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ASSIGNMENTS OF ERROR

1. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE JURY VERDICT AND AWARDING A NEW TRIAL AS ANY ERROR CAUSED BY PROSPECTIVE JUROR CINDI GREATHOUSE'S RESPONSES WAS NOT PREJUDICIAL OR AFFECT THE DEFENDANT'S RIGHT TO RECEIVE A FAIR TRIAL
2. WHETHER RESPONDENT'S FAILURE TO EXERCISE DUE DILIGENCE AND MAKE FURTHER INQUIRIES OF CINDI GREATHOUSE RESULTED IN NO SHOWING OF BIAS, PREJUDICE OR AN UNFAIR TRIAL, MAKING THE CIRCUIT COURT'S AWARD OF A NEW TRIAL AN ABUSE OF DISCRETION

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On July 9, 2007, Petitioner, Albert Postlewait, Jr. filed an age discrimination Complaint against the City of Wheeling in the Circuit Court of Ohio County, West Virginia. Appendix 1 at 11.

A jury trial began on October 20, 2010, and on October 21, 2010, the jury returned a verdict in favor of Albert Postlewait, Jr. for \$99,164.98 for past lost retirement benefits and \$1,219.28 for emotional distress, embarrassment, humiliation, depression and anxiety. The Judgement Order was entered by the Circuit Court Clerk on November 19, 2010. Appendix 1 at 7.

On December 7, 2010, Respondent filed Defendant's Motion for Judgment as a Matter of Law and Alternative and/or Joint Motion for New Trial. Appendix at 1 at 22 and 300. A hearing on said Motion was held on December 17, 2010. Appendix 2, 12/17/10.

On December 30, 2010, the Circuit Court Clerk entered an Order by Ohio County Circuit Judge Martin J. Gaughan awarding Respondent a new trial. Appendix 1 at 3.

Petitioner timely filed his Notice of Appeal with this Honorable Supreme Court's Clerk on January 31, 2011.

II. STATEMENT OF FACTS

Albert Postlewait, Jr., who had worked for the City of Wheeling on its Police Department for over 20 years and was considering retiring, took a test for the City of Wheeling for eligibility as an equipment mechanic on June 30, 2005. He scored the highest grade on the test. On July 8, 2005, an Eligibility List for the equipment mechanic position listed Albert Postlewait, Jr. as the number one applicant with the highest test score. On July 14, 2005, Albert Postlewait, Jr., who was over 50 years of age, being born on February 4, 1955, was interviewed for the position of equipment mechanic. Also interviewed were Jay Adams, who scored the third highest on the test, and Gary Weichman, who scored the fourth highest on the test. The number two applicant, James Jones, was not interviewed. Appendix 1 at 11, 14, 15 and 16.

The Director of Human Resources, David Denham, and Supervisor of Vehicle Maintenance Department, Anthony Peace, conducted the interviews. Appendix 2, 10/20/10, page 182, line 24 to page 183, line 4.

Albert Postlewait, Jr., who came in first on the test, and Gary Weichman, who came in fourth on the test, both met the qualifications for the job and both were recommended for hiring. Appendix 1 at 14 and Appendix 2, 10/20/10, page 193, lines 3-5.

Gary Weichman was finally selected for the position beginning August 29, 2005. Gary Weichman was age 18. Appendix 2, 10/21/10, page 198, lines 2-17.

At trial, Cindi Greathouse, a prospective juror, had answered a voir dire question regarding whether she had ever been in a lawsuit stating that she had a "workers' comp issue" that "was settled out of court." Appendix 2, 10/20/10, page 41, line 10 to page 42, line 5. No further questions were asked of her concerning the workers' compensation lawsuit during individual voir dire. Appendix

2, 10/20/10, page 86, line 8 to page 88, line 6.

At trial, Anthony Peace, the Supervisor of the Vehicle Maintenance Department, denied that he had a conversation with another equipment mechanic, Steve Darrow, about hiring a younger individual as Mr. Darrow would “like to take him under my wing.” Appendix 2, 10/20/10, page 258, lines 15-21.

