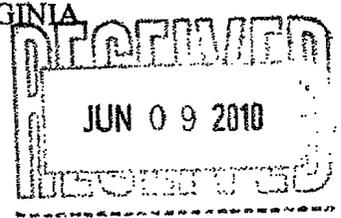


11-0183

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

JEROLD JOHN RICE, JR.,  
Plaintiff,



v.

CIVIL ACTION NO.: 09-C-41  
Judge Thomas C. Evans, III

THE BURKE-PARSONS-BOWLBY CORPORATION, a West Virginia corporation; and STELLA-JONES U.S. HOLDING CORPORATION, a Delaware corporation, and STELLA-JONES INC., a foreign corporation,

Defendants.

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CLERK OF THE SUPERIOR COURT  
JACKSON COUNTY  
WEST VIRGINIA

**JUDGMENT ORDER**

This action came on for trial before the Court and jury, The Honorable Thomas C. Evans, III presiding, and the issues having been duly tried, the jury on May 17, 2010, by *Verdict Form* properly returned (Exhibit #1), found by a preponderance of the evidence that the defendants, The Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation and Stella-Jones, Inc., unlawfully terminated the Plaintiff, Jerold John Rice, Jr., on the basis of his age. Additionally, said jury found by a preponderance of the evidence that the defendants' termination of the Plaintiff was malicious. The jury did not find that: 1) the defendants made Plaintiff an unconditional offer of reinstatement to the same or substantially equivalent job; and 2) that Plaintiff failed to accept the offer of reinstatement; and 3) that nothing occurred between defendants and Plaintiff since March 12, 2009, the date of Plaintiff's termination from employment, that rendered further

association between the parties offensive to the Plaintiff, so as to reasonably justify Plaintiff in refusing to accept any such offer of reinstatement. Further, said jury found that the Plaintiff was entitled to an award of back pay and front pay damages. Finally, said jury did not find that the defendants' actions in this matter warranted an assessment of punitive damages against them.

In accordance with the verdict of the jury, it is therefore ORDERED and ADJUDGED that the Plaintiff, Jerold John Rice, Jr., be granted judgment against defendants Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation and Stella-Jones, Inc., in the following amounts:

Back pay	\$ 142,659.00
Pre-judgment interest on back pay awarded by the Court pursuant to W.Va.Code § 56-6-31 and <i>Rodriguez v. Consolidation Coal Co.</i> , 206 W. Va. 317, 524 S.E.2d 672 (1999).	\$ 11,791.84
Front Pay	<u>\$1,991,332.00</u>
TOTAL	\$2,145,782.84

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The Court finds the right to bring the above action accrued on March 12, 2009.

It is further ORDERED that defendants, The Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation and Stella-Jones, Inc., pay all required court costs.

It is further ORDERED that the Plaintiff in this action receive post-judgment interest from defendants, The Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation and Stella-Jones, Inc., pursuant to W. Va. Code §56-6-31 at 7.00 percent per annum, from May 17, 2010, until paid in full.

To all of which defendants The Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation and Stella-Jones, Inc., object.

The Clerk shall enter this Judgment Order as of this date and shall issue attested copies of this Judgment Order to all counsel of record.

Entered this 4<sup>th</sup> day of June, 2010.

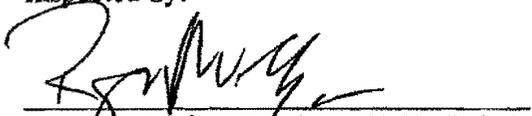
  
THOMAS C. EVANS, III, JUDGE

Prepared by:

  
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CLERK OF COURT  
JACKSON COUNTY  
WEST VIRGINIA

Inspected by:

  
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ENTERED THE 7th DAY OF  
June 2010  
ORDER BOOK 103 . PAGE  
16  
Keith Beuther  
CLERK CIRCUIT COURT

Kevin E. Hyde, Esquire  
Jonathan W. Oliff, Esquire  
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*Counsel for Defendants*

A TRUE COPY, CERTIFIED THIS THE

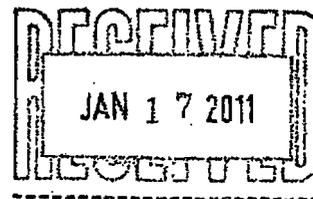
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Keith Beuther  
CLERK CIRCUIT COURT  
OF JACKSON COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

JEROLD JOHN RICE, JR.,

Plaintiff,



v.

