IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 22-0185

Jayson Nicewarner, *et al.*,
Plaintiffs Below, Petitioner,

v.

City of Morgantown,
A municipal corporation,
Defendant Below, Respondent

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

This case presents questions to this Court, that when answered, will impact professional firefighter wages across the state. Should the firefighters be provided Holiday Pay for their entire 24-hour shift regardless of the start time of the shift? Is paid time off provided to firefighters under the Holiday Pay Statute a wage under the West Virginia Wage Payment and Collection Act? The answer to both questions is "yes".

Fifty-four (54) Morgantown firefighters brought this lawsuit seeking to recover years of loss compensation resulting from the city failing to comply with the firefighter Holiday Pay statute (W.Va. Code § 8-15-10a), the West Virginia Wage Payment and Collection Act, and W.Va. Code § 2-2-1, which establishes the state holidays. (J.A. 01). Firefighters work a 24-hour shift. (J.A. 1301). The firefighters begin their shift at 8:00 a.m. (Id. at 91). There are three shifts of firefighters. (J.A. 1327). When a firefighter takes a sick day or a bereavement day, it is counted as one calendar

day with the city, even though the shift spans 24-hours. (Id at 49-52). But the city provided paid time off to firefighters for Holiday Pay in the amount of 12 hours per holiday per firefighter (J.A. 1290). The city should have provided 24 hours of Holiday pay time. (J.A. 214). This had gone on for decades prior to filing the lawsuit. (J.A. 1324).

Despite denying the allegations in the Complaint, in February of 2020, the city acknowledged it was not paying firefighters correctly by doubling the amount of holiday paid time off from 12 hours to 24 hours per shift for all firefighters, whether the firefighter works the holiday or not. This was done by city ordinance. (J.A. 483). The firefighters agree this method complies with the holiday pay statute[1].

Throughout this case four mediations have taken place. One mediation occurred pre-suit. Different mediators have been used. Discovery took place with multiple depositions being taken. (J.A. 1278, 1314, 1335, 1380). Plaintiffs' expert evaluated five (5) years of pay records provided by the city and compiled his damage report for the unpaid wages, which included a separate calculation for attorneys' fees, interest, and the doubling effect for separated employees under the WPCA. (J.A. 1005).

On December 15, 2020, a mediation was conducted at Kay, Casto, and Chaney in Morgantown. While unsuccessful, the parties agreed to meet again to continue mediating. At the subsequent mediation at Kay, Casto, and Chaney on January 15, 2021, the city offered $1.7 million as a back pay fund to be distributed to the fifty-four (54) firefighters for the unpaid holiday pay. The "forward fix" enacted by city ordinance (J.A. 483) would remain in place. This final offer

[1] The case has two parts to consider for resolution: a lump sum amount to be paid to the firefighters for the unpaid holiday pay from the date of the complaint filing back; and a method must be established to pay holiday that complies with the statute ensuring that firefighters are paid correctly today and into the future. This has been referred to as a "forward fix" in various firefighter holiday pay cases across the state.

from the city was only $100,000 above ¼ of the expert's total damage calculation of $6.4 million owed to the firefighters. (Id.) The firefighters respectfully declined the settlement offer.

Soon after, on December 20, 2020, in a separate but related firefighter Holiday Pay case, *Stroop v. City of Martinsburg,* Judge Faircloth of the 23rd Judicial Circuit affirmed its previous August 11, 2020, Order where it ordered[2]:

> "Stated another way, if a fire fighter works any part of a Holiday, that firefighter shall receive 36 hours of pay or 24 hours of paid time off. If the firefighter does not work the Holiday, the firefighter is to receive 36 hours of pay or 24 hours of paid time off." (J.A. 324, 332).

On May 7, 2021, the *Nicewarner* Plaintiffs filed their Motion for Summary Judgment. (J.A. 209). On June 2, 2021, the Defendant filed its Motion for Summary Judgment. (J.A. 140). The matter was fully briefed and set for oral hearing before Judge Gaujot on June 16, 2021[3]. The Court heard brief arguments from the parties on the merits of the respective motions for summary judgment, but deferred ruling on the matters pending further mediation by the parties. (J.A. 514).

In compliance with the Court's direction, the parties returned to mediation on August 5, 2021, for a Zoom mediation with mediator Charlie Piccirillo. The Defendant made no monetary move. The Plaintiffs signaled they would be willing to move if the city moved.

On Sept 16, 2021, the Court held a 2nd pre-trial and hearing on the cross-motions for summary judgment. (J.A. 697). This hearing was held by Zoom. Near the end of the hearing, but

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[2] The City of Martinsburg appealed this Order to this Court of Appeals. On August 19, 2021, after being fully briefed, this Court dismissed the appeal. (J.A. 701). Judge Faircloth's Order remains undisturbed. The *Stroop* case settled and resolved completely. The Martinsburg firefighters now receive 24 hours of paid time off whether they work the Holiday or not.

[3] On the morning of the hearing, aware that Plaintiffs' counsel would be travelling from Wheeling to Morgantown for the hearing and therefore not in the office, Defendant filed a Supplemental Response to Plaintiffs' Motion for Summary Judgment by facsimile only. (J.A. 356). The parties' counsel had consistently used electronic mail throughout the case for communications, including delivering pleadings.

while still on the record, the Court directed counsel for the Defendant to draft the order and submit it to the Court and opposing counsel by September 24, 2021. The Court further directed Plaintiffs' counsel to submit any written objections by October 7, 2021. (J.A. 1515) Defense counsel submitted its draft order on September 24, 2021. (J.A. 1038). On September 28, without waiting for Plaintiffs' objections or changes to the draft order, the Court signed and entered the order as drafted by defense counsel. (J.A. 1066).

Plaintiffs timely filed their objections (J.A. 1094) on October 7, 2021. Plaintiffs objected to the Court finding that Holiday Pay is not a wage under the WPCA. (Id.). In Morgantown, Holiday Pay is provided as paid time off to be used later. When used, it is calculated and paid as money in the firefighters' paychecks. (J.A. 1408). Under the WPCA, this makes the paid time off a "wage". Further, once the Court found the WPCA did not apply, it found the five-year statute of limitations for wage claims did not apply; the Court applied *laches* (even though a statute clearly applied) and indicated the Plaintiffs waited too long to bring these claims. (J.A. 1089). Further, the Plaintiffs objected to the Court's finding the treatment of the firefighters' 24-hour shift as one calendar day for all purposes but Holiday Pay was immaterial to the amount of paid time off the firefighters should receive. (J.A. 1094). While the Plaintiffs do not object to the finding that the city is entitled to choose paid time off to compensate its employee-firefighters, the Gaujot Order stating Holiday Pay is not a wage renders the now separated firefighters, like retirees, unable to recover any holiday pay time they were deprived; a non-employee cannot be provided paid time off as a form of compensation.

