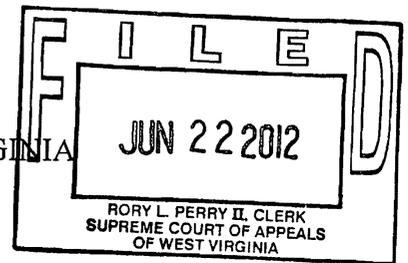


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JWCF, LP, (formerly known as
Baker Installations, Inc.), a foreign
corporation conducting business in
West Virginia, Defendant Below,
Petitioner

vs.) No. 12-0389

Steven Farruggia, Plaintiff Below
Respondent

PETITIONER'S BRIEF

Barbara G. Arnold, (W. Va. Bar I.D. 4672)
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, West Virginia 25332
304-344-5600 Telephone
304-344-8141 Facsimile

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	13
ARGUMENT.....	13
A. STANDARD OF REVIEW.....	13
B. ASSIGNMENTS OF ERROR.....	14
1. The trial court erred in denying the motions of JWCF, LP, (“JWCF”) for judgment as a matter of law as the evidence presented by the plaintiff below, Steven Farruggia, was insufficient to show that the defendant below, JWCF, LP, (“JWCF”) had violated the terms of W. Va. Code § 23-5A-3(b)..	14
2. The trial court erred in denying JWCF’s motion for a new trial as the verdict finding for the plaintiff below, Steven Farruggia, on his retaliatory discharge claim was clearly contrary to law and against the weight of the evidence as the evidence showed that JWCF had not violated the terms of W. Va. Code § 23-5A-3(b).....	18
3. The trial court erred in giving a punitive damages instruction and in allowing the issue of punitive damages to reach the jury when, as a matter of law, there was insufficient evidence presented by the plaintiff below to show that JWCF’s decision to eliminate Steven Farruggia’s position of employment constituted willful, wanton, or malicious conduct.....	19
4. The trial court erred in both refusing to continue trial and refusing to exclude Steven Farruggia’s proffered evidence of damages resulting from his purported loss of wages and salary, when, in the course of trial, it was disclosed that Mr. Farruggia had failed to supplement discovery responses prior to trial and had withheld evidence of his most recent employment conditions, including salary and wage information.....	21

5. The trial court erred in excluding evidence that JWCF had previously treated Steven Farruggia in a lenient manner by voluntarily re-employing him after having discharged him for good cause, resulting in unfair prejudice against JWCF in relation to Mr. Farruggia’s claim of retaliatory discharge and his claim for punitive damages.24

6. The trial court erred in admitting evidence relating to emotional distress suffered by Steven Farruggia and Mr. Farruggia’s family, when such evidence had no relevance to any issue properly before the jury but could only serve to improperly arouse the emotions and sympathies of the jury.....26

7. The overall effect of the trial court’s evidentiary rulings was to exclude evidence necessary for an accurate understanding of the employment relationship between the parties and of the relevant circumstances at issue, thus precluding a fair trial on the merits26

CONCLUSION28

TABLE OF AUTHORITIES

Cases:

<i>Alkire v. First Na'l. Bank of Parsons,</i> 197 W.Va. 122, 475 S.E.2d 122 (1996)	19
<i>Bailey v. Mayflower Vehicles Sys.,</i> 218 W. Va. 273, 278, 624 S.E.2d 710, 715 (2005)	16
<i>Fredeking v. Tyler,</i> 224 W. Va. 1, 680 S.E.2d 16 (2009)	13
<i>Gillingham v. Stephenson,</i> 209 W.Va. 741, 551 S.E.2d 663, 667 (2001)	13
<i>Harless v. First Nat'l Bank,</i> 169 W.Va. 673, 289 S.E.2d 692 (1982)	20
<i>Marsch v. American Electric Power Company,</i> 207 W.Va. 174, 530 S.E.2d 173 (1999)	20
<i>Mayer v. Frobe,</i> 40 W. Va. 246, 22 S.E. 58 (1895)	14, 19
<i>McDougal v. McCammon,</i> 193 W.Va. 229, 236-237, 455 S.E.2d 788 (1995)	14, 22
<i>Perrine v. E.I. du Pont de Nemours & Co.,</i> 225 W. Va. 482, 694 S.E.2d 815 (2010)	14
<i>Powell v. Wyoming Cablevision, Inc.,</i> 184 W. Va. 700, 704, 706, 403 S.E.2d 717, 721, 723 (1991)	14-15, 17
<i>Sanders v. Georgia-Pacific Corp.,</i> 159 W. Va. 621, 225 S.E.2d 218 (1976)	13
<i>Sizemore v. Peabody Coal Co.,</i> 188 W. Va. 725, 426 S.E.2d 517 (1992)	15
<i>State v. Hinkle,</i> 200 W. Va. 280, 489 S.E.2d 257 (1996)	14
<i>State v. Rodoussakis,</i> 204 W. Va. 58, 511 S.E.2d 469 (1998)	14

Tennant v. Marion Health Care Foundation, Inc.,
194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995) 13

Statutes:

W. Va. Code § 23-1-1.....14
W. Va. Code § 23-4-1.....14
W. Va. Code § 23-5A-1 (LEXIS through 2012 Regular Sess.).....2, 14
W. Va. Code § 23-5A-3 (LEXIS through 2012 Regular Sess.)..... 1, 10, 15-16, 18-19

Rules:

W.Va. R. Evid. 401.....25
W.Va. R. Evid. 403.....25
W.Va. R. Evid. 702.....22

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motions of JWCF, LP, (“JWCF”) for judgment as a matter of law, as the evidence presented by the plaintiff below, Steven Farrugia, was insufficient to show that the defendant below, JWCF, LP, (“JWCF”) had violated the terms of W. Va. Code § 23-5A-3(b).
2. The trial court erred in denying JWCF’s motion for a new trial as the verdict finding for the plaintiff below, Steven Farrugia, on his retaliatory discharge claim, was clearly contrary to law and against the weight of the evidence as the evidence showed that JWCF had not violated the terms of W. Va. Code § 23-5A-3(b).
3. The trial court erred in giving a punitive damages instruction and in allowing the issue of punitive damages to reach the jury when, as a matter of law, there was insufficient evidence presented by the plaintiff below to show that JWCF’s decision to eliminate Steven Farrugia’s position of employment constituted willful, wanton, or malicious conduct.
4. The trial court erred in both refusing to continue trial and refusing to exclude Steven Farrugia’s proffered evidence of damages resulting from his purported loss of wages and salary, when, in the course of trial, it was disclosed that Mr. Farrugia had failed to supplement discovery responses prior to trial and had withheld evidence of his most recent employment conditions, including salary and wage information.
5. The trial court erred in excluding evidence that JWCF had previously treated Steven Farrugia in a lenient manner by voluntarily re-employing him after having discharged him for good cause, resulting in unfair prejudice against JWCF in relation to Mr. Farrugia’s claim of retaliatory discharge and his claim for punitive damages.

