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.

REPLY BRIEF OF PETITIONER FAIRMONT TOOL, INC.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Rules

I. INTRODUCTION.

From the outset, Respondent/Plaintiff Opyoke focused his trial presentation on the idea that he was wrongfully and discriminatorily discharged. Even after judgment was rendered against him on this pernicious allegation, Respondent continued that presentation through closing arguments, including asserting that he was entitled to wages and benefits arising from his layoff on July 20, 2015. Now, Respondent makes the intellectually dishonest assertion that his wrongful discharge damages presentation to the jury (for which he was rewarded) was substantively supportive of the unrelated claim for FMLA interference (Count III), the only jury verdict to survive post-trial motions practice. After cutting through the fog of irrelevant argument offered in the Brief in Response, the fact remains that Respondent offered nary a single reference to record evidence from which the jury could have reasonably found in Respondent's favor on his FMLA interference claim.

Petitioner Fairmont Tool consistently and repeatedly challenged Respondent's FMLA interference claim on the grounds that Respondent could not make a claim for damages after his July 20, 2015 layoff under the applicable law. Petitioner did so at the pretrial motions stage pursuant to Rule 56,[1] at the trial stage pursuant to Rule 50[2] and timely objection,[3] and then at the

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[1] Appx.0033 – Appx.0036; Appx.0060. In addition, Petitioner argued that punitive and emotional distress damages were not available for an alleged FMLA violation. Appx.0044 – Appx.0046; Appx.0059 – Appx.0060.

[2] Appx. Vol. II, p. 280, lines 21 – 24; Appx. Vol. II, p. 282, line 14 – Appx. Vol. II, p. 283, line 2; Appx. Vol. II, p. 316.

[3] *See*, Appx. Vol. II, pp. 322-24. With respect to the "exhibit," Petitioner objected to the lack of foundation and prejudicial language therein. Appx. Vol. II, pp. 238-39, 240-41. The objection was withdrawn after redactions were made because Respondent had two (2) live claims for wrongful discharge at that time. Appx. Vol. II, p. 241.

post-trial stage pursuant to Rules 50 and 59.[4] Respondent offered no substantive response.[5] In his Brief in Response, Respondent again offers no substantive response.[6]

In his response brief, Respondent offers nothing more than rhetorical pleas and no substantive response to the pertinent appellate issues. He glosses over or ignores the substantial jurisprudence governing FMLA interference claims, the only claim for which he obtained a favorable judgment. Instead, Respondent chooses to level unsubstantiated and irrelevant assertions in the apparent hope of obscuring the fundamental legal flaws of his claim with a cloud of emotion and misdirection. Contrary his present allocution, the record reveals it was Respondent, not Petitioner, who repeatedly flaunted legal standards and Court rules seeking to game this State's civil justice system in hopes of manufacturing a big payday from a jury enflamed by accusations the Circuit Court found to be devoid of evidentiary support.

First, Respondent falsely describes certain post-trial motions as untimely.[7] Respondent boldly asserts that the Circuit Court gave "Petitioner the benefit of being heard on matters to which they had not timely objected."[8] As with many of Respondent's claims at trial, the accusation is sternly made but wholly lacking in factual support. While it must be conceded the motions referenced had to be filed within ten (10) days of entry of the order or judgment at issue pursuant to W. VA. R. CIV. P. 59(e), Respondent deliberately misstates the record to further his provocative

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4 Appx.00183; Appx.00187 – Appx.0190; Appx.0194 (seeking judgment as a matter of law or new trial on both FMLA interference and Tort of Outrage claims); Appx.0238; Appx.0240 (incorporating prior motion); Appx.0243-50. In particular, as an alternative to judgment as a matter of law, Petitioner sought a new trial on both claims because of the "cumulative effect of the errors" (Appx.0246) and the "combined effect of the erroneous Outrage, emotional damage and punitive damage instructions" (Appx.0247).

5 Appx.0075 – Appx.0078. Appx. Vol. II, pp. 282 (referencing alleged emotional harm without reference to "actual monetary losses" of any kind); Appx. Vol. II, p. 305; Appx.0252-57.

6 *Respondent's Brief*, pp. 10-13.

7 *Respondent's Brief*, pp. 2-4, 7-8.

