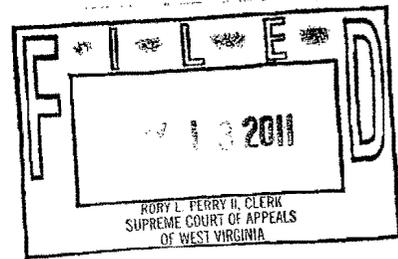


**In the Supreme Court of Appeals of West Virginia**

**Docket No. 11-0183**



**THE BURKE-PARSONS-BOWLBY  
CORPORATION, STELLA-JONES  
U.S. HOLDING CORPORATION,  
AND STELLA JONES INC.,**  
Petitioners

v.

Appeal from a final order  
of the Circuit Court of  
Jackson County (09-C-41)

**JEROLD JOHN RICE, JR.,**  
Respondent

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**Petitioners' Brief**

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## **ASSIGNMENTS OF ERROR**

A NEW TRIAL IS WARRANTED BASED UPON THE COURT'S ERROR IN ADMITTING TESTIMONY AND EVIDENCE OF PRIOR BAD ACTS

A NEW TRIAL IS WARRANTED BASED ON THE COURT'S DECISION TO ALLOW EVIDENCE OF PLAINTIFF'S DAMAGES BEYOND FEBRUARY 1, 2010 AND THE VERDICT AWARDING PLAINTIFF FRONT PAY DAMAGES

THE APPLICATION OF *MASON COUNTY* TO ALLOW AN UNMITIGATED AWARD OF FRONT PAY AND BACK PAY DAMAGES IS AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS REQUIREMENTS

## **STATEMENT OF THE CASE**

This appeal involves three assignments of error requiring that Petitioners Burke-Parsons-Bowlby Corporation, Stella-Jones U.S. Holding Corporation, and Stella-Jones Inc. be given a new trial on the claim of Respondent Jerold John Rice, Jr. for age discrimination. By denying Petitioners' motion for new trial based on the assignment of error set forth herein, the Circuit Court abused its discretion. Each of the assignments of error were substantial and individually or collectively warrant the judgment and order in the underlying proceedings be vacated and a new trial ordered.

### **Rice's Employment With BPB**

The Burke-Parsons-Bowlby Corporation ("BPB") produced pressure treated wood products. (A.R. v.6 at 193) (references to the appendix record – the

contents of which were agreed to by the parties – are set forth with the appropriate volume and page number as follows, “A.R. v. \_\_ at \_\_”). Its principal product was railroad ties and the remainder of the business was comprised of fence posts, fence boards, guardrail posts and log homes. (A.R. v.6 at 193-194). BPB was headquartered in Ripley, West Virginia. (A.R. v.6 at 235-236). In addition to its headquarter operations, BPB operated five manufacturing facilities. (A.R. v.3 at 185-186).

Rice was employed by BPB in 1985 and as a staff accountant and credit manager. (A.R. v.3 at 168-169). Throughout his employment Rice worked at the Ripley headquarter offices. In August, 2006, Rice became BPB’s controller when its controller, Melvin Cobb, retired. (A.R. v.4 at 36). Rice remained in the controller position until the position was eliminated in March, 2009. (A.R. v.4 at 59; A.R. v.5 at 109).

#### Stella-Jones Acquires BPB

Stella-Jones Inc. is a Canadian corporation. (A.R. v.3 at 183-184). Stella-Jones U.S. Holding Corporation is a Delaware Corporation which owns and operates entities in the United States. The entities are referred to herein collectively as “Stella-Jones.” Effective April 1, 2008 Stella-Jones acquired BPB through a share acquisition. (A.R. v.4 at 4-5; A.R. v.5 at 181-182). Immediately following the acquisition, Stella-Jones continued to employ everyone who had

been employed by BPB, including Rice. (A.R. v.5 at 182). Rice was 46 years old. After the acquisition, Rice's primary responsibility was to reconcile matters related to the acquisition and to complete the fiscal year end audit for BPB. (A.R. v.4 at 7; A.R. v.5 at 187-188). Rice reported to Doug Fox, Senior Vice-President, Engineering and Operations for Stella-Jones. (A.R. v.4 at 6; A.R. v.5 at 156-157, 186). Rice also remained responsible for managing the finance department in Ripley and was tasked with learning the Stella-Jones accounting systems. (A.R. v.4 at 9-10). In May, 2008, one month after the acquisition was completed, Rice applied for employment and interviewed with another company, Brick Street, because he felt overworked. (A.R. v.4 at 6, 8-9).

In August, 2008, Stella-Jones decided to have someone from its Canadian headquarters take a more senior role in the U.S. finance operations. (A.R. v.5 at 78-80, 187). This was designed to facilitate the integration of the operations of the BPB and Stella-Jones operations, including Stella-Jones' two U.S. plants. (A.R. v.5 at 78-81). Eric Vachon ("Vachon") became Vice-President, Finance U.S. Operations. (A.R. v.4 at 14-15). Vachon supervised Rice. (A.R. v.5 at 80, 187). Rice remained as the controller and continued to have responsibility for leadership and supervision of the BPB finance team in Ripley. (A.R. v.4 at 15; A.R. v.5 at 80). Rice supervised an assistant controller, George Weekly ("Weekly"), a payroll manager, Lori McKown ("McKown"), a credit manager

Stacy Rhodes (“Rhodes”), and an accounting clerk, James Kiser (“Kiser”). (A.R. v.4 at 8, 11-12, 25, 48; A.R. v.5 at 80).

