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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MICHELLE ISAACS,

Petitioner,

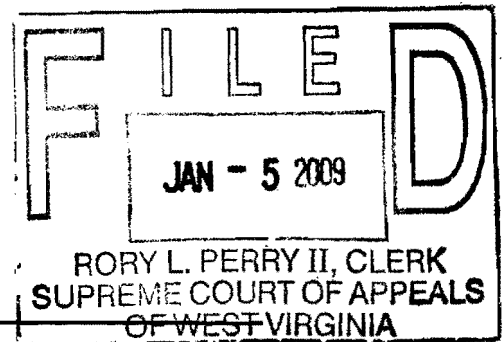
vs.

**Circuit Court of Berkeley County
Civil Action No. 05-C-817**

Docket No. _____

DANIEL P. BONNER,

Respondent.



**RESPONSE TO PETITION FOR APPEAL
OF RESPONDENT DANIEL P. BONNER**

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**RESPONSE TO PETITION FOR APPEAL
OF RESPONDENT DANIEL P. BONNER**

I. Kind of Proceeding and Nature of Ruling Below¹

This is a Petition for Appeal of the final orders of the Circuit Court of Berkeley County, Judge Silver presiding. The Petitioner herein (Plaintiff below) brought an action in Magistrate Court for statutory liquidated damages after securing a determination from the Wage and Hour Section of the West Virginia Division of Labor (hereinafter "Wage and Hour") that the Respondent (Defendant below) owed the Petitioner for accrued, unused paid leave at the time of her departure from the Respondent's employ. The Respondent filed his Affirmative Defenses, Answer and Counterclaim, and then removed the action to the Circuit Court. In his Counterclaim, the Respondent asserted a claim for damages arising for the Petitioner's assertion

¹ The Respondent notes that the first section in the Petition is a two and one-half page segment titled "Summary of Argument." The Respondent objects. Rule 3(c) of the Rules of Appellate Procedure clearly and unambiguously provides for the form and content of a Petition:

A petition for appeal shall state the following *in the order indicated*:

- (1) the kind of proceeding and nature of the ruling in the lower tribunal;
- (2) a statement of the facts of the case;
- (3) the assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal; and
- (4) points and authorities relied upon, a discussion of law, and the relief prayed for.

Emphasis added. There seems to be a growing trend among lawyers, at least in the Eastern Panhandle, to front-load appeal petitions with an argument section such as that appearing in the instant Petition. This works an unfair disadvantage to responding parties who must either likewise ignore the Rules established by this Court, or comply with those Rules and take the risk of missing the opportunity to fully respond to the arguments of the petitioner.

All of the foregoing notwithstanding, the Respondent disputes and denies the factual averments set forth in said Summary of Argument. The statements omit so many facts necessary to provide a complete and accurate picture that the end result is an inaccurate impression that is unsupported by the record evidence. For example, while stating to this Court that Wage and Hour agreed with the Petitioner's claim that she had not been compensated for earned paid leave, the Petition wholly fails to inform the Court that the investigating Wage and Hour officer admitted on the witness stand at trial that her determination would have been different had the Petitioner provided her with all of her pay stubs, instead of just those containing the error on which the Petitioner knowingly relied to advance her false claim, Tr., October 23, 2007, 83:21 through 84:8, and further admitted that her initial reading of the paid leave policy was clearly in error. Tr., Oct. 23, 2007, at 76:24 through 77:18; Tr. Oct. 23, 2007, at 84:14 through 90:7.

of false and fraudulent claims against him, including a prayer for the attorney fees and costs incurred by him in defense thereof, insofar as those expenditures are the true damage sustained when one is forced to appear and defend a fraudulent claim.

Given the relatively small amount originally in controversy, the parties had initially agreed to engage in early mediation before either party incurred significant fees and costs. The Respondent twice secured early mediation dates from the named mediator, but the Respondent needed to cancel both dates. Ultimately, mediation did not occur approximately two weeks before trial, as a result of which the attorney fees then claimed by the Petitioner effectively prevented the settlement of the case. The case proceeded to a trial on the merits.

The matter was tried to the Court in proceedings spanning four separate days of testimony and evidence at which many witnesses were heard and numerous documents were submitted to provide a comprehensive record of the Petitioner's employment with the Respondent. Following the trial and the furthersubsequent submission of proposed orders by each of the parties, the Circuit Court, by Order entered March 21, 2008, found in favor of the Respondent on the Petitioner's Complaint, and found in favor of the Respondent on his Counterclaim. Because the Respondent prevailed on his Counterclaim, the Circuit Court ordered the Petitioner to reimburse the Respondent the sum wrongly extracted from him through the false claim to Wage and Hour, plus punitive damages, and further ruled that the Respondent was entitled to reasonable attorney fees and costs incurred by him in defense of the Petitioner's claims.

By subsequent Order, entered July 31, 2008, the Circuit Court awarded to the Respondent his attorney fees and costs. Over the objections of the Respondent, the Circuit Court awarded attorney fees and costs as a measure of punitive damages attendant to the finding of fraud by the

Petitioner, rather than as an appropriate award of special damages upon any one of the legal theories proven by the Respondent's evidence of the Petitioner's knowing and intentional assertion of fraudulent claims against the Respondent (including the common law tort of injurious falsehood, abuse of process, or malicious prosecution). The Petitioner argued, however, that because the Circuit Court had found that the Petitioner had acted fraudulently, the attorney fees and costs had to be awarded as a measure of punitive damages upon the finding of fraud. It is from these Orders that the Petitioner now seeks review by this Court.

II. Statement of Facts

1. The Respondent, Dr. Daniel P. Bonner, is a dentist who has operated a practice in Inwood, West Virginia since 1979. Tr., Oct. 30, 2007, at 6:6-16; Tr., Nov. 16, 2007, at 24:4-9.

2. In late 1979 or early 1980, the Defendant established, in writing, a paid leave policy for the employees of his dental practice, Tr., Oct. 30, 2007, at 9:24 through 10:11; Tr., Nov. 16, 2007, at 24:25 through 25:17, which policy remained unchanged in its material terms until the late Summer of 2004, when the number of hours paid for a day of paid leave was increased from 8 to 9 hours.² Tr., Oct. 23, 2007, at 207:12 through 208:5; Tr., Oct. 23, 2007, at 208:17-22; Tr., Oct. 30, 2007, at 34:18 through 35:1; Tr., Oct. 30, 2007, at 35:21-25; Tr., Oct. 30, 2007, at 37:6-38:25; Tr., Oct. 30, 2007, at 169:15 through 171:11; Tr., Nov. 16, 2007, at 18:22-25; Tr., Nov. 16, 2007 at 26:8-9; Tr., Nov. 16, 2007, at 30:4-7; Tr., Nov. 16, 2007 at 33:19 through 15.

² Between 1979/1980 and May of 2004, the policy was re-copied onto a new piece of paper on one occasion, at which time a list of paid holidays was added to the page without change to the preexisting paid leave policy. Tr., Oct. 30, 2007, at 36:21 through 37:10; Tr., Nov. 16, 2007, at 27:4 through 28:4.

