violated W.Va. Code § 21-5-3. The circuit court recognized that it would have been confusing and unfairly prejudicial to interject an administrative violation at trial and then attempt to keep the jury's attention narrowly focused on deciding liability only under W.Va. Code § 21-5-3. (Trial Trans., Vol. II at pp. 4-6).

In sum, the record reflects that the circuit court correctly applied the balancing test of Rule 403 and, as a result, did not abuse its discretion. Moreover, the circuit court permitted Petitioner to introduce evidence, *ad nauseam,* at trial of the fact that her rate of pay was not set forth in writing. Accordingly, this Court should affirm.[10]

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[10] Petitioner's reliance upon *Lipscomb v. Tucker Cty. Comm'n*, 206 W. Va. 627, 527 S.E.2d 171 (1999) is misplaced. *See Petitioner's Brief* at p. 14. In Syl. Pt. 2 of *Lipscomb*, this Court held that "[w]here an employer prescribes *in writing* the terms of employment, any ambiguity in those terms shall be construed in favor of the employee." (emphasis added). The holding in *Lipscomb* is inapplicable to the facts of this case for two reasons. First, this case does not involve a dispute over the terms of a written agreement. Second, there was no "ambiguity" in Petitioner's pay. "Ambiguity" means "an uncertainty of meaning or intention, as in a contractual term or statutory provision." *Black's Law Dictionary* at p. 88 (8th ed. 2004). Petitioner contended that her rate of pay was 25% of Hinkle Trucking was paid for her loads. Respondents contended that Petitioner's pay was a rate-per-ton. Both of those concepts are clear and unambiguous. The only issue was whether the jury believed Petitioner or Respondents.

### D. THE TRIAL COURT CORRECTLY RULED THAT SECTION 21-5-3 OF THE WAGE PAYMENT AND COLLECTION ACT, UNDER WHICH PETITIONER BROUGHT HER CLAIM AGAINST RESPONDENTS, DOES NOT PROVIDE FOR RECOVERY OF LIQUIDATED DAMAGES.

In her third assignment of error, Petitioner contends that the circuit court erred in finding that liquidated damages were unavailable to her. This argument is moot because the jury found that Petitioner failed to prove she was owed any unpaid wages from Respondents.[11] (Trial Trans., Vol. II at p. 107). Because the jury found against Petitioner on liability, the circuit court's ruling with regard to the availability of liquidated damages had no impact in the underlying case. Based upon the jury's verdict, which Petitioner's does not challenge as an assignment of error in this appeal, any ruling with regard to liquidated damages would constitute an advisory opinion on a hypothetical controversy. This Court has frequently held that "[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes." Syl. pt. 2, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991). *See also*, *State ex rel. ACF Indus., Inc. v. Vieweg,* 204 W.Va. 525, 533 n.13, 514 S.E.2d 176, 184 n.13 (1999) ("[T]his Court cannot issue an advisory opinion with respect to a hypothetical controversy."); *Farley v. Graney,* 146 W.Va. 22, 29–30, 119 S.E.2d 833, 838 (1960) ("[C]ourts will not ... adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies . . . . Nor will courts resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies.").

To the extent this Court does review this issue on appeal, Respondents submit that the circuit court properly ruled that Petitioner was not entitled to recover liquidated damages. In her Complaint, Petitioner pleaded and asserted her WPCA claim under W. Va. Code § 21-5-3, not § 21-5-4. (App. 1-4). It is well established that W. Va. Code § 21-5-3 does not provide for recovery

[11] Notably, Petitioner has not raised the jury's verdict as an assignment of error in this appeal.

of liquidated damages. The only section of the WPCA that gives rise to recovery of liquidated damages is W.Va. Code § 21-5-4(b), which provides in pertinent part:

> Whenever a person, firm or corporation discharges an employee, or whenever an employee quits or resigns from employment, the person, firm or corporation shall pay the employee's wages due for work that the employee performed prior to the separation of the employment on or before the next regular payday on which the wages would otherwise be due and payable . . . .

