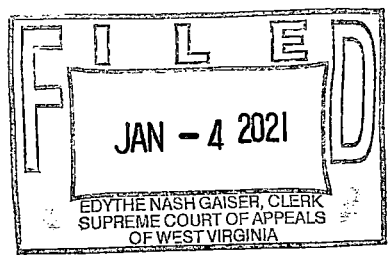
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0755



AMIE MILLER,
Petitioner

v.

ST. JOSEPH RECOVERY CENTER, LLC,
a Delaware limited liability company,
ST. JOSEPH'S OPERATING COMPANY, LLC
a Delaware limited liability company,
and SILSTONE HOLDINGS, LLC,
a Delaware limited liability company,
Respondents

Appeal from a final order
of the Circuit Court of Wood County
(Civil Action No. 19-C-226)

Petitioner's Brief

Counsel for Petitioner, Amie Miller

Walt Auvil (WVSB # 190)
Kirk Auvil (WVSB # 12953)
Anthony Brunicardi (WVSB #13593)
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058
auvil@theemploymentlawcenter.com
theemploymentlawcenter@gmail.com

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1. Petitioner Aime Miller was not an at-will employee. She was employed under both a drafted by and were most definitely issued by SJRC. Petitioner's *Employee Agreement* written contract – the *Employment Agreement* - and pursuant to an *Employee Handbook* defining the terms and conditions of her employment. Both documents were presumably required SJRC to pay her salary on a bi-weekly basis. It was undisputed and the Circuit Court found that SJRC failed to meet this contractual obligation no less than four times during April, May and June 2019, immediately preceding Petitioner's June 18, 2019 resignation. Thus, based upon the *Employment Agreement* the Petitioner is entitled to receive the severance payments provided for in Section 4.6(b) of that agreement as she voluntarily resigned for a "good reason."

2. By the terms of its own *Employment Agreement,* the severance benefits to which the Petitioner is entitled are wages. Accordingly, the civil penalty provisions of the West Virginia Wage Payment Collection Act found at West Virginia Code §21-5-4(e) (as amended 2015) apply to SJRC's failure to timely pay those wages to the Petitioner. The trial court misconstrued the West Virginia Wage Payment Collection Act which defines "wages" to include fringe benefits. W.Va. Code §21-5-1(c) (as amended 2015). Further, the trial court failed to make the requisite findings of fact and conclusions of law in connection with this ruling.

3. Without any analysis or consideration of the legal standards of waiver, the trial court improvidently and abruptly forced this matter to be tried as a bench trial after its hasty determination that Petitioner had waived her right to a jury trial. The fact that SJRC demanded a jury trial, entered into an agreed scheduling order setting the case for jury trial, submitted jury instructions and then, without notice, abruptly moved the Circuit Court to deprive Petitioner of a jury trial. This untimely request was granted over Petitioner's objection just days before the scheduled trial. The Petitioner should have been afforded a trial by jury as any alleged waiver of a jury trial had been overlooked and waived by SJRC.

4. The court below exceeded its authority when it improperly ruled *sue sponte* that Texas law applied to Petitioner's remaining severance claim just days before trial. Neither party sought this ruling, and this issue was considered without notice to or argument from the parties. This case was pled, briefed, and argued by the parties under West Virginia law, specifically pursuant to the West Virginia Wage Payment Collection Act, West Virginia Code Chapter 21, Article 5. Not only had the choice of law provision been waived by the parties' conduct, rights granted under the West Virginia Wage Payment Collection Act cannot be restricted or contracted away - which was the result of the trial court's choice of law ruling. Further, the trial court's cursory *Trial Order* disposing of this matter cited no provision of Texas law thereby further convoluting the basis for the trial court's decision in this matter.

5. Since the *Employment Agreement* did not address payment of accrued paid-time-off at termination of employment, and the *Employee Handbook* allowed Petitioner to be paid her accrued paid-time-off, Petitioner's entitlement to payment of accrued paid-time-off after resigning is ambiguous at best. As such, such ambiguity must be resolved in favor of the employee. Meadows v. Wal-Mart Stores, 207 W. Va. 203, 530 S.E.2d 676 (1999). Accordingly, it was error for the court-below to deny this claim, particularly without the entry of an *Order* making proposed findings of fact and conclusions of law.

TABLE OF AUTHORITIES

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Appeal from a final order
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(Civil Action No. 19-C-226)

Petitioner's Brief

Now comes the Petitioner herein and Plaintiff-below, Amie Miller (hereafter "Petitioner") by and through Walt Auvil, her attorney and pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and the *Order* of this Court tenders the within *Brief* in support of her appeal.

The Petitioner appeals the ruling of the Circuit Court of Wood County, West Virginia, the Honorable Jason A. Wharton presiding, dismissing Petitioner's civil action against Respondents St. Joseph Recovery Center (hereafter "SJRC"); St. Joseph's Operating Company, LLC; and Siltstone Holdings LLC.

This action filed pursuant to the West Virginia Wage Payment and Collection Act, W. Va. Code Ch. 21, Art. 5, sought damages for unpaid severance pay and accrued paid-time-off following Petitioner's resignation. Petitioner resigned from her position at SJRC as a Nurse Practitioner within six months of being employed after SJRC failed on at least four occasions to pay her wages at the time required. The dismissal of the severance claim followed the Circuit Court's abrupt decision to conduct a bench trial rather than a jury trial and to apply Texas law in the case just days before the case was tried.

Petitioner appeals the Circuit Court's conclusion that Petitioner's resignation was not for a "good reason" despite finding that SJRC's repeated failures to timely pay her wages materially breached the employment agreement between the parties. Resignation for a "good reason" admittedly triggered Petitioner's right to a severance package. Petitioner appeals other adverse rulings of the Circuit Court as detailed herein including the denial of Petitioner's claim for payment of accrued paid paid-time-off pursuant to the *Employee Handbook*. Petitioner does not appeal the dismissal of the non-SJRC defendants.

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erroneously dismissed the Petitioner's claim for severance after concluding that she was not entitled to this relief since she did not resign for a "good reason" as defined by the *Employment Agreement.* After correctly holding that SJRC had repeatedly and materially breached the *Employment Agreement* by failing to pay her on time, the finding that the Petitioner did not resign because she had been paid late on four different occasions in the less than six months she worked at SJRC flies in the face of the overwhelming evidence in the record, contradicts logic and requires reversal and remand of this matter.

2. The Circuit Court's holding that the severance payments due to Petitioner pursuant to her *Employment Agreement* were not "wages" pursuant to the West Virginia Wage Payment and Collection Act was clearly erroneous as the terms of that agreement defined the severance payments as wages, thereby triggering the applicability of the civil penalties under the Act. The West Virginia Wage Payment Collection Act, W.Va. Code §21-5-1(c) defines wages to include fringe benefits payable pursuant to W.Va. Code §21-5-4(e) and the lower court's ruling to the contrary is clearly wrong.

3. The Circuit Court erroneously ruled that the Petitioner had waived her right to a jury trial based upon an untimely request from SJRC which did not allow sufficient notice or an opportunity to fully brief and argue this issue. The court-below failed to make the requisite findings and conclusions of law regarding the very broad jury-trial waiver imposed. Further, the trial court ignored the fact that SJRC demanded a jury trial, entered into an agreed scheduling order setting this case for a jury trial, and submitted jury instructions. It was accordingly error to deprive Petitioner of a jury trial by granting SJRC's untimely motion over Petitioner's objection days before trial.

4. It was error for the Circuit Court to *sua sponte* and without notice raise the issue of choice of law and to rule that the Petitioner's claim for severance pay would be resolved under Texas law due to a choice of law provision. This case was pled, briefed, and argued by the parties under West Virginia law, specifically the West Virginia Wage Payment And Collection Act, West Virginia Code Chapter 21, Article 5, which serves an important public purpose in protecting the rights of West Virginians from wage theft, rights that cannot be contractually restricted. The lower court's

cursory *Trial Order* disposing of this matter cited no provision of Texas law thus further convoluting the legal basis for the trial court's ruling.

5. Petitioner's claims for payment of accrued paid-time-off (PTO) were improperly dismissed by the Circuit Court as such payments were earned and due to her according to the *Employee Handbook*. The *Employment Agreement* did not address payment of accrued paid-time-off at termination of employment, and therefore Petitioner's entitlement to payment of accrued paid-time-off after resigning is ambiguous at best. Accordingly, it was error for the court-below to deny this claim, particularly without the entry of an *Order* making proposed findings of fact and conclusions of law.