6. The trial court erred in admitting evidence relating to emotional distress suffered by Steven Farruggia and Mr. Farruggia's family, when such evidence had no relevance to any issue properly before the jury but could only serve to improperly arouse the emotions and sympathies of the jury.

7. The overall effect of the trial court's evidentiary rulings was to exclude evidence necessary for an accurate understanding of the employment relationship between the parties and of the relevant circumstances at issue, thus precluding a fair trial on the merits.

STATEMENT OF THE CASE

Procedural History

In the matter below, Respondent Steven Farruggia, a former employee of Petitioner JWCF, LP ("JWCF")¹, alleged a violation of the West Virginia Human Rights Act ("HRA") and retaliatory discharge in violation of West Virginia Code 23-5A-1, *et seq.* (Appendix Record at 1711-1715) Prior to trial, the Respondent withdrew his HRA claim; but continued to assert his retaliatory discharge claim. Mr. Farruggia sought damages for loss of pay, inconvenience, as well as punitive damages, attorney's fees and costs, and reinstatement or front pay; but withdrew his claim for emotional distress damages. (A.R. at 1402).

Prior to trial, plaintiff/respondent also filed a motion *in limine* to exclude evidence relating to his drug-use problem. JWCF did not object to the exclusion of drug-use evidence; but did argue for the admission of evidence pertaining to Mr. Farruggia's employment history, as, although indirectly related to his drug use, it tended to show that JWCF had treated him with

¹ As is set forth in the case style of many of the documents filed in the matter below, JWCF was formerly known as "Baker Installations, Inc."; and any references in the Appendix Record or in the instant brief to "Baker Installations" or "Baker" should be understood to refer to JWCF.

reasonable consideration inconsistent with his allegations, and could be presented while omitting any express reference to drug use. (A.R. at 355, 1403). The trial court nevertheless refused to allow such evidence. (A.R. at 1403). The plaintiff/respondent also filed a motion *in limine* to exclude the defendant/petitioner's previously identified economics expert, Gary Bennett, CPA, on the grounds that Mr. Bennett had not provided a report of his opinions. (A.R. at 118-119, 1197-1201, 1207-1276, 1404). The motion *in limine* to exclude the testimony of Mr. Bennett was granted by the trial court. (A.R. at 1404).²

The matter went to trial, over the course of which, the trial court made various evidentiary rulings now at issue and described in further detail in the Assignments of Error. (A.R. at 118-119, 511-519, 614-643, 724-744, 763-764, 1197-1201, 1201, 1207-1276, 1305-1314, 1350-1379, 1390-1400, 1401-1410, 1411-1491, 1613). The trial court also denied JWCF's Rule 50 motions for judgment as a matter of law, also now at issue and described in further detail in the Assignments of Error. (A.R. at 567-568, 724). At the close of trial, the trial court instructed the jury in relation to punitive damages which instruction is now at issue. (A.R. at 763-764). The jury's verdict was in favor of the plaintiff/respondent, and a judgment order in his favor was entered by the trial court. The subsequent Rule 59 motion of JWCF, for a new trial, was denied, the denial of that motion also being assigned herein as error. (A.R. at 1390-1400).

² As emphasized below, however, the defendant's explanation for Mr. Bennett's failure to provide a report, i.e., that he was awaiting updated economic information from the plaintiff, was essentially validated by plaintiff's unfair but ultimately successful attempt, in the course of trial, to present expert opinions based upon updated economic information that had not been disclosed prior to trial nor provided to Mr. Bennett for timely review, but had been given only to plaintiff/respondent's own economics expert, William Cobb, just prior to trial along with certain directives from plaintiff/respondent's counsel. In effect, the standard applied by the trial court in excluding the testimony of JWCF's expert prior to trial was ignored when the trial court allowed the plaintiff/respondent to present previously undisclosed information through his expert.

Statement of Facts

Plaintiff/respondent Steven Farruggia was hired by the defendant/petitioner, JWCF (then known as Baker Installations) to perform cable installation work on February 21, 2005. Several months later, on or about September 6, 2006, he was terminated for cause when he failed to take a required drug test. After participating in a drug rehabilitation program, he was rehired as a cable installer on October 9, 2006. (A.R. at 1412). On February 14, 2007, the plaintiff/respondent suffered a compensable injury that rendered him physically unable to work when he slipped on ice while in the course of his employment. (A.R. at 901-902, 1224). Mr. Farruggia returned to light-duty work on March 12, 2007; and, within two weeks, found that he could not perform the required work. (A.R. at 902). Subsequently, on July 19, 2007, he underwent corrective back surgery. (A.R. at 903). On or about September 17, 2007, he was released by a medical provider, Dr. Christopher Grose, to return to light-duty work with numerous, explicit restrictions on his physical activities. (A.R. at 830). Dr. Grose never released Mr. Farruggia to return to work without restrictions. (A.R. at 62, 317-319, 323, 329).

