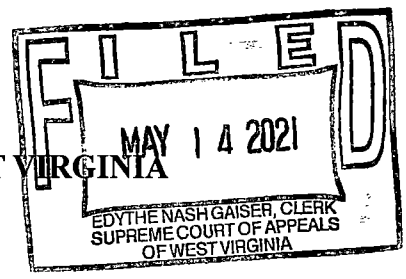

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Fairmont Tool, Inc.
Defendant Below, Petitioner

vs.) No. 20-1042

Norvel Louis Opyoke,
Plaintiff Below, Respondent

(An appeal from a final order of the Circuit Court of Marion County
Civil Action No. 15-C-252.)

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE AND BACKGROUND:
A. THE COMPLAINT AND UNDERLYING FACTS.

The instant action began on October 27, 2015 when Respondent filed his Complaint in the Circuit Court of Marion County alleging six counts: Count I – Religious Discrimination in Violation of the West Virginia Human Rights Act ("WVHRA"), Count II – Discriminatory Discharge in Violation of the Family Medical Leave Act ("FMLA"), Count III – Failure to Notify of FMLA Rights, Count IV – Tort of Outrage, Count V – Hostile Work Environment, and Count VI – Retaliatory Discharge.[1] As Petitioner has provided a detailed account of the underlying facts in this claim, Respondent will only provide facts that need to be added in addition to Petitioner's recount or to clarify the same.

At a visit with his doctor in April, Mr. Opyoke learned that the doctor was ready to start chemo.[2] On his first day back to work after that visit, Mr. Opyoke told Pat Stevens and Brian Lamb about the surgery, that he was going to be getting a different type of chemo and that he wanted to know if he could get FMLA leave.[3] Mr. Opyoke continued to go to Mr. Stevens weekly and ask about the FMLA papers.[4] Mr. Opyoke testified that he talked to Brian Lamb, since he had helped write the Employee Handbook that provided that FMLA was an option, but Mr. Lamb did not know to whom to direct him.[5] Mr. Opyoke also spoke to Tammy Hendricks, to whom office questions were directed.[6] Mr. Opyoke recalls being told by Ms. Hendricks or her helper that FMLA wasn't offered at Fairmont Tool.[7] From his April visit with his doctor, in

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[1] Appx.0015-25
[2] Appx. Vol. II, p. 230
[3] Appx. Vol. II, p. 231
[4] Appx. Vol. II, p. 232
[5] Appx. Vol. II, p. 232
[6] Appx. Vol. II, p. 232
[7] Appx. Vol. II, p. 233

which he was told he needed to start chemotherapy, until July 4th when he was hospitalized, no one at Fairmont Tool ever got back to him about his request to take medical leave.[8]

B. THE UNDERLYING CASE AND TRIAL

Respondent does not dispute Petitioner's recitation of the facts regarding the underlying case and trial.

C. THE POST-TRIAL MOTIONS PRACTICE

As stated in Petitioner's brief, the Circuit Court entered judgment on the jury's verdict on August 16, 2017.[9] Respondent will provide further facts related to the post-trial motions practice, as a proper understanding of the facts related to these filings is paramount to the full disposition of this matter.

On August 25, 2017, Petitioner filed "Defendant's Motion for Judgment as a Matter of Law or, In the Alternative, For a New Trial".[10] On August 29, 2017, Petitioner also filed "Motion to Amend Judgment Order Entered August 16, 2017".[11] This motion was not made within ten (10) days of the entry of the Judgment Order entered August 16, 2017 and therefore was not a proper motion under W. Va. R. Civ. Pro. Rule 59(e).

On October 31, 2017, a hearing was held on "Defendant's Motion to Amend Judgment Order Entered August 16, 2017"[12], despite the fact that the motion was not timely filed within ten (10) days of the Order. Despite the untimely filing, the Circuit Court granted Petitioner's

[8] Appx. Vol. II, p. 233
[9] Appx. 0177
[10] Appx. 0183 - 0197
[11] Appx.0370
[12] Appx. 0198

motion and entered "Order Granting Defendant's Motion to Amend Judgment Order August 16, 2017" and "Amended Judgment Order" on February 27, 2018.[13] The Petitioner was given the benefit of this Order being entered, despite the fact that their motion to amend the order did not comply with the time limitation set in Rule 59(e).[14]

