**No. 20-1042**

# IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**FAIRMONT TOOL, INC.,**
***Petitioner and Defendant Below,***

**v.**

**NORVEL LOUIS OPYOKE,**
***Respondent and Plaintiff Below.***

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## BRIEF OF PETITIONER FAIRMONT TOOL, INC.

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Civil Action No. 15-C-252
In the Circuit Court of Marion County, West Virginia
(Honorable Patrick N. Wilson, Judge)

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*Counsel for Petitioner Fairmont Tool, Inc.:*

J. Robert Russell (WVSB #7788), Counsel of Record
David L. T. Butler (WVSB #11339)
SHUMAN MCCUSKEY SLICER PLLC
300 Wedgewood Drive, Suite 110
Morgantown, WV 26505
(304) 291-2702
rrussell@shumanlaw.com
dbutler@shumanlaw.com

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## I. ASSIGNMENTS OF ERROR.

1. The Circuit Court erred by permitting Respondent's wrongful discharge and Tort of Outrage claims to be presented and argued to the jury, resulting in unfair prejudice against Petitioner, and denying Petitioner's post-trial motion for relief.

2. That Circuit Court erred by denying Petitioner's post-trial motion for relief after acknowledging the prejudicial effect of the jury instructions as to Respondent's Tort of Outrage claim.

3. Alternatively, the Circuit Court erred by denying Petitioner's post-trial motion for relief, as there was no legally sufficient evidentiary basis for a reasonable jury to find for Respondent on his FMLA claim and the verdict was the product of plain and unfair prejudice.

4. Alternatively, the Circuit Court erred in awarding Respondent liquidated damages, interest, attorney fees and costs by not adequately considering the record and relevant factors under applicable law.

## II. STATEMENT OF THE CASE AND BACKGROUND:

### A. THE COMPLAINT AND UNDERLYING FACTS.

The instant action began and was presented to the jury cloaked as a claim for unlawful discriminatory and retaliatory discharge. The Complaint alleged six (6) claims: (1) Religious Discrimination in violation of the West Virginia Human Rights Act ("WVHRA"), (2) Discriminatory Discharge in violation of the FMLA, (3) Failure to Notify of FMLA Rights, (4) Tort of Outrage, (5) WVHRA Hostile Work Environment (Religion), and (6) WVHRA Retaliatory Discharge.

Petitioner Fairmont Tool is in the business of manufacturing, fabricating and machining metal products,[1] primarily to the oil and natural gas drilling industry.[2] Respondent Opyoke was hired by Fairmont Tool as a machinist at its Fairmont, Marion County, West Virginia, location in February of 2010.[3] Respondent has lived with cancer since he was 21 years old

Respondent alleged that he was treated in a disparate manner based at least in part on his religion[4] and subjected to a hostile work environment, all in violation of the WVHRA.[5] In Count III of his Complaint ("Failure to Notify of FMLA Rights"), Respondent alleged that:

> Shortly after being diagnosed with cancer, on our [sic] about July 15, 2015, Plaintiff Opyoke approached his employer Fairmont Tool to file for FMLA leave due to being diagnosed with a serious health condition.... On or about July 15, 2015, representatives of Defendant Fairmont Tool told Plaintiff Opyoke that they did not offer FMLA leave there.... Defendant Fairmont tool [sic] did not notify Plaintiff Opyoke of his eligibility to take FMLA leave after he requested it, and in doing so interfered with, restrained, and/or denied Mr. Opyoke the exercise of his lawful rights under the FMLA.

Respondent alleged that he "applied for FMLA leave on or about Thursday, July 15, 2015, as his chemotherapy was set to commence on that date."[6] Nevertheless, he alleged that he was called into work and laid off on July 20, 2015.[7] As a result, Respondent asserted claims for discriminatory discharge in violation of the FMLA[8] and retaliatory discharge for engaging in protected activities under both federal and state law.[9] In Count IV of his verified Complaint ("Tort of Outrage"), Respondent asserted that,

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1 Appx.0016.
2 Appx. Vol. II, p. 11.
3 Appx.0016; Appx. Vol. II, p. 227.
4 Appx.0018.
5 Appx.0021.
6 Appx.0021
7 Appx.0021.
8 Appx.0019.
9 Appx.0021-22.

> The wrongful employment acts and/or omissions taken against Plaintiff Opyoke by Defendant Fairmont Tool were done in an outrageous manner and were so extreme as to be intolerable in a civilized society.... As a result of the outrageous, wrongful actions aforesaid, Plaintiff Opyoke suffered injuries, damages and losses as hereinafter set forth.

In addition to a prayer for compensatory and general damages, plus interest and attorney's fees,[10] Respondent made a claim for punitive damages, labeling the alleged misconduct of Petitioner as "willful, wanton, and malicious and/or reckless."[11]

During trial, Respondent testified that he had "battled" cancer most of his life.[12] He testified that while he was employed at Fairmont Tool, he was diagnosed with bladder cancer and had his kidney removed in 2012, taking about three months off.[13] When he returned, Fairmont Tool moved Respondent over to a less rigorous position in the inspection department.[14]

Respondent testified that in April of 2015, he was told that he had about a six-month window to begin high dose chemotherapy.[15] He was told he had between April to September to get started on his treatments.[16] He testified that he first realized he would need time off during his April 2015 doctor visit.[17] Respondent testified that his doctor scheduled his chemotherapy treatments and that he did not.[18] He testified that after being informed by his doctor of the six (6) month treatment window, he requested FMLA from his immediate supervisor, Patrick L. Stevens and Christopher Moyers.[19] Stevens testified that Respondent never requested FMLA,[20] and

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10 Appx.0022.
11 Appx.0023.
12 Appx. Vol. II, p. 228.
13 Appx. Vol. II, p. 227-28.
14 Appx. Vol. II, p. 228-29.
15 Appx. Vol. II, p. 229.
16 Appx. Vol. II, p. 230.
17 Appx. Vol. II, p. 230.
18 Appx. Vol. II, pp. 247.
19 Appx. Vol. II, pp. 230-31.
20 Appx. Vol. II, p. 308.

assuming that he did request FMLA, Stevens would have directed Respondent to Jamie L. Kelley, Fairmont Tool's human resources manager.[21] Moyer testified that Respondent never requested FMLA,[22] and assuming that he had requested FMLA, he would have directed Respondent to Ms. Kelley.[23] Respondent also testified that Tammy E. Hendricks, office manager, told him that Fairmont Tool did not offer FMLA.[24] Tammy E. Hendricks testified that Respondent never requested FMLA and that she did not him that Fairmont Tool did not offer FMLA.[25]

Respondent testified that his body unexpectedly "crashed" at the beginning of July 2015 because of his cancer.[26] He testified that his doctor informed him that he needed to begin chemotherapy treatments immediately. Respondent testified that he dropped off a "Return to Work" slip to Jamie Kelley on July 13, 2015, with a handwritten note on it stating, "I need copy of Federal Medical Leave Act papers – Thanks Louis Chemo Starting Wed. 15th."[27] Ms. Kelley testified that after receiving the "Return to Work" slip from Respondent,[28] she explained to him that he was *eligible* for FMLA, but she requested additional information from Respondent because the "Return to Work" slip did not say how long he would need off or the frequency of the treatments.[29] Respondent testified he had a conversation with Ms. Kelley but could not recall the specifics.[30] Respondent admitted that the note did not explain how long he needed off or the frequency of treatments.[31] Respondent testified that he took off July 15, 16 and 17, 2015, for a

