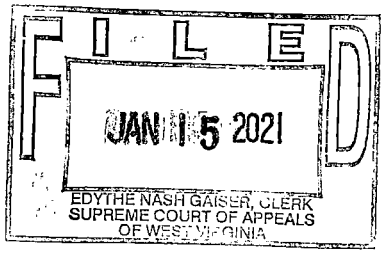
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0684



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 RESPONDENT ADAM J. DAVIS

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

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Applying well-settled case law, the trial court found that Petitioner, Fairmont Tool, Inc. ("Fairmont Tool"), violated W. Va. Code § 21-5-3 (i.e., Section 3 of the West Virginia Wage Payment and Collection Act ("WPCA")) by making payroll deductions for uniforms, boots, and other work-related items in the absence of a valid wage assignment. The court entered a judgment in favor of Respondent, Adam J. Davis ("Davis"), individually and on behalf of a class of current and former Fairmont Tool employees. Thereafter, damages were awarded pursuant to a stipulation that was voluntarily reached by the parties' respective counsel. There is no reversible error in this case. The trial court's decisions were thorough, well-reasoned, and in accordance with West Virginia law. Fairmont Tool's appeal should be denied on all grounds.

Through this appeal, Fairmont Tool accuses the trial court of "[e]levating form over substance and ignoring precedents from this Court." Pet'r's Br. 1. In reality, Fairmont Tool's arguments amount to a rejection of a line of cases stretching over 35 years and a frontal assault on wage protection in West Virginia. Fairmont Tool advances a novel theory—i.e., that employers can only be liable for wage assignment violations under W. Va. Code § 21-5-3 when they are selling goods to their employees and assuming the role of a creditor. Not only is this theory unsupported by West Virginia law, accepting it would undercut the Legislature's efforts to provide full, meaningful wage protection and would open the door to untold abuses by employers. Likely realizing the difficult path ahead, Fairmont Tool opens its appellate brief by mischaracterizing the type of deductions at issue, calling them cash advances.[1] Fairmont Tool also attempts to incorrectly paint Davis and the class members as wrongdoers—despite Fairmont Tool's employee primarily responsible for human resources and payroll having testified that neither Davis nor any of the class

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[1] As Fairmont Tool is aware, cash advances are not at issue in this case. Although Fairmont Tool had a specific category of deductions that it labeled as cash advances, the parties agreed to exclude that category of deductions (i.e., cash advances) from the wage assignments at issue.

members committed any wrongdoing whatsoever regarding the purchases that served as the basis for the invalid wage assignments. And Fairmont Tool attacks the very same damages stipulations into which it voluntarily entered in this case. After extensive briefing, the trial court properly ruled on each of the issues that Fairmont Tool now seeks to resuscitate. Davis and the class respectfully request that the trial court's decisions be affirmed as to each of the issues on appeal.

I. STATEMENT OF THE CASE

Fairmont Tool is a company that provides services to the oil and gas industry. Pet'r's Br. 1. Davis began his employment with Fairmont Tool in approximately October 2014. AR 1312-13. On January 3, 2017, Fairmont Tool terminated Davis's employment. AR 1316-17. Early in discovery, Fairmont Tool admitted it made deductions from its employees' pay. In response to an interrogatory asking whether the pay of current and/or former Fairmont Tool employees in West Virginia was subject to deductions, Fairmont Tool answered:

> Without waiving said objection, and otherwise fully responding, Defendant's employees are subject to deductions required by federal and state law. Further, Defendant DFM [sic] ***has and does make certain deductions from some of its employees' paychecks where the employees have voluntarily agreed to participate in a uniform service provided by a third-party vendor or have voluntarily charged boots or tools on Defendant's account***, and with Defendant's consent from a third-party vendor.

AR 1320 (emphasis added). Fairmont Tool's President, Director, and Treasurer, Nathan Kincaid, confirmed that it makes deductions from its employees' pay for uniforms, boots, and other items. AR 1325-1328. Fairmont Tool also produced spreadsheets documenting hundreds of deductions for uniforms and other merchandise (hereafter "MDSE"), including personal protective equipment in the form of steel-toed metatarsal boots employees are required to wear. AR 1329-1420.

At various points in its brief, Fairmont Tool inaccurately refers to these payroll deductions as "advances" or "cash equivalents." Pet'r's Br. 3, 11, 16. Fairmont Tool did, in fact, have a specific category of deductions identified as "CASH ADVANCE" line items, and it produced a

five-page spreadsheet itemizing cash advances made to employees during the relevant time period. AR 853-857. Importantly, cash advances were intentionally excluded from the class definition. AR 844 ("Cash advances have been excluded from the current class definition, as the Plaintiff has made clear that he is not seeking class-based recovery relative to cash advances."); AR 1947-1948 (trial court finding "that Defendant categorizes cash advances as being separate from uniforms and MDSE[,]" "that Plaintiff and the class have not placed at issue the entirely separate category of cash advances[,]" and that "the only categories of assignments at issue in this fase pertain to uniforms and MDSE"); AR 1988-1993 (attaching Pet'r's "CASH ADVANCE" spreadsheet to trial court's Order Resolving Parties' Mots. for Summ J.). Fairmont Tool's suggestion that the deductions at issue in this appeal are cash advances is misleading and incorrect.

Elsewhere in its brief, Fairmont Tool argues Davis "understood the company credit card was only to be used for items related to the maintenance of the truck he was driving," but that he, at times, used it for personal purposes. Pet'r's Br. 2. This is simply an illegitimate attempt to besmirch Davis's character. Davis was given permission by a Fairmont Tool supervisor or member of management for the limited personal purchases he made with the company credit card. AR 864, 1107. Moreover, Jamie Kelley, Fairmont Tool's employee primarily responsible for human resources and payroll, testified neither Davis nor any of the other employees did anything wrong by using the credit card, even for personal purposes. AR 867-870, 1107-1108. No one in management disciplined the employees for credit-card use or expressed concerns about it. *Id.*

Fairmont Tool acknowledges it did not have valid wage-assignment forms for Davis or any other class members. When asked to produce a complete copy of all written wage assignments from its current and/or former West Virginia employees for the five-year period preceding the filing of the Complaint, Fairmont Tool initially responded: "None." AR 1421. Approximately nine

months later, Fairmont Tool served amended responses to Davis's discovery, noting, among other things, its position "that it does not possess any 'written wage assignments' with regard to its employees," but then producing forty documents, each of which was titled "Wage Deduction Authorization Agreement[.]" AR 1427-1428; AR 631-670 ("Wage Deduction Authorization Agreement[s]" produced by Pet'r). However, even a cursory examination of these documents reveals they do not meet the statutory requirements necessary to be valid wage-assignment forms as set forth in W. Va. Code § 21-5-3(e).[2] Fairmont Tool does not argue otherwise.

Ironically, Fairmont Tool's own policies demonstrate that it was fully aware it should have been obtaining valid, WPCA-compliant wage-assignment forms. As its Employee Handbook provides: "Failure to return items will result in deductions from the final paycheck. Employees will be required to sign the Wage Deduction Authorization Agreement to deduct the costs of such items from the final paycheck." AR 1432 (excerpt from Pet'r's Employee Handbook). Again, however, Fairmont Tool failed to obtain any valid written wage assignments from its employees.

Despite Fairmont Tool's repeated attempts to recast these payroll deductions as some form of cash advances, the facts in the record—including, among other things, the testimony of Fairmont Tool's office personnel—confirm they were deductions taken out of employee wages that were due and owing. Jamie Kelley, the employee primarily responsible for company payroll and human resources (AR 867-868), explained the process Fairmont Tool used for making these deductions:

> Q. . . . Ms. Kelley, am I correct that Fairmont Tool allows employees to make purchases on its various accounts, and Fairmont Tool then reduces the employee's gross pay by the corresponding amount of those charges?
>
> A. Yes.

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[2] W. Va. Code § 21-5-3(e) sets forth specific requirements that must be satisfied for a valid wage assignment: (i) acknowledgement by the employee before a notary public or other officer authorized to take acknowledgments; (ii) a specification of the total amount due and collectible; and (iii) a statement that three-fourths of the periodical earnings or wages of the assignor are exempt from assignment. The documents produced by Fairmont Tool do not satisfy any of these requirements. AR 1948-1949.

Q. So the employees end up owing Fairmont Tool?

A. Yes.

* * *

Q. Would you say the majority of the time, Fairmont Tool recoups from its employees the debts that are owed to Fairmont Tool?

A. Yes.

Q. Through retractions in those employees' wages?

A. Yes.

Q. And, in this case, we've had spreadsheets provided to us . . . documenting boots and uniforms, and a category called MDSE that I'm going to ask you about. As well as there's been mention[] -- though I don't believe you have it in the spreadsheets -- of tools and other credit card transactions. Those are examples of the debts that Fairmont Tool recoups from its employees, correct?