3. The Respondent does not deny that, upon reproducing the written leave policy onto a new piece of paper, and upon changing the written policy in the late Summer of 2004 to provide 9 hours of pay for a paid leave day, his office staff would dispose of the previous copy of the written policy as a matter of course and without any intent to conceal anything, despite the Petitioner's unrelenting attempts to create the inference that something sneaky must have been going on because the Respondent could not produce prior copies of the policy.

4. The terms of the paid leave policy, first established in 1979/1980, are: (1) For the first year of full-time employment, measured from the date of hire, employees earn no paid leave, for their second and third years of full-time employment, employees earn one week of paid leave, and for their fourth and subsequent years of full-time employment, employees earn two weeks of paid leave. Tr., Oct. 30, 2007, at 74:13 through 75:5; Tr., Oct. 24, 2007, at 95:4-15; Tr., Oct. 30, 2007, at 156:5-18; Tr., Oct. 30, 2007, at 157:10 through 158:21; Tr., Nov. 16, 2007, at 26:8-15; Tr., Nov. 16, 2007, at 180:14-15; (2) The number of days in a week of paid leave is equal to the number of days that the employee is required to work each week.³ Tr., Oct. 23, 2007, at 141:2-9; (3) For each day of paid leave, employees receive eight (now nine) hours of pay at their regular rate of pay. Tr., Nov. 16, 2007, at 29:12 through 30:7; (4). Employees are required to take paid leave in full-day increments.⁴ Tr., Oct. 30, 2007, at 189:19-22; Tr., Nov. 16, 2007, at 52:18 through 53:22; Tr., Nov. 16, 2007, at 111:25 through 112:10; and, (5)

³ The dental office operates on a four-day week, so that for the average employee, four days of paid leave would constitute a week. For an employee working only three days per week, three days of paid leave would constitute a week, and so on.

⁴ The Petitioner revealed her awareness of this requirement at trial. When asked if she could take paid leave in a less than full-day increment, she responded that she could ask the Respondent to do that, Tr., Oct. 23, 2007, at 192:8 through 193:7, demonstrating that she understood that the general rule did not permit her to do so and that she would need to seek permission from her employer to deviate from the rule.

Paid leave days had to be used in the year in which they were earned and could not be carried over into subsequent years. Tr., Oct. 30, 2007, at 189:23 through 190:2; Tr., Oct. 23, 2007, at 233:20-24; Tr., Nov. 16, 2007, at 12:16 through 13:2; Tr., Nov. 16, 2007, at 51:12 through 52:6. *See*, Policy, attached hereto as Exhibit A (reflecting the change to 9 hours pay per leave day).

5. Because the leave policy requires a year of *full-time employment* to earn the full measure of potential paid leave, the leave is calculated on a pro-rata basis for employees who do not work the entire year, due to separation from employment or otherwise. Tr., Oct. 30, 2007, at 122:6-16; Tr., Oct. 30, 2007, at 190:3-11.

6. Although the Respondent has never, at any time, contended that he is entitled to award to any employee less paid leave than was earned in the time actually worked, the Respondent has the discretion to award to an employee additional paid leave – in the same way as any monetary or other consideration – as a performance or incentive bonus, or in the case of special circumstances that might arise for an employee. Tr., Oct. 30, 2007, at 21:1-14; Tr., Oct. 30, 2007, at 69:20 through 70:3; Tr., Oct. 30, 2007, at 100:21 through 101:11.

7. The Petitioner is a Registered Dental Hygienist, Tr., Oct. 23, 2007, at 128:4, who became employed as a dental hygienist in the Respondent's dental practice on November 1, 2000, Stipulations of the Parties,⁵ No. 1, and resigned from the Respondent's employ effective July 14, 2004. Stipulations, No. 4.

8. The Petitioner took an unpaid leave of absence for maternity from September 1, 2001, through January 31, 2002, and took another unpaid leave of absence for maternity from November 1, 2003 through January 31, 2004, from which she returned to full-time employment with the Respondent on February 1, 2004. Stipulations, No. 2 and 3.

⁵ Hereinafter cited as "Stipulations."

9. Although the Petitioner did not work the entirety of her second year of employment, having been on the unpaid leave of absence for the first three (3) months of that year,⁶ the Respondent allowed her to take a full week of paid leave, Defendant's Trial Ex. 12; Tr., Nov. 16, 2007, at 47:17-18, and in fact, paid her for more than the 32 hours pay that she would have earned for four days of paid leave, Defendant's Trial Ex. 12; Tr., Nov. 16, 2007, at 47:19 through 48:6; Tr., Nov. 16, 2007, at 112:11 through 115:4; Tr., Nov. 16, 2007, at 140:19 through 141:20, which benefit the Respondent extended to the Petitioner because, *inter alia*, he believed that she was experiencing financial difficulties and could not afford to be off without pay while having a new baby that required her to take unexpected days off. Tr., Nov. 16, 2007, at 48:7 through 50:22.

10. Up to and including the date of the Petitioner's departure from the Respondent's employ, no other employee except the Petitioner had ever been awarded paid leave for time during which the employee was on an unpaid leave of absence and, therefore, did not render a year of full employment, Tr., Oct. 30, 2007, at 114:6-7; Tr. Nov. 16, 2007, at 152:18 through 153:11, although there was at least one other employee whose situation had been similar to that of the Petitioner.⁷

⁶ Under the pro rata policy, the Petitioner earned only three days of paid leave in her second year of employment, not the full four days, because she worked only $\frac{3}{4}$ of the year. The Petitioner lost no paid leave days for the two months of unpaid absence in the final months of her first year of employment, because she earned no paid leave days during the first year, and there were, therefore, none to lose.

⁷ Rebecca Dunn's situation was like that of the Petitioner, but there is no evidence that Ms. Dunn received a full measure of unpaid leave when she returned to full-time work. Like the Petitioner, Ms. Dunn was on maternity leave when the anniversary of her hire date occurred. Tr., Oct. 23, 2007, at 122:12-15; Tr. Oct. 23, 2007, at 124:8 through 125:10. Ms. Dunn testified that she used the leave time that she had already accrued at the beginning of her maternity leave. Tr., Oct. 23, 2007, at 124:14-17. Ms. Dunn returned from her maternity leave and announced that she would resign in one month, which she did. Tr., Oct. 23, 2007, at 13-18. Ms. Dunn did not earn paid leave while she was on the unpaid leave of absence and was not compensated for paid leave upon her return.

11. The Petitioner worked the entirety of her third year of employment, and received one week of paid leave for that year. Tr., Oct. 23, 2007, at 149:6-8; Tr., Oct. 23, 2007, at 173:11-14; Tr., Nov. 16, 2007, at 220:11-17.

12. Between the Petitioner's return from her second unpaid leave of absence on February 1, 2004, and her resignation on July 14, 2004, the Petitioner took, and was paid for, three (3) days of paid leave. Stipulations, No. 5.

