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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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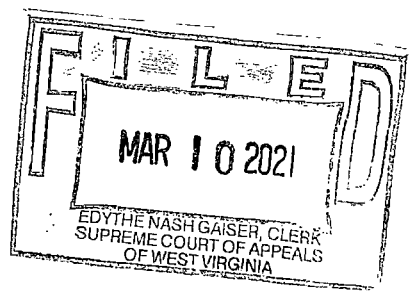
DOCKET NO. 20-0755

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)



Reply Brief

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Reply Brief

Now comes the Petitioner and Plaintiff-below, Amie Miller (hereafter "Petitioner") 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 this *Reply Brief* in support of her appeal.

Petitioner appeals the ruling of the Circuit Court of Wood County, West Virginia, dismissing Petitioner's civil action against Respondents St. Joseph Recovery Center (hereafter "SJRC"); St. Joseph's Operating Company, LLC; and Siltstone Holdings LLC after a brief non-jury trial.

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 as a Nurse Practitioner after SJRC failed on four occasions to pay her wages as required by her written employment agreement. The Circuit Court's dismissal of Petitioner's breach of contract claim followed its abrupt decision less than a week before trial to conduct a bench trial rather than the previously agreed upon jury trial, along with its sua sponte decision to apply Texas law to the dispute.

The Circuit Court dismissed Petitioner's breach of contract claim based upon its conclusion that that Petitioner's resignation was not for a "good reason',' despite finding that SJRC repeatedly failed to timely pay wages, thereby materially breaching the employment agreement between the parties. It is undisputed that under the terms of the contract at issue resignation for a "good reason" triggered Respondent's obligation to pay Petitioner a predetermined severance package. Petitioner appeals to this Court due to the irreconcilable conflict between the Circuit Court's findings of fact and its legal conclusion denying Petitioner all relief.

Petitioner also appeals the Circuit Court's adverse pretrial rulings denying coverage for Petitioner's wage claims under the West Virginia Wage Payment and Collection Act and the dismissal of Petitioner's claim for payment of accrued paid-time-off (PTO) pursuant to the SJRC *Employee Handbook.* Petitioner does not appeal the dismissal of the non-SJRC defendants.

1. Petitioner Amie Miller was employed under both a written contract – the Employment Agreement - and an Employee Handbook. The Circuit Court found that SJRC materially breached its obligation to pay Petitioner. The Employment Agreement entitled Petitioner to severance pay if she left for "good reason". The Circuit Court's finding that Petitioner did not leave her employment for "good reason" was not based upon any plausible reading of the evidence presented at trial.

The Circuit Court's found that "SJRC materially breached its obligation to provide the Petitioner compensation of benefits by failing to make payments of the base salary in accordance with the Company's regular payroll practices" (APP000382). However, the Circuit Court subsequently found that that Petitioner voluntarily resigned her employment and was therefore not entitled to the severance package set forth in her employment agreement.

Respondent's argument - which the trial court adopted - relies primarily upon inferences from the language in Petitioner's letter of resignation, which the trial court also mentions in its final order. While the Circuit Court recites language from the petitioner's resignation letter in its order (APP000383), it ignores the undisputed testimony of Petitioner and other SJRC employees that Petitioner expressed to SJRC CEO Donna Meadows that Petitioner and other SJRC employees were going to leave because payroll was not being met on an ongoing basis. (APP 000322-323, 326-327, 333-334). The Circuit Court's order does not address the undisputed testimony that Petitioner raised SJRC's failure to timely make required wage payments with SJRC CEO Meadows and expressed the unbearable insecurity it was creating for her. Meadows responded by noting that she too could not continue to work for SJRC under these conditions. (APP 334). This testimony went completely unrefuted, yet it is not even discussed in the Circuit Court's final order.

Thus, Petitioner and Respondent, through its CEO, agree that Respondent's failure to timely pay its employees motivated Petitioner and other SJRC employees to search for other employment. (APP 000322-323, 326-327, 333-334).[1] Indeed, the Circuit Court notes that

[1] Q. Have you had conversations with Ms. Meadows and Ms. Fairchild -- I'm sorry. Ms. Meadows, about

Petitioner began looking for other employment the day after Respondent's first material breach of the employment agreement by failing to make payroll (APP000382) but, astoundingly, the Court then draws no inference from that timing, nor from Petitioner's June 11, 2019, submission of her resignation, four days after SJRC's fourth failure to make payroll in as many months. (APP000332). The Circuit Court's refusal to even acknowledge the uncontroverted evidence of Petitioner's motive for resigning constitutes reversible error.