However, Steve Darrow testified at trial that he did have a discussion with Mr. Peace telling him that he would like to have somebody that he could take under his wing. Appendix 2, 10/20/10, page 276, line 23 to page 277, line 3. Steve Darrow also confirmed that he wanted “a younger guy.” Appendix 2, 12/10/10, page 277, lines 12-16.

Because Albert Postlewait, Jr. did not get the job he claims that he lost \$101,444.05 in retirement benefits that David Denham of the City of Wheeling confirmed. Appendix 2, 10/20/10, page 229, line 14 to page 330, line 18.

The jury awarded Albert Postlewait, Jr. only \$99,164.98 of his requested past lost retirement benefits and also awarded him \$1,219.28 for his emotional distress. Appendix 1 at 21.

After the verdict, in response to the Circuit Court’s questions at a hearing on December 17, 2010, it was established that Juror Cindi Greathouse had previously filed a lawsuit over 14 years earlier on August 23, 1996, part of which was a “deliberate intention” claim for personal injuries against her employer, Swisher International, Inc. Appendix 2, 12/17/10, page 17, line 2 to page 18, line 7 and Appendix 1 at 107.

Based upon Cindi Greathouse’s description of the lawsuit as a workers comp causation claim without disclosing anything else about the lawsuit, the Circuit Court granted Respondent a new trial. Appendix 1 at 6.

SUMMARY OF ARGUMENT

Potential Juror Cindi Greathouse truthfully answered a voir dire question about participation in lawsuits by stating she had a “workers’ comp issue” that “settled out of court.” On individual voir dire Respondent’s counsel failed to further inquire about the issue.

After the jury verdict for Petitioner, Albert Postlewait, Jr., Respondent requested a hearing and proved that Cindi Greathouse’s “workers’ comp issue” that “settled out of court” was a “deliberate intention” personal injury claim against her employer, Swisher International, Inc.

There has been no showing that Cindi Greathouse intentionally deceived anyone with her responses to voir dire.

There has been no showing that Cindi Greathouse had any bias or prejudice against the City of Wheeling.

There has been no showing that the trial was unfair.

The Circuit Court abused its discretion and erred in awarding a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner, Albert Postlewait, Jr., by counsel, believes that the decisional process would be significantly aided by oral argument. Petitioner’s counsel requests oral argument pursuant to Rule 19 as this case involves assignments of error in the application of settled law and an unsustainable exercise of discretion where the law governing that discretion is settled.

ARGUMENT

STANDARDS OF REVIEW

Although the ruling of a trial court in granting or denying a Motion for a New Trial is entitled to great respect and weight, the trial court’s

ruling will be reversed upon appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

Syl. Pt. 4, Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976); Syl. Pt. 1, Macek v. Jones, 671 S.E.2d 707 (W.Va. 2008)

We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to de novo review.

Syl. Pt. 2, Mazek v. Jones, Supra.

I. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE JURY VERDICT AND AWARDING A NEW TRIAL AS ANY ERROR CAUSED BY PROSPECTIVE JUROR CINDI GREATHOUSE'S RESPONSES WAS NOT PREJUDICIAL OR AFFECT THE DEFENDANT'S RIGHT TO RECEIVE A FAIR TRIAL

Petitioner, Albert Postlewait, Jr., does not take issue with the underlying factual findings made by Martin J. Gaughan, Judge of the Circuit Court of Ohio County. The relevant findings that Judge Gaughan made, which Petitioner, Albert Postlewait, Jr. also relies upon are contained in the Circuit Court's Order of December 30, 2010, granting a new trial. Judge Gaughan found as follows:

In response to the question, "(h)ave you or any members of your immediate family ever been in or filed a lawsuit?", Ms. Greathouse responded that she had "had a workers' comp issue "that . . . settled out of court."

Appendix at 1 at 5.

Additionally, the Court finds that Cindi Greathouse testified at the December 17, 2010 hearing that she thought she disclosed the lawsuit against her employer when she told the Court that she was involved in a "workers' comp. issue."

Appendix at 1 at 5.