13. It is of relevance to issues that arose in this civil action that during the tenure of the Petitioner's employment with the Respondent a number of changes were implemented in the administrative practices related to employees time tracking and payroll:

a. In late 2002, the Respondent began using QuickBooks for payroll data, which program produced an itemized pay stub for each employee, Joint Trial Ex. 5 and 6; Defendant's Trial Ex. 2 through 8; Tr., Nov. 16, 2007, at 66:1-8, although the Respondent continued to prepare the actual paychecks by hand. Joint Trial Ex. 1-B. Although QuickBooks enables the user to include used and available leave data on the pay stub, the Respondent never used this feature, but continue to track paid leave by other means. Tr., Oct. 23, 2007, at 211:8-12; Tr., Oct. 30, 2007, at 72:13 through 73:22; Tr., Oct. 30, 2007, at 173:8 through 174:3; Tr., Nov. 16, 2007, at 66:9-25.

b. In April of 2004, the Respondent put into use a time-tracking program and required each employee to clock in and clock out on an office computer each day, or for periods of absence during a day, and from which a time report for each employee was generated at the end of each pay period. Defendant's Trial Ex. 1; Joint Trial Ex. 4; Tr., Oct. 23, 2007, at 214:16 through 216:9; Tr., Oct. 24, 2007, at 77:2-9; Tr., Oct. 30, 2007, at 172:3-15; Tr., Oct. 30, 2007, at 175:15 through 177:9; Tr., Nov. 16, 2007, at

54:3 through 55:24; Tr., Nov. 16, 2007, at 62:5-12. The Respondent put the clock-in program into use in large part due to his suspicions that the Petitioner was over-reporting her hours worked under the employee "honor system," self-report practice previously used by the Respondent to determine the number of hours worked each payroll period by each employee. Tr., Oct. 23, 2007, at 167:15-24; Tr., Oct. 23, 2007, at 209:14-19; Tr., Oct. 30, 2007, at 171:14 through 172:4; Tr., Nov. 16, 2007, at 58:17 through 59:12; Tr., Nov. 16, 2007, at 154:7 through 155:7. The clock-in program also provided a record of days taken off by an employee, and allowed those days to be recorded as paid or unpaid leave. Defendant's Trial Ex. 1; Joint Ex. 4; Tr., Oct. 23, 2007, at 210:24 through 211:3; Tr., Oct. 30, 2007, at 78:10 through 79:14; Tr., Nov. 16, 2007, at 56:2-21; Tr., Nov. 16, 2007, at 62:13-17.

c. In July of 2003, the Respondent began using a computer calendar program for office scheduling which program, while not providing an exact record of hours worked by any employee, did provide a back-up record of the days on which employees were scheduled to work or had scheduled time off. Joint Ex. 3; Tr., Nov. 16, 2007, at 57:1 through 58:16.

14. Because the pay stubs produced by the QuickBooks program were not used to track used and available paid leave, those areas of the pay stubs showed as zeroes on the pay stubs of all employees, until the April 23, 2004, payday, at which time all employee pay stubs, including the Plaintiffs, inexplicably showed available leave time expressed in hours which, in some instances bore no relationship to the paid leave time that the employee would actually have earned or used during the employment year.⁸ Joint Trial Ex. 5 and 6; Defendant's Trial Ex. 2

⁸ To this day, the Respondent has no explanation for the sudden appearance of leave data on the pay stubs, but only knows that he did not enter it into the program, because he had never figured out how to

through 8; Tr., Oct. 23, 2007, at 175:2 through 16:1; Tr., Oct. 23, 2007, at 214:3-15; Tr., Nov. 16, 2007, at 68:13 through 70:15; Tr., Nov. 16, 2007, at 70:15-25.

15. The Respondent's employees knew that their pay stubs did not provide the record of their paid leave usage and availability, and that the sudden appearance of hours showing on the stubs was not accurate, because the issue was discussed at morning staff meetings, and also was a source of humor among employees, who teased the Defendant about his lack of computer skills. Tr., Oct. 23, 2007, at 211:13 through 212:21; Tr., Oct. 30, 2007, at 174:7 through 175:14; Tr., Nov. 16, 2007, at 67:1 through 68; Tr., Nov. 16, 2007, at 71:1-20. Moreover, the time showing on the pay stubs never changed, even when employees, including the Petitioner,⁹ used paid leave days after the sudden appearance of the entry on the pay stubs. Joint Trial Ex. 6; Defendant's Trial Ex. 2 through 8.

16. That the Petitioner was aware that the pay stubs were not used to report used and available paid leave is shown by the fact that even though the Petitioner's pay stubs throughout 2003 all showed no time available for paid leave, but the Petitioner took and was paid for the one week of paid leave to which she was entitled during that period of time. Tr., Oct. 23, 2007, at 149:6-8; Tr., Oct. 23, 2007, at 173:11-14; Tr., Nov. 16, 2007, at 220:11-17.

17. At all times relevant to the Petitioner's claim for unpaid wages (i.e., paid leave wages), the Petitioner was aware of and had access to the Respondent's written paid leave policy evidenced by her participation in and notification of the 2004 office policies manual in which is

use this feature of the program. His only theory is that perhaps the computer technician contracted by him for occasional servicing may have entered data as a starting point, so that the Respondent could begin using the feature.

⁹ The Petitioner's pay stubs from April 23, 2004, through her last pay check showed 64 hours as her available leave time even though she used and was paid for three days of leave during that time. Joint Trial Ex. 6.

last appeared during her tenure of employment, as is shown by the events described immediately below.

18. In the months immediately after the Petitioner's February 1, 2004, return from her second unpaid leave of absence, several employees had complained to the Respondent of problems in the office originating with the office manager, in response to which the Respondent scheduled a staff meeting for April 13, 2004, to enable employees to address their concerns and to make suggestions for the resolution of the problems. Defendant's Trial Ex. 10; Tr., Oct. 23, 2007, at 160:15-19; Tr., Oct. 23, 2007, at 199:10 through 200:23; Oct. 30, 2007, at 160:1-12; Tr., Oct. 30, 2007, at 251:4 through 252:21; Tr., Nov. 16, 2007, at 36:5-15.

19. The Petitioner attended the April 13, 2004, staff meeting, Defendant's Trial Ex. 10; Tr., Oct. 23, 2007, at 142:17 through 143:6; Tr., Oct. 23, 2007, at 157:15 through 162:15, from which a primary suggestion from the employees was the development of an office policies manual. Defendant's Trial Ex. 10; Tr., Oct. 23, 2007, at 143:15-144:22; Tr., Oct. 23, 2007, at 162:13-15; Tr., Oct. 23, 2007, at 165:1-23; Tr., Oct. 23, 2007, at 203:18-20; Tr., Oct. 30, 2007, at 159:17 through 160:7; Tr., Nov. 16, 2007, at 36:16-20; Tr., Nov. 16, 2007, at 217:8-19.

20. Work on the office policies manual commenced the very next day,¹⁰ and was completed by the middle of May, 2004. Tr., Oct. 23, 2007, at 205:18 through 206:1; Tr., Oct. 23, 2007, at 232:2-5; Tr., Oct. 30, 2007, at 34:8-11; Tr., Oct. 30, 2007, at 43:1 through 45:1; Oct. 30, 2007, at 167:5 through 168:1; Tr., Oct. 30, 2007, at 221:22 through 224:3; Tr., Oct. 30, 2007, at 254:18-25; Tr., Nov. 16, 2007, at 29:2-11; Tr., Nov. 16, 2007, at 40:8-18.

¹⁰ Each employee was asked to submit descriptions of the standard activities necessary to her particular area of responsibility in the practice, and the Respondent also incorporated text from the model office manual developed by the American Dental Association ("ADA") for provisions relating to regulatory requirements and general office practices. Front desk staff worked on the data input as the materials were submitted from employees, and the ADA text was available to copy and paste from a CD, such that progress on the office policies manual advanced very quickly.