II. STATEMENT OF THE CASE

This appeal concerns post-resignation pay sought by the Petitioner Aime Miller following her resignation from employment with SJRC in June 2019. After SJRC refused to pay to Petitioner her accrued paid-time-off, Petitioner filed the instant action on September 10, 2019 seeking to enforce her contractual and statutory rights to post-resignation pay, including a contractual severance package, accrued paid time off promised in the *Employee Handbook* and statutory penalties for late payment due to violations of the West Virginia Wage Payment Collection Act, West Virginia Code §§21-5-1 *et seq.* (2018). All claims were denied by the trial court, the Honorable Jason A. Wharton, several at the pre-trial stage and the remainder following a bench trial precipitously *Ordered* by the trial court in lieu of a jury trial.

A. Facts

Petitioner herein and Plaintiff-below Amie Miller (hereafter "Petitioner") accepted employment at St. Joseph Recovery Center ("SJRC") as a Nurse Practitioner in December 2018

pursuant to an "Employment Agreement" between Petitioner and SJRC. *Complaint ¶ 2, Exhibit A to the Complaint; Answer ¶ 2, Meadows 30(b)(7) TR 24*, APP 000003, 000028, 146. The thirteen page "*Employment Agreement*" outlined the terms and conditions of Petitioner's employment including compensation, termination, resignation, and the availability of severance pay. APP 00009-00013. In addition to the individual employment agreement, SJRC issued Petitioner (and other employees) an "*Employee Handbook*" also containing provisions pertaining to procedures for resignation, termination, and severance. *Meadows 30(b)(7) TR 35-38,* APP 000148.

After less than six months on the job at SJRC, Petitioner resigned due to SJRC's repeated failure to pay her salary and compensation on time. Petitioner's pay was late no less than four times during her brief employment at SJRC. APP 000146-147.[1] After receiving her pay late for the fourth time, on June 18, 2019, Aime Miller resigned from SJRC. She did so by hand delivering two versions of a letter of resignation to SJRC's CEO Donna Meadows - one providing two-months-notice and one providing three-months-notice to her employer. APP 369-370.[2] SJRC instead elected for Petitioner to leave two weeks after her resignation letter was submitted, a decision made solely at Defendant's election, and not by Petitioner. *Complaint ¶ 9; Answer ¶ 9,* APP 000005, 000028. CEO Meadows was fully aware that Petitioner was resigning because she was not being paid as required by her employment agreement. APP 000365.

Petitioner's resignation letter accepted by SJRC stated as follows:

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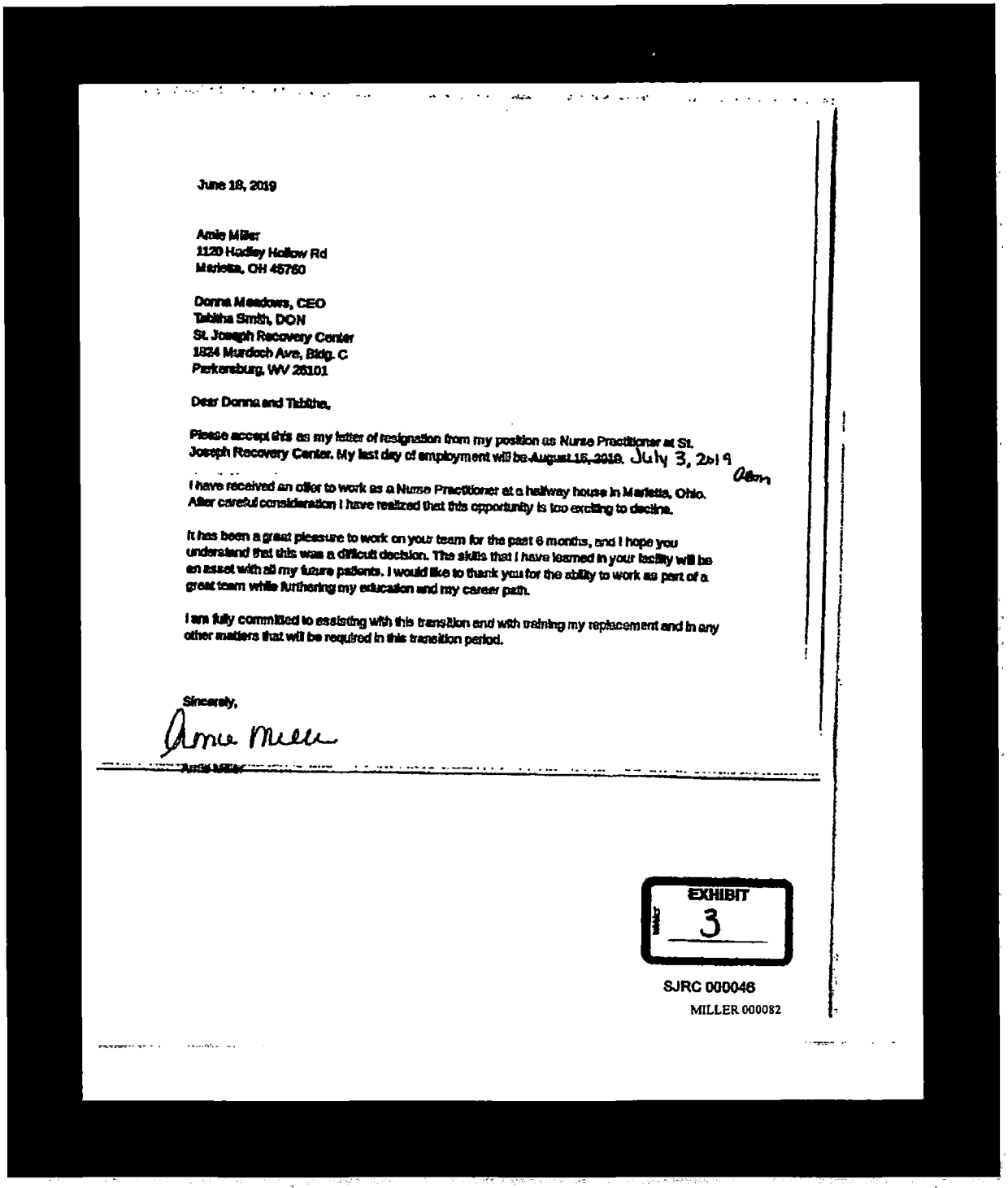
[1]Payroll was not timely paid by SJRC on March 29, 2019, April 12, 2019, April 26, 2019, and June 7, 2019 APP 000371-372. Eleven days following SJRC's fourth failure to make payroll on time, Petitioner submitted her resignation.

[2] Only the version of the resignation letter actually accepted by SJRC is a part of the record at APP 000082, as no discovery was conducted by Respondent SRJC and no evidence was offered by SJRC at trial.



June 18, 2019

Amie Miller
1120 Hadley Hollow Rd
Marietta, OH 45750

Donna Meadows, CEO
Tabitha Smith, DON
St. Joseph Recovery Center
1824 Murdoch Ave, Bldg. C
Parkersburg, WV 26101

Dear Donna and Tabitha,

Please accept this as my letter of resignation from my position as Nurse Practitioner at St. Joseph Recovery Center. My last day of employment will be ~~August 15, 2019~~ July 3, 2019 Amm

I have received an offer to work as a Nurse Practitioner at a halfway house in Marietta, Ohio. After careful consideration I have realized that this opportunity is too exciting to decline.

It has been a great pleasure to work on your team for the past 6 months, and I hope you understand that this was a difficult decision. The skills that I have learned in your facility will be an asset with all my future patients. I would like to thank you for the ability to work as part of a great team while furthering my education and my career path.

I am fully committed to assisting with this transition and with training my replacement and in any other matters that will be required in this transition period.

Sincerely,

Amie Miller

Amie Miller

EXHIBIT
3

SJRC 000046
MILLER 000082

APP 000082; 000361-000364.

After her resignation Petitioner requested the severance due to her by virtue of the *Employment Agreement* and the earned and accrued but unused paid-time-off as permitted by the *Employee Handbook*. SJRC refused to pay either, despite Aime Miller departing SJRC in good

standing and upon the two-week notice period directed by SJRC CEO Meadows. APP 000361-364, 000374-375.

In support of her claim for severance pay, Petitioner relied upon the *Employment Agreement* which provided that any resignation for a "good reason" entitled the Petitioner to severance benefits from SJRC. The pertinent provisions of the *Employment Agreement* begin with section 4.4:

> 4.4 Voluntary resignation
>
> In the event that the Employee voluntarily resigns the Employee will give a minimum of three (3) months advance written notice to the Company, except in the case of voluntary resignation for Good Reason as provided for in this Agreement. In the event that the Employee resigns for Good Reason, he shall be entitled to the Severance Package set forth in Section 4.6 below.