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21 Appx. Vol. II, p. 311.
22 Appx. Vol. II, p. 161.
23 Appx. Vol. II, p. 161.
24 Appx. Vol. II, p. 232-33.
25 Appx. Vol. II, p. 314.
26 Appx. Vol. II, p. 233.
27 Appx. Vol. II, p. 234.
28 Appx. Vol. II, p. 119.
29 Appx. Vol. II, pp. 120-21, 127-28, 136-37.
30 Appx. Vol. II, p. 252.
31 Appx. Vol. II, p. 250.

chemotherapy treatment but was unable to begin treatment because he had an infection.[32] Respondent testified he brought the FMLA paperwork to Fairmont Tool on July 20, 2015 and mailed a copy that day by certified mail.[33]

Jamie Kelley testified that Respondent failed to respond to her inquiries to determine whether the leave was FMLA-qualifying prior to the Plaintiff being laid off.[34] The Plaintiff testified that he was laid off by Fairmont Tool on July 20, 2015.[35] Respondent testified that he would have started his chemotherapy treatments prior to July 15, 2015, but for the failure of Patrick L. Stevens, Christopher A. Moyer and Tammy E. Hendricks to notify him of his eligibility to take FMLA.[36] He further testified that was really distressed when he lost his insurance (after the layoff) and was unable to see a specialist his doctor recommended.[37] Respondent testified that he did not seek treatment from a medical doctor, psychiatrist, psychologist or therapist for his alleged emotional distress.[38] During his case-in-chief, Respondent did not call his doctor or any other witnesses to testify as to the alleged harm he suffered as a result of the failure of Patrick L. Stevens, Christopher A. Moyer and Tammy E. Hendricks to notify him of his eligibility to take FMLA.[39] Respondent did not present a rebuttal case.

### B. THE UNDERLYING ACTION AND TRIAL.

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32 Appx. Vol. II, pp. 237-38, 250.
33 Appx. Vol. II, pp. 253-54.
34 Appx. Vol. II, pp. 121-22, 124-25.
35 Appx. Vol. II, p. 236.
36 Appx. Vol. II, pp. 232-33.
37 Appx. Vol. II, pp. 243-44.
38 Appx. Vol. II, p. 259.
39 Appx. Vol. II, p. 53.

On May 18, 2017, the Circuit Court heard Fairmont Tool's motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.[40] Petitioner moved for judgment as to all of the Respondent's six (6) claims.[41] Relevant to this appeal, the Circuit Court denied the motion with regard to Respondent's FMLA interference, wrongful termination and Tort of Outrage claims. As noted below, Respondent withdrew the discrimination claims and, by the time Respondent's case was submitted to the jury, only the FMLA interference and Outrage claims remained.

With respect to the FMLA interference claim (Count III), Fairmont Tool argued that Respondent was laid off for business reasons unrelated to his FMLA leave request and, therefore, was not denied FMLA benefits to which he was entitled.[42] Similarly, Fairmont Tool argued that it was entitled to judgment as a matter of law on Respondent's discriminatory and retaliatory discharge claims (Counts II and VI) because it was undisputed that the layoff decision was made for reasons unrelated to the alleged protected activity, i.e., a workforce reduction due to the downturn in the oil and gas industry.[43] Finally, Fairmont Tool argued that the legitimate, nondiscriminatory reasons for Respondent's layoff prevented a finding in his favor on the Tort of Outrage claim.[44] The Circuit Court initially took the motion under advisement,[45] ultimately denying the motion "[i]n light of the genuine disputes of material fact raised by each party" and

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40 Appx.0028-61; Appx. Vol. II., p.4.
41 Appx.0029-30; Appx. Vol. II, p.5.
42 Appx.0034-36; Appx. Vol. II, p.6.
43 Appx.0036-46, 56-59; Appx. Vol. II, pp. 8-14, 28-29.
44 Appx. Vol. II, p. 30.
45 Appx. Vol. II, p. 48.

finding that "[t]he facts alleged by each party contradict one another and a fact finder should be permitted to assess the facts alleged and presented...."[46]

On the first morning of trial, Respondent voluntarily dismissed his claims for Religious Discrimination and Hostile Work Environment just before evidence was presented.[47] Respondent presented five (5) witnesses: Jamie L. Kelley, Christopher A. Moyer, Nathan S. Kincaid, John Martin and himself.[48] At the close of Respondent's case-in-chief, the Circuit Court granted judgment in favor of Fairmont Tool on the two (2) wrongful discharge claims pursuant to Rule 50 of the West Virginia Rules of Civil Procedure.[49] Fairmont Tool presented two (2) witnesses, rested, and renewed its motions for judgment as a matter of law, which were denied by the Circuit Court.[50]

After the evidence was in, Fairmont Tool objected to the submission of the Tort of Outrage claim to the jury.[51] Fairmont Tool argued that the submission of that common law claim would effectively permit Respondent to circumvent what the parties agreed was the FMLA's prohibition on emotional damages for alleged violations of 29 U.S.C. § 2615(a)(1). Fairmont Tool further objected to the instruction on punitive damages that was tied to the Outrage claim.[52]

The jury was instructed on the FMLA interference claim and that it could award Respondent damages on the Tort of Outrage claim if it found that he established that Fairmont Tool acted "with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain that such distress would result from its conduct."[53] The Circuit Court further

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46 Appx.0175-76.
47 Appx.0185; Appx. Vol. II, pp. 62-63.
48 Appx.0185.
49 Appx. Vol. II, pp. 302-06.
50 Appx. Vol. II, pp. 316-17.
51 Appx. Vol. II, pp. 322-24.
52 Appx. Vol. II, pp. 326-27.
53 Appx. Vol. II, p. 347.

instructed the jury that it could find for Respondent on the Tort of Outrage if it found that his "severe emotional distress **resulted from his alleged wrongful termination**"[54] or the "manner in which he was discharged was extreme and outrageous."[55] The instruction referred to "terminating plaintiff Opyoke."[56] On the heels of that erroneous instruction, the jury was instructed that it could award additional general amounts for annoyance, inconvenience, embarrassment, humiliation, loss of dignity and emotional distress.[57] And, right after that, the jury was instructed as to the availability of punitive damages.[58]

Respondent's counsel then presented a closing that focused on alleged "intentional" conduct[59] and "emotional distress," arguing the "law allows for compensation for Louie's distress and what he went through emotionally."[60] Then, Respondent's counsel went through the verdict form and the elements of the FMLA interference claim.[61]

Having been so instructed, the jury returned a verdict in favor of Plaintiff on both counts. The jury awarded Respondent $3,520.00 in lost wages and $881.22 in past lost benefits in association with his FMLA claim (Count III).[62] With respect to Respondent's Outrage claim (Count IV), the jury further awarded Respondent $50,000.00 for emotional distress, $75,000.00 for annoyance, $50,000 for inconvenience, and $150,000.00.[63]

The Circuit Court entered judgment on the jury's verdict on August 16, 2017.[64]

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54 Appx. Vol. II, p. 348.
55 Appx. Vol. II, pp. 348-49.
56 Appx. Vol. II, p. 349.
57 Appx. Vol. II, p. 349.
58 Appx. Vol. II, pp. 349-50.
59 Appx. Vol. II, p. 355.
60 Appx. Vol. II, pp. 355-56.
61 Appx. Vol. II, pp. 356-57.
62 Appx.0400.
63 Appx.0401.
64 Appx.0177.