2. Severance payments due pursuant to the Employment Agreement constitute wages. The Circuit Court's pretrial letter ruling to the contrary is clear error. The trial court's failure to make meaningful findings of fact and conclusions of law in connection with this ruling undermines appropriate appellate review.

By a letter ruling of August 12, 2020, the Circuit Court dismissed Petitioner's West Virginia Wage Payment and Collection Act claims, ruling that the severance package provided for by the Employment Agreement did not constitute wages pursuant to the Act. (APP000266-267). The Circuit Court ignored the fact that the severance package was not determined upon termination – rather, the parties mutually agreed to the severance package before Petitioner accepted employment. The severance package was part of the total compensation package to which Petitioner and other employees were contractually entitled if Respondent materially breached the obligations it undertook in the agreement. The Circuit Court also ignored the fact that the severance package was earned by virtue of Petitioner accepting employment and continuing to work for Respondent, despite not being paid as her employment agreement required for several

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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.

Tabitha Smith trial testimony. APP 000334.

months. There simply is no basis for the Circuit Court's conclusory statement in its letter ruling that "severance pay" by its very nature cannot be "earned" by Petitioner until after she is terminated. That is not the law, particularly given that the Circuit Court claimed it would be interpreting the agreement under Texas law, which specifies that severance payments are wages, making them subject to the West Virginia Wage Payment and Collection Act. Bloch v. SAVR Communs., Inc., 9 No. 03-12-00183-CV, 2014 Tex. App. LEXIS 3157, (Tex. App. Mar. 19, 2014); Texas Lab. Code Ann. §61.001(7).

The Circuit Court admitted that Respondent breached its material obligations to Petitioner initially in April 2019, but Petitioner continued to work through many more breaches until her eventual resignation in June. Petitioner's entitlement to the severance package vested when Respondent initially breached its material obligations to the Petitioner, not when Petitioner left employment months later after several additional breaches.

The employment agreement provides that if "the employee resigns for good reason" she is entitled to the severance package. As such, Petitioner became entitled to the severance package in April 2019 when Respondent failed to pay her, prompting her to begin her job search. Even if this Court were to view a single failure to pay Respondent's wages as insufficient cause to constitute a "good reason" to resign, Respondent's multiple subsequent failures to pay Petitioner amply qualify as a "good reason" to resign.

The Circuit Court's ruling also contradicts this Court's precedent as set forth in Meadows v. Wal-Mart Stores, 207 W.Va. 203, 207, 530 S.E.2d 676, 680 (1999) (Syl. pt. 6), wherein this Court noted that unused fringe benefits owed upon separation from employment are wages pursuant to the West Virginia Wage Payment and Collection Act unless "express and specific" language precludes them being treated as due to the departing employee. The Circuit Court ruled

that the severance pay did not constitute a fringe benefit because it was to be paid after the employment relationship ended. That ruling is incompatible with Meadows, which notes that accrued fringe benefits are frequently paid after separation from employment, but such benefits are not thereby disqualified from being considered "wages" as defined by the West Virginia Wage Payment and Collection Act.

3. Without notice the trial court abruptly ordered this matter to be tried as a bench trial after a cursory determination that Petitioner had waived her right to a jury trial, and despite that fact that Petitioner and Respondent had both demanded a jury trial, entered into an agreed scheduling order setting the case for jury trial and submitted jury instructions. Granting Respondent's untimely request to enforce an alleged waiver of Petitioner's right to trial by jury five days before trial was error.

In responding to Petitioner's argument that the Circuit Court abused its discretion in granting Respondent's belated request to enforce Petitioner's alleged jury trial waiver, Respondent argues that Petitioner's waiver of her right to a jury trial was knowing and intelligent. However, no record exists as to whether Petitioner's alleged waiver of her right to trial by jury was knowing and intelligent because the issue was never noticed nor briefed. Rather, it was resolved five days before the scheduled jury trial based upon an email exchange between counsel and the Court, followed immediately by a brief telephonic hearing. No inquiry into the nature of Petitioner's alleged waiver was conducted, nor were any findings of fact or conclusions of law ever made. Indeed, no order was ever prepared memorializing the trial court's consideration of this important issue.