In regard to Ms. Greathouse's alleged failure to disclose the lawsuit against her former employer, the Court finds that although Ms. Greathouse did not intentionally deceive the Court, she did fail to disclose certain information which would have been vital to the Defendant in making a Motion to Strike for Cause and in exercising her preemptory strikes. **The information that Ms. Greathouse failed to disclose involved a lawsuit against her former employer under the deliberate intent statute wherein she recovered money damages from her employer. The Court finds that Ms. Greathouse referred to the lawsuit as a workers' compensation claim, but did not disclose anything about the lawsuit.** The Court finds that this failure to disclose prejudiced the Defendant and impaired the Defendant's right to a fair trial. The Court therefore grants the Defendant's Motion for a New Trial.

Appendix 1 at 6.

The significance of the boldfaced language is it is factual and Petitioner has no argument that the Circuit Court erred concerning the factual findings. However, the non-boldfaced language above relates to applications of the law which are subject to de novo review under an abuse of discretion standard. See Syl. Pt. 2, Mazek v. Jones, Supra.

It should be noted that Cindi Greathouse answered the first question regarding whether she had ever participated in criminal or civil case by admitting that she had been previously convicted of a criminal action in Magistrate Court. Appendix 2, 10/20/10, page 23, lines 7-21.

The Circuit Court had asked whether any of the jurors had been convicted of perjury, suborning perjury, false swearing or any felony, to which all jurors had responded in the negative. Appendix 2, 10/20/10, page 19, lines 21-24. Accordingly, Cindi Greathouse's Magistrate Court conviction must have been for some other offense, however, there was no further inquiry.

Later the Court asked, "Have you or any members of your immediate family ever been in or filed a lawsuit? I think that's pretty much been answered before, but in case it was limited, have any

of you ever been sued or sued anyone else?" Appendix 2, 10/20/10, page 41, lines 10-14. Cindi

Greathouse responded as follows:

Potential Juror Greathouse: My name is Cindi Greathouse. I had a workers' comp issue.

The Court: Did you go to hearing on that?

Potential Juror Greathouse: We did - - well, we did not. It was settled out of court.

The Court: Okay. Thank you.

Appendix 2, 10/20/10, page 41, line 24 to page 42, line 6.

Thereafter the Court asked all the potential jurors a question to which they all responded in the negative as follows:

The Court: Okay. For any of you who have been involved in a lawsuit, with the fact that you have personally been involved in a lawsuit or you're associated closely with anyone who's been in a lawsuit, would that in any way make it difficult for you to be fair and impartial in this case? Is there anyone that that would influence?

(Response in the negative.)

Appendix 2, 10/20/10, page 44, lines 16-21.

Cindi Greathouse disclosed that she knew Russell Jebbia, Public Works Director for the City of Wheeling, as she was president of the Edgewood Community Association who had dealings with him and his office regarding a sewage project. Appendix 2, 10/20/10, page 33, line 4 to page 34, line 9. Cindi Greathouse testified that the sewage dispute that she and the Edgewood Community Association had with the City of Wheeling had been resolved fairly. Appendix 2, 10/20/10, page 50, lines 9-15 and page 52, lines 2-3.

Cindi Greathouse advised the Court that her mother was a deputy sheriff years ago and that her uncle was a police officer in the City of Moundsville. Appendix 2, 10/20/10, page 46, lines 14-17.

Cindi Greathouse testified that she had union grievances against employers for overtime that usually turned out okay and that she believed were handled fairly. Appendix 2, 10/20/10, page 53, lines 3-15.

Later the Court permitted individual voir dire and counsel for Respondent requested that Cindi Greathouse be brought in to chambers for questioning. Appendix 2, 10/20/10, page 85, lines 15-24. The discussion regarding Cindi Greathouse and her individual voir dire testimony is so important that it is quoted herein for two (2) pages as follows:

Ms. Arnold: Ms. Greathouse had a number of civil - - I don't know whether they were civil actions. She said she believes she settled fairly with the city. There was something about police. I think we need to talk to her. A dispute over - - she had grievances.

The Court: I think she's in a civil group that had some disputes with the city.

Ms. Arnold: Okay.

The Court: She answered a lot of questions.

(Whereupon, Potential Juror Greathouse entered the Court's chambers and the following transpired.)

The Court: Just have a seat. You understand that you're still under oath?

Potential Juror Greathouse: Yes, sir.