A. Yes.

Q. And those are debts that Fairmont Tool recoups from its employees' wages because those debts are owed to Fairmont Tool, correct?

A. Yes.

* * *

Q. Indulge me for a moment. Do you have a personal credit card?

A. Yes.

Q. . . . Completely separate from Fairmont Tool, right?

A. Yes.

Q. . . . Have you ever bought something from a store using your personal credit card?

A. Yes.

Q. . . . And once you do that, you no longer owe the store, correct?

A. Correct.

Q. . . . At that point, you owe the credit card company that extended you the credit, correct?

A. Correct.

Q. . . . And that's essentially the same thing we're talking about in terms of what Fairmont Tool is doing in recouping wages -- or recouping debts that are owed to it from its employees' gross wages; is that correct?

A. That's essentially the function that Fairmont Tool was performing. But Fairmont Tool benefits in no way in my mind of credit or with benefits on that.

Q. . . . [A]s we sit here, you don't know whether or not there are any discounts that are applied to Fairmont Tool's accounts based upon payment in full of those accounts, correct, with third-party vendors?

A. That's correct.

Q. In the present case, Fairmont Tool permitted employees to buy things on Fairmont Tool's accounts, correct?

A. Yes.

Q. . . . And the employees then became responsible to Fairmont Tool to repay those amounts, correct?

A. Yes.

Q. And that was because Fairmont Tool had essentially extended credit to the employees to make those purchases, correct?

* * *

Q. Is that correct?

A. Yes.

* * *

Q. And what we've been discussing in terms of Fairmont Tool's practice in recouping debts that were owed to it by its employees based upon purchases those employees have made, that was part of Fairmont Tool's business model, correct?

A. I don't understand.

Q. Was it a common practice for Fairmont Tool to do that?

A. Yes.

Q. Did that practice extend to essentially all its employees?

A. Yes.

Q. And did Fairmont Tool do that, to your knowledge, because in many instances that gave Fairmont Tool's employees, including [the Plaintiff], the opportunity to buy goods and services for use in furtherance of their employment with Fairmont Tool?

A. Yes.

AR 1439-45.

Ms. Kelley's deposition testimony makes it abundantly clear Fairmont Tool not only assigned the wages of Davis and other employees, it also essentially served as a creditor—using the assignments to recoup debts owed to Fairmont Tool by its employees. In fact, on at least one occasion, Fairmont Tool sold an item directly to Davis and then took the purchase price for that item out of Davis's pay. As Davis explained, in approximately February 2016, he purchased a bag of calcium chloride directly from Fairmont Tool which, in turn, took the amount charged for that purchase directly from Davis's paycheck. AR 1314-1315.

For purposes of liability under the WPCA, the reason for the wage assignments is, of course, irrelevant. Nevertheless, it is evident Fairmont Tool's wage-assignment scheme benefited its own safety agenda and internal company rules. To that end, Ms. Kelley testified as follows:

> Q. So from a safety standpoint, it benefits Fairmont Tool and the employees to have the uniforms, correct, of the employees who need the uniforms?
>
> A. Yes. There are some employees that it is a safety benefit.
>
> * * *
>
> Q. Boots also serve an important safety function for some employees at Fairmont Tool, correct?
>
> A. Yes.
>
> Q. Steel-toed metatarsal boots, for instance?
>
> A. Yes.
>
> Q. . . . What percentage of employees who work for Fairmont Tool would you say fall under that umbrella of needing to wear steel-toed metatarsal boots, if you're aware?
>
> A. I would estimate 80 to 90 percent.
>
> Q. So in terms of ensuring that those 80 to 90 percent of employees have appropriate boots, that serves as a safety interest for Fairmont Tool as well as those employees, correct?
>
> A. Yes.
>
> Q. Am I correct that Fairmont Tool requires for safety reasons that all employees working on jobs in the yard, on inspections, in the weld shop, and as drivers if

> unloading and loading, wear proper safety equipment including metatarsal work boo[t]s?
>
> A. Yes.
>
> Q. You are familiar with Fairmont Tool's employee handbook?
>
> A. Yes.
>
> Q. In fact, Fairmont Tool's employee handbook specifically provides that the wearing of appropriate [personal protective equipment] is required of all personnel as a condition of employment and as a condition of entry in Fairmont Tool facilities; is that correct?
>
> A. Yes.

AR 1447-1448. Thus, Fairmont Tool essentially passed the cost of its safety policies onto its employees, then stepped into the role of a creditor to those same employees once they incurred expenses for company-mandated uniforms, boots, or other personal protection items.

Davis filed his Complaint on May 31, 2017. AR 18. The Complaint contained two counts. Count I was brought solely as an individual claim, alleging Fairmont Tool violated the wage payment provisions of the WPCA by failing to pay Davis all vacation pay due and owing at the time of his termination. Count II was brought as an individual and putative class claim, alleging Fairmont Tool's payroll deductions constituted an unlawful assignment of wages in violation of the WPCA. On July 6, 2017, Fairmont Tool filed its Answer to the Complaint (AR 27), but later filed an Amended Answer on October 25, 2018 (AR 1167), asserting a counterclaim alleging entitlement to reimbursement for uniform rentals and for purchases of boots, tools and other items under a breach-of-contract theory or, alternatively, under an unjust enrichment theory.

On November 29, 2017, the parties entered into a Settlement Agreement with regard to Count I of the Complaint. On December 22, a formal dismissal of Count I was filed. AR 40. From that point forward, the only remaining claim against Fairmont Tool was the claim asserted in Count II of the Complaint—i.e., that Fairmont Tool unlawfully assigned wages in violation of the WPCA. Eventually, the court certified the class and adopted the following class definition:

> 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.

AR 786.

Counsel for both parties worked diligently to prepare stipulations covering issues raised in the class claim, including the issue of damages. AR 3407-3426. On April 25, 2018, a final set of stipulations was filed. AR 123-125. The stipulations provide an agreed-upon methodology for calculating damages in the event of liability on the class claim. If Davis prevailed, the parties agreed liquidated damages would be awarded in an amount equal to two or three times the amount Fairmont Tool had deducted—depending on the date when the deductions were made. After having agreed to the stipulations, Fairmont Tool obtained new counsel and filed a motion seeking to withdraw from the stipulations. AR 304. That motion was heard on August 17, 2018. AR 1144.

On May 16, 2018, Davis moved for summary judgment regarding Count II. AR 346. On April 25, 2019, Davis filed an updated motion for summary judgment. AR 1286. On June 21, 2019, the trial court entered an order granting Davis's summary judgment motion with regard to liability. AR 1946. The trial court concluded that Fairmont Tool's deductions violated the wage-assignment provisions codified in W. Va. Code § 21-5-3. AR 1953-1954. The trial court rejected Fairmont Tool's argument that W. Va. Code § 21-5-3 could only be triggered against an employer where credit was established pursuant to a sale of goods. AR 1955-59. Nevertheless, relying on the testimony of Fairmont Tool employee Jamie Kelley, the trial court concluded that, even if the WPCA imposed a creditor requirement, Fairmont Tool was in fact a creditor. AR 1959-1961.

The trial court's June 21, 2019 order also addressed a motion for summary judgment that Fairmont Tool filed with respect to its counterclaims. Citing both statutory and case law, the trial

court concluded that "non-compliant wage assignments are a nullity." AR 1962. To the extent Fairmont Tool was asserting a contract claim, it was "legally barred" from pursuing any recovery against its employees "on the theory that Defendant's violation of their rights under the WPCA is somehow its employees' fault and an actionable breach of contract." AR 1963. Likewise, Fairmont Tool was barred from recovery under its equitable claim of unjust enrichment. AR 1963-64.

On October 16, 2018, the trial court denied Fairmont Tool's motion to withdraw from the prior stipulations. AR 1144. The trial court conducted a thorough analysis of the issue under *West Virginia Dep't of Transp. v. Veach*, 239 W. Va. 1, 799 S.E.2d 78 (2017). AR 1146-1152. In doing so, the trial court determined that the stipulations were freely and voluntarily and that there were not sufficient grounds for setting them aside. AR 1144. Eventually, Davis retained a class administrator, David Epperly. Notably, Fairmont Tool had no objection to Mr. Epperly serving as the class administrator in this case. AR 3428-3429, 3909. On December 7, 2018, Davis disclosed an economic expert, Clifford Hawley, Ph.D. AR 1255. Davis's expert disclosure indicated Dr. Hawley would testify and render expert opinions to a reasonable degree of economic certainty regarding matters relative to economic loss/damages, including the alleged damages in offset claimed by Fairmont Tool in its counterclaims. *Id.* Because of Fairmont Tool's actions, including the filing of counterclaims on October 25, 2018 (AR 1167), in the wake of the parties' stipulations, Davis and the class were placed in a position that required them to retain an economist—a course of action that was never precluded by the express language contained in the negotiated stipulations into which the parties' entered.[3] AR 3909. At a hearing held on May 28, 2019, the parties reached

[3] As noted in Section IV.E, *infra*, Fairmont Tool argues it agreed to the stipulations to avoid cost-shifting relative to an economist if Fairmont Tool ultimately lost on liability. However, that is not borne out by the plain language of the stipulations, as the stipulations contain no reference to either party waiving the right to retain any experts, including economists .The stipulations were reached mutually in an effort to simplify the issues and eliminate uncertainty regarding damages. Toward the latter part of the case,

an agreement to submit all remaining damages issues to the trial court without hearing. AR 1870. Thereafter, on August 9, 2019, Fairmont Tool filed a motion asking the trial court to reconsider its ruling on the enforceability of the stipulations. AR 3283.