The definition of "good reason" as well as the eligibility for severance payments is found in section 4.6 of the *Employment Agreement:*

> ***(4.6) Termination by the Company without Cause; Resignation for good reason.***
>
> a) **The company may terminate the employment of the employee** in its absolute discretion, without Cause, and for any reason, **upon providing the Employee with** one (1) month notice and **a Severance Package ("the Severance package")** consisting of Base Salary paid monthly in accordance with the Company's normal payroll practices for the lesser of (A) the number of full months of the then remaining term of the Agreement; **or (b) three (3) months, together with health coverage during the severance period.** The provisions of the Severance Package shall constitute full and final satisfaction of all rights and entitlements that the Employee has or may have arising from or related to the termination of his/her employment, whether pursuant to statute, contract, common law, or otherwise." [3]

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[3] This last sentence which attempts to restrict Petitioner's remedies under the Wage Payment & Collection Act is prohibited by West Virginia Code § 21-5-10 (1975) which provides:

> Except as provided in section thirteen [§21-5-13], **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.

(b) **Employee's employment will be deemed to have been terminated without cause** ***if the Company materially breaches its obligations to provide him/her compensation or benefits*** or breaches any other material term of this Agreement, ***each reason of which shall constitute "Good Reason" for resignation*** by the Employee as set forth in Section 4.4, above, or in the event that there is a change of control, and the Company's successor does not assume and honor this Agreement. (emphasis added)[4]

The "*Employee Handbook*" issued to Petitioner when she was hired also contained provisions pertaining to procedures for resignation, termination, and severance, and stated, in pertinent part:

> Because you are employed at will, either you or the company may terminate the employment relationship at any time, for any reason, with or without notice (if employee is under an employee agreement, employment termination by either party will follow the terms of the contract). Employees providing proper notice will be considered to have left in good standing and may be eligible for the payment of certain accrued, unused paid time off. Those employees deemed to have not left in good standing will not be eligible for any accrued, unused paid time off, and they will not be eligible for rehire. *Employee Handbook*, Section 3.8 ("Employment at Will") *Meadows 30(b)(7) TR 35-38*, APP 000148.

As to the notice requirements for voluntary resignations, SJRC's *Employee Handbook* further provides:

> Employees who resign voluntarily are required to submit their notice in writing to the program director and supervisor. Written notice must include the date the notice is given and the time period of intended notice. Management and all salaried staff are expected to provide a (30) thirty-day notice, and all other positions must provide a (2) two-week notice. **Employees who fail to work the proper notice will not be eligible for the payment of eligible, available paid time off** and will not be eligible for rehire. (emphasis added) *Employee Handbook*, Section 3.15 ("Voluntary Resignation Procedure"). APP 000005, 000021, 000028, 147-149

This Court has also noted that employees' rights to wages conferred by the Act cannot be affected by equitable principles, such as estoppel. Britner v. Medical Sec. Card, 200 W. Va. 352, 489 S.E.2d 734, (1997) (citing W. Va. Code § 21-5-10).

[4]Additionally, Section 4.,7 of the *Employment Agreement* entitled "Total Severance Compensation" provides that: "Except as set forth in this Agreement, the Employee shall not be entitled to any compensation for wrongful dismissal, severance pay, or termination pay, if the employment of the Employee is terminated pursuant to the terms hereof." Complaint ¶ 3, Answer ¶ 3. APP 000003-4, 000028.

B. Procedural Background

When SJRC would not pay accrued paid-time-off and severance pay, Petitioner filed this action on September 10, 2019, requesting a jury trial on these matters. APP 00003-000021. In its *Answer,* SJRC admitted that Petitioner was employed under the terms of the agreement which was attached as Exhibit A to the complaint and similarly requested a trial by jury. APP 000027-28. The civil case information sheets of Petitioner and all named Defendants including SJRC requested jury trials. APP 000032, 000041.

An agreed scheduling order was entered on January 31, 2020, setting this case for jury trial on September 1, 2020. APP 000043. Deadlines for the submission of jury instructions were established, and the court-below directed that "the provisions of this order and the resultant scheduling order shall be controlling in the management of this case." APP 000045; 000049.

Thereafter, SJRC's "*Motion for Summary Judgment*" was briefed by the parties and a hearing was held on August 11, 2020. APP 000050-000244. As to Petitioner's entitlement to reimbursement of accrued paid-time-off provided for in the *Employee Handbook*, SJRC argued that the *Employment Agreement* controlled and that the *Employee Handbook* did not apply whatsoever to Petitioner's employment, thereby depriving Petitioner of payment of accrued paid-time-off. APP 000216-218. SJRC then relied upon Petitioner's letter of resignation to assert that Petitioner had not resigned because of not being paid on time. APP 000218-219. SJRC further asserted that the severance package provided for in the employment agreement was not compensation for labor or services rendered and therefore did not constitute "wages" under the

Wage Payment Collection Act thereby eliminating any civil penalties under the Act due for the nonpayment of such severance package. APP 000229-230.[5]

As to the issue of whether the severance package constituted wages, Petitioner directed the trial court to the *Employment Agreement* which defined the payments as "a Severance Package ("the Severance package") consisting of Base Salary paid monthly in accordance with the Company's normal payroll practices." Thus, SJRC's *Employment Agreement* by its plain terms provided that severance constitutes wages. APP 000238-239. As to the purported inapplicability of the *Employee Handbook,* SJRC's handbook did not specifically state whether an employee's entitlement to accrued PTO was affected by a separate employee agreement or not. Therefore, relying upon this Court's ruling in Meadows v. Wal-Mart Stores, 207 W. Va. 203, 530 S.E.2d 676 (1999), Petitioner argued that any ambiguity should be resolved in favor of payment of accrued paid-time-off. APP 000240-241.

The trial court nevertheless held that SJRC's *Employee Handbook* had no bearing on the case and therefore Petitioner was entitled to none of her accrued PTO. (APP 000266-267; *Letter from Judge Jason A. Wharton, August 11, 2020*). Further, the court-below determined that the severance pay provided for under the *Employment Agreement* did not constitute wages as defined by the Wage Payment Collection Act. The court-below also found that "although the [resignation] letter submitted to St. Joseph Recovery Center appears on its face to be dispositive of the issue, counsel for the Plaintiff sets forth reasonable grounds that a jury should be permitted to evaluate

[5] SJRC noted that it would not object to certifying to this Court the question regarding severance pay or to staying the proceedings pending the outcome of such certified question. APP 000230-231.

concerning the Plaintiff's reasons for leaving her employment." [6] Finally, Defendants St. Joseph's Operating Company LLC and Siltstone Holdings, LLC were dismissed from the case.[7]

A final pretrial hearing was conducted on August 24, 2020 during which a variety of issues relating to jury selection in light of the Covid-19 pandemic restrictions were discussed by counsel and the Court. APP 000278-287. Following this pretrial hearing, an email exchange was initiated by counsel for SJRC where for the very first time SJRC asserted that the provisions of the *Employment Agreement* (Section 7.6) constituted a waiver of Petitioner's right to trial by jury – a waiver which SJRC now belatedly sought to enforce. APP 000289-293. Based upon this email, the Circuit Court scheduled a hearing for August 26, 2020 at 8:45 a.m. via Skype on the issue of whether the Petitioner was entitled to proceed with the trial by jury.[8]

At this hastily scheduled hearing, the Circuit Court *sua sponte* raised the issue of whether the law of the State of West Virginia or the law of the State of Texas applied to the case despite the fact that SJRC had never before raised the issue of whether Texas or West Virginia law applied. APP 000297. Petitioner's objections to the lack of any notice as to these two important, substantive issues (jury waiver and choice of law) when neither issue had ever been raised, argued, or briefed at any point in these proceedings, were ignored. APP 000299-300. Petitioner correctly noted that this case was brought pursuant to West Virginia law, briefed under West Virginia law, and argued

[6] Although counsel for SJRC was directed by the trial court to submit an order consistent with the Court's findings, no such order was ever presented or entered. APP 000267.

[7] Petitioner does not appeal the dismissal of these Defendants from this case.

[8] The transcript of this hearing appears at APP 000294-308.

under West Virginia law including argument upon SJRC's summary judgment motion. Moreover, both parties had sought the right to trial by jury, had prepared and submitted jury instructions on that basis, and had conducted the pretrial hearing on that basis. APP 000301.

The court-below nevertheless overruled Petitioner's objections, holding that there was no prejudice to the Petitioner in being denied an opportunity to present the issue of her reason for resigning to a jury. APP 000301-302. The trial court also – again without notice, input or briefing from the parties –found that the *Employment Agreement* constituted a waiver of Petitioner's right to a jury trial and that therefore she was "not entitled to a jury trial" and would instead "be heard at a bench trial." APP 000303. The trial court noted that it intended to conduct and resolve the case pursuant to Texas law on its own motion over Petitioner's objection and to do so on the previously scheduled trial date - five days later on September 1, 2020. APP 000305-306. Again, no *Order* was prepared memorializing these rulings and not findings or fact or conclusions of law were made.