In September, 2008, Rice and Vachon met with Jeremy Stover (“Stover”), a Certified Public Accountant, to discuss employment opportunities for Stover with BPB. (A.R. v.4 at 39-40; A.R. v.5 at 86-87). Rice had known Stover for several years through Stover’s work as an external auditor for BPB. (A.R. v.4 at 34-35, 43; A.R. v.5 at 84; A.R. v.6 at 168-169). Rice himself had approached Stover about coming to work for BPB in 2006 and earlier in 2008 while Stover was working on the year-end audit and closing out the books for BPB after the acquisition by Stella-Jones. (A.R. v.4 at 36-39; A.R. v.5 at 189-190; A.R. v.6 at 170-171). On both occasions, Stover indicated he could not ethically discuss employment opportunities because of the pending audit and independence issues. (A.R. v.4 at 37, 39; A.R. v.6 at 171-172).

In December, 2008, after Stover’s work on the audit was no longer an impediment, Vachon decided to offer Vachon a position as an assistant controller and offered Stover the position in January, 2009. (A.R. v.1 at 331-333; A.R. v.4 at 44; A.R. v.5 at 87-88; A.R. v.6 at 173-175, 178). Stover was hired and started working in February, 2009, in a new assistant controller position along with Weekly. (A.R. v.4 at 44-45; A.R. v.5 at 91-92; A.R. v.6 at 178). Like Weekly,

Stover was supervised by and reported to Rice, the controller. (A.R. v.4 at 45; A.R. v.5 at 91-92; A.R. v.6 at 183).

In February, 2009, Vachon spoke with Stella-Jones' CFO about the structure of the BPB finance department as it was operating in Ripley. (A.R. v.5 at 99-100). Vachon discussed eliminating the controller position in BPB's finance department and retaining only the assistant controller positions. (A.R. v.5 at 100). Vachon decided to restructure the finance department and eliminate the controller position because he was already having to take on Rice's leadership responsibilities for the BPB finance department. (A.R. v.5 at 100-102). Given the work he was performing and leadership he was providing, Vachon did not see the need for a controller level position at BPB. (A.R. v.1 at 317-318; A.R. v.5 at 104-105). Vachon met with Rice on March 12, 2009, and told him the controller position, and thus his employment, was eliminated. (A.R. v.4 at 59; A.R. v.5 at 109). Vachon never replaced the controller position in Ripley. (A.R. v.5 at 129, 198). Vachon himself, assumed the leadership role for the BPB finance department. (A.R. v.5 at 101, 126, 198; A.R. v.6 at 187-188, 199-200).

#### Procedural History

Rice filed suit against BPB on April 9, 2009 in the Circuit Court of Jackson County, West Virginia alleging age discrimination under the West Virginia Human Rights Act. (A.R. v.1 at 4). Specifically, Rice claimed he was

terminated based on his age, 47. BPB denied that Rice's age played any role in his termination and further, asserted legitimate reasons for eliminating Rice's controller position and terminating his employment. (A.R. v.1 at 9). The trial of this case occurred in Jackson County, West Virginia Circuit Court from May 12, 2010 through May 17, 2010. The jury ruled in favor of Rice and awarded him a total of \$2,113,991.00. (A.R. v.1 at 215-217). The jury did not assess punitive damages. (A.R. v.1 at 217).

The following facts are pertinent to the three assignment of errors in this appeal.

First, Rice identified Robert Crane as a witness in this case in his pre-trial memorandum. (A.R. v.1 at 74). The Circuit Court subsequently allowed Rice's counsel to take Crane's deposition. Crane was an employee of Stella-Jones who worked as the plant manager of the Stella-Jones facility in Arlington, Washington State, which produced utility poles. (A.R. v.3 at 47, 186-187; A.R. v.4 at 129-132; A.R. v.5 at 165-166). He was 60 years old when he was hired by Stella-Jones. (A.R. v.4 at 167). Crane was employed by Stella-Jones since 2007, well over a year before Stella-Jones acquired BPB. (A.R. v.4 at 166).

In December, 2008 Buddy Downey ("Downey"), Crane's boss, told Crane he was being given early retirement. (A.R. v.4 at 149-150; A.R. v.5 at 167, 202-203). Crane told his crew that he was retiring and entered into a separation

agreement with Stella-Jones, which paid him a year's salary. (A.R. v.4 at 159, 164-165, 303). Crane later filed a charge of discrimination with the Equal Employment Opportunity Commission claiming that he was forced to retire because of his age and an alleged disability. On December 4, 2009 BPB filed a Motion *in Limine* to Exclude All References to Other Lawsuits or Claims. (A.R. v.1 at 26). BPB sought to exclude any testimony or references relating to Crane's allegations, which had been referenced in a deposition in this case.

Rice filed a Motion *in Limine* to Admit Testimony of Robert Crane on April 21, 2010 and a separate Notice of Intent to Introduce Evidence of Prior Acts of Defendants on March 26, 2010. (A.R. v.1 at 95, 123). The Circuit Court heard argument on Rice's motion *in limine* on April 26, 2010. (A.R. v.2 at 449). On May 4, 2010 the Circuit Court denied BPB's Motion *in Limine* and granted Rice's Motion *in Limine* to Admit Testimony of Robert Crane. The Circuit Court did so by issuing a letter to counsel for both parties. (A.R. v.1 at 181). However, the Circuit Court did not make a specific finding that the alleged prior bad act – that Crane's employment was terminated because of his age – had actually occurred. (A.R. v.1 at 181-182).

Additionally, at the April 26, 2010 hearing, the Circuit Court heard argument from all counsel as to whether Crane's testimony was relevant under *MacKenzie v. Carroll International Corp.*, 216 W.Va. 686, 610 S.E.2d (2004).

Although the letter to counsel directed Rice's counsel to prepare an order carrying the ruling into effect, aside from the Circuit Court's letter, no order was entered prior to trial. (A.R. v.1 at 2). At trial, BPB objected to the admission of Crane's testimony because the Circuit Court had not found by a preponderance of the evidence that the bad act alleged by Crane (that he was forced to retire because of his age) had actually occurred. (A.R. v.4 at 113). BPB objected to the introduction of Crane's testimony and proffered Downey's testimony for the Circuit Court's consideration but no additional evidence was considered and no additional findings were made. (A.R. v.4 at 115-116, 124-125). Over BPB's objection, portions of Crane's videotaped deposition testimony were played for the jury at trial, thus allowing the jury to hear Crane testify that Stella-Jones discriminated against him because of his age. (A.R. v.4 at 127).