### C. THE POST-TRIAL MOTIONS PRACTICE.

On post-trial motions, the Circuit Court both increased and decreased the verdict amounts by several Orders all entered February 27, 2018. After a hearing on October 31, 2017,[65] the Circuit Court granted Fairmont Tool's unopposed Motion to Amend Judgment Order to reflect Respondent's dismissal of Counts I and V, as well as the Circuit Court's rulings on the Rule 50 motions made by Fairmont Tool during trial,[66] and entered an Amended Judgment Order reducing the jury's verdicts to judgment in the amount of $329,401.22 in favor of Respondent.[67] The Circuit Court also entered an Order, granting, in part, and denying, in part, Fairmont Tool's Rule 50(b) Motion for Judgment as a Matter of Law Or, In the Alternative, Motion for New Trial,[68] concluding, in part, that Fairmont Tool's argument that the court improperly instructed the jury on the claim of tort of outrage by linking the same to his alleged "wrongful termination" was "well taken[.]"[69] However, the Circuit Court found the improper instructions "one of harmless error" and did not necessitate judgment as a matter of law or granting of a new trial.[70]

In the same order, the court found that, due to the lack of corroboration of emotional injury suffered by Respondent and the lack of evidence regarding treatment, the award of damages for emotional distress related to Tort of Outrage claim was essentially punitive damages, making the additional award of punitive damages a double recovery.[71] The Circuit Court found Fairmont Tool entitled to judgment as a matter of law on the punitive damages claim and ordered that the "damage

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65 Appx. Vol. II, pp. 410-57.
66 Appx.0198.
67 Appx.0200.
68 Appx.0183.
69 Appx.0225.
70 Appx.0225.
71 Appx.0226-28.

award shall be remitted by $150,000.00."[72] However, the Circuit Court denied Fairmont Tool's request for judgment as a matter of law or alternative new trial on the FMLA interference claim (Count III) or Tort of Outrage claim (Count IV).[73]

By separate Order entered that date, the Circuit Court granted, in part, Respondent's Motion For Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, And Litigation Costs, awarding Respondent liquidated damages and prejudgment interest in the amount of $5,633.56 (including interest at the rate of 7% per annum), as well as attorney's fees in the amount of $57,435.00 and costs in the amount of $4,571.26.[74]

On March 13, 2018, Fairmont Tool filed its Motion to Alter or Amend the Court's Amended Judgment Order and Motion for a New Trial and Alternative Motion for Judgment as a Matter of Law.[75] Respondent filed his response thereto[76] and the Circuit Court held a hearing on the motion,[77] followed by a letter ruling granting Fairmont Tool's motion for new trial as to the Tort of Outrage (Count IV).[78] After Respondent filed an objection,[79] the Circuit Court's rulings were memorialized by Order entered June 13, 2018.[80] In that Order, the Circuit Court found, based upon the erroneous references to "wrongful termination" acknowledged in its February 28, 2018 Order, "the Court's instruction on the tort of Outrage was improper and prejudicial to the Defendant."[81] The Circuit Court further found that "the jury's finding for Plaintiff on the tort of

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72 Appx.0228.
73 Appx.0228.
74 Appx.0230.
75 Appx.0238.
76 Appx.0252.
77 Appx. Vol. II, pp. 458-77.
78 Appx.0259.
79 Appx.0261.
80 Appx.0263.
81 Appx.0272.

Outrage was based on findings regarding wrongful termination, a claim which was dismissed by the Court,"[82] warranting a new trial on the Outrage claim.[83] However, the Circuit Court declined to grant a new trial or otherwise disturb the jury's verdict as to the FMLA notice claim (Count III).[84]

Respondent submitted a proposed order on Count III, to which Fairmont Tool objected.[85] To further clarify its ruling, the Circuit Court issued a letter ruling on August 1, 2018[86] and entered an Order Denying Defendant's Rule 50(b) Motion As To Count III on October 5, 2018, confirming that the Amended Judgment Order entered February 27, 2018, was void, re-issuing findings as to the FMLA notice claim (Count III) and directing that no judgment order would be issued concerning the jury's verdict as to Count III until after the retrial of the Tort of Outrage claim (Count IV) and not until further Order of the court.[87]

On September 10, 2018, Fairmont Tool filed a Rule 56 motion as to the Tort of Outrage claim,[88] in which Fairmont Tool noted, in part, that FMLA remedies are "tailored to the harm suffered" and statutorily limited.[89] Instead of proceeding to the retrial of the Outrage claim, Respondent submitted a proposed Order Dismissing Tort of Outrage Complaint and thereby indicated his intent to voluntarily dismiss Count IV (Tort of Outrage), with prejudice, which was entered by the Circuit Court before expiration of the five (5) day period for objections set forth in

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82 Appx.0273.
83 Appx.0274.
84 Appx.0274-75.
85 Appx.0279.
86 Appx.0289.
87 Appx.0321-22.
88 Appx.0291.
89 Appx.0300-05, quoting, *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002).

West Virginia Trial Court Rule 24.01.[90] As reflected in the docket of this matter, Respondent then attempted to file an abstract of judgment with the Clerk of this Court on November 25, 2019, which filing was rejected by the Clerk.[91] Respondent also submitted a proposed Order purporting to set pre-judgment and post-judgment interest on the phantom judgment, to which Fairmont Tool objected on December 4, 2019.[92]

On that same date, Fairmont Tool filed a motion for status conference and relief pursuant to Rules 59 and 60 of the West Virginia Rules of Civil Procedure.[93] Respondent moved to strike the motion[94] to which Fairmont Tool responded.[95] On January 15, 2020, Fairmont Tool filed a motion for relief from the Order Dismissing Tort of Outrage Complaint.[96] After a hearing on January 21, 2020,[97] the Circuit Court granted the motion and, by Order entered March 19, 2020, the trial court dismissed Opyoke's Outrage claim, with prejudice.[98] On that same date, the Circuit Court entered an *Amended Judgment Order*, rendering judgment in favor of Respondent in the amount of $67,639.82.[99]

On May 29, 2020, Fairmont Tool filed a motion to alter or amend the March 19, 2020 Amended Judgment Order pursuant to Rule 52(b) and Rule 59(e) of the West Virginia Rules of Civil Procedure.[100] By *Amended Judgment Order* entered December 2, 2020,[101] the court

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90 Appx.0323.
91 Appx.0010.
92 Appx.0325.
93 Appx.0330.
94 Appx.0346.
95 Appx.0351.
96 Appx.0374.
97 Appx. Vol. II, pp. 478-94.
98 Appx.0407.
99 Appx.0413.
100 Appx.0420.
101 Appx.0445.

memorialized all prior rulings, issued its findings regarding interest, liquidated damages, attorney fees and costs, and entered final judgment as to the jury verdict in favor of Respondent in the amount of $4,401.22 and further awarded Respondent $4,401.22 in liquidated damages and $616.17 per annum in prejudgment interest, as well as $57,435.00 in attorney's fees and $4,571.26 in costs in relation to the jury's verdict on Count III (FMLA Rights).[102]

By Order entered January 6, 2021, the Circuit Court granted Fairmont Tool's Motion for Stay of Execution of the Judgment Pending Resolution of Appeal.[103] On January 26, 2021, pursuant to Rule 25 of the West Virginia Rules of Civil Procedure, Tyler Opyoke, Administrator of the Personal Estate of Norvel Louis Opyoke, filed his Notice of Suggestion of Death, reporting that Respondent died on December 22, 2020.[104]

## III. SUMMARY OF ARGUMENT.

The trial of this matter was dominated by an evidentiary presentation and argument wholly irrelevant and plainly prejudicial. Respondent's presentation to the jury was focused on the pernicious narrative that Fairmont Tool terminated his employment in response to his announcement of a life-threatening form of cancer and request for FMLA leave to seek aggressive chemotherapy. His dire diagnosis could not be denied. But, Respondent's assertion that Fairmont Tool engaged in such callous and wrongful conduct in response thereto was unsubstantiated, which the Circuit Court found as matter of law at the conclusion of Respondent's case-in-chief. Nevertheless, Respondent pressed on with a calculated presentation designed to persuade the jury using the rhetoric of wrongful termination to award general, emotional **and** exemplary damages

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102 Appx.0457.
103 Appx.0459.
104 Appx.0461.

for what courts have uniformly found to be a "technical" violation of the FMLA's rather rigid notice provisions.

