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PETITIONER'S REPLY TO RESPONSE
TO PETITIONER'S APPEAL

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

Respondent, the City of Wheeling, argues that failure of perspective juror Cindy Greathouse to disclose material facts accurately during voir dire was prejudicial as it impaired the Respondent's rights to exercise either a challenge for cause or peremptory strike.

Respondent argues that it was prejudiced when Cindy Greathouse responded to the Court's question on voir dire regarding having been involved in a "lawsuit" by disclosing that she had a "workers' comp issue" that "was settled out of court."

Respondent, City of Wheeling, argues vigorously that if it had known about perspective juror Greathouse's two personal injury deliberate intent cases against her employer, Swisher International, Inc., that the Circuit Court may have dismissed Ms. Greathouse for cause or the City could have exercised a peremptory strike to remove her from the panel.

What the City of Wheeling suggests requires the Supreme Court of Appeals to make an unjustified leap in logic. Assuming *arguendo* that Cindy Greathouse had a bias against her employer, Swisher International, Inc., for causing a personal physical injury by deliberate intention, that in no way suggests that she had some type of bias against all employers or Respondent, the City of Wheeling, or in any way suggests bias for or against age discrimination lawsuits. The leap of logic is unfounded.

The City of Wheeling argues that Ms. Greathouse's experience with litigation arising from her employment, i.e., deliberate intent claims against her former employers, was information that

was material to the voir dire process in this age discrimination case. See Respondent's Brief at page 18. Respondent seems not to care about whether there were underlying workers' compensation claims for personal injury, but that the additional "deliberate intention" lawsuits for personal physical injuries against Swisher International, Inc., somehow indicated a bias against the City of Wheeling or a bias regarding age discrimination. However, there is no evidence to support any inference or argument connecting lawsuits for personal injuries against Swisher International, Inc., to any bias against the City of Wheeling or any bias regarding age discrimination claims.

It should be noted that the Circuit Court did not find that Ms. Greathouse had a bias relating to the City of Wheeling or age discrimination suits. Appendix 1, page 7.

The reason that the Circuit Court did not make the finding that there was any bias by Ms. Greathouse is that there was no factual basis in the record to make that finding. That is the same issue that was before the West Virginia Supreme Court of Appeals where there had been allegations that a juror had given false answers which were found to be "without a factual basis in the record." See State v. Banjoman, 178 W.Va. 331, 365 S.E.2d 331, 318 (1987). In Banjoman, the Supreme Court stated, "We find nothing in the record to warrant a conclusion of bias or prejudice on the part of Ms. Dunn." State v. Banjoman, 178 W.Va. 331, 365 S.E.2d 331, 318 (1987).

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).

To the contrary, the Circuit Court specifically found that the failure to disclose the deliberate intention class action "did not prejudice the defendant and would not have been relevant to the

defendant's voir dire." Appendix 1, page 6.

Regarding the workers' compensation deliberate intent lawsuit that was settled out of court, the Circuit Court found that the "failure to disclose prejudiced the Defendant and impaired the Defendant's right to a fair trial." Appendix 1, page 7. The Circuit Court's Order states that it "finds that Ms. Greathouse referred to the lawsuit as a workers' compensation claim, but did not disclose anything about the lawsuit." Appendix 1, page 7. That is not completely accurate as Ms. Greathouse's response about the workers' compensation claim was in reply to the Court's question about "lawsuits" and Ms. Greathouse expressly stated that, "It was settled out of court." Appendix 2, 10/20/10, page 42, line 5.

There being no evidence of any bias or prejudice in the record, the finding of the Circuit Court that the City of Wheeling was prejudiced is erroneous and the ruling granting a new trial should be reversed.

II. RESPONDENT'S FAILURE TO EXERCISE DUE DILIGENCE AND MAKE FURTHER INQUIRES OF CINDY 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.

Respondent argues in response to this assignment of error that the voir dire responses were prejudicial as they impaired the Respondent's right to exercise either a challenge for cause or a peremptory strike.

It must be remembered that during individual voir dire in the Circuit Court's chambers the counsel for Respondent, City of Wheeling, failed to ask any questions whatsoever of Cindy Greathouse regarding her workers' compensation claim that was settled out of court. Appendix 2, 2/20/10, page 85, line 16 to page 88, line 18.

Moreover, a new trial will be granted only when a perspective juror's wilful or inadvertent failure, during voir dire, to disclose relevant information suggests actual or probable bias or prejudice, not merely because the complaining party has been, in effect, denied a peremptory strike of a particular prospective juror. . . The potential for bias or prejudice appears on this record to be obviously remote.

McGlone v. Superior Trucking, 178 W.Va. 659, 263 S.E.2d 736, 746 (1987).

Because Ms. Greathouse suggested she had prior disputes with the City of Wheeling,

Respondent's counsel questioned as follows:

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: No, no. **Everything was great. It worked out wonderful.**

Appendix 2, 10/20/10, page 86, line 18 to page 87, line 1. (Emphasis added.)

This factual response, if anything, shows bias for the City of Wheeling.

Ms. Greathouse had disclosed that she had union grievances which led counsel for the City of Wheeling to ask the following:

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

Potential Juror Greathouse: Yes, Ma'am.

Ms. Arnold: Alright. Resolved to your satisfaction?

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

Appendix 2, page 87, line 19 to page 88, line 3.

The responses show no evidence of prejudice or bias against the City of Wheeling or relating to age discrimination lawsuits. The only reasonable inference that can be drawn is that Ms. Greathouse had no bad feelings regarding her disputes with the City of Wheeling and in her union grievances.

