No. 20-0684

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAIRMONT TOOL, INC.,
Petitioner and Defendant Below,

v.

ADAM J. DAVIS, Individually and on Behalf of Those Similarly-Situated,
Respondent and Plaintiff Below.

BRIEF OF PETITIONER FAIRMONT TOOL, INC.

Civil Action No. 17-C-163
In the Circuit Court of Marion County, West Virginia
(Honorable David R. Janes, Judge)

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BRIEF OF PETITIONER FAIRMONT TOOL, INC.

The primary issue before this Court is whether cash or cash equivalent advances an employer makes on behalf of employees and former employees are "wage assignments" under the West Virginia Wage Payment and Collection Act ("the WPCA"). Elevating form over substance and ignoring precedent from this Court, the Circuit Court of Marion County answered the question in the affirmative. Though Petitioner conducted itself in a manner approved by this Court in *Rotruck v. Smith*, 2016 W.Va. LEXIS 69 (W. Va., Feb. 10, 2016) (memorandum decision), the trial court found that Petitioner violated W. VA. CODE § 21-5-3(e), awarded Respondent and the class the amounts deducted from payroll as reimbursement for such advances and denied Petitioner any offset for the actual amounts expended on their behalf (the value of which Respondent and the Class previously received).

Adding insult to injury, the trial court effectively punished Petitioner by refusing to allow it to withdraw from a pretrial evidentiary set of stipulations, even though Respondent admittedly violated the agreement underlying said stipulations and nullified the same by subsequent litigation conduct. The trial court not only denied Petitioner its clear right to withdraw from the stipulations but used the same as alternative justification to impose draconian liquidated damages – damages not supportable under any valid construction of the WPCA.

I. STATEMENT OF THE CASE AND BACKGROUND:

A. THE UNDERLYING FACTS.

Petitioner, Fairmont Tool, Inc. ("Fairmont Tool"), is a West Virginia company providing services to the oil and gas industry, including tooling of drill pipe and casing and field inspections

at client well pads.[1] Fluctuating with market demands, Fairmont Tool employs approximately 75-120 local residents in these skilled labor positions.[2]

Fairmont Tool advanced money and the cash equivalent to Respondent, Adam J. Davis ("Davis"), a former employee of Fairmont Tool, for personal purchases. Davis was provided a company credit card because he drove a truck to customer locations.[3] Davis understood the company credit card was only to be used for items related to the maintenance of the truck he was driving[4] and not for personal purchases, such as food.[5] Nevertheless, he admitted to using it to purchase CB radio equipment for his personal vehicle,[6] a personal lunch,[7] and meals for himself and his family on a couple of occasions.[8] Davis further obtained a bag of calcium chloride and a winter coat purchased on company accounts for his personal use.[9]

Even though Fairmont Tool provided employees with a $120 allowance for the purchase of safety boots, Davis also took advantage of a Fairmont Tool vendor account (with its 10% discount rate) to obtain more expensive boots for himself out of personal preference, an additional winter pair of boots, as well as a pair for his son's personal use.[10] Finally, even though Fairmont Tool provided him with a fire retardant uniform to wear while on client well pads (free of charge), Davis elected to obtain a rental uniform from a third-party vendor.[11] Set up by another Fairmont Tool employee (and class member), Fairmont Tool paid the bulk of the costs of the optional rental

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1 AR562-63.
2 AR1764.
3 AR1786. Plaintiff was the only class member deposed in this matter.
4 *Id.*
5 AR1789.
6 AR1788-89.
7 AR1789.
8 AR1791.
9 AR1791-92.
10 AR1787, 1790, 1792-93.
11 AR1793-94.

uniforms with employees choosing to use the third-party service contributing just $9 per week.[12] Davis understood and agreed to pay a share of the costs of that optional service.[13] He was not charged interest on the money advanced[14] and agreed to reimburse Fairmont Tool for these advances.[15] He chose to pay the advanced amounts back to Fairmont Tool through agreed upon payroll deductions.[16]

Davis resigned his employment with Fairmont Tool, effective January 3, 2017.[17] When he left employment, Davis kept the personal items purchased with Fairmont Tool money.[18] Davis had an $18.00 fee deducted from his final paycheck, which represented the uniform rental and cleaning service Fairmont Tool advanced for Davis during the prior pay period.[19]

Fairmont Tool provided the $120 yearly allowance for metatarsal safety boots to all employees and the optional rental uniform service for those employees wishing to avoid ruin their own clothes and washing machines.[20] The optional uniforms are supplied and laundered by an independent third-party vendor.[21] Each employee participating in the service contributed $9.00 per week (or $18.00 per 2-week pay period) and Fairmont Tool covered the remainder of the costs.[22] The uniform service and policy (including the employee reimbursement amounts) was devised by a Fairmont Tool employee and member of the Class certified in this action.[23] Fairmont Tool had

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12 AR2438-39.
13 AR1794.
14 AR1797; AR1766.
15 AR1789-90.
16 AR1789-91.
17 AR1777; AR1795; AR1797.
18 AR1797.
19 AR1969-72.
20 AR1777-78.
21 AR1778.
22 AR1777.
23 AR2438-39.

no ownership or other relationship with any of the third-party vendors, other than as a customer.[24] Fairmont Tool does not seek to collect amounts due and owing from an employee who separates from employment before reimbursing the company for the advances.[25]

B. THE UNDERLYING ACTION.

On May 31, 2017, Davis filed the complaint in the instant action alleging two (2) claims. In Count I, Davis claimed some 80 hours in vacation, for which he was entitled to compensation at his separation, along with liquidated damages pursuant to W. VA. CODE § 21-5-4.[26] In Count II, Plaintiff alleges a claim on his own behalf and as a class representative for current and former employees of Fairmont Tool.[27]

The essence of the latter claim is that Fairmont Tool violated the wage assignment provision (Section 21-5-3(e)) of the WPCA when the company recouped (via payroll deductions) advances made on behalf of Davis and the putative class members for personal purchases on company credit cards and company credit accounts with outside vendors, including safety boots and uniform rentals.[28] Along with the request for reimbursement of all sums deducted in this regard, Plaintiff sought liquidated damages under the West Virginia Code Section 21-5-4(e), attorney fees and costs.[29]

After Fairmont Tool answered the complaint,[30] the trial court scheduled the case for trial during the June 2018 term of court.[31] Fairmont Tool filed a motion to dismiss or in the alternative

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24 *Id.*
25 AR1767-68.
26 AR24. This claim was settled and dismissed by stipulation on December 22, 2017. AR40.
27 AR25.
28 *Id.*
29 *Id.*
30 AR27.
31 AR37.

motion for summary judgment as to the remaining claim on January 29, 2018,[32] to which Davis responded on February 13, 2018.[33] The parties then jointly proposed a revision to the pretrial schedule to extend the deadline for Davis to disclose expert witnesses to April 23, 2018, which amendment was adopted by the trial court on April 4, 2018.[34]

On the eve of the April 23, 2018 deadline for his disclosure of expert witnesses, Davis proposed a set of stipulations premised upon the suggestion that the parties would jointly save the expense of retaining and presenting expert testimony on damages.[35] On April 25, 2018, the "Parties' First Set of Stipulations" was filed with the trial court.[36] The next day Davis filed his Motion for Class Certification, citing the stipulations and asserting that "[i]f the class prevails on the merits, the damages are easily quantifiable for the class members under the WPCA."[37]

Fairmont Tool filed a stipulation of substitution of counsel,[38] which was approved by Order entered May 2, 2018.[39] On May 3, 2018, Fairmont Tool moved the trial court to amend the scheduling order to address the requirements of Rule 23 of the West Virginia Rules of Civil Procedure.[40] Notably, just eight (8) days after the filing of the stipulations, Fairmont Tool also moved to withdraw from and/or rescind the "Parties' First Set of Stipulations."[41]

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32 AR42.
33 AR57.
34 AR115. The parties then jointly moved to extend the discovery deadline to permit Davis additional time to depose the President of Fairmont Tool, which amendment was adopted by the trial court on April 25, 2018. AR119.
35 AR3199-AR3200.
36 AR123.
37 AR127.
38 AR291.
39 AR294.
40 AR295. Fairmont Tool further sought leave for the motion to be heard on May 7, 2018. AR321.
41 AR304.