21. The single page notice of the paid leave policy was included in the office policies manual, which leave policy did not change in its terms, but had been rewritten to include introductory and explanatory language and examples taken from the ADA model manual. Tr., Oct. 23, 2007, at 207:2 through 208:11; Tr., Oct. 30, 2007, at 169:1 through 170:4; Tr., Oct. 20, 2007, at 258:6 through 259:17; Tr., Nov. 16, 2007, at 29:12 through 30:7; Tr., Nov. 16, 2007, at 31:5-13; Tr., Nov. 16, 2007, at 37:1-3.

22. Upon completion of the office policies manual, the Respondent announced at a staff meeting that all employees should review and sign it. Tr., Oct. 23, 2007, at 206:7-9; Tr., Oct. 23, 2007, at 226:3-13; Tr., Oct. 23, 2007, at 234:10-12; Tr., Oct. 30, 2007, at 45:18-25; Tr., Oct. 30, 2007, at 168:2-8; Tr., Oct. 30, 2007, at 254:4-11; Tr., Nov. 16, 2007, at 40:19 through 41:7.

23. Employee Karen Smith testified that the Petitioner asked to have the manual for review next (i.e., after Ms. Smith had completed reviewing it), Tr., Oct. 30, 2007, at 253:21 through 256:2, and Ms. Smith recalled seeing the Petitioner's signature on the signature page of the manual, although she did not witness the Petitioner signing it. Tr., Oct. 30, 2007, at 255:14-20; Tr. Oct. 23, 2007, at 265:2 through 268:3.

20. The office policies manual was placed on the table in the staff break room where it was accessible to all employees, including the Petitioner, Tr., Oct. 23, 2007, at 206:4-11; Tr., Oct. 30, 2007, at 45:4-14; Tr., Oct. 30, 2007, at 168:13-21; Tr., Oct. 30, 2007, at 256:14-23; Tr., Nov. 16, 2007, at 31:17 through 33:7, and remained in the break room until February of 2005, when the dental practice moved into a new building, after which, it could not be found despite repeated searches. Tr., Oct. 30, 2007, at 41:11 through 42:18; Tr., Oct. 30, 2007, at 202:4-24; Tr., Oct. 30, 2007, at 241:18 through 243:12; Tr., Oct. 30, 2007, at 258:6 through 259:17.

21. The Petitioner was aware of the adoption of the new office policies manual in May of 2004, and had access to it for review at her convenience from its adoption until her departure from her employment on July 14, 2004.

22. No compensation for unused, accrued paid leave was included in the Petitioner's last paycheck because, under the terms of the leave policy which had been in place for the Respondent's practice since 1979/1980, the Petitioner had used all of the paid leave days that she had earned as of her last day of employment. Tr., Oct. 23, 2007 133:18-23.

23. On or about July 26, 2004, the Petitioner filed a "Request for Assistance," that is, a complaint, with Wage & Hour, asserting that at the time of her resignation from the Respondent's employ, she was not paid for all of her accrued paid leave in her final paycheck. Stipulations No. 6; Joint Trial Ex. 1-B.

24. On her verified Request for Assistance (hereinafter, "RFA") form, the Petitioner claimed that she was owed for 64 hours of accrued paid leave, as shown on her last pay stub, and checked the box indicating that no written leave policy existed while she was employed, Joint Ex. 1-B, both of which assertions the Petitioner consciously and actually knew to be false.

25. In further support of her claim for unpaid vacation-pay wages, the Petitioner attached to her RFA a handwritten statement in which she asserted, *inter alia*, that in her last paycheck, she "had been shorted [her] vacation pay for the previous week," that in the previous years that she worked for the Respondent, the "hours available according to you pay stub are available at anytime," and that she was informed by other employees that the day after her resignation, an employee handbook had been started in order for the Respondent not to have to pay her, Joint Ex. 1-B, all of which the Petitioner consciously and actually knew to be false.

26. The Petitioner's RFA was assigned to Mary Beth McGowan, a field officer for Wage & Hour, who works from her home in Martinsburg, West Virginia. Tr., Oct. 23, 2007, at 13:21-23.¹¹

27. After reviewing the RFA, McGowan contacted the Respondent by telephone to advise him of the Petitioner's claim, at which time McGowan asked him to send the "company policy on vacation and payroll records showing vacation pay received by complainant." Joint Trial Ex. 1-I, at 09/13/04; Tr., Oct. 23, 2007, at 48:17-22..

28. Under facsimile cover page dated October 5, 2004, the Respondent forwarded to McGowan the information requested by her, although by that time the paid leave policy had already been changed to 9 hours of pay per paid leave day. Joint Trial Ex. 1-D.

29. McGowan claimed to have been unable to understand the paid leave policy when she first reviewed it "because it wasn't dated," Joint Ex. 1-I at entry of 10/25/04; Tr., Oct. 23, 2007, at 54:24 through 59:7; Tr. Oct. 23, 2007, at 68:22 through 71:14; Tr., Oct. 23, 2007, at 74:4-12, but, when asked to review the policy on the witness stand, McGowan admitted that some of her prior conclusions about the policy were in error, in part because she had overlooked some complete sentences.¹² Tr., Oct. 23, 2007, at 76:24 through 77:18; Tr. Oct. 23, 2007, at 84:14 through 90:7.

¹¹ Because the conduct of Wage and Hour significantly violated the Respondent's right to the process established in the applicable statutes and administrative regulations, and because the investigation calls into serious question the degree of credibility that should be afforded Wage and Hour's determination that the Respondent did owe the Petitioner wages for unused paid leave time, it is set forth in some detail herein. That account notwithstanding, many details are not included for the sake of page limitations.

¹² It is unclear how the absence of a date printed on the written paid leave policy could have impeded the investigator's ability to understand the terms themselves. Moreover, despite the fact that McGowan claimed that this was the prime obstacle to her understanding, she at no time requested that the Respondent provide her with that particular piece of information – even though, at that time, the Respondent could have forwarded a copy of the entire 2004 office policies manual, which the Petitioner had signed, and which would have resolved any question as to whether or not it was in place prior to the Petitioner's departure from her employment.

30. After reviewing the matter with her, McGowan's supervisor instructed her to obtain "proof of vacation wages paid for 2001 and 2002 and why company paid complainant 3 days vacation in 2004" from the Respondent.¹³ Joint Ex. 1-I at entry of 11/04/04.

31. Subsequently, McGowan requested additional pay stubs from the Petitioner, who sent only those pay stubs from May and June, 2004, Joint Ex. 1-I at 11/17/04 and 12/21/04, even though Petitioner stated at trial that she had all of her previous pay stubs, which would have included those showing zeroes for leave used and available.

32. McGowan believed the additional pay stubs to be all of the pay stubs that the Petitioner had, and admitted at trial that if she had seen the earlier pay stubs (i.e., those showing the zeroes for leave available), her conclusions about the leave time showing on the pay stubs likely would have been different. Tr. October 23, 2007 83:21 through 84:8.