Counsel for Respondent simply did not inquire regarding the workers' compensation claim that was "settled out of court." There was no inquiry concerning the nature of the injuries, whether it was a simple claim or whether injuries were deliberately caused. There was no inquiry whether the case was in state or federal court when it was settled. Absolutely nothing was explored.

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).

This Court's oft-repeated "raise it or waive it" rule is applicable.

Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated in State ex rel. Cooper v. Caperton, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996): "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their piece."

Proudfoot v. Dan's Marine Service, 210 W.Va. 498, 558 S.E.2d 298, 304 (2001).

Our law is clear that the parties to a trial are responsible for conducting a full and complete voir dire during which, if the perspective jurors are forthright, all relevant and meaningful information will be revealed which is necessary for the impaneling of

a qualified jury. Therefore, a party cannot simply sit back and invite error because of a juror's disqualification.

Proudfoot, 210 W.Va. at 505, 558 S.E.2d at 305.

The failure to obtain information regarding the workers' compensation claim that was settled out of court was the result of failure to exercise any diligence by asking any questions whatsoever on the part of counsel for the City of Wheeling. No questions were asked to raise any suggestion of a bias against the City of Wheeling or relating to age discrimination suits. The City of Wheeling appears to argue that Ms. Greathouse's reference to a worker's compensation claim that was "settled out of court" was incomplete, evasive or deceptive, thereby relieving it of any duty to ask questions to develop the existence, if any, of any bias or prejudice.

The United States Supreme Court set forth a particularized test for determining whether a new trial is required when there is juror deceit during voir dire. This test requires the proponent of the new trial to:

First demonstrate that a juror failed to answer honestly a material question on voir dire and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial

State v. Dennis, 216 W.Va. 331, 607 S.E.2d 437, 455 (2004) citing McDonough Power Equipment v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed. 2d 663 (1984).

In State v. Dennis, *Supra*, the trial court refused to grant a mistrial when it was learned during the course of the trial that one of the jurors was the daughter of a woman who had been a secretary in the Prosecutor's Office and was working in the Circuit Clerk's Office at the time of trial. State v. Dennis, 607 S.E.2d at 454.

In Dennis and in the case at bar, a hearing was held on the issue. In Dennis and in the case at bar, the record demonstrated that the juror simply misunderstood the voir dire question. In Dennis and in the case at bar, Appellant's counsel did not demonstrate how a different response by the juror would have provided a valid basis to sustain a challenge for cause or show that the juror was actually biased. In Dennis the West Virginia Supreme Court of Appeals stated as follows:

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 misunderstand 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 juror 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.

State v. Dennis, 607 S.E.3d at 455. (Emphasis added.)

There is nothing in the record to suggest that Ms. Greathouse was biased or prejudiced and therefore the Circuit Court erred in granting a new trial.

III. 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

Respondent argues that because the Friday after Thanksgiving is a statutorily established legal holiday that its Motion was timely filed.

If the West Virginia Supreme Court of Appeals wished for the statutory Friday after Thanksgiving to be a legal holiday then it could have amended Rule 6 of the West Virginia Rules of Civil Procedure. However, it did not.

Petitioner agrees with Respondent's admission in its Brief which states as follows:

A very literal reading of the Rule could yield the result the Petitioner urges, as the day after Thanksgiving is not among the "legal holidays" specifically identified in the Rule, nor is it any longer a holiday declared by the Governor, inasmuch as the Legislature has seen fit to designate it so on a permanent basis.

See Respondent's Response Brief at page 26.

Respondent argues that "Rule 6 necessarily must be read in conjunction with Section 2-1-1" of the West Virginia Code which was enacted after Rule 6. See Respondent's Brief at page 26.

Petitioner, Albert Postlewait, Jr., disagrees and suggests that this Supreme Court's Rules should not be superceded by Legislative enactments when it relates to the Supreme Court's procedures. There must be separation of the powers of the Courts and the Legislature. Although the result may seem harsh to the Respondent for filing its Motion one day late, a review of the entire case by this Supreme Court noting that the Respondent failed to diligently pursue voir dire questions, failed to object to evidence, and failed to raise in the Circuit Court all of the issues raised in its cross assignments of error, suggests that justice will be done by strictly enforcing the Rule and reversing the Circuit Court's Order granting a new trial.

PETITIONER'S RESPONSE TO CROSS-ASSIGNMENTS OF ERROR

Statement of the Case

Petitioner, Albert Postlewait, Jr., takes issue with all of the conclusory arguments made in Respondent's Statement of the Case as Rev. R.A.P. Rule 10(c)(4) requires the Statement of the Case to be concise and "a statement of facts of the case that are relevant to the assignments of error." Pursuant to Rev. R.A.P. Rule 10(d) & (g), Albert Postlewait, Jr.'s responsive Statement of the Case should relate to "correcting any inaccuracy or omission" in the Respondent's Brief.

The first inaccuracy and omission relates to the testimony of Steve Darrow cited by Respondent which the Circuit Court relied upon in denying the Respondent's Motion for a Judgment as a Matter of Law. This was not the only evidence considered by the Circuit Court. The Circuit Court's ruling is memorialized in the Order granting the new trial on other grounds is 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 protective 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 a reasonable jury could have inferred that taking someone under your wing meant 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.**

Appendix 1, page 4. (Emphasis added.)