CIVIL ACTION NO.: 09-C-41  
Judge Thomas C. Evans, III

THE BURKE-PARSONS-BOWLBY  
CORPORATION, a West Virginia  
corporation; and STELLA-JONES  
U.S. HOLDING CORPORATION,  
a Delaware corporation, and  
STELLA-JONES INC., a foreign  
corporation,

Defendants.

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CIVIL ACTION NO. 09-C-41

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ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL

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On August 13, 2010 came the Plaintiff, Jerold John Rice, Jr., by counsel, and came the defendants, The Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation and Stella-Jones, Inc., by counsel; and the Court proceeded to hear oral argument related to Defendants' Motion For New Trial.

Following a full and complete examination of the motion pending (and the memoranda both for and against), consideration of the evidence of the case, argument of counsel and analysis of the issues presented, the Court makes the following findings of fact and conclusions of law:

1. Defendants have filed a Motion For New Trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. Under that rule, "a new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that

substantial justice has not been done.” State ex rel. Meadows v. Stephens, 207 W.Va. 341, 345, 532 S.E.2d 59, 63 (2000) (quoting In re State Public Building Asbestos Litigation, 193 W.Va. 119, 124, 454 S.E.2d 413, 418 (1994), *cert. denied sub nom.*, W.R. Grace & Co. v. West Virginia, 515 U.S. 1160, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995)). The West Virginia Supreme Court of Appeals has further stated that “[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.” *Id.* (quoting Syl.Pt.4, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958)). It is for that reason that the West Virginia Supreme Court has stated that “a trial judge should rarely grant a new trial.” *Id.*

2. Defendants rely upon three allegations of error in their Motion For New Trial. A review of the law and the facts of this case with respect to each of these areas reveal that the Court did not commit error and that the jury’s verdict should stand.

#### **TESTIMONY OF ROBERT CRANE**

3. Prior to the trial of this matter, the Court held that the testimony of Plaintiff’s witness Robert Crane was admissible pursuant to West Virginia Rule of Evidence 404(b) and McKenzie v. Carroll Intern. Corp., 216 W. Va. 686, 610 S.E.2d 341 (2004), to show the intent and motive of the defendants. West Virginia Rule of Evidence 404(b) states:

(b) *Other crimes, wrongs, or acts.* – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

4. According to Stafford v. Rocky Hollow Coal Co., 198 W. Va. 593, 482 S.E.2d 210 (1996), “[t]he beginning point of any Rule 404(b) analysis is that the party offering the evidence of prior bad acts must first identify the specific and precise purpose for which the evidence is being offered.” *Id.* at 599. Following the satisfaction of this threshold requirement, the trial court must hold an *in camera* hearing to determine that the acts or conduct identified in the threshold inquiry actually occurred. *Id.*; State v. Dolin, 176 W. Va. 688, 347 S.E.2d 208 (1986). “Once the trial court determines by a preponderance of the evidence that the prior bad acts did in fact occur, the trial court must conduct a relevancy analysis under Rules 401, 402, and 104(b) of the West Virginia Rules of Evidence. Stafford, 198 W. Va. at 599; Syl.pt.2, State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994). Then the trial court must conduct a balancing test under W. Va. R. Evid. 403, to ensure that the probative value of the testimony outweighs the danger of unfair prejudice. Stafford, 198 W. Va. at 600. Finally, if satisfied as to the admissibility of the prior bad acts evidence, the trial court should, where requested, give the jury a limiting instruction at the time the evidence is offered explaining the reason for limiting the use of the evidence. *Id.* The Court performed the analysis required by Stafford and McGinnis and admitted the testimony of Mr. Crane.