On May 7, 2018, the trial court heard arguments on Davis' Motion for Class Certification and Fairmont Tool's Motion to Stay and Amend Scheduling Order.[42] In addition to urging the trial court to consider the pending dispositive motion on liability,[43] Fairmont Tool raised questions regarding the lack of commonality/typicality and adequacy, given Davis' status as a former employee arguably entitled to different remedies under his theory of the case than the current employees he sought to represent in the putative class definition.[44] Fairmont Tool also raised the fact that discovery had not yet concluded.[45]

On May 16, 2018, while the trial court considered the foregoing, Davis filed his own Motion for Summary Judgment,[46] along with a motion to continue the hearing on Fairmont Tool's dispositive motion[47] (then set for May 22, 2018).[48] Eschewing any pretense of trying the case during the June 2018 Term of Court, Davis' motion to defer ruling on the dispositive motion sought approval of a class notice with an opt-out date to be established,[49] the very time-consuming issues Fairmont Tool raised in its Motion to Stay.

On May 17, 2018, the trial court continued the hearings on both parties' dispositive motions generally.[50] That same day, Fairmont Tool filed its response in opposition to the Motion for Class

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42 AR324.
43 AR336-AR337. Fairmont Tool's Motion for Summary Judgment had yet to be decided by this time.
44 AR336.
45 AR339.
46 AR346.
47 AR536.
48 AR541.
49 AR536.
50 AR541.

Certification.[51] The parties filed their respective trial exhibit disclosures,[52] the pretrial schedule was modified[53] and Davis filed his reply in support of class certification.[54]

By Order entered June 5, 2018,[55] the Circuit Court of Marion County conditionally certified the following class of individual employees, current and former, which was modified by Agreed Order entered July 2, 2018:

> For the period from July 1, 2012, through July 31, 2017: All persons currently and/or formerly employed by Defendant Fairmont Tool, Inc. in West Virginia who are not shareholders of Fairmont Tool, Inc. and who had their wages owed by Fairmont Tool, Inc. reduced by Fairmont Tool, Inc. relative to uniforms, model uniforms, and/or purchases categorized by Fairmont Tool, Inc. as MDSE, inclusive of, but not limited to, the purchase of boots and tools.[56]

However, the trial court explicitly stated that "[t]his order is conditional and may be altered or amended by the Court before the decision on the merits pursuant to Rule 23(c)(1) of the West Virginia Rules of Civil Procedure."[57] The trial court continued the case to the October 2018 Term of Court.[58]

In a sworn deposition taken the day before the trial court conditionally certified a class, Davis repudiated his agreement to reimburse Fairmont Tool for monies advanced on his behalf (as well as repudiating any such agreement on behalf of the class).[59] Accordingly, on June 22, 2018, Fairmont Tool moved to amend its Answer to assert the defenses of anticipatory breach, repudiation, unclean hands, and setoff, as well as a counterclaim for breach of contract and/or

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51 AR543.
52 AR596; AR600.
53 AR605.
54 AR607.
55 AR671.
56 AR787.
57 AR677.
58 AR678.
59 AR708.

unjust enrichment.[60] Just before midnight that night, Davis moved for leave to amend his complaint to add Nathan Kincaid, the President of Fairmont Tool, as a party defendant.[61] Fairmont Tool then moved to decertify the class based upon the newly secured testimony of Plaintiff Davis.[62]

On August 6, 2018, the parties filed the witness disclosures required by the pretrial scheduling order for the October Term of Court.[63] Citing Fairmont Tool's motion to "rescind certain stipulations that were entered into by agreement of the parties' respective counsel at that time in lieu of Plaintiff Adam J. Davis retaining an economist," Davis also filed a Reservation of Right to disclose an expert economist.[64]

After the parties filed responses thereto,[65] the trial court held a hearing on August 17, 2018 with respect to the pending motions.[66] During the hearing, counsel for Davis and the now certified Class confirmed that the primary impetus behind the "Parties' First Set of Stipulations" was to save the expense of retaining expert witnesses to testify about damages in what was likely to be a fee-shifting situation.[67] Counsel specifically asked for relief in the form of time to disclose an expert, should the trial court grant Fairmont Tool's motion to rescind the same.[68] By letter dated August 28, 2018, the trial court announced and summarized its rulings and directed counsel to prepare certain orders.[69] The trial court denied Fairmont Tool's motion to decertify and Davis'

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60 AR682.
61 AR727.
62 AR795.
63 AR835; AR838.
64 AR841.
65 Davis filed written responses to Fairmont Tool's motion to withdraw from and/or rescind the stipulations, AR871, motion to decertify, AR843, and motion to amend. AR907. For its part, Fairmont Tool responded to Davis' motion to amend complaint, AR924, and motion to approve notice to class. AR915.
66 AR964.
67 AR1024-25.
68 AR1024.
69 AR1032-33.

motion to amend to add Kincaid as a party defendant.[70] The trial court granted Fairmont Tool's motion to amend answer and add counterclaim and Davis' motion to approve class notice.[71] Finally, the trial court denied Fairmont Tool's motion to withdraw/rescind the stipulations "with the understanding that the Court reserves the right properly to instruct the finder of fact on the law applicable to the facts of the case."[72] Counsel submitted notices and proposed orders reflecting the respective favorable rulings on October 1, 2018.[73] And opposing counsel responded with their respective objections.[74] The trial court entered the orders as submitted by counsel.[75]

The case was continued to the February 2019 Term of Court.[76] And, the notice to the class was modified to permit opt-outs to be postmarked by December 31, 2018.[77]

On October 25, 2018, Fairmont Tool filed its Amended Answer and Affirmative Defenses and Counterclaim.[78] After the parties stipulated to an extension of time,[79] Davis filed a Motion to Dismiss the counterclaim on November 12, 2018,[80] quickly followed by the appearance and appointment of co-counsel for Plaintiff Davis and the Class.[81] A hearing was held on the motion to dismiss on November 28, 2018,[82] with the trial court taking the matter under advisement.[83]

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70 *Id.*
71 *Id.*
72 AR1033.
73 AR1034-71.
74 AR1076-1104.
75 AR1105-66.
76 AR1072.
77 AR1185.
78 AR1167.
79 AR1184.
80 AR1189.
81 AR1203-08; AR1220-23.
82 AR1224.
83 AR1252.

On December 7, 2018, despite having prevailed in his opposition to Fairmont Tool's attempt to withdraw from the stipulations, Davis disclosed an expert economist.[84] The case was continued to the June 2019 Term of Court.[85]

In April and May of 2019, the parties filed more briefs on the dispositive motions.[86] The court held a hearing on the respective dispositive motions on May 9, 2019,[87] issuing a letter dated May 13, 2019 summarizing the court's rulings.[88] In short, the trial court granted Davis' dispositive motions as to both Count II and the counterclaim and, therefore, denied Fairmont Tool's dispositive motion.[89] The trial court directed counsel for plaintiff to prepare an order reflecting the rulings.[90] Counsel for Davis submitted a proposed order[91] to which Fairmont Tool objected.[92] The trial court then entered the Order Resolving the Parties' Motions for Summary Judgment (as submitted by counsel for Davis) on June 21, 2019.[93] The trial court found that prior precedent "make it very clear that these types of transaction – for Plaintiff and all other class member – fall within the WPCA's wage-assignment provision."[94] The Circuit Court suggested the holding in *Rotruck v. Smith*, No. 14-1284, 2016 WL 547190 (W. Va. Feb. 10, 2016) was in conflict with the published decision in *Clendenin Lumber & Supply Co., Inc. v. Carpenter*, 172 W. Va. 375, 305

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84 AR1255.

85 AR1271; AR1282.

86 Davis filed an "Updated" motion for summary judgment as to Count II of the Complaint, AR1286, as well as a motion for summary judgment on Fairmont Tool's counterclaims, AR 1454, and an "Amended" response to Fairmont Tool's dispositive motion as to Count II. AR 1481. Fairmont Tool filed a reply in support of its dispositive motion, AR 1647, as well as responses to Davis' updated and amended brief. AR1708; AR1741.