The City of Wheeling's supervisor of the vehicle maintenance department, Anthony Peace, who was involved in the hiring process testified as follows:

Q. How about Steve Darrow, did Steve Darrow have any input in telling you, Hey, you should hire the young guy, I'd like to take him under my wing and teach him? Do you remember that?

A. He didn't tell me that.

Appendix 2, 10/20/10, page 258, line 15 to 19, Anthony Peace's testimony.

The very next witness in the trial was Steve Darrow who testified as follows:

Q. Before Mr. Weichman was hired you had the discussion with Tony Peace, the supervisor, that you would like to have somebody that you could take under your wing and teach out there, isn't that true?

A. Yes.

Appendix 2, page 276, line 23 to page 277, line 3, testimony of Steve Darrow.

Q. You wanted a younger guy, not specific ages - -

A. Right.

Q. - - But a younger guy that you could mold to your way of thinking, right?

A. I would say yes.

Appendix 2, page 277, line 12 to 16.

On page 6 of its Brief in its Statement of the Case, Respondent refers to City of Wheeling Ordinance Section 159.10 noting that it was admitted into evidence and was available to the jury during deliberations. Thereafter on page 29 of its Brief, Respondent refers to the City Ordinance as an issue to be decided by the trial court and states, inaccurately, that “The jury was effectively permitted to have a portion of the jury charge in the jury room during deliberation to the exclusion of the remainder of the charge . . .” See Respondent’s Brief at page 29.

The Circuit Court memorialized its normal procedure of sending the entire jury charge with the jury into the jury room for deliberations stating as follow:

Ladies and Gentlemen, we’re going to send you back into the jury room. We will be sending back all of the instructions, along with all the exhibits.

Appendix 2, page 340, line 9 to 12.

Respondent twice again argues in its Brief that the City Ordinance was sent back with the jury for consideration “to the exclusion of the remainder of the Court’s charge” (Respondent’s Brief at page 36-37) and “to the exclusion of the remainder of the Court’s instructions” (Respondent’s

Brief at page 37). Those representations are simply inaccurate.

Additionally, regarding Ordinance 159.10 Respondent omitted the fact that Plaintiff requested a directed verdict instruction for the Circuit Court to find that the Ordinance was violated. Respondent's counsel objected. The Circuit Court declined to give the directed verdict instruction indicating that applying facts to the law was a jury question. The discussion relating to the jury charge was as follow:

The Court: On the top of 14 we've taken out the first paragraph. Is there an objection to that?

Mr. Kasserman: There is an objection that. . . I'm asking you to find that this code section was violated.

Ms. Arnold: And, Your Honor, I strongly object. . .

The Court: I think that this would be the situation where the Clerk was applying facts to the law, and that's a jury question, which is why we're moving forward. Go ahead. But you're now on the record with that objection, which you weren't before.

Mr. Kasserman: Thank you.

Respondent omitted the facts that during the arguments on jury instructions that Petitioner, Albert Postlewait, Jr., abandoned his claim for past and future wage loss as he had fully mitigated his wage loss and limited his request for damages to his lost pension benefits; that the instructions were changed and that there was no objection by counsel for the City of Wheeling to the jury instructions that permitted damages for "the loss of back pension benefits alone, separate from wages." See Respondent's Brief at 29. Appendix 2, 10/21/10, page 274, line 13 to page 280, line 14 and page 284, line 10 to page 285, line 9.

Respondent's Brief at page 38 states, "In particular, witness after witness was questioned

about whether Mr. Postlewait was an ‘in-house employee’ under the Ordinance.” However, during Petitioner’s case in chief there were only three (3) witnesses that were asked about whether Mr. Postlewait was “in-house” (1) Albert Postlewait, Jr., who was asked one (1) question (Appendix 2, 10/20/10, page 97, line 16 to 18); (2) David Denham, the former Human Resources Director of the City of Wheeling, who was asked a total of four (4) questions (Appendix 2, 10/20/10, page 157, line 20 to page 158, line 23); and (3) witness Anthony Peace, the Supervisor of the Vehicle Maintenance Department of the City of Wheeling, who was asked a total of three (3) questions (Appendix 2, 10/20/10, page 251, line 8 to page 253, line 5).

To the third of these three questions asked of Mr. Peace, the Circuit Court sustained the City of Wheeling’s objection and there was no response permitted. Appendix 2, 10/20/10, page 252, line 23 to page 253, line 5. However, on cross examination counsel for the City of Wheeling asked witness Anthony Peace for an explanation of the term “in-house.” Appendix 2, 10/20/10, page 265, line 1 to line 20.

Also significantly omitted from Respondent’s Statement of the Case is that Respondent, the City of Wheeling, in its case in chief presented questions to two (2) City of Wheeling supervisory employees concerning what was meant by the term “in-house.” The first was questioning by Respondent’s counsel to Russell Jebbia, Director of Public Works for the City of Wheeling. Appendix 2, 10/21/10, page 150, line 24 to page 152, line 5.

Counsel for the City of Wheeling then inquired in its case in chief of David Denham, the former Human Resources Director, regarding the meaning of “in-house.” Appendix 2, 10/21/10, page 173, line 23 to page 175, line 21.

Respondent’s Statement of the Case omits the fact that the term “in-house” is not defined in

the Ordinances of the City of Wheeling.