On November 7, 2019, the trial court denied Fairmont Tool's motion to reconsider, finding it to be untimely, finding that no basis for such a motion to reconsider exists under the law, and finding that no good cause existed to disturb its prior ruling. AR 3472-3474. The trial court also ruled on damages in its November 7, 2019 Judgment Order. Concluding that no genuine issue remained between the parties regarding damages, the trial court entered judgment in the amount of $325,728.00 (i.e., $87,731 in underlying wage reductions and $237,997.00 in liquidated damages calculated pursuant to the parties' stipulations). AR 3474-3478. Davis was directed to file a motion for attorneys' fees, costs, and any class representative award within 30 days (AR 3478)—a timeframe extended by subsequent order dated December 9, 2019 (AR 3480).

On December 19, 2019, Davis filed his motion for attorneys' fees, costs, and a class representative award. AR 3486. The motion was accompanied by, among other things, detailed timesheets documenting the legal work performed, along with affidavits and fee orders from other, comparable cases. Davis requested a rate of $450 per hour for each of the participating attorneys. In its fee order, however, the court found an hourly rate of $350 was appropriate under the facts and circumstances. AR 3915. In addition, the court awarded $21,518.14 in litigation costs,[4]

Fairmont Tool's current counsel actually ***agreed*** to the economist making prejudgment interest calculations consistent with Fairmont Tool's position regarding prejudgment interest.AR 2242-2243, 3909-3910.

The stipulations dealt with damages only and, therefore, had no bearing on liability. The stipulations provided the parties with an agreed-upon framework for damages in this case.

[4] Davis wrote off some recoverable costs, including mileage, copying, and postage costs. AR 3669.

including the cost of retaining an economist and class administrator. AR 3921. The court entered a Final Judgment Order on August 3, 2020, from which Fairmont Tool now appeals. AR 3964.

II. SUMMARY OF ARGUMENT

Under its first assignment of error, Fairmont Tool argues an employer can only be liable for wage assignment violations under W. Va. Code § 21-5-3 if it acts as a creditor in connection with a sale of goods. The trial court correctly rejected that interpretation. Under *Clendenin Lumber & Supply Co., Inc. v. Carpenter,* 172 W. Va. 375, 380, 305 S.E.2d 332, 337 (1983) and its progeny, an employer's liability is not triggered by its status as a creditor. If an employer makes a deduction from wages that is not (1) required by law or (2) listed as a statutorily authorized deduction in W. Va. Code § 21-5-3, then the employer is liable in the absence of a valid assignment. Here, the deductions made by Fairmont Tool for uniforms, boots, etc. were not required by law and were not listed in W. Va. Code § 21-5-3. Nevertheless, as the trial court also concluded, even if Fairmont Tool were required to be a creditor in order for liability to exist with regard to the wage assignments at issue, the testimony of Jamie Kelley (the Fairmont Tool employee primarily responsible for company payroll and human resources) established that Fairmont Tool was in fact a creditor with regard to such wage assignments. AR 1443-44, 1960-1961.

Next, Fairmont Tool alleges the trial court erred by entering a judgment for liquidated damages. According to Fairmont Tool, liquidated damages are only recoverable in termination-of-employment cases under W. Va. Code § 21-5-4, and not in wage assignment cases under W. Va. Code § 21-5-3. To begin with, the question of liquidated damages was resolved by a stipulation agreed upon by Fairmont Tool and its counsel. The trial court enforced the stipulation and applied methodology set forth in the stipulation for calculating liquidated damages. AR 1146-1152. In light of the parties' stipulations, this Court need not resolve the issue of whether the WPCA permits liquidated damages for wage assignments. In any event, even if that issue were somehow required

to be addressed, the outcome remains the same, as W. Va. Code §§ 21-5-3 and 21-5-4 must be read *in pari materia* and in light of the WPCA's remedial purpose.

In a related assignment, Fairmont Tool argues that the trial court erred by refusing to retroactively apply the 2015 amendments to W. Va. Code § 21-5-4, which limited the amount of liquidated damages that could be recovered. Again, however, it is the stipulation that controls—a stipulation that was entered into knowingly and voluntarily and a stipulation that expressly addresses the change in liquidated damages from treble damages to double damages, effective June 11, 2015. In any event, the June 11, 2015 WPCA amendment cannot be applied retroactively under *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017).

Next, Fairmont Tool contends the trial court should not have granted judgment to Davis, on Fairmont Tool's counterclaim. Through its counterclaim, Fairmont Tool sought to recover the value of items purchased by Davis and the class. To the extent that the counterclaim sounded in contract, the trial court correctly held Fairmont Tool's wage assignments violated W. Va. Code § 21-5-3 and were, therefore, void. No recovery could be made under a void contract. In addition, under W.Va. Code § 21-5-10, an employer is statutorily prohibited from entering into any contract that "contravenes" or "sets aside" the WPCA's protections. To the extent that the claim was one for unjust enrichment, Fairmont Tool was barred under the equitable doctrine of unclean hands.

Fairmont Tool also argues it should have been granted relief from the parties' stipulation governing class damages. The trial court conducted a full and proper analysis using the factors outlined in *Veach, supra*. *Veach* confirms that a stipulation is a binding contract. To warrant relief from a stipulation, a party must make a showing of fraud, mistake, or improvidence, and a showing of both diligence and good cause. Because Fairmont Tool failed to establish acceptable grounds for rescinding the stipulations, the court properly denied its motion for relief from the stipulations.

Finally, Fairmont Tool argues the trial court erred in awarding attorneys' fees and costs. It complains the hourly rate used by the trial court exceeded the prevailing market rate. However, the rate of $350 per hour was fully supported by affidavits and by court orders in other, comparable cases, and Fairmont Tool failed to offer any legitimate proof of why a lower rate should have been applied. Fairmont Tool also argues it was error for the trial court to award the costs incurred by Davis in retaining an economic expert. As the trial court recognized, in light of Fairmont Tool's actions following the parties' entry into the stipulations, it was reasonable for Davis and the class to retain an economist—a course of action that was never precluded by the express language contained in the negotiated stipulations into which the parties' entered. AR , this cost was reasonably necessary in light of the to complete the calculation of damages using the methodology established in the stipulation. AR 3909. In fact, as the trial court found, Fairmont Tool actually agreed at one point to utilize the very same economist for the purpose of preparing prejudgment interest calculations in light of Fairmont Tool's position on the subject. AR 3909-3910.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues raised by the Petitioner in this appeal do not involve unsettled questions of West Virginia law and do not trigger any of the other criteria listed under W. Va. R. App. P. 20. The Respondent respectfully requests that this case be disposed of without oral argument, as this case is appropriate for this Court affirming the trial court via memorandum decision under Rule 21. If, however, the Court desires to hear argument, then the case is best suited for Rule 19 argument.

IV. ARGUMENT

A. The trial court correctly concluded that Fairmont Tool violated the WPCA's prohibition against unlawful wage assignments.

1. The trial court's decision regarding Fairmont Tool's violation of the WPCA is sound, regardless of whether Fairmont Tool was a creditor.

Wages and wage assignments are matters of "vital concern to the public" that have been

subject to regulation by the Legislature for over 100 years. *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 27, 84 S.E. 906 (1915). This Court "has long been aware of the potential problems posed by wage assignments, which in days past often took the form of credit accounts at the company store. [The] Court in *Western v. Buffalo Min. Co.*, 162 W. Va. 543, 251 S.E.2d 501 (1979), recognized that the [WPCA] and its forbearers were drafted, in part, to rein-in the often pernicious use of wage assignments to reduce the pay of workers[.]" *Robertson v. Opequon Motors, Inc.*, 205 W. Va. 560, 566-67, 519 S.E.2d 843 (1999). Accordingly, the WPCA is remedial legislation designed to protect working people and assist them in collection of compensation wrongly withheld. Syl. pt. 3, *Jones v. Tri-County Growers, Inc.*, 179 W. Va. 218, 366 S.E.2d 726 (1988); *Mullins v. Venable*, 171 W. Va. 92, 94, 297 S.E.2d 866, 869 (1982). "Because it is remedial legislation, the WPCA must be construed liberally in order to accomplish the purposes for which it was intended." *Citynet, LLC v. Toney*, 235 W. Va. 79, 92, 772 S.E.2d 36, 49 (2015) (citing *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)).