If the employer fails to pay an employee wages "as required under this section," then, the employer, "in addition to the amount which was unpaid when due, is liable to the employee for two times that unpaid amount as liquidated damages." *See* W.Va. Code § 21-5-4(e). This is the *only* section of the WPCA that provides for recovery of liquidated damages. Very plainly, based on its use of the phrase "as required under *this* section," recovery of liquidated damages under W. Va. Code § 21-5-4(e) is expressly limited to violations of the requirements set forth in W.Va. Code § 21-5-4. In contrast, the applicable sanctions for the alleged violations of W.Va. Code § 21-5-3, under which Petitioner asserted her claim in Count I of her Complaint, are found in W.Va. Code § 21-5-6, which provides that a prevailing plaintiff may obtain a "judgment for the amount of such claim proven to be due and unpaid, with legal interest thereon until paid." Unlike W.Va. Code § 21-5-4, Section 21-5-6 contains no reference to liquidated damages.

In *Atchison v. Novartis Pharm. Corp.*, 2012 WL 851114 (S.D.W. Va. Mar. 13, 2012), the Southern District examined the WPCA and rejected the notion that a claim under W.Va. Code § 21-5-3 gives rise to recovery of liquidated damages using fundamental principles of statutory construction. The court reasoned as follows:

> Plaintiff's pick-your-own-penalty theory is untenable because the WPCA provisions at issue in this case have clearly-defined remedies. Section 21–5–6 specifies that its remedy applies to violations of section three, while § 21-5-4(e) specifies that it is available for violations "of this section," section four. Rather than read this

> language out of the statute, the Court will apply it. In *Kessel v. Monongalia Cnty. Gen. Hosp. Co.*, 220 W.Va. 602, 648 S.E.2d 366, 382 (W.Va. 2007), the Supreme Court of Appeals of West Virginia held that where the state legislature had set forth a category of activities that it intended to constitute per se restraints of trade, the principle of *expressio unius est exclusio alterius* applied to prohibit the addition of additional activities to that category through regulation. *Id.* at 384. Similarly, the WPCA creates categories—here, the remedies available for pay frequency violations—that may not be undone by regulation. *Id.* To the extent the regulations imply otherwise, they will not be applied. *Id.* at 382 ("There is no question that when the rules of an agency come into conflict with a statute that the statute must control.").
>
> Further, Plaintiff's interpretation of the regulations renders meaningless the statutory language in § 21–5–4(e) and § 21–5–6, which clearly states the violations to which the penalties in those sections apply. Whenever possible, the Court will interpret statutes so as to give meaning to the words therein. *See Cmty Antenna Serv. Inc. v. Charter Commc'ns VI,* 227 W.Va. 595, 712 S.E.2d 504, 513 (W.Va.2011) ("Our rules of statutory construction require us to give meaning to all provisions in a statutory scheme, if at all possible.") (citing *Syl Pt. 2, Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975)). Applying these principles of statutory construction, it is plain that the remedy for a violation of § 21–5–3(a) is found in § 21–5–6, not § 21–5–4(e).

*Atchison*, at *1–3.

In the underlying action, Petitioner did not assert a claim under W.Va. Code § 21-5-4 or otherwise challenge the timeliness of Respondents' payment of her wages upon her resignation. (App. 384-389; Trial Trans., Vol. II at p. 6). Rather, Petitioner alleged that, throughout her employment, she was improperly paid under her employment agreement in violation of W.Va. Code 21-5-3. Based upon the fact that Petitioner pleaded and asserted her claim under W.Va. Code § 21-5-3, she could not have recovered liquidated damages under W.Va. Code § 21-5-4(e), as a matter of law, even if she had prevailed at trial. Accordingly, this Court should affirm.

## E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SANCTIONING PETITIONER.

In her fourth and final assignment of error, Petitioner appeals the circuit court's decision to imposing sanctions for her counsel's conduct in terminating her deposition.[12]

By way of background, Petitioner's deposition was noticed to begin at 9:30 a.m. on Friday, January 9, 2018, in the jury deliberation room of the Pendleton County Courthouse. (App. 27-28). Everyone involved, with the exception of Petitioner's counsel, was present at the aforementioned time and place to proceed with Petitioner's deposition. (*Id.*). While waiting for her attorney to arrive, Petitioner browsed two notebooks – one legal pad and one spiral bound notebook. (*Id.*). At approximately 9:50 a.m., Petitioner left the jury deliberation room to contact her attorney who was then 20 minutes late. (*Id.*). At approximately 10:00 a.m., Petitioner re-entered the jury deliberation room with her attorney; however, Petitioner was no longer was carrying the two notebooks she had been reviewing earlier. (*Id.*).