87 AR1804.

88 AR1848.

89 *Id.*

90 *Id.*

91 AR1874.

92 AR1907.

93 AR1946.

94 AR1956-57.

S.E.2d 332 (1983)[95] and was distinguishable.[96] Finally, the trial court alternative concluded that, even if status as a creditor were required, it would find Fairmont Tool a creditor under the West Virginia Consumer Credit and Protection Act.[97] With respect to Fairmont Tool's counterclaim, the trial court held that any agreements were "illegal contract[s]" in that they failed to comply with W. VA. CODE § 21-5-3(e).[98] The trial court also reasoned that such agreements may not be enforced pursuant to W. VA. CODE § 21-5-10.[99]

On May 28, 2019, the parties appeared before the Court ostensibly to address evidentiary motions.[100] Fairmont Tool again raised the issue of the enforceability of the stipulations[101] and requested clarification of the trial court's ruling as to the counterclaim.[102] The parties agreed to proceed to a bench trial on the issue of damages[103] and a briefing schedule was set.[104]

On June 27, 2019, the parties submitted their respective dispositive motions as to damages.[105] On July 29, 2019, each side filed their respective responses.[106] On August 9, 2019, Fairmont Tool also filed a Re-Notice of Withdrawal From the Parties' First Set of Stipulations and Motion to Reconsider,[107] to which Davis responded.[108]

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95 *Id.*, citing, *In re Involuntary Hospitalization of T.O.*, 238 W. Va. 455, 796 S.E.2d 564, 573 (2017).
96 AR1958.
97 AR1960.
98 AR1961.
99 AR1962.
100 AR1851.
101 AR1856-59.
102 AR1854-55.
103 AR1868.
104 AR1870.
105 Davis submitted his Motion for Summary Judgment Regarding Damages (with exhibits). AR1994. Fairmont Tool submitted a competing Motion for Summary Judgment Regarding Plaintiff's Claim For Damages, Including Credits (with exhibits). AR2410.
106 AR3122; AR3138.
107 AR3283.
108 AR3388.

By letter dated September 12, 2019, the Circuit Court announced its decisions, overruling Fairmont Tool's Re-Notice and Motion to Reconsider and granting Davis' Motion for Summary Judgment, declining a setoff of any kind for Fairmont Tool.[109] The trial court again directed counsel for Davis to submit a proposed order and left the issue of attorney fees and costs to be addressed upon receipt of the anticipated motion.[110] Fairmont Tool filed its objections to the proposed order[111] and Davis responded.[112] On November 7, 2019, the trial court entered the Judgment Order (as proposed by counsel for Davis), including an award of $87,731.00 as the base amount of wage reductions and an award of $237,997.00 in liquidated damages.[113] The total amount awarded was $325,728.00, plus prejudgment interest at 7.00% per annum and post-judgment interest at 5.50% per annum.[114]

After an agreed upon extension of time for submission of his request for attorney fees and costs,[115] Davis submitted his Motion for Recovery of Reasonable Attorney Fees, Litigation Costs, and Class Representative Award on December 19, 2019.[116] A briefing schedule was ordered.[117] Fairmont Tool filed its Response in Opposition.[118] Davis then filed his Reply in Further Support.[119] By letter dated April 30, 2020, the Circuit Court announced its decision that the April 25, 2018 stipulation and W. VA. CODE § 21-5-12 permitted Davis to recover reasonable attorney fees and costs from Fairmont Tool.[120] With the exception of the "customary" fee, the trial court determined

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109 AR3431-33.
110 AR3433.
111 AR3434.
112 AR3451.
113 AR3475.
114 AR3478.
115 AR3480.
116 AR3486.
117 AR3611.
118 AR3615.
119 AR3567.
120 AR3889.

all twelve factors from *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986) suggested that the motion should be granted.[121] The trial court reduced the fee request to $350.00 per hour for attorneys and $150.00 per hour for paralegal time and directed counsel for Davis to submit order granting the motion with the figures re-calculated accordingly.[122] Fairmont Tool filed its TCR 24.01 objections[123] and the trial court entered the order (as proposed by counsel for Davis) on July 2, 2020, awarding Davis and the Class $160,000.00 in attorneys' fees, $21,518.14 in litigation costs, and $5,000.00 to Davis as a service award.[124]

Davis then submitted a proposed Final Judgment Order,[125] which was entered by the Circuit Court on August 3, 2020.[126]

II. SUMMARY OF ARGUMENT:

The Circuit Court effectively ignored this Court's decision in *Rotruck v. Smith*, 2016 W.Va. LEXIS 69 (W. Va., Feb. 10, 2016) (memorandum decision). Just like the insurance company employer in *Rotruck*, Fairmont Tool provided Plaintiff Davis and the other Class members its purchasing power to obtain items of their own choosing. Using this cash equivalent, Davis admittedly purchasing boots and meals for his family, as well as a CB radio for his personal vehicle. He further admittedly chose to obtain rental uniforms (though free ones were provided by the company) and agreed to reimburse Fairmont Tool for all of these uniquely personal items. Pursuant to this Court's jurisprudence on the issue, as set forth and explained in *Rotruck*. the transactions in this case were not an "assignment of earnings" under West Virginia Code Section

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121 *Id.*
122 *Id.*
123 AR3890.
124 AR3923.
125 AR3961.
126 AR3964. The Clerk of the Circuit Court then entered Taxation of Costs on August 5, 2020. AR3972.

21-5-3(e) and the Circuit Court erred in ruling to the contrary and awarding Plaintiff and the class damages for the amounts recovered by Fairmont Tool in this respect.

The Circuit Court compounded the problem when it also erroneously awarded liquidated damages to current and former employees alike for the alleged affronts to Section 21-5-3(e). The West Virginia Wage Payment and Collection Act has but one reference to liquidated damages, W. VA. CODE § 21-5-4(e), a provision that is expressly limited to the failure to remit wages due where an employee is discharged. quits or resigns. Though this Court has yet to address the issue, WPCA does not refer to or in any way suggest a relation Sections 21-5-3(e) and 21-5-4(e). Simply put, the WPCA does not provide a multiplier for liquidated damages with regard to an alleged violation of Section 21-5-3(e) and the Circuit Court's conclusion in this regard was clearly and prejudicially erroneous.

Adding insult to injury, the Circuit Court erroneously applied Section 21-5-4(e) and denied Fairmont Tool its lawful offset for the benefits conferred upon Davis and the Class. After explicitly holding by letter ruling that the liquidated damages to be awarded were two (2) times the amounts unpaid, the Circuit Court entered an order prepared by Plaintiff's counsel awarding liquidated damages at a rate of three times the actual damage amount for deductions that took place during three (3) of the five (5) years covered by the Class definition. In addition to being lacking in support within the WPCA framework, that award was contrary to this Court's jurisprudence as to the retroactivity of remedial statutory provisions. See, Syl. Pt. 7, *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017). Though the liquidated damages provision of the WPCA, W. VA. CODE § 21-5-4(e) is inapplicable, under *Martinez*, the Circuit Court's application of the same should have been as current written, i.e., two (2) times the amount of wages withheld.

Similarly, Fairmont was entitled to offset for the value it did provide Davis and the Class, i.e., the personal property it purchased for them. Likewise, after Davis expressly repudiated his confessed agreement to reimburse Fairmont Tool (on behalf of himself and the Class), Fairmont Tool was entitled to offset bring a counterclaim for breach of contract and unjust enrichment under West Virginia law. *See*, Syl. Pt. 1, *Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 343 (1971). The Circuit Court erred in granting summary judgment to Davis and the Class negating these claims against the award made by the Court.

The Circuit Court also erred in refusing to permit Fairmont Tool to withdraw from a set of evidentiary and legal stipulations submitted more than a year before the issue of liability was submitted to the Court for decision. Under black letter law, Fairmont Tool was entitled to withdraw from the evidentiary stipulations and the legal stipulations had no force or effect. Davis failed to demonstrate any prejudice that would have been borne by the withdrawal or rescission of the stipulations. In fact, Davis breached the agreement underlying the stipulations by subsequently retaining and presenting an expert economist – a cost he then successfully moved to assess against Fairmont Tool.