C. The Trial

On September 1, 2020, a mere five days after these game-changing rulings were issued, a non-jury, bench trial before Judge Wharton was conducted.[9] Three witness were called to testify, two former employees of SJRC, Tabitha Smith and Gina Elschlager, and the Petitioner Aime Miller.[10] Although SJRC's CEO, Donna Meadows attended the trial as SJRC's corporate

[9] The trial record is found at APP 000309-380. No *Order* reflecting the finding and rulings of the trial court made on August 26, 2020 was ever entered.

[10] Two exhibits were admitted. Exhibit 1 was the *Employment Agreement.* APP 000356. Exhibit 2 was Petitioner's letter of resignation. APP 000082, 000361-366.

representative, neither she nor any other witnesses were called by SJRC nor was any evidence presented by SJRC.

Witness Tabitha Smith was also employed by SJRC under an employment agreement identical to the Petitioner's agreement. APP 000316-317. Ms. Smith was also a Nurse Practitioner and served as Director of Nursing and as Petitioner's direct supervisor. APP 000317.[11] Tabitha Smith recounted the problems created by SJRC's failure to pay its employees their salaries on time as well as its failure to pay health insurance premiums. APP 000318. When Ms. Smith asked her supervisor why the premiums had not been paid, she was given conflicting information. APP 000319. Ms. Smith and others made SJRC CEO Donna Meadows aware that employees had not been paid. APP 000319-322. Ms. Smith noted that the March 29, 2019 pay due to her and her SJRC co-workers was not received until April 17, 2019, over two weeks after it was due. APP 000322. Ms. Smith reported that the SJRC staff was so upset about not being paid that she had rescheduled planned interviews of applicants because she was concerned the SJRC staff would mention that they had not been paid to one of the applicants. APP 000323.

Ms. Smith also described a text exchange with Aime Miller regarding Petitioner not being paid where Ms. Smith had apologized to the Petitioner for SJRC's failure to pay her in a timely manner. APP 000323-324. Ms. Smith also contacted SJRC CFO Lori Fairchild and informed her that many SJRC employees were disgruntled because they had not been paid. APP 000325. At that time, Ms. Smith was told that one reason for the hold up in payment was that SJRC's owner had

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[11] Ms. Smith testified that she was represented by Petitioner's counsel in similar litigation but noted that all of the exchanges which she described in her testimony were contemporaneously documented and accurately recounted in her testimony. APP 335-336. Despite this testimony, counsel for SJRC never asked to see the documentation of the exchanges with SJRC management which Smith relied upon while testifying. APP 000336-339.

not approved payroll. APP 000326. Ms. Smith and other managers discussed the fact that SJRC would lose staff as a result of the fact that its employees felt insecure about being paid. APP 000326-327.

When Ms. Smith was not paid again on April 26, 2019, another text exchange with SJRC CEO Donna Meadows occurred and Ms. Smith warned CEO Meadows at that time that continuing problems with receiving timely payroll would result in resignations. In that text exchange on April 26, 2019, Tabitha Smith told CEO Meadows "I am seriously afraid we are going to end up losing staff." APP 000327-328. CEO Meadows responded, promising payroll would be made good for all employees on the following Monday, but the promised payday did not happen on Monday. APP 000329-000330. When Ms. Smith confronted SJRC CFO Lori Fairchild about SJRC's continual failure to timely make payroll, Fairchild responded that SJRC employees "need[ed] to put their big girl panties on and deal with it." APP 000330.[12]

Tabitha Smith was also asked at trial about her interactions with CEO Meadows regarding the three months' notice she had provided when Smith resigned her employment from SJRC in June 2019. After sustaining a defense objection based upon relevance, the trial court refused to permit Petitioner's counsel to vouch the record and would not allow further discussion of the matter. APP 000331-332. Tabitha. Smith resigned four days after SJRC failed to make payroll (again) on June 7, 2019. APP 000332.

Ms. Smith also touched upon her discussions with Aime Miller regarding Miller's resignation from employment while both were still working at SJRC, and described the conversations leading up to Petitioner's resignation as follows:

[12] Ms. Smith also filed a complaint with the West Virginia Department of Labor based upon the SJRC's failure to pay wages on April 29, 2019. APP 000332-333.

Q. And can you tell us what it was that Ms. Miller told you while you were both still working that was leading her to resign her employment from SJRC?

A. Every payday that was late, she would get a little more despondent and upset each payday, and after about the second or third payday she was like, "I can't do this when I don't know when I am going to get paid. So I'm going to start looking because who knows, there is going to be a day that we're going to end up not getting paid." APP 000333.

Tabitha Smith and her boss CEO Meadows also discussed the fact that SJRC's failure to timely pay wages had understandably undermined Meadows' own willingness to remain employed at SJRC:

Q. Have you had conversations with Ms. Meadows and Ms. Fairchild -- I'm sorry. Ms. Meadows, about Ms. Meadows herself resigning because she was not getting paid?

A. When the three of us – I know that me and Amie and Donna were in the office. I am not sure if Jordan was there that day or not. We were kind of talking about pay being late and everybody was upset and Amie made the comment, "You know, this is bad. How do I know that one day we are not just going to come in and not be paid" and Donna made the comment that she had left a really good job to come to this and if she felt like it was going to be an issue, she wouldn't still be there, but she had left a good job at the VA and she could not continue going on without getting paid for very long either. APP 000334-335.[13]

Tabitha Smith also recalled one time where at SJRC's request, she, the Petitioner and three other managers verbally agreed to allow SJRC to pay them late so that subordinate hourly staff

[13] Ms. Smith also noted that CEO Meadows volunteered that she was still owed a substantial sum she (Meadows) had personally advanced to SJRC for business expenses:

Q. Did Ms. Meadows also complain to you and Ms. Miller that she personally fronted a substantial amount of expenses to SJRC for which she hadn't been reimbursed?

A. Correct. She said roughly, I don't remember the exact amount, but roughly around $15,000 that she put into paint and pictures and different things to get the place ready for open-house and said she still hadn't gotten reimbursed, so it was not just us that wasn't getting paid. She was not reimbursed at that time either. APP 000334 -335.

could be paid on time. APP 000340. However, despite soliciting this agreement from Smith and others to allow SJRC to pay the hourly staff on time, SJRC failed to pay ANY of the employees on time. APP 000341.[14]

Another former employee Gina Elschlager, a behavioral health technician employed by SJRC in December 2018 also recalled the problems with being paid on time. APP 000344-345. Ms. Elschlager testified that on four occasions in April and June of 2019 she was not paid on time and that, on each occasion, she went to Director of Nursing Tabitha Smith about it. Although Ms. Elschlager testified to the four times that SJRC failed to pay her on time before she resigned on July 2nd, the court-below refused to allow her to testify as to why she had resigned. APP 000349. Ms. Elschlager was also not paid accrued overtime which she had earned during her employment and was never reimbursed in any form for the overtime she had worked. APP 000351-352. Frustrated regarding the payroll issues, Ms. Elschlager eventually emailed the SJRC owner directly, describing the effect that not getting paid was having on SJRC employees. APP 000345-000348. Ms. Elschlager requested that the owner pay the staff on time, but the problem continued. APP 000348-352.

The non-jury trial concluded with Aime Miller who testified that she had signed her *Employment Agreement* with SJRC on December 20, 2018 and began working on January 2, 2019. APP 000358-000359. This agreement provided that payment of the Petitioner's base salary was to be "made in accordance with the company's regular payroll practices." APP 000357. Regular payroll practices for SJRC required that payroll be direct deposited in employee accounts every

[14] The Court refused to allow Petitioner to elicit testimony from Tabitha Smith regarding SJRC actually deducting payroll hours for hourly employees before paying them. APP 000341-342.

other Friday. APP 000357. The Petitioner noted that her resignation was "for good reason" as provided by the *Employment Agreement*, Section 4.6 as follows:

> Q. Direct your attention to page 7 of Exhibit 1 Subheading B [the *Employment Agreement*]. This will be the full paragraph on page seven of Exhibit 1. The language there, Ms. Miller, is "Employee's employment will be deemed to have been terminated without Cause if the Company materially breaches its obligations to provide him/her compensation or benefits or breaches any other material term of this Agreement, each reason of which shall constitute 'Good Reason' for resignation by the Employee as set forth in Section 4.4 above.
>
> A. Yes.
>
> Q. Did you understand that your resignation for good reason would result in you being paid severance pay pursuant to this document?
>
> A. Yes.
>
> Q. Is it accurate that you were not paid timely, your pay pursuant to the regular pay, was not paid timely to you on March 29, April 12, April 26, and June 7, 2019?
>
> A. Yes.
>
> Q. Did you begin the look for work elsewhere as a result of not being paid timely by SJRC?
>
> A. Yes. APP 000359-360.