During her deposition, inquiry of Petitioner was made by Respondents' counsel about her notebooks. Such inquiry was designed to ascertain to whether they contained discoverable material or communications protected by the attorney-client privilege and, if so, whether the Petitioner had impliedly waived any applicable privilege by reviewing such materials to refresh her recollection in anticipation of her deposition. Petitioner's counsel obstructed the examination and instructed Petitioner not to answer. (App. 29). Carefully prefacing his questions to avoid the actual substance of the information contained within Petitioner's notebooks, Respondents' counsel

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[12] Unfortunately, this is not the first occasion attorney, Harley O. Staggers, Jr., has appealed a circuit court's imposition of monetary sanctions against him for unprofessional conduct at a deposition. *See Redman v. S. Branch Career & Tech. Ctr.*, 2013 WL 5418171 (W. Va. Sept. 27, 2013). In *Redman*, this Court responded to Attorney Staggers' appeal by stating that "[a]s this assignment of error bears no impact on the denial of petitioner's motion for new trial, we decline to address it in this decision." *Id.* at *4. Similar to *Redman*, the circuit court's decision to impose sanctions against Attorney Staggers bears no impact on the other issues raised in this appeal. As such, this Court should again decline to address the circuit court's decision to impose sanctions against Mr. Staggers.

attempted to inquire into the facts and circumstances surrounding the creation, exchange, and purpose of the Petitioner's notebooks, again for the purpose of ascertaining whether they did, in fact, contain privileged communications. (App. 29; 39-45). The following exchange took place:

> Q. Did you review any documents to prepare for today's deposition?
>
> A. No.
>
> Q. Did you review any documents to help refresh your memory with regard to any aspect of your case?
>
> A. No.
>
> Q. Did you bring any documents with you today?
>
> A. No.
>
> Q. I believe earlier you had a notebook and a legal pad; is that correct?
>
> A. Yeah, notebooks.
>
> Q. Did you review those notebooks?
>
> A. No.
>
> Q. Why did you bring them with you?
>
> A. Just in case I needed to make notes for myself from previous –
>
> MR. STAGGERS: I'm going to object also as to attorney/client privilege. Notes to her attorney are privileged. Anything that you are communicating with your attorney is a privilege. And I'm instructing you not to answer with regard to communications between you and I.
>
> Q. Did you write information in those notebooks?
>
> A. Yes.
>
> Q. Without telling me what information you wrote down, was the information in those notebooks communicated to you by your attorney?
>
> A. No.
>
> Q. Where did the information come from that you wrote down in your notebooks?
>
> MR. STAGGERS: I'm going to object. It's her privilege. If she's writing it to me, which is what you're going to ask, that's the privilege. I'm instructing her not to answer this line of inquiry. You cannot -- however you think you're going to get to this.

And if you continue, I believe it's to annoy and embarrass, and I will file my motion. But I don't want to do that.

But any communication, whether it's written, oral, smoke, you know, whatever, it's privileged. And she – I'm instructing you not to answer anything that you communicated with me. However he wants to say it, don't do this or don't do that, I'm instructing you not to answer any communication between you and I.

Q. Without telling me what information –

MR. STAGGERS: Objection.

Q. -- you wrote down in your notebook –

MR. STAGGERS: Is there a question?

Q. -- was that information intended to go to your attorney?

A. Yes.

Q. Did you provide it to him?

A. Yes.

MR. STAGGERS: Please move on.

Q. And was that immediately before this deposition started?

MR. STAGGERS: Please move on. I'm instructing you not -- when, where, how, it's a privileged communication. I'm instructing her not to answer. If you pursue it, if you -- if that's your strategy, just tell me that's your strategy and we can just, you know, get out of here because I will file a motion. It's a privileged communication. She's already told you straight up, it was for me.

Q. Now, is it fair to say that when you walked into this room this morning –

MR. STAGGERS: We're done.

Q. -- for the deposition, you had two notebooks with you; is that correct?

MR. STAGGERS: I'm -- no. We're going – we're going to the judge. I'll file my motion whenever I get a transcript. You were told.

MR. MOORE: Are you terminating the deposition?

MR. STAGGERS: I'm terminating the deposition.