On February 27, 2018, the Circuit Court also entered "Order Denying in Part and Granting in Part Defendant's Motion for Judgment as a Matter of Law and Alternative Motion for Judgment as a Matter of Law".[15] In this Order, the Circuit Court opined that there was legally sufficient evidence presented on which a reasonable jury could find that Petitioner failed to notify Respondent of his eligibility to take FMLA leave and the failures of the Petitioner to provide such information and the actions or inactions leading thereto was of such an "extreme and outrageous" nature to warrant recovery under the tort of outrage.[16] The Circuit Court also opined that the award of punitive damages was duplicative of the damages awarded with regard to the tort of outrage and was, therefore, improper double recovery.[17] On the same date, the Circuit Court entered "Order Granting Plaintiff's Motion For Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, and Litigation Costs, In Part.".[18]

Petitioner then filed "Defendant's Motion to Alter or Amend the Court's Amended Judgment Order and Defendant's Motion for a New Trial and Alternative Motion for Judgment as a Matter of Law" on March 13, 2018.[19] This motion was also filed after the ten (10) day deadline provided by W. Va. R. Civ. Pro. Rule 59 and therefore was not a proper motion to be

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[13] Appx.0198-0205
[14] W. Va. R. Civ. Pro. Rule 59(e)
[15] Appx.0206 - 0228
[16] Appx.0215
[17] Appx.0215
[18] Appx.0230-0236
[19] Appx.0238-0251

heard. Respondent filed "Plaintiff's Response In Opposition to Defendant's Motion to Alter or Amend the Court's Amended Judgment Order and Defendant's Motion for a New Trial and Alternative Motion for Judgment as a Matter of Law" on March 16, 2018, objecting to Petitioner's motion on the grounds that it was filed more than ten (10) days after the entry of the judgment by the Circuit Court and that Petitioner had already made a filing on the same issues and the Circuit Court properly addressed all of Petitioner's assignments of error and ruled accordingly.[20]

On March 21, 2018, a hearing was held on "Defendant's Motion to Alter or Amend the Court's Amended Judgment Order and Defendant's Motion for a New Trial and Alternative Motion for Judgment as a Matter of Law" as well as other pending motions in the matter.[21] On June 13, 2018, the Circuit Court entered "Order Granting Defendant's Motion for New Trial", only as to Count IV (Tort of Outrage) and ordered that the jury verdict as to Count IV be set aside.[22] In that same Order, the Circuit Court voided the "Amended Judgment Order" entered February 27, 2018, as well as the "Order Denying in Part and Granting in Part Defendant's Motion for Judgment as a Matter of Law and Alternative Request for a New Trial" also entered February 27, 2018. These orders were entered despite the fact that Petitioner's objections to the Circuit Court's February 27, 2018 orders were not timely filed, again giving the Petitioner the benefit of being heard on matters to which they had not timely objected.

On August 1, 2018, the Circuit Court sent a letter to the parties detailing its findings with regard to Plaintiff's proposed Partial Judgment Order on FMLA Claim and the objections to the

[20] Appx.0252-0257
[21] Appx.0237-0251
[22] Appx.0263-0278

same.[23] After detailing the findings, the Circuit Court directed Petitioner to draft a proposed order denying their renewed Rule 50(b) motion, as such was the order of the Circuit Court, within ten days of the receipt of the letter.[24]

On September 10, 2018. Petitioner filed "Defendant's Motion for Summary Judgment" moving the Circuit Court for judgment as a matter of law on the remaining claim for Tort of Outrage.[25] A hearing was set on this matter however, due to the severe illness of Respondent's counsel, a motion was made by Respondent to continue the hearing and an order was entered by the Circuit Court on the same day granting the motion to continue.[26] On October 5, 2018, the Circuit Court entered "Order Denying Defendant's Rule 50(b) Motion As To Count III".[27] Around this time, Respondent began considering dismissing the tort of outrage claim, in part because of Respondent's failing health. Respondent sent Petitioner a proposed dismissal order for the tort of outrage claim in approximately October or November of 2018. A couple of months later, after not receiving a response on the matter, Respondent's counsel called Petitioner's counsel, who indicated that they had not yet signed the dismissal order as there were some issues regarding the same that they wanted to address. Petitioner's counsel indicated that they would file a motion regarding the same, but a motion was never filed. Respondent's counsel attempted to contact Petitioner's counsel over the course of the next several months, in the hopes that they could come to a resolution that would lead to the entry of a final order. Throughout this time, Respondent's health continued to decline and a speedy conclusion to this matter was of the utmost concern.