8 *Id.*, p. 4.

narrative. A simple application of Rule 6(a) of the Rules of Civil Procedure conclusively establishes that each such motion was timely.[9] For instance, the August 29, 2017 post-trial motion referenced in Respondent's brief[10] sought amendment of the judgment order entered on August 16, 2017 – nine (9) days earlier under the W. VA. R. CIV. P. 6(a) calculation.[11] Likewise, the March 13, 2018 post-trial motion referenced by Respondent[12] sought relief from the amended judgment order entered February 27, 2018 – precisely ten (10) days earlier under Rule 6(a).[13]

Second, Respondent levels a series of assertions regarding the sixteen (16) months that elapsed between the Circuit Court's order for post-trial relief on June 13, 2018, which included granting a retrial of the Tort of Outrage claim, and Respondent's submission of a proposed order effectively signaling his intent to voluntarily dismiss that claim.[14] Respondent's recitation is primarily comprised of aspersions against counsel for Petitioner apparently designed to tilt the emotional balance in Respondent's favor. Noticeably absent, however, are citations to the record on appeal to support the same. This oversight is understandable, as the actual record paints a far different picture.

As the record clearly discloses, it was Respondent's dilatory and unauthorized litigation conduct that delayed matters.[15] After the Circuit Court entered the Order granting post-judgment relief,[16] Respondent waited more than a year to signal his intent to voluntarily dismiss his Tort of

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9 W. VA. R. CIV. P. 6(a) ("In computing any period of time prescribed or allowed by these rules... the day of the act, event, or default from which the designated period of time begins to run shall not be included.... When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.").

10 *Respondent's Brief*, pp. 2-3,7. Appx.0183 – Appx.0197.

11 Appx.0177 – Appx.0182.

12 *Respondent's Brief*, pp. 3-4, 8, 12. Appx.0237 – Appx.0251.

13 Appx.0200 – Appx.0205.

14 *Respondent's Brief*, pp. 5-6.

15 Appx.0323 – Appx.0412.

16 Appx.0263 – Appx.0278.

Outrage claim rather than take advantage of the retrial.[17] Even more problematic, Respondent submitted unsolicited proposed orders in contravention of Court rules.[18] In an attempt to restrict Petitioner's post-judgment and appellate rights by fiat, Respondent initially submitted an unsolicited proposed judgment order on the FMLA interference verdict.[19] After the Circuit Court rejected that attempt,[20] a year passed. Then, instead of filing a stipulation or motion under the Rules, Respondent submitted yet another unsolicited proposed order.[21] The latter proposed dismissal of the Tort of Outrage claim but added a gratuitous reference to the FMLA jury verdict.[22]

Respondent's intent to flaunt the Rules was further illuminated when he attempted to collect on the judgment previously voided by Order of the Circuit Court entered June 13, 2018.[23] First, he tried to electronically file an abstract of judgment with the Clerk on November 25, 2019, referencing the judgment expressly voided on June 13, 2018.[24] Then, he submitted yet a third unsolicited proposed order on November 27, 2019, this time trying to coerce the imposition of interest on the null and void judgment.[25] The Circuit Court correctly observed that no such judgment existed[26] and held that Respondent did not comply with the requirements of W. VA. R.

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17 Appx.0407 – Appx.0412.

18 *Id.*

19 Appx.0280; Appx.0289.

20 Appx.0289 – Appx.0290; Appx.0327 – Appx.0328.

21 Appx.0329; Appx.0415.

22 Appx.0329. In addition to being unsolicited, the Circuit Court admittedly entered the proposed order before the five (5) day period for objections under W. VA. T.C.R. 24.01 had expired. Appx.0415.

23 Appx.0263 – Appx.0278.

24 Appx.010; Appx.0415. As the Circuit Court subsequently observed, "the verdict in favor of Plaintiff as to Count III (FMLA Rights) has not been reduced to judgment, as the only Order to do so – the *Amended Judgment Order* entered February 27, 2018 – was subsequently voided in its entirety by the June 13, 2018 Order." Appx.0410 – Appx.0411. Thankfully, the Clerk of the Circuit Court of Marion County rightly rejected the electronic filing. App.010.

