12-0389

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

2012 FEB 21 PM 4:29

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

STEVEN FARRUGGIA,

Plaintiff,

v.

Civil Action No.: 08-C-720
Judge Carrie Webster

JWCF, LP (formerly known as
BAKER INSTALLATIONS, INC.),
a foreign corporation conducting
business in West Virginia,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

Pending before the Court is Defendant, JWCF, LP's ("JWCF") Motion for a New Trial, filed pursuant to Rule 59 of the West Virginia Rules of Civil Procedure.[1] Defendant timely filed said motion following entry of the Judgment Order in this case. On December 22, 2010, the court heard oral argument on Defendant's motion. Steve New, Esquire, appeared on behalf of the plaintiff, Steven Farruggia; and Barbara Arnold, Esquire, appeared on behalf of the defendant, JWCF. The court took the motion under advisement pending submission of the parties' proposed orders.

The court has considered the parties' respective pleadings filed in connection with Defendant's motion, and their oral argument offered on said motion. The court has also reviewed other relevant papers of record and pertinent legal authorities. Accordingly, for the reasons set forth the below, the Court is of the opinion the Defendant's Motion for a New Trial should be and is **DENIED**.

[1] Defendant JWCF, LP is formerly known as "Baker Installation Services."

STANDARD OF REVIEW

A new trial should be granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *Dows v. Stephens*, 207 W.Va. 341, 532 S.E.2d 59 (2000); *Morrison v. Sharma*, 200 W.Va. 192, 194, 488 S.E.2d 467, 469 (1997). Thus, before the trial court may set aside the jury verdict and award a new trial, the trial judge must find that the verdict was against the clear weight of the evidence, based on false evidence, or will result in a miscarriage of justice. Syllabus Point 8, *Lamphere v. Consolidated Rail Corp.*, 210 W.Va. 303, 557 S.E.2d 357 (2001).

The West Virginia Supreme Court of Appeals has held that "in determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference fairly arising from the evidence in favor of the party returned must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true."

In determining whether there is sufficient evidence to support a jury verdict, the trial court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 609 S.E.2d 895 (2004); *Bailey v. Norfolk and Western Railway Company*, 206 W.Va. 654, 527 S.E.2d 516 (1999); *Syl. Pt. 5, Orr v. Crowder*, 173 W.Va. 335, 314 S.E.2d 593 (1983).

Pursuant to Rule 61 of the West Virginia Rules of Civil Procedure, "[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial... unless refusal to take such action appears to the court inconsistent with substantial justice...." W.Va.R.E. 61.

Therefore, in accordance with Rule 61, "(a) judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syllabus Point 7, *Starcher v. South Penn Oil Co.*, 81 W.Va. 587, 95 S.E. 28 (1918); Syllabus Point 7, *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E.2d 684 (1991).

A trial judge also has authority to weigh evidence and consider credibility of witnesses, as if he or she were a member of the jury. *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994) *cert. denied*, 115 S.Ct. 2614, 515 U.S. 1160, 132 L.Ed.2d 857. Thus, when 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 evidence or without sufficient evidence to support it. *Neely v. Belk Inc.*, 222 W.Va. 560, 668 S.E.2d 189 (2008).

RELEVANT PROCEDURAL BACKGROUND

The trial of the issues in this case commenced on the 13th day of September, 2010. On the 13th day of September, following deliberation thereof, the jury returned a verdict in favor of the plaintiff, finding that the plaintiff had proved, by a preponderance of the evidence (1) "[t]hat retaliation for the Plaintiff's filing a workers' compensation claim was a significant factor in the decision of the Defendant to discharge the plaintiff." and (2) "[t]hat the Defendant failed to reinstate the Plaintiff to his former or comparable position with the Defendant." As to the Defendant's affirmative defense set forth on the

jury verdict form, the jury found that the Defendant did not prove, by a preponderance of the evidence, "that it would have laid off the Plaintiff notwithstanding his pursuit or receipt of workers' compensation benefits." The jury awarded the Plaintiff damages in the amount of $229,619.00 dollars in front and back pay, and aggravation, inconvenience and other non-economic damages. It also found that the Defendant's actions warranted an assessment of punitive damages against the Defendant in the amount of $30,000 dollars.

Following the jury verdict, the Court entered an Order adjudging and awarding the plaintiff judgment in the amount of $259,619.00 dollars in satisfaction of the jury award in this case, against the Defendant, JWCF, LP., in accordance with W.Va. Code 56-6-31(a), as well as prejudgment and post-judgment interest and court costs. The Defendant filed the instant post-trial motion following entry of the Final Judgment Order.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Defendant seeks a new trial on the grounds that (1) the verdict was contrary to law; (2) that prejudicial error resulted from the *improper admission* of irrelevant and unfairly prejudicial evidence; (3) that prejudicial error resulted from the *improper exclusion* of relevant evidence; and (4) that substantial justice was not done (court emphasis added).