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[23] Appx.0289-0290
[24] Appx.0290
[25] Appx.0291-0292
[26] Appx.0371
[27] Appx.0311-0322

For almost a year, no further action occurred in this matter. On October 4, 2019, approximately one year after Respondent originally sent the Petitioner the proposed dismissal order for the Tort of Outrage claim to Petitioner to review, Respondent proceeded with filing the proposed dismissal order with the Court. The Circuit Court entered the "Order Dismissing Tort of Outrage Complaint" on October 9, 2019.[28]

On December 4, 2019, Petitioner filed "Defendant's Objections to Plaintiff's Proposed Order Setting Pre-Judgment and Post-Judgment Interest".[29] On this same date, Petitioner also filed "Defendant's Motion For Status Conference and Other Relief Regarding Attorney Fees, Liquidated Damages and Interest".[30] Respondent filed a motion to strike Petitioner's motion for a status conference and other relief on the basis that it was untimely filed, but the Circuit Court still set a hearing on the motion.[31] Petitioner was again given an opportunity to be heard on the same post-trial motions that had previously been ruled on.

On January 15, 2020, the Petitioner filed "Defendant's Motion for Relief Regarding Order Dismissing Tort of Outrage Complaint".[32] Petitioner had previously requested a new trial on the Tort of Outrage claim, was granted a new trial, and then had objections once Respondent proposed an order dismissing that claim. At this point, it became clear that Petitioner's continual filing of post-trial motions was an attempt to delay a final entry in this matter.

On March 19, 2020, the Circuit Court entered "Order Granting Defendant's Motion for Relief Regarding Order Dismissing Tort of Outrage".[33] In this Order, the Circuit Court voided

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[28] Appx.0323-0324
[29] Appx.0326-0329
[30] Appx.0330-0345
[31] Appx.0346-0350
[32] Appx.0374-0382
[33] Appx.0407-0412

the "Order Dismissing Tort of Outrage Complaint" entered on October 9, 2019 and further ordered that Respondent's Tort of Outrage claim be dismissed with prejudice.[34] Petitioner was again given the opportunity to be heard on matters and the Circuit Court entered a ruling granting the relief requested. The Circuit Court also entered "Amended Judgment Order" on March 19, 2020.[35] This "Amended Judgment Order" voided the previous "Order Granting Plaintiff's Motion for Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, and Litigation Costs, In Part" entered on February 27, 2018.[36]

Petitioner then filed "Defendant's Motion to Alter, Revise or Amend *Amended Judgment Order* Entered March 19, 2020 Pursuant to WVRCP 52(b) and WVRCP 59(e)"[37], which simply reasserted arguments that had previously been made in motions by Petitioner and that the Circuit Court had fully ruled upon. On December 2, 2020, the Circuit Court entered "Amended Judgment Order"[38] which provided final rulings from the Circuit Court on these matters.

II. SUMMARY OF ARGUMENT

Petitioner has continually attempted to take multiple bites from the apple by pursuing numerous post-trial motions, with many of these motions being filed untimely. The Circuit Court entered judgment on the jury's verdict on August 16, 2017. Petitioner then filed "Defendant's Motion for Judgment as a Matter of Law or, In the Alternative, For a New Trial" on August 25, 2017. On February 27, 2018, the Circuit Court entered "Order Denying in Part and Granting in

[34] Appx.0412
[35] Appx.0413-0419
[36] Appx. 0418
[37] Appx.0420-0444
[38] Appx.0457

Part Defendant's Motion for Judgment as a Matter of Law and Alternative Motion for Judgment as a Matter of Law". In this Order, the Circuit Court opined that there was legally sufficient evidence presented on which a reasonable jury could find that Petitioner failed to notify Respondent of his eligibility to take FMLA leave and the failures of the Petitioner to provide such information and the actions or inactions leading thereto was of such an "extreme and outrageous" nature to warrant recovery under the tort of outrage.

On February 27, 2018, the Circuit Court also entered "Order Granting Plaintiff's Motion for Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, and Litigation Costs, In Part", "Order Granting Defendant's Motion to Amend Judgment Order August 16, 2017", and "Amended Judgment Order". Petitioner did not file any objections to either of these orders, nor did they file any further motions until March 13, 2018. Rule 59 requires that objections to a judgment that has been entered must be filed within ten (10) days.