5. The Court also held that the testimony of Mr. Crane was admissible pursuant to McKenzie. In McKenzie, the West Virginia Supreme Court of Appeals held, in syllabus point 2, that the type of testimony offered by Robert Crane is relevant in a discrimination action.

In an action for employment discrimination, a plaintiff may call witnesses to testify specifically about any incident of employment discrimination that the witnesses believe the defendant perpetrated against them, so long as the testimony is relevant to the type of employment discrimination that the plaintiff has alleged.

216 W. Va. 686.

6. Defendants first argue that the Court erred because it did not hold an *in camera* hearing prior to trial regarding the admissibility of Mr. Crane's testimony as required by Stafford. Defendants' assertion is simply not true. The Court held two such hearings: one on January 7, 2010 and one on April 26, 2010.

7. Defendants further argue that the Court did not comply with Stafford in that it did not find that the events Mr. Crane alleges occurred actually occurred. This is due to the fact that while the Court had sent a letter to counsel informing counsel of its ruling relating to Mr. Crane's testimony, the Order had not yet been entered as of the date of the defendants' Motion For New Trial. The Court has since entered the Order, which states in relevant part:

5. As required by Stafford, the court has conducted an *in camera* hearing in order to determine that the acts or conduct identified in the threshold inquiry actually occurred. After a review of the evidence, including reviewing the videotaped evidentiary deposition of Robert Crane, the court hereby FINDS and CONCLUDES that the acts alleged by Mr. Crane actually occurred. Essentially, the only material portion of Mr. Crane's testimony that defendants contend is incorrect is his assertion that his employment was terminated. Instead, defendants assert that Mr. Crane retired. However, Mr. Crane's testimony makes clear that he was given no choice but to resign. There was no evidence presented to the court which contradicts Mr. Crane's testimony on this issue.

(See Order Granting Plaintiff's Motion In Limine To Admit Testimony Of Robert Crane).

Accordingly, the defendants' second point of error is likewise incorrect.

8. The final point of error alleged by the defendants with regard to Mr. Crane's testimony is that the Court erred in admitting the testimony pursuant to McKenzie because the incident was too dissimilar from the Plaintiff's situation. The defendants made this same argument before trial. In the Court's Order it rejected this argument of the defendants.

7. Defendants' argument that Crane's circumstances when compared to Plaintiff's circumstances are "too dissimilar" to be admissible is unavailing. The argument comes from McKenzie v. Carroll Intern. Corp., supra; where the court held as follows:

Therefore, we hold that in an action brought for employment discrimination, a plaintiff may call witnesses to testify specifically about any incident of employment discrimination that the witnesses believe the defendant perpetrated against them, so long as the testimony is relevant to the type of employment discrimination that the plaintiff has alleged. There are, however, limitations to the admissibility of such evidence. Incidents that are too remote in time or too dissimilar from a plaintiff's situation are not relevant. Stair v. Lehigh Valley Carpenters Local Union No. 600 of United Bhd. of Carpenters & Joiners of America, 813 F.Supp. 1116, 1119 (E.D.Pa.1993). In view of our holding, we find that it was reversible error for the trial court to preclude Mr. McKenzie from calling witnesses to testify about their own alleged experiences with age discrimination by Carroll. (citations omitted).

8. Dissimilar circumstances, sufficient to conclude that Crane's testimony would be irrelevant on the issue of discriminatory motive or intent relating to Plaintiff's termination from employment, would mean circumstances which by reason of logic and common sense fail to make it more likely that defendants' motive and intent in this case was discriminatory. For instance, age discrimination by the defendants occurring ten years ago would mean little to the pending case. In like manner, age discrimination by a

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subsidiary corporation occurring prior to acquisition by Stella-Jones would also be irrelevant even if it was close in time to Plaintiff's termination from employment, because the decision was not made by the management group that terminated Plaintiff from his employment.