The WPCA is codified in W. Va. Code §§ 21-5-1, *et seq.* The subject of wage assignments is addressed in W. Va. Code § 21-5-3, which, in pertinent part, provides as follows:

> (a) **Every person, firm or corporation doing business in this state, except railroad companies as provided in section one of this article, shall settle with its employees** at least twice every month and with no more than nineteen days between settlements, unless otherwise provided by special agreement, **and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services.**
>
> * * *
>
> (e) No assignment of or order for future wages shall be valid for a period exceeding one year from the date of the assignment or order. An assignment or order shall be acknowledged by the party making the same before a notary public or other officer authorized to take acknowledgments, and any order or assignment shall specify thereon the total amount due and collectible by virtue of the same and three fourths of the periodical earnings or wages of the assignor shall at all times be exempt from such assignment or order and no assignment or order shall be valid which does not so state upon its

> face: *Provided,* That no such order or assignment shall be valid unless the written acceptance of the employer of the assignor to the making thereof is endorsed thereon: *Provided, however,* That nothing herein contained shall be construed as affecting the right of employer and employees to agree between themselves as to deductions to be made from the payroll of employees.

(Emphasis added). As reflected in the Code of State Rules, the intent of this statutory provision is painfully apparent: "An employer shall have a written assignment of wages that conforms to the requirements set forth in W. Va. Code § 21-5-3(e) on the form approved by the Commissioner prior to making any deductions, other than authorized statutory deductions, from an employee's wages." W. Va. C.S.R. § 42-5-9.1.

As the WPCA makes clear, "[t]he term 'deductions' includes amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance." W. Va. Code § 21-5-1(g). There is absolutely no question that the assignments at issue in this case (*e.g.*, assignments for uniform rentals and the purchase of boots, tools, etc.) were not required by law and were not authorized statutory deductions as specifically defined in the WPCA. These payroll deductions were not cash advances, which were separately identified by Fairmont Tool and excluded from the class definition. Moreover, Fairmont Tool concedes it did not have valid wage assignments from Davis or other similarly-situated employees covering these wage deductions. AR 1948. Instead, Fairmont Tool contends that the wage-assignment provision of the WPCA is simply not applicable.

Fairmont Tool's argument ignores the plain language of the WPCA, the intent of the WPCA, and well-established case law from this Court defining the scope and meaning of the wage-assignment provisions. Davis's wage-assignment claim under the WPCA is straightforward. Davis alleged Fairmont Tool violated the specific WPCA wage-assignment prohibition set forth in W. Va. Code § 21-5-3. That statute "prescribes the required form of an assignment of earnings by an

employee who voluntarily assigns future earnings to another in satisfaction of a debt." *Clendenin*, 172 W. Va. at 380, 305 S.E.2d at 337.

In an effort to wiggle out of the metaphorical vise in which it has placed itself through nothing short of its very own actions, Fairmont Tool contends that W. Va. Code § 21-5-3 is not applicable to its conduct here because the charges at issue were not an "assignment of earnings" as defined ***in the West Virginia Consumer Credit and Protection Act ("CCPA")***:

> "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, 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.

W. Va. Code § 46A-2-116(b). Fairmont Tool posits that an employer-employee transaction only falls within this definition when the employer is also a "creditor" of the employee. The Court's opinion in *Clendenin,* a published decision, demonstrates this position is flatly wrong. In *Clendenin*, the employer "maintain[ed] a policy" under which it extended credit to its employees who wished to purchase goods from it. 172 W. Va. at 376, 305 S.E.2d at 333. The employee in *Clendenin* charged several items. Ultimately, pursuant to an agreement between the parties, the employer began deducting $30 per pay period to pay off the account. The employee in *Clendenin* then claimed that the agreement was an assignment of earnings as contemplated by W. Va. Code § 46A-2-116 which, in turn, violated W. Va. Code § 21-5-3. The employer in *Clendenin* argued that it was not subject to the assignment-of-earnings provisions as defined by W. Va. Code § 46A-2-116(2)(b) because it did not transfer the earnings "to another," but only to itself.

This Court considered whether the employment agreement in *Clendenin* was an assignment of earnings under the CCPA and was, therefore, subject to the requirements of the WPCA, W. Va.

Code § 21-5-3. The Court found that the two statutes needed to be construed together to determine whether an employer is included in the words "to another." It recognized that "use of the word 'deductions,' as defined throughout these two statutes, is a ***clear demonstration by the legislature that it was contemplating employers when it imposed restrictions on the assignment of future earnings***." *Clendenin*, 172 W. Va. at 380, 305 S.E.2d at 337 (emphasis added). Specifically, the WPCA defined deductions as "amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance" and "[s]imilar language appears in [the CCPA]." *Id.* Further, as the *Clendenin* Court observed, the "types of matters included within the term 'deductions' are those which are ***generally associated with employer/employee relationships***. Therefore, [the Court] believe[d] it sound to conclude that ***employers are subject to W. Va. Code, 46A-2-116(2)(b) [1974], and W. Va. Code, 21-5-3 [1979]***." *Id.* (emphasis added).

Because the reduction of an outstanding credit balance was not one of the "specifically enumerated categories of common employment deductions," the Court found that the agreement between the parties in *Clendenin* was, in fact, an assignment of wages subject to the WPCA. *Id.*, 172 W. Va. at 380-81, 305 S.E.2d at 337-38. Furthermore, "the "phrase 'to another' as used in the definition of an assignment of earnings under [the CCPA], includes an employer when that employer is also the creditor of the employee." *Id.*,172 W.Va. at 381, 305 S.E.2d at 338.

Here, Fairmont Tool unlawfully assigned wages without valid, written assignment forms in connection with, among other things, boots and uniforms that Davis and other class members were required to have for their work. The published decisions handed down by this Court, including *Clendenin* and its progeny, make it very clear that these types of transactions fall within the scope of the WPCA's wage-assignment provision.

For example, in *Jones*, *supra*, this Court addressed a wage assignment claim involving Jamaican orchard workers. The Court found that the employer was subject to the WPCA's wage assignment rules when it withheld a portion of the workers' wages to pay for insurance premiums, actual meal costs, costs advanced for transportation, and future repatriation costs. There was no discussion of whether the employer was acting as a creditor via this arrangement. Indeed, these deductions could not possibly be seen as arising from a debtor/creditor transaction. The *Jones* Court, nevertheless, found that the employer had failed to comply with any of the requirements of the wage assignment statute and, therefore, "violated the terms and conditions of W. Va. Code, 21-5-3." *Jones*, 179 W. Va. at 223, 366 S.E.2d at 731. Significantly, *Jones* also made clear the Legislature's intent to identify ***specific, mandatory requirements*** for assigning wages:

> The history of the Code provisions on wage assignments shows a deliberate, legislative intent to allow assignment of wages ***if, and only if, certain specified conditions are met.*** From the initial provisions allowing unfettered assignment of wages, the legislature has changed the law of West Virginia to permit only limited assignments, and then ***only when clearly defined legislative formalities are observed.*** Based on the legislative history of the Wage Payment and Collection Act, we hold that compliance with all requirements of the Act ***is mandatory*** when assigning an employee's wages.

(Emphasis added.)

Similarly, in *Robertson*, *supra*, this Court affirmed a trial court ruling that deductions from commissions paid to salespeople at a car dealership were invalid wage assignments. The dealership deducted amounts for credit card charges relating to the sale and for post-sale vehicle repairs. The trial court found that these withholdings were illegal because the plaintiff had "never executed valid wage assignments for these charges as required by the Act." *Robertson*, 205 W. Va. at 567, 519 S.E.2d at 850. The deductions in *Robertson* were akin to those at issue in this case. The Court rejected the dealership's argument that "deductions for credit card sales are not wage assignments,

but instead reflect a calculation of the commission." *Id.* In rejecting the dealership's argument, the Court again stressed that the WPCA "***demands strict adherence***." *Id.* (emphasis added).

These cases make clear that the *Clendenin* Court did not narrowly define the class of employer/employee assignments to those where the employer is functioning as a creditor in a sale of goods to the employee. Rather, the creditor/debtor employment relationship in *Clendenin* was merely one of the possible ways that a transaction could be subject to the wage-assignment provisions. If the deduction from an employee's wages (1) is not required by law and (2) does not appear on the list of statutorily-approved deductions in W. Va. Code § 21-5-3, then the deduction is an assignment of wages under West Virginia law. Thus, there is no question that the assignment provision of the WPCA applies to the facts of this case. The trial court in this case was absolutely correct in concluding that Fairmont Tool violated the WPCA.

2. The *Rotruck* case, a memorandum decision, does not correctly state West Virginia law and is distinguishable from the present case.