More specifically, in relation to his injury, Mr. Farruggia was seen by Dr. Alfred Landis, his first treating physician, on March 22, 2007, who noted that Mr. Farruggia “was continuing to have pain in his lower back.” (A.R. at 1225). Plaintiff/respondent then continued to be treated, by Dr. Alfred Landis, until May 29, 2007, when he “requested to transfer under the care of Dr. Zahir.” (A.R. at 1225). Thereafter, on June 2, 2007, the plaintiff/respondent underwent an MRI, requested by Dr. Zahir, which MRI “revealed a herniated disc.” (A.R. at 1225). Plaintiff/respondent was seen by his third treating physician, Dr. Frederick H. Armbrust, a neurosurgeon, on June 29, 2007, “for a neurosurgical consultation.” (A.R. at 1226). Plaintiff/respondent was then off work beginning on July 18, 2007, and “[o]n 7-19-2007, . . . had

a laminotomy and excision of herniated disc at L4-L5 level,” performed by Dr. Armbrust. (A.R. at 1226).³

Following his surgery, the plaintiff-respondent was released to return to work on September 17, 2007, by Christopher Grose, D. C., his treating chiropractic physician at that time; but Dr. Grose set forth several restrictions limiting Mr. Farruggia to only light-duty work, as follows.

Work/School/Sports Excuse. . . . **Return with restrictions[.]** The above named patient is able to return to work/school/sports with restrictions on 9-17-09. **Pt can ride truck but must have assistance with all lifting. No twisting, bending or stooping. He will begin a work condition [sic] program** (emphasis added). Restrictions are in effect for 6 wks or until further notice.⁴

(A.R. at 234).

The work conditioning/work hardening recommendations also were established, by Dr. Grose, as follows:

Conclusion/Recommendations

Mr. Farruggia demonstrates **functioning at or around a Light Physical Demand level** with material or non-material handling described on pages two and three of this report. **Mr. Farruggia does not appear to meet the Heavy Physical Demand Level to return to pre-injury employment as a Professional**

³ After that surgery, Mr. Farruggia contended that “he did not have any change in his symptoms either in his leg or lower back. However, those were rather somewhat worse.” (A.R. at 1226). Plaintiff/respondent also contended that “he needed assistance to move around . . . had restriction of mobility.” (A.R. at 1226).

“On 8-21-2007, . . . [plaintiff/respondent] was seen [again] by Dr. Armbrust, who noted he had no change in his symptoms.” (A.R. at 1226).

Next, “**on 8-28-2007, . . . [plaintiff/respondent] stated he decided not to see Dr. Armbrust any further because he had gotten worse. . . . he requested to see [a fourth physician,] Dr. Kim at the pain clinic.**” (emphasis added) (A.R. at 1226).

⁴ Dr. Saghir R. Mir, the orthopedic surgeon who performed Mr. Farruggia’s IME, on October 2, 2007, wrote that “Patient stated that he did not go to any physical therapist through his physician. However, **he saw a chiropractic physician [Dr. Christopher Grose], who gave him a few treatments. Patient is no longer seeing that chiropractic physician.**” (emphasis added) (A.R. at 1227).

Installation Technician per the Dictionary of Occupational Titles. (emphasis added) Mr. Farruggia does appear to be safe for entry into a Work Conditioning/Work Hardening Program. As such, Mr. Farruggia may benefit from:

If modified or alternative duty is available to him, then Mr. Farruggia would be able to return to pre-injury employment at the above physical demand level with the limitations described in pages two and three of this report.

And/or

Entry into a Work Conditioning/Work Hardening Program. The purpose of Work Conditioning/Work Hardening would be to increase Mr. Farruggia's material and non-material handling tolerances, to meet the requirements to return to pre-injury employment or the highest possible level prior to proceeding with vocational rehabilitation plan as outlined in Title 85[,] Series 15[,] Section 34 of the West Virginia Code.

Mr. Farruggia may benefit from being scheduled for an independent medical evaluation for the purpose of determining if Mr. Farruggia has reached maximal medical improvement or if further medical management of his symptoms is indicated. . . .

(A.R. at 895, emphasis added)⁵

By letter also dated September 17, 2007, Mr. Farruggia was notified, by Bodyworks Rehabilitation, as follows: **"You have been scheduled to start Work Conditioning on Monday[,] September 24th 2006[sic] at Bodyworks Rehabilitation."** (A.R. at 1458). That work conditioning was for plaintiff/respondent's duties as described in his "Job Description," where

⁵ The IME proposed by Dr. Grose was conducted by Dr. Saghir R. Mir, a board certified orthopedic surgeon, on October 2, 2007. (A.R. at 901-908, 1224-1231). Dr. Mir's conclusion was that **"Patient is NOT READY for an impairment rating, which is deferred for another 3-4 months."** (A.R. at 908, 1230-1231). Dr. Mir also noted that, "[e]ven though this patient has gone back to work, **he has not reached maximum degree of medical improvement.**" (A.R. at 907, emphasis added). Dr. Mir also recommended that the Plaintiff have a "second neurological opinion because . . . of a possibility of residual disc vs. residual loose fragment along with scarring . . . [and] physical therapy as an outpatient a couple of times a week over the next six weeks . . . [and] a trial of epidural injections[] . . ." if no further surgery is recommended. Significantly, Dr. Mir also wrote, **"Patient has already had a functional capacity evaluation, and he was not found to be ready for regular work. After additional follow-up [sic] he may need work conditioning and work hardening or even a vocational consultation."** (A.R. at 907, 1230, emphasis added).

[t]he physical demands were to “[c]arry, raise and climb a 80[-]pound, 28-foot fiberglass extension ladder, work outdoors in all weather conditions, work at heights, in attics and crawl spaces, bending and stooping; [and] safely use power tools.” (A.R. at 1485). Plaintiff/respondent began his extra light-duty work on September 19, 2007. (A.R. at 847).

Upon his return to work, on September 19, 2007, Mr. Farruggia’s immediate supervisor, Austin M. Cantrell, provided him with a written notice stating that:

It has been determined by your physician, physical therapist and the West Virginia Market Manager for Baker Installations, Brent Cheesebrew[,] **to return you to extra light duty** with Baker Installations. With the prospect of expanding our size substantially in the future, we have established an intermediate position: Progress Evaluator. The Progress Evaluator will be responsible for the following activities.

- Post Install Quality Control Inspections
- Real Time Quality Control Inspections
- Safety Inspections
- Data and Information acquisition from MSO’s
- Technician progression development
- Other activities vital to the expansion of Baker Installations

• • •

It shall be understood that this position is strictly temporary and in no way constitutes a full[-]time position with the above[-]listed job title. Upon determination from all parties regarding the return of Steven Farruggia to a full[-]time[,] regular[-]duty position, the position of Progress Evaluation will be dissolved. . . .