On March 13, 2018, more than ten (10) days after the entry of the "Amended Judgment Order", Petitioner filed "Defendant's Motion to Alter or Amend the Court's Amended Judgment Order and Defendant's Motion for a New Trial and Alternative Motion for Judgment as a Matter of Law". Not only was this motion not timely filed, but Petitioner was simply trying to take another bite out of the apple by making another motion with the same arguments made in the August 25, 2017 motion. The Circuit Court had already properly addressed all of Petitioner's assignments of error and had ruled accordingly. As no objections to the February 27, 2018 Orders by the Circuit Court were timely filed by Petitioner, the record was not preserved for Petitioner to now bring this appeal.

Further, Petitioner has alleged multiple assignments of error related to Respondent's Tort of Outrage claim. These assignments of error are moot, as the Circuit Court granted Petitioner's

motion for a new trial on Respondent's Tort of Outrage claim and this claim was later dismissed. Further, when Petitioner filed a motion requesting relief from the order dismissing the Tort of Outrage claim, the Circuit Court also granted that. Petitioner cannot allege that the Tort of Outrage claim has caused prejudice because any jury award related to the Tort of Outrage claim has been removed from the December 2, 2020 "Amended Judgment Order".

III. STATEMENT REGARDING ORAL ARGUMENT

The facts and legal arguments are adequately presented in the brief and record on appeal. The decisional process would not be significantly aided by oral argument, and the case is appropriate for a memorandum decision.

IV. ARGUMENT

A. STANDARD OF REVIEW

The denial of Petitioner's motion for summary judgment was not a decision on the issues themselves, but rather a finding that there was a genuine issue of fact to be tried.[39] An order denying a motion for summary judgment is merely interlocutory, leaves the case pending for trial, and is not appealable except in special instances in which an interlocutory order is appealable.[40] In this matter, the denial of the motion for summary judgment is not a ruling that is properly reviewable.

Regarding Petitioner's renewed motion for judgment as a matter of law under Rule 50(b), the task of this Court is not to review the facts to determine how it would have on the evidence presented, but rather to determine whether the evidence was such that a reasonable trier of fact

[39] *Aetna Casualty & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 172 (1963).
[40] Syl. Pt. 8 *Aetna Casualty & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160 (1963).

might have reached the decision below.[41] When considering a ruling on a Rule 50(b) motion after trial, the evidence must be viewed in the light most favorable to the nonmoving party.[42]

It is not the Circuit Court's role to substitute its credibility judgments for those of the jury.[43] The Circuit Court, in determining whether there was enough evidence to support the jury's verdict, should (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.[44]

The issue of whether Respondent 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 moot, as the Tort of Outrage claim has been dismissed, and the Court does not ordinarily decide moot questions.[45]

B. THE CIRCUIT COURT DID NOT ERR BY DENYING PETITIONER'S MOTIONS FOR JUDGMENT AS TO RESPONDENT'S FMLA INTERFERENCE CLAIM.

On July 19, 2017, at the close of the Respondent's evidence, Petitioner moved the Circuit Court for judgment as a matter of law on Counts 2, 3, 4 and 6 of the Respondent's Complaint.[46]

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[41] Syl. Pt. 2 *Fredeking v. Tyler* 224 W. Va. 1 (2009)
[42] Id.
[43] *Fredeking v. Tyler 224 W. Va. at 6* (2009)
[44] Syl. Pt. 2 *Fredeking v. Tyler* 224 W. Va. 1 (2009) (quoting Syl. Pt. 5 *Orr v. Crowder*, 173 W. Va. 335, 31`5 S.E.2d 593 (1983)).
[45] Syl. Pt. 1 *Velogol v. City of Weirton*, 212 W. Va. 687 (2002).
[46] Appx.0183-0197

The Circuit Court granted the motion as to Counts 2 and 6 and denied the motion as Counts 3 and 4 without prejudice to its renewal at the close of all the evidence.[47] On July 20, 2017, at the close of all of the evidence in the trial of this case, Petitioner again moved for judgment as a matter of law as to Counts 3 and 4 of Respondent's Complaint.[48] The Circuit Court took the motion under advisement and submitted the matter to the jury.[49]

After the Circuit Court entered the "Judgment Order" on August 16, 2017, Petitioner filed "Defendant's Motion for Judgment as a Matter of Law or, In the Alternative, For a New Trial" on August 25, 2017. This motion was properly filed within the ten (10) day time limitation set forth in the August 16, 2017 Order.