In its brief, Respondent fails to address its own demand for a jury trial, its agreement to a jury trial in an agreed scheduling order, and its submission of jury instructions. These affirmative acts by Respondent acted as a waiver of the jury waiver provision, ultimately raised five days before the trial. While no record exists supporting the sufficiency of Petitioner's waiver of her right to trial by jury, an extensive record exists supporting Respondent's repeated express demand

for a jury trial in this matter. Not until well after all deadlines for pretrial motions set forth in the agreed scheduling order had passed did Respondent raise anything about an alleged jury trial waiver. Petitioner should have been afforded a trial by jury as Respondent's time to assert that she waived her right to a jury had long passed and had been affirmatively waived by Respondent's own conduct in the case.

Respondent further argues that the Court's ruling, if error at all, was harmless, citing West Virginia Rule of Civil Procedure Rule 61 (Rule 60 was cited but Rule 61 was quoted). Rule 61 states that the Court at every stage of the proceeding should "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." An error that results in a bench trial rather than an agreed upon trial by jury clearly affects the "substantial rights of the parties." For this Court to rule otherwise would serve to diminish the right to trial by jury explicitly guaranteed to the citizens of this State by the West Virginia Constitution. Thus, the Circuit Court's abuse of discretion in improperly ruling that this matter be decided by bench trial rather than trial by jury is not harmless error.

4. It was error for the Circuit Court to sua sponte and without notice raise and summarily rule that Petitioner's claim for severance pay would be resolved under Texas law.

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 and explicitly provides that the rights afforded to West Virginians under that Act that cannot be contractually restricted. The Circuit Court's cursory Trial Order disposing of Petitioner's cause of action under the Act cited no provision of Texas law contravening the Act, further undermining

the legal framework for the trial court's ruling. Accordingly, the Circuit Court erred in applying Texas law to Petitioner's employment agreement.

Respondent claims that Petitioner never "contended that the choice of law provision is invalid." Respondent's Brief, p. 27. This is incorrect. Petitioner argued in the final, hastily arranged telephonic pretrial hearing that Respondent's failure to identify or to seek to enforce the choice of law provision constituted a waiver. In the same hearing Respondent quoted at page 28 of its brief Petitioner argued that Respondent had waived the choice of law provision. (APP 000299-302). In fact, Respondent never raised the choice of law provision at all; the Circuit Court did. This is illustrated most dramatically in the transcript of the final pretrial hearing, wherein Respondent's counsel exclaims that the Circuit Court has just revealed the existence of this the choice of law provision to him.[2] (APP 000297-298).

As Petitioner set forth in its initial brief, it is not the proper role of a trial court to sua sponte raise choice of law issues past the eleventh hour, as the Circuit Court did here. [3] Respondent is well aware of this, as it made no attempt to address that point in its brief. Petitioner objected to the

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[2] RESPONDENT'S COUNSEL: The main legal argument here that I am sure that Mr. Auvil will address as well as it is long established in West Virginia that in the context of waiver –
THE COURT: Let me stop you there for a second. Do we not need to look that this in the context of the laws of the state of Texas? Under 7.5 of the employment agreement it indicates that the jurisdiction, that the agreement should be governed by and construed in accordance with the laws of the State of Texas without regard to conflicts of law principles.
RESPONDENT'S COUNSEL: And in going through that I notice that, as well.
THE COURT: Because that is where I directed my research yesterday.
RESPONDENT'S COUNSEL: Yes, and I don't know if Texas applies to this labor provision or in the context of whether the waiver -- the answer is I don't know, Your Honor, whether it is Texas or West Virginia.

[3] As this Court noted in State ex rel. Nat'l Union Fire Ins. Co., of Pittsburg, P.A., 850 S.E.2d 680, 683 (W.Va. 2020): "We believe that the circuit court committed clear error as a matter of law by sua sponte dismissing Count III. The parties appeared for argument on Petitioner's 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."