The Court: Okay, You had indicated that you had had some disputes with the city. Were those disputes all involving your participation in a civic organization?

Potential Juror Greathouse: Yes, sir.

The Court: Anyone else want to ask any follow-up questions?

Ms. Arnold: I thought I heard you say that you believed that those claims were settled fairly?

Potential Juror Greathouse: Yes, ma'am.

Ms. Arnold: You don't have any problems with the way it was settled?

Potential Juror Greathouse: Oh, no. Everything was great. It worked out wonderful.

Ms. Arnold: Okay. I don't have any further questions, Your Honor.

Mr. Kasserman: That problem you had with the city, would that affect your ability to be fair, a fair juror in this case where Albert Postlewait is suing the City of Wheeling for age discrimination in a mechanic position when they hired someone 18 years old when he was 50?

Potential Juror Greathouse: No, it would not have any effect, sir.

Mr. Kasserman: You could listen to the evidence and Judge Gaughan's rulings and instructions on the law and apply that in a fair and impartial manner to both parties?

Potential Juror Greathouse: Absolutely.

Mr. Kasserman: I don't have anything further, Your Honor.

Ms. Arnold: I do have one follow-up question. You indicated that you maybe are or had been a union member and that you filed grievances with our union. Did you believe that those were handled fairly?

Potential Juror Greathouse: Yes, Ma'am.

Ms. Arnold: All right. Resolved to your satisfaction?

Potential Juror Greathouse: Yes, ma'am. Everything worked out great.

Ms. Arnold: Okay. Thank you.

The Court: Any follow up?

Mr. Kasserman: No, sir.

The Court: You may have your seat back in the courtroom.

Potential Juror Greathouse: Thank you very much.

(Whereupon Potential Juror Greathouse exited the Court's chambers and the following transpired.)

The Court: Any motion for cause?

Ms. Arnold: No, Your Honor.

Mr. Kasserman: No.

Appendix 2, 10/20/10, page 85, line 16 to page 88, line 18.

It should be noted by this Supreme Court that no follow up questions were asked of the "lawsuit" where Cindi Greathouse had "a workers' comp issue" that "was settled out of court." Counsel for the Respondent simply did not make further inquiry.

Where there is a recognized statutory or common law basis for disqualification of a juror, a party must during voir dire avail himself of the opportunity to ask such disqualifying questions. Otherwise the party may be deemed not to have exercised reasonable diligence in ascertaining the disqualification.

Syl. Pt. 8, Arnoldt v. Ashland Oil, 186 W.Va. 394, 412 S.E.2d 795 (1991); Syl. Pt. 8, State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

The Circuit Court found that "Ms. Greathouse did not intentionally deceive the Court . . ."
Appendix 1 at 6.

In fact, Cindi Greathouse gave entirely truthful testimony. The civil action was a "deliberate intention" action against her employer that is authorized as part of the workers' compensation

statute. See West Virginia Code, § 23-4-2(d)(2). The West Virginia Supreme Court of Appeals has determined that the statutory “deliberate intention” cause of action is part of West Virginia workers’ compensation.

W.Va. Code § 23-4-2(c)(2)(i-ii) (1991) has blended within the West Virginia workers’ compensation scheme the directive that all employees covered by the West Virginia Workers’ Compensation Act are subject to every provision of the Workers’ Compensation chapter and are entitled to all benefits and privileges under the Workers’ Compensation Act, including the right to file a direct deliberate intention cause of action against an employer pursuant to W.Va. Code 23-4-2(c)(2)(i-ii) (1991).

Syl. Pt. 3, Bell v. Vecellio & Grogan, Inc., 397 W.Va. 138, 475 S.E.2d 138 (1996).

Accordingly, when Cindi Greathouse answered the question about lawsuits with the fact that she had a workers’ compensation claim that settled out of court, she testified truthfully.

If it be determined that a juror falsely answered a question on voir dire examination, whether or not a new trial should be awarded is withing the sound discretion of the trial court.

Syl. Pt. 3, West Virginia Human Rights Commission v. Tenpin Lounge, Inc., 158 W.Va. 349, 211 S.E.2d 349 (1975).