In an effort to essentially eviscerate the WPCA's wage-assignment provision, Fairmont Tool relies entirely on an unpublished memorandum decision, *Rotruck v. Smith,* No. 14-1284, 2016 WL 547190 (W. Va. Feb. 10, 2016), for its theory that an employer *must* be a creditor for a transaction to qualify as an assignment of wages. Fairmont Tool's reliance on *Rotruck* is misplaced. First, the *Rotruck* decision is an unpublished opinion with limited precedential value. Because *Rotruck* clearly conflicts with this Court's published opinions, it must be disregarded. Syl. pt. 5, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014) ("while memorandum decisions may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited; where a conflict exists between a published opinion and a memorandum decision, the published opinion controls"); *see also Henry v. Benyo*, 203 W.

Va. 172, 176 n.3, 506 S.E.2d 615, 619 n.3 (1998) (hesitating to "rely upon decisions which the issuing court has not deemed suitable for official publication").

Second, the Court in *Rotruck* reached its conclusion that liability hinged on the employer's status as a "creditor" without considering the broader legislative intent—i.e., ***that employer/employee relationships are covered by the WPCA.*** Put another way, *Clendenin* established that "employers" are among those who are subject to the WPCA's wage assignment provisions. Whenever an employer requires one of its employees to accept a wage reduction in payment of amounts that are due to the employer, the WPCA comes into play. This can take the form of an actual sale of goods, like *Clendenin*, or any other payroll deduction that is not specifically authorized by W. Va. Code § 21-5-3. Again, to the extent that the memorandum decision in *Rotruck* conflicts with the published decision in *Clendenin*, the "published opinion controls." *See In re T.O.*, 238 W. Va. 455, 796 S.E.2d 564, 573 (2017).

Third, the facts in *Rotruck* did not involve an employer that was making regular and systematic wage reductions. Instead, *Rotruck* involved an unusual situation in which the employer was essentially making gifts in the form of wage advances to a single employee. Essentially, Fairmont Tool wants to apply *Rotruck* as the general rule when, at best, it was a narrow, fact-specific holding in a single case. Accepting Fairmont Tool's reading of the WPCA would pervert the legislature's intent by taking an outlier case and using it to upset 35 years of law to the contrary.

In short, Fairmont Tool's interpretation of the WPCA flies in the face of any liberal, or even logical, construction of the statute. There is no dispute that Fairmont Tool routinely assigned a portion of its employees' wages to itself. Under *Clendenin, Jones*, and *Robertson*, these transactions are treated as assignments of wages for WPCA purposes. The trial court's ruling regarding liability in the present case should, therefore, be affirmed.

3. Even if Davis was required to prove Fairmont Tool's status as a creditor for purposes of W. Va. Code 21-5-3, the undisputed evidence showed that Fairmont Tool was extending credit to its employees, including Davis, and was recouping that debt.

Even if this Court were to somehow determine that the wage assignment provisions found in W. Va. Code § 21-5-3 are only applicable to an employer that is acting as a creditor in a sale of goods, Fairmont Tool cannot avoid the trial court's inescapable conclusion that it was a creditor with respect to the uniforms, boots, and other items purchased by Davis and the rest of the class. AR 1959-1961. Jamie Kelley's[5] testimony, in particular, confirmed Fairmont Tool was "essentially extending credit to the employees" and was "recouping debts" by making deductions from their wages. AR 1439-1444. There is no doubt that by making those wage deductions, Fairmont Tool was acting as creditor. As the trial court recognized: "[L]ike a credit-card company, Defendant willingly stepped into the role of a creditor. Defendant had direct access to its employees' wages, including the wages of Plaintiff and the other class members, and Defendant used that position of power to recoup money from its employees, including Plaintiff and the other class members, in the form of wage assignments. AR 161950.

Consequently, even accepting Fairmont Tool's argument that employers are only subject to W.Va. Code § 21-5-3 if they are creditors, the trial court correctly found Fairmont Tool was acting as a creditor by making the wage deductions at issue in this case. Thus, even if this Court applies a creditor analysis, the trial court's grant of summary judgment should be affirmed.

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[5] As noted above, Jamie Kelley was the Fairmont Tool employee primarily responsible for company payroll and human resources. AR 867-868.

B. The trial court correctly enforced the parties' stipulations regarding damages and entered judgment accordingly.

1. The stipulations freely entered into by the parties provide a sufficient, independent basis for the trial court's award of liquidated damages.

Next, Fairmont Tool argues that the liquidated damages provision found in W. Va. Code § 21-5-4(e) is limited to termination-of-employment cases and, therefore, does not apply to wage assignment cases. Although Fairmont Tool is wrong, the Court does not need to decide that issue. The trial court did not abuse its discretion in enforcing the parties' stipulations regarding damages; thus, the parties' agreed-upon framework for applying damages was properly applied.

In reality, this entire assignment of error is simply another attempt by Fairmont Tool to escape the effects of the stipulations that it made and submitted to the trial court. AR 123. As explained in Section E, *infra*, these stipulations were meant to provide a methodology for calculating class damages, thereby eliminating any future risk or uncertainty in that regard. The stipulations were the product of ongoing negotiations between counsel. AR3407-3426. Once counsel reached an agreement, the stipulations were properly filed in the underlying civil action.

When the trial court entered its damages order on November 7, 2019, it did not engage in any interpretation of W. Va. Code §§ 21-5-3 or 21-5-4. The order emphatically states that liquidated damages were being awarded "as provided for in the stipulation" and that they were being "calculated in accordance with the parties' stipulation." AR 3475 (Judgment Order, at ¶ 24-25). Because the trial court did not apply W. Va. Code §§ 21-5-3 or 21-5-4 in rendering its judgment on damages, Fairmont Tool cannot properly assign that as error. Instead, Fairmont Tool is attacking its own stipulations. For the reasons set forth more fully in Section E, those stipulations are binding. Fairmont Tool cannot simply change its mind and seek relief from their binding effect.

2. Even if this Court addresses the issue of statutory construction, liquidated damages are recoverable in a wage-assignment claim arising under W. Va. Code § 21-5-3.

Even if this Court were to consider the viability of liquidated damages under the WPCA with regard to the violations at issue, there is ample support for awarding such damages for wage-assignment violations under W. Va. Code § 21-5-3. Fairmont Tool notes the language authorizing liquidated damages only appears in W. Va. Code § 21-5-4, which applies to cases involving employment terminations. Because the same language does not appear in the companion provision, W. Va. Code § 21-5-3, Fairmont Tool argues liquidated damages are "expressly and contextually . . . limit[ed] to unpaid wages after separation from employment." Pet'r's Br. 20.

But this argument overlooks the remedial purpose of the WPCA and this Court's admonition that the WPCA must be interpreted liberally. The WPCA is meant to "protect working people and assist them in collection of compensation wrongly withheld." Syl. pt. 3, *Jones, supra.* The goal, then, of the WPCA is to provide the fullest possible remedy to ensure that employees are fully compensated for their losses and that employers are punished for their violations.

It is necessary to "review [an] act or statute in its entirety to ascertain legislative intent properly." Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). Thus, "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Equally important is the principle that a statute should not be interpreted to reach an absurd or unjust result. "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938). It is "the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute,

when such construction would lead to injustice and absurdity." Syl. pt. 2, *Conseco Fin. Serv'g Corp. v. Myers*, 211 W. Va. 631, 567 S.E.2d 641 (2002).

Consider a case in which A's employment is terminated. Thereafter, A successfully proves that his former employer, B, improperly assigned his wages in violation of W. Va. Code § 21-5-3. A is, therefore, entitled to recover all of his wages, including those wages that were covered by the assignment. Furthermore, A is entitled to liquidated damages based on the full amount of his improperly assigned wages. A's remedy for B's wage-assignment violation will be the full amount of the wrongfully-deducted wages plus liquidated damages, in addition to pre-judgment interest.

Taking into consideration the remedial purpose of the WPCA, it makes no sense to afford a lesser remedy to a similarly-situated employee whose wages have also been improperly assigned by the employer but who has not been terminated. In the present case, for example, some of the class members are ***current*** employees who are still on Fairmont Tool's payroll. The wage assignment violations (which occurred during the period between July 1, 2012, and July 31, 2017) are just as real for them, and the effects are just as devastating. Treating these two groups of employees differently makes no sense and frustrates the WPCA's purpose—particularly in a case, such as the present one, where Fairmont Tool has not raised as an assignment of error on appeal any argument that Davis, a former Fairmont Tool employee, is not an adequate class representative of current Fairmont Tool employees. Indeed, it would leave one of the two groups with a substantially-lesser remedy. Under time-honored rules of construction, the provisions of W. Va. Code § 21-5-3 and W. Va. Code § 21-5-4 must be read together, and the remedy expressly codified in W. Va. Code § 21-5-4 must be interpreted so that all class members who were aggrieved by wage-assignment violations will be treated equally and will receive full compensation, including liquidated damages. Any other interpretation would lead to a result that fully compensates some

injured employees, but deprives others of the WPCA's fully remedial effect.