(A.R. at 846, emphasis added).

Notwithstanding the restricted release from Dr. Christopher Grose, who had become the plaintiff/respondent’s third treating physician, and Dr. Grose’s recommendation that Mr. Farruggia begin work conditioning on September 24, 2007, plaintiff/respondent refused physical therapy on or about September 23, 2007, by stating in writing in a letter to Brick Street Insurance as follows:

I am writing to let you know that I went back to work on 9-19-2007 on restricted duty. **I am declining Physical therapy, because my body cannot hold up to the strenuous activities outlined in the agenda, and further cannot keep my work schedule.** My Employer has set aside a work regimen that is **non strenuous**, and I will be faxing you a copy of that in the future[;] **I want it to be known that I am doing this on trial basis, and may not be able to continue the work duties set forth.** I am currently seeing Dr. Christopher K. Kim, MD[,] at the Center for Pain Relief at St. Francis Hospital. **I am still in a great deal of pain, and hopefully Dr. Kim will be able to help.**⁶ You wrote a letter, and stated that Neurological Associates was still my attending physician. And this is incorrect. I will do anything you need me to do to further assist you in this claim.

(A.R. at 845). By letter dated October 1, 2007, Brent Cheesebrew, defendant/petitioner's Operations Manager, notified Brick Street Insurance Brick Street Insurance, the workers' compensation insurance carrier, that

Steve Farruggia has returned to Light[-]Duty Status. According to his release from his Doctor[,] **we are using Steve to due [sic] very Light[-]Duty work. He is doing some QC [quality control] checks for us and some limited labor training with newer technicians. We are set to reevaluate Steve's Progress bi-monthly. We are doing this because we do not have an extended program for Steve but will accommodate him as long as progress is made.** We have asked a nurse case manager to help us in the evaluation process[.]”

(A.R. at 896).

However, despite the provision of temporary light-duty work, the plaintiff/respondent was unable to demonstrate that he could perform the essential functions of his former position as a cable installer. On October 2, 2007, Dr. Saghir Mir performed an IME of the plaintiff/respondent, recording his findings as follows:

PRESENT COMPLAINTS AND FUNCTIONAL LIMITATIONS:

Patient continues to have an aching, throbbing and burning type of pain across his lower back and right buttock area all the time. **Following surgery, [on 7-19-2007]**

⁶ According to Dr. Saghir Mir's IME report, Plaintiff "saw Dr. Kim on 9-18-2007 . . . [and Plaintiff] was advised that[,] at present[,] Dr. Kim does not want to consider any injections." (A.R. at 904).

his symptoms are worse. Any activity increases his symptoms. Intermittently, he has pain going down his right way all the way to his foot. He has numbness and tingling in his right calf and right foot, mostly on the lateral side. Prolonged sitting, standing, walking and riding in a car increases his symptoms. Coughing, sneezing and straining also increases his back pain. Lying down helps him some, though he has to change position constantly. At nighttime [sic], his symptoms wake him up. He has occasional dribbling or urine. He is able to manage activities of daily living by himself.

(A.R. at 904, emphasis added). Dr. Mir also indicated that **“Patient stated he has been back to work, though he does not do much.”** (A.R. at 904, 1227, emphasis added). On November 15, 2007, Mr. Farruggia signed a settlement agreement with Brick Street Insurance through which he gave up all his rights to future workers’ compensation benefits related to his work-related injury in return for a lump-sum payment. (A.R. at 897). The temporary, extra light-duty position was eliminated on November 28, 2007 as no additional light-duty work was needed. (A.R. at 1433). Mr. Farruggia expressly admitted that he was unable to perform the duties of his pre-injury job as a cable installer even after November 28, 2007, when he was laid off from his job for lack of work. (A.R. at 1227, 1230).

SUMMARY OF ARGUMENT

Petitioner, JWCF, LP, (“JWCF”), requests that the Court reverse the trial court’s denial of judgment as a matter of law and seeks a holding that judgment as a matter of law in its favor was warranted, or, in the alternative, that the Court reverse the trial court’s denial of JWCF’s motion for a new trial on the grounds that the jury verdict was clearly contrary to law and against the weight of the evidence, or alternatively, that a new trial is warranted due to several erroneous or otherwise improper procedural and evidentiary rulings by the trial court, ultimately precluding a fair trial on the merits and denying the petitioner substantial justice.

The plaintiff below, Steven Farruggia, presented insufficient evidence to show that JWCF violated the terms of W. Va. Code § 23-5A-3(b), when the evidence presented at trial showed that Mr. Farruggia had never been released by a physician to return to work at his former (pre-injury) position of employment as a cable installer; and, thus, he never qualified for reinstatement to his former or a “comparable” position, as defined by statute. Mr. Farruggia had been employed only temporarily at an extra light-duty position, which position was terminated for lack of need, specifically because both he and his medical providers clearly indicated that he was physically unable to perform the duties of a cable installer or any comparable position. As Steven Farruggia never qualified for reinstatement pursuant to the applicable statute, there was no basis for his retaliatory discharge claim; and the trial court erred in denying JWCF’s motions for judgment as a matter of law.

The trial court also erred in denying JWCF’s motion for a new trial as the verdict relating to the retaliatory discharge claim was contrary to law and against the weight of the evidence. In relation to the retaliatory discharge claim, the jury expressly found, as clearly stated on the verdict form, that JWCF had failed to reinstate the plaintiff/respondent to his former position or a comparable position. As the evidence clearly showed that Steven Farruggia had never qualified for reinstatement, JWCF had no statutory obligation to reinstate him. As there was no other basis for the jury’s determination that a retaliatory discharge had occurred, the jury was clearly wrong; and a new trial was thus warranted.

The trial court erred in giving a punitive damages instruction and in allowing the issue of punitive damages to reach the jury when, as a matter of law, there was insufficient evidence presented by the plaintiff below to show that JWCF’s decision to eliminate Steven Farruggia’s temporary position of employment constituted willful, wanton, or malicious conduct that would

merit punishment, over and above full compensation for damages resulting from his alleged retaliatory discharge. The trial court's punitive damages instruction was thus misleading and constituted prejudicial error, as it improperly permitted the jury to consider the issue of punitive damages, suggested that the evidence presented was sufficient to meet the standard for an award of punitive damages, and resulted in an award of punitive damages.