Ms. Miller also recalled that she, SJRC CEO Meadows, and SJRC Director of Nursing Smith had had multiple conversations regarding SJRC's failure to pay employees on time. APP 000360-361. Ms. Miller had also become aware that hourly employees at SJRC were not being paid on time either. APP 000364. As a result of SJRC's failure to pay her and other employees on time, the Petitioner understandably began to look for a new job in April 2019:

> Q. Why did you decide to look for work in April of 2019?

A. After the paychecks started not coming in on time, I just decided that this was not a stable place to work. I have children I need to raise and I need a paycheck and in my mind, if they are late now, at some point I feared that we were not going to get paid at all. APP 000364.

Ms. Miller also discussed her resignation letter, *Exhibit 2*, noting that she had prepared two resignation letters, one providing for a three-month notice period and one providing for a two-month notice period. APP 000361-363. Petitioner took both resignation letters to CEO Meadows and discussed them with her, commenting to CEO Meadows that her *Employment Agreement* required three-months-notice, and that she had therefore prepared letters with both a three-month and two-month notice period and asking CEO Meadows which notice period she preferred. CEO Meadows responded that since SJRC was not generating sufficient revenue to justify the salaries of two Nurse Practitioners, a two-week notice would be adequate. Thus, SJRC voluntarily agreed to shorten Aime Miller's resignation notice period to two weeks, a fact noted on the resignation letter itself in CEO Meadows' handwritten edit to the letter shortening the notice period from August 15, 2019 to July 3, 2019. APP 000082, 000363-364.

Petitioner also explained that she did not include any reference to the lack of timely payment of wages in her resignation letter because she did not feel it was appropriate:

A. I was raised that you don't burn your bridges. We live in a small community. There are not many places for nurse practitioners to work. How would I know if later on down the road if I was going to go work at, let's say, WVU Medicine, Donna could be hiring there: she could be working there. You just don't burn your bridges.

Q. Were both Ms. Meadows and Ms. Smith fully aware of the actual reasons for your resignation?

A. Yes. It was discussed numerous times. Every time the pay was late there was discussion about, you know, when is it going to be that we are not going to get paid. I have a family. I am not sure how long I can continue to work here without fear of not having a paycheck.

Q. Did Ms. Meadows actually express to you her concern about her own ability to stay because she wasn't getting paid herself?

A. During that meeting for the April 12th pay period when she asked Tabitha and I to hold our pay, I asked, "How much longer is this going to continue?" She didn't know. She assured us she felt at some point we were going to get paid, that she was owed quite a bit of money for renovations that she had done and did state she wouldn't have come to work here if she didn't feel that we would be getting paid because she had a very good job before she came here. But she agreed if this was something that was going to continue, she may have to look as well.

Q. After that conversation, two more times you were not paid timely, correct?

A. Correct.

Q. Was not getting paid the reason you looked for and accepted employment elsewhere, Ms. [Miller]?

A. Yes. APP 000365-366

Ms. Miller also confirmed that the *Employment Agreement* entered into between the parties included SJRC's failure to pay her timely when wages were due as a "good reason" to resign. APP 000375-376.

By *Order* entered September 2, 2020, the day following the bench trial in this matter, the trial court denied Aime Miller all relief. Despite acknowledging that SJRC had materially and repeatedly breached its obligation to make payments of Petitioner's base salary in accordance with the company regular payroll practices, the court-below nevertheless concluded that Aime Miller had not resigned because she was not paid on time during March, April, and June of 2019 immediately before her resignation. APP 000382-383. Petitioner appeals each of these adverse rulings.

III. SUMMARY OF ARGUMENT

1. Petitioner Aime Miller was not an at-will employee. She was employed under both a written contract – the *Employment Agreement* - and pursuant to an *Employee Handbook* defining the terms and conditions of her employment. Both documents were presumably drafted by and were most definitely issued by SJRC. Petitioner's *Employee Agreement* required SJRC to pay her salary on a bi-weekly basis. It was undisputed and the Circuit Court found that SJRC failed to meet this contractual obligation no less than four times during April, May and June 2019, immediately preceding Petitioner's June 18, 2019 resignation. Thus, based upon the *Employment Agreement* the Petitioner is entitled to receive the severance payments provided for in Section 4.6(b) of that agreement as she voluntarily resigned for a "good reason."

2. By the terms of its own *Employment Agreement,* the severance benefits to which the Petitioner is entitled are wages. Accordingly, the civil penalty provisions of the West Virginia Wage Payment Collection Act found at West Virginia Code §21-5-4(e) (as amended 2015) apply to SJRC's failure to timely pay those wages to the Petitioner. The trial court misconstrued the West Virginia Wage Payment And Collection Act which defines "wages" to include fringe benefits. W.Va. Code §21-5-1(c) (as amended 2015). Further, the trial court failed to make the requisite findings of fact and conclusions of law in connection with this ruling.

3. Without any analysis or consideration of the legal standards of waiver, the trial court improvidently and abruptly forced this matter to be tried as a bench trial after its hasty determination that Petitioner had waived her right to a jury trial. The fact that SJRC demanded a jury trial, entered into an agreed scheduling order setting the case for jury trial, submitted jury instructions and then, without notice, abruptly moved the Circuit Court to deprive Petitioner of a

jury trial. This untimely request was granted over Petitioner's objection just days before the scheduled trial. The Petitioner should have been afforded a trial by jury as any alleged waiver of a jury trial had been overlooked and waived by SJRC.

4. The court below exceeded its authority when it improperly ruled *sue sponte* that Texas law applied to Petitioner's remaining severance claim just days before trial. Neither party sought this ruling, and this issue was considered without notice to or argument from the parties. This case was pled, briefed, and argued by the parties under West Virginia law, specifically pursuant to the West Virginia Wage Payment Collection Act, West Virginia Code Chapter 21, Article 5. Not only had the choice of law provision been waived by the parties' conduct, rights granted under the West Virginia Wage Payment Collection Act cannot be restricted or contracted away - which was the result of the trial court's choice of law ruling. Further, the trial court's cursory *Trial Order* disposing of this matter cited no provision of Texas law thereby further convoluting the basis for the trial court's decision in this matter.

5. Since the *Employment Agreement* did not address payment of accrued paid-time-off at termination of employment, and the *Employee Handbook* allowed Petitioner to be paid her accrued paid-time-off, Petitioner's entitlement to payment of accrued paid-time-off after resigning is ambiguous at best. As such, such ambiguity must be resolved in favor of the employee. Meadows v. Wal-Mart Stores, 207 W. Va. 203, 530 S.E.2d 676 (1999). Accordingly, it was error for the court-below to deny this claim, particularly without the entry of an *Order* making proposed findings of fact and conclusions of law.

IV. STATEMENT REGARDING ORAL AGRUMENT

Pursuant to WVRAP 18(a) of the West Virginia Rules of Appellate Procedure, Petitioner asserts that should this Court reach the question of whether or not the severance package at issue in this matter constitutes "wages" under the West Virginia Wage Payment Collection Act, then oral argument may be necessary pursuant to Rule 20 as this case raises a question of first impression. Otherwise, Petitioner asserts that oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate as this case concerns a claim where the result is against the weight of evidence.

V. ARGUMENT

Standard of Review

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 1, Public Citizen, Inc. v. First National Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996); Timberline Four Seasons Resort Mgmt. Co. v. Herlan, 223 W.Va. 730, 732, 679 S.E.2d 329, 331 (2009) (Syl. Pt. 2). In this instance, the trial court's cursory *Order* disposing of this matter after bench trial contains "ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations..." therefore it "must be reviewed *de novo*." *Syl. Pt. 1*, in part, State ex rel. Cooper v. Caperton, 196 W.Va. 208, 470 S.E.2d 162 (1996).[15]

[15] Additionally, this Court has held that interpretation of contracts is reviewed *de novo*. Syl. Pt. 4, Blackrock Capital Investments Corp. v. Fish, 239 W.Va. 8991, 799 S.E.2d 520, 522 (2017).