34. After receiving the additional pay stubs from the Petitioner, McGowan determined that the Respondent owed the Petitioner for 40 hours of vacation pay, totaling \$920.00, and liquidated damages in the amount of \$5,520.00, Joint Ex. 1-I at 12/21/04, which conclusion McGowan reached even though she had not yet requested from the Respondent the additional information that she was directed by her supervisor to obtain and had not requested the date of the adoption of the leave policy which she claimed was so indispensable to her understanding of the policy.¹⁴

35. On the basis of McGowan's determination, the Director of Wage and Hour, on January 12, 2005, sent to the Respondent a "demand for wages," Joint Trial Ex. 1-E; Joint Trial

¹³ Even McGowan testified that she did not know why such information was needed. Tr., Oct. 23, 2007, at 65:22 through 67:18. After all, the Petitioner's claim was limited to her last year of employment.

¹⁴ All of which shows that McGowan relied solely on the pay stubs provided by the Petitioner, from which she took the 64 hours and subtracted 24 hours for the 3 paid leave days taken by the Petitioner during her last months of employment.

Ex. 1-I at 01/19/05, which advised the Respondent that “Failure to respond may result in the addition of liquidated damages as required in § 21-5-4(e) ... [of \$5,520.00],”¹⁵ and that if the Respondent disagreed with the determination, he could request a meeting within five days of receipt of the demand. Joint Trial Ex. 1-E.

36. Within the permitted five days’ response time, the Respondent responded, disputing the demand for wages, explaining the basis of his dispute, and stating that, at the very most, the Petitioner was entitled to 4.20 hours,¹⁶ for which he enclosed a check, adding that, “If check does not close this case, then I request a hearing.” Joint Ex. 1-F.

37. The Respondent’s consistent and un rebutted testimony was that, although paid leave did not accrue in partial-days under the paid leave policy, he had converted days into hours, calculated the number of hours that the Petitioner had earned toward the next full day of leave, and sent payment in that amount in an attempt to settle the claim. Tr., Oct. 30, 2007, at 12:23 through 13:14; Tr., Oct. 30, 2007, at 17:10 through 18:1.

38. Although the administrative regulations establish the procedures that must be followed, Wage and Hour violated those procedures, neither accepting the payment in settlement of the claim nor giving the Respondent the requested meeting – instead, Wage and Hour’s response was to serve the Respondent with a subpoena *duces tecum* dated February 10, 2005, demanding that all pay records for the Plaintiff’s entire period of employment be produced at the

¹⁵ Nowhere does the demand advise the Respondent that even if he pays the sum demanded he will remain subject to a claim for the liquidated damages, and that such claim could be asserted in a civil action after the Wage and Hour is closed as resolved – which is exactly what happened in this case.

¹⁶ Because the leave policy required paid leave to be taken in a minimum of full-day increments, the Petitioner had no legitimate demand for compensation for part of a day not yet fully earned at the time of her departure. Nonetheless, the Petitioner in this appeal to assert that this offer to settle the claim is an admission on the part of the Respondent that the Petitioner had 4.2 vested hours of paid leave. This violates the rule that offers in pursuit of settlement is not admissible as evidence of liability or admissions of fault, W.V.R.E. 408, and yet the Petitioner continues to use it for just that purpose.

Division's Charleston, West Virginia offices within 72 hours, pursuant to W. Va. Code § 21-5-11(a) and (b).¹⁷ Joint Trial Ex. 1-G.

39. Upon receiving the subpoena as aforesaid, the Respondent concluded that he was not going to receive the hearing that he had requested in his response letter of January 21, 2005, Tr., Nov. 16, 2007, at 94:20 through 95:1, and, in the meantime, McGowan had assured both the Respondent and his administrative staffer, Barb Campbell, that if the Respondent paid the demanded sum of \$920.00 demanded, that the claim would be fully and finally resolved.¹⁸ Tr., Oct. 30, 2007, at 186:7 through 187:23; Tr., Nov. 16, 2007, at 99:4-9.

40. On the basis of McGowan's assurance of finality, and without ever admitting that he owed the Petitioner any sum, the Respondent paid the \$920.00 in order to buy his peace and bring the matter to a close. Tr., Nov. 16, 2007, at 104:2 through 105:6.

41. Subsequently, the Plaintiff initiated the action for statutory liquidated damages, having been advised to do so by McGowan. Tr., Oct. 23, 2007, at 101:4-8.

III. Assignments of Error

The Petitioner asserts five assignments of error, all of which are disputed by the Respondent as misstatements of the law, misstatements of the relevant underlying facts, or both.

¹⁷ Which do not apply once the demand has been disputed and a hearing requested.

¹⁸ Additionally, the Respondent consulted his accountant who, after considering the man hours that would be lost to comply with the new subpoena and other factors, advised the Respondent that if, but only if, payment of the \$920.00 would fully resolve the Petitioner's claim, it was economically better for the Respondent to pay the demand. The gross inconvenience to the Respondent's office that would have attended the response to the subpoena would not have been a concern had it not been for the fact that the office was in the process of moving to the new building at the time the subpoena was served, making it nearly impossible to respond within the scant 72 hours provided.

IV. Points and Authorities (i.e., Discussion of the Law)

A. Standard of Review

The Respondent generally agrees that the standard(s) of review described in the Petition are the correct standards that are applicable to the instant appeal, and to which the Respondent adds only minor additional considerations.

The clearly erroneous standard under which the Circuit Court's findings of fact will be examined on review is particularly important where, as here, many findings of fact may have been the product of weight of the evidence and credibility of witness determinations by the trial court. "The trial court heard the witnesses, observed their demeanor and is in a far better position to pass upon the weight and credibility of their testimony than this Court." *Petition of Wood*, 123 W.Va. 421, 427, 15 S.E.2d 393, 396 (1941). "A reviewing court cannot assess witness credibility through a record." *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997).

Additionally, while it is true that if the factual findings are free from plain error and the trial court has applied the correct legal standard, its ultimate decision will be upheld as a matter of law, it is not conversely also true that the trial court's ultimate ruling will be upheld only if the court has applied the correct legal standard. "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syllabus, *Sherwood Land Co. v. Municipal Planning Comm'n of the City of Charleston*, 186 W. Va. 590, 413 S.E.2d 411 (1991), quoting, Syll. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

Application of the above-quoted rule is particularly important to the instant appeal, where, as noted previously, the Respondent sought the attorney fees and costs ultimately awarded to him, but objected to the Circuit Court's legal basis for the award.

B. Discussion

1. The Circuit Court correctly applied the plain language of the paid leave policy.

The Circuit Court did not ignore the plain language of the paid leave policy, but the Petitioner's argument would have it do so.¹⁹

The Petitioner's argument is premised upon the Petitioner's having plucked a single word – “time” – out of the context in which it appears, and then assigning to that word a meaning that renders it inconsistent with the whole of the policy. Taking a single word out of context to defeat the clear intent of the document as a whole does not comply with, but violates, the rule requiring that an instrument that expresses its intent clearly will simply be applied in accordance with that plain intent. But, that is what the Petitioner asks this Court to do.