The trial court erred in both refusing to continue trial and refusing to exclude Steven Farruggia's proffered evidence of damages resulting from his purported loss of wages and salary; when, in the course of trial, it was disclosed that Mr. Farruggia had failed to supplement discovery responses prior to trial and had withheld evidence of his most recent employment conditions, including salary and wage information. As Steven Farruggia had not supplemented his discovery responses in order to provide his most recent salary and wage information prior to trial, the testimony of his expert economist, William Cobb, as allowed by the trial court, was potentially inaccurate and misleading; but could not be subjected to adequate cross-examination. Further, JWCF's expert witness Gary Bennett, CPA, whose testimony had been excluded, over one and one-half weeks before trial, did not have adequate time to fully review and analyze the new information so that adequate responsive testimony might be presented. The trial court's refusal, on the eve of the beginning of Defendant's case in chief, to allow adequate time to prepare to meet or utilize the previously undisclosed new evidence and its refusal to exclude evidence that had not been properly updated or supplemented, resulted in trial by ambush, precluded a fair trial on the merits in regard to the issue of damages; and it resulted in unfair and undue prejudice on the issue of damages.

The trial court also erred in excluding evidence that JWCF had previously treated Steven Farruggia in a lenient manner by voluntarily re-employing him after having discharged him for

cause after he refused a drug test. Although JWCF did not take substantial issue with the trial court's ruling that evidence of the plaintiff/respondent's prior drug use was prejudicial, JWCF argued that reference to drug use could be avoided while admitting evidence that JWCF had voluntarily treated its employee with leniency. Evidence of JWCF's prior conduct was relevant in that it would have tended to negate Steven Farruggia's claim that JWCF had discharged him in order to retaliate against him and had acted out of malice. Thus, the jury was denied substantial evidence relevant to JWCF's intent which evidence would have shown that JWCF had a history of treating Mr. Farruggia in a reasonable and even forgiving manner that was wholly inconsistent with charges of retaliation, malice, and reckless indifference.

The trial court erred in admitting evidence relating to emotional distress suffered by Steven Farruggia and Mr. Farruggia's family as such evidence had no relevance to any issue properly before the jury but tended solely to arouse sympathy for the plaintiff/respondent. The admission of such evidence was unduly prejudicial and unfair, and would have tended to mislead the jury into awarding punitive damages or other damages solely on the basis of sympathy for Mr. Farruggia and his family.

The overall effect of the trial court's evidentiary rulings was to so unfairly prejudice the jury against JWCF as to deny JWCF a fair trial on the merits. Taken as a whole, the trial court's evidentiary rulings, as made both prior to and in the course of trial, were selective in effect and allowed Steven Farruggia to present himself as an employee with an unblemished work record whose family was particularly in need. As presented to the jury, the evidence gave no indication of Mr. Farruggia's actual relationship with his employer, but precluded JWCF from showing that it had treated Mr. Farruggia with at least reasonable consideration at all times. As the jury was

denied adequate evidence to enable them to understand the employer-employee relationship at issue, JWCF was denied substantial justice.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under W. Va. R. App. P. 19(a), as the petitioner's assignments of error relate to the application of settled law as well as an issue of insufficient evidence and a case result against the weight of the evidence.

ARGUMENT

STANDARD OF REVIEW

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998] is *de novo*." *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009), Syl. pt. 1. The Court applies a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law. *Gillingham v. Stephenson*, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001).

The reviewing standard for denial of a new trial motion was stated in *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995), as follows:

We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

See also Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976)

("Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.").

"[T]he question of whether a jury was properly instructed is a question of law, and the review is *de novo*." *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996), Syl. pt. 1. "When this Court . . . reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), and its progeny." *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010), Syl. pt. 6.

To the extent that the issues raised herein relate to the trial court's evidentiary rulings, "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998), Syl. pt. 4; *see also McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995), Syl. pt. 1. ("Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.").

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motions of JWCF, LP, ("JWCF") for judgment as a matter of law, as the evidence presented by the plaintiff below, Steven Farruggia, was insufficient to show that the defendant below, JWCF, LP, ("JWCF") had violated the terms of W. Va. Code § 23-5A-3(b).

Discriminatory practices relating to an employee's receipt of workers' compensation benefits are clearly prohibited. *See, e.g.*, W. Va. Code § 23-5A-1. This Court held that, in order to make a prima facie case of discrimination under W. Va. Code 23-5A-1, *et seq.*, 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, 704,

403 S.E.2d 717, 721(1991) (footnote omitted). When an employee makes a prima facie case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge. In rebuttal, the employee can then offer evidence that the employer's proffered reason for the discharge is merely a pretext for the discriminatory act. *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991); *Sizemore v. Peabody Coal Co.*, 188 W. Va. 725, 426 S.E.2d 517 (1992).

Here, plaintiff/respondent Steven Farruggia alleged retaliatory discharge and was required to show that retaliation had occurred pursuant to W. Va. Code § 23-5A-3, which states in pertinent part as follows:

§ 23-5A-3. Termination of injured employee prohibited; re-employment of injured employees.

(a) It shall be a discriminatory practice within the meaning of section one [§ 23-5A-1] of this article **to terminate an injured employee while the injured employee is off work due to a compensable injury** within the meaning of article four [§§ 23-4-1 et seq.] of this chapter **and is receiving or is eligible to receive temporary total disability benefits**, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(b) 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. **A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury.** A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. In the event that neither

the former position nor a comparable position is available, the employee shall have a 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 recall shall be in effect for one year from the day 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 this one year period.

W. Va. Code § 23-5A-3 (LEXIS 2012) (emphasis added). Subsection (a) is not applicable to this matter as the alleged retaliation did not occur while the injured employee was off work or receiving workers' compensation benefits. At the relevant time, he was working in a position variously described as light, very light, or extra light-duty, that was not a comparable position to his prior position as a cable installer; and although he had previously filed a workers' compensation claim, that claim had been settled prior to the alleged retaliation, and he was not eligible to receive any additional benefits.