But what should happen if a juror, like Cindi Greathouse, truthfully answers a question on voir dire examination? Direction is given in Phares v. Brooks, 211 W.Va. 346, 566 S.E.2d 233 (2002), a per curium decision. In Phares the Supreme Court determined that a hearing should have been had to see whether juror Dolechek failed to respond or falsely responded to material voir dire questions. The case was remanded with these directions:

If, in fact, the questions were falsely answered, this Court believes that the Appellant should receive a new trial. If, on the other hand, the Court determines that Ms. Dolechek did not, in fact, falsely answer the questions posed on voir dire, the Court believes that the original judgment should be reinstated.

Phares v. Brooks, 556 S.E.2d at 236.

In another case where it was alleged that a false answer had been made on voir dire, the West Virginia Supreme Court of Appeals found that the allegations that the juror had given false answers were “without a factual basis in the record.” State v. Banjoman, 178 W.Va. 311, 359 S.E.2d 311, 318 (1987).

In Banjoman after the perspective juror, Ms. Dunn, truthfully answered voir dire questions that she worked at a bank and could have cashed some of the defendant’s checks, the Supreme Court of Appeals determined that it could not assume from that fact that she remembered the defendant. This Court stated, “We find nothing in the record to warren a conclusion of bias or prejudice on the part of Ms. Dunn. State v. Banjoman, Supra.

The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.

Syl. Pt. 1, State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974); Syl. Pt. 1, West Virginia Department of Highways v. Fisher, 170 W.Va. 7, 289 S.E.2d 213 (1982).

The Circuit Court abused its discretion in awarding a new trial when Cindi Greathouse’s answers were truthful and there was no showing of any bias or prejudice by the Respondent. Bias or prejudice of Cindi Greathouse cannot be inferred because she had a deliberate intention claim against her employer, Swisher International, Inc., a tobacco company, that is completely unrelated to the Respondent, the City of Wheeling, or its employees.

As the Circuit Court found that Cindi Greathouse did not intentionally deceive the Court and in actuality she truthfully answered the question about whether she had been involved in any lawsuits, mentioning a workers’ compensation issue that was settled out of court, it is apparent that

the Circuit Court abused its discretion in awarding a new trial.

Technically, Cindi Greathouse told the complete truth. A regular workers' compensation claim does not result in a lawsuit. It is an administrative claim. When Cindi Greathouse positively responded to whether she had a lawsuit, stating that it was a workers' compensation claim and that it "settled out of court," further inquiry by duly diligent counsel would have revealed the facts that her claim was against her former employer, Swisher International, Inc., and that the claim had nothing to do with the City of Wheeling or its employees.

In a case where the Circuit Court properly refused to grant a mistrial, it was determined by the Supreme Court that the Circuit Court properly employed its discretion as there was no showing of prejudice or other basis for the Court to find injustice by the juror's continued participation in the case.

The hearing did not reveal any intent on the part of the juror to withhold information regarding her mother's employment; the record demonstrates that the juror simply misunderstood the voir dire question. Appellant's counsel did not question the juror during the hearing and did not demonstrate how a correct response by the juror would have provided a valid basis to sustain a challenge for cause or show that the jury was actually biased. In essence, there was no showing of prejudice or other basis for the lower court to find that injustice would result from the juror's continued participation on the panel. (Emphasis added.)

State v. Dennis, 216 W.Va. 331, 607 S.E.2d 437, 455 (2004).

Absent any showing of bias or prejudice or that the Respondent failed to receive a fair trial, the Circuit Court abused its discretion and erred in awarding a new trial.

- II. WHETHER RESPONDENT'S FAILURE TO EXERCISE DUE DILIGENCE AND MAKE FURTHER INQUIRIES OF CINDI GREATHOUSE RESULTED IN NO SHOWING OF BIAS, PREJUDICE OR AN UNFAIR TRIAL, MAKING THE CIRCUIT COURT'S AWARD OF A NEW TRIAL AN ABUSE OF DISCRETION

Counsel for Respondent, the City of Wheeling, failed to ask even one question of Juror Cindi Greathouse regarding her workers' compensation claim that was settled out of court. Appendix 2, 10/20/10, page 85, line 16 to page 88, line 18. The Circuit Court had permitted counsel for both parties to individually voir dire any prospective juror they wished. In his preliminary instructions to the lawyers the Circuit Court expressly stated, "I am very free with individual voir dire." Appendix at 9.