Circuit Court raising this issue sua sponte on the basis that Respondent had waived this choice of law defense and had already agreed to a jury trial, and that entire case had already proceeded under West Virginia law and the parties had submitted jury instructions based upon West Virginia law. The choice of law issue entered the case solely at the Circuit Court's instigation, during the pretrial conference hastily set by the trial court five days before trial. (APP 000299-302.)

However, even under Texas law, Petitioner's unpaid severance pay constitutes wages. If this Court were to conclude that the Circuit Court properly held that Texas law applied to the employment agreement, Texas law explicitly designates severance pay as wages: "At all relevant times, the Texas Payday Act has defined '**wages**' as: Compensation owed by an employer for: (A) labor or services rendered by an employee, whether computed on a time, task, piece, commission, or other basis; and (B) vacation pay, holiday pay, sick leave pay, parental leave pay, or **severance pay** owed to an employee under a written agreement with the employer or under a written policy of the employer". Tex. Lab. Code Ann. § 61.001(7)." Bloch v. SAVR Communs., Inc., No. 03-12-00183-CV, 2014 Tex. App. LEXIS 3157, at *1 (Tex. App. Mar. 19, 2014). (emphasis added). Accordingly, the Circuit Court's ruling that Petitioner's unpaid severance did not constitute wages was incorrect, even if Texas law applied to Petitioner's claim.

Petitioner was prejudiced by the Circuit Court's improper rulings. During the final pretrial hearing, held on less than 24 hours' notice, Petitioner explained that the Circuit Court's sudden decisions to eliminate the agreed upon trial by jury and to raise a new defense on behalf of Respondent sua sponte five days before trial prejudiced Petitioner:

> THE COURT: How are you prejudiced if the Court grants their request that the terms of the employment agreement be honored?
>
> MR. AUVIL: Well, if they've waived them, I am prejudiced because we proceeded based on the understanding that the Court and opposing counsel and this party proceeded on the entire case law.

THE COURT: Go ahead.

MR. AUVIL: The Court set deadlines in the agreed order that provided for a jury trial in which all of these matters were to be resolved. None were resolved. None were even brought forward. We are prejudiced because we prepared this case for a jury, as did the Defendant. We prepared jury instructions, as did the Defendant. We debated the issues to be presented to the jury, as did the Defendant.

THE COURT: Other than the jury instructions, and those would be helpful to the Court in determining the issues, I am struggling to see how you are prejudiced.

MR. AUVIL: If the Court concludes there is no prejudice from raising for the first time an issue that was to be raised by the order and the Court question that was in fact waived by the Defendants in their answer, waived by the entered pretrial order, waived in the jury instructions, if there is no prejudice to that it is hard to imagine where there would ever be prejudice to a party due to late raising of legal issues. That is for the Court to decide.

APPENDIX 000301-302.[4]

The Circuit Court announced its decisions with regard to both the jury issue and the application of Texas law at this same hearing, five days before trial. No notice of either issue had been previously provided. Contrary to Respondent's suggestion in its brief, the Circuit Court only suggested that the parties could request additional time to familiarize themselves with Texas law, not to further brief or argue the two issues it had decided at the hastily arranged hearing. Accordingly, it makes no sense to suggest as Respondent does that Petitioner should have asked to continue the trial to dispute these rulings: the Circuit Court had ruled, albeit without giving the parties an opportunity to research or brief the issues. The Circuit Court's errors were set in set in stone. Respondent's suggestion that Petitioner contributed to the trial court's errors by declining to ask to continue her case to argue with the Circuit Court about its rulings is specious.

[4] Shortly after this exchange, the Circuit Court concluded that the employment agreement was to be interpreted under Texas law. APP 000306.

Respondent argues that Petitioner "conceded that she would be prepared to proceed at trial under Texas law." To the contrary, Petitioner's counsel stated that he was prepared to proceed under West Virginia law and that, should the trial court rule that the case would be adjudicated under Texas law, he would try to familiarize himself with that law before trial.[5] The Circuit Court ruled that it intended to resolve the case pursuant to Texas law on its own motion over Petitioner's objection. (APP 000305-306). Further, a statement by Respondent's counsel to Petitioner's counsel, as identified in Respondent's brief, that Respondent would not object to a continuance does not constitute an offer by the Court to continue the case.