Referring to subsection (b) of § 23-5A-3, this Court has observed that an employee has the burden of proving, through competent medical evidence, that he has recovered from his compensable injuries and is capable of returning to work and performing his job duties. *Bailey v. Mayflower Vehicles Sys.*, 218 W. Va. 273, 278, 624 S.E.2d 710, 715 (2005). This is exactly what the plaintiff/respondent failed to show at trial. To the contrary, not only did his medical providers' record demonstrate that he was limited to work far less physically demanding than his former position as a cable installer; but he essentially indicated, in a contemporaneous writing, that his restricted work activities were such that he could not also withstand the "strenuous" physical therapy that had been proposed for him while his workers' compensation claim was still pending in September of 2007.

In determining whether there is a nexus between the filing of a workers' compensation claim and an employee's discharge, there is usually a lack of direct evidence; and courts look to a

variety of factors: proximity in time of the claim and the firing is relevant; evidence of satisfactory work performance and supervisory evaluations before the accident can rebut an employer's claim of poor job performance; and any evidence of an actual pattern of harassing conduct for submitting the claim is persuasive. *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 704, 403 S.E.2d 717, 721 (1991). Here, there is no evidence that JWCF even “fired” the employee as that term is normally understood. There was no evidence that the extra light-duty position occupied by the plaintiff/respondent was anything other than a temporary position; nor was there any evidence that anyone was hired, after the plaintiff/respondent’s position was eliminated, to perform the type of work he had been doing. Therefore, there was no evidence to suggest that Mr. Farruggia was working in a truly permanent position that had merely been referred to as “temporary” by the employer, in an effort to avoid an issue of liability.

To the contrary, the evidence showed clearly that nine months had passed since the plaintiff/respondent’s compensable injury had first prevented him from performing the work he had been hired to perform, i.e., the work of a cable installer. In the weeks before his extra light-duty position was eliminated, there was no indication that the plaintiff/respondent’s condition was improving sufficiently that his return to work as a cable installer could be predicted with reasonable confidence either by Mr. Farruggia himself or by any of his treating physicians. He was not able to perform the work of a cable installer in November of 2007, and no physician had released him to perform such work without restrictions. “Obviously, where the employee has suffered a severe injury that forever limits the employee’s ability to perform his accustomed work, the employer should not be penalized for discharging the employee.” *Powell*, 184 W. Va. at 706, 403 S.E.2d at 723.

JWCF made no effort to terminate the plaintiff/respondent after he sought workers' compensation benefits. At the time his position was eliminated, he had already elected to settle his workers' compensation claim, for a lump-sum payment, and to forego all future medical benefits. Thus, Mr. Farruggia had already received all that he was entitled to receive for his compensable injury, and JWCF had no reason or incentive to retaliate against him even if he had qualified for reinstatement. However, under the terms of § 23-5A-3(b), JWCF had no obligation to reinstate the plaintiff/respondent as a cable installer, or to place him in a comparable position, until such time as he showed that he was sufficiently recovered that he could perform his duties as a cable installer. As the plaintiff/respondent was never able to qualify for reinstatement pursuant to the express terms of § 23-5A-3(b), JWCF's motions for judgment as a matter of law (A.R. at 567-568, 724), should have been granted and Mr. Farruggia's claims dismissed with prejudice.

2. The trial court erred in denying JWCF's motion for a new trial as the verdict finding for the plaintiff below, Steven Farruggia, on his retaliatory discharge claim, was clearly contrary to law and against the weight of the evidence, as the evidence showed that JWCF had not violated the terms of W. Va. Code § 23-5A-3(b).

Reference to the verdict form utilized at the trial of this matter and to the subsequent judgment order entered by the trial court, plainly shows that the jury based its verdict on the erroneous conclusion that JWCF had improperly "failed to reinstate [Steven Farruggia] to his former or comparable position with [JWCF]" (A.R. at 4). As noted above, given that the plaintiff/respondent never qualified for such reinstatement, the jury's conclusion that the applicable law had been violated was clearly wrong. Plaintiff/respondent admitted that he was aware of the terms of his extra light-duty position and that he understood it to be a temporary position from which he might be laid off if sufficient light-duty work was not available. (A.R. at 333-334). As the evidence at trial plainly showed that Steven Farruggia had never even attempted

to be reinstated to his position as a cable installer or to a comparable position, by obtaining a release from his treating physician, without restrictions, he could not, as a matter of law, have been retaliated against as prohibited by W. Va. Code § 23-5A-3, which expressly applies to reinstatement to a former or comparable position. The plaintiff/respondent never identified an alternate authority as a source for a purported legal duty to provide him with a permanent light-duty position in lieu of his former position or a comparable position. As the jury's verdict was plainly both contrary to law and against the weight of the evidence presented at trial, JWCF's motion for a new trial should have been granted; and the trial court committed reversible error in denying said motion.

3. The trial court erred in giving a punitive damages instruction and in allowing the issue of punitive damages to reach the jury when, as a matter of law, there was insufficient evidence presented by the plaintiff below to show that JWCF's decision to eliminate Steven Farruggia's position of employment constituted willful, wanton, or malicious conduct.

In order to justify the recovery punitive damages, and thus, in order to warrant a jury instruction on punitive damages, there must first be presented evidence sufficient to show that JWCF engaged in willful, wanton, malicious, or reckless conduct. As this Court stated in *Alkire v. First Nat'l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996):

The type of conduct which gives rise to punitive damages in West Virginia was first formulated in *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895), where the Court stated in Syllabus Point 4:

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous. Although there are tempting shorthand phrases to characterize the type of conduct which warrants punitive damage consideration, for example, "conscious indifference," "reckless, willful and wanton," "particularly egregious" we

are still committed to the traditional rule announced in *Mayer* and cited with approval in a number of subsequent cases.

Id. at 129 (citations omitted).

