APPEAL NO.: 22-0185

JAYSON NICEWARNER, *et al.*,

Petitioner,

v.

CITY OF MORGANTOWN,
a municipal corporation,

Respondent.

AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF RESPONDENT

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II. STATEMENT OF INTEREST[1]

The Defense Trial Counsel of West Virginia ("DTCWV") is an organization of over 400 attorneys who engage primarily in the defense of individuals and corporations in civil and administrative litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 21,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. DTCWV's goals include elevating the standards of legal practice within the State of West Virginia, working for elimination of Court congestion and delays in civil and administrative litigation in West Virginia, promoting improvement of the administration of justice in West Virginia, and increasing the quality of legal services provided to our citizens.

DTCWV is interested in the issues before this Court in this matter because DTCWV members routinely represent employers in litigation involving claims under the West Virginia Wage Payment and Collection Act, W. Va. Code §§ 21-5-1, *et seq.* ("WPCA"). DTCWV members and their employer clients depend upon clear and rational legal decisions concerning application of the WPCA. As this Court has long held, the WPCA is not to be "bootstrapped" to other statutory remedies. Specifically, a claim under W. Va. Code § 21-5-12(a) does not create a right to wages, but instead establishes recovery of existing wages based on the employment contract. To find that, as the Petitioners urge here, an employee's adherence to well-established law constitutes a violation of the WPCA is unreasonable and contrary to the Legislature's intent in the implementation of the WPCA.

[1] Pursuant to W. Va. R. App. P. 30(e)(5), DTCWV states that no counsel for any party authored this amicus curiae brief, in whole or in part, and no party or its counsel made a monetary contribution specifically intended to fund the preparation or submission of this amicus curiae brief.

DTCWV has always advocated for the consistent application of clear laws and legal principles. Here, the law is clear and well established, which is that the City of Morgantown ("City") is correct in its application of W. Va. Code § 8-15-10a ("Holiday Pay Act"). More importantly to DTCWV, the law is clear that regardless of the actions of the Holiday Pay Act issue in this case, any remedy available to Petitioners does not include a claim under the WPCA.

Consistent application of clear legal principles represents a core value of DTCWV. Here, the Petitioners seek to inject an illogical and over expansive interpretation of the WPCA that would include retroactive recovery whenever the Legislature or this Court alters a law governing the terms of employment. Regardless of the Court's ultimate interpretation of the Holiday Pay Act, DTCWV urges this Court to reject the Petitioners' position on the WPCA and find that, consistent with the plain intent of the WPCA and this Court's prior ruling; the WPCA is not a punitive measure to be "bootstrapped" to other statutory claims.

For these reasons, DTCWV strongly believes that this Court should affirm the Circuit Court's grant of summary judgment and issue an opinion that unequivocally reiterates that it is improper to attempt to attach a WPCA claim to an alleged statutory violation.

III. RELEVANT FACTS AND PROCEDURAL HISTORY

DTCWV defers to and adopts the Relevant Procedural History and Relevant Factual Background contained in the Response Brief of Respondent City of Morgantown.

IV. ARGUMENT

DTCWV does not take a position on the issues in this appeal concerning the Holiday Pay Act. Instead, the DTCWV focuses on the WPCA claims. While Petitioners stake the entirety of their claim on their assertion that they were improperly compensated pursuant to the Holiday Pay Act, DTCWV suggests that this Court must separate the Holiday Pay Act analysis from the WPCA analysis.

Specifically, the Court should address those issues separately in order to, once again, unequivocally disallow the bootstraping of a WPCA claim to some other alleged statutory violation. In doing so, the Court should conclude that even if the Court finds that the Holiday Pay Act has been misinterpreted for nearly 50 years, the WPCA does not apply to a violation of that statute.

A. The City Did Not "Fail" to Pay Wages Due for Purpose of the WPCA.

The WPCA governs the proper and timely payment of "wages" to employees in West Virginia. If such wages are not properly paid, the WPCA provides for the award of damages. Critically, however, the WPCA does not govern the entitlement to such wages.

Specifically, the WPCA requires employees be paid wages due for their work or service at least twice per month, with no more than nineteen days between payments absent a special agreement. W. Va. Code § 21-5-3. The WPCA defines "wages" as compensation for labor or services rendered by an employee and, in certain sections of the statute, "wages" includes "fringe benefits." W. Va. Code § 21-5-1(c). The WPCA also states that "fringe benefits" includes holidays. W. Va. Code § 21-5-1(l). However, it also provides that "nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his or her employees which does not contradict the provisions of this article." W. Va. Code § 21-5-1(c).