Despite multiple objections and motions designed to prevent Respondent from presenting this slanted and unsupported message, both prior to and during the trial, the Circuit Court permitted the Respondent to present both claims to the jury. Piled on top of this strategy, plainly erroneous instructions telling the jury that this heinous allegation was actually viable combined to result in a particularly enflamed jury that rewarded Respondent for this strategy. The combined effect of the instructional error and evidentiary presentation was such that the jury was presented with a confusing narrative strongly suggesting that it was entitled to find that Fairmont Tool had wrongfully discharged Opyoke on account of his cancer diagnosis and request for FMLA lease (even though those claims had been dismissed as a matter of law for insufficient evidence).

In the end, the jury found for Respondent on both the technical FMLA claim as well as the Tort of Outrage that should have never been submitted to the jury, much less submitted with the erroneous instruction that it was based upon Respondent's discharge from his employment with Fairmont Tool. Having been erroneously instructed, the jury understandably rendered a harsh verdict against Fairmont Tool. The harshness of that verdict - $175,000 in general damages and another $150,000 in punitive damages flowing from a $4,401.22 verdict for alleged special damages – is overwhelming evidence that the jury rendered its verdict out of unvarnished passion and prejudice, rather than being borne out of reason and a dispassionate sense of justice.

The Circuit Court subsequently recognized the plainly erroneous nature of the Outrage and punitive damages instructions to the jury during the first round of post-trial motions. However, the Circuit Court denied complete relief to Fairmont Tool. The Circuit Court initially saw the instructional error as "harmless" and denied relief in the form of judgment or a new trial on any

claim, choosing instead to merely grant judgment and remit the erroneous punitive damage award. After a second motion, the Circuit Court acknowledged the inherently prejudicial effect and the jury's tainted verdict but refused to grant judgment or a new trial on both claims, preferring to limit the new trial to the Tort of Outrage while preserving the jury verdict on the FMLA claim. Rather than engage in the new trial, Respondent finally dismissed the Outrage claim, with prejudice. Nevertheless, the Circuit Court remained steadfast in the post-judgment findings and conclusions originally made when judgment was entered for Respondent on the entire jury verdict. Despite the changed landscape, with only the $4,401.22 award on the FMLA claim intact, the Circuit Court awarded Respondent additional liquidated damages, interest, and the bulk of his requested attorney fees and costs (reduced only by application of the prevailing fee rate for the area in which the case was tried). The Circuit Court failed to conduct the proper analysis of the relevant factors before awarding these additional damages under the FMLA.

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

## IV. STATEMENT REGARDING ORAL ARGUMENT.

This case is also appropriate for oral argument under Rule 20 because it involves an issue of public importance, i.e., the elements of an alleged violation of 29 U.S.C. § 2615(a)(1), the so-called FMLA Notice claim, as well as an issue of first impression for this Court, i.e., whether a common law Tort of Outrage claim can be asserted for an alleged FMLA Notice claim.

## V. ARGUMENT.

### A. STANDARD OF REVIEW.

As the Circuit Court should have granted judgment as a matter of law relative to Respondent's attempts to dramatize his layoff as a wrongful discharge, the appropriate standard of

review relative to those issues is *de novo*.[105] Similarly, the legal issue of whether a plaintiff can maintain a claim for Tort of Outrage with separate damages for annoyance and inconvenience relative to an underlying claim of FMLA Notice violation is subject to *de novo* review.[106] With respect to the issue of whether the Circuit Court erred by issuing erroneous instructions that, read as a whole, misstated the law and prejudiced the Petitioner, the appropriate standard of review is also *de novo*.[107]

Finally, the granting or denial of a motion for new trial is subject to a two-pronged deferential standard. Rulings concerning a new trial and conclusions as to the existence of reversible error reviewed under an abuse of discretion standard and underlying factual findings reviewed under a clearly erroneous standard, while questions of law are subject to a *de novo* standard of review.[108] "Athough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal

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[105] Syl. Pt. 1, *Findlay v. State Farm Mutual Automobile Insurance Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews de novo the denial of a motion for summary judgment where such a ruling is properly reviewable by this Court."); *see also*, Syl. Pt. 1, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009) ("The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure [1998] is *de novo*."); *Gillingham v. Stephenson*, 209 W. Va. 741, 745, 551 S.E.2d 663, 667 (2001) ("We apply a de novo standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law.").

[106] Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."); *see also*, *Riggs v. West Virginia University Hospitals, Inc.*, 221 W. Va. 646, 653, 656 S.E.2d 91, 98 (2007) ("As the issue raised directly challenges the trial court's application of the MPLA's non-economic damages cap to the jury verdict, our review is *de novo*.").

[107] *State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995) ("if an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise de novo review.") (footnote omitted); *see also*, *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 63, 479 S.E.2d 561, 573 (1996) ("our review of the legal propriety of the trial court's instructions is *de novo*") (citation omitted).

[108] *Williams v. Charleston Area Med. Ctr.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797 (2003) (quoting *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995)).

when it is clear that the trial court has acted under some misapprehension of the law or the evidence."[109]

### B. THE CIRCUIT COURT ERRED BY DENYING PETITIONER'S MOTIONS FOR JUDGMENT AS TO RESPONDENT'S FMLA INTERFERENCE CLAIM.

Respondent's FMLA interference claim (Count III) was premised upon the assertion that he requested FMLA leave and was not notified of his eligibility and rights. The claim, brought pursuant to 29 U.S.C. § 2615(a)(1), has several elements. To establish an FMLA interference claim, an employee must prove that "(1) [he] was an eligible employee; (2) [his] employer was covered by the statute; (3) [he] was entitled to leave under the FMLA; (4) [he] gave [his] employer adequate notice of [his] intention to take leave; and (5) the employer denied [his] FMLA benefits to which [he] was entitled."[110] The question of whether notice was sufficient under the statutory scheme need not be resolved to render judgment.[111]

It is the last element upon which Respondent failed and Petitioner was entitled to judgment as a matter of law. When an FMLA interference claim is premised on an employer's failure to provide timely notice or, in other words, a "technical" violation of the FMLA, a plaintiff must show that the employer's failure to provide notice resulted in an "impairment of [his] rights and resulting prejudice."[112] Moreover, when an employer's layoff of an employee would have occurred

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109 Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976). *See also, McKenzie v. Sevier*, 2020 W. Va. LEXIS 808, *15, 854 S.E.2d 236, 2020 WL 7223169 (W. Va., Nov. 18, 2020).

110 *Rodriguez v. Smithfield Packing Co., Inc.*, 545 F.Supp.2d 508, 515 (D. Md. 2008) (citing *Edgar v. JAC Products, Inc.*, 443 F.3d 501, 507 (6th Cir. 2006)).

111 *See, Rhoads v. FDIC*, 257 F.3d 373, 384 n.9 (4th Cir. 2001) (finding a dispute over the notice element of an FMLA interference claim to be moot where another element was clearly not established).