Rather than addressing this issue on the merits, Fairmont Tool appeals to emotion. If the Court finds that the remedial purposes of the WPCA justifies an award of liquidated damages, Fairmont Tool warns that "the sky's the limit." All of the traditional rules of statutory construction will effectively be "turned on their head." Pet'r's Br. 22. But Davis is not asking for a remedy created out of whole cloth. The liquidated damages remedy is already codified within the WPCA. Reading such language in W. Va. Code § 21-5-4 in conjunction with W. Va. Code § 21-5-3, liquidated damages should be available for the wage-assignment violation at issue so that all similarly-situated employees are treated equally and receive a full remedy for the wage violation. The trial court did not "judicially rewrite the WPCA" (*see id.*), as Fairmont Tool implies in its brief. Rather, as addressed above, the trial court properly applied the parties' stipulations regarding damages. Because the parties stipulated to the applicable damages framework, including the application of liquidated damages, this Court does not have to wade into the issue of whether liquidated damages are awardable for wage-assignment violations. But if the Court, nevertheless, chooses to go down that path, the result is the same, as liquidated damages for wage-assignment violations are warranted under the WPCA, applying a liberal interpretation of the Act and taking into account the Act's remedial purpose intended by the Legislature.

Therefore, this assignment of error should be denied. The trial court did not commit any error by enforcing the parties' stipulations. In an event, applying the aforementioned rules of construction and the remedial purpose of the WPCA, liquidated damages are properly recoverable in cases alleging wage-assignment violations under W. Va. Code § 21-5-3.

C. The trial court's entry of liquidated damages in an amount equal to three times the actual damages for pre-June 11, 2015 violations is consistent with the parties' stipulations and is otherwise supported by law.

Relatedly, Fairmont Tool argues it was error for the trial court to enter judgment for

liquidated damages "at the rate of three times the actual damages." Pet'r's Br. 23. Fairmont Tool insists the current version of W. Va. Code § 21-5-4(e) (effective June 11, 2015) must be applied, which limits liquidated damages to "two times [the] unpaid amount." Again, however, Fairmont Tool misinterprets the law and completely ignores the parties' damages stipulations (which specifically address the period when treble liquidated damages apply and the period when double liquidated damages begin, consistent with the statutory change).

As addressed above, the trial court entered its judgment in accordance with the damages stipulations agreed to by the parties. Fairmont Tool's argument is built on a false premise—i.e., that the trial court committed error by misinterpreting W. Va. Code § 21-5-4 and entering a judgment tainted by that error. But the damages issues were resolved ***by the parties themselves*** through their stipulations. By entering into the stipulations, Fairmont Tool consented to have the amount of class damages calculated according to a specific methodology.[6] Nowhere is it alleged that the trial court failed to properly apply the agreed-upon methodology. Instead, Fairmont Tool is unhappy with the methodology itself and is attempting to walk away from an agreement it made freely and with the full participation of its counsel. For the reasons stated in Section E, *infra*, the trial court correctly enforced the stipulations and entered a proper judgment.[7]

Consequently, there is no reason to address the issue of whether it was statutorily proper to apply treble liquidated damages with regard to Fairmont Tool's wage-assignment violations

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[6] Again, there is no merit to Fairmont Tool's argument that the stipulations were unfair or that it received nothing in return for its agreement regarding liquidated damages. The parties established an agreed-upon framework for damages in this case.

[7] Fairmont Tool also argues the trial court issued two "entirely contradictory rulings," the first in its September 12, 2019 letter and the second in its damages order. Pet'r's Br. 23. Suffice it to say that a court of record speaks through its orders. *See, e.g., Legg v. Felinton*, 219 W. Va. 478, 483, 637, S.E.2d 576, 581 (2006) (observing that "[i]t is a paramount principle of jurisprudence that a court speaks only through its orders"). The September 12, 2019 letter referenced by Fairmont Tool is exactly that— a letter, not an order.

prior to June 11, 2015. But even if this Court were to do so, there was no error.

In arguing error based upon the application of treble liquidated damages to the class for the applicable period prior to June 11, 2015 (i.e., prior to the effective date of the amendment to W. Va. Code § 21-5-4), Fairmont Tool incorrectly contends this Court should, pursuant to *Martinez, supra*, retroactively apply the June 11, 2015 amendment to W. Va. Code § 21-5-4. This Court, however, does not need to undertake that particular analysis, as the parties' stipulations fully address the agreed-upon framework for applying liquidated damages in this case. If, however, the Court chooses to follow Fairmont Tool down the tortured path it undertakes in arguing *Martinez*, the end result remains the same, insofar as the application of liquidated damages was appropriately split (as stipulated to by the parties) between treble liquidated damages applicable under the pre-June 11, 2015 version of the WPCA and double liquidated damages that became applicable when the amendment to the WPCA took effect on June 11, 2015.

In arguing *Martinez*, Fairmont Tool inaccurately asserts that any liquidated damages applied in this case should have been limited to double liquidated damages under the theory that the June 11, 2015 amendment to the WPCA should apply retrospectively. Again, in light of the parties' stipulation to the applicable damages framework, this Court need not address the issue of whether the June 11, 2015 amendment to the WPCA applies retrospectively. Even so, Fairmont Tool's argument under *Martinez* for a retrospective application of the WPCA amendment fails. "'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. Syl. pt. 4, *Taylor v. State Comp. Comm'r*, 140 W. Va. 572, 86 S.E.2d 114 (1955)." Syl. pt. 2, *Martinez, supra* (quoting Syl. pt. 2, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W. Va. 485, 766

S.E.2d 432 (2014)). "'A statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application.'" Syl. pt. 4, *Martinez*, *supra* (quoting Syl. pt. 2, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996)). Based upon these fundamental legal principles, this Court's decision that the two statutes at issue in *Martinez* (i.e., W. Va. Code §§ 55-7-29 and 55-7E-3) should be applied retroactively is distinguishable from the present case. First, the two statutes at issue in *Martinez* were newly-created statutes—unlike the longstanding WPCA and its various amendments over time. Second, the two statutes at issue in *Martinez* (W. Va. Code § 55-7-29, which addresses limitations on punitive damages, and W. Va. Code § 55-7E-3, which addresses a duty to mitigate damages in employment cases) were solely related to damages—unlike the WPCA, which addresses both substantive wage-related rights and damages under the Act. The WPCA is not a purely damages-based body of law, unlike the statutes at issue in *Martinez*. Given the longstanding existence, the scope, and the legislative purpose of the WPCA, taking into account the presumption that statutory amendments are intended to operate prospectively, and considering the absence of clear language (or any language for that matter) that explicitly addresses any intention by the Legislature for a retrospective application of the WPCA amendment placed at issue by Fairmont Tool, the June 11, 2015 amendment to the WPCA does not apply retrospectively.

D. The trial court properly granted judgment to Davis on Fairmont Tool's counterclaim, as Fairmont Tool's attempt to collect sums it improperly deducted from Davis and the class was an attempt to enforce a void contract.

Even though the wage assignments that Fairmont Tool produced were plainly invalid under the WPCA, Fairmont Tool nevertheless filed a counterclaim seeking recovery under those same

assignments. The trial court correctly determined, as a matter of law, that Fairmont Tool could not recover on assignments that were void and of no legal effect.

Fairmont Tool does not allege that the assignments upon which its breach-of-contract counterclaim is based constitute valid wage assignments in compliance with W. Va. Code § 21-5-3(e)--because they unquestionably do not. As this Court in *Jones* made clear, non-compliant wage assignments ***are a legal nullity***. Furthermore, employers, including Fairmont Tool, are expressly barred from entering into private agreements that circumvent the protections afforded to employees under the WPCA. To that end, W. Va. Code § 21-5-10 provides:

> Except as provided in section thirteen, no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void.

"There is express language in W. Va. Code [§] 21-5-10..., precluding contractual alteration of" an employee's rights under the WPCA. *Ash v. Ravens Metal Prods., Inc.*, 190 W. Va. 90, 96-97, 437 S.E.2d 254, 260-61 (1993). In *Ash,* this Court concluded that "an arbitration clause of a collective bargaining agreement cannot nullify the statutory rights given to employees under the [WPCA]." See also *Citynet, LLC*, 235 W. Va. at 95, 772 S.E.2d at 52 (acknowledging the Court's previous "refus[al] to enforce an agreement between an employer and an employee to pay wages outside the time frame set forth in the WPCA," then applying the same reasoning to invalidate the payout provision of an employee incentive plan to the extent that it contravened the WPCA).