Counsel for the City of Wheeling on page 39 of its Brief accuses Petitioner's counsel of "an utter lack of candor to the Court" by neglecting to point out Ordinance 159.18(g) regarding the "relevant" definition of "employee" which refers to persons in the "unclassified service" . . . "except for those in the Fire and Police Departments." Counsel for Albert Postlewait, Jr. argues that Ordinance 159.18(g) is therefore inapplicable as Albert Postlewait, Jr.'s position with the Police Force was a classified position and the equipment mechanic position to which he applied was a classified position. Respondent's witness, David Denham, its former Human Resources Director, confirmed that the application of "in-house" employees had nothing to do with whether an employee was classified or non-classified answering the following questions presented by counsel for Respondent:

Q. And it has nothing to do with being a classified employee or a non-classified employee?

A. Definitely not . .

Appendix 2, 10/21/10, page 175, line 22 to line 24.

Also omitted from Respondent's Brief is the fact that defense counsel's belief that Albert Postlewait, Jr. was an unclassified employee in the police group was corrected by David Denham, former Human Resources Director, who responded to Respondent's counsel's question as follows:

Q. And Mr. Postlewait would have been an unclassified employees (sp) in the police group?

A. No, actually, he would have been a classified employee.

Appendix 2, 10/21/10, page 177, line 13 to line 16.

The serious allegation of Albert Postlewait, Jr.'s counsel's violation of the general duty of candor to the Court should only be made when it can be proved by a preponderance of evidence, not upon Respondent's counsel's confusion concerning the facts of the case. See Gum v. Dudley, 202 W.Va. 476, 505 S.E.2d 391, 403 (1997).

Summary of Argument

Albert Postlewait, Jr., who was over 50 years of age, presented evidence that he was more qualified for the equipment mechanic position than Gary Weichman, age 18. The City of Wheeling's alleged non discriminatory reason for not hiring Albert Postlewait, Jr. was that Mr. Weichman was a "better fit." The jury and the Circuit Court, believed this to be pretextual. There was evidence that the City of Wheeling was motivated to hire a younger employee and accordingly the jury verdict was proper.

Regarding the allegations of "plain error," there was no error in admitting into evidence the technical procedure Ordinance on hiring classified employees for the City of Wheeling. Further, Respondent erroneously stated that the Circuit Court did not physically give the jury instructions to the jury. The Circuit Court sent the jury instructions into the jury room with the admitted exhibits and expressly noted it in the record. There is no plain error relating to questioning witnesses as to the meaning of "in-house" applicants. There is no definition in the City Code and Respondent presented its own evidence from its own witnesses in its case in chief as the meaning of "in-house" applicants, indicating any error was "invited error." The cross assignments of error should be dismissed.

Statement Regarding Oral Argument and Decision

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 Rev. R.A.P. 19 as the case involves cross assignments of error in the application of settled law and the Respondent is claiming insufficient evidence.

Argument

Respondent's cross appeal has three Cross-Assignments of Error numbered I, II and III. However, its Argument contains four Assignments of Error labeled A, B, C and D. The Roman numeral Assignments of Error and the alphabetically labeled sections are titled differently, however, it appears that Argument section A stands alone whereas Argument section B relates to Cross-Assignment of Error I; Argument section C relates to Cross-Assignment of Error II, and Argument section D relates to Cross-Assignment of Error III. Accordingly, Albert Postlewait, Jr.'s Responsive Argument will follow that format.

- A. THE CIRCUIT COURT'S DENIAL OF A POST TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW AND QUESTIONS OF LAW ARE GENERALLY SUBJECT TO REVIEW *DE NOVO* AND WHEN A JURY IS PERMITTED TO DECIDE QUESTIONS OF LAW, THE PLAIN ERROR DOCTRINE APPLIES (See Respondent's Brief at page 28)

Albert Postlewait, Jr. agrees that regarding the Supreme Court's review of the Circuit Court's denial Respondent's post trial Motion for Judgment as a Matter of Law should be that this Court must view the evidence in a light most favorable to the non moving party, Albert Postlewait, Jr. Albert Postlewait, Jr. agrees that the standard of review concerning legal issues is *de novo*.

Respondent argues that it "assigned as error the Circuit Clerk's allowing the jury to return a verdict for the loss of back pension benefits alone, separate from wages, which represents a legal issue." Respondent's Brief, page 29. Albert Postlewait, Jr. disagrees. It is a function of the jury to award damages. In discrimination claims a jury may award lost wages and employment benefits.

In Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990), also a discrimination claim brought under the West Virginia Human Rights Act, an award that included “\$41,167.99 in back pay and benefits” was approved by the West Virginia Supreme Court of Appeals which remanded the case for further wage calculations. The \$41,167.99 was for back pay and benefits from “October 1981, to August 14, 1985.” Paxton, 184 W.Va. at 244, 400 S.E.2d at 252. On remand additional losses were ordered to be calculated from August 15, 1985, to December 31, 1988. Paxton, 184 W.Va. at 244, 400 S.E.2d at 252, 259.

Regarding an employee’s mechanics lien damages under our West Virginia statute it has been held as follow:

The “value of such work or labor” is contained in West Virginia Code, § 38-2-31(1966) means all compensation contracted to be paid by the employer for the employee’s services regardless of the nature of such compensation.

Syl. Pt. 1, Farley v. Zabata Coal Corp., 267 W.Va. 630, 281 S.E.2d 238 (1981).

The Farley Court explained that the nature of such compensation included “accrued vacation pay, compensation for unused sick leave days or any other fringe benefits.” Farley, 167 W.Va. at 635, 281 S.E.2d at 242. (Emphasis added.)

The Wage Payment and Collection Act also expressly includes pension in the definition of wages, as part of the “fringe benefits” definition.