Finally, the Circuit Court erred in the awarding of attorney fees. costs and service award to Davis and the Class. The Court erred in finding that counsel was entitled to rate well beyond the prevailing rate in the relevant community. Moreover, despite refusing to allow Fairmont Tool to withdraw from the parties' stipulations, the Court made findings and conclusions regarding the need to retain expert witnesses that were patently inconsistent with Davis' justification for the stipulations and unsupported by the record evidence.

For these reasons, Fairmont Tool respectfully submits that the Circuit Court of Marion County committed reversible error.

III. STATEMENT REGARDING ORAL ARGUMENT:

Pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, Fairmont Tool respectfully submits that oral argument is appropriate in this case under Rule 20 of the Rules of Appellate Procedure. While the appeal involves matters of settled law and the application of settled law to the facts of this case, there is at least one issue – the awarding of liquidated damages – for which the undersigned has been unable to locate any prior decision of this Court.

IV. ARGUMENT:

A. THE CIRCUIT COURT ERRED BY APPLYING SECTION 21-5-3(e) TO THE TRANSACTIONS AT ISSUE.

The Circuit Court erred in finding that the reimbursements at issue were "assignments of earnings" under Section 21-5-3(e) of the WPCA. To reach the tortured conclusion urged by Plaintiff Davis and accepted by the trial court, three (3) facts had to be ignored or outright discarded: (1) that Davis obtained cash equivalent from Fairmont Tool and admittedly for the purchase of personal items (boots for his son, meals for his family, items for his house and car and a winter coat for himself); (2) the statutory phrase "assignment of earnings" was operationally defined in *Clendenin* with respect to earnings assigned to an employer when that employer is also a "creditor;" and (3) this Court operationally defined "creditor" in *Clendenin* and *Rotruck* to exclude those situations where the employer is effectively providing a cash advance to the employee.

Davis, the only person to testify on behalf of the Class, admitted that he used the purchasing power of Fairmont Tool to purchase items according to his own pleasure, including five (5) pairs of boots for himself and his family, meals for himself and his family, personal items for his car

and home, and a winter coat for himself.[127] These items were not Fairmont Tool products and Fairmont had no relationship with the vendors Davis purchased these items from, other than as a customer.[128]

This Court recently addressed this very proposition, analyzing all of the prior caselaw cited by Davis (and adopted by the trial court), and summarily dismissed Davis' underyling theory of liability.

> Addressing the question of whether there had been an assignment of wages between an employer and an employee, the Court in *Clendenin Lumber* observed that the wage assignment provisions of the WPCA and the Consumer Credit and Protection Act ("CCPA") must be read *in pari materia*: "[i]nasmuch as *W. Va. Code, 46A-2-116* [(1996)], and *W. Va. Code, 21-5-3* [(2015)], relate to assignment of earnings, they are to be construed together . . . ." *172 W. Va. at 379, 305 S.E.2d at 336....* The WPCA contains certain requirements applicable to the assignment of earnings, but it does not define the term. The term "assignment of earnings" is, however, defined in the CCPA as follows:
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> > "Assignment of earnings" includes all forms of assignments, deductions, transfers, or sales of earnings *to another*, either as payment or as security, and whether stated to be revocable or nonrevocable, and includes any deductions authorized under the provisions of section three *[§21-5-3]*, article five, chapter twenty-one of this code, except deductions for union or club dues, pension plans, payroll savings plans, charities, stock purchase plans and hospitalization and medical insurance.
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> *W. Va. Code § 46A-2-116(2)(b)* (1996) (Repl. Vol. 2015) (emphasis added). Based upon this definition, the *Clendenin Lumber* Court was tasked with deciding whether the phrase "to another" includes an employer. The *Clendenin Lumber* Court observed generally that the CCPA was enacted "to modernize and clarify the law regarding consumer sales and credit transactions. Specifically, article 2 regulates, *inter alia*, the practice of creditors regarding credit and debt collection practices in consumer credit transactions." *Clendenin Lumber, 172 W. Va. at 379, 305 S.E.2d at 336.* In furtherance of this general purpose, and as a result of its analysis of the relevant statutory provisions, the Court then held: "The phrase 'to another' as used in the definition of an assignment of earnings under *W. Va. Code, 46A-2-116(2)(b)* [(1996)], includes an employer *when that employer is also the creditor of the employee*." Syl. pt. 1, *Clendenin Lumber, 172 W. Va. 375, 305 S.E.2d 332* (emphasis added). Thus, under *Clendenin Lumber*, an employer is subject to the wage assignment requirements of *W. Va. Code § 21-5-3(e)* only when the employer also is a creditor of its own employee.

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127 AR1787-93.

128 AR1779.

Rotruck v. Smith, 2016 W.Va. LEXIS 69 *15-17 (W. Va., Feb. 10, 2016) (memorandum decision). The Court then concluded that the employer could not be considered a "creditor" because the transactions at issue were more akin to salary advances – not consumer credit transactions or loans.

> Applying *Clendenin Lumber*, the circuit court in the case *sub judice* correctly determined that, unlike the employer in *Clendenin Lumber* who engaged in the sale of commercial products to its own employees in consumer credit transactions, Insurance Queen was not a creditor of Ms. Rotruck. We agree. Pursuant to the CCPA, a "consumer credit sale" is defined in relevant part as "a sale of goods, services or an interest in land in which: (i) Credit is granted either by *a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a seller credit card* . . . ." *W. Va. Code § 46A-1-102(13)(a)* (1996) (Repl. Vol. 2015) (emphasis added). There is nothing in the record to indicate that Insurance Queen's advances to Ms. Rotruck qualify as a consumer credit sale. Likewise, the advances did not qualify as a "consumer loan" insofar as there is nothing in the record to indicate that Insurance Queen "regularly engaged in the business of making loans." *W. Va. Code § 46A-1-102(15)* (defining "Consumer loan").
>
> Rather than being consumer credit transactions or consumer loans, the advances to Ms. Rotruck by Insurance Queen appear to be more akin to salary advances graciously provided in response to Ms. Rotruck's financial need. Under these circumstances, the circuit court correctly concluded that the advances by Ms. Rotruck's employer, Insurance Queen, were not wage assignments. Accordingly, we find that the circuit court did not err in denying Ms. Rotruck a new trial on this issue.

Id. at *17-19.

Such is the case here. Davis readily admits that he used Fairmont Tool's purchasing power (i.e., cash equivalent) to purchase goods for his own personal use from outside vendors. Fairmont Tool was not in the business of selling these goods and did not sell them to Davis. Davis admitted that he needed to use Fairmont Tool's cash or cash equivalent because he didn't have the money to make the purchases at the time. And, he admittedly agreed to repay Fairmont Tool for these advances through wage deductions.

Consonant with *Clendenin* and *Rotruck*, no wages were ever "assigned" to "another," as contemplated by West Virginia Code § 21-5-3(e) and the companion definition found in West

Virginia Code § 46A-2-116. Rather, Fairmont Tool effectively provided a salary advance to its employees to obtain these items from outside vendors. *See*, *Rotruck*, *supra.*

Reaching the contrary conclusion, the Circuit Court stated that Fairmont Tool's conduct ran afoul of Section 21-5-3(e) and that *Rotruck* was contrary to *Clendenin* and distinguishable. It its letter ruling, the Circuit Court found that Fairmont Tool violated the WPCA and acted as a creditor without any explanation.[129] Then, adopting the order prepared by counsel for Davis and the Class, the trial court held that:

> In the present case, Defendant unlawfully assigned wages without valid written assignment forms in place in connection with, among other things, uniforms and boots that Plaintiff and class members employed by Defendant utilized for their work. The published decisions handed down by the Supreme Court of Appeals, including Clendenin [*Clendenin Lumber & Supply Co., Inc. v. Carpenter*, 172 W. Va. 375, 305 S.E.2d 332 (1983)] and its progeny, make it very clear that these types of transactions -- for Plaintiff and all other class members -- fall within the WPCA's wage-assignment provision.[130]

This was the sum total of the analysis of how the transactions at issue have been previously addressed by this Court and decided in the manner urged by Davis and the Class.