On December 15, 2021, a live hearing was held before the Court. The Court acknowledged the procedural errors in its previous Order and indicated "[b]ut at the very least, there's going to

be a reconsideration in this case because I didn't give you the benefit to -- of your objections, and I should have done that."

But the Court did not reconsider this case. After the live hearing, the Court re-issued the same order entirely against the firefighters and their claims. (J.A. 1250). Footnote One of the Gaujot Order states the two Orders are indistinguishable. (Id.). These Plaintiffs appeal the Gaujot Order to this Court.

As illustrated by the timeline below, at the trial court stage, the case took an odd procedural turn after the June 16, 2021, hearing.

- On May 15, 2019, pre-suit mediation was conducted with Monica Haddad as mediator.
- On June 7, 2019, the firefighters filed their complaint for declaratory judgment and compensatory damages in Monongalia County. (J.A. 01).
- On June 12, 2019, Judge Scudiere disqualified herself from the case. (J.A. 58).
- On June 28, 2019, the Defendant-City filed its Notice of Bonafide Defense. (J.A. 60).
- On July 11, 2019, Defendant-City answered the Plaintiffs' complaint. (J.A. 061).
- On February 18, 2020, the city adopted a resolution fixing the problem by increasing the amount of holiday paid time off from 12 hours to 24 hours for each firefighter whether the firefighter works the holiday or not. (J.A. 483).
- On December 15, 2020, a second mediation was conducted with Deb Scudiere as mediator.

- On December 20, 2020, in a separate but related firefighter Holiday Pay case, *Stroop v. City of Martinsburg,* Judge Faircloth of the 23rd Judicial Circuit affirmed its previous August 11, 2020, in favor of those firefighters. (J.A. 324).
- On January 15, 2021, a third mediation was conducted, again with Ms. Scudiere.
- On May 7, 2021, Plaintiffs filed their Motion for Summary Judgment. (J.A. 209).
- On June 2, 2021, the Defendant-City filed its Motion for Summary Judgment. (J.A. 138).
- On June 16, 2021, the oral hearing on cross Motions for Summary Judgment was conducted where the Court stated:
    - "The City is running a real risk here, three times plus attorney fees, plus, you know, expenses. So the City's potential risk is much greater than the firefighters'" (J.A. 1460).
    - "They do a tough job, and they're entitled to their pay." (J.A. 1461).
    - "Well, you know, it's a complicated case. I'll be the first to admit it. And there's merits on both sides. I think it would be wise to sit down and talk settlement. If you can't, let me know, and we'll do it the hard way." (J.A. 1463).
- On July 20, 2021, the Plaintiffs filed their updated pre-trial memorandum providing the expert report to the Court. (J.A. 516).
- On August 5, 2021, a fourth mediation was conducted by Zoom with Charlie Piccirillo as the mediator.
- On September 16, 2021, the Court held the 2nd portion of the Motion for Summary Judgment hearing where he ruled from the bench the firefighters' holiday pay was

not a wage or fringe benefit, that laches applied to the claims, and the case should be dismissed.

- Near the end of the hearing, but while still on the record, the Court directed counsel for the Defendant to draft the order and submit it to the Court and opposing counsel by September 24, 2021.
- The Court further directed Plaintiffs' counsel to submit any written objections by October 7, 2021. (J.A. 1515)
- On September 24, 2021, Defense counsel submitted its draft order. (J.A. 1038).
- On September 28, without waiting for Plaintiffs' objections or changes to the draft order, the Court signed and entered the order as drafted by defense counsel. (J.A. 1066).
- On October 7, 2021, Plaintiffs filed their objections (J.A. 1094).
- On October 8, 2021, Plaintiffs filed their Motion to Alter or Amend the Court's Judgment Pursuant to W.Va. R. C. P. Rule 59(e). (J.A. 1106)
- On November 19, 2021, the Plaintiffs filed a Motion for Live Hearing (rather than a Zoom hearing). (J.A. 1128). The Court granted the motion. (J.A.1143).
- On December 10, 2021, the Defendant filed its Response in Opposition to the Plaintiffs Motion to Alter or Amend. (J.A. 1144).
- On December 15, 2021, a live hearing was held before the Court. The Court acknowledged the procedural errors in the previous Order and indicated:

> "[b]ut at the very least, there's going to be a reconsideration in this case because I didn't give you the benefit to -- of your objections, and I should have done that."

- On February 9, 2022, despite indicating it would reconsider the case, the Court re-issued the same order authored by defense counsel without "refinements" by the circuit court as it did on September 28, 2021, entirely against the firefighters and their claims. (J.A. 1250). At the hearing, the Court is on the record stating the following:
    - "Well, the problem, though, as I see it, is, I didn't give the plaintiffs their due time in court because I entered your proposed order without considering their objections. And so for those reasons that I stated earlier, I believe that the Court is obligated to consider their objection, and thus it will necessitate a refined order from me. Now, whether I include the substantive arguments that they are making today or not is a different issue. But I can tell you that I will be entering an amended order." (J.A. 1540, Line 8:17). (Emphasis added.)
    - "But anyway, I want to be right. So, I'm going to consider everything. And I think it's within my discretion." (J.A. 1541, Lines 10:12).

Footnote One of the Gaujot Order states the two Orders are indistinguishable. (J.A. 1250).

The Morgantown firefighters are perplexed the Monongalia County Circuit Court found money paid to them as compensation for Holiday Pay required by a statute is not considered a "wage" under the West Virginia Wage Payment and Collection Act even though it is a wage for every other firefighter in every other city in West Virginia.

SUMMARY OF ARGUMENT

Any compensation as a result of employment, such as holiday pay for firefighters, is a wage or fringe benefit under the West Virginia Wage Payment and Collection Act (WPCA). The WPCA also provides the remedy when the plaintiffs/employees are not compensated completely from the defendant/employer. W.Va. Code § 21-5-3, W.Va. Code § 21-5-4, W.Va. Code § 21-4-12(b).

W.Va. Code § 8-15-10a, the Firefighter Holiday Pay statute, establishes enhanced benefits to firefighters who are required to work a holiday when most other workers are off. The statute requires

> "...if any member of a paid fire department is required to work during a legal holiday as is specified in subsection (a), section one [§2-2-1], article two, chapter two of this code, or if a legal holiday falls on the member's regular scheduled day off, he or she shall be allowed equal time off at such time as may be approved by the chief executive officer of the department under whom he or she serves or, in the alternative, shall be paid at a rate not less than one and one-half times his or her regular rate of pay..." (J.A. 004). This benefit appears in the firefighter paychecks as compensation for holiday pay as paid time off. (J.A. 1408).

The West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people, assist them in collection of compensation wrongly withheld and restricts right to assign wages. W. Va. Code § 21-5-3. *Jones v. Tri-County Growers, Inc.*, 366 S.E.2d 726, 179 W.Va. 218 (1988), *Mullins v. Venable*, 297 S.E.2d 866, 171 W.Va. 92 (1982).

The members of the City of Morgantown Fire Department did not waive, nor could they lawfully waive any statutory holiday pay requirements. (J.A. 06, 210, 179). Public policy and statute prevents it. Although the plaintiff/firefighters - whether they worked a holiday or not - may have been provided additional paid time off for each holiday, the city did not provide enough to comply with the statute. (J.A. 06). The city compensated the firefighters by providing them with 12 hours of paid time off whether the firefighter worked or not; the city should have compensated each firefighter with 24 hours of paid time off. (J.A. 183).

The plaintiff/firefighters named herein are owed wages for numerous holidays as set forth in W.Va. Code § 2-2-1, some over a period of many years, that were not paid completely by the City of Morgantown. Some or all of those holidays worked constituted overtime situations for the firefighters on duty, and as such, when firefighters work overtime on a legal holiday, they are

entitled to two times their regular rate of pay for the overtime hours worked. (J.A 034). *Pullano v. City of Bluefield*, 176 W. Va. 198, 342 S.E.2d 164 (1986).

The professional firefighters in the City of Morgantown are members of the International Association of Fire Fighters. Their chapter is Local 313. While technically this is a labor union, it differs from the layperson's generally accepted notions regarding unions. For example, firefighters, even ones that are members of the IAFF, cannot strike. See W. Va. Code Ann. § 18-5-45a(2) (Public employees in West Virginia have no right, statutory or otherwise, to engage in collective bargaining, mediation, or arbitration, and any work stoppage or strike by public employees is hereby declared to be unlawful), *Jefferson Cnty. Bd. of Educ. v. Jefferson Cnty. Educ. Ass'n,* 183 W. Va. 15, 17, 393 S.E.2d 653, 655 (1990) (holding in the absence of legislation, the common law rule recognized in both federal and state courts is that public employees do not have the right to strike.)

This is because there can be no interruptions of any kind in firefighting services for a city. That would jeopardize safety. Imagine any car wreck or structure fire while there is a firefighter work stoppage; the result would be a tragedy much worse than the original incident. Next imagine multiple car wrecks or structure fires happening over the course of weeks or months. That community would likely disintegrate from the lack of a cohesive response to the tragedies that are normal for a busy city.

City administrations across West Virginia, including Morgantown, know their firefighters cannot strike. No matter how badly the city treats them, the firefighters will show up for their 24-hour shift and respond to the emergency calls when those calls come. The only recourse the firefighters have, especially when their wages are not paid, is to file a lawsuit under the Wage Payment Collection act and, specifically here, the Holiday Pay statute. (W.Va. Code § 8-15-10a).

To illustrate how far adrift the City of Morgantown's position and the trial court's ruling is, this Court can examine what has occurred when successful resolution was reached in other cities around West Virginia.

- Charleston: The successful resolution included a lump sum back pay award of $1.7 million and a forward fix to ensure the firefighters were paid according to the statute.
- Martinsburg: The successful resolution included a lump sum back pay award of $1.75 million and a forward fix providing firefighters 24-hours of paid time off whether the firefighter works or not. If staffing issues create a need to pay the firefighters instead of providing them 24 hours paid time off, the amount will be 36 hours of pay.
- Weirton: The successful resolution included a lump sum back pay award and a forward fix to ensure the firefighters were paid according to the statute to include new language in their Collective Bargaining Agreement.
- Huntington: This case recently settled. The settlement is pending final settlement terms, signed releases, and final payment[4].
- Bluefield: The city corrected its manner of paying Holiday Pay without litigation. The city now is and has been paying its firefighters 36 hours of premium pay (1 ½ times their 24-hour shift even though the shift begins at 8:00am) since 2018. (J.A. 1037). Bluefield is the defendant in the *Pullano* case from 1987.

[4] The Petitioner's will file a Motion to Supplement the Record soon as soon as the documents are available for all of the above cities who corrected their Holiday Pay methods.

Judge Sims in the First Judicial Circuit and Judge Faircloth in the 23rd Circuit have specifically ruled in favor of firefighters (and police) who brought claims against their cities for incompletely providing Holiday Pay. Combined with the resolutions across the State and the two circuit court rulings, Judge Gaujot's decision in this case is an outlier.

Holiday Pay under W.Va. Code § 8-15-10a is wage or fringe benefit. As such, the firefighters should receive the benefit of the five-year statute of limitations provided for by implied employment contracts. Further, regardless of the start time, a firefighter who works a 24-hour shift, is entitled to 24 hours of paid time off or 36 hours of premium pay in compliance with W.Va. Code § 8-15-10a.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Unless this Court summarily reverses the decision below based on the record and the briefs provided, the Petitioners requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20, because the circuit court's decision affects the firefighter pay statewide and will continue to have an impact on firefighter wages across the state for years to come. Should this Appeals Court affirm the Gaujot order, firefighter wages across the state will certainly be rolled back for hundreds of firefighters whose Holiday Pay has been corrected to comply with the statute.

ARGUMENT

I. STANDARD OF REVIEW

a. Circuit court's entry of summary judgment is reviewed de novo. *Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.*, 2021 WL 1220951.

b. The Supreme Court of Appeals reviews de novo the denial of a motion for summary judgment. *West Virginia Division of Natural Resources v. Dawson*, 832 S.E.2d 102, 242 W.Va. 176 (2019).

c. Supreme Court of Appeals reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court. *Maston v. Wagner*, 781 S.E.2d 936, 236 W.Va. 488 (2015).

d. As with the circuit court, Supreme Court of Appeals, in reviewing summary judgment, must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, that is, the appellants. *Mace v. Ford Motor Co.*, 653 S.E.2d 660, 221 W.Va. 198 (2007).

II. APPLICABLE LAW

a. West Virginia Code § 8-15-10a states as follows:

Firemen who are required to work during holidays; how compensated.

From the effective date of this section, **if any member of a paid fire department is required to work during a legal holiday** as is specified in subsection (a), section one [§ 2-2-1], article two, chapter two of this code, **or if a legal holiday falls on the member's regular scheduled day off, he or she shall be allowed equal time off at such time as may be approved by the chief executive officer of the department under whom he or she serves or, in the alternative, shall be paid at a rate not less than one and one-half times his or her regular rate of pay:** Provided, that if a special election of a political subdivision other than a municipality falls on a Saturday or Sunday, the municipality may choose not to recognize the day of the election as a holiday if a majority of the municipality's city council votes not to recognize the day of the election as a holiday. Emphasis added.

b. W. Va. Code § 21-5-1 (c) states:

"The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in § 21-5-4, § 21-5-5, § 21-5-8a, § 21-5-10, and § 21-5-12 of this

code ...**the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee**: *Provided*, 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" Emphasis Added.

c. W. Va. Code § 21-5-1(l) states:

"The term 'fringe benefits' means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, **holidays**, sick leave, personal leave, production incentive bonuses, sickness and accident benefits, and benefits relating to medical and pension coverage." Emphasis added.

d. W.Va. Code § 21-5-6 states:

"if any [employer] shall refuse for the period of 5 days to settle with and pay any of its employees at the intervals of time as provided in 21-5-3 of this article, or to provide fringe benefits after the same are due ... and suit be brought for the amount overdue and unpaid, judgment for the amount of such claim proven to be due and unpaid, with legal interest thereon until paid, shall be rendered in favor of the plaintiff."

e. W. Va. Code Ann. § 21-5-4(b) states:

> "**Whenever a person, firm, or corporation discharges an employee, or whenever an employee quits or resigns from employment, the person, firm or corporation shall pay the employee's wages due for work that the employee performed prior to the separation of employment on or before the next regular payday on which the wages would otherwise be due and payable**: Provided, That fringe benefits, as defined in section one of this article, that are provided an employee pursuant to an agreement between the employee and employer and that are due, but pursuant to the terms of the agreement, are to be paid at a future date or upon additional conditions which are ascertainable are not subject to this subsection and are not payable on or before the next regular payday, but shall be

paid according to the terms of the agreement. For purposes of this section, "business day" means any day other than Saturday, Sunday, or any legal holiday as set forth in § 2-2-1 of this code." Emphasis added.

f. W. Va. Code § 21-5-4(e)states:

"If a person, firm, or corporation fails to pay an employee wages as required under this section, the person, firm, or corporation, in addition to the amount which was unpaid when due, is liable to the employee for two times that unpaid amount as liquidated damages."

g. W. Va. Code § 21-5-10 states:

"Except as provided in section thirteen, no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void."

h. W. Va. Code § 21-5-12 states:

"The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant."

i. *Pullano v. City of Bluefield*, 176 W. Va. 198, 342 S.E.2d 164 (1986) states:

"Under W.Va. Code, 8–14–2a, and W.Va. Code, 8–15–10a, police officers and firefighters must be paid one and one-half times their regular rate of pay when they are required to work on a legal holiday or when such holiday falls on their regular scheduled day off, provided that they are not accorded equal time off."

j. "Where a firefighter works overtime under W.Va. Code, 21–5C–3(a), and such overtime work is performed on a legal holiday under W.Va. Code, 8–15–10a, he is entitled to two times his regular rate of pay for the overtime hours worked". *Id.*

k. *Kucera v. City of Wheeling*, 153 W. Va. 531, 170 S.E.2d 217 (1969) states:

> "A municipal fireman, by reason of the language of subsections (e) and (f) of Code, 1931, 21—5C—1, as amended, comes within the protection afforded by Code, 1931, 21—5C—3, as amended, and is entitled to time and a half for hours worked in excess of the hours specified therein."

III. THE TRIAL COURT ERRED WHEN IT FAILED TO ORDER REGARDLESS OF THE SHIFT START TIME, A FIREFIGHTER WHO WORKS A 24-HOUR SHIFT SHOULD RECEIVE 24 HOURS OF PAID TIME OFF UNDER W. VA. CODE § 8-15-10a.

At Paragraph 19 of its Order, the trial court stated:

> "In accordance with the opinion of the Attorney General, and the binding precedent in *Pullano v. City of Bluefield*, this Court concludes that Plaintiffs are entitled to time off for each legal holiday equal to the time spent at work during the holiday or the time they would have worked during the holiday -not the full length of their 24-hour shift." (J.A. 1262).

a. A firefighter shift is a calendar day for all other payroll purposes in the City of Morgantown.

City of Morgantown firefighters work twenty-four (24) hour shifts. (J.A. 1256) The City of Morgantown admits a firefighter's regular shift is twenty-four (24) hours. (J.A. 1325). Consequently, every firefighter employed by the city is either working or scheduled off on each legal holiday. Accordingly, West Virginia law provides that, at a minimum, the City of Morgantown must compensate each of the plaintiffs with either twenty-four (24) hours of paid time off or thirty-six (36) hours of pay (24 hours x 1 ½) for each legal holiday.

It is undisputed for now and for as long as anyone can recall, the firefighter shift started at 8:00 a.m. and been considered one day for purposes of payroll, sick days, bereavement days, and vacation days, to name a few. (J.A. 1033, Lines 15-19). When a firefighter takes a sick day, vacation day, assignment day, military time, bereavement day, or a holiday, it is actually logged into the city produced payroll sheets as one calendar day, not two. (J.A. 1327). Additionally, when the 24-hour shift starting at 8:00 a.m. is worked for unscheduled overtime, it is also logged and counted as one calendar day. (J.A. 1123). These exhibits were not created by 24-hour on-shift firefighters; they were created by City administration. Further, the City of Morgantown's own finance director Dave Schultz testified in his deposition that when a firefighter took a 24-hour shift off for bereavement, it was counted as one calendar day. (J.A. 1414) Because the 24-hour shift in Morgantown has always been considered one day for these purposes, it should also be considered one day for purposes of calculating Holiday Pay, meaning the firefighters should be compensated with paid time off based on the entire 24-hour shift. Interestingly, after the lawsuit was filed, this is exactly what the city did; it paid 24-hours of paid leave time to each firefighter for each holiday. (J.A. 244) The documents provided to the trial court and now provided to this Appeals Court for *de novo* review show that for all purposes, the 24-hour shift was treated as one calendar day.

This is not "immaterial", it is crucial to the determination of this issue in this case. When what was being done in Bluefield when *Pullano* was being considered, it is clear the issue of how the 24-hour shift is treated (one calendar or two calendar days) affected the Appeals Court's decision. The City of Morgantown filed the Appellant's Brief in *Pullano* as an exhibit to one of its trial court pleadings to show that the 24-hour shift in Bluefield started at 8:00 a.m. and ended at 8:00 a.m. (J.A. 368). The city's pleading stated it was to refute the recent Court Order in *Stroop v. City of Martinsburg*, where Judge Faircloth ruled that firefighters who worked 8:00 a.m. to 8:00 a.m. were

entitled to 24 hours of leave time or 36 hours of pay. (J.A. 332). But that is not all the Appellant's Brief did in *Pullano*. It also clearly stated on Page 10 that each 24-hour shift was actually paid as two separate days for payroll purposes. (J.A. 369). There was no factual development in *Pullano* like there was in Martinsburg and there is her in Morgantown, that for all other purposes (sick day, vacation day, assignment day, military time, bereavement day) the City of Bluefield treated the 24-hour shift as one day. But it was developed that Bluefield actually paid the shift as two days. This is what Judge Faircloth was referring to in her Order regarding no factual development of the 24-hour shift. Judge Faircloth stated:

> "The logic the Supreme Court used in *Pullano* is unchanged regardless of the length of the shift. The possibility of the factual development of the twenty-four-hour shift in this case was anticipated by the Supreme Court in *Pullano*. The Court indicated this at footnote 12 where the Court stated:
>
> > 'We emphasize that the method adopted by the city is acceptable under W.Va. Code 8-15-10a, but is not necessarily the method required of all municipalities under this statute. In particular, the sixteen-hour figure utilized by the city was based on its schedule. Other municipalities obviously have different work schedules.'
>
> For all these reasons the Defendant's argument is not well taken. This Court's previous Order is a logical legal development based upon the differing factual development of the twenty-four-hour shift worked by Martinsburg fire fighters. The previous Order follows the Supreme Court in *Pullano*."

The *Stroop* case recently settled in compliance with Judge Faircloth's Order. The firefighters were awarded a back pay award of $1.75 million. The forward fix is now that all firefighters, whether they work the holiday or not, get paid 24 hours of paid time off for each holiday.

Considering the factual development in *Pullano* that the City of Bluefield actually paid the 24-hour shift as two days, it makes sense the Mercer County Circuit Court found the holiday paid time off be split into two days and calculated as two days. Then it makes sense that a Bluefield firefighter could only get credit for working part of the calendar holiday. It also makes sense and should be found by this Appeals Court that when for all other purposes, in cities like Morgantown and Martinsburg, a firefighter 24-hour work shift is considered one day, it should also be considered one day for the purposes of calculating holiday paid time off. Consistently considering the 24-hour work shift as one day across the different payroll categories is fair and just. It is clear error to not do so. If the trial court had considered the payroll categories consistently, the Court would have found the firefighters should get holiday paid time off for 24-hours or the entirety of the work shift. For example, the method now used by this defendant.

b. If already in overtime on the holiday, the firefighter is entitled to double time pay.

Morgantown firefighters are routinely scheduled to work 56 hours per week and receive overtime pay after 40 hours of work. (J.A. 1321, p. 27, line 20:23, 1292, p. 56, Line 4:8). Morgantown firefighters also work unscheduled overtime consistently throughout the year. (J.A. 1410, Lines 2:11). Therefore, on any given holiday, many Morgantown firefighters are already in an overtime condition. If in an overtime condition, pursuant to Syl. Pt 6 of *Pullano*, the applicable firefighters would be entitled to double-time pay for any compensation for the Holiday Pay statute.

c. Firefighters can start at midnight making the shift identical to a calendar day.

Lastly on this issue, it is important to note the firefighters as a department can choose the start time of their shift. "The members of any such paid fire department shall, by a majority vote, determine the schedule of hours to be worked in any twenty-four-hour period." W. Va. Code § 8-15-10. The firefighters could choose to start their shift at midnight thereby mirroring the calendar

day. This would then require without question that the city would be required to pay them 24 hours of paid time off or 36 hours of premium pay. "They do a tough job, and they're entitled to their pay." (J.A. 1461). Why force the firefighters who do a "tough job" to make their job even tougher by forcing them to change their own start time to midnight? The 8:00 a.m. start time allows them to have some normalcy to their lives that a midnight start would not permit. For all other purposes, the 24-hour shift is treated as a calendar day; it should be for purposes of Holiday Pay, too.

d. Even Bluefield has changed the method of paying Holiday Pay so it complies with W.Va. Code § 8-15-10a.

It is important to note here that Bluefield has changed from its method of paying holiday pay that was litigated in *Pullano*. Bluefield is now paying its firefighters 36 hours of premium pay (1 ½ times their 24-hour shift even though the shift begins at 8:00 a.m.) since 2018. (J.A. 1037). The Morgantown firefighters agree either the new Bluefield method, the Martinsburg method, or the new Morgantown method (changed after the suit was filed, to 24 hours of paid time off) complies with the Holiday Pay statute[5].

IV. THE TRIAL COURT ERRED WHEN IT FOUND PAID TIME OFF TO COMPENSATE FIREFIGHTERS UNDER THE HOLIDAY PAY STATUTE IS NOT A "WAGE" UNDER THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT.

a. The compensation provided to firefighters under W. Va. Code § 8-15-10a is absolutely a wage under West Virginia Wage Payment and Collection Act.

W. Va. Code § 21-5-1 (c), hereinafter referred to as the Wage Payment Collection Act or WPCA, states:

[5] Now the city of Morgantown should calculate a backpay award based on the 12 hours of missed paid time off over five years. The Plaintiffs' expert report completed this calculation.

"The term 'wages' means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in § 21-5-4, § 21-5-5, § 21-5-8a, § 21-5-10, and § 21-5-12 of this code ...the term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: Provided, 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." Emphasis Added.

Firefighters are paid for their "time" by the hour. See the deposition of James Goff:

Q. And do you consider the firefighters to be paid an hourly rate versus a salary?

A. Yes, I do.

(J.A. 1375, p. 41, Line 13:15).

b. Fringe benefits are also "wages" if the fringe benefit is "calculable and payable" to the employee.

"Wages" include "fringe benefits". Id. "With only a few exceptions, the WPCA applies to all employees in West Virginia and provides rights and remedies with regard to payment of wages." *Grim v. E. Elec.*, LLC, 234 W. Va. 557, 767 S.E.2d 267 (2014). Again, the holiday leave time is converted to money (wages) by paying either straight time, or time and a half, or double time to the firefighter in his paycheck for the payroll period when the leave is taken. Finance Director Dave Schultz was questioned about a randomly selected individual firefighter's paystub in his deposition. Using that paystub, Mr. Schultz stated the method used for the calculation of holiday leave time and when it was calculated. Therefore, Mr. Schultz testified the holiday leave time is "capable of calculation and payable directly to the employee" as per the WPCA. If the benefit being considered that is conveyed to the employee is calculable and payable directly to the employee, it is fringe benefit and, therefore, a wage.

The firefighters receive money in their paycheck based upon an amount of time off provided to them by the City in accordance with the Holiday Pay statute. The amount of money for the holiday pay time off is calculated based upon the work schedule of the firefighter and when the firefighter takes the holiday pay time. It is not paid until the holiday leave time is taken by the firefighter. Depending on when it is, it could even be paid as double time if the firefighter is already in an overtime condition. All this indicates the holiday leave time is a wage. Consider the deposition of the City of Morgantown Finance Director, Dave Schultz where he explained that the time off is paid time off and it is converted into money:

Q. Okay. And this time that we're talking about, 12 and 24, this is paid time off? Or how is this actually converted into money for ---?

A. **It's converted into money in the following manner.** Depending on their predetermined schedule that they've made out, **it may be paid as straight time or it may be paid at time and a half or a combination of both.**

Q. Okay. And in what situation would it be paid as straight time?

A. If it's part of your first 40 hours in the work week, it's going to be straight time.

Q. Okay. And then if it's paid in 41 and over, it's paid as overtime. Is that correct?

A. Holiday overtime, time and a half.

Q. Holiday overtime, okay.

A. There's actually --- it doesn't appear on the exhibit but there is an hours code for that. It's just that particular example doesn't show it.

Q. Okay.

(J.A. 1408) Emphasis added.

- Dave Schultz in in charge of payroll for the city:

  Q: And what is your job title? It's payroll manager. Correct?

  A. Yes.

  Q. Okay. And how long --- I'm sorry. What is your job description?

  A. To make timely and accurate payroll runs according to City guidelines.

(*Id.* at Page 10, Lines 2-10.)

c. "Fringe benefits" under the W. Va. Wage Payment and Collection Act include "holidays".

W. Va. Code § 21-5-1(l) states:

> "The term 'fringe benefits' means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, **holidays**, sick leave, personal leave, production incentive bonuses, sickness and accident benefits, and benefits relating to medical and pension coverage." Emphasis added.

It is not disputed this entire lawsuit regards unpaid funds for holidays worked or not worked by these Morgantown firefighters. See the deposition of James Goff (J.A. 1343):

> Q: We are here today to talk about firefighter pay and firefighter holiday time, holiday pay issues. Do you understand that?
>
> A: Yes.

d. Even if the "accrual" is necessary, paid time off for Holiday Pay meets the test.

The city has argued to be considered a "fringe benefit" under the WPCA, the conferred monetary benefit must also have accrued, not just be calculable and payable. The West Virginia

Supreme Court has defined "accrued" to mean "vested." The Court has defined vested as "...concerned with expressly enumerated conditions or requirements all of which must be fulfilled or satisfied before a benefit becomes a presently enforceable right." *Meadows v. Wal-Mart Stores*, Inc., 207 W. Va. 203, 215, 530 S.E.2d 676, 688 (1999). In this case, the City has no written policy concerning the accrual or vesting of paid holiday leave. Therefore, the policy is unwritten. "In *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000) (per curiam), this Court held that a consistently applied unwritten employment policy regarding the payment of fringe benefits could support an employer's defense against a WPCA suit when the unwritten policy was known by employees." *Gress v. Petersburg Foods, LLC*, 215 W. Va. 32, 36, 592 S.E.2d 811, 815 (2003). An unwritten policy then, could also support an employee's argument that the WPCA should apply. Here, the city consistently calculated and paid holiday leave time to firefighters at a rate consistent with each firefighter's straight hourly rate. (J.A. 1408, 1121). It paid those funds in the paycheck after the bank of holiday leave time was established for the year and the relevant holiday corresponding with the bank of hours passed. Once the holiday passed, the leave time became due to be paid, regardless of when the firefighter used the time. At that point the leave time benefit was "accrued" or became "vested".

This unwritten policy is also exercised when a firefighter becomes eligible to and does retire. Any holiday leave time that was in the bank and the actual holiday had passed was accrued or vested. When the firefighter retired, he received a calculated amount of money based on the amount of holiday leave time that he was due because it had accrued or vested. (J.A. 1122). Lieutenant Pickenpaugh retired on July 20, 2021. His retirement payout on July 30, 2021, included a line item for accrued holiday leave time that was calculated based on his hourly rate times the amount of holiday leave time that had accrued. When he retired, Lt. Pickenpaugh had 150.5 hours

of accrued holiday leave time coming to him that had not yet been paid. Those 150.5 hours were paid to him at an hourly rate of $19.97 per hour. He received a calculated and payable sum of $3,005.49 in paid holiday leave time upon his retirement.

e. Because the WPCA applies to these firefighters, so do its remedies.

"The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant." W. Va. Code Ann. § 21-5-12(b). The Morgantown firefighters have been forced to file a lawsuit to recover their wages not paid. They are entitled to recover the cost to bring the action: attorneys' fees., interest on the unpaid wages, ands litigation costs.

f. Wages owed to employees cannot be waived.

The firefighters' wages cannot be waived by private agreement or partial payment by the employer. "Except as provided in section thirteen, no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void." W. Va. Code § 21-5-10. (Alleged modification of employment agreement, whereby employees purportedly agreed to defer their annual raises until company was profitable, did not estop employees from bring action under Wage Payment and Collection Act to recover their annual raises; Act's definition of wages encompassed annual raises in question and further provided that statute could not be contravened or set aside by private agreement and acceptance by employee of partial payment of wages.) *Britner v. Med. Sec. Card, Inc.,* 200 W. Va. 352, 489 S.E.2d 734 (1997). These firefighters did not and could not waive their claims as a matter of law.

This shows that not only is the WPCA statutory factors to be considered a "fringe benefit" are met (capable of calculation and payable directly to an employee), but also the requirement that the benefit be "accrued" or "vested" has been met. The paid holiday leave time is a "fringe benefit" and is therefore a "wage" under the WPCA and all of the rights, responsibilities and remedies of the WPCA apply. The trial court here committed clear error in concluding the holiday leave time was not a wage when that leave time is accrued through a consistently applied unwritten policy and calculated and paid directly to the employee.

This Supreme Court finding the WPCA applies to municipal firefighters is not new. In *Kucera v. City of Wheeling*, 153 W. Va. 531, 170 S.E.2d 217 (1969) this Appeals Court found that municipal firefighters are covered by the WPCA when it stated at Syl. Pt. 2: "[a] municipal fireman, by reason of the language of subsections (e) and (f) of Code, 1931, 21—5C—1, as amended, comes within the protection afforded by Code, 1931, 21—5C—3, as amended, and is entitled to time and a half for hours worked in excess of the hours specified therein." *Kucera* was a case brought by municipal firefighters in Wheeling to recover unpaid overtime pay. Here, the *Nicewarner* plaintiffs are municipal firefighters who brought an action to recover funds that should have been paid to them under the Holiday Pay statute, W.Va. Code § 8-15-10a. The WPCA applies in both instances.

g. The Holiday Pay statute is unenforceable without the benefit of the Wage Payment and Collection Act.

The firefighters anticipate the city will rely on *Grim v. E. Elec., LLC*, 234 W. Va. 557, 571, 767 S.E.2d 267, 281 (2014) to support its argument the WPCA does not apply. While *Grim* did result in the WPCA not applying to the Eastern Electric employees, it was because a separate wage protection act applied, the now repealed Prevailing Wage Act. Again, the WPCA is remedial legislation designed to protect working people, assist them in collection of compensation wrongly

withheld and restricts right to assign wages. W. Va. Code § 21-5-3. *Jones v. Tri-County Growers, Inc.*, 366 S.E.2d 726, 179 W.Va. 218 (1988), *Mullins v. Venable*, 297 S.E.2d 866, 171 W.Va. 92 (1982). So was the Prevailing Wage Act. Both Acts contain provisions for enforcement. Both contain misdemeanor criminal provisions, employee enforcement provisions, damages provisions, and provisions for attorneys' fees and costs. Permitting the Eastern Electric employees to recover for claims under both the WPCA and the PWA would have been a double recovery. But the Holiday Pay statute is a single statute with no mechanism of enforcement. It must rely on the WPCA provisions for recovery if Holiday Pay is provided incompletely. If the WPCA is not read with the Holiday Pay statute, the statute has no teeth and cannot be enforced. Further, the Morgantown firefighters have not relied on two separate Acts that would provide them with a double recovery as the Eastern Electric employees did. These firefighters are relying on the stand-alone Holiday Pay statute that directs a pay enhancement coupled with the WPCA as the only method to enforce it. The WPCA must apply to these claims.

h. The Gaujot Order is an obvious injustice against all separated Morgantown firefighters whose claims will now be extinguished.

In the Court's Order of September 28, 2021, the Court order the following:

> "Accordingly, the Court orders that Plaintiffs' claims for retroactive monetary relief, including any claims for money damages by a Plaintiff who has separated from employment with Morgantown and cannot recover time off, are barred by the equitable doctrine of laches." (J.A. 1276 at Paragraph 81).

This order actively identifies there are former Morgantown firefighters that are owed paid holiday leave time that are will not and cannot receive their money. In addition to limiting the wage pay claims of currently employed firefighters, the trial court's ruling dismisses the Holiday Pay claims of all separated Morgantown firefighters entirely.

The opposite is the rule under the WPCA. "Whenever a person, firm or corporation discharges an employee, or whenever an employee quits or resigns from employment, the person, firm or corporation shall pay the employee's wages due for work that the employee performed prior to the separation of employment on or before the next regular payday on which the wages would otherwise be due and payable." W. Va. Code § 21-5-4(b). "If a person, firm or corporation fails to pay an employee wages as required under this section, the person, firm or corporation, in addition to the amount which was unpaid when due, is liable to the employee for two times that unpaid amount as liquidated damages." W. Va. Code § 21-5-4(e). The firefighters that no longer work for the Morgantown Fire Department who were not paid completely for their Holiday Pay are owed double the unpaid amount, plus interest, attorneys' fees and the costs to bring the action to recover the unpaid amounts. But instead, Judge Gaujot dismissed these firefighters'' claims entirely.

This goes beyond an obvious injustice; it flies in the face of all fairness and the entire civil justice system. Employees have a right to be paid by their employers. In fact, at the original pre-trial hearing, the trial court acknowledged just that on the record when it stated "[t]hey do a tough job and they're entitled to their pay." (J.A. 1461).

The Gaujot Order results in those firefighters who have left the employment of the city not deserving to be paid money owed to them. But if those separated firefighters still worked for the city, they could recover the paid holiday leave time they are owed, through paid time off. This flies in the face of the intent of the WPCA. The Gaujot order is a punitive result levied only against the firefighters who no longer are employed by the city. There are no grounds for this anywhere is our system of laws and/or jurisprudence. Employees are to be paid what they are owed. If there are firefighters who are owed paid holiday leave time but cannot receive actual paid leave time because

only active employees can receive that, then there is no recovery for those former firefighters. This is so basic, it defies explanation.

V. THE TRIAL COURT ERRED WHEN IT APPLIED LACHES, AN EQUITY DOCTRINE, TO LIMIT THIS CASE WHEN STATUTES PROVIDE THE LIMITATION.

Laches applies to suits in equity. Suits in equity demand an equitable (non-monetary) remedy. Statutes of limitations apply to suits at law. Suits at law demand a remedy at law, usually, money. "One of the substantive distinctions between statutes of limitations and laches is that '[l]aches applies to equitable demands, where the statute of limitation does not.' Syl. pt. 2 (in part), *Condry v. Pope,* 152 W.Va. 714, 166 S.E.2d 167 (1969). The reverse is also true, that is, statutes of limitations, not laches, apply to demands at law: 'The mere delay in asserting a right [at law], short of the limitation fixed by statute, does not bar the right in equity.' *Id.* Stated another way, '[i]f a legal right gets into equity [that is, into a proceeding in which equitable relief, primarily, is sought], the statute [of limitations] governs [the determination of whether the legal right is time-barred].' *Condry v. Pope,* 152 W.Va. 714, 722, 166 S.E.2d 167, 172 (1969), *quoting Waldron v. Harvey,* 54 W.Va. 608, 617, 46 S.E. 603, 607 (1904). Again, '[i]f the action was formerly cognizable at law, statute of limitations is the appropriate defense; if formerly cognizable in equity, laches applies.' M. Lugar and L. Silverstein, *West Virginia Rules of Civil Procedure* 81 (1960)." *Maynard v. Bd. of Educ. of Wayne Cty.*, 178 W. Va. 53, 60, 357 S.E.2d 246, 254 (1987).