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. The term “wages” shall also include then accrued **fringe benefits** capable of calculation and payable directly to an employee.

The term “**fringe benefits**” means any benefit provided an employee or group of employees by an employer, or which is required by law,

and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits related to medical and **pension coverage**.

West Virginia Code, § 21-5-1(c)&(d) (Emphasis added).

It should be noted that the City of Wheeling did not make any objection to the instructions that limited the damages to Albert Postlewait, Jr.'s pension benefits. Appendix 2, 10/21/10, page 274, line 13 to page 280, line 14 and page 284, line 10 to page 285, line 9. Further, the City of Wheeling did not object to the Verdict Form that permitted an award of the "Past lost retirement benefits." Appendix 1, page 8. In fact, the Circuit Court announced that "I think Barbara (Arnold) and I have agreed - - oh, oh, okay. Any loss of past retirement benefits-- Appendix 2, 10/21/10, page 283, lines 21 to 23.

Albert Postlewait, Jr. disagrees that the Respondent assigned as error the Circuit Court allowing the jury to return a verdict for the loss of back pension benefits alone, separate from wages. Petitioner does agree that whether wages include the lost opportunity to receive a pension is a matter of law for the Court.

Issues relating to City of Wheeling Ordinance 159.10 and witnesses testifying whether Albert Postlewait, Jr. was an "in-house employee" were not raised at trial. Albert Postlewait, Jr. requests the Supreme Court to note that Respondent admitted in its Brief as follows:

The Respondent acknowledges that these issues were not raised below; however, these issues involve the plain error doctrine.

See Respondent's Brief at page 29.

Albert Postlewait, Jr. agrees regarding the cited law that triggers the application of the "plain error" doctrine but argues that there was no error that was plain.

Respondent acknowledges that Wheeling Ordinance 159.10 “set forth hiring procedures under the Municipal Civil Service system . . .” See Respondent’s Brief at page 29.

Albert Postlewait, Jr. put forth evidence in his case in chief that the procedures were not followed so that the City of Wheeling could engage in age discrimination. Respondent did not object to admitting the Ordinance into evidence. Being a procedural Ordinance it was helpful to the jury to determine whether the City of Wheeling followed its own procedure. Respondent should be precluded from agreeing to admit the evidence and then on appeal, trying to say that the error was plain.

Regarding referral of Albert Postlewait, Jr. as an “in-house employee,” it should be noted that the City of Wheeling Ordinances do not define “in-house employee.” It should also be noted that Petitioner inquired of David Denham, Director of Human Resources, and Anthony Peace, Supervisor of the Vehicle Maintenance Department, concerning the meaning of “in-house” as did Respondent’s counsel. Petitioner’s counsel asked the Circuit Court for a jury instruction directing the jury to find that there was a violation of the procedure relating to “in-house employees” which the Court declined, permitting the jury to determine the fact of whether Albert Postlewait, Jr. was an “in-house employee” or not. Respondent made no request for a ruling as a matter of law, sat back and gambled on the jury verdict. Receiving an adverse jury verdict Respondent now inappropriately argues “plain error.”

Cross-Assignment of Error I

- I. THE CIRCUIT COURT ERRED IN NOT GRANTING THE DEFENDANT’S MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE THE PLAINTIFF FAILED TO PRESENT A *PRIMA FACIE* CASE OF AGE DISCRIMINATION TO THE JURY.

Respondent's Argument B

THE JURY COULD NOT REASONABLY HAVE FOUND AGAINST THE CITY ON THE AGE DISCRIMINATION CLAIM, AS THERE WAS NO EVIDENCE PRESENTED TO SUPPORT A FINDING BUT FOR THE PETITIONER'S AGE, HE WOULD HAVE BEEN HIRED; NOR WAS ANY EVIDENCE PRESENTED THAT THE DEFENDANT'S PROFFERED REASON FOR ITS EMPLOYMENT WAS MERELY PRETEXTUAL.

During the hearing on Respondent's Motion for New Trial the Circuit Court ruled as follows:

I believe that when we had testimony that they wanted to take someone and mold them or put them under their wings, it's a fair thing for the jury to infer that that might be a younger person. And in reality the testimony of the defense's primary witnesses did not satisfy me, as it apparently did not satisfy the jury, that they had reasons other than age to do this, this thing about the fit.

Appendix 2, 12/17/10, page 9, line 23 to page 10, line 7.

The Court memorialized this finding in its Order entered December 30, 2010, stating:

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 Plaintiff's age not to hire him.

Appendix 1, page 4.

As previously noted in the Statement of the Case, Anthony Peace, Supervisor of the Vehicle Maintenance Department, expressly denied having a conversation with mechanic Steve Darrow about having a younger person hired that Mr. Darrow could place under his wing. To the contrary,

Mr. Darrow expressly told the jury that he and Mr. Peace had that conversation. The jury and the Circuit Court apparently did not believe Mr. Peace.

Additionally, the jury and the Circuit Court apparently did not believe David Denham, former Director of Human Resources. The “fit” that the Circuit Court related to was the City of Wheeling’s proffered reason for not selecting Albert Postlewait, Jr., i.e., that age 18 Gary Weichman would be a “better fit. Gary Weichman had worked on engines in high school and worked changing oil during his senior year at a local automobile dealership. Gary Weichman scored an 84 on the standardized Vehicle Maintenance written test. Appendix 2, 10/20/10, page 197, line 10.