2. The Defendant first alleges that it did not have any legal duty to reinstate the Plaintiff to his regular or comparable position, as provided in W.Va. Code 23-5A-3(b) because the Plaintiff had not been released to return to work to his pre-injury, regular position as a cable installer, without any restrictions. In support thereof, Defendant states that the Plaintiff failed to obtain a written statement from a duly licensed physician

approving his "return to regular employment," as required under state law, and was therefore not entitled to seek reinstatement to a comparable position.

However, the language of W.Va. Code §23 – 5A – 3, is clear:

> "...it shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing...In the event that neither the former position or a comparable position is available, the employee shall have the right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential treatment recall shall be in effect for one year from the day of the injured employee notifies the employer that he or she desires reinstatement: Provided that the employee provides to the employer a current mailing address during the one year period."

3. West Virginia Code § 23-5A-1 states that "no employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive [workers' compensation benefits]."

4. The Supreme Court of Appeals has established a three-factor test to be applied in workers' compensation discrimination cases: [I]n order to make a *prima facie* case of discrimination under *W. Va.Code, 23-5A-1*, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, *W.Va. Code, 23-1-1, et seq.*; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or

otherwise discriminate against the employee. *Powell v. Wyoming Cablevision, Inc.*, 184 W.Va. 700, 403 S.E.2d 717 (1991).

5. Steven Farruggia, the Plaintiff, worked for the Defendant, Baker Installations, Inc. (hereinafter "Baker"), as a cable installer. The evidence was undisputed that he suffered a compensable injury on February 14, 2007, and was unable to work for some time thereafter. It is also undisputed that on September 19, 2007, he began work for Defendant Baker as a "progress evaluator."

6. The jury heard the following testimony and evidence at trial: that the position of *progress evaluator*, up to November 29, 2007, was a light duty position; that the plaintiff had returned to his full duty employment as a cable installer, as evidenced by certain truck reports generated by the Defendant, and a report from plaintiff's work supervisor, Austin Cantrell; that on February 14, 2008, the plaintiff asked for reinstatement to his job; that Brent Cheesebrew, one of the defendant's management employees, testified that from February 14, 2008 to February 14, 2009, Steven Farruggia was not considered for employment with Baker Installations.

7. Sufficient evidence was presented at trial to support the jury's finding that the Defendant improperly and unlawfully failed to reinstate the Plaintiff to his prior position or a comparable position. The court disagrees with Defendant's interpretation of the applicable law, as applied under the facts and evidence presented in the current case.

8. The Defendant next argues that failure of the Plaintiff to accurately disclose his employment situation prior to trial and the latent disclosure of certain information was unfairly prejudicial to the Defendant and constituted a "trial by ambush" on the issue of damages.

9. The crux of the Defendant's argument centers on the failure of the plaintiff to disclose, before trial, the fact that the Plaintiff had taken a new job with Wal-Mart on August 24, 2010, approximately three (3) weeks prior to the trial. When the Defendant and Court became aware of this information, the Court made inquiry of Plaintiff's counsel, who advised that he was not aware of the plaintiff's new job, and in fact, had not discuss such matters with him between August 24, 2010 and September 11, 2010.

During trial preparation on Saturday, September 11, 2010, plaintiff's counsel asserts that he learned for the first time that Steven Farruggia's employment had changed. During trial preparation on Sunday, September 12, 2010, plaintiff advised that at some point, he may become eligible for benefits with Wal-Mart. Plaintiff's counsel advised his expert economist, Will Cobb, via email.

10. During an in camera hearing ordered by the Court, Dr. Cobb testified that none of the recent information provided to him about the Wal-Mart position caused a change in his previously disclosed opinions. Dr. Cobb testified that in order to provide a detailed opinion on the cost of these employer benefits, he would need the actual amount of these employer benefits and the cost to the employer.

11. Defendant's counsel sought a continuance of the trial, on basis that the prejudice that the Defendant suffered as a result of the Court's earlier ruling excluding her expert from testifying at trial was not compounded by these additional disclosures by Plaintiff's counsel.

12. The Court disagrees with the Defendant and finds that the sanctions imposed upon the Plaintiff were adequate to remedy any resulting prejudice or potential unfairness to the Defendant. The Court provided the parties a half day to argue this issue.