The Petitioner then tries to assert that “everyone” agrees with her singular interpretation of the policy that would result in the Petitioner being compensated at her departure for less than a full day of paid leave. To this end, the Petitioner lifts a single testimonial exchange of the

¹⁹ The Petitioner persists in denying that there was a written policy in force during the course of her employment despite the overwhelming weight of evidence to the contrary. Pet. at p. 15, n. 2. In support of her denial, she cites the recollection of “an employee who left during that two month period” prior to the Petitioner's last day. This employee was not called as a witness at trial and therefore the record is devoid of any hint of her recollection. However, the Respondent notes that this non-witness employee left his employ on April 22, 2004, and was the office manager who actually prepared the first reproduction of the 1979/1980 written leave policy that was in existence until the adoption of the May, 2004, office policy manual. The Petitioner then relies on another nameless employee who was hired just after the Petitioner left. This witness, Bridget Green, testified that she didn't think the policy manual was in effect because she was never given her own personal copy of the manual. Tr., Nov. 16, 2008, at 212:23. Just because Ms. Green has some notion that she must get her own personal copy of an office manual in order for it to be in effect does not make it so.

Respondent and tries to use it to negate the whole of the Respondent's testimony, in which he repeatedly stated that the Petitioner (and other employees) did not earn exercisable and compensable paid leave in anything other than full day increments. Even in the very exchange quoted by the Petitioner, the Respondent repeats his consistent assertion that because leave was paid in full-day increments only, the Petitioner was not owed for any hours accumulated toward the next full day of paid leave at the time of her departure from the Respondent's employ.

The Petitioner's attempt to advance her argument is not only contrary to the evidence in the case, it is contrary to the law of this State.

The Wage Payment and Collection Act, W. Va. Code § 21-5-1, *et seq.*, (hereinafter, "the Act") and the case law decided thereunder, defeats the Petitioner's argument. Terms of the Act that are essential to this case appear in the definitions:

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, ... and 21-5-12] ..., the term 'wages' shall also include the 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 employees which does not contradict the provisions of this article.*

W. Va. Code § 21-5-1(c), *emphasis added*. Because fringe benefits, which include paid leave, W. Va. Code § 21-5-1(l), are included in wages, fringes benefits that are accrued, capable of calculation and payable to an employee must be paid to an employee who resigns as part of his/her final pay. W. Va. Code § 21-5-4(c). So, the question is whether or not fringe are accrued, calculable *and* payable – the question is one of vesting.

"The Act does not create a right to fringe benefits," *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 216, 530 S.E.2d 676, 689 (1999), and, even if offered, "an employer is free

to set the terms and conditions of employment and compensation, including fringe benefits”

Id. Nor does the Act set forth eligibility or vesting requirements – the payment of fringe benefits also are determined by the terms set by the employer. *Id.* at 215-16, 530 S.E.2d at 688-89.

Accordingly,

... whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term ‘wages’ are determined by the terms of employment and not be the provisions of [the Act]. Further, the terms of employment may condition the vesting of a fringe benefit right on eligibility requirements in addition to the performance of services, and these terms may provide that unused fringe benefits will not be paid to employees upon separation from employment.

Syl. Pt. 5, *Meadows v. Wal-Mart, Id.* In accord, see, Syl. Pt. 2, *Gress v. Petersburg Foods, LLC*, 215 W. Va. 32, 592 S.E.2d 811 (2003). As the Court explains, the concept of “vesting” or “accrual,” requires that the benefit has been earned *and* is capable of being exercised by the employee under the terms of the employer’s policy. The Petitioner asks this Court to apply only one element of the vesting requirement and ignore the other.

In the instant case, the Petitioner’s argument that she was entitled to payment for at least 4.2 hours of accumulated paid leave time must fail, because under the express terms of the written leave policy, the Petitioner had no right to exercise (take) 4.2 hours of paid leave. It was not capable of being exercised. “Vacation time may not be taken in blocks of less than one day.” Policy, at Ex. A hereto. If the time could not be exercised as paid leave, then it is not compensable when the employee leaves. The operation of this rule is clearly illustrated in the explanatory language ending in the last sentence of the policy: “If you haven’t taken them, you will receive payment *for those days* if you leave the practice.”

These vesting terms being clear and unambiguous, and within the power of the employer to establish, the Petitioner’s argument must fail as a matter of law.

2. The Circuit Court correctly applied the express terms of the written policy, and did not interpret it in favor of either party.

In order to accept the Petitioner's second argument, this Court must first accept that the Petitioner was correct in her previous argument – that is, that the Circuit Court erroneously interpreted and construed the clear and unambiguous written policy. As the foregoing discussion shows, it is the Petitioner, not the Circuit Court, that attempts to interpret and construed the clear terms and intent of the written policy, which is why the Circuit Court rejected the Petitioner's argument below and why this Court should reject it now.

A valid written instrument that expresses its intent clearly and unambiguously “is not subject to judicial construction or interpretation but will be applied according to such intent.” Syll. Pt. 3, *Estate of Tawney v. Columbia Natural Resources, LLC*, No. 32966 (W. Va., 2006). The rule requiring employment contracts to be construed in favor of the employee is a rule of construction, and therefore does not apply to an employment contract that expresses its intent clearly and unambiguously. The cases cited by the Petitioner for the proposition that the contract must be construed in favor of the employee clearly state this point of law. *See, e.g.*, Syll. Pt. 6, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 216, 530 S.E.2d 676, 689 (1999).

Because – as the Petitioner repeatedly avers – the Respondent's paid leave policy clearly and unambiguously expresses its intent, it is not subject to interpretation or construction. The fact that the Circuit Court correctly applied the clear intent to the Petitioner's claim to the end that the Petitioner's claim failed does not constitute an erroneous construction in favor of the employer. It is merely the result of the correct application of the clear intent of the policy.

The logical result of the argument urged by the Petitioner is that any time an employee does not receive what she or he wants from the terms of a leave policy, the policy is being wrongly construed in favor of the employer. This is not the law.

3. The Circuit Court correctly did not rewrite the clear policy on the basis of prior practice where no prior practice was established by the evidence.

The evidence in this case clearly established that there had not been a single instance where the Respondent awarded paid leave accrual during a period when the employee was on an unpaid leave of absence, except for the one time in 2002 when the Respondent made an exception for the Petitioner. A single incident of making an exception under what the Respondent believed to be exceptional circumstance does not a standing practice make. Accordingly, the Petitioner cannot rely on those cases in which a standing, unwritten policy, consistently applied over time becomes enforceable policy. *See, e.g., Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000) and *Howell v. City of Princeton*, 210 W.Va. 735, 559 S.E.2d 424 (2001). In each of those cases, the unwritten policy was consistently applied over a long period of time and was known to the employees. Such is not the case here.

The Respondent does not deny that he stated that, at the time of trial, there was another employee who would soon be taking an unpaid leave of absence for maternity, and to whom he would *probably* extend the full measure of paid leave notwithstanding that she would not earn it while she was not working. However, the Respondent was unequivocal that this employee, Gretchen Wolfe, was an exceptional employee whose contribution to the practice made her a valuable asset to the practice. Accordingly, the Respondent particularly wanted to encourage to remain in his employ after the birth of her baby. The Respondent was unequivocal that the granting the additional paid leave would be in the nature of an incentive bonus. Moreover, an intent to “probably” give this bonus to a single employee in the future cannot be relied upon by the Petitioner to claim the existence of a standing practice at the time of her resignation.