Albert Postlewait, Jr. had over 30 years experience working on vehicles and engines, including work in the mines. He scored an 89 on the standardized Vehicle Maintenance written test. Appendix 2, 10/20/10, page 196, line 23 to page 197, line 1.

David Denham, former Director of Human Resources, explained that one of the biggest reasons that he thought Albert Postlewait, Jr. would not “fit in” was that he may not get along with other individuals, specifically naming Carlos Burnside, Wayne Birkett and Jeff Boyd. Appendix 1, 10/20/10, page 148, line 21 to page 150, line 5.

Albert Postlewait, Jr.’s first three witnesses in his case in chief were Carlos Burnside, Wayne Birkett and Robert J. “Jeff” Boyd. Appendix 2, 10/10/10, page 138, line 12 to page 148, line 4.

Mr. Burnside denied telling anyone he had a concern about being able to work with Albert Postlewait, Jr. and denied making any complaints about Albert Postlewait, Jr. Appendix 2, 10/20/10, page 140, line 21 to page 141, line 5.

Mr. Birkett denied telling anyone that he couldn’t work with Albert Postlewait, Jr. or had any animosity toward Albert Postlewait, Jr. Appendix 2, 10/20/10, page 144, line 4 to 10.

Mr. Boyd indicated that he liked Albert Postlewait, Jr. and had never told anyone that he would have a difficulty working with Mr. Postlewait. Appendix 2, 10/20/10, page 147, line 11 to 19.

Albert Postlewait, Jr. made his *prima facie* case by showing that he was more qualified than Mr. Weichman, who was 30 years younger than him. The City of Wheeling's proffered explanation that Mr. Weichman was a "better fit" was based upon allegations that Mr. Postlewait wouldn't get along with other workers, namely Mr. Burnside, Mr. Birkett and Mr. Boyd. Albert Postlewait, Jr. proved that the proffered explanation was a pretext as there was no evidence that Mr. Postlewait failed to get along with anyone.

In disparate treatment cases under the West Virginia Human Rights Act, W. Va. Code, 5-11-9(1992), proof of pretext can by itself sustain a conclusion that the Defendant engaged in unlawful discrimination. Therefore, if the Plaintiff raised an inference of discrimination through his or her *prima facie* case and the fact-finder disbelieves the Defendant's explanation for the adverse action taken against the Plaintiff, the fact-finder justifiably may conclude that the logical explanation for the action was the unlawful discrimination.

Syl. Pt. 5, Skaggs v. Elk Run Coal Co., 198 W.Va. 151, 479 S.E.2d 561 (1996).

Viewing the evidence in a light most favorable to Albert Postlewait, Jr., it is clear that the jury, and the Circuit Court disbelieved the Respondent's explanation and justifiably concluded that Albert Postlewait, Jr. was the victim of unlawful discrimination.

Cross Assignment of Error II

- II. THE CIRCUIT COURT COMMITTED PLAIN ERROR IN ADMITTING INTO EVIDENCE AN ORDINANCE OF THE CITY OF WHEELING IN ADDITION TO INSTRUCTING THE JURY ON THE RELEVANT POINTS OF LAW DERIVED FROM THE ORDINANCE.

Respondent's Argument C

ALLOWING THE JURY ACCESS TO THE CIVIL SERVICE ORDINANCE OF THE CITY OF WHEELING DURING DELIBERATIONS, FOLLOWING INSTRUCTION ON THE SAME ORDINANCE, WAS PREJUDICIAL TO THE CITY.

First and foremost is the fact that Respondent did not object to Petitioner's Exhibit B, City of Wheeling Ordinance 159.10. Appendix 2, 10/20/10, page 156, line 9 to 20. Respondent admits that Ordinance 159.10 "establishes the procedures pertaining to filling the equipment mechanic position." See Respondent's Brief at page 36. Whether the City of Wheeling followed the procedures properly in the Ordinance was left up to the jury to decide as a matter of fact. Albert Postlewait, Jr. did not anticipate that the Respondent would argue this issue as there was no objection to the admission of the Ordinance into evidence. Accordingly, Exhibit B which is a copy of the City of Wheeling Ordinance is not part of the record. However, Exhibit B is quoted verbatim herein as follows:

Every position or employment, unless filled by reinstatement, reduction or transfer, shall be filled in the following manner:

Vacancies in positions in the **classified** service shall be filled so far as practicable by in-house applicants. Filling positions shall be based upon the merit to be approved by tests approved by the Civil Service Commission and upon the superior qualifications of the person promoted, as shown by his/her education, experience, performance record and work history.

The appointing officer shall notify the Civil Service Commission of any vacancy in the service which he/she desires to fill and shall request the certification of eligibles. The Commission shall certify, from the eligible or employment list, the names of the three persons who received the highest rank at preceding examinations.

The Department and/or Division Head, respective supervisor (if applicable) and the Human Resources Director shall interview the

three applicants and recommend to the Appointing Authority the most qualified individual(s) for the vacancy.

The appointing officer shall, in his/her discretion, make an appointment from the three names so certified. Should the appointing officer reject a higher ranked individual for a lower ranked individual, then he/she shall advise the Commission of his/her decision and reasons therefor.

As each subsequent vacancy occurs in the same or another position, precisely the same procedure shall be followed; provided, however, that after any name has been three times rejected in the same list, the name shall be stricken from the list. When there are a number of positions of the same kind to be filled at the same time, each appointment shall be made separately and in accordance with the foregoing provisions. If the number of eligibles on any eligible list is less than three, then those so remaining may be certified and appointments may be made therefrom, until the list is exhausted.