The second assignment of error relates to an unconditional offer of reinstatement BPB made to Rice. In December, 2009, BPB made an unconditional offer of reinstatement to Rice to return to work as a controller for a company Stella-Jones was acquiring. (A.R. v.1 at 284; A.R. v.4 at 70-74; A.R. v.5 at 116-118). Stella-Jones offered Rice the same pay and benefits he was earning when last employed. (A.R. v.1 at 284; A.R. v.4 at 74-75; A.R. v.5 at 120). Rice would be assigned to work in the same corporate office in Ripley, West Virginia where he had previously worked. (A.R. v.1 at 284; A.R. v.5 at 121). Stella-Jones had begun

the process of acquiring a company, adding a new chemical and energy division, and was creating a controller position to support the acquisition. (A.R. v.5 at 117-118, 199-200). BPB's counsel forwarded the unconditional offer of reinstatement to Rice's counsel on December 29, 2009. (A.R. v.1 at 285).

Rice and his counsel never inquired about the details of the controller position, never indicated Rice objected to coming back to work for BPB, and never asked for additional time to consider the offer. (A.R. v.4 at 77, 87-88). Instead, on January 4, 2010, Rice's counsel sent BPB's counsel a letter inquiring about back pay and requesting a written employment contract stating he could only be terminated for misconduct. (A.R. v.1 at 286; A.R. v.4 at 77-80). BPB's counsel responded that it was possible for Stella-Jones to extend the time for Rice to accept the offer, but that a written employment contract was a separate issue from the unconditional offer of reinstatement. (A.R. v.1 at 296; A.R. v.4 at 86-88). Rice's only further response was another letter inquiring about a written contract of employment stating he could only be terminated in the future for misconduct. (A.R. v.1 at 297; A.R. v.4 at 91-92). Rice's only real response to the unconditional offer of reinstatement was to ask for a guaranteed employment contract where he could only be discharged for misconduct, something no other BPB employee had; Rice was previously employed at-will "just like everyone else." (A.R. v.4 at 79-80, 91).

On January 6, 2010, BPB filed a Motion *in Limine* to Limit Evidence of Back Pay and Front Pay Damages because BPB had offered Rice an unconditional offer of reinstatement. (A.R. v.1 at 77). On April 15, 2010 the Circuit Court conducted a hearing on BPB's motion. (A.R. v.2 at 414). Rice presented no testimony or other evidence of special circumstances justifying his rejection of the unconditional offer of reinstatement. In support of the motion, BPB submitted deposition testimony of Rice and Vachon and attempted to present live testimony at the hearing from Vachon to explain the unconditional offer of reinstatement. (A.R. v.1 at 77-94; A.R. v.2 at 421-424, 437-438). The Circuit Court did not allow Vachon to testify. The Circuit Court determined it was a jury question as to whether reinstatement was appropriate. (A.R. v.2 at 446-447). The Circuit Court entered an order denying BPB's motion on May 10, 2010. The consequence of the Circuit Court's decision was to allow evidence at trial regarding Rice's back pay and front pay damages beyond the offered date of reinstatement.

The third assignment of error relates to a *Mason County* jury instruction which, as evident by the jury's award, allowed the jury to impermissibly award excessive front pay damages. Following a jury trial in May, 2010, the jury reached a verdict, awarding Rice \$142,659.00 in back pay and \$1,991,332.00 in front pay, without regard to BPB's unconditional offer of

reinstatement or Rice's actual income or reasonably expected future earnings. (A.R. v.1 at 215-217). The jury did not find that BPB's conduct warranted an assessment of punitive damages. (A.R. v.1 at 217). The Circuit Court entered a judgment in accordance with the verdict on June 4, 2010. (A.R. v.1 at 231).

BPB filed a motion for new trial addressing the issues raised on appeal. (A.R. v.1 at 218). At an August 13, 2010 hearing the Circuit Court indicated it was going to deny the motion for new trial. (A.R. v.2 at 482). The Circuit Court also specifically addressed the admission of Crane's testimony, determining, "if there was an oversight on the question of whether the plaintiff had proved by a preponderance of the evidence that Mr. Crane had been subjected to age discrimination ... I'll make the finding now by preponderance of the evidence." (A.R. v.2 at 492). Over BPB's objection the Court indicated it was going to enter a proposed order submitted by Rice, which contained additional analysis and findings under *Stafford v. Rocky Hollow Coal Co.*, 198 W. Va. 593, 482 S.E.2d 210 (1996) that were clearly not contained in the Court's ruling prior to trial. (A.R. v.2 at 493-497). The Circuit Court entered an Order Granting Plaintiff's Motion *in Limine* To Admit Testimony of Robert Crane on August 16, 2010, which contained the additional analysis and findings, three months after trial. *Compare* (A.R. v.1 at 256) *with* (A.R. v.1 at 181).

The Circuit Court entered an Order denying BPB's motion for new trial on January 12, 2011. (A.R. v.1 at 266). BPB timely filed a Notice of Appeal on January 27, 2011.

### **SUMMARY OF ARGUMENT**

First, Crane's testimony as to his own alleged age discrimination should not have been admitted. At trial in May 2010, the Circuit Court permitted the jury to hear Crane's testimony, a Stella-Jones plant manager in a state across the country, who did not work for BPB and reported to a different supervisor than Rice, and whose employment ended under entirely different circumstances. Following an April 26, 2010 motion hearing, the Circuit Court issued a ruling permitting Crane's testimony at trial in a May 4, 2010 letter to counsel. However, the Circuit Court's ruling did not make the necessary, specific finding that the alleged prior bad act – that Crane's employment was terminated because of his age – had actually occurred. *See Stafford v. Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210 (1996). Crane's testimony was permitted at trial over BPB's objection. In allowing Crane's testimony without conducting an in camera *Stafford* hearing during trial and making a finding under W. Va. R. Evid. 404(b) that the alleged prior bad acts actually occurred, the Circuit Court committed reversible error that requires a new trial.

