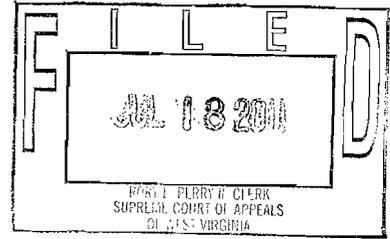


**In the Supreme Court of Appeals of West Virginia**

**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' Reply Brief**

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## STATEMENT OF THE CASE

### Vachon's Decision to Eliminate the Controller Position

Eric Vachon ("Vachon"), Vice-President, Finance U.S. Operations, supervised Rice. (A.R. v.4 at 14-15; A.R. v.5 at 80, 187). In February, 2009, Vachon spoke with Stella-Jones' CFO about eliminating the controller position in BPB's finance department in Ripley and retaining only the assistant controller position. (A.R. v.5 at 99-100). Vachon made the decision 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). On March 12, 2009, Vachon met with Rice and told him the controller position, and thus his employment, was eliminated. (A.R. v.4 at 59; A.R. v.5 at 109).

### Robert Crane

In December, 2008 Buddy Downey ("Downey"), Robert Crane's ("Crane") 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). 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 had not previously considered Rice's motion and heard argument on Rice's motion 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 issuing a letter to counsel for both parties that did not make any finding that the alleged prior bad act – that Crane's employment was terminated because of his age – had actually occurred; no order was entered prior to trial. (A.R. v.1 at 2, 181-182).

BPB objected to the admission of Crane's testimony at trial, 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). The Court did not consider any additional evidence, including BPB's proffer of Downey's testimony, and no additional findings were made. (A.R. v.4 at 115-116, 124-125). Instead, portions of Crane's videotaped deposition testimony were played for the jury over BPB's objection, allowing the

jury to hear Crane testify that Stella-Jones discriminated against him because of his age. (A.R. v.4 at 127).

BPB's Objection to *Mason County*

During trial, BPB objected to the application of *Mason County* and the possibility of double recovery of punitive type damages. (A.R. v.6 at 310-312). 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). After the Circuit Court entered a judgment in accordance with the verdict on June 4, 2010 BPB filed a motion for new trial addressing all of the issues raised on appeal, including the application of *Mason County*. (A.R. v.1 at 218, 231). 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 entered an Order denying BPB's motion for new trial on January 12, 2011. (A.R. v.1 at 266).

**SUMMARY OF ARGUMENT**

All three assignments of error raised in this appeal, addressed in great detail in Petitioner's Brief and the instant Reply Brief, substantially and directly impacted the jury's verdict reached at trial. Respondent's Brief (cited as "Rice

Brief”) speciously claims that BPB does “not even allege that the three errors they rely upon in this appeal were instrumental in any way in the jury’s finding of age discrimination.” (Rice Brief at 12). The very basis for this appeal is that the three assignments of error raised by BPB resulted in a jury verdict that went against the clear weight of the evidence.

First, the Circuit Court erroneously permitted a former employee – who worked in a Stella-Jones plant in a different location across the country, in a different role, for a different supervisor – to testify about his own allegations of age discrimination. There is no question the jury’s verdict finding age discrimination in this case was impacted by Crane’s testimony. Indeed, Crane’s testimony was offered to imply a pattern or practice of discrimination based on two unrelated events and Rice’s counsel relied heavily on Crane’s testimony in both opening and closing arguments. (A.R. v.3 at 144; A.R. v.7 at 61). Crane’s testimony was also highly prejudicial to BPB and served to cause unfair prejudice, confusion of the issues, and mislead the jury at trial.

Second, the Circuit Court should have excluded evidence at trial of Rice’s damages beyond February 1, 2020, the date Rice was to be reinstated, as a result of BPB’s unconditional offer of reinstatement. *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). If the Circuit

Court had correctly applied the law and determined reinstatement was appropriate, the jury would never have considered the reinstatement issue and could not have awarded Rice front pay. Any assertion that the Circuit Court's erroneous decision to admit evidence of damages beyond February 1, 2010 did not impact the jury's verdict in this case blatantly ignores the jury's award of lost wages beyond February 1, 2010, including \$1,991,332.00 in front pay. (A.R. v.1 at 215-217).