"To prevail in obtaining a new trial because of an alleged juror disqualification the complaining party must of been "diligent in his (or her) efforts to ascertain the disqualification . . ." McGlone v. Superior Trucking Company, 178 W.Va. 659, 363 S.E.2d 736, 745 (1987). See also West Virginia Human Rights Commission v. Tenpin Lounge, 158 W.Va. 349, 357, 211 S.E.2d 349, 354; State v. Banjoman, 178 W.Va. 311, 317 & n.9, 359 S.E.2d 331, 338 & n. 9 (1987); Proudfoot v. Dan's Marine Service, 210 W.Va. 498, 558 S.E.2d 298, 304 (2001); State v. Swims, 212 W.Va. 263, 569 S.E.2d 784, 789 (2002); Arnoldt v. Ashland Oil, 186 W.Va. 394, 412 S.E.2d 795, 811-813 (1991); Livengood v. Kerr, 182 W.Va. 681, 684, 391 S.E.2d 371, 374 (1990).

As Respondent, the City of Wheeling, failed to exercise due diligence to show a potential of bias or prejudice of Juror Cindi Greathouse, the Circuit Court abused its discretion and erred in granting a new trial.

III. WHETHER RESPONDENT'S FAILURE TO TIMELY FILE POST-TRIAL MOTIONS LEFT THE CIRCUIT COURT WITHOUT JURISDICTION TO GRANT A NEW TRIAL OR JUDGMENT AS A MATTER OF LAW REQUIRING THE CASE TO BE REMANDED WITH DIRECTIONS FOR REINSTATEMENT OF THE JUDGMENT ORDER

The standard of review on this question presented does not require a showing of an abuse of discretion by the Circuit Court.

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.

Syl. Pt. 2, Roberts v. Consolidation Coal Company, 208 W.Va. 218, 539 S.E.2d 478 (2000).

W.V.R.C.P. Rule 59(b) states, “Any motion for a new trial shall be filed not later than ten days after the entry of the judgment.”

W.V.R.C.P. Rule 50(b) states, in part, “The movant may renew the request for judgment as a matter of law by filing a motion no later than ten days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.”

The requirement of Rule 59(b) of the Rules of Civil Procedure that a motion for a new trial shall be served not later than ten days after entry of the judgment is mandatory and jurisdictional. The time required for service of such motion cannot be extended by the court of by the parties.

Syl. Pt. 3, Roberts v. Consolidation Coal Company, 208 W.Va. 218, 539 S.E.2d 478 (2000), Syl. Pt. 4, Miller v. Triplet, 303 W.Va. 351, 507, 714 (1998) and Syl. Pt. 1, Boggs v. Settle, 150 W.Va. 330, 145 S.E.2d 446 (1965).

The Judgment Order in this case was entered November 19, 2010. Appendix 1 at 8.

Respondent’s combined post trial Motion Requesting Judgment as a Matter of Law or Alternatively For a New Trial was filed December 7, 2010. Appendix 1 at 300.

W.V.R.C.P. Rule 6(a) states, in part, “the day of the act, event or default from which the designated period of time begins to run shall not be included . . . when the time period prescribed or allowed is fewer than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded” and legal holidays include “Thanksgiving Day.”

By Petitioner’s calculations the Respondent’s Motion was filed one day late depriving the

Circuit Court of jurisdiction to award a new trial or judgment as a matter of law. The calculation is as follows:

Date	Day of Week	Elapsed Days
11/19/10	Friday	Exempt
11/20/10	Saturday	Exempt
11/21/10	Sunday	Exempt
11/22/10	Monday	1
11/23/10	Tuesday	2
11/24/10	Wednesday	3
11/25/10	Thanksgiving	Exempt
11/26/10	Friday	4
11/27/ 10	Saturday	Exempt
11/28/ 10	Sunday	Exempt
11/29/10	Monday	5
11/30/10	Tuesday	6
12/01/10	Wednesday	7
12/02/10	Thursday	8
12/03/10	Friday	9
12/04/10	Saturday	Exempt
12/05/10	Sunday	Exempt
12/06/10	Monday	10
12/07/10	Tuesday	11

Accordingly, the Respondent's filing was only one day late. However, the West Virginia Supreme Court of Appeals has ruled that the filing time is jurisdictional and therefore the rule can be harsh.