This Court emphasized this latter point in *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). In *Meadows*, this Court addressed the employees' entitlement to unused sick and vacation leave upon separation from employment. *Id.* Of particular relevance, this Court held that "whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term 'wages' are determined by the terms of employment and not by the provisions of W. Va. Code §21-5-1(c)." *Id.* at 217, 690. By this language, this Court emphasized the employment contract controls whether fringe benefits must

be paid, and not the WPCA.

The Court applied this principle in *Grim v. Eastern Electric, LLC*, 234 W. Va. 557, 767 S.E.2d 267 (2014), which is factually similar to the case presently before the Court. In *Grim*, employees sued their employer for violations of the Prevailing Wage Act, and as a consequence of those violations, they made claims under the WPCA. Specifically, the employees asserted that, under the Prevailing Wage Act, the employer should have paid them higher hourly rates for work performed than those contained in their contract with their employer. *Id.* at 256, 271. The Court in *Grim* reiterated that the WPCA does not establish a right to a certain wage and does not define any particular "wage" that may be due an employee. *Id.* at 571–72, 281–82. Instead, the Court held that the contract between the employees and the employer required the payment of non-prevailing wages, and as the wages that should have been paid under the Prevailing Wage Act were determined by the terms of that statute, and not the employment contract, the WPCA did not apply to the amounts payable under the Prevailing Wage Act. *Id.* (citing *Adkins v. Am. Mine Research, Inc.*, 234 W. Va. 328, 765 S.E.2d 217 (2014); *Meadows*, 234 W. Va. 203, 530 S.E.2d 676; *Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir. 1990)).

The claims made by the Petitioners here are virtually indistinguishable from the claims made by the employees in *Grim*. The firefighters acknowledge that they knew of the City's policy concerning holiday pay, which the City followed when compensating them for working on holidays, just as the employees in *Grim* knew that the wages under their contract with the employer were less than the wages delineated in the Prevailing Wage Act. The City's policy to pay regular pay for hours worked outside the 24-hour period of the actual holiday represents an agreement between the employer and its firefighter employees that has been in place for some time. This policy does not contradict anything in the WPCA, and, as explained by the Court in *Meadows*, the

term "wages" is defined by the terms of employment—not by the WPCA. Per the terms of employment, the firefighters were due regular pay for the time worked outside the 24-hour period of the actual holiday, and nothing more, and the Petitioners admit the City paid the firefighters in this manner. Petition at 24–25.

Because the compensation claimed by the Petitioners stems solely from the provision of the Holiday Pay Act, the Petitioners cannot pursue a claim under the WPCA for that compensation consistence with this Court's rationale in *Grim*.

B. The WPCA Cannot Attach to Unrelated Alleged Statutory Violations.

When an employee alleges that the wages paid by an employer allegely violate a statute, the employees remedy rests with the statute allegedly violated, and not the WPCA. To find otherwise would render the WPCA a punitive hammer to bludgeon an employer that relies upon the terms of an employment agreement.

As outlined above, the WPCA does not create an entitlement to wages—only an employment agreement creates such an entitlement. The WPCA only governs the manner and timeliness of payment. Here, the employment agreement between the City and its firefighter employees established base pay or time off for hours worked on holidays as holiday compensation for firefighters. Petitioners', however, assert that the City should have paid time and a half for any shift that included time during a holiday. Not only do the Petitioners seek to overturn well established law in that regard, but they ask this Court to punish the City for following that law. Such a position is unreasonable and, more importantly, contrary to West Virginia law as articulated by this Court.

i. Petitioners' Argument that Wages Cannot be Waived is Irrelevant as No Party is Claiming a Wage has Been Waived.

This dispute centers not on whether a wage has been waived, but on whether a wage is due.

Confusingly, Petitioners spend an entire section of their Petition discussing how wages cannot be waived. Whether a wage was "waived" under the Holiday Pay Act, however, is irrelevant to the evaluation of whether the Petitioners may pursue a WPCA claim.

In rejecting the employees' WPCA claims, the Court in *Grim* established a distinction between unpaid wages due and compensation wrongly witheld. *Grim*, 234 W. Va. at 572, 767 S.E.2d at 282:

> Petitioners herein do not contend that their contractual wages were wrongly 'withheld' or that their agreed-upon wages were not paid timly. Rather, the gravamen of petitioners' complaint is that the agreed-upon wages were in violation of the PWA; therefore, their remedy for this violation lies within the PWA. The WPCA creates no right to prevailing wages.

Id.