25 Appx.0415.

26 Appx.0410 – Appx.0411.

CIV. P. 41 in trying to dismiss the Tort of Outrage claim.[27] The Circuit Court further found that Respondent had once again submitted an unsolicited order contrary to the Trial Court Rules[28] and the proposed order did not reduce the jury verdict on the FMLA Rights claim to judgment as required by W. VA. R. CIV. P. 58.[29] For these reasons, the Circuit Court set aside the improvidently entered proposed order in favor of a separate Amended Judgment Order entered March 19, 2020.[30]

Respondent's repetitive accusations in this regard appear to be offered for whatever prejudicial effect they can provoke. They are irrelevant to the relief sought and unresponsive to the issues raised in the instant appeal, as Respondent has not cross-appealed or otherwise alleged error in any of the Circuit Court's rulings below. In fact, Respondent voluntarily dismissed his Tort of Outrage claim rather than take advantage of the retrial awarded by the Circuit Court.

Respondent's post-trial conduct is a concentrated continuation of his trial strategy, which was to make unsupported accusations to confuse and mislead the jury in hopes of securing a verdict based upon sympathy for the Respondent and emotional disdain for the Petitioner. The combination of Respondent's strategy and the confusing, erroneous instructions issued by the Circuit Court worked to Respondent's benefit. The excessive nature of the jury's verdict demonstrated the jury's purely emotional reaction to Respondent's allegation that he was wrongfully terminated (laid off) in response to his cancer diagnosis and complete disregard for the actual evidence (or lack thereof) adduced with respect to the FMLA interference claim. For these

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27 Appx.0411. *See*, W. VA. R. CIV. P. 41(a) and the two (2) methods indicated – (1) a stipulation signed by all parties or (2) "at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

28 Appx.0411 – Appx.0412. *See*, W. VA. T.C.R. 24.01(b) ("Except for good cause or unless otherwise determined by the judicial officer, no order may be presented for entry unless it bears the signature of all counsel and unrepresented parties.").

29 Appx.0411.

30 Appx.0412; Appx.0413 – Appx.0419.

reasons, the jury's verdict must be set aside and judgment entered for Petitioner. At the very least, Petitioner was and is entitled to a new trial on Respondent's Count III (FMLA Rights) without the cloud of instructional errors and prejudicial evidentiary presentations that infected the jury trial of July 19-21, 2017.

II. ARGUMENT IN REPLY.

A. STANDARD OF REVIEW.

The appropriate standard of review relative to the instant appeal issues is *de novo*.[31] Where, as here, the damages claimed were not cognizable under the relevant statute (in this case 29 U.S.C. § 2917) and the error was further compounded by admittedly erroneous instructions, the *de novo* standard applies and the Circuit Court's order denying judgment as a matter of law must be reversed. Alternatively, a new trial on the FMLA interference claim must be granted.[32]

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

Respondent completely sidesteps the assignment of error. The instant issue is not the jury's assessment of conflicting testimony but, rather, Respondent's failure to adduce any evidence on a

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[31] 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."); *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); 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.").

[32] Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976) ("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 when it is clear that the trial court has acted under some misapprehension of the law or the evidence."). *See also*, *McKenzie v. Sevier*, 2020 W. Va. LEXIS 808, *15, 854 S.E.2d 236, 2020 WL 7223169 (W. Va., Nov. 18, 2020).

critical element of his claim. By all accounts, Respondent concedes the point, as he has responded with nary a single citation to where he offered evidence of a recoverable monetary loss.

In order to make out a claim under 29 U.S.C. § 2615(a)(1) of the FMLA, an employee must prove five (5) separate elements, including proof that "(5) the employer denied [his] FMLA benefits to which [he] was entitled."[33] If the employee fails to prove the essential element of "prejudice," the claim fails as a matter of law.[34] As the Supreme Court has made clear,

> To prevail under the cause of action set out in § 2617 [of the FMLA], an employee must prove, as a threshold matter, that the employer violated § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation: ***The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the violation," § 2617(a)(1)(A)(i)(II),*** and for "appropriate" equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered.[35]

Where the employee claims damages related to a layoff (or termination) decision that would have occurred whether or not the employee had requested FMLA leave, an FMLA interference claim cannot be maintained.[36]

Respondent focuses entirely on his evidentiary presentation as to notice and employer response (or alleged lack thereof). Noticeably absent from Respondent's brief is any citation to the record for evidence of prejudice, the final and vital element of the FMLA interference claim (Count III)), such as will sustain a claim for *compensation and benefits lost*, the only relief sought by

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33 *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)).