9. The "dissimilar circumstances" cited by the defendants between Plaintiff's circumstances and Mr. Crane's circumstances do not relate to anything material regarding whether this evidence tends to prove discriminatory motive or intent. While it is argued that Crane "retired" from his employment, his deposition leaves no question but that he retired only because Stella-Jones told him he had "no choice" but to do so.

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(See Order Granting Plaintiff's Motion In Limine To Admit Testimony Of Robert Crane).

9. It is clear that the Court's prior ruling in this regard was proper, as there are a multitude of similarities between Mr. Crane's situation and that of Mr. Rice. Both Mr. Crane and Mr. Rice were over the age of forty (Mr. Crane was sixty-two at the time of his termination). Mr. Crane was a longtime employee of a company that was taken over by Stella-Jones in 2007-2008, just like Mr. Rice. Mr. Rice had been employed by Stella Jones and its predecessor for approximately twenty-four years. Mr. Crane had been employed by Stella-Jones and its predecessor for approximately thirty-five years. Neither Mr. Crane nor Mr. Rice had any negative evaluations or disciplinary problems whatsoever during their entire careers with their former employers and Stella Jones. Both Mr. Crane and Mr. Rice had received compliments regarding their performance shortly before their terminations. Doug Fox was involved in the decision to terminate Mr. Rice's employment. Mr. Crane was supervised by Mr. Fox and was informed of his termination by an individual who reported directly to Mr. Fox. Mr. Crane's employment was terminated on December 8, 2008. The defendants have admitted that the decision to terminate Mr. Rice's employment was made prior to February 16, 2009. Thus, the two

decisions were in close proximity. Finally, both Mr. Rice and Mr. Crane were replaced by substantially younger individuals. Mr. Rice's replacement was approximately eighteen years younger than him. Mr. Crane's replacement was approximately twenty-two years younger than him.

10. Given the above similarities, defendants' argument that the circumstances of Mr. Crane and Mr. Rice were too dissimilar is, as the Court previously noted, unavailing. Therefore, defendants' Motion For New Trial is denied.

#### OFFER OF EMPLOYMENT

11. In this case the defendants offered the Plaintiff a position of employment with Stella-Jones. If Plaintiff accepted, he would have begun work on February 1, 2010. The December 29, 2009 letter to Plaintiff offering him a Controller position informed the Plaintiff that the offer would only remain open until January 4, 2010. The trial of this matter was originally scheduled for February 9, 2010. The defendants' letter to the Plaintiff indicated he could begin the new job on February 1, 2010, just eight days before trial. Although the defendants indicated that the offer was for "reinstatement", it is clear that the offer was for a new position. In fact, defendants informed the Plaintiff as follows in the letter:

As you know, your former Controller position was eliminated. However, Stella-Jones has very recently begun the process of acquiring a company, adding a new chemical and energy division within Stella-Jones, and is creating a Controller position.

12. After receiving the offer of employment Plaintiff responded to the offer through his counsel. That letter was dated January 4, 2010 and stated:

I spoke with John Rice about your letter of December 29, 2009. Mr. Rice is understandably concerned about job security, given the fact that he was fired after 24 years of excellent service and after numerous members of management have said negative things about him under oath. Is your client willing to enter into a written contract of employment with John Rice which would state that he could only be terminated in the future for misconduct?

Your letter does not mention past and future bonuses or back pay.

Please feel free to call so we can discuss these matters.