The Petitioner’s discussion on this assignment of error reveals that the real crux of her argument is her personal rejection of the notion that an employer has the discretion to award

additional compensation or benefits to reward good performance or to provide an incentive for continued good service to the business. The Petitioner would have this Court outlaw a practice that is a common business practice, is not unlawful, and that, by the bye, benefits those employees who take pride in their work and conscientiously apply themselves in the service of their employers so as to contribute to the success of the business.

Rewards for exceptional service – whether given in the form of raises, cash bonuses, additional days of paid leave, or tickets to a ball game – are not required by the law to be given to all employees if given to one. Obviously, such rewards lose all purpose if they must be awarded to poor performers as well as those whose service exceeds expectations.

Furthermore, there must be room for exceptions, so long as those exceptions do not involve the award of less than is vested and due. All employees would be likely to find great comfort in knowing that if faced with an unexpected situation, such as the impending death of a loved one or a major medical procedure, they can ask for special consideration if needed, such as the ability to carry over leave to the next year. It would be a sad thing if an employer could not offer this flexibility and accommodation for fear of running afoul of the Act. The law is not offended because an employer exercises his judgment to accommodate the special needs of an employee.²⁰ Moreover, while private agreements cannot be used to avoid the requirements of the Act, an employee still enjoys freedom of contract to negotiate for him or herself for a “better deal” than other employees. *See, e.g., Cutright v. Metropolitan Life Ins. Co.*, 201 W.Va. 50, 56, 491 S.E.2d 308 (1997)(employee had no grounds for complaint where his contract contained a lawful non-compete clause not found in the contracts of other employees).

²⁰ In fact, given that the purpose of the Act is to protect employees, it would be ironic if it imposed such unreasonable strictures as to prevent an employer from making exceptions to assist an employee through a time of unforeseen need.

There was no established practice of permitting employees to accumulate vested paid leave days while during periods of extended unpaid leaves of absence. Accordingly, the Petitioner's argument must fail.

4. The Circuit Court correctly found that the Petitioner had acted fraudulently in bringing her claims against the Respondent.

The record in this case is replete with evidence that the Petitioner had actual knowledge that the "available leave" showing on her pay stubs from April 23, 2004 through her last paycheck was incorrect and did not reflect the paid leave time actually available to her.²¹ The evidence is unequivocal that until April 23, 2004, none of the Petitioner's QuickBooks pay stubs had ever shown anything but zeroes for used and available leave, and that this was not the means used by the Respondent to track paid leave. Nonetheless, the Petitioner knowingly and intentionally used to paychecks from May, June and July of 2004, to make a claim to Wage and Hour that, at the time of her departure from employment, she was owed and not paid for 64 hours of paid leave. In that claim she also knowingly, intentionally and falsely stated that, in the past, the amount of leave showing on the pay stub was the amount of leave available.

The Petitioner's clear intent was to exploit the information that she knew to be false so as to obtain from the Respondent, through Wage and Hour, compensation to which she knew she was not entitled. Having successfully deceived Wage and Hour,²² the Petitioner then used her ill-gotten administrative victory to initiate a civil action against the Respondent for statutory

²¹ The Petitioner also perpetrated the false claim that there was not written policy while she was employed, and other miscellaneous false statements in support of her claim. However, for the sake of brevity, only the false pay stub claim is discussed here, and alone constitutes sufficient evidence from which the Circuit Court could have found fraud.

²² There can be no question that the Petitioner might have been unsuccessful had Wage and Hour conducted its investigation with greater competence, or if it had merely followed its own administrative rules.

liquidated damages, again asserting as facts those things known to her to be false. The Petitioner persisted in her fraudulent quest even when confronted during discovery with record evidence that proved that she could not have been unaware that the facts upon which she based her claim were false – records which the Petitioner undoubtedly did not anticipate that the Respondent would be able to produce.

When confronted with the clear falsity of her allegations at trial, the Petitioner try to backtrack and rehabilitate her own testimony, claiming, *inter alia*, that she thought that the 64 hours on the pay stub reflected that she had carried over a week of paid leave from her previous employment year. Of course, these sudden alternative explanations could not bear even minimum scrutiny, as the Petitioner could not explain why all of the pay stubs from the previous years showed zero leave available, and why a carry-over would not appear on the pay stubs until more than four months into the next employment year, and why if she had a carry-over week the time showing as available would not have been 96 hours instead of 64 hours, and why the time available on the pay stub never changed even after she took paid leave days, and why she only provide Wage and Hour with the pay stubs showing the 64 hours even though she had the ones showing zeroes, etc., etc., etc.

As the Circuit Court rightly concluded, the Petitioner's attempts to rehabilitate herself only provided further proof of her actual awareness of the falsehoods that she had knowingly perpetrated. The Petitioner simply was not credible, and as noted previously, credibility determinations are entitled to particular deference by this Court because a cold record can never surpass the opportunity for original observation. "The trial court heard the witnesses, observed their demeanor and is in a far better position to pass upon the weight and credibility of their testimony than this Court." *Petition of Wood*, 123 W.Va. 421, 427, 15 S.E.2d 393, 396 (1941).

The Circuit Court summed up the situation in its Order of July 31, 2008, at page 9:

This Court had no preconceptions about the case, but as the case developed during the trial, it became clear that there had been actual, intentional fraud on the part of the Plaintiff. And yet, it was the Plaintiff who was "in the driver's seat" all the way in pursuing false claims through a trial in this Court. The Court feels badly for the Plaintiff, as well as the Defendant. However, feeling badly for the Plaintiff does not alter the outcome in the case.

The overwhelming weight of all of the evidence gave the Circuit Court little choice but find that the Petitioner had engaged in fraud. To find otherwise would have been erroneous under the substantial evidence rule. "'Substantial evidence' is more than a scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996).

Once again, after all of the intellectualization by which the Petitioner attempts to make her position right, the argument is actually based upon an erroneous premise, and has been from the start of this case. That is, the crux of the Petitioner's argument is that because a pay stub produced by her employer contained erroneous data, she is entitled to exploit and profit from that error even though she knows it to be an error.²³

The Petitioner's argument is analogous to the situation where a person who deposits \$1,000 in his bank account later discovers on his statement that the bank erroneously recorded the deposit as \$10,000, and then goes on a spending spree, relying on some twisted notion that the extra money is his. Those who have tried it quickly find that the law is not on their side. And yet, the Petitioner is asking this Court to make that twisted notion the law of this State.

The Petitioner was aware of the falsity of the pay stubs, but used them to make claims to extract from the Respondent money that she knew he did not owe her. That is fraud.

²³ The Petitioner said as much in documents filed below, in which she tries to accomplish this outcome by a corruption of the rule requiring ambiguous employment contracts to be construed for the employee.

5. The Circuit Court correctly awarded attorney fees to the Respondent.

The Circuit Court's finding of fraud justified an award of punitive damages. The Circuit Court chose to include in that punitive damage award the attorney fees and costs incurred by the Respondent in defending himself against the Petitioner's fraudulent claims. As the Circuit Court concluded, this was particularly appropriate, and not in violation of the established case law of this Court, even though the compensatory damages awarded were negligible. As the Circuit Court correctly found, the 5-to-1 ratio approved in Syl. Pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), and reaffirmed in *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169, (W.Va. 2004), is explicitly not applicable in cases in which the underlying compensatory damages are negligible. On the whole, the Circuit Court's Order of July 31, 2008, is well-reasoned, and displays a scrupulous attention to the factors that this Court has established as indispensable to an award of punitive damages.