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

35 *Ragsdale*, 535 U.S. at 89 (citations omitted) (emphasis added).

36 *See* 29 C.F.R. § 825.216(a)(1); *Yashenko v. Harrah's NC Casino Company, LLC*, 446 F.3d 541, 550 (4th Cir. 2006).

Respondent in connection with Count III. The Circuit Court's orders did not support such a monetary award. The Circuit Court merely noted evidence that "Defendant's interference caused harm as Plaintiff's treatment was delayed which resulted in medical complications further delaying treatment, inability to procure unemployment, and ultimately a feeling that Plaintiff was given a 'death sentence' in light of the delay."[37] Not only was this conclusion unsupported by the record or otherwise supportive of the jury's verdict for damages as to Count III, as noted above, none of this alleged "harm" meets the *Ragsdale* criteria for compensation and Respondent did not seek (nor was he entitled to) equitable relief with regard to the FMLA interference claim.

Respondent's evidentiary wasteland in this regard was present both before and during trial. Going down the same wayward path as Respondent, the Circuit Court denied Petitioner's motions by focusing on the notice and response evidence, ignoring the legal premise that Respondent could not make a claim for wages or benefits post-layoff and Respondent's failure to present evidence of identifiable monetary losses in support of his FMLA interference claim. By the time the Circuit Court granted Petitioner judgment on the wrongful discharge claims at the close of Respondent's evidence, Respondent had already concluded his slanted presentation of the case. Ignoring the applicable legal standard and the prejudicial effect had on Petitioner's defense of the FMLA interference and Tort of Outrage claims, the denial of the Rule 50 motions served to compound the error.

The substantial prejudice visited upon Petitioner was then augmented and cemented when the Circuit Court erroneously (and admittedly so) instructed the jury on the Tort of Outrage claim, which instructions were given over Petitioner's objection based upon the faulty premise that

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37 Appx.0320-21.

Respondent could assert the IIED claim in relation to his remaining FMLA interference claim.[38] The prejudicial effect of the instructional error cannot be understated when one considers that the error admittedly told the jury that the wrongful discharge claims *were alive and well* by the language used therein. Respondent took full advantage of this instructional error by repeatedly implying that his claim for damages was rooted in the already dismissed wrongful discharge claims.[39] The excessive nature of the jury's verdict is proof that Respondent was successful in enflaming the jury to his benefit and the prejudice of Petitioner.

As noted above, Petitioner consistently objected to and moved for judgment/new trial on the FMLA interference claim on the grounds that Respondent failed to prove the final element. Respondent argues Petitioner's objection to his evidence was not preserved. This naked assertion is belied by the record below. Petitioner moved for judgment pursuant to Rule 50 as to the FMLA interference claim at the close of Respondent's case-in-chief.[40] Furthermore, contrary to

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[38] Respondent actually argued to the Circuit Court that the "outrageous" conduct justifying the IIED claim was the alleged termination of Respondent. Appx. Vol. II, pp. 284-86 ("The fact is that when the[y] retaliated against him and they fired him for requesting FMLA, it took away his insurance.... That very simple chain of elements that we can go through that if you fire somebody, if you intentionally fire somebody because they need leave, knowing that that's going to result in them not having health insurance, knowing that they are actively treating for cancer, and that that's going to stop them from getting cancer treatment, that's going to put somebody in severe emotional distress and that causes emotional distress."). In fact, Respondent conceded that he was not entitled to emotional distress damages under the FMLA claim, only the State law public policy claim. Appx. Vol. II, p. 286. Upon questioning by the Court, counsel for Respondent acknowledged that the Tort of Outrage claim was tied to the FMLA retaliation claim (Count II) and the public policy retaliatory discharge (*Harless*) claim (Count VI). Appx. Vol II, pp. 287-88.

Both of these claims were dismissed by the Circuit Court on Rule 50 motions, finding that the evidence did not support the proposition that Petitioner's decision-makers had knowledge of Respondent's FMLA activity when making the decision to lay him off. Appx. Vol. II, pp. 302-06. However, the Circuit Court *sua sponte* determined that the Tort of Outrage claim was a standalone claim and that the jury could conclude that the Petitioner's actions, as alleged in the FMLA interference claim, were outrageous. Appx. Vol. II, pp. 301-02.