In creating the protections afforded to employees under the WPCA, "[t]he legislature has attempted to prevent employers from abusing their positions by compromising the wages of employees. The language in W. Va. Code § 21-5-10 ***is mandatory***. An employer must pay earned wages to its employees. Any other reading would seriously compromise and undermine the

legislative intent of W. Va. Code § 21-5-10." *Britner v. Medical Sec. Card, Inc.*, 200 W. Va. 352, 355, 489 S.E.2d 734 (1997) (emphasis added). Thus, under the WPCA, Fairmont Tool's so-called assignments, as a matter of law, are invalid.

This Court has never hesitated in refusing to enforce void contracts. The petitioners in *Shonk Land Co. v. Joachim*, 96 W. Va. 708, 123 S.E. 444 (1924), sought to enjoin a county board of education's payment of contract indebtedness for school construction and improvements in excess of the current year's funding, which were incurred in violation of state law. Though branding the case a "hard one," this Court granted the requested injunction, holding that the "contracts under consideration were illegal and void, made expressly so by the statute, and cannot be enforced." *Id.* at 721, 123 S.E. at 449. Nearly thirty years earlier, in *Dempsey v. Board of Educ. of Hardee Dist.*, 40 W. Va. 99, 20 S.E. 811 (1894), this Court affirmed the denial of mandamus relief to a business creditor on indistinguishable facts, noting that a sheriff's draft obtained against an insolvent school board "is issued without authority and in disobedience of the law, and operates as a contraction of a debt in obedience of the constitution, and is ultra vires, null and void. . . ." *Id.* at 102, 20 S.E. at 812.

Fairmont Tool is, therefore, legally barred from hedging against its exposure by counterclaiming its current and former employees on the theory that its violation of their rights under the WPCA is somehow actionable as a breach of contract. The trial court correctly held that any purported agreement in violation of the WPCA was void, and Fairmont Tool's counterclaim alleging a breach of such a void "agreement" could not be sustained. A ruling to the contrary would ignore the clear mandate of W. Va. Code § 21-5-10, the legislative history of the WPCA, and the pertinent case law construing the Act.

Fairmont Tool's counterclaim for unjust enrichment was equally ineffective because it was simply another way of arguing breach of contract. AR 1180 (counterclaim allegation that, "[b]y providing the Plaintiff, the putative class members, and each of them, said benefits ***pursuant to its agreement with each of them***. . . .") (counterclaim allegation that, "[s]hould the Plaintiff, the putative class members, and each of them, prevail in their claims, and continue to repudiate their obligations to Fairmont Tool ***under their respective individual agreements***. . . ."). This Court has recognized that, even though a claim may be "framed in unjust enrichment," when it is prosecuted as a breach of contract, the claim "is, nonetheless, an action founded on contract." *Ringer v. John*, 230 W. Va. 687, 690, 742 S.E.2d 103, 106 (2013) (noting that "unjust enrichment, sometimes referred to as restitution, is a contract implied in law or a quasi-contract") (citing *Realmark Devs., Inc. v. Ranson*, 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003). Accordingly, the exact same WPCA prohibitions apply to Fairmont Tool's unjust-enrichment counterclaim.

Perhaps more fundamentally, "the right to recover for unjust enrichment is based on the principles of equity." *Realmark Devs., Inc.*, 214 W. Va. at 164, 588 S.E.2d at 153. At the threshold, then, "a party who seeks equity must come with clean hands." *Province v. Province*, 196 W. Va. 473, 484, 473 S.E.2d 894, 905 (1996) (citing *Moore v Mustoe*, 47 W. Va. 549, 552, 35 S.E. 871, 873 (1900) ("Equity never helps those engaged in fraudulent transactions, but leaves them where it finds them."). Where, as here, a party seeks equitable relief in connection with a transaction it insisted upon, in clear violation of a state statute—a remedial statute specifically enacted to counteract a long, unfortunate history of employer abuses—then, *ipso facto*, that party does not come before the court with clean hands. *See Creath's Adm'r v. Sims*, 46 U.S. 192, 208 (1847) (rejecting a surety's attempt to avoid judgment where he asked the "court to undo all that he has voluntarily and deli[b]erately performed, and in order to accomplish this end, [sought] to stamp

his own acts with illegality from their very inception" and further recognizing that, "[f]or such purposes he surely would have no standing and receive no countenance in a court of equity, upon any of its known principles").

Regardless, then, of whether Fairmont Tool's counterclaim is viewed as a breach-of-contract claim or an unjust-enrichment claim, the law does not afford Fairmont Tool a viable cause of action in terms of the relief it sought below. Consequently, the trial court correctly granted summary judgment against Fairmont Tool with regard to its counterclaim.

E. Applying the *Veach* factors, the trial court properly refused Fairmont Tool's request to withdraw from stipulations that were freely and knowingly entered.

Separately, Fairmont Tool argues that the trial court erred by enforcing stipulations that were meant to resolve, in advance, the issue of damages for the class claim. The damages stipulations were entered into by counsel, filed, and formally made a part of the record. It was only after Fairmont Tool changed counsel that it experienced "buyer's remorse" and asked for leave to withdraw from such stipulations. The trial court correctly denied Fairmont Tool's attempt to avoid the binding effect of the parties' stipulations.

Stipulations play a critical role in our judicial system by streamlining the issues, expediting litigation, and saving costs. Consequently, attorneys are given broad authority to enter into stipulations and "a party is ordinarily bound by a stipulation made by its attorney." *Veach*, 239 W. Va. at 8, 799 S.E.2d at 85. Stipulations are favored by the courts and generally will be enforced in the absence of good cause. *See,* generally, 83 C.J.S., *Stipulations* § 2.

Veach establishes the rules that must be followed whenever a party seeks to be relieved from a stipulation. Because of their binding nature, a court should not set aside a stipulation "for any less cause than would warrant the rescission of contracts in general, namely, fraud, accident, mistake, or some other ground of the same nature." Thus, "a circuit court is afforded wide

discretion in determining whether or not a party should be relieved of a stipulation," and a court's decision in that regard "should not be set aside absent an abuse of discretion." *Veach*, 239 W. Va. at 8, 799, S.E.2d at 85; *see also Cole v. State Comp. Comm'r*, 114 W. Va. 633, 173 S.E. 263 (1934).

The stipulations in this case "***reflect an agreement between the parties*** regarding, among other things, ***potential damages with respect to the class-based WPCA claim in this case.***" AR 1145 (emphasis added). The stipulations contain language regarding the agreed-upon scope of damages in the event of a finding of liability against Fairmont Tool on the class claim:

> 4. If liability is found against Defendant in this case in connection with any of the above-referenced reductions to wages that occurred during the period from July 1, 2012, through June 10, 2015, the parties agree that the Court shall award liquidated damages under the West Virginia Wage Payment and Collection Act ("WVWPCA") in the amount of three times each such reduction to wages that occurred during that period (*i.e.*, July 1, 2012, through June 10, 2015).
>
> 5. If liability is found against Defendant in this case in connection with any of the above-referenced reductions to wages that occurred during the period from June 11, 2015, through July 31, 2017, the parties agree that the Court shall award liquidated damages under the WVWPCA in the amount of two times each such reduction to wages that occurred during that period (*i.e.*, June 11, 2015, through July 31, 2017).

AR 124. In other words, the parties, both represented by counsel and both fully aware of the law and the damages at issue, agreed on precisely how damages would be calculated. Fairmont Tool, nevertheless, argues that the trial court should have upset the parties' stipulations. The trial court, citing *Veach*, correctly enforced the stipulations for multiple reasons, which were set forth in its October 16, 2018 order:

> • There was no evidence of any factual misrepresentations or mistaken assumptions in connection with the stipulations. Fairmont Tool, with assistance of counsel, made a voluntary decision to enter into the stipulations. AR 1146.
>
> • No evidence was presented from Fairmont Tool's prior counsel regarding a failure to appreciate what Fairmont Tool labels as an "erroneous legal reading of the WPCA[.]" AR 1146.

- Under *Veach,* "[m]istake of law . . . is not grounds to rescind a contract." The same circumstances are present here, "insofar as the Defendant alleges that its prior counsel's agreement on its behalf to the stipulations was a mistake of law." AR 1147-1150.

- The stipulations do not detrimentally impact the WPCA rights of any class members in violation of W. Va. Code § 21-5-10. AR 1148.

- "The WPCA is remedial legislation designed to protect workers and assist them regarding compensation wrongly withheld. Accordingly, . . . the stipulations do not run afoul of W. Va. Code § 21-5-10, which serves to ensure private agreements are not utilized as a means of circumventing WPCA protections to the detriment of workers." AR 1150.

- The stipulations were not a result of "improvidence." Defendant instead presents a "mistake of law" argument, which is not a ground for rescinding a stipulation under *Veach.* AR 1150-1151.

- Even if improvidence existed, David and the class would have been prejudiced if Fairmont Tool had been permitted to rescind the stipulations because David and the class could not have been restored to the same condition as when the stipulations were filed. . . ." AR 1151-1152.