MR. MOORE: Okay. Let the record reflect that Mr. Staggers is terminating the deposition. The time is approximately 1:10 p.m. We are not finished by any stretch of the imagination with this deposition. We

are ready, willing, and able to continue questioning this witness. And let the record reflect that the deposition is being terminated at the direction of Mr. Staggers and only at the direction of Mr. Staggers.

MR. STAGGERS: Let the record reflect that the inquiry was over and over, persistent. The witness told you that she was communicating with her attorney, and you persisted. And I said that this can only be to annoy or embarrass or oppress her, and you wouldn't even respond. You just kept asking the question once you knew it was privileged communication.

And, yes, I do have to terminate the deposition. I will file my motion after I get a copy of the transcript where it's clear that you were told that this was to communicate with her attorney and you persisted. There can only be one -- there can only be one reason you did that. And if that's your strategy, then that's fine.

MR. MOORE: Let the record reflect that Mr. Staggers is standing up –

MR. STAGGERS: Because I'm leaving. Let the record reflect that I'm sitting down and opposing counsel has a smug look, and evidently, they think this is funny. And, I guess, let the record reflect that this was the plan.

MR. MOORE: Are you intending to rely upon your –

MR. STAGGERS: We are leaving!

(Mr. Staggers hits the table.)

MR. MOORE: -- and leaving this deposition?

MR. STAGGERS: I've terminated the deposition. You can't badger her. You can't do that.

(Mr. Staggers stands and points across the table at Mr. Moore.)

MR. MOORE: Don't point at me.

MR. STAGGERS: I'll point at you any time I want to point at you. This is beyond any – we're done. How much – we're done. I terminated it.

. . .

(Mr. Staggers and the witness left the deposition.)

(Whereupon these proceedings were terminated at 1:12 p.m.)

(App. 39-45).

Shortly thereafter, Respondents filed a *Motion for Rule 37 Sanctions for Improper Unilateral Termination of Plaintiff's Deposition* on February 13, 2018. (App. 27-46). Petitioner filed a response in opposition. (App. 47-54). On March 9, 2018, the circuit court entered an Order granting the Respondents' motion. (App. 55-57). The two notebooks were ordered to be provided to a discovery commissioner for review and Petitioner's deposition was ordered to be reconvened forthwith. (*Id.*). Upon reviewing the two notebooks, the discovery commissioner concluded that the contents contained communications protected by the attorney-client privilege. (App. 59). The discovery commissioner further deemed the dispute to be in good faith. (*Id.*). Upon further review, however, the circuit court disagreed that the dispute was in good faith. (App. 60). The circuit court reasoned that "after reading the deposition transcript and watching the video from the deposition, the Court found that Defendants' counsel was properly questioning the Petitioner to explore whether a privilege existed with respect to the information contained in her notebooks and, if so, whether such privilege was waived when Petitioner reviewed the notebooks in anticipation of her deposition while waiting for her attorney to arrive." (*Id.*). The circuit court, after examining and applying the factors contained in Syl. Pt. 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), concluded that Respondents' attorney's fees and costs were reasonable. (App. 61; 151-157). Petitioner filed a motion to void the March 9, 2018 Order, which was denied after further briefing was submitted. (App. 158-179).

The attorney-client privilege is "a common law privilege that protects communications between a client and an attorney during consultations." *State ex rel. John Doe v. Troisi,* 194 W.Va. 28, 35–36, 459 S.E.2d 139, 146–47 (1995) (citations omitted). "The attorney-client privilege *only* "protects the *substance* of communications[.]" *Id.* (footnote omitted) (emphasis added). The privilege does not protect discovery of facts surrounding the communication, such as the date and

time of the communication, the manner of communication, the purpose or intent for making a communication, or whether such communications have been maintained in confidence. Indeed, such facts are relevant and necessary to determine whether information constitutes a confidential communication that is protected by the attorney-client privilege in the first instance.

The attorney-client privilege belongs to the client, not the attorney, and may be waived by the client. One way the privilege can be waived is through Rule of Evidence 612 in circumstances where a party reviews otherwise privileged documents to refresh recollection in preparation of testifying. Rule 612 gives an adverse party certain options when a witness uses a writing to refresh their memory: (1) "while testifying" or (2) "before testifying, if the court decides that justice requires the party to have those options." Specifically, W. Va. R. Evid., Rule 612(b) provides:

> An adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing or object includes unrelated matter, the court must examine the writing or object in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

Rule 612 applies to depositions through W. Va. R. Civ. P. 30(c).

Courts have developed the following three-part test to determine whether otherwise privileged documents should be produced under Rule 612 based on their use by a deponent to refresh his or her recollection prior to testifying at a deposition: "(1) a witness must use a writing to refresh his or her memory; (2) for the purpose of testifying; and (3) the court must determine that, in the interest of justice, the adverse party is entitled to see the writing." *Nutramax Labs., Inc., v. Twin Labs, Inc.*, 183 F.R.D. 458, 468 (D.Md. 1998); *see also Coryn Grp. II, LLC, v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 242 (D.Md. 2010); *Ferry v. BJ's Wholesale Club,* No. 3:06CV226–C, 2007 WL 75375, at *3 (W.D.N.C. Jan. 8, 2007).

At the time Petitioner's counsel terminated her deposition, Respondents' counsel was properly questioning Petitioner to explore whether a privilege, in fact, existed with respect to her notebooks, and if so, whether such privilege was waived when Petitioner reviewed the notebooks while waiting for her deposition to commence. Documents do not become protected by the privilege simply because they are given to one's attorney to conceal during a deposition. Similarly, a document is not protected by the attorney-client privilege simply because the attorney summarily declares them to be privileged. Rather, the *only* way to determine whether the notes contained in Petitioner's notebooks were, in fact, confidential, attorney-client communications was to ask Petitioner about the circumstances surrounding their creation. Likewise, the *only* way to determine whether Petitioner had waived the privilege was to ask questions about her review of her notebooks immediately prior to her deposition. The line of questioning, which triggered the unilateral termination of the deposition by Petitioner's counsel, was aimed at properly developing a record to ascertain whether the documents were, indeed, covered by the attorney-client privilege and whether a basis to argue waiver existed.

Petitioner's entire argument on appeal rests upon an inaccurate representation that inquiry was being made into protected attorney-client communication during Petitioner's deposition. *See Petitioner's Brief, generally.* The deposition transcript clearly reflects that no inquiry was made into the *substance* of the information contained in Petitioner's notebooks. (App. 39-45). In fact, Respondents' counsel expressly disclaimed any intention to inquire into the substance of the information contained in Petitioner's notebooks. (*Id.*). For example, Respondent's counsel carefully prefaced his question with instructions such as: "[w]ithout telling me what information you wrote down . . . ." (App. 40).

Respondents' counsel was in the process of developing a record concerning the facts and

circumstances surrounding the creation of Petitioner's handwritten notes and the purpose thereof, and the inquiries posed Petitioner were entirely proper. Petitioner's counsel interrupted the deposition, interjected improper objections and instructions not to answer questions that plainly did not seek privileged information, and obstructed Respondents' ability to develop a record by unilaterally terminating the deposition. Petitioner's counsel voiced no legal authority in support of his decision to end the deposition. Rather, he resorted to unduly hostile and threatening behavior, such as standing up and leaning over the table, pointing his finger at Respondents' counsel, raising his voice, and slamming his hand on the table – all of which can be seen from the video that is included in the Appendix and which was appended to Respondents' *Motion for Rule 37 Sanctions for Improper Unilateral Termination of Plaintiff's Deposition* before the circuit court.

Based upon the above conduct, the circuit court imposed monetary sanctions against Petitioner's counsel. This Court has previously instructed that, "On the appeal of sanctions, the question is not whether we would have imposed a more lenient penalty had we been the trial court, but whether the trial court abused its discretion in imposing the sanction." *Bartles v. Hinkle*, 196 W. Va. 381, 389–90, 472 S.E.2d 827, 835–36 (1996). In reviewing the record, there is no indication that the circuit court abused its discretion, particularly in light of the conduct by Petitioner's counsel captured on video.

## V. CONCLUSION

As demonstrated herein, each of the assignments of error identified by Petitioner is without merit. Accordingly, Respondents respectfully request that this Court affirm the judgment entered by the circuit court.

## CERTIFICATE OF SERVICE

I, Julie A. Moore, counsel for the Respondent herein, do hereby certify that a true copy of the foregoing *Respondents' Brief* was served upon the following counsel of record via United States Mail on this 27th day of April, 2020:

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