When an appointment is made under the provisions of this section, it shall be for the probationary period of six months, as provided in Section 159.14. Immediate report in writing shall be given to the Commission by the appointing officer, and/or by such other persons as may be designated by the Commission, of all appointments, reinstatements, vacancies, absences or other matters affecting the status of positions or the performance of duties of employees classified under the provisions of this article and all such notices shall be prepared in the manner and form prescribed by the Commission.

City of Wheeling Ordinance 159.10. (Emphasis added.)

Admitting this procedural Ordinance into evidence is not plain error. Pursuant to W.V.R.E. 401, the Ordinance is relevant if it contains the particular complex procedure to be followed by the City of Wheeling in hiring classified employees. Pursuant to W.V.R.E. 402, this relevant evidence is admissible. The City of Wheeling Ordinance is a public record that may be admissible pursuant to W.V.R.E. 1004.

Respondent doesn't argue that admitting the Ordinance into evidence in and of itself was plain error. The Respondent's argument is that admitting the Ordinance into evidence and then failing to provide the jury with the remainder of the instructions of law was prejudicial. See Respondent's Brief at page 36-37.

However, the Circuit Court did provide the jury with the entire jury charge, along with the exhibits. The Circuit Court memorialized this by stating:

Ladies and Gentlemen, we're going to send you back into the jury room. We will be sending back all of the instructions, along with the exhibits.

Appendix 2, page 340, line 9 to 12.

The actual jury instruction that related to the Ordinance was not objected to by Respondent's counsel. It summarized Ordinance 159.10. Appendix 2, 10/21/10, page 309, line 1 to page 310, line 8.

It was not "plain error" for the Court to permit the jury to take the instructions into the jury room. W.V.R.C.P. 51, states, in part, as follows:

The Court may show the written instructions to the jury and permit the jury to take the written instructions into the jury room. (Effective January 1, 1989.)

There was no objection to the admission of the Ordinance into evidence, no objection to the jury instruction and no objection to the jury instructions being provided to the jury in the jury room. Not only does Respondent's "plain error" argument fail, it is factually wrong as the Circuit Court provided the jury with the instructions.

Cross-Assignment of Error III

III. THE CIRCUIT COURT COMMITTED PLAIN ERROR IN PERMITTING

WITNESSES TO TESTIFY CONCERNING WHETHER THE PLAINTIFF WAS AN "IN-HOUSE EMPLOYEE," INsofar AS THAT ISSUE PRESENTED A QUESTION OF LAW FOR THE COURT.

Respondent's Argument D

PERMITTING WITNESSES TO TESTIFY WHETHER THE PETITIONER WAS AN "IN-HOUSE EMPLOYEE" AND, THUS, ALLOWING THE JURY TO DECIDE THAT ISSUE WAS AN IMPROPER DELEGATION OF THE COURT'S RESPONSIBILITY TO THE JURY.

Although City of Wheeling Ordinance 159.10 states, in part, that "Vacancies in positions in the classified service shall be filled so far as practicable by in-house applicants," there is no definition of "in-house" in the City of Wheeling Ordinances.

Albert Postlewait, Jr.'s counsel requested whether Albert Postlewait, Jr. was given any consideration as an "in-house" applicant by asking David Denham, the former Human Resources Director, a total of four questions (Appendix 2, 10/20/10, page 157, line 20 to page 158, line 23) and asking three questions to Anthony Peace, the Supervisor of the Vehicle Maintenance Department. To the third question the Respondent objected to the form of the question and the Circuit Court sustained the objection. Appendix 2, 10/20/10, page 251, line 8 to page 253, line 5. Thereafter, Respondent's counsel cross examined Mr. Peace regarding the explanation of the term "in-house." Appendix 2, 10/20/10, page 265, line 1 to line 20. Accordingly, Respondent also questioned witnesses concerning the issue relating to "in-house employees." After that, during its case in chief, Respondent's counsel presented the testimony of Russell Jebbia, Director of Public Works, concerning what was meant by the term "in-house." Appendix 2, 10/21/10, page 150, line 24 to page 152, line 5. Thereafter during its case in chief Respondent's counsel inquired of David Denham, former Human Resources Director, regarding the meaning of "in-house." Appendix 2, 10/21/10,

page 173, line 23 to page 175, line 21.

Accordingly, if there was any error whatsoever regarding questions relating to “in-house employees,” Respondent’s counsel invited the error. Following the Circuit Court granting Respondent’s objection to a question concerning the meaning of “in-house,” Respondent continued to elicit testimony through cross examination and then elicited testimony from two separate witnesses in its case in chief. Any error was “invited error” upon which this Supreme Court should turn a deaf ear. See State v. Day, 225 W.Va. 794, 696 S.E.2d 310, 318 (2010); Roberts v. Consolidation Coal Co., 208 W.Va. 218, 228, 539 S.E.2d 478, 488 (2000); and State v. Crabtree, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996).

Respondent argues at page 39 of its Brief as follows:

Demonstrating an utter lack of candor to the court, and having section 159.10 admitted into evidence, counsel neglected to point out to the court that the civil service ordinances also contained relevant definitions.

“Employee” for the purpose of Article 159 shall be those persons in the unclassified service as is listed in section 149.18, and those persons appointed to employment positions by the city manager, except for those in the Fire and Police Departments.

Wheeling W.Va. § Code 159.18(g) (Original emphasis.)