Rather than citing *Veach* and attacking the trial court's legal analysis, Fairmont Tool attempts an end run. According to Fairmont Tool, Davis "breached the agreement underlying" the stipulations. Pet'r's Br. 28. Specifically, Fairmont Tool argues that part of the consideration for the stipulations was a promise by Davis not to hire any economic expert. For support, Fairmont Tool cites part of the argument made at a hearing held on August 17, 2018—months ***after*** the stipulations were made and submitted to the court. Importantly, there is absolutely nothing in the stipulations themselves suggesting that they were premised on any underlying agreement. Nor did Fairmont Tool make that argument at the August 17 hearing.[8] The trial court found, instead, that

[8] At most, Fairmont Tool argued that "the reason for which ***[Davis]*** wanted the stipulation was to avoid having to hire an economist to do the calculations." AR 1017. But that is a far cry from saying an agreement existed without which ***Fairmont Tool*** would not have entered into the stipulations. In any event, the hiring of the economist, Dr. Hawley, was prompted by Fairmont Tool's litigation conduct—i.e., filing a counterclaim introducing new damages issues into the case. And notably, as addressed above, Fairmont

the "primary thrust of the stipulations was to afford the parties a degree of certainty as to the potential nature and extent of WPCA damages regarding Count II." AR 3469. In other words, the parties were motivated by a mutual desire to clarify the range of damages as early as possible in the litigation. Because there was no express agreement regarding using or not using an economist depending on the direction of the case, there is no merit to Fairmont Tool's argument that Davis somehow breached that agreement.

Fairmont Tool also argues that the stipulations relate to an issue of law, rendering them void. But the stipulations were clearly made to provide a specific, objective methodology for calculating the amount of the class damages. Indeed, at one point, Fairmont Tool itself refers to them as "stipulations ***as to damages***." Pet'r's Br. 29. The stipulations did not say what the law is or otherwise impair the trial court's power to interpret and apply the law. Instead, for their mutual benefit, the parties agreed in advance on how damages for the class were to be calculated if the class prevailed. That, of course, is a perfectly legitimate subject for the parties to address and resolve through stipulations. By doing so, the parties saved themselves the time and expense of additional litigation and provided certainty regarding the scope of damages. Because Fairmont Tool cannot satisfy the elements set forth in *Veach*, the trial court acted correctly when it denied Fairmont Tool's motion for relief from the stipulations.

F. The trial court properly exercised its discretion in determining the amount of attorney's fees and costs awardable.

For its final assignment of error, Fairmont Tool attacks the trial court's award of attorneys' fees and costs. Under well-settled law, matters involving fees and costs are left to the sound discretion of the trial court and, therefore, are reviewable only for an abuse of discretion. *See, e.g.*,

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Tool's counsel even agreed to the economist calculating prejudgment interest pursuant to an argument advanced by Fairmont Tool regarding the applicable prejudgment interest rate.

Daily Gazette Co., Inc. v. West Virginia Dev. Office, 206 W. Va. 51, 521 S.E.2d 543 (1999) ("[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees, and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion."); *Sanson v. Brandywine Homes, Inc.,* 215 W. Va. 307, 310, 599 S.E.2d 730, 733 (2004) ("We . . . apply the abuse of discretion standard of review to an award of attorney's fees."). Here, the trial court's award of fees and costs was proper and should be affirmed.

First, Fairmont Tool challenges the hourly rate as determined by the trial court in its fee order—i.e., $350 per hour. The seminal case of A*etna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986) lists a series of factors to be considered in determining the amount of the fee, including the "customary" fee for the services provided. To satisfy the factor relating to a "customary" fee, Davis submitted affidavits and trial court orders approving rates in comparable West Virginia cases ranging as high as $450 per hour. For example, Davis submitted an order from Judge Sims in *Brown v. Quicken Loans* approving a $450 rate.

In an effort to distinguish the *Brown* order, Fairmont Tool points out that the attorneys in *Brown* were "both specialized and in Ohio County." Pet'r's Br. 32. Of course, Bailey Glasser, LLP (the firm serving as co-counsel for Davis and the class) is a large, multi-state firm that also specializes in employment and consumer law cases. AR 3516, 3521. And Mr. Hansberry (also serving as co-counsel for the class) is an attorney who has over 14 years of experience practicing employment law in West Virginia and who has experience in the area of class-action litigation of WPCA claims. AR 3511-3512. The fact that *Brown* was an Ohio County case has no bearing on the analysis. For one thing, Fairmont Tools has no qualms citing cases from outside the Fairmont area, including one from ***southern*** West Virginia. *Id.*, citing *McGee v. Cole*, 115 F. Supp.3d 76

(S.D. W. Va. 2015). But more importantly, West Virginia does not rigidly apply the "local" rate when making fee awards. To the contrary, trial courts are advised to "consider how common it is today for lawyers to travel from Charleston, or Clarksburg, or Huntington, or other cities to represent clients in other, smaller counties." *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 674, 584 S.E.2d 523 (2003). Especially in view of the "scarcity" of comparable cases "in Marion County or anywhere in West Virginia" (AR 3907), it is helpful—if not necessary—to consider orders from other West Virginia counties.

In addition, Davis submitted an affidavit from "another West Virginia employment law attorney, who is familiar with Plaintiff's counsel and who has practiced WPCA class action litigation with Mr. Hansberry in neighboring Harrison County." AR 3906. Davis's fee motion was also accompanied by an order from *Bailey v. Green Tree*, a Roane County case approving a fee of $400 per hour. From all of these factors, the trial court properly exercised its discretion in finding that a rate of $350 per hour for the attorneys representing Davis and the class is fair and reasonable.

Unsatisfied, Fairmont Tool argues this hourly rate is too high.[9] Fairmont Tool leans heavily on the *McGee* case cited above in this brief. But *McGee* does not support an argument that the trial court abused its discretion. Indeed, *McGee* approved rates as high as $500 per hour for the most experienced attorneys participating in the case. The rate approved for John Tinney, a Charleston-based attorney with 20 years of experience, was $300 per hour. And notably, the *McGee* opinion is now over five years old. In the present case, the trial court considered the rates in *McGee*, but clearly was not bound by those rates. Simply stated, the $350 hourly rate (for attorneys) applied by the trial court in this case was amply supported.

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[9] The record is devoid of evidence of rates Fairmont Tool's counsel charged in this case.

As a final matter, Fairmont Tool contends that the trial court erred by awarding costs for a class administrator, David Epperly, and for Davis's economic expert, Dr. Hawley. In doing so, Fairmont Tool ends up talking out of both sides of its mouth. Even though it complains now about Epperly's role, Fairmont Tool had no objection to retaining Epperly in the first place. AR 3428-3429. Furthermore, Davis only retained Dr. Hawley after Fairmont Tool filed its counterclaim seeking a setoff for items purchased by Davis and the class. Even though judgment on the counterclaim was later entered in Davis's favor, Dr. Hawley still provided data and calculations that the trial court used in determining the appropriate amount of class damages. In fact, counsel for Fairmont Tool expressly stated that he "agreed" with having Dr. Hawley perform alternative prejudgment interest calculations, including one requested by Fairmont Tool itself, and that he "appreciate[d]" Dr. Hawley's efforts in that regard. AR 2242. As the trial court found, it is "unreasonable for Defendant's counsel to now complain about some of the very work it was agreeable to and even appreciative of Dr. Hawley performing." AR 3910. In light of these facts, the trial court acted well within its discretion by including the invoices from Mr. Epperly and Dr. Hawley in its award of costs.[10]

V. CONCLUSION

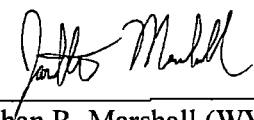
Petitioner, Fairmont Tool, has failed to show that the trial court committed any reversible error. For the reasons set forth herein, Respondent, Adam J. Davis, individually and on behalf of

[10] In the heading to Part F of its brief, Fairmont Tool contends the trial court "erred in awarding . . . [a] service award to plaintiff" (Pet'r's Br. 31), but provides no argument in support of that part of its assignment of error. Because Fairmont Tool has made no substantive argument in support of its contention (as set forth in a heading) that the trial court erred in awarding a service award to Davis, this unsupported assignment of error should be deemed to have been waived. *See Fruth v. Powers*, 239 W. Va. 809, 815, 806 S.E.2d 465, 471 (2017) ("We deem errors waived where they are not argued in the briefs, but are merely mentioned in passing."); Syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").

the class, respectfully requests that this Court fully affirm the judgment below with regard to liability and damages against Fairmont Tool relative to the class claim in this case.

Date: January 15, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2021, a true and correct copy of the foregoing **Brief of Respondent Adam J. Davis** was served by United States Mail, first class, postage prepaid, addressed to the following:

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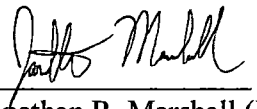

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