We issue this opinion today to send a forceful message to attorneys. The ramifications of failing to make a motion for a new trial after the entry of judgment, pursuant to Rule 59(b), are harsh.

Miller v. Triplet, 203 W.Va. 351, 507 S.E.2d 714, 720 (1998).

In application to this case, the result is not harsh. Petitioner, Albert Postelwait, Jr. did not have anything to do with potential juror Cindi Greathouse's responses on voir dire. He put on his proof and not only did Cindi Greathouse, but the remainder of the jury simply did not believe the

Respondent's evidence. For that matter, neither did the Circuit Court. The Circuit Court memorialized its feelings from the December 17, 2010, hearing in its Order entered December 30, 2010, stating as follows:

The Court denied the *Motion for Judgment as a Matter of Law* at the December 17, 2010, hearing and found that the Plaintiff presented testimony at the trial that could have led a reasonable jury to infer that the Plaintiff was not hired because of his protected status, including one employee at the Vehicle Maintenance Department of the City of Wheeling who expressed his desire to take the newly hired person "under his wing." The Court found that a reasonable jury could have inferred that taking someone under your wing meant that they wanted a younger person. **The Court also found that the testimony of the primary witness for the defense did not satisfy the Court and apparently did not satisfy the jury that the City of Wheeling had reasons other than the Plaintiff's age not to hire him.** (Emphasis added.)

Appendix 1 at 4.

This is evidence that there was a fair trial and a fair result.

Further, this case does not contain the situation that was contained in Roberts v. Consolidation Coal Company, 208 W.Va. 218, 539 S.E.2d 478 (2000) where the parties and the Court had agreed to extend the ten day filing deadline.

In this case during the hearing on the Respondent's post trial motion on December 17, 2010, counsel for Petitioner, Albert Postlewait, Jr., moved to stop the proceedings immediately based upon Rule 50(b) and Rule 59(b). Counsel for Petitioner, Albert Postlewait, Jr., stated as follows:

Mr. Kasserman: First, Your Honor, I move to stop the proceedings immediately. A motion post-trial under Rule 59(b) and under Rule 59(b) they're required to be filed within ten days of entry of judgment.

Appendix 2, 12/17/10, page 6, line 7-11.

Accordingly, as the Court lacked jurisdiction to award a new trial and having ruled against the Respondent on the Judgment as a Matter of Law during the hearing on December 17, 2010, it is clear that this case should be remanded with directions for reinstatement of the Judgment Order.

CONCLUSION

As the Circuit Court of Ohio County abused its discretion and erred in awarding a new trial or was without jurisdiction to award a new trial, Petitioner, Albert Postlewait, Jr., requests that the jury verdict in his favor and Judgment Order be reinstated and this matter be remanded for further proceedings, including his Motion for Attorney Fees and Expenses under the West Virginia Human Rights Act. As the Respondent failed to file any appeal to any of the Circuit Court's Orders the Judgment Order of November 9, 2010, should be deemed non-appealable.

Respectfully submitted,



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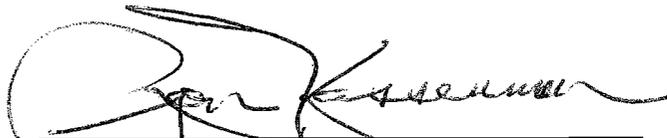
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ALBERT POSTLEWAIT, JR., Plaintiff,	:	
	:	
Petitioner,	:	
	:	Case No.: 11-0206
v.	:	
	:	
THE CITY OF WHEELING, Defendant,	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

Service of the foregoing Brief of Petitioner, Albert Postlewait, Jr., was had upon the Respondent by mailing a true and correct copy thereof by regular United States mail, postage prepaid and properly addressed, this 28th day of May, 2011, as follows:

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