Next, the application of *Mason County* in this case, which permitted the jury to ignore any earnings Rice actually received or would have reasonably earned based on a finding of malice was erroneous. BPB raised its objection regarding *Mason County* at trial and in its Motion for New Trial following the entry of judgment by the Circuit Court. The punitive, unmitigated award of back pay and front pay damages in this case amounts to a punitive damage award without any of the constitutional due process constraints that must be applied to a punitive damages award. The jury's award of \$142,659 in back pay damages and \$1,991,332.00 in front pay damages without the required consideration of Rice's actual income or reasonably expected earnings, has denied BPB's due process rights.

Finally, Rice's Brief makes several curious assertions that, "defendants concede that there was sufficient evidence before the jury for it to find Mr. Rice was terminated due to his age," and "defendants have not only conceded that Mr.

Rice's employment was terminated on the basis of his age, they also concede that the jury could have reasonably concluded that the termination was done maliciously." (Rice Brief at 12, 14-15, 40). BPB has never made any concessions regarding the jury's verdict finding age discrimination and awarding damages. Rather, BPB challenged the jury's verdict in this case based on the Circuit Court's substantial error in its Motion for New Trial and in this appeal. Moreover, Rice's claim that any error in this case was harmless error completely ignores the impact of the admission of Crane's testimony and evidence of Rice's damages beyond the date of reinstatement, and the application of *Mason County* on the jury verdict. Any one of the errors raised in BPB's appeal resulted in a jury verdict against the clear weight of the evidence and warrant a new trial.

#### **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 CIRCUIT COURT'S ERROR IN ADMITTING TESTIMONY AND EVIDENCE OF ALLEGED PRIOR BAD ACTS.

Prior to admitting Crane's testimony at trial, the Circuit Court never made the finding 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) that the alleged bad act – that Crane had either been forced to retire because of his age or had been fired because of his age – occurred. 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...

*See Stafford*, 198 W.Va. at 599; *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). Rice tries to avoid this reality by arguing “that the Circuit Court simply did not *explicitly* mention this point in its May 4, 2010 letter to the parties.” (Rice Brief at 36). Rice also goes as far as to argue the Circuit Court was not required to make any findings under *Stafford* prior to admitting Crane's testimony: “even if the letter had simply stated that Mr. Crane's testimony would be admissible .. it would be enough.” (Rice Brief at 37). However, the Circuit Court's May 4, 2010 letter made no findings whatsoever that Crane had either been forced to retire because of his age or had been fired because of his age, which was required by *Stafford*.

Rice also attempts to gloss over the Circuit Court's failure to make the required findings prior to admitting Crane's testimony by relying on the Circuit Court's August 16, 2010 Order, prepared three months after trial by Rice's counsel. (A.R. v.1 at 256; A.R. v.2 at 493-497). BPB proffered Downey's testimony at trial so the Circuit Court could make the required finding under *Stafford* if appropriate. However, Downey's testimony was not considered and no additional findings were made prior to the admission of Crane's testimony. Neither Rice nor the Circuit Court are able to correct the Circuit Court's error after the testimony was improperly admitted at trial. 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.

Additionally, the Circuit Court failed to recognize the limitations of the admissibility of other employee's allegations of discrimination espoused by the Circuit Court of Appeals, 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). Incidents that are too remote in time or too dissimilar from a plaintiff's situation are simply not relevant and should not be admitted. *Id.* (emphasis added).

Rice is unable to avoid the application of this Court's recent decision in *Wells*, finding 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). Aside from Rice and Crane's general allegation of age discrimination, their circumstances are even less similar than the employees' situations in *Wells*; rather, there are extensive factual dissimilarities between Crane and Rice.

It is undisputed that 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, not in the same location. Crane and Rice's employment ended approximately three months apart for different reasons, not on the same day in the same reduction in force as in *Wells*. Crane was offered early retirement by his supervisor, Downey; Rice was terminated because his position had been abolished.

Most importantly, as in *Wells*, Crane and Rice's employment ended as a result of two separate and distinct decisions by different supervisors in different departments. *Wells*, 226 W.Va. 547, 703 S.E.2d 518, 523 (2010). Vachon made the decision to eliminate Rice's controller position in BPB's finance department. There is no evidence or suggestion in this case that Vachon played any role in Crane's termination. Downey made the decision to offer Crane early retirement.