The Court also erred in finding Crane's testimony was admissible under *McKenzie v. Carroll International Corp.*, 216 W.Va. 686, 610 S.E.2d 341 (2004), which limits the admissibility of other employees' allegations of discrimination. Crane's allegations regarding his allegedly forced retirement were too dissimilar from Rice's situation. Crane worked at a facility across the continent from Rice. Crane had a different supervisor than Rice. Crane was in an entirely different position than Rice. Crane was substantially older than Rice. All of these facts indicate that Crane's employment situation was entirely different than Rice's and therefore was not relevant. Indeed, it was prejudicial. Accordingly, Crane's testimony should not have been admitted because it was irrelevant and any minor probative value of the testimony was substantially outweighed by the undue prejudice and confusion of the issues it presented. Permitting Crane's testimony and related argument by Rice at trial was clearly erroneous and warrants a new trial.

Second, BPB's unconditional offer of reinstatement should have precluded an award of back pay or front pay damages in this case after February 1, 2010, the effective date of the offer. *See, e.g., Dobson v. Eastern Associate Coal Corp.*, 188 W.Va. 17, 422 S.E.2d 494 (1992); *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982). Rice received an unconditional offer of reinstatement on December 29, 2009. The offer provided he

would return to work at the same rate of pay, benefits, position and location on February 1, 2010. Rice did not accept the offer even though it would have returned him to work as a controller with BPB in the corporate office where he had worked with the same pay and benefits.

Despite Rice's failure to present any evidence to meet his burden of pointing to special circumstances why he was justified in refusing the unconditional offer of reinstatement, the Circuit Court denied BPB's Motion *in Limine* to Exclude Back Pay and Front Pay Damages. Instead of ruling on whether reinstatement was or was not appropriate, the Circuit Court submitted the issue to the jury. The effect of the ruling was to allow the jury to consider – and ultimately award – front pay past February 1, 2010. This, despite the fact that reinstatement is the preferred remedy and “[w]hether the facts of a particular case warrant an award of front pay in lieu of reinstatement is a decision committed to the circuit court...” See *Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 680 S.E.2d 791, 813 (2009)(emphasis added). The jury should not have been permitted to consider any evidence regarding Rice's back pay or front pay damages beyond February 1, 2010, the offered date of reinstatement. Thus, the Circuit Court's decision to allow the jury to determine whether reinstatement was appropriate and the resulting verdict awarding Rice lost wages beyond February 1, 2010, were clearly erroneous and warrant a new trial.

Finally, as to the third assignment of error, the Circuit Court gave the jury an instruction based on *Mason County Board of Education v. State Superintendent of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982). The instruction permitted the jury to ignore any earnings Rice actually received or would have reasonably earned if it found that BPB acted maliciously. The jury ultimately found that BPB acted maliciously and awarded Rice \$1,991,332.00 in front pay damages, without consideration of any offset based on Rice's actual income or reasonably expected future earnings. Applying and extending *Mason County* to allow an unmitigated, unlimited award of back pay and front pay damages amounts to a punitive damage award without any of the constitutional due process constraints that must be applied to awards of punitive damages.

*Mason County* involved only an award of back pay damages and cannot be applied in such a manner that allows a punitive front pay award against BPB, depriving BPB of its constitutional due process rights. The *Mason County* Court clearly did not contemplate its holding would permit a punitive award of unmitigated front pay to an employee in an amount equal to almost twenty years of wages beyond trial. Finally, to the extent that it permits an award of unmitigated back pay damages for a punitive purpose, without any due process protections regarding the award, *Mason County* itself was wrongly decided. The jury's award in this case of \$142,659 in back pay damages, without the required consideration

of Rice's actual income or reasonably expected earnings, has denied BPB's due process rights.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is necessary in this case pursuant to Rule of Appellate Procedure 18(a) because the dispositive issues have not all been authoritatively decided and oral argument will significantly aid the decisional process. The case involves constitutional questions regarding the validity of a court ruling and accordingly, should be set for Rule 20 argument.

### **ARGUMENT**

I. **A NEW TRIAL IS WARRANTED BASED UPON THE COURT'S ERROR IN ADMITTING TESTIMONY AND EVIDENCE OF ALLEGED PRIOR BAD ACTS.**

At trial the jury heard the testimony of Robert Crane, a plant manager in Arlington, Washington, who alleged he had been fired by Stella-Jones because of his age. Before it admitted Crane's testimony at trial, the Circuit Court never determined by a preponderance of the evidence that Crane had been fired because of his age. Further, Crane's testimony should not have been admitted because it was irrelevant and any minor probative value of the testimony was substantially outweighed by the undue prejudice and confusion of the issues it presented. Specifically, Crane was not employed by Burke-Parsons-Bowlby and did not work in West Virginia where Rice worked. The Circuit Court's clear error in admitting Crane's testimony warrants a new trial.

A. THE CIRCUIT COURT ERRED IN ALLOWING CRANE'S TESTIMONY AT TRIAL WITHOUT CONDUCTING AN *IN CAMERA STAFFORD* HEARING AT TRIAL AND MAKING A FINDING UNDER RULE 404(B) THAT THE ALLEGED PRIOR BAD ACTS ACTUALLY OCCURRED.

In determining that the testimony of Robert Crane was admissible, the Circuit Court did not make the findings required by W. Va. R. Evid. 404(b) and the West Virginia Supreme Court of Appeals decision in *Stafford v. Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210 (1996). Before admitting testimony of prior bad acts, the court must:

- (1) Find that the prior bad acts occurred by a preponderance of the evidence after conducting an in camera hearing;
- (2) After determining by a preponderance of the evidence that the prior bad acts did in fact occur, conduct a relevance analysis under Rules 401, 402, and 104(b);
- (3) Conduct a balancing test under Rule 403 to ensure that the probative value of the testimony outweighs the danger of undue prejudice; and
- (4) If satisfied as to the admissibility of the prior bad acts, where requested, give a limiting instruction explaining the reason for limiting the use of the evidence.

*See Stafford*, 198 W.Va. at 599; *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992). Admission of testimony regarding prior bad acts in violation of the substantive and procedural requirements of W. Va. R. Evid. 404(b) constitutes reversible error requiring a reversal of the verdict and a new trial. *See Stafford*, 198 W.Va. at 600.

BPB initially filed a motion *in limine* to exclude Crane's testimony from trial and Rice later moved to admit Crane's testimony. (A.R. v.1 at 26). Following counsels' argument at an April 26, 2010 motion hearing, the Court issued a ruling regarding Crane's testimony in a May 4, 2010 letter to counsel for the parties. Although the Circuit Court's ruling examined the relevance of Crane's testimony, it did not make a finding by the preponderance of the evidence that the alleged prior bad act – that Crane's employment was terminated because of his age – had actually occurred. (A.R. v.1 at 181-182).

At trial, BPB renewed its objection to the admission of Crane's testimony and proffered the testimony of Buddy Downey, Crane's supervisor, in order for the Circuit Court to determine and make a finding whether, by a preponderance of the evidence, Crane had been terminated because of his age as required by *Stafford*. (A.R. v.4 at 113). The Circuit Court noted BPB's continuing objection but allowed Crane's testimony without conducting an *in camera* hearing at trial or making any additional finding.

Significantly, at the time of BPB's objection at trial, the Circuit Court had not made a finding by a preponderance of the evidence that Crane had either been forced to retire because of his age or had been fired because of his age. Three months after trial, well after BPB filed its motion for new trial (based in part on the improper admission of Crane's testimony) Rice submitted a proposed Order

Granting Plaintiff's Motion in Limine to Admit Testimony of Robert Crane. Tellingly, Rice's proposed order – essentially an attempt to cure the error that had occurred – contained analysis and findings under *Stafford* that the Circuit Court did not make in its May 4 letter to counsel. (A.R. v.1 at 256; A.R. v.2 at 493-497). The Circuit Court entered Rice's proposed order over BPB's objection. The Circuit Court's justification at the August 13, 2010 hearing that "if there was an oversight on the question of whether the plaintiff had proved by a preponderance of the evidence that Mr. Crane had been subjected to age discrimination ... I'll make the finding now by preponderance of the evidence," was wholly insufficient to satisfy the requirements necessary before evidence of prior bad acts can be admitted under this Court's decision in *Stafford*. (A.R. v.2 at 492).

Under *Stafford*, if the trial court does not find that the prior bad acts occurred by a preponderance of the evidence following an *in camera* hearing, then the evidence should be excluded. Accordingly, this Court's ruling in *Stafford* requires that BPB's request for a new trial be granted. 198 W.Va. at 600.

B. THE CIRCUIT COURT ERRED IN FINDING CRANE'S TESTIMONY WAS ADMISSIBLE UNDER *MCKENZIE* AND THAT ITS PROBATIVE VALUE OUTWEIGHED ITS PREJUDICIAL EFFECT.

Another factor mandates that Crane's testimony should not have been admitted. Over BPB's objection, the Circuit Court permitted the witness to testify regarding his own claim that Stella-Jones discriminated against him and terminated

his employment because of his age. The Circuit Court did not adhere to the limitations of the admissibility of other employee's allegations of discrimination, namely the requirement of near identity to be admissible. *See McKenzie v. Carroll International Corp.*, 216 W.Va. 686, 610 S.E.2d 341 (2004). As with Crane's situation, incidents that are too remote in time or too dissimilar from a plaintiff's situation are not relevant and should not be admitted. *Id.* (emphasis added). Recently, this Court specifically found that allegations of age discrimination by an employee were properly excluded at trial where the decision to discharge that employee could not be logically or reasonably tied to the decision to discharge the plaintiff. *See Wells v. Key Communications, L.L.C.*, 226 W.Va. 547, 703 S.E.2d 518 (2010).

In *Wells*, the plaintiff alleged she and another employee were both employed in Charlestown, West Virginia; within approximately seven months of one another; they were terminated on the same date; they were both in a protected class based upon their respective ages of fifty-two and fifty-six; and both were allegedly terminated under the same general management and decision making owners for the same alleged pretextual reason of financial difficulties. *Wells*, 226 W.Va. 547, 703 S.E.2d 518, 523 (2010). Despite the "various general commonalities" that existed, the Court found that the record established the discharges were too dissimilar to be relevant under *McKenzie*. "The decisions to discharge the plaintiff

and the other employee were two separate and distinct decisions that were made by different supervisors in connection with two separate departments.” *Wells*, 226 W.Va. 547, 703 S.E.2d 518, 523 (2010).

First, beyond Rice and Crane’s general allegation of age discrimination, their circumstances are even less similar than the employees’ situations in *Wells*; to be sure, the factual dissimilarities between Crane and Rice are abundant and pronounced. While the employees in *Wells* both worked at the same location in Charleston, West Virginia, Crane worked as a plant manager in a Stella-Jones plant located across the country in Arlington, Washington and Rice worked as a controller in the corporate office finance department in Ripley. The employees in *Wells* were terminated on the same day as part of the same reduction in force, however, Crane and Rice’s employment ended approximately three months apart for different reasons. Crane was offered early retirement by his supervisor, Downey, decided to enter into a separation agreement, and received severance from Stella-Jones. Rice was told he was being terminated because his position had been abolished and did not sign a separation agreement with BPB.

Second, as in *Wells*, Crane and Rice’s employment ended as a result of two separate and distinct decisions by different supervisors in different departments.

The decision to discharge Mr. Nelson from employment could not logically or reasonably be tied to the decision to discharge the Appellant from employment, as the decisions to discharge the Appellant and Mr. Nelson were two separate and distinct decisions

that were made by different supervisors in connection with two separate and distinct departments at West Virginia Wireless.” *Wells*, 226 W.Va. 547, 703 S.E.2d 518, 523 (2010).

Vachon, who made the decision to eliminate Rice’s controller position in BPB’s finance department, did not play any role in the end of Crane’s employment with Stella-Jones. Instead, Crane’s boss, Downey, told Crane that he was being offered early retirement from his plant manager role at the Arlington pole production plant. The Circuit Court’s ruling allowing Crane’s testimony and its order denying BPB’s motion for new trial completely and improperly ignored evidence that there was no common decision maker regarding the end of Rice’s employment with BPB and Crane’s employment with Stella-Jones.

Based on these differences it is clear that Crane’s allegations were too dissimilar and were not relevant to Rice’s claim. Additionally, just as the court found in *Wells*, the evidence pertaining to the other employee’s (Crane) allegation was not relevant to assessing the employer’s alleged discriminatory intent against the plaintiff (Rice). As a result, under *McKenzie* and *Wells*, the Circuit Court committed clear error in admitting Crane’s testimony.

Further, Crane’s testimony was highly prejudicial to BPB – exactly the type of evidence Rule 403 is intended to exclude from trial. Even if Crane’s testimony had some slight probative value, W. Va. R. Evid. 403 precluded its introduction at trial because “its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury.” Indeed, Crane’s testimony was offered to imply (not so subtly) a pattern or practice of discrimination based on two unrelated events. In Rice’s opening and closing arguments this is exactly how this evidence was used. Counsel for Rice argued that the jury should recall that Crane had been fired by Stella-Jones in what was a clear effort to prejudice the jury against BPB based on alleged actions taken against another employee and to cause the jury to infer discrimination against Rice from a wholly unrelated employee and situation. (A.R. v.3 at 144; A.R. v.7 at 61). The evidence both before and at trial established that the end of Crane’s employment had no connection to Rice’s employment or termination. Thus, Crane’s testimony was unduly prejudicial, confused the issues and served to mislead the jury and should have been excluded as requested in BPB’s pretrial motion. Permitting Crane’s testimony and related argument by Rice at trial was clearly erroneous and warrants a new trial.

II. **A NEW TRIAL IS WARRANTED BASED ON THE CIRCUIT COURT’S DECISION TO ALLOW EVIDENCE OF PLAINTIFF’S DAMAGES BEYOND FEBRUARY 1, 2010 AND THE VERDICT AWARDING PLAINTIFF FRONT PAY DAMAGES**

In this case, BPB made an unconditional offer of reinstatement for Rice to return to work on February 1, 2010. If Rice had accepted the offer, he would have returned to work in a controller position with BPB with the same pay, same benefits, and in the same corporate office in Ripley as when his employment

was terminated. Rice's response was to ask for a guaranteed employment contract where he could only be discharged for misconduct, something no other BPB employee had. Rice never accepted BPB's unconditional offer of reinstatement. Accordingly, BPB filed a Motion *in Limine* to Exclude Back Pay and Front Pay Damages Following Effective Date of Offer of Unconditional Reinstatement. (A.R. v.1 at 77). BPB's unconditional offer of reinstatement should have precluded an award of back pay or front pay damages after February 1, 2010, the effective date of the offer. *See, e.g., Dobson v. Eastern Associate Coal Corp.*, 188 W.Va. 17, 422 S.E.2d 494 (1992); *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982).

The Circuit Court deferred ruling on BPB's Motion *in Limine* at the January 7, 2010 pre-trial conference until a separate hearing because the issue would depend on additional evidence. At an April 15, 2010 hearing on BPB's motion, however, the Circuit Court declined to hear testimony from BPB's witnesses regarding the unconditional offer of reinstatement and Rice presented no evidence of special circumstances why he could not return to work as a controller for BPB. Following the April 15, 2010 hearing, the Court denied BPB's Motion *in Limine*, finding that it was a jury question whether there were special circumstances which would have prevented Rice from going back to work.

Absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential back pay liability. *Ford Motor Co.*, 458 U.S. at 241. Rice presented no evidence of special circumstances in response to BPB's motion *in limine* or at the April 15, 2010 hearing that would justify his rejection of BPB's unconditional offer of reinstatement. *See Hopkins v. Shoe Show of Virginia, Inc.*, 678 F.Supp. 1241 (S.D. W.V. 1988)(precluding potential award of back pay damages beyond unconditional offer of reinstatement where plaintiff did not point to special circumstances giving plaintiff reason to reject offer). In fact, no testimony from Rice was presented to dispute the company's need to hire a new controller as a result of its recent acquisition, to speak to whether he wanted to return to work, or to address the offer of reinstatement whatsoever.

In *Dobson*, the Supreme Court of Appeals examined *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985), which interpreted the federal Age Discrimination in Employment Act (the "ADEA"):

The inclusion of equitable relief strengthens the conclusion that Congress intended victims of age discrimination to be made whole by restoring them to the position they would have been in had the discrimination never occurred.

Front pay, an award for future earnings, is sometimes needed to achieve that purpose. Ordinarily, an employee would be made whole by a back pay award coupled with an order for reinstatement. Reinstatement is the preferred remedy to avoid future lost earnings, but reinstatement may not always be feasible in all cases.

*Dobson*, 422 S.E.2d at 501.

The Supreme Court of Appeals further recognized, “[o]bviously, as the *Maxfield* court stated, reinstatement would be the preferred remedy.” *Dobson*, 422 S.E.2d at 502. “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...” *See Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 680 S.E.2d 791, 813 (2009)(emphasis added). However, in this case the Court did not rule on whether reinstatement was or was not appropriate and instead submitted the issue for the jury’s determination. The effect of this decision was to allow the jury to decide front pay was appropriate instead of reinstatement, and the amount of front pay awarded.

Based on the facts of this case and the argument articulated in BPB’s Motion *in Limine*, the Circuit Court should have determined that Rice was not justified in refusing BPB’s unconditional offer of reinstatement, precluding the jury from even considering an award of front pay past the date of reinstatement. *See Giandonato v. Sybron Corp.*, 804 F.2d 120 (10th Cir. 1986)(court determined employee was not justified in refusing offer of reinstatement where employee’s wife was ill and he did not want to work under former supervisor); *Cowan v. Standard Brands, Inc.*, 572 F.Supp. 1576 (N.D. Al. 1983)(court determined employee cannot refuse an offer of reinstatement and avoid the result of *Ford Motor* because his feelings were hurt or because he did not feel the offer was bona

fide); *Fiedler v. Indianhead Touch Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982)(finding employee cannot refuse an offer of reinstatement based on personal reasons that he desired to have the EEOC investigation continue, that he was traumatized by the death of his wife, and that he did not wish to forego his new job). At the time of the April 15, 2010 hearing on BPB's motion, Rice had not testified or presented any evidence why he did not want to return to work for BPB as a controller. Additionally, BPB proffered witness testimony regarding the offer of reinstatement and the controller position offered to Rice. Despite all these shortcomings, the Circuit Court ceded the decision on the entitlement to, and amount of, front pay to the jury rather than ruling, as a matter of law, whether front pay could even be awarded.

Even the evidence presented by Rice at trial failed to establish a triable issue regarding his rejection of BPB's unconditional offer of reinstatement. Although Rice understood the controller job offer would pay him the same salary and benefits he received when he had been employed by BPB, he and his counsel never inquired about the details of the controller position, never indicated Rice objected to coming back to work for BPB, and never asked for additional time to consider the offer. (A.R. v.3 at 74-75; A.R. v.4 at 77, 87-88). Rice testified his primary concern was that he wanted to make sure he would not be fired without cause. (A.R. v.3 at 79, 84, 91). This was also reflected in Rice's only response to

the offer of reinstatement, his counsel's letters asking for an employment contract stating he could only be terminated for misconduct. (A.R. v.1 at 286, 297). Despite his previous at-will employment with BPB, Rice acknowledged that he would not even entertain the controller job offer unless he received an employment contract that he could not be fired without cause. (A.R. v.3 at 79-80).

*Ford Motor Co.* and *Dobson* require a terminated employee to accept an employer's unconditional offer of reinstatement to the same or substantially equivalent position or forfeit the right to pay beyond the effective date of the offer; reinstatement does not require providing additional benefits, such as the employment contract requested by Rice that would change his previous at-will employment status. *Ford Motor, Co.* 458 U.S. at 231-233; *Dobson*, 188 W.Va. 17, 422 S.E.2d 494. Rice's disagreement with the legal effect of the court's holdings in *Ford Motor Co.* and *Dobson* if he did not accept the unconditional offer of reinstatement fails to provide a basis for avoiding their application. Thus, Rice's belief that the job offer "was a scheme, a sham, a ploy simply to limit damages. It was not a sincere, gainful job offer," is inapposite. (A.R. v.3 at 89). Moreover, undisputed evidence established Stella-Jones had begun the process of acquiring a company, adding a new chemical and energy division, and was creating a controller position to support the acquisition. (A.R. v.5 at 117-118, 199-200).

Further, this case is nothing like those cases finding triable issues regarding an employee's rejection of an unconditional offer of reinstatement, which typically involve harassment or discrimination raising a serious question of whether an employee's return to the workplace would be reasonable. *See e.g., Lewis v. Fed. Prison Indus.*, 953 F.2d 1277, 1280 (11th Cir. 1992)(involving harassment and discriminatory conduct while working for former employer). Rice's age discrimination claim was based solely on BPB's termination of his employment; he did not claim anything else was done to him, such as comments about his age or other mistreatment . (A.R. v.3 at 59-62). He got along with his colleagues and liked the people he worked with during the time he was employed by BPB. (A.R. v.3 at 63-64). Rice did not suffer any physical or mental injuries as a result of his employment with or termination from BPB. (A.R. v.3 at 64-65). Likewise, this is not a case where further association between the parties would be offensive or degrading to Plaintiff. *Compare with Voorhees v. Guyan Machinery Co.*, 191 W.Va. 450 (W.Va. 1994) (involving a non-compete case where employee's former employer threatened competitor that hired employee, threatened to get employee fired from competitor if he did not renegotiate non-compete agreement employee, and competitor fired employee).

Under a proper application of *Ford Motor Co.* and *Dobson*, BPB's unconditional offer of reinstatement should have cut off Rice's back pay and front

pay damages as of February 1, 2010. Accordingly, any evidence regarding Rice's back pay or front pay damages beyond that date, including the extensive testimony on front pay by Rice's economic expert, should not have been admitted at trial. *See Parker v. SUMCO USA*, 2009 WL 2864580 (S.D. Ohio 2009)(granting motion *in limine* excluding evidence concerning back pay damages beyond date of unconditional offer of reinstatement and all evidence concerning front pay damages). The Circuit Court's decision to submit the issue whether reinstatement was appropriate to the jury in this case, as well as the jury verdict determining Rice was entitled to lost wages beyond February 1, 2010 (essentially for the next 20 years), were clearly erroneous and warrant a new trial.

**III. THE APPLICATION OF MASON COUNTY TO ALLOW AN UNMITIGATED AWARD OF FRONT PAY DAMAGES IS AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS REQUIREMENTS**

The jury was instructed at trial, based on *Mason County Board of Education v. State Superintendent of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982), that if it found BPB acted maliciously in discriminating against Rice, Rice had no duty to mitigate his damages. (A.R. v.1 at 206-207; A.R. v.7 at 45). The jury was also instructed that it was not required to reduce an award of back pay or front pay damages by any earnings and benefits Rice had received or would have reasonably earned. (A.R. v.1 at 207-209; A.R. v.7 at 45-49). This application of and extension of *Mason County* to allow an unmitigated, unlimited award of back pay

and front pay damages such as the award in this case amounts to a punitive damage award without any of the due process constraints applied to awards of punitive damages.

When deciding whether to award punitive damages a jury must consider several factors:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

Syl. Pt 3, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

The Due Process Clause requires a jury to measure the entitlement to punitive damages by the amounts of harm suffered and prohibits “grossly excessive or arbitrary punishments.” *See Perrine v. E.I. Du Pont De Nemours and Co.*, 2010 WL 1170661 (W.Va. 2010), *citing State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). West Virginia’s “punitive damages jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).” *See Syl. Pt. 7, Alkire v. First Nat. Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996). The court must also examine the amount of the award under the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992).

In this case, based on its finding that BPB acted maliciously, the jury was permitted to award Rice \$1,991,332.00 in front pay damages, without consideration of any offset based on Rice’s actual income from his new employment or his reasonably expected future earnings. It completely disregarded Rice’s actual employment with Johnson Insurance and his actual income of over

\$40,000 annually, not including benefits he was entitled to. (A.R. v.3 at 68-69).

The jury's award of almost 20 years of front pay goes far beyond the purpose of compensatory damages, making Rice whole for his actual or reasonably expected losses as a result of BPB's conduct, and is tantamount to punitive damages.

Indeed, the standard articulated by *Mason County* for determining if an employer's action are malicious is essentially a punitive damages standard:

On the other hand, in those cases where an employee has been wrongfully discharged out of malice, by which we mean that the discharging agency or official willfully and deliberately violated the employee's rights under circumstances where the agency or individual knew or with reasonable diligence should have known of the employee's rights, then the employee is entitled to a flat back pay award. 170 W. Va. 632, 295 S.E.2d 719, 725 (1982) (emphasis added).

The jury in the instant case was instructed:

"where there are circumstances that warrant an inference of malice, willfulness, or wanton disregard of the rights of others, or where there is a wrong done with criminal indifference to the civil obligations affecting the rights of others, punitive damages may be awarded. In this regard, you are further instructed that the foundation for an inference of "malice" may be the general disregard or the rights of others, rather than an intent to injure the individual." (A.R. v.7 at 52).

Although the jury found BPB acted maliciously in connection with the termination of Rice's employment, justifying an unmitigated award of \$1,991,332.00 in front pay damages, the jury also did not find that BPB's purported malicious actions warranted an assessment of punitive damages – presumably because BPB had been punished enough by the large front pay award.

Although the jury received instruction required by *Garnes* regarding punitive damages, no such instruction was given regarding a finding that BPB's conduct was malicious for mitigation purposes. (A.R. v.7 at 210-213). Additionally, none of the constitutional due process rights applicable to a punitive damage awards are available to BPB to protect it against an excessive front pay award.

Significantly, *Mason County* involved only an award of back pay damages:

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, , 170 W. Va. 632, 295 S.E.2d 719 (1982)(emphasis added).

On the other hand, in those cases where an employee has been wrongfully discharged out of malice, by which we mean that the discharging agency or official willfully and deliberately violated the employee's rights under circumstances where the agency or individual knew or with reasonable diligence should have known of the employee's rights, then the employee is entitled to a flat back pay award., 170 W. Va. 632, 295 S.E.2d 719, 725 (1982) (emphasis added).

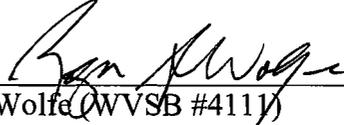
Thus, *Mason County's* specific holding was that an employee wrongfully discharged out of malice would be entitled to a flat back pay award. In fact, the plaintiff was entitled to reinstatement in *Mason County* – front pay was never an issue before the Court. Clearly *Mason County* did not contemplate its holding would permit a punitive award of unmitigated front pay to an employee for almost

twenty years beyond trial. *Mason County* does not justify, and cannot be applied in such a manner that allows a front pay award that is punitive in nature and deprives BPB of its constitutional due process rights.

To the extent it allows an award of unmitigated back pay damages for a punitive purpose, without any due process protections regarding the award even the *Mason County* decision itself was wrongly decided and should be reversed by this Court. For the very same reasons BPB's due process rights were denied by the jury's punitive award of front pay, the jury's award in this case of \$142,659 in back pay damages, without the required consideration of any mitigation issues, has denied BPB's due process rights. Additionally, deterrence is a goal of punitive damages and *Mason County* recognized that its rationale for allowing unmitigated back pay awards in cases involving malicious conduct was "to discourage malicious discharges." 170 W. Va. 632, 295 S.E.2d 719, 725 (1982). Accordingly, the jury should not have been permitted to award back pay or front pay without considering Rice's actual income or reasonably expected earnings, and a new trial is warranted in this matter.

## CONCLUSION

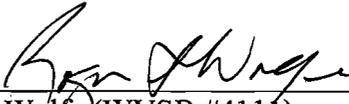
The error in this case is substantial and there is no question that one or all of the errors resulted in a jury verdict that went against the clear weight of the evidence. In such circumstances, a new trial is warranted, and given the multitude of issues presented this is the result justice requires.

Signed:   
Roger A. Wolfe (WVSB #4111)  
Counsel of Record for Petitioners

### CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2011, true and accurate copies of the foregoing **Petitioners' Brief** and **Petitioners' Appendix, Volumes 1 through 7**, were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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