After hearing arguments of the parties on October 31, 2017, the Circuit Court entered "Order Denying In Part and Granting Defendant's Motion For Judgment as a Matter of Law and Alternative Request for a New Trial" on February 27, 2018. As stated above, the Circuit Court opined that, based upon the evidence presented at trial on the issues of FMLA interference and tort of outrage, there was legally sufficient evidence presented on which a reasonable jury could find that Petitioner failed to notify Respondent of his eligibility to take FMLA leave and that the failures of Petitioner to provide such information and the actions or inactions leading thereto were of such an "extreme and outrageous" nature to warrant recovery under the tort of outrage.[50] In that order, the Circuit Court considered the evidence most favorable to the Respondent, who was the prevailing party. The Circuit Court also noted in the order that, while conflicting testimony was presented, the fact is that a reasonable jury clearly relied on the testimony of the

[47] Appx.0201
[48] Appx.0201
[49] Appx.0201
[50] Appx.0215

Respondent and that which corroborated his claims, so that judgment as a matter of law for Petitioner was not appropriate.[51]

Petitioner continued to attempt more bites at the apple on these claims when they untimely filed "Defendant's Motion to Alter or Amend the Amended Judgment Order and Defendant's Motion for a New Trial and Alternative Motion for Judgment as a Matter of Law" on March 13, 2018. The arguments made by Petitioner in that motion were simply a second attempt at post-trial relief, which is impermissible. Petitioner had retained new counsel at this time, but that was not sufficient grounds to reargue its motions for remitter and judgment as a matter of law and that motion should have been denied on procedural grounds alone. Further, all of Petitioner's post-trial motions after this point should have been denied as Petitioner did not timely file any objections to the February 27, 2018 orders.

Petitioner also puts forth an argument regarding Respondent's lost wage calculation exhibit and states that the calculations may have been relevant to a valid claim for wrongful discharge, but that Respondent was not legally entitled to the amounts contained in the lost wage calculation as damages for the FMLA interference claim. First, at trial, Petitioner did not preserve this objection. Specifically, Petitioner stated that they had no objection to that exhibit, except for the fact that it referenced the date of termination and that the document stated that the total did not include an estimate for any overtime due to the fact that he was laid off and wouldn't be entitled to any damages.[52] There was no objection to this document being used in relation to the FMLA interference claim. Furthermore, the section of the FMLA that outlines damages for interferences explains that employers are liable for damages in the amount of any

[51] Appx.0219
[52] Appx. Vol. II, p. 241

wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation.[53]

C. THE CIRCUIT COURT DID NOT ERR BY PERMITTING RESPONDENT'S WRONGFUL DISCHARGE AND TORT OF OUTRAGE CLAIMS TO BE PRESENTED AND ARGUED TO THE JURY, AND SUCH PRESENTATION DID NOT RESULT IN UNFAIR PREJUDICE AGAINST PETITIONER. FURTHER, THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONER'S POST-TRIAL MOTION FOR RELIEF.

Petitioner's arguments related to the tort of outrage claims are moot, as that claim as been dismissed. The "Amended Judgment Order" entered December 2, 2020 does not include any damages for the wrongful discharge or tort of outrage claims.[54] Any presentation on these claims to the jury cannot have resulted in unfair prejudice against the Petitioner as the only jury award that still stands in this matter is the award for the FMLA violation.

Petitioner has not provided any evidence that the jury was improperly influenced by sympathy, or that Petitioner was unfairly prejudiced, but has repeatedly sought to overturn the jury's verdict on Respondent's FMLA claims which were supported by Respondent's testimony, as well as the testimony of his supervisor Mr. Moyers.

Further, the Circuit Court did grant Petitioner's post-trial motion for relief by granting the "Defendant's Motion for a New Trial".[55] Petitioner has no basis for this assignment of error when the Circuit Court did in fact grant the Petitioner's Motion for a New Trial and the Tort of Outrage claim has since been dismissed and no jury award regarding the wrongful discharge or tort of outrage claims remain.

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[53] *See Dotson v. Pfizer*, 558 F.3d 284 (4th Cir. 2009).
[54] Appx.0457
[55] Appx.0259

D. THE CIRCUIT COURT DID NOT ERR 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.

Petitioner has made a claim that the Circuit Court's error in denying their pre-verdict motions was compounded by the subsequent instructional errors. In support of this argument, Petitioner makes a claim and cites to case law that were not included in the motions made at the trial court level and were not a part of the record as decided by the Circuit Court.