112 *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 90 (2002).

whether or not the employee had requested FMLA leave, an FMLA interference claim cannot be sustained.[113] Under the regulations governing the FMLA,

> An employee has no greater right to reinstatement or to other benefits and condition of employment than if the employee had been continuously employed during the FMLA leave period.... For example: (1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.[114]

With respect to this element, Respondent offered nothing more than proof of "lost wages" he allegedly suffered between his layoff on July 20, 2015 and August 16, 2015, when he was no longer able to maintain gainful employment due to his condition.[115] In this respect, Respondent put forth an "exhibit" prepared by counsel detailing his claim for $3,520.00 ($22/hour x 40 hours/week x 4 weeks) in "lost wages"[116] and $881.22 ($293.74/month x 3 months)[117] in benefits lost during this time period.

As Respondent testified, this reflected his "rate of pay, date of termination, and then when I was removed from work completely, and the benefits"[118] or a calculation "[f]rom the date I was let go on the 20th of July to August 16, 2015."[119]

> Q. By being let go from Fairmont Tool, obviously, that prevented you from taking any type of leave, correct?

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113 *See Yashenko v. Harrah's NC Casino Company, LLC*, 446 F.3d 541, 550 (4th Cir. 2006) (denying an employee's FMLA interference claim at the summary judgment stage because the facts clearly showed the employee would have been terminated for reasons unrelated to his FMLA request).

114 29 C.F.R. § 825.216(a)(1).

115 Appx. Vol. II, pp. 108, 237-42.

116 Appx. Vol. II, pp. 239-40, 361.

117 Appx. Vol. II, p. 177, 240, 360.

118 Appx. Vol. II, p. 238.

119 Appx. Vol. II, p. 240.

A. Yes.
Q. If you had not been let go on the 20th, you would have been able to work at Fairmont Took through August 16 at least, correct?
A. That's correct.
Q. And so you would've had your own health insurance through that point, correct?
A. That's correct.
Q. And then you would have had access to health insurance for three additional months, is that right, during the 12 weeks of FMLA?
A. Yes.
Q. So that would have taken -- that would've taken your insurance coverage into approximately the middle or late November; is that correct?
A. Yes.[120]

The problem is that, while these calculations might have been relevant to an otherwise valid claim for wrongful discharge, Respondent was not legally entitled to the amounts as damages for the FMLA interference claim. Under the FMLA, Fairmont Tool is not legally required to continue benefits of an employee laid off for purely business reasons.[121] The starting date for these calculations was July 20, 2015, the date on which Respondent was laid off. What's more, granting Fairmont Tool's motion for judgment pre-verdict, the Circuit Court found as a matter of law that Respondent failed to confront Fairmont Tool's evidence that the layoff was for a legitimate business purpose unrelated to Respondent's alleged request for FMLA leave.

In this respect, the Court found that Respondent did not offer sufficient evidence that the layoff decision was made with knowledge of Respondent's request(s) for FMLA leave or engagement in protected activity.[122] The Circuit Court found "no evidence was presented to support that."[123] Accordingly, the Circuit Court dismissed the FMLA wrongful discharge (Count II) and the public policy wrongful discharge (Count VI).[124] In other words, the Circuit Court found

120 Appx. Vol. II, p. 262.
121 *See, Ragsdale, supra*; *Yashenko, supra*; 29 C.F.R. § 825.216(a)(1).
122 Appx. Vol. II, pp. 302-06.
123 Appx. Vol. II, p. 305.
124 Appx. Vol. II, p. 306.

that the layoff was unrelated to Opyoke's medical condition and leave request. Therefore, under the applicable law, the Circuit Court should have also found that Fairmont Tool was not liable for any benefits allegedly lost after July 20, 2015.

After having his wrongful termination claims dismissed as a matter of law, Respondent still went right back to those wrongful discharge damages. As he was going through the elements on the verdict form in his closing, Respondent's counsel got to the last element counsel argued that "obviously his [Respondent's] ability to take those FMLA benefits were frustrated ***as he was let go***."[125]

> There's been a few arguments during this case that have been a little confusing to me, but one that is most puzzles me is this argument about Louie's failure to give time and duration [of the FMLA leave request]. It confused me to the point where I asked multiple witnesses, Mr. Kincaid and Ms. Kelley, does the fact that Louie was laid out [sic] before he could respond, before he could get the doctor's note to anybody, is that relevant to whether or not what he is asking for when he does it verbally or when he does it in writing, whether that's relevant, does it matter, and both individuals said, no, because it doesn't.[126]

Finally, Respondent specifically referred to the post-layoff wage and benefit calculations as the appropriate damages relative to the FMLA notice claim when he went on to urge the jury that,

> The first part of the damage that you are going to consider in deciding what amount, if any, you are going to mark in the Verdict Form is economic damages. The value of Fairmont Tool's portion of the insurance we heard was $293.74 a month which Louis ***had to pay after his termination*** regardless of the reason of this termination.... So going back to the damages section under the FMLA claim. I asked under lost benefits that you indicate that Louie lost $881.23. That's the minimal amount that he would've had to pay for his treatment towards health insurance. And finally we heard the testimony from Louie that until he was able to stop working his lost wages $3,520. And so I ask that you bring back Louis $4,401.22 for his economic damages.[127]

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125 Appx. Vol. II, p. 357 (emphasis added).

126 Appx. Vol. II, p. 375.

127 Appx. Vol. II, pp. 360-61 (emphasis added).

And, this is the precise amount awarded by the jury on the FMLA notice claim (Count III) - $881.23 for lost benefits and $3,520.00 for lost wages.[128]

With respect to the Outrage and punitive damages claims, Respondent again turned to the then defunct discharge claims.

> When ***terminating*** Louie, Fairmont Took know that he would have to pay for his own insurance which was something ***he could not do without working***. Fairmont Tool put him in this situation. A situation with a reckless disregard that he would be forced to go without needed cancer treatment. So I ask that you write "yes" here, that they did act with a substantial reckless indifference that they would cause a substantial probability of emotional distress.[129]

The evidence in this regard was essentially the same as presented in support of and opposition to Fairmont Tool's pre-trial motion pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.[130] Respondent offered nothing but knowledge that Respondent had been sick in the past and the close time proximity to the July 15, 2015 FMLA request, which the Circuit Court determined was "not enough."[131] On the other hand, Fairmont Tool offered unimpeached testimony from its managers that the layoff decision was the result of a downturn in the oil and gas services industry and, as one of three inspectors, Respondent was laid off because he had the least seniority.[132]

The Circuit Court erred by not granting the dispositive motion pre-trial. Instead, the Circuit Court permitted Respondent to argue to the jury that his layoff was a retaliatory discharge for which Fairmont Tool was potentially liable, including exposure to damages for the Tort of Outrage and punitive damages. The Circuit Court further erred by not granting the Rule 50 motion after

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128 Appx.0448.
129 Appx. Vol. II, p. 359 (emphasis added).
130 Appx.0029-0170.
131 Appx. Vol. II, p. 305.
132 Appx. Vol. II, pp. 142, 161-62, 180-85, 189, 194.

Respondent had been fully heard on the issue, again after all the evidence was in and again after the jury rendered what was an obviously tainted verdict. After all, the Circuit Court's findings that Respondent's layoff was not related to his alleged request(s) for FMLA leave was legally fatal to Count III. Respondent deliberately chose to argue that the consequence of the alleged "technical" notice violation was that he was deprived of wages and benefits from the date of layoff until he was unable to work due to his condition.