Moreover, the Court sanctioned Plaintiff's counsel for the failure to timely supplement discovery under Rule 26(e), ordering said counsel to pay defendant's consulting economist's fees in the amount of one thousand eighteen hundred dollars ($1,800.00), for his review of such documents. In addition, the Court offered as a further sanction *to strike one hundred forty two thousand two hundred eight dollars ($142,208.00)* from the plaintiff's damage claim, an offer that the Defendant inextricably declined. The Court is further persuaded by defendant's claim that the plaintiff purposefully failed to accurately disclose his employment situation, and denies same as grounds for a new trial. The Court therefore declined Defendant's invitation to sanction the plaintiff by striking Will Cobb altogether as a witness.

13. Finally, according great weight to the inferences and outcome reached by the jury, the jury awarded only one hundred fifty thousand dollars ($150,000.00) in front pay damages. Clearly, the inference may be made that the jury did in fact disregard Dr. Cobb's opinions with respect to requests for front pay and specifically those portions related to the loss of a job with fringe benefits. The defendant suffered no prejudice in this case by the plaintiff's alleged failure to supplement discovery.

14. The Defendant contends the court erred in excluding from the jury, evidence of the plaintiff's prior job termination and certain other evidence. At the pretrial conference, the defendant agreed and stipulated that it would not raise issues relative to plaintiff's termination for refusal to take a drug test. Then, during the trial, the defendant announced that it wanted to recall the plaintiff to the stand for the purpose of asking essentially, whether his employer (Baker Installations) had been good to him in the years prior to his termination by giving him second chances.

15. The court finds, pursuant to Rules 401, 403, and 404(b) of the West Virginia Rules of Evidence, that exclusion of said evidence was proper and squarely within the court's broad discretion. This Court enjoys broad discretion and appropriately ruled that the evidence sought to be introduced against the plaintiff was inappropriate 404(b) evidence, and that irrespective of whether it had been properly noticed by the defendant under the cases of State v. McGinnis and Stafford v. Rocky Hollow Coal (citations omitted), the Court reasoned that the plaintiff would suffer unfair prejudice if the defendant was permitted to introduce evidence of the plaintiff's prior drug use and that the defendant had rehired him; The Court ultimately ruled that the probative value of this evidence, if any, was substantially outweighed by its prejudicial effect based upon the prior stipulation regarding drug use.

16. The Plaintiff asserted at trial and continues to assert that the evidence which the Defendant sought to introduce, *i.e.* that the Defendant(s) are "good guys" now because they were "good guys" in the past because they gave people like Steve Farruggia a second chance, is inappropriate and irrelevant evidence under Rule 404(a) of the West Virginia Rules of Evidence. The Defendant's alleged kind acts, benevolence, or offering "second chances" evidence would be irrelevant for determination as to whether Baker Installations retaliated against the plaintiff for receipt of workers' compensation benefits, or improperly and unlawfully failed to reinstate him to his prior or a comparable position. Accordingly, this evidence was appropriately excluded.

17. The Defendant argues that a new trial should be granted because of an issue with the jury's award of punitive damages. The Court disagrees. The jury in this case heard uncontested evidence in the form of a party admission by the defendant's manager

that the defendant unlawfully terminated the plaintiff because he took a workers' compensation settlement. The jury inspected emails from the defendant's benefits manager that were admitted into evidence, and which expressed displeasure with the plaintiff's worker's compensation settlement, including, "I am upset that BrickStreet has made a settlement offer to Steven Farruggia...." and "please see if you can get him in the office to sign the settlement papers before we review the lack of light duty available at his regular meeting on Friday." (*Exhibit number reference omitted*). This evidence was uncontested. The Defendant's human resource employee, Cinnomin Yobe, the author of these emails, did not testify at trial.

18. The defendant asserts that the court erred by refusing a jury instruction proffered by the defendant. The Court's refusal of this instruction was appropriate. The jury had ample evidence upon which to base an award of punitive damages, and in viewing the jury's award in light of the evidence, the jury's finding should not be set aside on a Motion for New Trial.

19. With respect to the defendant's assertion that **improper sympathy evidence** was injected into the trial and justifies a new trial, the Court denies the defendant's motion. The Court finds that the testimony of the plaintiff, Steven Farruggia regarding his terminally ill sister-in-law who was living in the Farruggia home at all times relevant to this case, was proper and did not result an improper jury award. Had the jury's award for aggravation, annoyance and inconvenience been for millions of dollars, the defendant's arguments may hold some weight. However, in light of a fifteen thousand dollar ($15,000.00) award for aggravation, annoyance, inconvenience and loss of enjoyment of life, the Court finds Defendant's argument unpersuasive and denies same.

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RULING

Accordingly, for the reasons stated above and for others apparent from the record, it is hereby **ORDERED** that the Defendant's Motion for New Trial is denied.

An objection and exception is saved to all parties aggrieved by this Order.

It is **FURTHER ORDERED** that a certified copy of this Order be sent to all parties involved.

2/21/12.

The Honorable Carrie Webster
Judge, 13th Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID OFFICE THIS 21st DAY OF February 2012
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA