

NO. 32512

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HEETER CONSTRUCTION, INC.

Appellant

v.

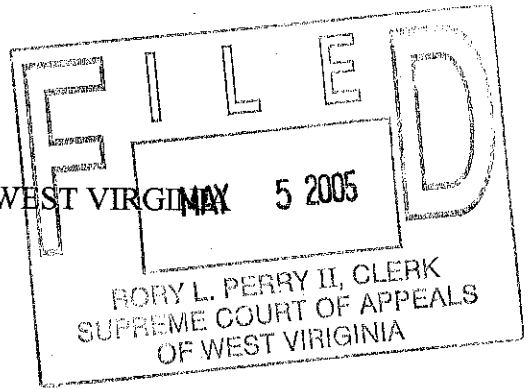
WEST VIRGINIA HUMAN RIGHTS COMMISSION
and PETER KELLY, OCTAVIA E. BINDER, KERRY
L. WALKER, TIMOTHY E. BOYKINS, SHERRIE
THOMAS and ANDREA THOMAS-PAULEY,

Appellees.

REPLY BRIEF OF APPELLANT

Submitted by,

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Introduction

The Appellant challenges an adverse judgment of the West Virginia Human Rights Commission. As is readily apparent, these parties agree on very few things about this case, its outcome, and how the case proceeded below. In this reply the Appellant will first address misstatements contained in the Appellees' recitation of the facts and the history of this case. These misstatements irretrievably infect the validity of the Appellees argument.

THE APPELLEES' BRIEF MISSTATES IMPORTANT ASPECTS AND FACTS OF THE CASE BELOW

The Appellees' brief is replete with errors. The errors begin on page 1 of the brief when the Appellees erroneously characterize the ruling below, then presume to inform this Court what the "central theme" of Appellant's appeal is. The Appellees state that the Commission's order found that Heeter "had discriminated against each of the six African American Complainants." That is simply not the case, see Argument D *infra*. Here is what the Order under appeal actually holds with respect to three (3) of the Appellees:

88. The Respondent has proven by a preponderance of the evidence that it would not have hired **Kerry L. Walker** as a flagger . . . p. 29.
91. The Respondent has proven by a preponderance of the evidence that it would not have hired **Sherri Thomas** as a flagger . . . p. 30.
92. The Respondent has proven by a preponderance of the evidence that it would not have hired **Andrea Thomas-Pauley** as a rock truck driver . . . p. 30.

In paragraph 77, p. 26 of the Administrative Law Judge's decision the Administrative Law Judge finds that in the case of **Octavia Binder, Kerry L. Walker** (against whom the Administrative Law Judge found in ¶88) and **Timothy Boykins** discrimination played a significant part in the Respondent's decision not to hire them. Thereafter, more specific paragraphs apply to **Peter Kelly**, ¶84, **Octavia Binder**, ¶86 and **Timothy Boykins**, ¶89. These several paragraphs differentiate Kelly, Binder and Boykins from the others. However, the conflict caused by the references in paragraphs 77 and 88 to Walker remains without any modification by the Commission on appeal. And as pointed out *infra* there is no other finding supporting the judgment awarded to Kelly. The Appellees' misstatement about "prevailing" is repeated on pages 2, 5, 6, 22, 23 and 25 of the Appellees' brief, *see* Argument D *infra*, thus pervading their entire argument.

Appellees then state that the "central theme" of this appeal concerns violations of constitutional and statutory law in the conduct of the hearing. On the contrary, there is no "central theme," rather this appeal is prosecuted upon various grounds each of which standing alone should require that this Court reverse the judgment below. Collectively, the Final Decision below must be doomed. While it is accurate that the Appellant urges this Court to find violations of the governing statutes and the Appellant's due process rights as well, the shameful manner in which the proceedings below were conducted serves as an overriding consideration and undeniably provides the backdrop to the consideration of the many errors which were committed. It must be remembered that out of these proceedings a judgment of more than \$200,000 was entered. As will be further addressed herein there were many significant errors and omissions committed below and a Final Decision was written which even today is difficult, if not

impossible, to understand. Indeed, the Appellees attempt to rewrite the decision in their brief, even at one point going beyond the record to refer to an alleged "understanding" of counsel about damages.

The Appellees also misstate important aspects of the case "history," Brief pp. 3-6. The Appellees' history as provided defies the substantial testimony and documentary evidence in favor of Heeter which went unrebutted and unanswered in the record below. The Appellee would have this Court conclude that Heeter simply hired no minorities when the absolute opposite is true and is amply reflected in the record. State and federal inspectors testified that Heeter not only complied with, but exceeded, government-imposed minority hiring goals, Vol. 4 pp. 98-187, Vol. 7 pp. 199-248. The position which was sought by Complainant Kelly (to whom the Administrative Law Judge and Commission awarded large damages) was actually filled by hiring a Mr. Greg Jackson, an African American, Final Order ¶84. The Appellees refer to the federal job requirements as if those requirements represented the only reason minorities were ever hired by Heeter, p. 11. However the actual record demonstrates that these Complainant Appellees submitted their applications *during a one week period in August 2000. That time period is after the so-called "federal job" began.* Moreover, state and federal jobs alike proscribe discrimination. The Appellees, the Administrative Law Judge and the Commission have simply engaged in an interpretation of the record which is unjustified by the unadorned facts.

The Appellees' editorializing about a presumed record which does not exist is, of course, designed to prejudice this Court against Heeter. A careful reading of the evidence shows that Heeter did hire many minorities, including African Americans, native Americans and females.

All of these minorities are protected whether they are hired for state or federally funded jobs. The "character assassination" that Mr. Heeter had a sexual liason with an employee as presented in Appellees' Brief p. 15, Vol. 5 pp. 154-157 was admitted by the Administrative Law Judge on the grounds that it was "probative to pretext" on the claim of gender discrimination, Vol. 5 p. 155. It is noteworthy that in March, 2005 all claims of *quid pro quo* sexual harassment against Heeter were tried in the Circuit Court of Logan County. In that two and a half (2 1/2) day trial Heeter was cleared of all such allegations in a defense verdict which was returned by the jury following deliberations of less than one hour. The attempt to resurrect those allegations has no place in this appeal. Unfortunately, such character assassination has persisted in these ugly proceedings.

Points and Authorities

A. Counsel's Misconduct, When Allowed by a Trial Court to Continue, Can Constitute a Violation of a Party's Fair Trial Rights Guaranteed by Due Process of Law.

CAMC v. Zakaib, 437 S.E.2d 759 (1993)
Carabello v. City of New York, 446 N.Y.S.2d 318 (App. Div. 1982)
Cohen v. Covelli, 94 N.Y.S.2d 782
Forsyth v. Church, 42 P.2d 975, 977 (Kan. 1935)
In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981)
Lopez v. Josephson, 30 P.3d 326, 332-336 (Mont. 2001)
Putro v. Baker, 410 P.2d 717 (Mont. 1966)
State ex rel. McCamic v. McCoy, 276 S.E.2d 534, 536 (1981)
State v. Turner, 538 P.2d 966 (Kan. 1975), Annota.
Torres v. City of New York, 762 N.Y.S.2d (AD1 Dept. 2003)
West Virginia Code, §29A-5-1(d)

77 C.S.R. 2-7.4a
77 C.S.R. 2-7.13
77 C.S.R. 2-7.27e.4
87 ALR.3d 337
Rule 4.2 of the Code of Professional Conduct

B. The Appellant Has Most Assuredly Not Abandoned His Economic Damage Argument.

West Virginia Code, §29A-5-4(g)(1)

West Virginia Code, §29A-5-4(g)(5)

C. The Appellees Erroneously Urge this Court to Affirm the Judgments as to Liability and Damages.

Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986)

Ilosky v. Michelin Tire Corp., 307 S.E.2d 603 (W.Va. 1983)

Jordan v. Bero, 210 S.E.2d 618 (W.Va. 1974)

Moore v. Consolidation Coal Co., 567 S.E.2d 661 (W.Va. 2002)

West Virginia Code, §29A-5-2

West Virginia Code, §29A-5-4(g)

West Virginia Code, §29A-5-4(g)(5) and (6)

D. Appellees Walker, Thomas and Thomas-Pauley Are Non-Prevailing Parties.

Bailey v. Norfolk and Western Ry. Co., 527 S.E.2d 516, 529 (W.Va. 1999)

Martin v. Randolph Board of Education, 465 S.E.2d 399 (W.Va. 1995)

Mace v. Charleston Area Medical Center Foundation, Inc., 422 S.E.2d 624 (W.Va. 1992)

McClung v. Marion County Comm'n; 360 S.E.2d 221 (W.Va. 1987)

Page v. Columbia Natural Resources, Inc., 480 S.E.2d 817 (W.Va. 1996)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Skaggs v. Elk Run Coal Co., Inc., 479 S.E.2d 561 (W.Va. 1996)

State ex rel. Erlewine v. Thompson, 207 S.E.2d 105, 107 (W.Va. 1973)

State ex rel. Kaufman v. Zakaib et al., 535 S.E.2d 727 (W.Va. 2000)

State v. White, 425 S.E.2d 210, 212, n.2 (W.Va. 1992)

West Virginia Code, §5-11-10

E. The Appellees, the Administrative Law Judge, and the Commission Erroneously Rely Upon "Mixed Motive."

Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986)

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)

McDonnell-Douglas v. Green, 411 U.S. 792 (1973)

Moore v. Consolidation Coal Co., 567 S.E.2d 661 (W.Va. 2002)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 584 (W.Va. 1996)

42 U.S.C. §2000e-2m

Annota., Effect of Mixed or Dual Motives in Action Under Title VII (Equal Employment Opportunities Subchapter) of Civil Rights Act 1964, 83 ALR Fed. 268

Note, Employment Law: Desert Palace v. Costa Returning to Title VII's Core Principles by Eliminating the Direct Evidence Requirement in Mixed Motive Cases, 57 Okla.L.Rev. 403 (2004)

F. Asterisks Placed upon Respondent's Exhibit 5 Have Nothing to Do with Proving Unlawful Discrimination

ARGUMENT

A. Counsel's Misconduct, When Allowed by a Trial Court to Continue, Can Constitute a Violation of a Party's Fair Trial Rights Guaranteed by Due Process of Law.

The Appellees seek to trivialize the shabby, often chaotic conduct of the proceedings below. Appellees even seek to blame Heeter's trial counsel as if that somehow justifies the over the top antics engaged in by the Attorney General's representative of these Appellees. The Appellees argue that the Administrative Law Judge possessed "limited authority" to control such misbehavior, p. 17. It is submitted that not only does the Administrative Law Judge have ample authority akin to that of a circuit judge with which to control the proceedings, West Virginia Code, Chapter 29A, Article 5, Section 1(d), 77 C.S.R. 2-7.4a, 2-7.13, 2-7.27e.4, but it can be reasonably argued that the Administrative Law Judge possesses more power than a judge does when it comes to deciding the outcome of the case. The Administrative Law Judge sits as fact finder, law finder and assessor of damages. The Administrative Law Judge possess the power to return huge damage awards for allegedly lost wages which he/she finds against the largest of employers or the smallest of employers who are subject to the Human Rights Act. In this case the judgment now exceeds \$200,000 with interest. The Administrative Law Judge can literally put a small employer out of business with the amount of damages awarded. Consequently, the

parties should expect much better than they received in this case as this was clearly an inappropriate, out of control proceeding from beginning to end.

Contrary to Appellees' argument, pp. 15-19, courts have in fact held that trial counsel's misconduct can so permeate the proceedings as to effectively destroy a party's ability to obtain a fair trial, Torres v. City of New York, 762 N.Y.S.2d (AD1 Dept. 2003); Lopez v. Josephson, 30 P.3d 326, 332-336 (Mont. 2001) (attorney's misconduct pervaded the proceedings to such an extent that prejudice had to be presumed). Another court held that the guiding principle of our legal system is to extend fairness to both sides. Under that rationale the court reversed a judgment due to a lawyer's misconduct, Putro v. Baker, 410 P.2d 717 (Mont. 1966). The Court there eloquently stated, at p. 722 that:

“The guiding principle of our legal system is fairness. We must tenaciously adhere to the ideal that both sides of a lawsuit be guaranteed a fair trial [citing the Montana Constitution].



This strictness is necessary to give due confidence to parties in the result of their causes, and to enlighten the public who have recourse to our courts that any improper influence which has the natural tendency to prejudice the verdict is grounds for a mistrial.”

A personal attack on the other attorney has required a reversal, Carabello v. City of New York, 446 N.Y.S.2d 318 (App. Div. 1982). A grossly improper and inflammatory summation can result in a reversal, Cohen v. Covelli, 94 N.Y.S.2d 782, when counsel “crosses the line” which is based on propriety, good taste and judgment, see also Forsyth v. Church, 42 P.2d 975, 977 (Kan. 1935).

As to the alleged provocation on the part of the opponent's counsel which these Appellees assert, courts have held that provocation never constitutes a good defense to an

attorney's violation of the Code of Professional Conduct, State v. Turner, 538 P.2d 966 (Kan. 1975), Annota. 87 ALR.3d 337. The judge in charge of a case always has the nondelegable responsibility to see that lawyers practicing before him/her maintain the highest standards of conduct, In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981). The rationale for this conclusion is that it is necessary to maintain public confidence in the integrity of the legal profession, Id. 919-920. As this Court has held, lawyers are considered officers of the court whose professional duties include assisting the discharge of the Court's vital duties to administer the law and to resolve controversies, State ex rel. McCamic v. McCoy, 276 S.E.2d 534, 536 (1981).

The record below reflects that Appellees' attorney was utterly contemptuous of the integrity of the process and openly defied his responsibilities as a court officer. The Administrative Law Judge simply ignored or openly coddled the misbehaving counsel telling him at one time that he should try to stipulate damages [see Argument B, pp. 7-8 *infra.*] and during that process "not use curse words of any kind," Vol. 3 p. 175. Consistent with the foregoing authority, Heeter's right to a fair trial was effectively destroyed.

In their response on this subject, the Appellees' reliance on CAMC v. Zakaib, 437 S.E.2d 759 (1993), p. 18, appears misplaced. In that case, former hospital employees were being interviewed *ex parte* by plaintiff's counsel pursuant to a court's order. Hospital counsel filed a writ of prohibition with this Court citing Rule 4.2 of the Code of Professional Conduct which prevents *ex parte* contacts by counsel with the other party. This Court merely denied the writ finding that Rule 4.2 refers to officials who have the legal power to bind a corporation. That decision has no application to this issue as raised in the appeal and certainly does not stand for

the proposition that a consistently misbehaving attorney cannot destroy a litigant's fair trial rights under due process of law.

B. The Appellant Has Most Assuredly Not Abandoned His Economic Damage Argument.

The Appellees state, p. 38 of their brief, that the Appellant "recognizing the fallacy of his position" has abandoned the argument concerning economic damages. That is hardly the case. See Brief of Appellant pp. 30-35. The Appellees here make the common mistake of interpreting the length of an argument as written on paper with its force. The Appellant continues to assert that the decision finding Heeter liable for lost wages to Ms. Binder and Messrs. Kelly and Boykins is clearly wrong in view of the substantial evidence contained in the whole record, West Virginia Code, Chapter 29A, Article 5, Section 4(g)(5). Moreover, it is the Appellant's continued assertion that the hearing was conducted in violation of both constitutional and statutory provisions, §29A-5-4(g)(1). It is axiomatic that damages, like liability, must be established through the presentation of evidence in contested cases before the Human Rights Commission:

"... The rules of evidence as applied in civil cases in circuit courts of this state shall be followed. West Virginia Code, Chapter 29A, Article 5, Section 2(a).

Since no testimony, no cross examination, no stipulation and no authentication of documents exists it is obvious that the large amount of damages awarded must be reversed. This Court is directed to Vol. 3 p. 175 where the Administrative Law Judge says: **"I'm going to ask that the parties attempt to stipulate as to what the back pay and mitigation are and if they cannot that they submit their differences in writing as well."**

The Appellees attempt to evade the requirement that damage evidence must be presented "as applied in civil cases in circuit courts" by referring to an alleged case history which is neither consistent with the law nor with the facts, see Brief of Appellees pp. 4-5. The Appellant's trial counsel specifically asked for a hearing on damages in her submissions. Even if she had not done so the Administrative Law Judge would not be relieved of fulfilling the statutory obligations. These requirements exist to protect parties, not to make the work of the Administrative Law Judge or lawyers easier. Obviously, the disputes about damages were significant and could only have been properly addressed by conducting a hearing at which evidence was taken on the subject. The "mail in" substitute of "evidence" constitutes plain and clear error and on its face requires reversal of the large damage award which was entered below.

C. The Appellees Erroneously Urge this Court to Affirm the Judgments as to Liability and Damages.

The Appellees argue that "[i]n reality it is not the 'manner' with which the Appellant takes issue, it is the result, Brief p. 19. On the contrary, it is both! The reality is that the manner in which the proceedings were conducted and the result achieved cannot be separated. A ragged, out of control hearing will invariably conclude with an improper outcome. Under the heading of "scope of review" the Appellees emphasize how allegedly "limited" judicial review of Human Right Commission decisions is, Brief pp. 8-10, to the point that one could conclude that it is virtually impossible to reverse such a decision. If the way that this matter proceeded represents "business as usual" before the Administrative Law Judge and the Commission and the review is so "limited," then this Court is hereby respectfully asked to dispel any belief that the Commission can uphold judgments which range well into six figures following hearings containing insults,

profanities and juvenile, smart-aleck comments, all upheld with impunity and free from close judicial review.

The decision below was entered to the extreme prejudice of substantial rights of this Appellant because the findings, inferences, conclusion and decision violated rights, exceeded authority, followed unlawful procedure, rejected or neglected the law as well as reliable, probative and substantial evidence. Moreover, the decision appears arbitrary and an abuse of discretion. In summary, the application of any provision of West Virginia Code, Chapter 29A, Article 5, Section 4(g) to this case can result in reversing this judgment.

Liability

Liability for back pay is entered to the tune of \$62,331.98 for one party (Peter Kelly, III) for whom there is no finding that he met his burden of proof as required by Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1986) and the applicable statutory law. In fact, his name is omitted from paragraph 77, p. 26 of the Final Decision which appears intended to award judgment for those parties therein named.

In the case of Octavia Binder and Timothy Boykins lipservice is given to the Conaway analysis, see also Moore v. Consolidation Coal Co., 567 S.E.2d 661 (2002). While the Final Decision certainly acknowledges this precedent, p. 32, the decision glaringly omits to follow through with the analysis, instead engaging in a rambling discussion, pp. 32-39, which is difficult to follow. Within that discussion the decision notes that the Administrative Law Judge "found these considerations [of Heeter's hiring practices] non-discriminatory reasons for Mr. Heeter's hiring decisions." Heeter's hiring of African Americans was however discounted as merely "highly laudable." No weight whatsoever was given to the fact that Heeter's minority hirings

well exceed Logan's population statistics, that an African American minority was hired in place of a prevailing party who is also African American or that more than a thousand applicants signed up for less than one hundred job openings. If one merely closes one's eyes and ears to the significance of substantial evidence offered by one party to a controversy and thereafter emphasizes the evidence of the other party, the result is easily forecasted. Indeed that is why the Appellant raised the statistics about this Administrative Law Judge's record of decisions. It is respectfully submitted that is why our statute permits the Court to reverse the decision when it is clearly wrong in view of reliable, probative and substantial evidence to the contrary or the decision is arbitrary and capricious, §29A-5-4(g)(5) and (6). Another example of this error is the conclusion that in the case of Ms. Binder, Heeter discriminated on account of her age when the application did not state her age, Commission Exhibit 10, and 30% of the other flaggers then hired were between 40 and 60 years of age, Respondent's Exhibit 27. . .

Damages

The Appellees curiously refer to "comparators" who "approximate the wage losses of a complainant," that the methods of proving damages are imprecise "since precision in this task would be impossible" and "estimating a complainant's loss," Brief pp. 41-42. Moreover, the Appellees even go outside the record to refer to an "understanding" that damages would be built from comparator earnings information, Brief p. 5.

Damages must be proved through evidence admitted of record as in civil trials, §29A-5-2. There is no separate rule for Human Rights cases tried before an Administrative Law Judge. In these cases, as in all cases, a party who seeks damages must prove those damages by a preponderance of the evidence, see citations of authority Brief of Appellant p. 32. Damage

evidence must be tested by cross-examination and be predicated upon proper foundation testimony.

The awards of incidental damages for emotional distress in this case appear to be little more than a knee-jerk award for any Complainant who appeared. The testimony is devoid of any substance which supports such an award to any of the Appellees. While medical or psychological testimony may not be required, certainly something more than a self-serving statement that "I was upset" is required. It is submitted that if the damages are to be permitted that the standard required be (1) that they are established by a preponderance of the evidence (2) shown to be causally connected to the wrong and (3) reasonably certain, Jordan v. Bero, 210 S.E.2d 618 (1974); Ilosky v. Michelin Tire Corp., 307 S.E.2d 603 (1983). This Court is respectfully requested to so find.

D. Appellees Walker, Thomas and Thomas-Pauley Are Non-Prevailing Parties.

Respondent erroneously argues that the decision in the case *sub judice* effectively makes an award to Complainants Walker, Thomas and Thomas-Pauley by finding the presence of an "impermissible race factor" but holding:

Respondent has demonstrated by a preponderance of the evidence that it would not have hired the Complainants, Kerry Walker, Sherri Thomas and Andrea Thomas-Pauley, even were the impermissible factor of race not considered [.] Final Order, pg. 40.

As to each of those Complainants the Commission adopted the Final Decision including paragraphs 88, 91 and 92 which already established that Heeter prevailed. The above findings make it clear and unequivocal that the ALJ and the Commission found that Mr. Heeter had established that the same result (his failure to hire the Complainants) would have occurred regardless of any unlawful motive.

In Skaggs v. Elk Run Coal Co., Inc., 479 S.E.2d 561 (W.Va. 1996) (which Appellees also cite pp. 2, 3, 25 and 33) the Court held:

Thus a Plaintiff states a claim under the Act if he or she proves by a preponderance of the evidence that a forbidden intent was a motivating factor in an employment action. Liability will then be imposed on a Defendant unless it proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive. *Id.* at 585. (Emphasis added).

The “same result” and “would not have hired” *ante* are synonymous in this case and precisely what the Administrative Law Judge and the Commission found in the Final Decision.

Stated slightly differently “[w]here the Plaintiff proves by a preponderance of the evidence that an illicit motive entered into the challenged employment decision, then the Plaintiff wins unless the Defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the illicit motive” Bailey v. Norfolk and Western Ry. Co., 527 S.E.2d 516, 529 (W.Va. 1999) citing Martin v. Randolph Board of Education, 465 S.E.2d 399 (W.Va. 1995). Again, the Commission found the result would have been the same without the improper motive.

There is absolutely no legal authority to award a Complainant incidental or other damages in the absence of a finding of the violation of the applicable statutes. In fact, there is specific statutory authority to the contrary.

“If, after such hearing and consideration of all the testimony, evidence and record in the case, the Commission shall find that the Respondent has not engaged in such unlawful discriminatory practice, the Commission shall state its findings of fact and conclusions of law as aforesaid and shall issue and cause to be served upon the Complainant an order **dismissing the said Complaint** as to such Respondent.” West Virginia Code, §5-11-10 (emphasis added).

Hence, after finding that Mr. Heeter had “not engaged in such unlawful discriminatory practice” the statutorily mandated duty of the ALJ and the Commission was to dismiss the Complaints as to Walker, Thomas and Thomas-Pauley.

Appellees attempt to characterize the matter as one of mixed motives – but such term is excluded by an outcome as described in the decision. “‘Mixed motive’ refers to cases in which a discriminatory motive *combines* with some legitimate motive to produce an adverse action against the Plaintiff,” Skaggs, at 584, pt. 68. In the present case, the finding was that the Appellant would have followed his course of action irrespective of any other factors, see Argument E *infra*.

The Skaggs court further found “[t]he United States Supreme Court took up the matter of mixed motives . . . and concluded that when a plaintiff proves that a discriminatory motive entered into an employment decision, the burden then shifts to the defendant to show that the same decision would have been made in the absence of the discriminatory motive,” citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Therefore, even if characterized as “mixed motive” the language of the decision has the same effect. See also Page v. Columbia Natural Resources, Inc., 480 S.E.2d 817 (W.Va. 1996), McClung v. Marion County Comm’n, 360 S.E.2d 221 (W.Va. 1987) (Holding “the employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct.”) and Mace v. Charleston Area Medical Center Foundation, Inc., 422 S.E.2d 624 (W.Va. 1992).

As noted above, the ALJ stated in his Order “Respondent has demonstrated by a preponderance of the evidence that it would not have hired Complainants, Kerry Walker, Sherri Thomas and Andrea Thomas-Pauley, even were the impermissible factor of race not considered.” Counsel for the Appellees devoted five pages of their brief (pp. 22-27) to an attempt to

reconstitute the language of the decision below so as to read as a favorable decision for the non-prevailing parties through a tortured analysis which has no meaningful application here. Our Court has consistently held that a court speaks only through its orders. In State ex rel. Kaufman v. Zakaib et al., 535 S.E.2d 727 (W.Va. 2000) this Court held that a circuit court judge could not be called upon by subpoena to elaborate about his official holdings in a case citing to “. . . a long-standing principle of our jurisprudence, namely, that a court speaks only through its orders”¹ Referring further to State v. White, 425 S.E.2d 210, 212, n.2 (W.Va. 1992). [H]aving held that a court speaks through its orders, we are left to decide this case within the perimeters of the Court’s order” (internal citations omitted) and State ex rel. Erlewine v. Thompson, 207 S.E.2d 105, 107 (W.Va. 1973) holding that “a court of record speaks only through its orders.” In Kaufman the Court further noted that similar principles as discussed in that case were applied to “quasi-judicial officials.” Kaufman fn. 9. Accordingly, the Appellee’s attempt to reconstitute the meaning of the decision must fail.

E. The Appellees, the Administrative Law Judge, and the Commission Erroneously Rely Upon “Mixed Motive.”

The Appellees appear to rely on the mixed motive analysis to support their argument that Appellees Walker, Thomas and Thomas-Pauley prevailed, and as a consequence they were entitled to receive an award of incidental damages, Brief pp. 23-24. Appellees go so far as to accuse Appellant of “blatantly misstating” the law, p. 24. On the contrary, it is the Appellees and the lower tribunal who have misused this analysis. Of course, Appellees aver that the Administrative Law Judge applied a mixed motive analysis p. 5 in reaching his decision.

¹The Walker/Kelly problem in the Final Decision for example remains a part of the order below and simply cannot be reconciled, see p. 2 of this Brief. And note the absence of supporting findings in favor of Kelly indicating that he had met his burden of proof. The only reference is that Heeter had not met his burden, ¶84.

However, the Administrative Law Judge mentions the mixed motive analysis only one time in his Final Decision, p. 33 wherein he writes:

“There is also the ‘mixed motive’ analysis under which a complainant may proceed to show pretext . . .”

A closer reading of the Administrative Law Judge’s decision demonstrates that the aforementioned reference to the mixed motive analysis follows two paragraphs which refer to and describe “prctext.” Nowhere in the opinion thereafter does the Administrative Law Judge inform the reader or specify what analysis he ultimately employs to reach his decision. In fact, a reading of paragraph 5, p. 40 under Conclusions of Law yields the interpretation that the ALJ appears to have blended the analyses together. That paragraph starts with what appears to be the traditional pretext analysis of the burdens, but towards the end of the same paragraph the Administrative Law Judge appears to convert to a mixed motive analysis, *ergo* the Appellant reiterates the argument that the order employs an erroneous burden of proof.

To better understand this point requires a look at the history of “mixed motive” analysis. The analysis comes from the plurality decision of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) which concerned a claim of sex discrimination under Title VII. The Court there held that where a plaintiff proves by a preponderance that an illegitimate criterion was a substantial factor in an adverse employment decision the burden shifts to the employer to explain the decision. Justice O’Connor’s concurring opinion which was followed consistently by courts stated that the burden shifted only when the plaintiff could prove by direct evidence that the criterion was a substantial factor in the employment decision, see cases Annota., Effect of Mixed or Dual Motives in Action Under Title VII (Equal Employment Opportunities Subchapter) of Civil Rights Act 1964, 83 ALR Fed. 268. The decision also held that defendant employers may then

avoid liability by proving by a preponderance that they would have reached the same decision even if the employer had not taken the illegitimate criterion into account.

Congress reacted to the Price Waterhouse v. Hopkins decision by amending Title VII in 1991. Under the amendments Congress specifically allowed employees to maintain a cause of action under the mixed motive theory, 42 U.S.C. §2000e-2m. Congress addressed the same action defense by codifying that defense in such a way as to limit the remedies available to the complainant who proves his/her case under 2000e-2m:

“On a claim in which an individual proves a violation under 2000e-2m and Respondent demonstrates that the Respondent would have taken the same action in the absence of the impermissible motivating factor the court (i) may grant declaratory relief, injunctive relief, attorney fees and costs and shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment.”

This has been interpreted by commentators as altering the traditional method of proving discrimination under McDonnell-Douglas v. Green, 411 U.S. 792 (1973); see Conaway v. Eastern Associated Coal Corp., *supra*; Note, Employment Law: Desert Palace v. Costa Returning to Title VII's Core Principles by Eliminating the Direct Evidence Requirement in Mixed Motive Cases, 57 Okla.L.Rev. 403 (2004). McDonnell-Douglas established the pretext framework in employment cases. The authority named by the article and cited by the Appellees in their brief, p. 24, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) merely held that it was consistent with the 1991 amendment to Title VII to instruct the jury as to the mixed motive theory and that the law did not require direct evidence of discrimination in order to prove the mixed motive case. Justice O'Connor again concurred, reiterating that pre-amendment cases required direct evidence of discrimination, but post amendment mixed motive cases did not.