13. Defendants responded through a letter from their counsel, Mr. Oliff, on January 11, 2010. The letter did not respond to Plaintiff's concerns raised in his January 4, 2010 letter. After not receiving a response regarding his concerns, Plaintiff, through his counsel, sent defendants another letter. It stated as follows:

In my letter to you of January 4, 2010, I explained that Mr. Rice "is understandably concerned about job security, given the fact that he was fired after 24 years of excellent service". Consequently, I asked in that letter if your client was willing to enter into a written contract of employment with John Rice which would state that he could only be terminated in the future for misconduct. In your letter to me of January 11, 2010, you did not respond to Mr. Rice's request. Please let me know your client's response.

14. Plaintiff did not receive any further correspondence from defendants related to the new offer of employment. Plaintiff's questions and concerns over the new position were never clarified by defendants in writing via a written contract of employment or otherwise. Plaintiff's position is that it is clear from the circumstances of the offer that defendants were simply trying to cut off Plaintiff's back and front pay and were uninterested in actually employing him. They gave him a few short days (over a

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holiday weekend) to respond to the new offer. Then the defendants refused to provide critical details concerning the new offer.

15. Defendants argue that simply making this new job offer, coupled with the Plaintiff's failure to accept it within a few short days, serves to cut off any back pay or front pay award in this case. Defendants further argue that the Court erred when it permitted the jury to consider awarding damages to the Plaintiff beyond February 1, 2010. In Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992) the West Virginia Supreme Court indicated that an employer "may toll the continuing of back pay damages by unconditionally offering the plaintiff the job that was previously denied." Essentially, a defendant may toll the damages by offering reinstatement. However, reinstatement was not offered to Mr. Rice. Plaintiff was offered a completely new position with new duties associated with the purchase of an out-of-state company. Importantly, the jury found that the defendants did not make an unconditional offer of reinstatement to the Plaintiff to the same or substantially equivalent position. (See Verdict Form).

16. Because this circumstance involves offering the Plaintiff a new position as opposed to offering him reinstatement to his former position, the defendants are actually arguing that the Plaintiff has failed to mitigate his damages by not immediately accepting the new position. Of course, "the burden of raising the issue of mitigation is on the employer." Syl.Pt.10, Maxey v. McDowell County Bd. Of Educ., 212 W. Va. 668, 575 S.E.2d 278 (2002). Thus, mitigation is an affirmative defense. The West Virginia Supreme Court has held:

Once a claimant establishes a prima facie case of discrimination and presents evidence on the issue of

damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of diligence shifts to the defendant. The defendant may satisfy his burden only if he establishes that: (1) there were substantially equivalent positions which were available; and (2) the claimant failed to use reasonable care and diligence in seeking such positions.

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Syl.Pt.4, Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990).

17. Accordingly, the defendant had to establish to the jury that the new position offered to the Plaintiff was “substantially equivalent” to his former position. Courts have held that “the substantial equivalent of the position from which the claimant was discriminatorily terminated must afford the claimant virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.”

Rasimas v. Michigan Dept. of Mental Health, 714 F.2d 614, 624 (6<sup>th</sup> Cir.,1983); *see also* Williams v. Albemarle City Bd. of Ed., 508 F.2d 1242, 1243 (4<sup>th</sup> Cir. 1974).

18. The defendant also had to establish to the jury that the Plaintiff “failed to use reasonable care and diligence” in failing to immediately accept this new position. Obviously these are questions for the jury to determine when giving consideration to the defendants’ assertion that the Plaintiff has failed to mitigate his damages. It is the Plaintiff’s position that he acted reasonably in attempting to determine whether the new position was substantially equivalent as well as what the terms of the employment would be.

19. Significantly, the defendants’ argument that the Court committed error ignores the jury’s finding in this case that the Plaintiff’s discharge was malicious (and therefore Plaintiff had no duty to mitigate his damages). (See Verdict Form).

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer. Syl.Pt.2, Mason County Bd. of Educ. v. State Sup't of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982).

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Syl.Pt.3, Paxton, 184 W.Va. 237.