Notably, no party here contends that the firefighters are waiving a wage. The City has a policy in place governing holiday pay, and it pays the firefighters in accordance with that policy. The City's policy, which governs the terms of the employment agreement as it pertains to compensation for working on a holiday, governs the entitlement to wages to the Petitioners. *See Adkins*, *supra*; *Meadows*, *supra*; *Weldon*, *supra*. There has been no modification to that policy. As identified in *Grim*, this case, at best, deals with unpaid wages due under the terms of a statute—not compensation wrongly withheld under an employment agreement, which is an important distinction. The result is that even if Petitioners prevail on its Holiday Pay Act argument, recovery is limited to what is allowed under the Holiday Pay Act. As this Court articulated in *Grim*, no WPCA claim exists for this recovery.

ii. Petitioners' Argument that the Holiday Pay Act Does Not Provide For a Mechanism For Recovery is Illusory.

Curiously, Petitioners claim *Grim* does not apply here because, in *Grim*, the Prevailing Wage Act contained a mechanism for recovery that this case lacks. Yet, if not for the Holiday Pay

Act, the Petitioners could not allege that the City owes anything more than what the Petitioners received. In other words, if the Holiday Pay Act cannot identify some benefit the Plaintiffs claim are missing, then how does the Court know what the Petitioners assert is due? If the Holiday Pay Act does not provide for a clearly identifiable wage that can be calculated, then they cannot make a claim under WPCA because the amount allegedly owed becomes immeasurable and incalculable.

In *Pullano v. City of Bluefield*, 176 W. Va. 198, 205, 342 S.E.2d 164, 171–72 (1986), this Court held that, in the event a municipality grants insufficient time off under the Holiday Pay Act, it can correct the error by granting additional time off as opposed to paying damages. *Pullano* is factually the same as the case at hand. It involves the interpretation of the Holiday Pay Act as it pertains to overtime pay for firefighters. The Court upheld the Circuit Court's ruling that if the firefighter could establish that they had not been granted sufficient time off, then they would be entitled to additional time off. *Id.* at 205, 171.

Here, the Holiday Pay Act, and this Court's interpretation of that statute, dictate what the Petitioners are due under that statute. If the Court finds that the Holiday Pay Act requires additional time off for the Petitioners, then the logical recovery, consistent with *Pullano*, is additional time off. Conversely, if the Court finds that the Holiday Pay Act requires the payment of additional monies, the Court should award the monies calculated per its interpretation of the Holiday Pay Act. Petitioners' suggestion that the Holiday Pay Act fails to allow for a proper recovery represent an illusory argument designed to improperly inflate their damages and punish the City.

Contrary to Petitioners' argument, the clear remedy to a violation of the Holiday Pay Act would be a correction of the City's policy to coincide with the new interpretation of that statute, and, potentially, compensate for previous holidays worked either through additional pay or

additional time off, depending on the Court's decision. In this context, the Petitioners' suggestion that the WPCA applies to this case is a thinly veiled punitive attempt to double damages otherwise available under the Holiday Pay Act. Regardless of the Court's ultimate decision under the Holiday Pay Act, the City has, in good faith, followed what has been a well-established interpretation of the Holiday Pay Act. As such, there is no reason to punish the City by application of the WPCA.

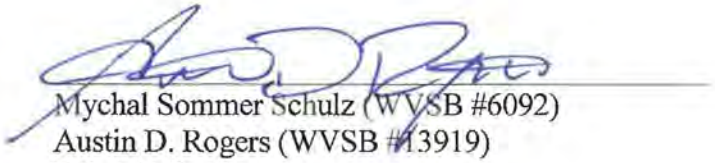
V. CONCLUSION

Regardless of the Court's ultimate determination of the Petitioners' claims under the Holiday Pay Act, the Petitioners may not pursue claims under the WPCA.

The Petitioners' received exactly what they were entitled to receive under the City's holiday pay policy. Whether the City's policy violates the Holiday Pay Act is, for purposes of the WPCA, simply not relevant. As reflected by this Court's precedent, the entitlement to wagee under the WPCA is governed by the terms of the employment agreement, which here is the City's policy. As it is uncontroverted that the City compensated the Petitioners per the terms of the City's policy, the Petitioners may not pursue a claim under WPCA for monies that they contend should have been paid per the Holiday Pay Act.

For the reasons articulated above, DTCWV requests that this Court follow its precedents, affirm the Circuit Court's grant of summary judgment to the City, and unequivocally reiterate that a party may not bring a WPCA claim when an employer pays all compensation due under an employment agreement, even if that employment agreement is later found to be insufficient under a statute.

DEFENSE TRIAL COUNSEL
OF WEST VIRGINIA



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