Rice's suggestion that somehow Doug Fox was involved in both decisions, without any record support does not change these facts.

The Circuit Court ignored undisputed 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 in their circumstances, Crane's allegations were too dissimilar and were not relevant to assessing the BPB's alleged discriminatory intent against Rice. Under *McKenzie* and *Wells*, the Circuit Court committed clear error in admitting 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**

Rice essentially objects to the offer of reinstatement made by BPB because it "was a legal strategy to cut off any lost wages award." (Rice Brief at 21). However, Rice's characterization of BPB's offer of reinstatement is entirely inapposite. Even if BPB's unconditional offer of reinstatement was intended to cut off any potential lost wages award, under West Virginia and United States law it should have precluded an award of back pay or front pay damages after February 1, 2010, the date of reinstatement. *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). Both *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. *Ford Motor, Co.* 458 U.S. at 231-233; *Dobson*, 188 W.Va. 17, 422 S.E.2d 494. Additionally, reinstatement does not require providing additional benefits, such as an employment contract that Rice sought in an attempt to change his previous at-will employment status.

It is the employee's burden to demonstrate special circumstances to justify the rejection of an employer's unconditional job offer; absent such circumstances an unconditional job offer ends the accrual of potential back pay liability. *Ford Motor Co.*, 458 U.S. at 241; *see also 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). Rice is unable to avoid his own burden of having to prove special circumstances to justify his rejection of BPB's unconditional offer of reinstatement onto BPB. (Rice Brief at 24). In response to BPB's motion *in limine* and at the April 15, 2010 hearing Rice presented no evidence of special circumstances to justify his rejection of BPB's unconditional offer of reinstatement or identifying why he did not want to return to work for BPB as a controller.

BPB filed its Motion *in Limine* requesting that the Circuit Court exclude back pay and front pay damages after February 1, 2010, the date of reinstatement. (A.R. v.1 at 77). Rice's assertion that the Circuit Court was never asked to rule that reinstatement was the preferred remedy as opposed to front pay is entirely inaccurate. (Rice Brief at 29). BPB had offered Rice reinstatement and its Motion *in Limine* requested that the Circuit Court make the reinstatement determination – in order to determine whether the unconditional offer of reinstatement should have precluded an award of back pay or front pay damages after February 1, 2010, the Circuit Court necessarily had to determine whether reinstatement was appropriate. “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).

As the Supreme Court of Appeals has recognized, “[o]bviously, as the *Maxfield* court stated, reinstatement would be the preferred remedy.” *Dobson*, 422 S.E.2d at 502. However, the Circuit Court declined to hear testimony from BPB's witnesses at the April 15, 2010 hearing or even rule on whether reinstatement was or was not appropriate. Although Rice presented no evidence of special circumstances why he could not return to work as a controller for BPB at the hearing, the Circuit Court found it was a jury question. As a result, the Circuit

Court improperly permitted the jury to decide front pay was appropriate instead of reinstatement, and the amount of front pay awarded.

Further, Rice's continued focus on his inquiry about an employment contract in response to the unconditional offer of reinstatement, Rice's only response to the offer of reinstatement, and the timing of BPB's response is misplaced. (A.R. v.1 at 286, 297). Although Rice understood the controller job offer would pay him the same salary and benefits he received when he had been employed by BPB and he never indicated any objection to coming back to work for 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 74-75, 79-80; A.R. v.4 at 77, 87-88). Quite simply, Rice never met his burden of demonstrating special circumstances to justify rejection of the offer of reinstatement. *See, e.g., 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).

In this case, Rice received an unconditional offer of reinstatement from BPB to return to work on February 1, 2010. Rice 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 suggestion now that the terms of the controller position were substantially different than the position Rice previously held flies in the face of these undisputed facts. Under *Ford Motor Co.* and *Dobson*, the Circuit Court should have determined Rice was not justified in refusing BPB's unconditional offer of reinstatement, and prevented the introduction of any evidence of damages beyond the date of reinstatement. The Circuit's failure to make such a determination, submitting it to the jury instead was clearly erroneous and warrants 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**

Although a party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun by stating the party's objection, even Rice concedes that BPB objected regarding the *Mason County* instruction at trial. See *Roberts v. Powell*, Syl. Pt. 1 157 W.Va. 199 (1973); (Rice Brief at 15). Contrary to Rice's claim, BPB does not raise its objection regarding the application of *Mason County* for the first time on appeal. At trial, BPB argued that stripping an employer of a mitigation defense with a showing of malice is

essentially punitive damages, based on the same malice standard. (A.R. v.6 at 310-312). After discussion, the Circuit Court took BPB's objection under advisement when preparing the jury instructions at trial.