Returning to Appellees' argument that our Human Rights Act has no such remedy limiting language as is contained in Title VII, pp. 26-27 the Appellant agrees. However, our statute also has no language which is the equivalent of the mixed motive language contained in 2000e-2m. The Appellees cannot have it both ways, most particularly when the analysis employed by the Administrative Law Judge is vague and fuzzy as it is in the instant case. In fact, West Virginia jurisprudence has held that mixed motive cases represent a subcategory of disparate treatment cases, Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 584 (1996). More recently, in Moore v. Consolidation Coal Co., 567 S.E.2d 661 (2002) this Court has reiterated that the McDonnell-Douglas three step evidentiary framework continues to govern claims of disparate treatment filed under our Human Right Act which should govern the subcategories of such cases. The traditional pretext analysis therefore appears to remain firmly in place. In conclusion, not only does the decision *sub judice* depart from the required analysis generally, but also and more to the point, the decision's lone reference to "mixed motive" scarcely supports the award of incidental damages to these non-prevailing parties.

F. Asterisks Placed upon Respondent's Exhibit 5 Have Nothing to Do with Proving Unlawful Discrimination

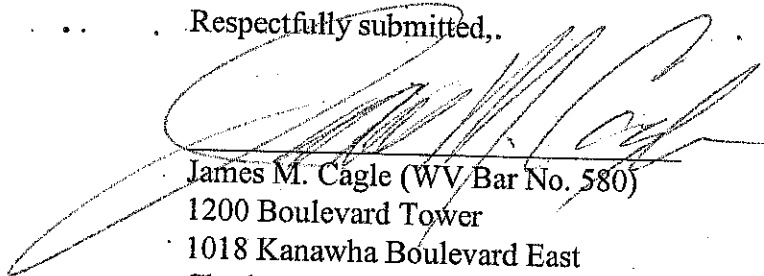
The Appellees recklessly assert in their brief pp. 24, 33, that evidence of discrimination exists by virtue of "someone at Heeter [having] carefully marked with an asterisk" the names of African American job applicants. The Appellees then cite to Respondent's Exhibit 5 as displaying the asterisks in the voluminous documents identified as the Applicant Flow Chart. There is no finding of fact and no reference in any conclusion of law in the 44 page Final Decision which refers, or in any way emphasizes these "asterisks," having been placed beside the names of African Americans. The Appellees have carelessly reached into the record in an

attempt to make something out of nothing. These documents were copied and converted into hearing exhibits offered and worked on by lawyers and company employees for presentation at the hearing. The asterisks are there for ease in locating the names of minority applicants in what was a proceeding ostensibly being driven by statistics, *i.e.* the claim of disparate treatment or disparate impact of African Americans in view of the number of applicants, the number of job openings, and statistical information about the population make-up of Logan County, West Virginia.

Conclusion

For the foregoing reasons as well as those set forth in the Appellant's Brief the judgment below should be reversed and judgment awarded to this Appellant.

Respectfully submitted,



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NO. 32512

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HEETER CONSTRUCTION, INC.

Appellant,

v.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

and

PETER KELLY, OCTAVIA E. BINDER,
KERRY L. WALKER, TIMOTHY E. BOYKINS,
SHERRI THOMAS and ANDREA THOMAS-PAULEY,

Appellees.

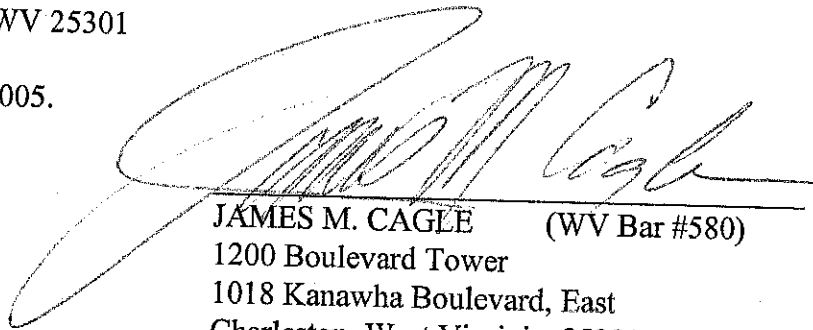
CERTIFICATE OF SERVICE

I, James M. Cagle, hereby certify that I have served a true and exact copy of the foregoing
REPLY BRIEF OF APPELLANT via first-class mail, postage prepaid to the following:

Paul R. Sheridan, Esquire
Deputy Attorney General
Civil Rights Division
P. O. Box 1789
Charleston, West Virginia 25326

Harry Henshaw, III
Suite 1204
707 Virginia St., East
Charleston, WV 25301

on this the 5th day of May, 2005.



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