Further, as stated above, Petitioner cannot be prejudiced by jury instructions related to the Tort of Outrage claim when the Circuit Court granted the Petitioner a new trial and subsequently the Tort of Outrage claim was dismissed. The "Amended Judgment Order" entered December 2, 2020 did not contain the amounts the jury awarded for the Tort of Outrage claim, as it was dismissed, and this issue is not moot.

E. ALTERNATIVELY, THE CIRCUIT COURT DID NOT ERR BY DENYING PETITIONER'S POST-TRIAL MOTION FOR RELIEF AS THERE WAS A LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO FIND FOR RESPONDENT ON HIS FMLA CLAIM AND THE VERDICT WAS NOT THE PRODUCT OF PLAIN AND UNFAIR PREJUDICE.

29 U.S.C § 2615(a)(1) states that it is "unlawful for any employer to interfere with, restrain, or deny exercise of or attempt to exercise, any right provided under this subchapter." This Court has previously acknowledges that to state a claim of interference with FMLA rights, the employee must establish that "(1) [he] was an eligible employee, (2) the defendant was an employer as defined under the FMLA, (3) [he] was entitled to leave under the FMLA, (4) [he]

gave the employer notice of [his] intention to take leave, and (5) the employer denied the employee FMLA benefits to which [he] was entitled.[56]

Petitioner claims that Respondent only failed on the last element, that Petitioner denied the employee FMLA benefits to which he was entitled, and that Petitioner was entitled to judgment as a matter of law due to Respondent's failure to establish that element. However, as appropriately decided by the Circuit Court, this was a question for the jury to decide. Petitioner has provided no authority to show that the jury was not entitled to make a finding regarding whether the Petitioner denied the Respondent FMLA benefits to which he was entitled.

As put forth by Petitioner in their brief, when an FMLA interference claim is premised on 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 resulted in prejudice. Genuine issues of material fact exist as to whether Respondent suffered prejudice as a result of the interference. Therefore, this was an appropriate question for the jury and could not be properly decided by a judgment as a matter of law.

It is not the Circuit Court's role to substitute its credibility judgments for those of the jury.[57] The Circuit Court, in determining whether there was enough evidence to support the jury's verdict, should (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and

[56] *Mayo v. St. Mary's Med. Ctr., Inc.*, 2017W. Va. LEXIS 214, *9 (W. Va., April 7, 2017) (citing *Ainsworth v. Loudon County Sch. Bd.*, 851 F. Supp. 2d 963, 975, (E.D. Va. 2012).
[57] *Fredeking v. Tyler 224 W. Va. at 6* (2009)

(4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.[58]

Based on the above criteria, the Circuit Court determined that there was enough evidence to support the jury's verdict. Respondent did show that Petitioner's failure to provide notice resulted in an impairment of his rights and resulting prejudice. At a visit with his doctor in April, Mr. Opyoke learned that the doctor was ready to start chemo.[59] On his first day back to work after that visit, Mr. Opyoke told Pat Stevens and Brian Lamb about the surgery, that he was going to be getting a different type of chemo and that he wanted to know if he could get FMLA leave.[60] Mr. Opyoke continued to go to Mr. Stevens weekly and ask about the FMLA papers.[61] Mr. Opyoke testified that he talked to Brian Lamb, since he had helped write the Employee Handbook that provided that FMLA was an option, but Mr. Lamb did not know to whom to direct him.[62] Mr. Opyoke also spoke to Tammy Hendricks, to whom office questions were directed.[63] Mr. Opyoke recalls being told by Ms. Hendricks or her helper that FMLA wasn't offered at Fairmont Tool.[64] From his April visit with his doctor, in which he was told he needed to start chemotherapy, until July 4th when he was hospitalized, no one at Fairmont Tool ever got back to him about his request to take medical leave.[65]

If the Circuit Court considers the evidence most favorable to the Respondent, assumes that all conflicts in the evidence were resolved by the jury in favor of the Respondent, assumes as

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[58] Syl. Pt. 2 *Fredeking v. Tyler* 224 W. Va. 1 (2009) (quoting Syl. Pt. 5 *Orr v. Crowder*, 173 W. Va. 335, 31`5 S.E.2d 593 (1983)).
[59] Appx. Vol. II, p. 230
[60] Appx. Vol. II, p. 231
[61] Appx. Vol. II, p. 232
[62] Appx. Vol. II, p. 232
[63] Appx. Vol. II, p. 232
[64] Appx. Vol. II, p. 233
[65] Appx. Vol. II, p. 233

proved all facts which the Respondent's evidence tends to prove, and gives the Respondent the benefit of all favorable interferences which reasonably may be drawn from the facts proved, then the jury's verdict must be found to be credible and the Circuit Court cannot substitute their own credibility judgments.