1. **The Circuit Court erroneously dismissed the Petitioner's claim for severance after concluding that she did not resign for a "good reason" as defined by the *Employment Agreement,* and that she was therefore not entitled to the severance package. After correctly holding that SJRC had repeatedly and materially breached the *Employment Agreement* by failing to pay Petitioner on time, the lower court's finding that the Petitioner resigned for reasons other than being paid late on four times in the less than six months she worked at SJRC is contrary to the overwhelming evidence in the record, defies logic and requires reversal and remand of this matter.**

The Circuit Court's consideration of whether the Petitioner had resigned for a "good reason" was improperly based upon a prosecution-like dissection of Petitioner's motivations rather than the applicable terms of the *Employment Agreement*. For instance, the trial court observed that on the day she tendered her resignation letters to CEO Meadows, Petitioner did not mention the severance package. From this omission, it was inferred that Petitioner's actions were therefore "inconsistent with the position that at the time of the presentation of her letter of resignation that she believed she was entitled to the severance package set forth in the employment agreement." However, the Petitioner's belief at that or any other moment that she was or wasn't entitled to severance benefits has no bearing whatsoever on whether or not the *Employment Agreement* required payment of severance to Aime Miller.

Further, all other evidence in the record directly contradicts the trial court's inference. For instance, the fact that Aimee Miller and CEO Meadows had repeatedly discussed the fact that both were contemplating leaving employment due to SJRC's continued failure to pay them and others on time was never mentioned. Neither was the fact that CEO Meadows knew that the Petitioner was resigning because she was not being paid on time. APP. 000362-365. Nor were Ms. Miller's discussions with her supervisor Tabitha Smith and CEO Meadows in which Ms. Miller told both

SJRC managers, "You know this is bad. How do I know that one day we're going to come in and not be paid?" APP 000334. Petitioner's well-founded concern stemming from SJRC's repeated failure to pay her on time was accorded no weight by the trial court when it is hard to conceive of a more compelling or logical reason for an employee to be concerned, or to ultimately resign.

Nothing in the *Employment Agreement* required Petitioner to raise the severance payment issue while she was resigning or else to have waived that claim. Thus, whether she demanded that payment at that meeting, or whether she had the legal acumen to be able to sufficiently understand and parse the *Employment Agreement* to discern whether she did or didn't have a legal claim has no bearing on whether she resigned for a "good reason" as defined in the *Employment Agreement* and was therefore due the agreed upon severance. APP 000333-335.

Nor did the notice attempted or offered by the Petitioner eliminate her claim for severance. Though the trial court reasoned that the presentation of two letters of resignation (one providing for two-months-notice and one providing for three-months-notice) was inconsistent with Petitioner's claim that no notice was needed because she was resigning for a "good reason" pursuant to Section 4.4 of the *Employment Agreement,* this conclusion is similarly flawed. First, Petitioner sought to comply with the written terms of the *Employment Agreement* prominently requiring three-months-notice for a voluntary resignation (Section 4.6) as best as a nonlawyer could. Second, Petitioner was also considering her professional obligations to her clients as a Nurse Practitioner. The adverse inference that Petitioner's good-faith attempt to provide adequate notice undermines her claim that she was leaving for a "good reason" (not being paid) is nonsensical and contrary to every inference which could logically be drawn from the evidence. Additionally, in

any event, the notice offered was unilaterally changed by SJRC because they admittedly could not afford to continue to pay the Petitioner.

Taking this illogical analysis one step further, the trial court then framed the issue of Petitioner's resignation letter in light of the adverse inferences drawn regarding notice required by the contract, and not mentioning severance in the moment, and then concluding that those facts "lend more weight and credit to the specific words chosen by the [Petitioner] in composing her resignation letter." Despite recognizing the undisputed proof that SJRC had breached its *Employment Agreement* with Petitioner by not paying her on time on multiple occasions, the trial court nevertheless held that she had "failed to prove by preponderance of the evidence that her resignation constituted termination without cause under the terms of the contract" or resigning for a "good reason" and further found that "the Plaintiff voluntarily resigned her employment and is therefore not entitled to the severance package set forth in the employment agreement."[16] APP 000382-000383.

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[16] It was undisputed that Petitioner complied with all procedures required by SJRC for voluntary resignation. Respondents' 30(b)(7) designee testified as follows:

> Q. Okay. But back to the -- back to the terms of the notice though, Designation 9 regarding Paragraph 10 of the complaint indicates that "Ms. Miller complied strictly with all procedures required for voluntary resignation." Is it accurate that she complied with all of the requirements in the employee handbook which defined voluntary resignation?
>
> A. Yes.
> Q. And that if the handbook applied to her, she was eligible for -- to receive her accrued and unused vacation time as of her separation from employment?
>
> A. If the handbook applied. Again, our belief is the employment agreement controls the terms of employment. *Meadows 30(b)(7) TR 44,* APP 000148-149.

In fact, SJRC was hard-pressed to deny that Petitioner was entitled to her severance wages if she resigned because of a failure to timely pay her wages four times in the three months preceding her resignation. As CEO Meadows stated at her deposition:

> Q. My question, though, is: Is it correct, Ms. Meadows, that if a judge or jury in this case determines that failing to pay Ms. Miller on a timely basis her wages due four times within three months constitutes good cause for her resignation, that then St. Joseph's Recovery Center owes her the severance that's set forth in her employment agreement; right?
>
> BY MR. REALE:
> Same objection. You can answer if you can.
>
> A. If a judge and jury decided that, yeah, I guess. Yes.
> *Meadows 30(b)(7) TR 47;* APP 000149.

It is difficult to find any evidence in the record supporting the clearly erroneous conclusion that Petitioner's resignation was caused by something other than SJRC's failure to pay her wages on time. The record overwhelmingly supports Petitioner's resignation being caused by SJRC's repeated material breach of her employment contract. No findings were made denigrating the credibility of the Petitioner or the two the witnesses who supported the obvious conclusion that repeatedly not being paid in a timely manner caused Petitioner to resign. Regardless of this clearly erroneous conclusion by the court-below, Aimee Miller is nevertheless entitled to severance because SJRC admittedly violated the *Employment Agreement* consistent with termination of her employment without cause: "Employee's employment **will be deemed to have been terminated without cause if the Company materially breaches any other obligations to provide him/her compensation.**" (emphasis added). Nothing in the *Employment Agreement* required proof of anything other than or beyond SJRC's repeated failure to pay to her the agreed upon compensation, in order to entitle Petitioner to severance, which the Circuit Court found had occurred. In fact, the trial court's conclusion that Aime Miller resignation was not caused by not being paid on time is

completely contrary to the norms of the workplace and logic. Employees seek work to earn their pay. When they were repeatedly not paid on time by their employer, Petitioners and others similarly situated were forced to look for other work so she (and they could) count on being paid in order to support her family (their families).[17]

""Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, Bethlehem Mines Corp. v. Haden, 153 W. Va. 721, 172 S.E.2d 126 (1969)." Syllabus point 2, Orteza v. Monongalia County General Hospital, 173 W. Va. 461, 318 S.E.2d 40 (1984)." Syllabus point 3, Waddy v. Riggleman, 216 W. Va. 250, 606 S.E.2d 222 (2004). Additionally, ""[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syllabus Point 3, Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962)." Syllabus point 1, Hatfield v. Health Management Associates of West Virginia [, Inc.], 223 W. Va. 259, 672 S.E.2d 395 (2008) (*per curiam*)." Syllabus point 5, Dan's Carworld, LLC v. Serian, 223 W. Va. 478, 677 S.E.2d 914 (2009). By searching for the "motivation" of the Petitioner herein, the court-below has unquestionably run afoul of both of these well settled principles of contract law. Moreover, the circuit court's letter ruling herein summarily disposing of Petitioner's claims fails the fundamental test which requires that "courts must be careful not to wear blinders." Rather "[t]he judge must sift

[17] ""A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." [Syllabus point 1,] Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962)[.]' Syllabus point 1, Bennett v. Dove, 166 W. Va. 772, 277 S.E.2d 617 (1981)." Syllabus point 6, Dan's Carworld, LLC v. Serian, 223 W. Va. 478, 677 S.E.2d 914 (2009). *See also*, Benson v. AJR, Inc., 226 W. Va. 165, 167, 698 S.E.2d 638, 640 (2010).

the evidence produced at trial and gather enough information to paint a true picture of the attendant facts and circumstances." Brown v. Gobble, 196 W. Va. 559, 569, 474 S.E.2d 489, 499 (1996). The Circuit Court demonstrably failed to do.

2. The Circuit Court's holding that the severance payments due to Petitioner pursuant to her *Employment Agreement* were not wages pursuant to the West Virginia Wage Payment and Collection Act was clearly erroneous as the terms of that agreement defined such severance payments as wages thereby triggering the applicability of the civil penalties under the West Virginia Wage Payment and Collection Act. The West Virginia Wage Payment and Collection Act, W.Va. Code §21-5-1(c) defines wages to include fringe benefits payable pursuant to W.Va. Code §21-5-4(e) and the lower court's ruling to the contrary is clearly wrong.