20. Therefore, where a wrongful discharge is malicious, a plaintiff has no duty to mitigate his damages. This exception was most recently referenced by the West Virginia Supreme Court of Appeals in Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009). In that case the jury awarded the plaintiff \$513,410 in front pay damages with no reduction for any alleged failure to mitigate damages. The Court upheld the entirety of the front pay award, relying upon the "malicious discharge" exception. "When an employee is wrongfully discharged and the employer's actions in discharging said employee are malicious, the employee has no duty to mitigate his/her damages." *Id.*

21. Therefore, as the jury found the Plaintiff had no duty to mitigate his damages, he obviously had no duty to accept the position of employment offered by the defendants.

22. Even if the Court were inclined to agree with defendants' representation that the offer of a new position to Plaintiff was somehow a "reinstatement", the defendants' Motion would still be denied. This is because the jury found that further association between the parties would be offensive to the Plaintiff and would reasonably

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justify Plaintiff's refusal to accept any offer of reinstatement. (See Verdict Form). The Plaintiff's situation was similar to the facts in Epstein v. Kalvin-Miller Interi., Inc., 139 F.Supp.2d 469, 483 (S.D.N.Y. 2001), where just before trial (as here) the defendant raised the possibility of reinstatement rather than an award of front pay. The Court in Epstein held that "[t]his attempt by the defendant to reconcile with the plaintiff was too belated to restore the trust that is necessary for a reasonable employee-employer relationship." *Id.* In this case, the jury could have reasonably found that defendants' sudden offer of a new position on the eve of trial is similarly too belated to restore the trust necessary for the Plaintiff and the defendants to maintain a reasonable employee-employer relationship. The West Virginia Supreme Court has held that an employee need not accept reinstatement if "circumstances are such as to render further association between the parties offensive or degrading to the employee." Voorhees v. Guyan Machinery Co., 191 W. Va. 450, 457, 446 S.E.2d 672, 679 (1994) (citing Teich v. Aetna Indus. Corp., 168 N.E.2d 114 (N.Y. 1960); Steranko v. Inforex, 362 N.E.2d 222 (1977)). Given the evidence, a reasonable jury could have found further association between the parties offensive or degrading.

23. Finally, defendants argue that the Court erred by permitting the jury to consider the issue instead of cutting off the Plaintiff's damages claim before trial. In support of this argument the Plaintiff cites Peters for the proposition that "Whether the facts of a particular case warrant an award of front pay in lieu of reinstatement is a decision committed to the circuit court . . ." 680 S.E.2d at 813. In Plaintiff's Complaint he sought front pay, not reinstatement. The defendants never asked the Court to determine whether reinstatement was the preferred remedy in this case. It only asked the

Court to cut off Plaintiff's back and front pay due to the alleged offer of reinstatement. The Court properly ruled that was a question for the jury.

24. Because the facts in this case support the jury's conclusion that the offer of employment to the Plaintiff was not an unconditional offer of reinstatement to the same or substantially equivalent job and that the Plaintiff was reasonably justified in refusing to accept the employment, defendants' Motion must be denied. The jury's verdict in this regard is not against the clear weight of the evidence.

#### THE "MALICIOUS" DISCHARGE EXCEPTION

25. The Court submitted an instruction to the jury based upon syllabus point 2 of the Mason County case.

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Syl.Pt.2, Mason County Bd. of Educ. v. State Sup't of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982).

26. In this case, the jury decided that the discharge of the Plaintiff by the defendants was malicious. Therefore, the jury did not reduce the Plaintiff's back pay or front pay award.

27. The defendants first argue that the Mason County ruling does not apply in the context of front pay, only back pay. Defendants' assertion is incorrect. In Seymour v. Pendleton Community Care, 209 W.Va. 468, 549 S.E.2d 662 (2001), the West Virginia

Supreme Court explicitly applied the above exception regarding the duty to mitigate damages in the context of front pay. In Seymour, the trial court reduced a front pay award because it concluded that the plaintiff failed to mitigate her damages. The West Virginia Supreme Court of Appeals reinstated the full front pay award after it concluded that because her discharge was malicious, plaintiff had no duty to mitigate her damages. Thus, it is clear that the exception to the duty to mitigate damages is applicable to front pay as well as back pay.