For these reasons, Fairmont Tool is entitled to reversal of the Amended Judgment Order entered December 2, 2020, and remand to the Circuit Court for dismissal of all claims, with prejudice.

### C. THE CIRCUIT COURT ERRED BY PERMITTING RESPONDENT'S WRONGFUL DISCHARGE AND TORT OF OUTRAGE CLAIMS TO BE PRESENTED AND ARGUED TO THE JURY, RESULTING IN UNFAIR PREJUDICE AGAINST PETITIONER, AND DENYING PETITIONER'S POST-TRIAL MOTION FOR RELIEF.

Given the presentation and argument detailed above, combined with the admittedly erroneous instructions on Outrage and punitive damages, it should come as no surprise that the jury was misled as to the true nature of this case at the end of the proceedings. The instant case was prosecuted from the beginning as one for wrongful termination. Respondent threw everything against the proverbial wall to see what would stick. The result was to deliberate confuse the jury, blurring the lines between wrongful termination and the more "technical" violation found in Count III – the failure to notify of FMLA rights. As the Circuit Court correctly observed, "the jury's finding for Plaintiff on the tort of Outrage was based on findings regarding wrongful termination, a claim which was dismissed by the Court."[133]

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133 Appx.0273.

During trial, Respondent agreed that his Tort of Outrage claim was tied to the wrongful discharge claims (Counts II and VI).[134] Nevertheless, the Circuit Court denied Fairmont Tool's motions under Rule 50 of the West Virginia Rules of Civil Procedure with respect to Respondent's FMLA interference claim (Count III), finding the issues questions of fact to be determined by the jury.[135] Also denying Fairmont Tool's Rule 50 motions as to the Tort of Outrage (Count IV), the Circuit Court found it to be a standalone claim and that the jury could determine that "what was done regarding actions by the employer in this matter [Count III] might be so outrageous to warrant damages."[136]

However, the "evidence" Respondent put on for the latter claim was directly geared toward the wrongful discharge claims that were ultimately dismissed and a particularly pernicious series of unsubstantiated accusations. For example, Respondent offered a former employee as a witness for the singular and express purpose of testifying that he was "ordered to terminate other people with medical issues"[137] in support of Respondent's claim for outrage and exemplary damages, because as he said the "claim is not that he [Respondent] was denied FMLA leave. It was that he was terminated in retaliation for requesting any information and the pattern ... is disposing of people" when management "has knowledge that they are going to need – have health problems, and they're going to need some time off."[138] Over the objections of Fairmont Tool,[139] the Circuit Court permitted the former employee to testify that he was told to "let go" another employee who

134 Appx. Vol. II, pp. 287-88.
135 Appx. Vol. II, p. 302.
136 Appx. Vol. II, p. 301.
137 Appx. Vol. II, p. 199.
138 Appx. Vol. II, p. 201.
139 Appx. Vol. II, pp. 197-212.

was having medical problems and missing work.[140] The testimony was unquestionably, plainly and unfairly prejudicial to Fairmont Tool. Even after the Circuit Court granted judgment against Respondent on the wrongful discharge claims, he focused on the language of those claims and damages in closing statements to the jury.

Moreover, the inclusion of the Tort of Outrage claim was erroneous. The FMLA provides statutory remedies for interference of employees' rights under the FMLA.[141] Although this Court has not specifically addressed this issue, a plethora of jurisdictions have so held. "[I]t is generally accepted that Congress intended the FMLA's specific remedies to be the exclusive remedies available for a violation of the FMLA."[142] The policy behind this rule of law is quite simple: a plaintiff could easily make an "end run" around administrative requirements, relatively short periods of repose, limitations on damages and a host of other legislative restrictions through creative pleading, that is, by slapping a common law label on what is at heart a statutory claim.

In addition to being outside the permissible boundaries of the FMLA's slate of remedies, a mere "technical violation" of the FMLA's notice requirements could never satisfy the elements of the Tort of Outrage. A technical violation of the FMLA is not egregious enough conduct to be considered "extreme and outrageous." Although this Court has not specifically addressed this issue, other jurisdictions have adopted this reasoning. For example, federal courts in the Seventh Circuit have held that "even when a plaintiff is entitled to leave under the FMLA, denying an

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140 Appx. Vol. II, p. 218.

141 29 U.S.C. § 2617(a)(2).

142 *See, e.g., Anderson v. Shade Tree Servs.*, No. 4:12CV01066 ERW, 2012 U.S. Dist. LEXIS 113009, 2012 WL 3288120, at *1 (E.D. Mo. Aug. 10, 2012) (collecting cases); *Cisneros v. Colorado*, No. CIV.A.03CV02122WDMCB, 2005 U.S. Dist. LEXIS 40045, 2005 WL 1719755, at *10 (D. Colo. July 22, 2005) (collecting cases); *O'Hara v. Mt. Vernon Bd. of Educ.*, 16 F. Supp. 2d 868, 894 (S.D. Ohio 1998).

employee's request for leave or discharging an employee for requesting leave, is not egregious enough conduct to be considered extreme and outrageous."[143]

Respondent did not present any evidence that he suffered physical injury. "'There can be no recovery in tort for an emotional and mental trouble alone without ascertainable physical injuries arising therefrom, . . . through the simple negligence of the defendant.'"[144] Moreover, "[d]amages are not recoverable if the related injurious effect is too speculative."[145]

Respondent failed to put forth any evidence regarding the emotional distress he claims to have endured other than his factually unsupported allegations and, as such, Fairmont Tool was entitled to judgment as a matter of law prior to the submission of this issue to the jury. There was no evidence as to key elements of the FMLA interference and Tort of Outrage claims. The Circuit Court's denial of those motions combined with the admitted failure to properly instruct the jury in this regard led the jury to abandon reason and issue a verdict based entirely upon passion and sympathy.

Fairmont Tool was entitled to judgment as a matter of law as to the FMLA interference and Tort of Outrage claims at the close of Respondent's case-in-chief and, most certainly, at the close of evidence. The submission to and instruction to the jury in this regard (especially considering the erroneous instructions discussed in the next section) could serve no other purpose than to prejudicially confuse and enflame the jury.

For the foregoing reasons, the Circuit Court committed error and Fairmont Tool is entitled to reversal of the jury's verdict and judgment entered.

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143 *Alcazar-Anselmo v. City of Chicago*, 2008 U.S. Dist. Lexis 32042 (N.D. Ill. 2008).

144 *Johnson v. W. Va. Univ. Hosp.*, 186 W. Va. 648, 651, 413 S.E.2d 889, 892 (1991); *accord, Settle v. Settle*, 858 F. Supp. 610 (S.D.W. Va. 1994).

145 *Johnson,* 186 W. Va. at 651, 413 S.E.2d at 892 (1991) (citations omitted.)

### D. THAT CIRCUIT COURT ERRED BY DENYING PETITIONER'S POST-TRIAL MOTION FOR RELIEF AFTER ACKNOWLEDGING THE PREJUDICIAL EFFECT OF THE JURY INSTRUCTIONS AS TO RESPONDENT'S TORT OF OUTRAGE CLAIM.

Additionally, the Circuit Court's error in denying Fairmont Tool's pre-verdict motions was compounded by the subsequent instructional errors. "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence."[146] "An erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudiced by such instruction."[147] As the Circuit Court recognized, the instructions as to Tort of Outrage erroneously focused on a claim that the trial court dismissed, i.e., wrongful discharge.