Following the jury's verdict, which did not award punitive damages, BPB again objected in its Motion for New Trial to the application of *Mason County* allowing essentially a punitive damage award in the form of unmitigated back pay and front pay damages. (A.R. v.1 at 218). More specifically, BPB sought a new trial based on the application and extension of *Mason County* to allow a punitive, unmitigated award of back pay and front pay damages without any of the constitutional due process constraints that must be applied to awards of punitive damages. Tellingly, Rice did not argue in his response to BPB's Motion for New Trial that BPB had somehow waived its objection to the application of *Mason County*. (A.R. v.1 at 218). The Circuit Court did not conduct any review under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991) of the punitive, unmitigated award of back pay and front pay damages. Instead, the Circuit Court addressed BPB's arguments in its Order denying BPB's motion for new trial (A.R. v.1 at 266).

Moreover, BPB's challenge to punitive wage awards under *Mason County* on appeal is a constitutional question that does not require the development of additional underlying facts that have not been developed below. *See Board of*

*Education of Kanawha County*, 190 W.Va. 223, 226 (1993). 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). BPB challenges the constitutionality of *Mason County* itself and the denial of BPB’s due process rights on appeal. Accordingly BPB properly persevered and has not waived consideration of these issues raised for this Court’s consideration on appeal.

Allowing an unmitigated, unlimited award of back pay and front pay damages pursuant to *Mason County*, 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).

After punitive damages have been awarded, the court must also determine 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); and second, if a punitive damage award is justified, 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). Despite BPB’s Motion for New Trial, the Circuit Court did not conduct any review under *Garnes* of the punitive, unmitigated award of back pay damages and \$1,991,332.00 in front pay damages. Nor did the Circuit Court 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).

The Supreme Court of Appeals recently stated in *West Virginia American Water Co. v. Nagy*, No. 101229 (W.Va. Supreme Court June 15, 2011)(memorandum decision) that even when not mitigated, a wage loss award is still compensatory in nature. However, this general premise cannot apply to the specific facts of this case, where the jury's unmitigated award of \$1,991,332.00 in front pay damages 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 while ignoring Rice's actual income (not hypothetical mitigation of losses from a job Rice had some duty to obtain) did not compensate him for actual or reasonably expected losses. As such, the award cannot be characterized as compensatory in nature. Rather, based on a finding that BPB acted maliciously, the jury in this case was permitted to award Rice \$1,991,332.00 in front pay damages – tantamount to punitive damages.

Just as with punitive damages, the Court in *Mason County* recognized deterrence was its rationale for allowing unmitigated back pay awards in cases involving malicious conduct, "to discourage malicious discharges." 170 W. Va.

632, 295 S.E.2d 719, 725 (1982). *Mason County's* standard for determining whether an employer's action is malicious is also akin to that for punitive damages:

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).

Compared to the punitive damages jury instruction in this case:

“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).

BPB's due process rights were denied by the jury's punitive award of back pay and front pay damages, without the consideration of Rice's actual earnings. None of the constitutional due process rights applicable to a punitive damage award were available to BPB to protect it against an excessive unmitigated award of back pay and front pay damages in this case. The Circuit Court did not provide any review of the award under constitutional jurisprudence that prohibits punishments that are grossly excessive or arbitrary. Accordingly, 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.

Respectfully submitted,

**The Burke-Parsons-Bowlby Corporation,  
Stella-Jones U.S. Holding Corporation, and  
Stella-Jones, Inc.**

By counsel



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**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

**CERTIFICATE OF SERVICE**

I, Roger A. Wolfe, counsel for Petitioners, certify that service of the foregoing Petitioners' Reply Brief, has been made this 18th day of July, 2011 upon the following by mailing a true and exact copy thereof in the United States mail, postage prepaid, as follows:

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