The Circuit Court's holding that the severance payments due to Petitioner pursuant to her *Employment Agreement* were not wages pursuant to the West Virginia Wage Payment and Collection Act was clearly erroneous. The trial court considered this issue pursuant to SJRC's summary judgment motion. By ruling in favor of SJRC and finding that severance pay was not "wages" pursuant to the West Virginia Wage Payment And Collection Act, W.Va. §21-5-1(c), the severance package outlined in the *Employment Agreement* in this case was excluded from the civil penalty provisions of the West Virginia Wage Payment Collection Act, W.Va. Code §21-5-4(e). Thus, had Petitioner established her claim for severance benefits to the satisfaction of the trial court, no civil penalties would be assessed for SJRC's failure to timely pay severance.

As Petitioner has established herein, she resigned from employment at SJRC for "Good Reason", in accordance with § 4.6(b) of her Employment Agreement, thereby entitling her to payment of the "Severance Package" outlined in § 4.6(a) of the agreement. Since that severance was not timely paid, Petitioner contends that civil penalties for the non-payment of wages are due to her as well as the severance payments.

This issue has not been settled by this Court. Accordingly, "[w]here the issue on appeal from the circuit court is clearly a question of law or involving the interpretation of a statute" this Court has applied "a *de novo* standard of appeal." *Syl. Pt. 1 in part,* University of West Virginia Board of Trustees ex rel. West Virginia University v. Fox, 197 W.Va. 91, 475 S.E.2d 91 (1996).

First and foremost, the terms of the *Employment Agreement* defined such severance payments as wages thereby triggering the applicability of the civil penalties under the West Virginia Wage Payment and Collection Act. W.Va. Code §§ 21-5-1 *et seq.* SJRC's employment agreement defines and describes the severance payments to be paid thereunder as wages: "a Severance Package ("the Severance Package") **consisting of Base Salary paid monthly in accordance with the company's normal payroll practices.**" (emphasis added). Severance payments "consisting of Base Salary paid monthly in accordance with the company's normal payroll practices" are by the terms of SJRC's own agreement, clearly wages under the West Virginia Wage Payment and Collection Act.

Additionally, contrary to the ruling herein, the West Virginia WPCA provides "**the term 'wages' shall also include then accrued fringe benefits capable of calculation and payable directly to an employee**: Provided, that nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his or her employees which does not contradict the provisions of this article." W. Va. Code Ann. § 21-5-1(c) [emphasis added].

While this Court has not directly addressed the applicability of civil penalties under the Wage Payment and Collection Act to nonpayment of severance pay, this Court held in Meadows v. Wal-Mart Stores, 207 W. Va. 203, 530 S.E.2d 676 (1999) that the provisions of any employment contract is binding as to fringe benefits. Meadows also provides guidance in interpreting

employment contracts when a dispute arises regarding whether fringe benefits are payable to an employee upon separation from employment:

> Terms of employment concerning the payment of unused fringe benefits to employees must be express and specific so that employees understand the amount of unused fringe benefit pay, if any, owed to them upon separation from employment. Accordingly, this Court will construe any ambiguity in the terms of employment in favor of employees. Meadows v. Wal-Mart Stores, 207 W. Va. 203, 207, 530 S.E.2d 676, 680 (1999)(Syl. pt. 6)[18]

Thus, while any ambiguity with regard to the payment of accrued fringe benefits "capable of calculation and payable directly to an employee" must be construed in favor of the Petitioner, instead, the court-below has instead drawn all such inferences against Petitioner. This erroneous ruling accordingly must be reversed.

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[18] In Lipscomb v. Tucker Cty. Comm'n, 206 W. Va. 627, 631, 527 S.E.2d 171, 175 (1999), a separate case decided in the same year as Meadows, this Court reiterated its deference to employees in employment contract claims:

> This case concerns a county employee, but the majority of our employment law jurisprudence concerns private employers. And while we recognize that many West Virginians are employed by small businesses, with varying degrees of legal sophistication, most businesses with a handbook or written wage and hour policy are larger operations. These larger businesses have usually employed major law firms, full of capable and intelligent attorneys with a full command of the Queen's English, as well as schooling in the nuances of our employment law. It is with such professional assistance, often over a lengthy period of time, that these businesses craft carefully their employment policies and handbooks.
>
> The employee, who usually does not have the benefit of professional legal training or advice, merely goes to work under the guidelines of the policy. He or she may receive a thick notebook of regulations, or may merely be told to read a posting, but the employee does not make the rules. As we observed in Meadows, "generally, employers draft the policies which are relied upon by employees." Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203, 530 S.E.2d. 676, 1999 W. Va. LEXIS 37, *36 (No. 25325, June 9, 1999). That is why we require employers to be specific in their terms. Thus, we reiterate, in less limited language, our specific holding from Meadows: where an employer prescribes in writing the terms of employment, any ambiguity in those terms shall be construed in favor of the employee. In other words, the employers, who give life to their policies, must also live up to their policies. Lipscomb v. Tucker Cty. Comm'n, 206 W. Va. 627, 631, 527 S.E.2d 171, 175 (1999).

3. **The Circuit Court abused its discretion when it improvidently and erroneously ruled that the Petitioner had waived her right to a jury trial in this matter based upon an untimely request from SJRC which did not allow sufficient notice or an opportunity to fully brief and argue this matter. The court-below failed to make the requisite findings regarding the very broad waiver of a right to a jury trial that was imposed. SJRC had entered into an agreed scheduling order setting this case for a jury trial and had submitted jury instructions. It was accordingly error to deprive Petitioner of a jury trial by granting SJRC's untimely motion over Petitioner's objection days before the scheduled trial.**

Without any analysis or consideration of the legal standards of waiver, the trial court improvidently and abruptly forced this matter to be tried as a bench trial after a hasty determination that Petitioner had waived her right to a jury trial. SJRC had demanded a jury trial, had entered into an agreed scheduling order setting the case for jury trial, had submitted jury instructions and then, without notice, abruptly moved the Circuit Court to deprive Petitioner of a jury trial. This untimely request was granted over Petitioner's objection just days before the scheduled trial. The Petitioner should have been afforded a trial by jury as any alleged waiver of a jury trial had been overlooked and waived by SJRC.

This Court has held that "[t]he right to a jury trial is so fundamental that procedural safeguards must be employed, including making an appropriate record of any waiver of this right, to ensure that a defendant's waiver of the right was made personally, knowingly, intelligently and voluntarily. State v. Neuman, 179 W. Va. 580, 584, 371 S.E.2d 77, 81 (1988); syl. pt. 3, State v. Redden, 199 W. Va. 660, 487 S.E.2d 318 (1997). State ex rel. Callahan v. Santucci, 210 W. Va. 483, 485, 557 S.E.2d 890, 892 (2001). The key in evaluating a claimed waiver of the right to trial by jury is whether the waiver "was personal, knowing, intelligent and voluntary." State v. Redden, 199 W. Va. 660, 662, 487 S.E.2d 318, 320 (1997)(Syl. pt. 5).

The standards for waiver of a non-constitutional right have been discussed by this Court recently. In Parsons v. Halliburton Energy Servs., Inc., 237 W. Va. 138, 785 S.E.2d 844 (2016) this Court considered the "common-law" doctrine of waiver, noting that the focus of the inquiry is upon the "party against whom waiver is sought" and that waiver requires that a "party ... intentionally relinquished a known right." Waiver can be inferred from actions or conduct. As this Court has further explained, "[t]he essential elements of the doctrine of waiver are: (1) the existence of a right, advantage, or benefit at the time of the waiver; (2) actual or constructive knowledge of the existence of the right, advantage, or benefit; and (3) intentional relinquishment of such right, advantage, or benefit." Bruce McDonald Holding Co. v. Addington, Inc., 241 W. Va. 451, 453, 825 S.E.2d 779, 781 (2019)(Syl. Pts. 3 & 4).

While this record is unclear as to whether the Petitioner intentionally relinquished her right to a jury trial, it can certainly be said that the elements of waiver exist in SJRC's initial demand for a jury trial, agreement to a jury trial in an agreed scheduling order, and submission of jury instructions. Then, in violation of the time frames set forth in the agreed scheduling order within which pretrial motions could be brought, SJRC finally raised the alleged jury waiver five days before trial. The Circuit Court's demand that the Petitioner demonstrate "prejudice" from the sudden assertion of the issue completely ignored the legal standards for waiver which should have applied.