Unless malice and willfulness is to be presumed upon a finding that a statutory retaliatory discharge occurred, there was no evidence sufficient to meet the standard described in *Alkire*. "Punitive or exemplary damages are such as, in a proper case, a jury may allow against the Defendant by way of punishment for willfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, **over and above full compensation for all injuries directly or indirectly resulting from such wrong.**" *Marsch v. American Electric Power Company*, 207 W.Va. 174, 530 S.E.2d 173 (1999), Syl. pts. 12-13 (emphasis added).. As stated in *Harless v. First Nat'l Bank*, 169 W.Va. 673, 289 S.E.2d 692 (1982), Syl. pt. 4, "[p]unitive damage instructions are legitimate only where there is evidence that defendant acted with wanton, willful, or reckless conduct, or criminal indifference to civil obligations affecting rights of others to appear, or where the legislature so authorizes."

Prior to trial, the lower court denied JWCF's motion to exclude evidence relating to Steven Farruggia's claim for punitive damages. (A.R. at 1405-1406). However, at trial, plaintiff/respondent simply did not present evidence sufficient to show that JWCF had acted in a manner that suggested malicious intent or a reckless disregard for his rights. As a matter of law, based upon the evidence presented, a jury instruction on punitive damages was simply not warranted and was not consistent with the evidence. The giving of such an instruction was misleading and prejudicial error, and incorrectly suggested to the jury that the acts of the employer were sufficient to meet the standard for an award of punitive damages. This error was magnified by the admission of irrelevant evidence that tended to depict the plaintiff/respondent in

a most sympathetic light and as a victim of circumstance who deserved monetary help, and the exclusion of relevant evidence that tended to show that JWCF had a history of treating Steven Farruggia in a reasonable and even forgiving manner that was wholly inconsistent with allegations of malice and reckless indifference.

4. The trial court erred in both refusing to continue trial and refusing to exclude Steven Farruggia's proffered evidence of damages resulting from his purported loss of wages and salary, when, in the course of trial, it was disclosed that Mr. Farruggia had failed to supplement discovery responses prior to trial and had withheld evidence of his most recent employment conditions, including salary and wage information.

The trial court erred in both refusing to continue trial and refusing to exclude Steven Farruggia's proffered evidence of damages resulting from his purported loss of wages and salary, when, in the course of trial (A.R. at 286-294), it was disclosed that Mr. Farruggia had failed to supplement discovery responses prior to trial and had withheld evidence of his most recent employment conditions, including salary and wage information. As Steven Farruggia had not supplemented his discovery responses in order to provide his most recent salary and wage information prior to trial, the testimony of his expert economist, William Cobb, as allowed by the trial court, was potentially inaccurate and misleading, but could not be subjected to adequate cross-examination. Further, JWCF's expert witness Gary Bennett, CPA, whose testimony had been excluded prior to trial (A.R. at 1207-1211), did not have adequate time to fully review and analyze the new information so that adequate responsive testimony might be presented. The trial court's refusal to allow adequate time to prepare to meet or utilize the previously undisclosed new evidence and its refusal to exclude evidence, that had not been properly updated or supplemented, resulted in trial by ambush, precluded a fair trial on the merits in regard to the issue of damages, and resulted in unfair and undue prejudice on the issue of damages.

As documented by his e-mail to plaintiff/respondent's economics expert, William E. Cobb, Steven Farruggia's counsel knew, by early afternoon on September 12, 2010, at the latest,⁷ that the plaintiff/respondent had been employed at two jobs, including a new job at Wal-Mart with substantial benefits far in excess of those offered by JWCF. (A.R. at 288). The trial of this matter began on September 13, 2010, a Monday. This information was improperly withheld, and was only revealed in the course of Mr. Farruggia's trial testimony on the morning of September 15th. (A.R. at 288-302). Plaintiff/respondent's counsel subsequently argued, contrary to well-established law, that he had no duty to supplement discovery. (A.R. at 317). This Court has plainly stated that one purpose of discovery is to eliminate surprise and to preclude trial by ambush. *McDougal v. McCammon*, 193 W.Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995). Speaking for this Court, Justice Cleckley stated: "We find the failure to supplement the discovery requests, as required by Rule 26(e) of the Rules of Civil Procedure, is a violation of the letter and spirit of one of the most important discovery rules." 193 W.Va. at 237, 455 S.E.2d at 796.

As William Cobb's expert testimony would clearly have been not only unhelpful to the jury, *see, e.g.*, W. Va. R. Evid. 702, but potentially actively misleading, in the absence of the most recent employment information, fairness and substantial justice required that William Cobb's testimony either be excluded, or that adequate time be permitted to allow JWCF to review the new information, to prepare for cross-examination, and to allow JWCF's previously excluded expert, Gary Bennett, CPA, to review the new information and prepare his own analysis to be presented at trial. JWCF moved for a continuance in order to allow time to meet the new evidence, but was denied. (A.R. at 744). The new material relating to Steven Farruggia's previously undisclosed employment related to wages and benefits and included a extensive

⁷ Counsel indicated that his client had informed him of the new job on Saturday, September 11, 2010.

employment manual. (A.R. at 926-1194). Had a continuance been granted, an adequate analysis of plaintiff/respondent's current wages and benefits may well have revealed that his current position is far more remunerative than his prior position with JWCF, greatly reducing plaintiff/respondent's damages. The trial court eventually decided on September 16th, on the eve of the defendant/petitioner's case in chief, to allow Gary Bennett, CPA, not only to assist JWCF's counsel with cross-examination, but to testify; however, this was too late to allow adequate time to prepare absent a continuance.

The trial court's decision clearly constituted an abuse of discretion, as is plainly shown when the trial court's ruling on the plaintiff/respondent's expert is compared with the trial court's prior exclusion of JWCF's expert Gary Bennett, CPA. (A.R. at 1404). In considering a pre-trial motion *in limine*, (A.R. at 1197-1202), the trial court arguably erred by refusing to allow the testimony of JWCF's expert economist, Gary Bennett, CPA, on the grounds that he had not provided a report prior to trial, when no report was required by the trial court's scheduling order, opposing counsel never sought to depose the expert witness prior to trial; and the expert's failure to prepare a report or otherwise disclose his opinions prior to trial was attributed to the failure of the plaintiff/respondent to supplement and update his initial and earlier disclosure of his then-current wage, salary, and benefit information. (A.R. at 1207-1211). Clearly, as demonstrated by plaintiff/respondent's attempt to present previously undisclosed evidence, Mr. Bennett was shown to have been reasonable in his expectation of further information from the plaintiff/respondent.