When the trial court granted Fairmont Tool's motion for judgment as a matter of law on the wrongful discharge claims, Respondent was left with no evidence in support of his claim for damages as a result of the alleged FMLA Notice violation. Even so, as discussed in more detail in Section B, above, Respondent focused at the alleged damages flowing from his claim for wrongful termination in his closing presentation to the jury. The combination of this focus with the admittedly erroneous instructions resulted in prejudicial plain error.[148]

"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Fairmont Tool objected to the inclusion of the Tort of

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[146] *Guthrie*, at Syl. Pt. 4. *See also*, Syl. Pt. 2, *Reynolds v. City Hosp., Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000).

[147] Syl. Pt. 2, *Hollen v. Linger*, 151 W.Va. 255, 151 S.E.2d 330 (1966). *Accord*, Syl. Pt. 5, *Yates v. Mancari*, 153 W. Va. 350, 168 S.E.2d 746 (1969); Syl. Pt. 8, *Kodym v. Frazier*, 186 W. Va. 221, 412 S.E.2d 219 (1991).

[148] Syl. Pt. 7, *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996) (quoting, Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)).

Outrage and the related punitive damage instructions in the jury charge.[149] By objecting to both instructions, Fairmont Tool preserved the issue.[150]

> "No party may assign as error the giving or the refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which he objects and the grounds of his objection; but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made subject of an objection.' Rule 51, in part, W.Va. RCP."

The overruling of Fairmont Tool's objections led to the tainted verdict. After hearing Respondent's references to the "termination" and the items of damage he requested in relation thereto, the jury listened to the instructions regarding wrongful discharge and termination, wholly unaware that the claims were dismissed by the trial court as a matter of law. The jury then awarded Respondent the very sums urged for in the wrongful discharge claim – sums altogether irreconcilable with the requirements of the FMLA interference claim.

Given the rulings on the wrongful discharge claims, the Circuit Court should have sustained Fairmont Tool's objection and/or granted its pre-verdict motions. At the very least, the Circuit Court should have granted Fairmont Tool's post-verdict motion for judgment as a matter of law when it recognized the plain error in the instructions, as given.

Fairmont Tool is entitled to reversal of that award and remand to the trial court for dismissal of all claims, with prejudice.

### E. ALTERNATIVELY, THE CIRCUIT COURT ERRED BY DENYING PETITIONER'S POST-TRIAL MOTION FOR RELIEF, AS THERE WAS NO LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO FIND FOR RESPONDENT ON HIS FMLA CLAIM AND THE VERDICT WAS THE PRODUCT OF PLAIN AND UNFAIR PREJUDICE.

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149 Appx. Vol. II, pp. 322-27.

150 *Page*, at Syl. Pt. 5 (quoting, Syl. Pt. 1, *Shia v. Chvasta*, 180 W. Va. 510, 377 S.E.2d 644 (1988)).

Based upon the evidence presented at the trial, there was no evidence from which a reasonable jury could have concluded that Fairmont Tool's alleged failure to notify Respondent of his eligibility to take FMLA leave after he requested it resulted in damages to Respondent in the amount of $4,401.22 or any other sum. In order to make out an "interference" claim under the FMLA, an employee must demonstrate that (1) he is entitled to FMLA benefits; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm.[151] First, Respondent did not present any evidence that he gave proper notice of his need for leave. Pursuant to the FMLA, "[a]n employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the *anticipated timing and duration* of the leave."[152] Assuming *arguendo* that Respondent mentioned his medical condition and need to take time off to undergo chemotherapy treatment, he did not present any evidence that he told anyone at Fairmont Tool the anticipated timing and duration of the leave.

In fact, the opposite is true. Respondent indicated he did not get into specifics with supervisors and recalled meeting with Jamie Kelley but not the specifics of the meeting. The only evidence of record clearly demonstrated that Fairmont Tool informed Respondent of his eligibility prior to his layoff. Pursuant to the FMLA, "[n]otification of eligibility may be oral or in writing[.]"[153] Ms. Kelley testified that she notified him of his eligibility on July 13, 2015, which testimony was unequivocal and unopposed. She further testified that Respondent failed to respond to her inquiries to determine whether the leave was FMLA-qualifying prior to his being laid off.

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151 *See, Ragsdale, supra*; *Adams v. Anne Arundel Cnty. Pub. Sch.*, 789 F.3d 422 (4th Cir. 2015).
152 29 C.F.R. § 825.302(c) (emphasis added).
153 29 C.F.R. § 825.300.

She received the paperwork from his physician, including the requested details (strong evidence of her version of events), after Respondent was laid off.

Second, as noted in the prior section, Respondent did not present any evidence that Fairmont Tool's alleged failure to provide notice resulted in an impairment of his rights and resulting prejudice. The Family and Medical Leave Act provides for recovery of damages equal to "wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation" or "any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care," up to a maximum sum equal to 12 weeks of wages or salary for the employee."[154]

Respondent testified that he was waiting for Fairmont Tool to notify him of his eligibility. However, he further testified that his doctor set his chemotherapy treatment schedule and that he had a six (6) month window to begin treatments. He further testified that his doctor first informed him that he needed to begin chemotherapy treatments immediately after his body "crashed" at the beginning of July 2015. At that point, he contacted Ms. Kelley and the information and notification process was admittedly followed, though he was laid off for unrelated reasons before he could begin FMLA leave. Respondent did not present any testimony that his physician would have scheduled his treatments sooner. The only evidence he presented of a purported consequence were the alleged "lost wages" and "lost benefits" from the date of his layoff to the date his physician said he could not work, for which Fairmont Tool cannot be held liable under the FMLA.[155]

There is no question that, by this point, Respondent was laid off and ineligible for continuing benefits. The trial court found, as a matter of law, that Respondent failed to prove the

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154 29 U.S.C. § 2617(a)(1).

155 *See*, note 84-86, *supra.*

July 20, 2015 layoff was due to this medical condition or request for FMLA leave. Therefore, Fairmont Tool's responsibility to continue any wages or benefits to Respondent ceased at the time he was laid off pursuant to the FMLA[156] and Respondent failed to establish any other "wages, salary, employment benefits ... lost" or "any actual monetary losses" as a result of the alleged actions or inactions of Fairmont Tool. Without such evidence, Respondent failed to present a legally sufficient case to support the jury's verdict on Count III – the FMLA notice violation.

For these reasons, the Final Judgment Order should be set aside, the summary judgment rulings reversed or denial of Rule 50 motion reversed and this case remanded for entry of judgment in favor of Fairmont Tool.

### F. ALTERNATIVELY, THE CIRCUIT COURT ERRED IN AWARDING RESPONDENT LIQUIDATED DAMAGES, INTEREST, ATTORNEY FEES AND COSTS BY NOT ADEQUATELY CONSIDERING THE RECORD AND RELEVANT FACTORS UNDER APPLICABLE LAW.

Assuming, *arguendo*, Respondent's verdict on the FMLA notice claim is upheld, the Circuit Court erred in awarding liquidated damages, interest, full attorney's fees and costs to Respondent. Respondent started the jury trial with six (6) claims, primarily focused on wrongful termination. After voluntary dismissal of the religious discrimination, hostile work environment claims and Outrage claims (Counts I, IV and V), as well as the Circuit Court's granting of judgment as a matter of law against Respondent on the wrongful discharge claims (Counts II and VI), the Respondent was left with a jury verdict on just the "technical" FMLA notice claim (Count III) for a total award of $4,401.22.