No record exists as to whether Petitioner's alleged waiver of her right to trial by jury was personal, knowing, intelligent and voluntary as the issue was never noticed nor briefed. Rather, it was resolved five days before trial based upon an email exchange between counsel and the Court on August 24th and 25th and a brief telephonic hearing on the following morning, (August 26th,

2020). No inquiry whatsoever into the nature of Petitioner's alleged waiver was conducted by the trial court before abruptly ruling that the trial would proceed without a jury. APP 000300-305. Nor were any findings of fact or conclusions of law ever made or any *Order* prepared memorializing the trial court's consideration of this important issue.

Through its affirmative actions in this litigation as well as its dilatory failure to raise the issue of jury waiver until well past the eleventh hour, SJRC's right to rely upon the jury waiver was forgone.[19] Petitioner should have been afforded a trial by jury as SJRC's time to assert that she had waived her right to a jury trial had passed and had been waived by SJRC. APP 000289-307.

4. It was error for the Circuit Court to *sua sponte* and without notice raise the issue of choice of law just days before trial and to rule that the Petitioner's claim for severance pay would be resolved under Texas law due to a choice of law provision. This case was pled, briefed, and argued by the parties under West Virginia law, specifically the West Virginia Wage Payment Collection Act, West Virginia Code Chapter 21, Article 5, which serves an important public purpose in protecting the rights of West Virginians from wage theft, rights that cannot be contractually restricted. The lower court's cursory *Trial Order* disposing of this matter cited no provision of Texas law thus further convoluting the legal basis for the trial court's ruling.

Following the final pretrial hearing, the Circuit Court *sua sponte* and without notice improperly raised the issue of choice of law and held that the Petitioner's claim for severance would be resolved under Texas law due to a choice of law provision. Until the hearing held on August 26, 2020, just five days before the trial was scheduled, this case had been pled, briefed, and argued by the parties under West Virginia law without any mention whatsoever of applying Texas law. Most critically, SJRC never raised this defense or attempted to assert contractual rights under Texas law as it should have done in order to avoid waiving such rights. The parties and the

court-below had until that point in time, dealt with the contract at issue and the claims raised thereunder as arising and being interpreted under West Virginia law throughout this litigation until well past the eleventh hour. Under such a circumstance it was error for the Circuit Court to *sua* sponte impose its interpretation of the choice of law provision. [20]

This Court recently discussed a similar *sua sponte* and unsolicited choice of law ruling by a circuit court and noted that it is generally improper for the trial court to raise and dispose of issues *sua sponte* without affording the parties an opportunity to brief and argue the issues presented. State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., No. 19-0978, 2020 W. Va. LEXIS 702, at *7-8 (Oct. 19, 2020)[21] That is particularly true when both forms of recovery sought by the Petitioner (severance and vacation pay) are wages as defined under the West Virginia Wage

[20] In Benson v. AJR, Inc., 215 W. Va. 324, 326 n.3, 599 S.E.2d 747, 749 (2004) this Court noted:

> This Court *sua sponte* recognized an issue regarding the contract's interpretation based on the words chosen to draft the agreement. Because the contract was written in terms of permitting AJR to terminate Appellant "without cause," and because the subsequent salary payment obligations arise in reference to a termination "without cause," we initially questioned whether the payment obligations would be invoked in a case, such as this, where the employee was undeniably dismissed for cause. We determine, however, that the contract should be read in the fashion undertaken by the parties and the court below predominantly because the three contractual conditions that excuse AJR's requirement to pay Appellant his salary (two of which are clearly "for cause" type of dismissals) would be rendered meaningless if the payment provisions could only be invoked in a non-cause dismissal situation. See Bischoff v. Francesa, 133 W.Va. 474, 498, 56 S.E.2d 865, 878 (1949) (recognizing as "elementary [the] principal [sic] that, in interpreting contracts, or any written instruments, an attempt should be made to give force and meaning to all of the language employed therein").

[21] As this Court noted: "The parties appeared for argument on Petitioners' motion to dismiss or stay on September 5, 2019. The parties briefed and argued the issues raised in that motion. No party asked the circuit court to dismiss Count III of the complaint. No party asked the circuit court to find that West Virginia law applied to the bad faith claims pled in the complaint. No party briefed these issues and no party argued for or against such relief." State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., No. 19-0978, 2020 W. Va. LEXIS 702, at *7-8 (Oct. 19, 2020). Further, the Court observed that "[a]t the bare minimum, the circuit court should have given the parties notice and the opportunity to respond to the grounds for dismissal the circuit court was considering." State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., No. 19-0978, 2020 W. Va. LEXIS 702, at *9 (Oct. 19, 2020). None of these due process protections were observed with regard to the circuit court's abrupt choice of law ruling.

Payment and Collection Act. The Act explicitly prohibits the waiver of any of its terms by private agreement therefore making the trial court's choice of law ruling particularly egregious.[22] Had the trial court given the parties an opportunity to consider this issue, this obvious error likely would have been argued and perhaps uncovered.

5. Petitioner's claims for payment of accrued paid-time-off were improperly dismissed by the Circuit Court as such payments were earned according to the *Employee Handbook*. The *Employment Agreement* does not address payment of accrued paid time off at termination of employment, and therefore Petitioner's entitlement to payment of accrued paid-time-off after resigning is at best ambiguous. Accordingly, it was error for the court-below to deny this claim, particularly without the entry of an *Order* making proposed findings of fact and conclusions of law.

SJRC's *Employee Handbook* provision concerning payment of Petitioner's accrued paid-time-off were improperly construed by the Circuit Court and her claim for that pay erroneously discussed. The standard of review of the Circuit Court's dismissal of Plaintiff's vacation pay claim is *de novo*.[23]

Nothing in the language of either the *Employment Agreement* or the *Employee Handbook* precludes the payment of accrued paid-time-off to the Petitioner. The *Employee Handbook* provides that employees who leave after providing proper notice will be paid their accrued paid-time-off. The *Employee Agreement* makes no mention of the *Employee Handbook* or payment of accrued paid-time-off. Both documents were issued to Petitioner by SJRC and both purported to govern the terms and conditions of Petitioner's employment. At best, it is unclear as to whether the *Employee Handbook* requires payment of accrued paid-time-off to Petitioner. Accordingly, as

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[22] West Virginia 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. W. Va. Code § 21-5-10.

[23] "This Court reviews a circuit court's interpretation of a contract de novo." Blackrock Capital Inv. Corp. v. Fish, 239 W. Va. 89, 91, 799 S.E.2d 520, 522 (2017)(Syl. Pt. 4)

this Court has previously held in Meadows v. Wal-Mart Stores, 207 W. Va. 203, 530 S.E.2d 676 (1999), such ambiguity must be resolved in favor of the employee, and not the employer as the Circuit Court did in this case.

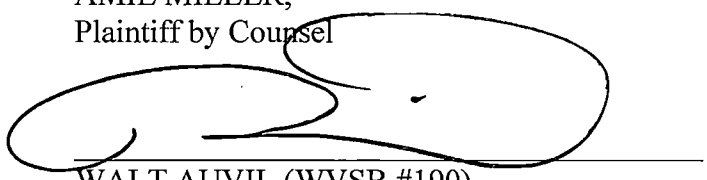
VI. CONCLUSION

The court-below deprived the Petitioner of the severance wages to which she was clearly entitled under the terms of her *Employment Agreement*. The court-below erroneously defined her severance as something other than wages when the *Employment Agreement* itself defined severance as wages. The trial court also erroneously deprived the Petitioner of her accrued vacation pay due according to the *Employee Handbook* since it was admitted by SJRC that the Petitioner left her employment upon proper notice. Moreover, the court-below also ruled on the eve of trial that Petitioner could not have a jury trial on the sole remaining claim and then decided without any input from the parties that Texas law would control this claim – all done without the requisite findings of fact and conclusions of law. Finally, despite overwhelming evidence regarding SJRC's breach of the *Employment Agreement* by its repeated failure to pay Petitioner's wages on time, the circuit court ruled that Petitioner had not resigned for this reason.

The circuit court's letter ruling should be reversed with instructions from this Court that, upon remand, to correct the egregious errors set forth herein.

Respectfully submitted,

AMIE MILLER,
Plaintiff by Counsel



WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
ANTHONY BRUNICARDI (WVSB #13593)

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058
(304) 485-6344 (fax)

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiff hereby certifies that on the 4th day of January 2021, he served a true copy of ***Petitioner's Brief*** upon counsel of record by emailing and depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

Philip A. Reale, II
Law Office of Philip A. Reale, PLLC
300 Summers Street, Suite 980
Charleston WV 25301

WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
ANTHONY BRUNICARDI (WVSB #13593)
Counsel for Plaintiff

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058
(304) 485-6344 (fax)