This definition of “employee” in Ordinance 159.18(g) does not address the issue of whether an employee is “in-house.” The Municipal Ordinances of the City of Wheeling puts “Classification of Employees” in its ordinance in a single sentence as follows:

The classification of employees is delineated in section 149.18.

City of Wheeling Ordinance 159.06.

Section 149 of the City of Wheeling Ordinances is its Administrative Code which states as

follows:

The employees of the City are divided into the unclassified and classified service.

a. The unclassified service shall comprise the following:

1. City manager, city clerk and finance director.

2. Assistant city manager, public works director, city engineer, fire chief, police chief, city solicitor, assistant city solicitor, judge of municipal court, clerk of municipal court, recreation director, public safety dispatch director, economic and community development director, economic and community development assistant director, building codes official, building inspector, housing programs officer, marketing coordinator, WPCD superintendent, water superintendent, operations superintendent, human resources director and secretary to the city manager.

3. Such persons filling part-time or temporary budgeted positions.

b. The classified service shall include all other employment positions now existing.

c. Status of persons appointed to unclassified position while serving in classified position:

1. Any person appointed after May 13, 1992 to one of the positions in the unclassified service mentioned in subsections (a)(1) or (2) hereof shall

not be retained as a classified member in his/her previous position.

2. Any person appointed prior to May 13, 1992 to one of the positions in the unclassified service mentioned in subsections (a)(1) or (2) hereof, who served in the classified service at the time of appointment to the unclassified position shall, upon termination of tenure in the office in the unclassified service, be retained as a classified member of the department in which the member served prior to appointment in the same capacity in which the member previously served without loss of seniority rights, civil service status or pension rights, provided that the member was in good standing at the time of termination of the unclassified tenure.

David Denham, the former Director of Human Resources for the City of Wheeling, was questioned extensively regarding Ordinance 159.10, 159.06 and 149.18, culminating with his admission that those sections applied “across all areas of the City of Wheeling.” Appendix 2, 10/21/10, page 189, line 14 to page 193, line 24. The final question and answer regarding these code sections were as follows:

- Q. Administrative Code at the top goes across all areas of the City of Wheeling, correct?
- A. Unless otherwise provided in here, that would be the case.

Appendix 2, 10/21/10, page 193, line 19 to 23.

Counsel for Respondent was confused as to Albert Postlewait, Jr.’s status with the City and former Human Resources Director David Denham accurately advised Respondent’s counsel that

Albert Postlewait, Jr. was in the classified service.

Q. And Mr. Postlewait would have been an unclassified employees (sp) in the police group?

A. No, actually, he would have been a classified employee.

Appendix 2, 10/21/10, page 177, line 13 to line 16.

Although Mr. Denham indicated his opinion that Albert Postlewait, Jr., being a policeman, would not be “in-house” when applying for a municipal civil service position, he also explained that the term “in-house” had nothing to do with whether an employee was in the classified or unclassified service in answer to Respondent’s counsel’s question as follows:

Q. And it has nothing to do with being a classified employee or a non-classified?

A. Definitely not.

Appendix 2, 10/21/10, page 175, line 22 to line 24.

Respondent’s counsel at no time raised any issue regarding Wheeling Ordinance 159.18(g) to the Circuit Court. At this Supreme Court level is the first time that it has been raised, and it is raised in conjunction with an allegation of a violation of the general duty of candor to the Circuit Court. This is an unfounded allegation which is not supported by any evidence, only being supported by the confusion of Respondent’s counsel, partially caused by the failure of the Wheeling City Ordinances to define “in-house.” This Supreme Court has suggested that a violation of the general duty of candor to the Court should be proved by a preponderance of evidence. See Gum v. Dudley, 202 W.Va. 476, 505 S.E.2d 391, 403 (1977).

Albert Postlewait, Jr.'s counsel, Ronald Wm. Kasserman, who is personally writing this Brief argues strenuously that there is absolutely no evidence of any violation of a duty of candor to any court whether the Circuit Court or this Supreme Court.

If there had been some objection as the Circuit Court level or Respondent's counsel had raised Ordinance 159.18(g) at any time, this matter would have been addressed. It is certainly not "plain error" and Respondent's Cross-Assignment of Error should be dismissed.

CONCLUSION

Viewing the evidence in the light most favorable to Albert Postlewait, Jr. there was sufficient evidence for a reasonable jury to find that there was unlawful discrimination against him by the City of Wheeling on the basis of his age. The evidence supported the award of damages for his lost opportunity to receive retirement benefits from the Police Force which he could have received if he had been hired as an equipment mechanic. The jury and the Circuit Court were not convinced by the City of Wheeling's principle witnesses regarding the alleged non discriminatory reason for failure to hire Albert Postlewait, Jr. Evidence of pretext was established with the jury, with which the Circuit Court concurred.

There were no objections to Albert Postlewait, Jr.'s Exhibit B, the City Ordinance, and the jury instructions were provided to the jury, without objection by Respondent. Respondent asked questions of its own witnesses during its case in chief regarding the meaning of "in-house employees" which are not defined in the City of Wheeling Ordinances.

Albert Postlewait, Jr. requests this West Virginia Supreme Court of Appeals set aside the Circuit Court's Order entered December 30, 2010, awarding a new trial, that the Judgment Order entered November 19, 2010, be reinstated, and that the case be remanded for further consideration

of Albert Postlewait, Jr.'s Motion for Attorney Fees and Costs, which the Circuit Court originally granted, then determined was moot when it erroneously awarded the new trial. Appendix 1, page 7.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ron Kasserman", written in a cursive style.

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