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

The Circuit Court did not err in awarding liquidated damages, interest, full attorney's fees and costs to the Respondent. Any employer that violates 29 U.S.C.S. § 2615 shall be liable to any eligible employee affected for damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to the employee by reason of the violation.[66] In the case that wages, benefits or other compensation has not been lost or denied to the employee, then damages may be the amount of any actual monetary losses sustained by the employee as a direct result of the violation.[67] The employee also may receive damages in the amount of interest at the prevailing rate.[68] There is also a provision for an additional amount as liquidated damages equal to the sum of the amount described in §2617(a)(1)(A)(i) and the interest described in §2617(a)(1)(A)(ii). Finally, the court shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee and other costs of the action to be paid by the defendant.[69]

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[66] 29 USCS §2617(a)(1)(A)(i)(I)
[67] 29 USCS §2617(a)(1)(A)(i)(II)
[68] 29 USCS §2617(a)(1)(A)(ii)
[69] 29 USCS §2617(a)(3)

Petitioner has already made these arguments regarding attorney fees, liquidated damages and interest in a motion filed December 4, 2019.[70] As stated in "Plaintiff's Motion to Strike Defendant's Motion for Status Conference and Other Relief Regarding Attorney Fees, Liquidated Damages and Interest", Petitioner's motion on these matters was untimely. Petitioner cited to W. Va. R. Civ. Pro. Rule 59(a), Rule 59(e) and Rule 60(b) as the basis of this motion. Under all of these Rules, the motion would be untimely in relation to all prior judgments entered in this matter.[71] Despite the fact that Petitioner's motion was untimely and argued the same issues that had previously been litigated, the Circuit Court still gave the Petitioner the benefit of entering another "Amended Judgment Order" on December 2, 2020 that fully addressed the arguments presented by Petitioner.[72]

V. CONCLUSION

For these reasons, Respondent respectfully prays that this Honorable Court deny the Petitioner's request to reverse the Amended Judgment Order entered by the Circuit Court on December 2, 2020 and deny the request to remand this case for entry of judgment as a matter of law in favor of Petitioner and dismissal of all claims. Further, Respondent prays this Honorable Court denies Petitioner's request for a new trial on Respondent's claim for FMLA interference (Count III). Respondent also prays this Honorable Court denies Petitioner's request for reversal of the award of liquidated damages, prejudgment interest, and attorney's fees and costs and does not remand this case for further proceedings.

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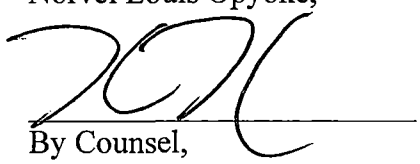
[70] Appx.0330-0345

[71] W.Va. R. Civ. Pro. Rule 59(b) and 59(e) state that any motion for a new trial or any motion to alter or amend a judgment must be filed not later than 10 days after the entry of the judgment. At the time this motion was filed on December 4, 2019, no judgments had been entered in the matter since the "Order Dismissing Tort of Outrage Complaint" was entered on October 9, 2019.

[72] Appx.0445-0458

Respectfully submitted,
Norvel Louis Opyoke,



By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Fairmont Tool, Inc.
Defendant Below, Petitioner

vs.) No. 20-1042

Norvel Louis Opyoke,
Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing "**Respondent's Brief**" was served upon the Petitioner by United States mail, first class, postage paid, this 13th day of May, 2021 to:

J. Robert Russell
David L. T. Butler
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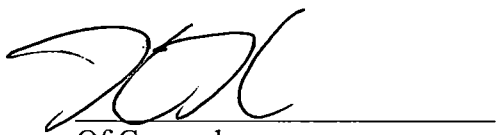
Morgantown, WV 26505
Counsel for Petitioner and Defendant Below, Fairmont Tool, Inc.

Respectfully Submitted,
Norvel Louis Opyoke,



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