With regard to the clearly contrary precedent in *Rotruck*, the Circuit Court found that "this unpublished memorandum decision does not compel a different conclusion."[131] Without further explanation of any kind, the trial court determined that "[t]o the extent that the memorandum decision in Rotruck conflicts with the published decision in Clendenin, the 'published opinion controls'.[132] The trial court also distinguished *Rotruck* solely on the basis that it involved "cash advances" and "cash advances have been specifically excluded from the categories of assignments

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129 AR 1849.
130 AR1956-57.
131 AR1958.
132 *Id.*, citing, *In re Involuntary Hospitalization of T.O.*, 238 W. Va. 455, 796 S.E.2d 564, 573 (2017).

at issue."[133] The trial court did not address any of Fairmont Tool's arguments that the transactions at issue were akin to wage advances, i.e., the use of Fairmont Tool's cash or cash equivalent by Davis and the Class. With no reference to a specific example, the trial court abruptly and held that "[b]oth the language of the statute as well as Clendenin and its progeny compel the conclusion that Defendant's reductions taken from the wages of Plaintiff and the class were unlawful wage assignments in violation of the WPCA."[134] Without any analysis or reference to the operational definitions of *Clendenin* or *Rotruck*, the trial court observed that, even if status as a creditor were required, it would find Fairmont Tool a creditor under the West Virginia Consumer Credit and Protection Act.[135]

Contrary to the Circuit Court's reasoning, this Court's published opinion in *Clendenin* does not support Davis' application of Section 21-5-3(e) to the instant situation. Nor does *Rotruck* conflict in any way with the holding in *Clendenin.* It is patently absurd to suggest otherwise. This Court in *Rotruck* quoted extensively from *Clendenin* in reaching its conclusions.

Not only did *Clendenin* involve a situation where the employer was ***selling*** its products to its employees, a fact this Court latched onto as evidence it was a "creditor," this Court later went to great lengths to distinguish *Clendenin* from the situation where an employer merely advances monies for its employees in *Rotruck.* As the above discussion shows, the *Rotruck* Court thoroughly examined the situation in *Clendenin* and concluded that it involved an employer "who engaged in the sale of commercial products to its own employees in consumer credit transactions." The current situation, like *Rotruck*, involves no such consumer sale, making *Clendenin* (whether published or not) inapplicable. Like *Rotruck*, in the instant situation, Fairmont Tool was providing its

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133 AR1958.
134 AR1959.
135 AR1960.

employees with benefits "akin to salary advances." Fairmont Tool was providing its employees the ability to use Fairmont Tool's cash and cash equivalent to purchase personal items in advance. And, like *Rotruck*, the Court must conclude that Section 21-5-3(e), with the added definition of "assignment of earnings" imported from W. Va. Code § 46A-2-116(2) in *Clendenin*, does not apply to such advances.[136]

Likewise, this situation is nothing like the quasi-slave labor situation involved in *Jones v. Tri-County Growers, Inc.*, 179 W. Va. 218, 366 S.E.2d 726 (1988) or the policy of adjustments to commission for consumer credit sales, such as that found in *Robertson v. Opequon Motors, Inc.*, 205 W. Va. 560, 519 S.E.2d 843 (1999). While *Jones* contains a detailed history of the WPCA, the captive labor situation there, with deductions being taken to compensate third-parties and agents of foreign governments, is not comparable to the instant circumstance by any stretch of the imagination.

As for the precedential value of *Rotruck*, to ignore its holding one must skip over several logical steps. As this Court previously held, memorandum decisions comply with the West Virginia Constitution in the same way as any other written decision. *See*, Syl. Pts. 5-6, *In re Involuntary Hospitalization of T.O.*, 238 W. Va. 455, 796 S.E.2d 564 (2017). As such, "'memorandum decisions may be cited as legal authority, and are legal precedent' through the Court's application of settled law to the facts of a particular case." *T.O.*, 238 W. Va. at 464, 796 S.E.2d at 573. *See also*, *State v. McKinley*, 234 W.Va. 143, 151, 764 S.E.2d 303, 311 (2014) (""there is no question that memorandum decisions are pronouncements on the merits that fully comply with the constitutional requirements to address every point fairly arising upon the record and to state the reasons for a decision concisely in writing.").

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While "where a conflict exists between a published opinion and a memorandum decision, the published opinion controls," Syl. Pt. 5, *McKinley*, in part, the Circuit Court jumped to the conclusion that a conflict exists between *Clendenin* and *Rotruck* without analyzing the point in any meaningful way. In fact, the *Rotruck* Court reached its decision based upon a thorough analysis of *Clendenin*. There is simply no conflict between *Rotruck* and *Clendenin* and, absent such, *Rotruck* is perfectly good and sound precedent to be applied here.

For the foregoing reasons, the Circuit Court erred in granting summary judgment to Davis and the Class and denying the corresponding motion of Fairmont Tool. Fairmont Tool was entitled to judgment as a matter of law that the transactions at issue did not violate Section 21-5-3(e) of the WPCA.

B. THE CIRCUIT COURT ERRED IN AWARDING LIQUIDATED DAMAGES ACROSS THE BOARD FOR ALLEGED VIOLATIONS OF W. VA. CODE § 21-5-3(e).

In short, the WPCA specifies the remedies to be applied when its terms are alleged to have been violated and the WPCA contains no provision for an award of liquidated damages for allegedly invalid assignments of earnings. More to the point, the only section that authorizes an award of liquidated damages – Section 21-5-4(e) – expressly and contextually limits that remedy to unpaid wages after separation from employment. As noted above, the Circuit Court granted Davis' dispositive motion with respect to damages for Davis and the Class, in the process denying Fairmont Tool's renewed motion to rescind the stipulations and dispositive motion as to damages. This ruling was both inconsistent and contrary to the law.

Section 21-5-4(e) of the WPCA, entitled, "Cash orders; employees separated from payroll before paydays," provides that:

> If a person, firm or corporation fails to pay an employee wages ***as required under this section*** [21-5-4] the person, firm or corporation, in addition to the amount which was unpaid when due, is liable to the employee for ***two times that unpaid amount as liquidated damages***....

W. VA. CODE § 21-5-4(e) (2015). (Emphasis added). The reference to "this section" in Section 21-5-4(e) follows and refers to the following language from the same section:

> (b) 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 employment ***on or before the next regular payday*** on which the wages would otherwise be due and payable....

W. VA. CODE § 21-5-4(b) (2015). (Emphasis added). Thus, by its very terms, Section 21-5-4(e) limits the scope of this remedy to claims made under Section 21-5-4 – NOT claims made under Section 21-5-3(e) or any regulations concerning the same.

As this Court has observed, "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten." *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 299 n. 10, 624 S.E.2d 729, 736 n. 10 (2005).

> Furthermore, with regard to matters of legislative policy, we have recognized that, "[i]f the Legislature has promulgated statutes to govern a specific situation yet is silent as to other related but unanticipated corresponding situations, it is for the Legislature to ultimately determine how its enactments should apply to the latter scenarios . . . When specific statutory language produces a result argued to be unforeseen by the Legislature, the remedy lies with the Legislature, whose action produced it, and not with the courts. The question of dealing with the situation in a more satisfactory or desirable manner is a matter of policy which calls for legislative, not judicial, action. Worley v. Beckley Mech., Inc., 220 W. Va. 633, 643, 648 S.E.2d 620, 630 (2007).

Liberty Mut. Ins. Co. v. Morrisey, 236 W. Va. 615, 626, 760 S.E.2d 863, 874 (2014), quoting, *Soulsby v. Soulsby*, 222 W. Va. 236, 247, 664 S.E.2d 121, 132 (2008).