Although the Petitioner here only secured \$1,016.60 from the Respondent in her Wage and Hour claim, she then further advanced her fraud by hauling the Respondent into what became a protracted civil action. As the Circuit Court correctly observed, had the Petitioner been satisfied to let the matter rest after obtaining the sum paid in the Wage and Hour claim, it never would have been in the position to consider the Respondent's prayer for attorney fees. But it was she, and she alone, who made the choices that led to the outcome. The fact that the Petitioner now finds herself in the uncomfortable position of facing the consequences of her choices does not make the Circuit Court wrong.

The Circuit Court's award of attorney fees and costs as a measure of punitive damages is supported by the record of this case, and of the legal principles applicable to punitive damage

awards. However, the Respondent contends that the attorney fees and costs should have been awarded as a matter of compensatory, not punitive damages.

The simple fact is that the real damage done to the Respondent is the lost time, inconvenience, and costs that he was forced to suffer because of the Petitioner's pursuit of her fraudulent claims, in Wage and Hour and especially in the Circuit Court.²⁴ These are the actual injuries visited upon a blameless party who is hauled into court by a wrongdoer who misuses the legal system, even if – or maybe especially if – the blameless party ultimately prevails in his defense of the false claims. In recognition of this truth, our law recognizes such costs as legitimate elements of compensatory damages under a number of legal theories.

See, e.g., TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 468, 419 S.E.2d 870 (1992), wherein this Court adopted the majority rule that attorney fees were available as an element of special damages in a slander of title action where the real injury was the cost of the party's having to come to court to vindicate his rights. The *TXO* cited Restatement (Second) of the Law of Torts § 623A and Restatement (Second) of the Law of Torts § 624 (1977), insofar as the tort of slander of title is a form of the tort of injurious falsehood. *See, also, Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W. Va. 210, 216, 314 S.E.2d 166 (1984) (where the Court, citing Prosser on Torts (4th ed. 1971), notes that injurious falsehood is among the recognized actions for wrongs against economic interests).

The Respondent contends that the attorney fees and costs should have been awarded as the measure of special compensatory damages upon the Circuit Court's conclusion that the Petitioner had subjected the Respondent to false claims at both the Wage and Hour and civil action stage. The evidence at trial established that the Respondent would pursue on any one of a

²⁴ The Court should note that the Respondent did not make a claim for the lost revenues, employee costs and like damage that he incurred as a result of the Petitioner's false claims, although these, too, would be legitimate elements of damages.

number of such theories, including the common law tort of injurious falsehood, malicious prosecution²⁵ or abuse of process.

To the extent that the Circuit Court erred, it was in awarding the attorney fees and costs as a measure of punitive damages rather than as special damages, thus exposing to this inevitable appeal and subjecting the Respondent's award to a higher degree of scrutiny than should be applied under the facts. The Circuit Court was correct, but for the wrong reason. "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syllabus, *Sherwood Land Co. v. Municipal Planning Comm'n of the City of Charleston*, 186 W. Va. 590, 413 S.E.2d 411 (1991), quoting, Syll. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

The Circuit Court's award of attorney fees and costs should be sustained as a proper award of special damages.

V. Conclusion

The Petitioner left her employment while in the fourth year of her employment with the Respondent. Under the paid leave policy in effect throughout the Petitioner's tenure of employment, the Petitioner would have been entitled to two (2) weeks, totaling eight (8) days, of paid leave had she worked the entirety of the employment year. But she did not. The Petitioner took and unpaid leave of absence for the first three months of her fourth employment year, as a result of which, the maximum number of days of paid leave that she could earn for working the

²⁵ Because this was a bench trial, and that the Circuit Court did not consider attorney fees and costs until a subsequent hearing following its ruling in favor of the Respondent on his counterclaim, any suggestion that the Respondent would have had to initiate a separate legal action to pursue a malicious prosecution claim is misplaced.

remainder of that year would have been six (6) days. She did not work the remainder of the employment year, but quit after rendering only five (5) months and a few days of employment service. During that time, the Petitioner earned only three (3) days of paid leave, which she had already taken at the time of her departure from her employment. While the Petitioner had begun to earn time towards another day of paid leave when she quit, the established leave policy permitted paid leave to be exercised in not less than full day increments. Accordingly, the Petitioner had no vested leave that could have been exercised by her when she left her job, and was entitled to no compensation for unused, vested paid leave in her final paycheck.

Because the Respondent did not pay the Petitioner for all of the paid leave days that she would have accrued had she worked out her entire employment year, the Petitioner used an erroneous pay stub entry, which she knew to be false, to initiate a Wage and Hour claim against the Respondent. Providing the Wage and Hour investigator with only the false information, the Petitioner prevailed in her Wage and Hour claim. Not content to accept only the small award produced in Wage and Hour, the Petitioner initiated a civil action against the Respondent for statutory liquidated damages.

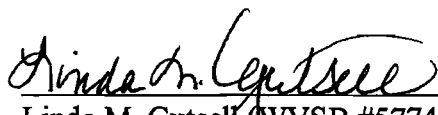
The overwhelming evidence at trial – not merely the substantial evidence, but the overwhelming evidence – proved that the paid leave policy existed and was known by the Petitioner to exist, and that the erroneous entries on a few pay stubs were known by the Petitioner to be incorrect. Upon all of the evidence, the trial court correctly found for the Respondent on the Petitioner's claim, and also found for the Respondent on his counterclaim for the Petitioner's assertion of fraudulent claims against him.

Having found that the Petitioner had committed fraud in the bringing of her claims, the Circuit Court not only ordered the Petitioner to repay the funds secured through Wage and Hour,

but also awarded punitive damages, which included the Respondent's attorney fees and costs. The Circuit Court was correct in awarding the Respondent his attorney fees and costs, because that is an appropriate measure of damages when a person has been fraudulently hauled through the legal system. The Circuit Court should, however, have awarded the fees and costs as special, not punitive damages, and this Court should sustain the award on that basis.

The Petition, being unsupported by the whole of the record below, should be denied review by this Court. However, if *certiorari* is granted, it should be for the sole purpose of establishing as a clear tenet of our law that one who initiates fraudulent legal claims will compensate the wronged party for the attorney fees and costs incurred to defend the false claim.

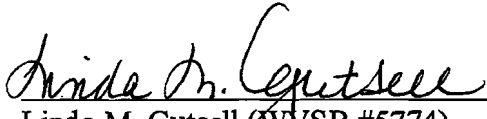
DANIEL P. BONNER,
The Respondent,
By counsel.


Linda M. Gutschell (WVSB #5774)
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CERTIFICATE OF SERVICE

I, Linda M. Gutsell, counsel for the Respondent, Daniel P. Bonner, hereby certify that I have served a true and accurate copy of the foregoing RESPONSE TO PETITION FOR APPEAL OF RESPONDENT DANIEL P. BONNER upon the Petitioner by mailing a true and accurate copy thereof, by U.S. Mail, first-class postage prepaid, to counsel for the Petitioner, at the address shown below, this 30th day of December, 2008:

Andrew C. Skinner, Esq.
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