The Circuit Court raised the Texas law issue sua sponte six days before trial. In doing so, the Circuit Court placed Petitioner in the position of either finally having her day in court or asking to continue the case as a result of the Circuit Court's improper actions in raising this defense of its own accord at the last minute. While Petitioner elected to proceed to trial without moving to continue the case, this does not ameliorate the Circuit Court's errors in sua sponte applying Texas law and in depriving Petitioner of a trial by jury. Petitioner preserved these errors, objecting to both rulings. (APP 000300-302). The Circuit Court's abuse of discretion forced Petitioner to choose between two paths, both of which were prejudicial to her interests. Petitioner should not

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[5] Petitioner's counsel noted that Petitioner was prepared to proceed under West Virginia law, but if the trial court was ruling otherwise, he would try to prepare himself to proceed under Texas law.

> THE COURT: Are the parties ready to proceed next week or do you need more time to prepare in light of -- where do we stand now?
>
> MR. AUVIL: **If we are proceeding under West Virginia contract law I am able to proceed.** If today we are finding out we are proceeding under Texas law, I know nothing about Texas law so I will have to learn something about it. I will try to do so before next week. (emphasis added).

be punished for choosing one of the two bad options improperly thrust upon her by the Circuit Court.

5. Petitioner's claim for payment of her accrued paid time-off (PTO) was improperly dismissed by the Circuit Court.

In denying Petitioner's West Virginia Wage Payment and Collection Act claim for her accrued paid time-off (PTO) the Circuit Court and Respondent understandably rely upon a provision of the employment agreement noting that the severance package set forth therein "constitutes full and final satisfaction of all rights and entitlements that the employee has related to the termination of his/her employment". Standing alone this provision seems to waive any right to wages Petitioner might have, outside of the severance package itself.

However, when Petitioner was hired she and other employees were issued an SJRC Employee Handbook. The handbook discusses two groups of SJRC employees: employees "at will" and employees "under an employee agreement," the latter group including the Petitioner. Immediately after noting that employees under employee agreements "will follow the terms of the contract", the handbook then notes in the next sentence that "employees" providing proper notice will be considered to have left in good standing and may be eligible for payment of their accrued PTO upon departure. (APP000148). No distinction is made in the handbook between the two groups of SJRC "employees" as to eligibility for payment of accrued payment of PTO Thus, whether the Employee Handbook contradicted the remedy limitation clause in the employment agreement is at best ambiguous. A reasonable reading of the handbook is that SJRC intended the potential payment of accrued PTO to act as an incentive for all employees – whether at will or contractual – to afford proper notice upon departure from employment. Indeed, Petitioner did provide proper notice and anticipated receiving her accrued PTO as a result.

Any ambiguity in SJRC's terms entitling employees to payment of accrued PTO must be resolved in favor of Petitioner. However, the Circuit Court dismissed the PTO claim without any discussion of the internal contradiction between the limitation clause in the employment agreement and the handbook's language which appears to permit employees "under an employee agreement" to receive their accrued PTO. Given that the Employment Agreement does not explicitly address payment (or non-payment) of accrued paid time-off at termination of employment, Petitioner's entitlement to payment of her accrued PTO after resigning with proper notice is at best ambiguous. Accordingly, it was error for the court-below to deny Petitioner's PTO claim, particularly without making any findings of fact or conclusions of law explaining the basis for its ruling.

II. CONCLUSION

The Circuit Court committed multiple serious errors, each of which is sufficient grounds for reversal. The trial court's untimely decision to deprive Petitioner of a jury trial, its sua sponte assertion of a choice of law defense for Respondent and the irreconcilable conflict between its findings of fact and the judgment rendered in favor of Respondent all require reversal and a remand of this matter to the Circuit Court with directions to reinstate Petitioner's claims for both severance pay and accrued PTO wages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiff hereby certifies that on the 10th day of March, 2021, he served a true copy of **Reply Brief** upon counsel of record by emailing and depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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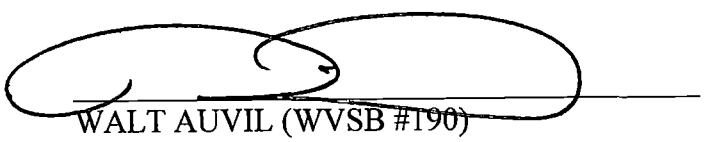

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