By its plain language, Section 21-5-4(e) does not authorize an award of liquidated damages for a claim of failure to comply with the WPCA's wage assignment requirements, found in Section 21-5-3(e), much less at three (3) times "specials" awarded by the Circuit Court below. The trial court erred when it accepted Davis' hollow argument that the remedial nature of the WPCA justified an award of liquidated damages. By that same rationale, the sky's the limit. The rules of statutory construction underlying *Liberty Mut.* would be turned on their head by such a results-oriented approach. The Legislature spelled out the offense and the remedy. Section 21-5-4(e) is explicitly tied to the scenario set forth in Section 21-5-4(a). To hold otherwise is to judicially rewrite the WPCA.

Likewise, the Plaintiff and trial court can find no refuge in the *Parties' First Set of Stipulations.*[137] Suffice to say, under settled precedent stipulations as to the law are of no value, the Circuit Court held that the issue was "unresolved"[138] and decided that the WPCA authorized the liquidated damages award.[139] Accordingly, the Stipulations have no bearing on this issue.

For the foregoing reasons, the Circuit Court committed error in awarding liquidated damages to Davis and the Class. Fairmont Tool is entitled to reversal of that award and remand to the trial court for entry of judgment in favor of Fairmont Tool and denying any claims to liquidated damages for the alleged violations of Section 21-5-3(e).

C. THE CIRCUIT COURT ERRED IN AWARDING LIQUIDATED DAMAGES AT THE RATE OF THREE TIMES ACTUAL DAMAGES.

Despite ruling to the contrary, the Circuit Court awarded liquidated damages at a rate that was nearly three (3) the amounts deducted, as found by the Court. The Order entered (prepared by

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137 *See*, discussion, *infra.*
138 AR3432.
139 *Id.*

counsel for Davis) contained a reference to the Stipulations in this regard, an apparent incorporation of the Stipulation for three (3) times the actual damage amount for deductions that took place between July 1, 2012 and June 10, 2015 (the date Section 21-5-4(e) was revised), as sought by Davis in his dispositive motion with respect to damages.

Notwithstanding Fairmont Tool's objections to the same, the Circuit Court issued two (2) entirely contradictory rulings. In its letter ruling of September 12, 2019, the trial court was persuaded by the argument of Davis and the Class and awarded liquidated damages at the rate of "two times the unpaid amounts."[140] Yet, when the order prepared by counsel was executed (as originally written), the liquidated damages term included a reference to the Stipulation, no mention of the trial court's decision to limit liquidated damages and an affirmation of Davis' full request for liquidated damages. The Order, as executed, included a total of $237,997.00 in liquidated damages.[141] Simple math shows this was decidedly more than two (2) times the amount of "unlawful wage assignments," which came in at $87,731.00.[142] The final factor was more than 270% of the base amount deducted.

Most certainly, Plaintiff cannot claim a legal entitlement to **three (3) times** the amount deducted for any of the transactions covered by the Class definition. The WPCA is a remedial statute and Section 21-5-4(e) is concerned with remedies. Even if the Court were to conclude that Section 21-5-4(e) applied to the instant situation, which it does not,[143] any remedy thereunder would necessarily be limited to former employees and the statute would have to be applied in its current form, not pursuant to some strained construction of a former version of the statute.

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140 AR3432.
141 *Id.*
142 AR3475.
143 *See*, discussion, *supra*.

"It is recognized that '[i]n general, statutes dealing with a remedy apply to actions tried after their passage even though the right or cause of action arose prior thereto.'" *Martinez*, 239 W. Va. at 618, 803 S.E.2d at 588, quoting, 3 Sutherland Statutory Construction § 60:1 (7th ed. 2016). As the Court held in *Martinez*, the 2015 tort reforms are applicable to all claims tried after their effective date. *Id.* at Syl. Pt. 2 ("The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." (citations omitted). In this respect, the *Martinez* Court found that the changes to punitive damages and back pay recoveries were to be applied "irrespective of when the cause of action accrued or when the claim or suit is filed." *Id.* at Syl. Pts. 6-7.

Like the punitive damages and back pay provisions at issue in *Martinez*, the Court has found (and Davis has argued) that "[t]he West Virginia Wage Payment and Collection Act is remedial legislation designed to protect [all] working people and assist them in the collection of compensation wrongly withheld." Syllabus, *Mullins v. Venable*, 171 W. Va. 92, 297 S.E.2d 866 (1982). Thus, like the reform to damages recoverable in civil actions addressed in *Martinez*, the reform to the WPCA's liquidated damages provisions must be applied as currently written "irrespective of when the cause of action accrued or when the claim or suit is filed." The Legislature changed Section 21-5-4(e) to provide for liquidated damages in the amount of "two times that unpaid amount," effective June 11, 2015. W. VA. CODE § 21-5-4(e) (2015).[144] Davis'

[144] Of note, the Legislature again amended Section 21-5-4(e) in 2018. Effective May 15, 2018, before this Court was confronted with Plaintiff's Motion for Summary Judgment Regarding Count II (filed May 16, 2018 and "updated" April 25, 2019), much less the Motion for Summary Judgment Regarding Damages (filed June 27, 2019), the Legislature added a new subsection (f) – entitled "employer provided property." Section 21-5-4(f) permits an employer to "deduct withhold, deduct or divert an employee's final wages, in an amount not to exceed the replacement cost of the employer provided property that was not returned as

Complaint was filed on May 31, 2017, well after the change to Section 21-5-4(e).[145] Therefore, Davis and the Class members have absolutely no legally viable claim to liquidated damages in the amount of **three (3) times** the amounts allegedly deducted.[146]

The Circuit Court committed error in awarding more than two (2) times actual amounts deducted as liquidated damages. Should this Court determine Section 21-5-4(e) applies to the instant situation, Fairmont Tool is entitled to reversal of that award and remand to the trial court for application of the statute as written.

D. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF ON FAIRMONT TOOL'S COUNTERCLAIM AND OTHERWISE DENYING OFFSETS FOR FAIRMONT TOOL'S ADVANCES ON BEHALF OF PLAINTIFF AND THE CLASS.

Davis, on behalf of himself and the Class, admitted his contemporaneous agreement to reimburse Fairmont Tool for the purchases and advances at issue but expressly repudiated the agreement. For this reason, Fairmont Tool was entitled to assert a setoff and bring a counterclaim for breach of contract and unjust enrichment under West Virginia law. Syl. Pt. 1, *Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 343 (1971).

The Circuit Court granted summary judgment to Davis and the Class, asserting that the agreements were "illegal contracts." While Fairmont Tool firmly disputes that interpretation of Section 21-5-3(e), the simple fact is that, even if correct, such a construction would only affect the manner of reimbursement by Davis and the Class. The obligation to reimburse Fairmont Tool still

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set forth under paragraph (C) of this subsection, to recover the replacement cost of the employer provided property," subject to certain conditions. W. VA. CODE § 21-5-4(f) (2018).

[145] AR18.

[146] For the reasons set forth in Section E, below, Davis and the trial court cannot seek refuge in the Stipulations.

remains and Fairmont Tool is entitled to treat Davis' reneging on the agreement as repudiation and seek specific performance.

> The general rule in cases of anticipatory breach of contract is that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue any of three remedies: he may treat the contract as rescinded and recover on quantum merit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing.

Syl. Pt. 1, *Annon, supra. See also, Realmark Devs. v. Ranson*, 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003) ("unjust enrichment . . . is but the equitable reason for requiring payment for value of goods and services received.") (Citations omitted). Under West Virginia law, a party faced with the repudiation (anticipatory breach) of an agreement by another party can keep the contract alive and sue for anticipatory breach at the same time since West Virginia law expressly allows specific performance as a remedy for anticipatory breach. *Miller v. Jones*, 68 W. Va. 526, 71 S.E. 248, 249 (1911).

The WPCA may prescribe what, if any, form must be used for the processing of payroll deductions (though Section 21-5-3(e) does not apply to the instant transactions). However, the failure to use the "correct" form did not and could not negate the formation of an agreement between an employee or former employee (such as Davis) and an employer (such as Fairmont Tool) to advance sums which would then be repaid. The WPCA does not proscribe such agreements, as indicated in *Rotruck*.

Contrary to the Order (and Davis' argument), Section 21-5-10 has nothing to do with the claims in the Counterclaim. While Section 21-5-10 may prohibit agreements to forego an employee's rights to payment of accrued compensation within the specified time after separation

from employment (Section 21-5-4) or the requirement of a wage assignment agreement for withholding of certain wages (Section 21-5-3(e)), it does not prohibit agreements between employees and employers for cash advances or the like.

The Circuit Court erred in granting summary judgment to Davis and the Class on the affirmative defense of setoff and the counterclaim. Fairmont Tool provided cash advances or advances akin to cash advances to Davis and the Class. Fairmont Tool is entitled recoup the value of such advances or setoff the same against the recovery of Davis and the Class. For these reasons, the Final Judgment Order should be set aside, the summary judgment rulings reversed and this case remanded for entry of judgment in favor of Fairmont Tool.

E. THE CIRCUIT COURT ERRED IN DENYING FAIRMONT TOOL THE FUNDAMENTAL RIGHT TO WITHDRAW FROM THE PARTIES' FIRST SET OF STIPULATIONS.

The law on this matter is clear. Not only are party stipulations as to the law ineffective as a matter of law, a party has the right to withdraw from stipulations as to evidentiary matters, such as the instant stipulations regarding damages. *See*, Cleckley, et al., HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 4th Ed. Vol. 2. p. 12-75. "A party may withdraw from an agreement to stipulate or from a stipulation at any time before the stipulation is received in evidence, and in such a case the stipulation cannot be received in evidence. The fact that written stipulation was signed is not controlling." *Id.* at 12-80. On May 3, 2018, just eight (8) days after the same were made, Fairmont Tool moved to withdraw from the Parties' First Set of Stipulations – well before discovery concluded and more than a year before the parties even submitted briefs on the issue of damages. Not only was Fairmont Tool entitled to withdraw from the Stipulations as a matter of right, Davis subsequently breached the agreement underlying the Stipulations by retaining and presenting an expert economist (adding to the potential costs for both sides in a fee-

shifting environment) and voided any claim Davis might have had to hold Fairmont Tool to the same.

Even as it denied Fairmont Tool's Motion to Withdraw/Rescind the Stipulations, the Circuit Court gave voice to the unenforceable nature of the stipulations regarding liquidated damages. The Circuit Court "reserve[d] the right to properly instruct the finder of fact on the law applicable to the facts of this case."[147] This recognition of the court's role in deciding the law irrespective of the stipulations should have counseled in favor of granting Fairmont Tool's motion.

Nevertheless, Davis then breached the agreement underlying the same. As the emails Davis produced in opposing the *Defendant's Motion to Withdraw From And/Or Rescind the Parties' First Set of Stipulations* demonstrate, the stipulations were proposed by Plaintiff's counsel on the eve of Plaintiff's deadline for disclosure of experts and premised upon the idea that such stipulations would save the parties from incurring such costs.[148] This was further reinforced by the fact that counsel advocated in the hearing on this issue on August 17, 2018 relief (should the Court grant the motion to rescind) in form of "additional time that we could disclose an expert."[149] Counsel for Plaintiff and the Class goes on to explain how the real impetus behind the "Stipulations," at least as far as it was disclosed to defense counsel, was the need to keep costs down for the mutual benefit of both sides, as Plaintiff was presenting this as a fee-shifting case.

> We have been, I think as Mr. Russell indicated, we have been very up front about the fact that this is a fee shifting case, Your Honor, and I do think it's worth noting that the -- I understand what the statute says with regard to may in terms of if a plaintiff prevails under the Wage Payment and Collection Act, the Court may award attorneys' fees and costs. I think the case law is a little more construing that statute as a little more definitive about the fact that attorneys' fees and costs should be awarded if the plaintiff prevails. But to that end it benefits everybody if you don't have the expense of an economist coming in. It certainly benefits us and it certainly

147 AR1033.
148 AR884-906.
149 AR1024-25.

> benefits the other side if they do not prevails and have the expense of an economist coming into a case and looking at, okay, let me run out damages for 179 individuals. You know, if we rescind the stipulations then that might be what we need to do. I would just ask that if that happens in whole or in part that we be given additional time to disclose an economist. We filed a reservation of right under the current scheduling order to do that.[150]

Counsel gave every reason to believe that the intent behind the proposed stipulations as to damages was to avoid the expense of an expert economist. Yet, not two (2) months after the Circuit Court denied the Fairmont Tool's motion, Davis retain an expert economist on December 7, 2018, breaching the underlying agreement and effectively reneging on the consideration for the Stipulations.[151]

A stipulation is "an oral or written agreement between counsel ... A stipulation among the parties to a lawsuit is akin to a contract." Cleckley, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, 4th Ed. Vol. 2, § 12-5(b), p. 12-75. And, it is black letter law that,

> where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue any of three remedies: he may treat the contract as rescinded and recover on quantum merit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing.

Syl. Pt. 1, *Annon, supra.*

"It is the general rule that stipulations as to what the law is are of no validity." W.W.A., Annotation, Stipulations Of Parties As To The Law, 92 A.L.R. 663, 664 (1934). *See also*, 73 Am. Jur. 2d, *Stipulations* § 4 (2001). This uniform maxim is based upon the equally uniform black letter law that the Court is the final arbiter of the law of the case. *See, Estate of Sanford v. Con'r,*

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150 *Id.*

151 AR1255.

308 U.S. 39, 51, 60 S. Ct. 51, 84 L. Ed. 20 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law"); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991) ("[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."

By their very nature, stipulations are only admissible to substitute for evidence – not the law of the case.

> A "stipulation" is an oral or written agreement between counsel, with express or implied consent of the parties as to: (1) the existence or non-existence of any fact: a stipulation of fact; (2) the content of the testimony that an absent witness would give if s/he here present in the court: a stipulation of testimony; and (3) the contents of a writing: a stipulation as to the contents of a writing.

Cleckley, *supra*, p. 12-75. "Stipulations are substitutes for ***evidence*** that is not otherwise in dispute." *Id.* (emphasis added). Of course, the instant Stipulation Nos. 4-7 fail to meet the basic definitions above. "A party may withdraw from an agreement to stipulate or from a stipulation ***at any time*** before the stipulation is *received* in evidence, and in such a case the stipulation ***cannot be received in evidence***. The fact that written stipulation was signed is not controlling." *Id.* at 12-80 (emphasis added and in original) (citations omitted).

The trial court's ruling, as reflected in the final Order, is troubling in its inconsistency and lack of substantive analysis. Well-worn precedent establishes the right of Fairmont Tool to withdraw from evidentiary stipulations and the unenforceability of stipulations as to the law. The reference to the stipulations as alternative support for the trial court's awarding of liquidated damages is particularly cumbersome in this respect. The mere use of an alternative rationale renders the ruling equivocal in nature and unclear for appellate purposes. As this Court recently counseled, such "kitchen sink" orders are "strongly disfavor[ed]" as they "present a substantial

impediment to comprehensive appellate review." *Taylor v. W. Va. Dept. of Health & Human Res.*, 237 W. Va. 549, 558, 788 S.E.2d 295, 304 (2016).

More to the point, citation to the stipulation as binding authority for the imposition of damages under Section 21-5-4(e) contradicts the clear statement by the trial court in its letter ruling that it "reserves the right properly to instruct the finder of fact on the law applicable to the facts of the case."[152]

For these reasons, the Circuit Court erred in denying Fairmont Tool's Motion to Withdraw And/Or Rescind. The Stipulations were unnecessary, Davis showed no prejudice and then breached the very agreement underlying the same.

F. THE CIRCUIT COURT ERRED IN AWARDING ATTORNEY FEES, COSTS AND SERVICE AWARD TO PLAINTIFF.

In its Order granting Davis' motion for attorney fees, litigation costs, and a service award, the Circuit Court ignored the principal that attorney fees should reflect the rate of the area in which the case is pending. The Circuit Court further made unsupported statements about the necessity for Davis to retain an expert economist and, despite Davis' brazen breach of the agreement underlying the Stipulations by retaining said economist, found it reasonable to shift the costs of the same to Fairmont Tool.

With regard to the second half of lodestar method, reasonable rates "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). The prevailing party must produce evidence, in addition to affidavits of the party's own attorneys, demonstrating that the rates requested correspond to "those

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[152] AR1033.

prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 895 n. 11. The relevant community is the one in which the court sits. *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988).

In support of his claim for $450 per hour for all four (4) attorneys involved, David cited an affidavit from a Charleston-based attorney[153] and several distinguishable cases.[154] The *Millhouse v. Homecomings* Order did not specify what rate, if any, was approved by the Circuit Court of Ohio County. The *Bailey v. Green Tree* Order referenced a rate of $400 per hour for Dan Hedges, whom the Circuit Court of Roane County described as a practitioner with "thirty-eight years of specialized experience in the area."[155] And, the *Brown v. Quicken Loans* Order again involved practitioners both specialized and in Ohio County. There, the Court reserved the $450 per hour rate for James G. Bordas, Jr., a former practitioner with a couple of decades more experience than the instant attorneys and with respect to litigation of an action in Wheeling, West Virginia, not Marion County, West Virginia.[156]

More recently, Chief Judge Chambers of the Southern District of West Virginia rejected the same sort of exorbitant rates. In *McGee v. Cole*, 115 F.Supp.3d 76 (S.D. W. Va. 2015), a civil rights case over same-sex marriage licenses, plaintiffs sought between $771 and $789 per hour for one attorney and between $567 and $655 per hour for another attorney from two nationally recognized firms. *Id.* at 775. The plaintiffs relied, in part, upon the *Laffey* Matrix.[157] Rejecting this

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153 AR3567.
154 AR3570-3600.
155 AR3582.
156 AR3596.
157 The *Laffey* Matrix is a "schedule of attorneys' fees," originally developed based on information concerning the prevailing rates charged by federal litigators in the District of Columbia. *Id.* at n.1. The instant Plaintiffs refer to the same index in support of their claims. *See*, AR3497-98.

approach, Chief Judge Chambers found that such fees must be based upon the local market, not some metropolitan area or regional index.

> Though each attorney provided some support for the rates each seeks, those rates are well above the relevant market within which this Court sits.... They were not sought out by state residents who found it difficult to obtain representation for these claims in West Virginia. They should not expect hourly rates to be based upon rates from large metropolitan markets, such as their home cities, or schedules like the *Laffey* Matrix....

Id. at 774. The Court reduced the sought-after rates to $500 per hour for Mr. Smith, the most senior national counsel with "impressive" credentials. *Id.* at 775. He further reduced the rate sought by Ms. Harrison "an experienced and seasoned litigator managing subordinate staff" from the same nationally recognized firm, to $400 per hour. *Id.* Looking to the local litigators involved, the Court approved rates more in keeping with the local market.

> Finally, the Court addresses the fees requested by the Tinney Law Firm. Led primarily by John Tinney, Jr., the firm used four attorneys for a variety of purposes, contributing about 150 hours at rates from $205 to $300 per hour. The firm's paralegal also spent 60.6 hours on the case, seeking a rate of $100 per hour, which is typical. Mr. Tinney has been engaged in complex litigation throughout this state for twenty years, and enjoys a solid representation. His associate, Ms. Kittredge, is less experienced, but seeks the lower rate of $225 per hour. The Court approves the rates he seeks for his firm.

Id.

Davis cited *Dijkstra v. Carenbauer*, No. 5:11CV152, 2015 U.S. Dist. LEXIS 193920, 2015 WL 12750449 (N.D. W. Va. July 29, 2015), which, likewise, did not support his claims.[158] *Dijkstra* involved settlement of a West Virginia Consumer Credit and Protection Act civil action where counsel sought both a one-third contingency fee from the common settlement fund as well as a lodestar fee to be paid by the defendant. 2015 U.S. Dist. LEXIS 193290 at *2-3. In stark contrast to the instant action, within the context of the lodestar fee request, Mssrs. Marshall and Kipnis

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158 *See*, AR3500.

were only seeking rates of $300 and $225 per hour, respectively. *Id.* at *14. And, the most senior attorney of record, John W. Barrett, Esq., was only seeking a fee of $400 per hour. *Id.*

The Circuit Court determined that an award of $350 per hour was appropriate for all attorneys involved.[159] This rate is higher than that sought by the same counsel in the Northern District of West Virginia. As supported by the more recent case from the Circuit Court of Marion County, West Virginia, a rate of $250 is more appropriate for the Fairmont region.[160]

With respect to the shifting of litigation costs, the Circuit Court entered findings essentially placing the blame upon Fairmont Tool for Davis and the Class retaining two (2) expert economists.[161] The Circuit Court's findings in this regard are decidedly shallow. Davis did not offer any opinions regarding the amount of allowable offsets to the award of amounts deducted.[162] Instead, Davis relied upon the Circuit Court's liability rulings on dispositive motions and the Stipulations.[163] Neither the opinions submitted by Dr. Hawley or those from David Epperly (upon whom Dr. Hawley relied, in part, mentioned offsets or a valuation thereof in any way.[164] Each of them relied in large part upon the Stipulations, the very evidentiary agreements breached by Plaintiff.[165]

Given the breach of the agreement underlying the Stipulations, Plaintiff's continued reliance upon the Stipulations, and the lack of any record support for Davis' retention of Clifford Hawley, Ph.D., or David Epperly, M.B.A.,[166] the Circuit Court erred in finding the retention of

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159 AR3915.
160 AR3641.
161 AR3909.
162 AR3122-23.
163 AR3123-24.
164 AR2148-2234; AR2236-2240.
165 *Id.*
166 Mr. Epperly was retained as the Claims Administrator. Fairmont Tool is differentiating Mr. Epperly's work in that capacity from the economic calculations Mr. Epperly performed to support Dr. Hawley's opinions.

these individuals to provide expert economic opinions justified under the circumstances and erred in finding the shifting of the costs of their expert work reasonable. For these reasons, Fairmont Tool is entitled to reversal of that portion of the Final Judgment Order and the underlying Order awarding attorney fees, litigation costs and service award.

V. CONCLUSION.

Fairmont Tool provided advances of cash and cash equivalent to Plaintiff Davis and the Class and the Plaintiff and Class agreed to reimburse Fairmont Tool for these advances through payroll deductions. This type of arrangement was specifically countenanced by this Court in *Rotruck v. Smith*, 2016 W.Va. LEXIS 69 (W. Va., Feb. 10, 2016) (memorandum decision). Furthermore, following this Court's guidance in *Clendenin Lumber & Supply Co., Inc. v. Carpenter*, 172 W. Va. 375, 305 S.E.2d 332 (1983), such arrangements are not "wage assignments" under W. VA. CODE § 21-5-3(e). The Circuit Court of Marion County erred in finding and concluding otherwise. The Circuit Court compounded that error by imposing liquidated damages of more than two (2) times the amounts deducted, ostensibly pursuant to W. VA. CODE § 21-5-4(e), a code section that has no relation to alleged violations of Section 21-5-3(e). The Circuit Court committed reversible error when it refused to permit Fairmont Tool to withdraw from Stipulations entered into just eight (8) days earlier, stipulations that were both unenforceable legal stipulations and evidentiary stipulations garnered by a promise later broken by Plaintiff. And, the Circuit Court erred in awarding Plaintiff an attorney fee at a rate not commensurate with the local area in which the case is pending and shifting the costs of expert economists retained in contravention of the promise made by Plaintiff to obtain the aforesaid Stipulations.

For these reasons, Fairmont Tool respectfully prays this Honorable Court reverse the Final Judgment Order entered by the Circuit Court on August 3, 2020 and remand this case for entry of judgment as a matter of law in favor of Fairmont Tool and dismissal of all claims, with prejudice.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, I served true and correct copies of the foregoing ***"Brief of Petitioner, Fairmont Tool, Inc."*** on the following counsel of record by electronic mail and United States mail, first class, postage paid, and addressed as follows:

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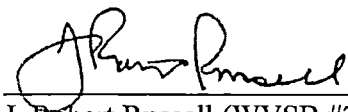

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