In addition to damages equal to actual lost wages or benefits or actual monetary losses, the FMLA provides for interest on that actual loss amount "at the prevailing rate" and liquidated

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156 *See*, 29 C.F.R. § 825.216(a)(1).

damages "equal to the sum" of the actual losses and interest.[157] However, the mere fact that liability has been established by a jury does not bar the court from exercising its discretion to deny an award of liquidated damages if it finds that the employer acted in good faith and had reasonable grounds for believing that its actions were not a violation of the Act.[158] The Circuit Court did not even acknowledge its discretion with regard to an award of liquidated damages.[159] The Circuit Court did not conduct the required analysis and failed to reconcile the fact that Respondent did not provide the required information prior to his layoff on July 20, 2015, thereby providing ample reasonable grounds for Fairmont Tool to believe it had complied with the Act.

Moreover, with respect to interest, the Circuit Court did not examine what is meant by "at the prevailing rate." Instead, the Circuit Court apparently erroneously determined that the awards were "mandatory rather than discretionary"[160] and awarded prejudgment interest at the rate for judgments set by this Court for 2017 (an apparent reference to the Administrative Order for that year)[161] and then awarded 100% of the combined total as liquidated damages.[162] To the extent it relied upon the judgment rate set pursuant to West Virginia Code § 56-6-31, rather than the "prevailing rate" referenced in the FMLA, the Circuit Court erred. This Court has equated employment litigation for benefits due under a statute with breach of contract claims.[163] Likewise,

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157 29 U.S.C. § 2617(a)(1) (2008).

158 *See, Miller v. AT&T*, 83 F.Supp. 2d 700 (S.D. W. Va. 2000), *aff'd*, 250 F.3d 820 (4th Cir. 2001). *See also, Cooper v. Fulton County*, 458 F.3d 1282, 1287-88 (11th Cir. 2006) (affirming district court's award of liquidated damages under abuse of discretion standard where district court found employer acted in good faith but its conduct was not objectively reasonable), citing, *Chandler v. Specialty Tires of America (Tenn.), Inc.*, 283 F.3d 818, 827 (6th Cir. 2002).

159 Appx.0452.

160 Appx.0452.

161 Appx.0453.

162 Appx.0453.

163 *See*, Syllabus, *Western v. Buffalo Mining Co.*, 162 W. Va. 543, 251 S.E.2d 501 (1979) ("A suit by employees for recovery of money allegedly obtained under a wage assignment that violates *W.Va. Code,*

this Court has found that Section 56-6-31 does not apply to breach of contract claims.[164] This Court has found that "West Virginia Code § 56-6-27 (2012), rather than West Virginia Code § 56-6-31, provides for prejudgment interest in actions founded on contract."[165] That section provides prejudgment interest is an issue that must be submitted to the jury for consideration.[166] The issue of prejudgment interest was not so submitted in the instant case.

With regard to the awarding of attorney fees and costs, the Circuit Court's error was both substantive and procedural. The trial court initially awarded $57,435.00 in attorney fees in February of 2018 when the jury verdict included $175,000.00 in damages for Outrage.[167] In fact, the Circuit Court's analysis and the amounts awarded did not change, even after the trial court set aside that verdict and award and Respondent voluntarily dismissed the claim altogether.[168]

The Circuit Court erred in failing to conduct the required three-step lodestar analysis for awarding fees in FMLA cases, including analysis of the claims made versus successful claims and adjusting the award accordingly.[169] The court further erred in failing to detail its findings and conclusions as to the twelve steps for adjusting the lodestar calculation up or down.[170] In particular,

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*21-5-3*, is one based on contract and the five year statute of limitations provided for in *W.Va. Code, 55-2-6*, is applicable.")

164 Syl. Pt. 3, *Ringer v. John*, 230 W. Va. 687, 742 S.E.2d 103 (2013) ("In an action founded on contract, a claimant is entitled to have the jury instructed that interest may be allowed on the principal due, [56-6-27], but is not entitled to the mandatory award of interest contemplated by [56-6-31], since this statute does not apply where the rule concerning interest is otherwise provided by law.") (citing, Syl. Pt. 4, *Thompson v. Stuckey*, 171 W. Va. 483, 300 S.E.2d 295 (1983)).

165 *Ringer*, at 690, 742 S.E.2d at 106.

166 W. VA. CODE § 56-6-27.

167 Appx.0235.

168 *Compare*, Appx.0230-36 and Appx.0445-58.

169 *See, Martin v. Cavalier Hotel Corp.*, 134 F.3d 638 (4th Cir. 1998). *See also, Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 81 n. 9, 380 S.E.2d 238, 248 n.9 (1989) (adopting this method in West Virginia).

170 *See, Johnson v. Georgia Highway Express*, 488 F.2d 714, 717- 19 (5th Cir. 1974); Syl. Pt. 4, *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 669, 584 S.E.2d 523, 525 (2003) (citing *Johnson*).

though the Circuit Court acknowledged the different outcomes between the July 2017 jury verdict and the final *Amended Judgment Order* entered on December 2, 2020, the court failed to provide any analysis as to why the changing landscape did not warrant an adjustment to the original calculation of attorney fees.[171] In the event this Court were to uphold the FMLA notice verdict, the *Hensley* and *Johnson* factors clearly weighed in favor of a substantial adjustment downward.

The clear conclusion to be drawn is that the Circuit Court did not consider the lack of success at all in determining the fees and costs to be awarded. The court did not adjust the number of hours submitted or the amounts claimed. The only adjustment made was to approximate a regionally based rate. As such, the Circuit Court's award of liquidated damages, interest, fees and costs was erroneous as a matter of law and Fairmont Tool is entitled to reversal of the same and remand of the same appropriate adjustment.

## VI. CONCLUSION.

For these reasons, Fairmont Tool respectfully prays this Honorable Court reverse the Amended Judgment Order entered by the Circuit Court on December 2, 2020, and remand this case for entry of judgment as a matter of law in favor of Fairmont Tool and dismissal of all claims, with prejudice. Alternatively, Fairmont Tool respectfully prays this Honorable Court grant it a new trial on the Respondent's claim for FMLA interference (Count III). In the further alternative, Fairmont Tool requests this Honorable Court reverse the award of liquidated damages, prejudgment interest, and attorney's fees and costs and remand this case for further proceedings consistent with the law adduced herein.

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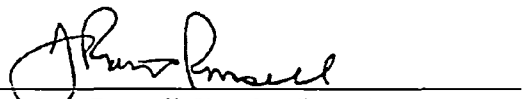
171 Appx.0455-56.

Respectfully submitted.

**PETITIONER, FAIRMONT TOOL, INC.,**
**By Counsel**

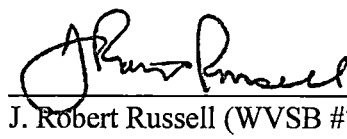


J. Robert Russell (WVSB #7788)
David R.T. Butler (WVSB #11339)
**SHUMAN MCCUSKEY SLICER PLLC**
300 Wedgewood Drive, Suite 110
Morgantown, WV 26505
Telephone: (304) 291-2702
Fax: (304) 291-2840
rrussell@shumanlaw.com

## CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2021, I served true and correct copies of the foregoing ***"Brief of Petitioner, Fairmont Tool, Inc."*** on the following counsel of record by electronic mail and by United States mail, first class, postage paid, and addressed as follows:

Karl J. Kolenich, Esquire
James L. Lindsay, Esquire
**Klie Law Offices, PLLC**
85 West Main Street
Buckhannon, West Virginia 26202
*Counsel for Respondent and Plaintiff Below, Norvel Louis Opyoke*



J. Robert Russell (WVSB #7788)
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300 Wedgewood Drive, Suite 110
Morgantown, WV 26505
Telephone: (304) 291-2702
Fax: (304) 291-2840
rrussell@shumanlaw.com