Here, the Morgantown firefighters filed their original complaint with three claims: Count One is a claim that the city failed to pay Holiday Pay based in the Holiday Pay statute, W.Va. Code § 8-15-10a. The firefighters request monetary, not equitable relief. Specifically, the firefighters demand they be paid money the city owes them. At Paragraph 16, the Complaint states: "The City

of Morgantown and its employees in charge of payroll negligently failed to pay plaintiffs the proper amount of holiday pay due them pursuant to W.Va. Code § 8-15-10a and a demand is hereby made for all sums due each plaintiff, plus statutory interest." (J.A. 007). Count Two is a claim that the City's failure to pay the Holiday Pay according to W.Va. Code § 8-15-10a is a violation of W.Va. Code § 21-5-1 et seq. (Id.). Specifically, the Complaint states at Paragraph 20: "By failing to properly and promptly pay the aforesaid holiday pay to plaintiffs, the City of Morgantown has violated W.Va. Code § 21-5-3, by not paying plaintiffs 'wages due' them." (Id.). Again, this is a request for monetary, not equitable relief. Count Three is a claim for declaratory judgment asking the Court to interpret the Holiday Pay statute to state the firefighters are entitled to the monetary benefits they claim. Specifically at Paragraph 24, the Complaint states: "Plaintiffs are 'persons' as described above and pray that this court declare that as a firefighter working on state-designated holidays they are and have in the past been entitled to be paid at a rate as stated in West Virginia Code § 8-15-10a, that is a payment at a rate not less than one and one-half times his regular rate of pay." (Id.). Nowhere is the relief sought in the Complaint grounded in equity; the relief sought is now and always has been grounded in three state statutes and demanded money as the remedy. There has been no factual finding by the trial court that the firefighters' claims asserted were equitable in nature; nor has there been any conclusion of law that the claims were equitable in nature. These claims are for money and were based in statute. Monetary remedies allow the non-breaching party to recover monetary damages. In contrast, equitable remedies are non-monetary solutions to resolve the disputed issue. Here, laches does not apply, the applicable statute of limitations applies.

VI. THE TRIAL COURT COMMITTED CLEAR ERROR WHEN IT FAILED TO APPLY 5-YEAR STATUTE OF LIMITATIONS PURSUANT TO W. VA. CODE § 21-5-1(c) AND RELEVANT PRECEDENT.

The applicable limitation on this action is provided by statute. As discussed above, laches does not apply to limit the time for filing of this case because it is not a suit in equity. Some limitation on time must apply because almost all suits have deadlines that limit when they can be filed. Here, what applies is a statute of limitations. Most civil suits requesting money damages, as this one, have a 2-year statute of limitations[6]. But here, because the leave time at issue is directed to be paid pursuant to a statute, W.Va. Code § 8-15-10a, and is actually capable of calculation and payable directly to an employee in their individual paychecks pursuant to another statute, W. Va. Code § 21-5-1(c), claims for the paid leave time the city failed to provide are covered by a 5-year statute of limitations.

The West Virginia Supreme Court of Appeals, as well as numerous federal courts, have consistently held that claims that fall under the W. Va. Wage Payment and Collection Act are claims based on (at least) implied contract and are therefore governed by the 5-year statute of limitations found in W.Va. Code § 55-2-6. If a written contract exists, the statute of limitations would be 10 years. See *Jones v. Tri-County Growers*, 179 W. Va. 218 (1988) (holding suits brought under the West Virginia Wage Payment and Collection Act are governed by the five year statute of limitations for contract actions), *Western v. Buffalo Mining Co.*, 162 W.Va. 543, 251 S.E.2d 501 (1979) and *Lucas v. Moore*, 172 W.Va. 101, 303 S.E.2d 739 (1983) (holding a suit by employees for recovery of money allegedly obtained under a wage assignment that violates W.Va. Code § 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), *Sansom v. Sansom*, 148 W. Va. 603, 137 S.E.2d 1 (1964)

[6] W. Va. Code Ann. § 55-2-12

(holding the statute of limitations of five years is applicable in the case at bar, because it is based on an implied contract), *Rich v. Simoni*, 2014 U.S. Dist. LEXIS 138352, 2014 WL 4978442 (holding W.Va. Code § 55-2-6 provides a five-year limitations period for the filing of a breach of implied contract claim), *Goodwin v. Willard*, 185 W. Va. 321, 406 S.E.2d 752 (1991) (holding the Act contemplates that employees shall have rights and remedies under the statute as if still under contract with their employers, and actions brought under this provision are therefore subject to the five year statute of limitations for contract), *Grim v. E. Elec., Inc.*, 234 W. Va. 557, 767 S.E.2d 267 (2014) (the effect of an implied contract on the statute of limitations as applied to prevailing wages).

Because the wages (or fringe benefit) the city has failed to pay the firefighters fall under the Wage Payment and Collection Act and because it is settled law that those claims are governed by a five-year statute of limitations, the Plaintiffs here are entitled to recover wages for the entire five years prior to the complaint filing. Because laches does not apply, a statute of limitations must. Here the applicable statute is found in W.Va. Code §21-5-3 *et seq.,* the Wage Payment and Collection Act, which provides a 5-year statute of limitations for these claims.

CONCLUSION

Like other municipal firefighters around the State of West Virginia, the Morgantown firefighters are attempting to recover unpaid wages from their employer, here, the City of Morgantown. The evidence provided to the trial court proved the paid time off provided to the firefighters to comply with W.Va. Code § 8-15-10a was calculable and payable to each firefighter. It is therefore a wage covered by the Wage Payment and Collection Act. Because this paid time off is covered by the WPCA, the 5-year statute of limitations apply meaning the firefighters can look back five (5) years to calculate and recover their wages missed. With that comes the

protections of the WPCA that the employer who failed to pay the wages will pay interest on those unpaid wages and the attorneys' fees and costs to recover them. Here, the city failed to acknowledge the firefighter shift is 24-hours and regardless of when the shift starts, the firefighters are therefore entitled to 24 hours of paid time off. The city provided them 12 hours of paid time off per holiday. The firefighters are owed significant back wages, interest, and costs based on the missing 12 hours of paid time off per holiday. Had the trial court in this matter ordered this, it would have been in line with most other cities around the state that have corrected their holiday pay policy. To find otherwise damages firefighter wages and will negatively affect retention and recruitment of firefighters across the state.

For the foregoing reasons, the firefighters are entitled to relief and pray this Court enters an order reversing the ruling of the Circuit Court and remanding this case for further proceedings consistent with this Court's ruling.

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