[39] Appx. Vol. II, pp. 359-61, referencing Appx.0448 (the "exhibit" of calculations of wages and benefits from July 20, 2015 (date of layoff) through August 16, 2015 (date Respondent was no longer able to maintain gainful employment)).

[40] *See* notes 2-4, *supra*.

Respondent's representation, Petitioner did initially object to the "exhibit" for lack of foundation and prejudicial information, withdrawing the same only after redactions and due to the presence (at that time) of two (2) claims for wrongful termination.[41] It was only after Respondent's case-in-chief that the Circuit Court correctly determined 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[42] and found "no evidence was presented to support that."[43]

Respondent made no substantive response to the indictment that he failed to meet the fifth element of the FMLA interference claim with evidence of an actual monetary loss, either in his response to the Rule 56 motion, responses to the Rule 50 motions at trial, or response to post-trial motions.[44] Nor does Respondent offer any defense before this Court.[45] Respondent certainly cannot now be heard to suggest with a straight face that the evidentiary presentation summarized in his "Exhibit 3" was relevant to the prejudice element of the FMLA interference claim.

That presentation (testimony and "exhibit") purported to support a claim for "lost wages" and "benefits" during the period between his layoff (July 20, 2015) and the date his doctor declared him unable to maintain gainful employment (August 16, 2015)[46] in support of Respondent's original wrongful discharge claims. Respondent testified that he started treatment on July 15, 2015,[47] that he believed he was laid off on July 20, 2015 "due to my medical condition"[48] and, had

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41 *See* note 3, *supra.*

42 Appx. Vol. II, pp. 302-06.

43 Appx. Vol. II, p. 305.

44 *See*, note 5, *supra.*

45 *Respondent's Brief*, pp. 10-13.

46 Appx. Vol. II, pp. 108, 237-42. Respondent testified that he was still unable to return to work by the time of trial. Appx. Vol. II, p. 254.

47 Appx. Vol. II, p. 235.

48 Appx. Vol. II, p. 261.

he not been laid off, he would have been able to work for Petitioner through August 16, 2015.[49] Respondent testified that he would've been able to access his health insurance through Petitioner for three (3) additional months at that point.[50] This was the entirety of the support for Respondent's "Exhibit 3," which contained a calculation of $3,520.00 ($22/hour x 40 hours/week x 4 weeks) in "lost wages"[51] and $881.22 ($293.74/month x 3 months)[52] in benefits (the costs of his health insurance coverage) during this time period, the very amount awarded by the jury. As Respondent testified, the numbers indicated were to reflect his "rate of pay, date of termination, and then when I was removed from work completely, and the benefits"[53] or a calculation "[f]rom the date I was let go on the 20th of July to August 16, 2015."[54]

Pursuant to *Ragsdale* and 29 C.F.R. § 825.216(a) and the Circuit Court's granting of the Rule 50 motions as to the wrongful discharge claims, Respondent is not legally entitled to "lost wages" or "benefits" from July 20, 2015 to the present. Yet, that is the only evidence that he presented both before and during trial as to his claim for "actual monetary losses" in conjunction with the FMLA interference claim. Respondent did not offer any testimony as to how he would have structured any such leave differently, much less the amount of wages or benefits he was denied because of the alleged interference. There was absolutely no testimonial or evidentiary support linking the alleged interference during April through early July of 2015 to the simple calculations made by Respondent and his counsel, as evidenced by Respondent's failure to cite to the record in support of such a contention.

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49 Appx. Vol. II, p. 262.
50 *Id.*
51 Appx. Vol. II, pp. 239-40, 361.
52 Appx. Vol. II, p. 177, 240, 360.
53 Appx. Vol. II, p. 238.
54 Appx. Vol. II, p. 240.

For these reasons, the Circuit Court clearly erred in denying the Rule 50 and 59 motions as to the FMLA interference claim. Those decisions must be reversed and the case remanded for entry of judgment as a matter of law in favor of Petitioner on the FMLA interference claim (Count III).

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.