28. The defendants further argue that Mason County was wrongly decided as it deprives defendants of their constitutional right to due process as it is punitive in nature. However, the Plaintiff's front and back pay awards in this case were compensatory in nature. Importantly, the West Virginia Supreme Court of Appeals recently reaffirmed its holding in Mason County in Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791, (2009). In Peters, the jury awarded the plaintiff \$513,410 in front pay. The jury also awarded the plaintiff \$1,000,000 in punitive damages. The defendant argued that the jury improperly failed to consider the plaintiff's failure to mitigate his damages. The Court found that "Rivers Edge's malicious misconduct in terminating Mr. Peters' employment in retaliation for his application for and receipt of workers' compensation benefits absolves Mr. Peters of the duty to mitigate his damages in this case." 224 W.Va. at 184. The Court then also affirmed the award of punitive damages to the Plaintiff. Clearly, the Mason County rule is still the law in the State of West Virginia. Further, removing one of the defendants' defenses due to their malicious actions is not tantamount to a deprivation of due process. Accordingly, the Court declines the defendants' invitation to ignore the law in West Virginia.

29. For all the above reasons, the Court hereby DENIES the Defendants' Motion For New Trial. It is clear that this case involved conflicting testimony and circumstances and that it was fairly tried under proper instructions. It is also clear that the verdict is not plainly contrary to the weight of the evidence.

The objections of the defendants are preserved.

The Clerk is directed to send certified copies of this Order to all parties or counsel of record.

ENTER: *Jan. 11, 2011*  
~~December 28, 2010~~

*Thomas C. Evans*

THOMAS C. EVANS, III, CIRCUIT JUDGE

FILED  
JAN 12 2011  
CLERK OF COURT

ENTERED THE 12<sup>th</sup> DAY OF

JAN 2011

ORDER BOOK 105 PAGE

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*Bruce W. Dellkarr*  
CLERK CIRCUIT COURT

A TRUE COPY, CERTIFIED THIS THE

JAN 12 2011

*Bruce W. Dellkarr*  
CLERK CIRCUIT COURT  
OF JACKSON COUNTY, WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**THE BURKE-PARSONS-BOWLBY CORPORATION,**  
a West Virginia corporation; and  
**STELLA-JONES U.S. HOLDING CORPORATION,**  
a Delaware corporation, and **STELLA-JONES,**  
**INC.,** a foreign corporation,

Petitioners/Defendants below,

v.

Appeal No. \_\_\_\_\_  
(Circuit Court Civil Action No. 09-C-41)

**JEROLD JOHN RICE, JR.,**

Respondent/Plaintiff below.

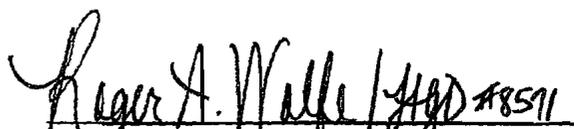
**CERTIFICATE OF SERVICE**

I, Roger A. Wolfe, counsel for Petitioners/Defendants, certify that service of the attached "Notice of Appeal" has been made this 27<sup>th</sup> day of January, 2011 upon the following by mailing a true and exact copy thereof in the United States mail, postage prepaid, as follows:

Mark A. Atkinson, Esquire  
Atkinson & Polak, PLLC  
P. O. Box 549  
Charleston, West Virginia 25322-0549

Keith Brotherton, Clerk  
Circuit Court of Jackson County  
Jackson County Courthouse  
100 Court Street  
P. O. Box 427  
Ripley, West Virginia 25271

Frank Vesel, Official Court Reporter  
c/o Circuit Judges Office  
P. O. Box 800  
Ripley, West Virginia 25271

  
Roger A. Wolfe (WVSE #4011)