As with the previous assignment of error, Respondent avoids the issue. The submission of the Tort of Outrage claim to the jury (with its admittedly erroneous instructions) was legally erroneous and inherently prejudicial to Petitioner's right to a fair trial on the FMLA interference claim. While the Circuit Court granted Petitioner's motion for new trial on the Tort of Outrage claim, the Circuit Court denied the motion for new trial on the FMLA interference claim, the claim to which Respondent now says his Tort of Outrage count was anchored.[55] Moreover, as discussed in the next Section, jury instructions are to be read "as a whole." The admittedly and prejudicially erroneous Tort of Outrage instructions infected the instructions as a whole. Petitioner raised this point in post-trial motions and gave the Circuit Court the opportunity to correct the error.

As noted in the initial Brief, Respondent's presentation on this topic was not geared toward the FMLA interference allegations but, rather, the allegation that Petitioner terminated Respondent for his health condition and had allegedly done the same to other employees.[56] Respondent's evidentiary presentation (or lack thereof) was bad enough. But, the inclusion of this claim for

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[55] Respondent's position in this regard has morphed over time. Initially, Respondent admitted that he could not make such a claim related to the conduct referenced in the FMLA interference count. *See*, note 37, *supra*. Since the Circuit Court decided to treat the IIED claim as a standalone claim, Respondent did an about-face on the subject.

[56] Appx. Vol. II, pp. 199, 201.

nothing more than what the federal courts have labeled a "technical" violation (29 U.S.C. § 2615) of the FMLA is unsustainable under federal and West Virginia law.[57] Petitioner was entitled to judgment as a matter of law as to both claims. The submission of both claims (especially where, as here, the instructions were erroneous) served no other purpose than to prejudicially confuse and enflame the jury.

For the foregoing reasons, the Circuit Court committed reversible error and Petitioner is entitled to reversal of the jury's verdict and entry of judgment in its favor on all counts.

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.

Respondent is incorrect. As noted above, Petitioner raised this issue in its post-trial motions, seeking, at a minimum, a new trial on both counts submitted to the jury – FMLA interference and Tort of Outrage.[58] Those motions were denied by the Circuit Court.

Respondent's analysis is confusing and illogical. He seems to want it both ways. He argued below that the Tort of Outrage claim was adequately supported by the evidence of conduct that undergirded the FMLA interference claim. Yet, he now suggests that an admittedly prejudicial error in the instruction as to Outrage should be ignored when evaluating the companion FMLA instructions. This is not the law in West Virginia.

The Court's instructions to the jury are to be read as a whole, not dissected. "[W]hen reviewing a challenge to jury instructions, we consider the instructions given as a whole and not

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57 *See*, Section V.C. of the *Brief of Petitioner Fairmont Tool, Inc.*

58 *See*, notes 3-4, *supra*.

in isolation to determine whether the instructions adequately state the law and provide the jury with an ample understanding of the issues and the controlling principles of law."[59]

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.[60]

Further, "[a]n 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."[61]

As the Circuit Court correctly recognized, the Outrage instructions were prejudicially erroneous and left the jury with the impression that it could award damages based upon claims that had been dismissed by the court, i.e., the wrongful discharge claims. The combined effect of denying Petitioner's Rule 50 motion as to the Tort of Outrage and the erroneous instructions to the jury permitted Respondent to present an argument to the jury that focused on July 20, 2015 – the date Respondent was laid off – and to award him damages based upon the jury's reaction to that decision. The reverse should have taken place. By its rulings dismissing as a matter of law Respondent's wrongful discharge claims, the Circuit Court identified July 20, 2015 as a legal cutoff for any of Respondent's claims for monetary damages.[62] Nevertheless, the erroneous

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[59] *State v. LaRock*, 196 W. Va. 294, 308, 470 S.E.2d 613, 627 (1996), citing, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

[60] Syl. Pt. 4, *State v. Guthrie*, 194 W. Va. 657, 665, 461 S.E.2d 163, 171 (1995).

[61] 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).

[62] *See*, Section B, *supra*, and the discussion of 29 C.F.R. §825.216(a) and *Ragsdale*, 535 U.S. at 89.

instructions misled the jury. Under the applicable standard, Petitioner was entitled to judgment as a matter of law for want of evidence supporting the jury instructions on FMLA interference and Tort of Outrage. Alternatively, Petitioner was entitled to a new trial on the FMLA interference claim, given the admittedly prejudicial effect of the instructions and plain error that infected the proceedings at trial.

For the foregoing reasons, Petitioner is entitled to reversal of the jury's verdict and Circuit Court's orders upholding same and entry of judgment in Petitioner's favor on all counts or, in the alternative, a new trial on the FMLA interference claim (Count III).

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.

As discussed in greater detail in Section B, above, Respondent ignores the final element of his FMLA interference claim – proof that "(5) the employer denied [his] FMLA benefits to which [he] was entitled."[63] Without proof of "compensation and benefits lost 'by reason of the violation,'" or "other monetary losses sustained 'as a direct result of the violation,'" Respondent could not and cannot maintain a claim for FMLA interference in violation of 29 U.S.C. § 2615.[64]

Notwithstanding the fact that his testimony was insufficient as a matter of law,[65] Respondent merely cites to testimony he believes supports the notice element.[66] He omits the fifth element altogether. He offers no evidence that he would have structured his leave in a different way or otherwise received additional benefits under the FMLA remedial scheme. Respondent's

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63 *Rodriguez*, 545 F.Supp.2d at 515.
64 *Ragsdale*, 535 U.S. at 89, quoting, 29 U.S.C. § 2617(a)(1)(A)(i).
65 *See*, Section V.E. of the *Brief of Petitioner Fairmont Tool, Inc.*
66 *Respondent's Brief*, p. 16.

only evidence in this regard was, as discussed above, a calculation of "wages" and "benefits" he claims to have lost **after** he was laid off on July 20, 2015.

The undeniable fact is that Respondent was laid off and ineligible for continuing benefits at the time he claims to have lost wages and benefits. Given the Circuit Court's ruling granting judgment as a matter of law on the wrongful termination claims, Petitioner was entitled to judgment as a matter of law as to these alleged monetary losses in relation the FMLA interference claim. In the alternative, Petitioner was entitled to a new trial on the FMLA interference claim.

For the foregoing reasons, the Circuit Court committed reversible error and Petitioner is entitled to reversal of the jury's verdict and entry of judgment in its favor on all counts or, in the alternative, a new trial on the FMLA interference claim (Count III).

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.

Here, Respondent's argument is truly reductive. In his rush to defend the Circuit Court's erroneous post-verdict awards, Respondent skips over the first step in the analysis of his claim to additional damages, including liquidated damages, interest, and attorney fees and costs. He ignores the fact that he failed to prove compensable monetary losses in relation to the FMLA interference claim from which to base such post-verdict awards.

Respondent also furthers his baseless accusation strategy in this respect. Respondent makes the positively fallacious argument that Petitioner's motion for relief from the post-judgment awards "was untimely."[67] Per Order entered October 15, 2018, the Circuit Court observed that no judgment order was entered as to the FMLA interference jury verdict, as the February 27, 2018

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67 *Respondent's Brief*, p. 18.

Amended Judgment Order had been voided by Order entered June 13, 2018 and no judgment order would be entered until completion of the retrial of the Tort of Outrage claim.[68] By Order entered March 19, 2020, the Circuit Court further observed that the "prior judgments of record have all been expressly voided by Order of the Court"[69] and the verdict in Respondent's favor on the FMLA interference claim (Count III) "has not been reduced to judgment."[70] For these reasons, the Circuit Court set aside the improvidently entered proposed order in favor of a separate Amended Judgment Order entered March 19, 2020.[71] As noted in Petitioner's motion filed May 29, 2020,[72] the COVID-19 pandemic interrupted judicial proceedings and, pursuant to the Administrative Orders of this Court, the motion was timely. This resulted in the Circuit Court's entry of the Amended Judgment Order dated December 2, 2020,[73] from which Petitioner appealed to this Honorable Court.

Suffice to say, for the reasons spread across this Reply and the initial Brief of Petitioner, Respondent failed to prove cognizable compensatory damages related to his only surviving jury verdict – FMLA interference (Count III). As such, he was not and is not entitled to additional damages in the form of liquidated damages, interest, attorney fees and costs under the law cited in the initial Brief of Petitioner.[74]

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68 Appx.0321.
69 Appx.0410.
70 Appx.0410 – Appx.0411.
71 Appx.0412; Appx.0413 – Appx.0419.
72 Appx.0420 – Appx.0444.
73 Appx.0445 – Appx.0458.
74 *See*, Section V.F. of *Brief of Petitioner Fairmont Tool, Inc.*

III. 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.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, I served true and correct copies of the foregoing ***"Reply 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:

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