Whether the pre-trial exclusion of Mr. Bennett's testimony constituted error was rendered moot by the subsequent discovery, at trial, that the plaintiff/respondent was, in fact, actually attempting to present updated wage, salary, and benefit information that had never been disclosed. This ironic turn of events effectively gave the trial court the opportunity to reconsider

its earlier reasoning as applied to JWCF's expert and to correct any possible error by either excluding William Cobb's expert testimony or by continuing the trial in order to allow JWCF's counsel and expert sufficient time to meet the new and previously withheld evidence. Inconsistent with its earlier ruling as to Gary Bennett's testimony, however, the trial court then refused to allow adequate time for JWCF to consider the updated evidence newly disclosed in the course of trial; and it refused to exclude the plaintiff/respondent's economic evidence although it clearly had not been appropriately updated or supplemented prior to trial. Thus, the trial court's decision to allow the presentation of plaintiff/respondent's "updated" evidence was unfair; resulted in substantial prejudice against JWCF; and constituted trial by ambush and an abuse of discretion.

5. The trial court erred in excluding evidence that JWCF had previously treated Steven Farruggia in a lenient manner by voluntarily re-employing him after having discharged him for good cause, resulting in unfair prejudice against JWCF in relation to Mr. Farruggia's claim of retaliatory discharge and his claim for punitive damages.

Prior to trial, Steven Farruggia's motion *in limine* to exclude evidence of his drug use problem was granted. (A.R. at 1404). However, in the course of trial, JWCF's argument that it should be permitted to introduce evidence showing that, in the course of his employment by JWCF, Mr. Farruggia had been properly terminated for cause, but that JWCF had subsequently given him a second chance and rehired him, was denied. (A.R. at 354-358, 436-464, 615-617). This constituted a clear abuse of discretion on the part of the trial court, as more complete evidence of Mr. Farruggia's employment history tended to show that JWCF had, in actual demonstrable fact, treated Mr. Farruggia with at least reasonable consideration and, arguably, leniency.

Such evidence tended to show, not only that any attribution of malice to JWCF was ill-founded and inconsistent with its past conduct, but that even retaliatory motive was inconsistent with JWCF's actual record of attempting to retain Mr. Farruggia as a useful employee. Such evidence would also have been consistent with JWCF's creation of an "extra-light" or light-duty, temporary position when it had no obligation whatsoever to do so.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." W.Va. R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." W. Va. R. Evid. 403. Evidence relating to Steven Farruggia's prior termination for cause and subsequent re-employment was relevant and admissible pursuant to Evidence Rule 401, as it was relevant to show that JWCF had historically acted in a considerate and even lenient manner, when more strict treatment was fully justified and would have resulted in Steven Farruggia's permanent separation from JWCF, for good cause, at a prior date. The balancing required by Evidence Rule 403 was unnecessary, as the potentially prejudicial information would not be presented. To the extent that some prejudice might be presumed where no reason was presented for Steven Farruggia's prior termination, that prejudice would not outweigh the probative value of more complete evidence of JWCF's conduct in dealing with the plaintiff/respondent.

As the probative value of this evidence outweighed any possible prejudice to the plaintiff/respondent, exclusion was not warranted and the defendant/petitioner was prejudiced and denied a fair trial. Further, as the trial court instructed the jury on the issue of punitive damages,

evidence relating to JWCF's lenient conduct was relevant and would have tended to negate any suggestion that it had acted with malice or in reckless disregard for its employee's rights.

6. The trial court erred in admitting evidence relating to emotional distress suffered by Steven Farruggia and Mr. Farruggia's family, when such evidence had no relevance to any issue properly before the jury but could only serve to improperly arouse the emotions and sympathies of the jury.

Prior to trial, the court below specifically ruled that certain evidence would not be presented as it related to claims that had been withdrawn, including claims for emotional distress. (A.R. at 1402). Stephen Farruggia was permitted to testify in relation to his emotional distress despite the fact that he was no longer asserting an emotional distress claim. (A.R. at 313-315). He was also permitted to testify that his sister-in-law was terminally ill and that her children would thus be left without their mother (A.R. at 307-308), despite such testimony having no relevance to any issue to be determined by the jury, and contrary to the lower court's pretrial order. As the only possible effect of such testimony would be to arouse the emotions and sympathies of the jurors in favor of Mr. Farruggia as a victim of circumstance, and against an employer effectively depicted as discharging an employee in his time of need, such testimony could serve only to unfairly prejudice the jury against JWCF. Any possible relevance was substantially outweighed by the dangers of unfair prejudice and confusion. As the admission of this testimony was so clearly improper, it constituted an abuse of discretion.

7. The overall effect of the trial court's evidentiary rulings was to exclude evidence necessary for an accurate understanding of the employment relationship between the parties and of the relevant circumstances at issue, thus precluding a fair trial on the merits.

The overall effect of the trial court's evidentiary rulings as noted herein was to so unfairly prejudice the jury against JWCF as to deny JWCF a fair trial on the merits. Taken as a whole, the trial court's evidentiary rulings, as made both prior to and in the course of trial, were selective in

effect and allowed Steven Farruggia to present himself as an employee with an unblemished work record whose family was particularly in need. As presented to the jury, the evidence gave no indication of Mr. Farruggia's actual relationship with his employer, but precluded JWCF from showing that it had treated Mr. Farruggia with at least reasonable consideration at all times. Despite having had the opportunity to terminate Mr. Farruggia for cause and to maintain that separation permanently, JWCF had voluntarily given Mr. Farruggia a second chance by rehiring him. The jury was thus denied any evidence of JWCF's willingness to work with Mr. Farruggia, and was also denied evidence of JWCF's lenient conduct in allowing him opportunities, i.e., his rehiring after justified termination, that it had no legal obligation to provide. As the jury was denied adequate evidence to enable them to understand the employer-employee relationship at issue, JWCF was denied substantial justice.

Even if the discrete evidentiary rulings, each viewed in isolation, did not rise to the level of an abuse of discretion, the overall effect of admitting irrelevant and misleading evidence, particularly when considered in conjunction with the trial court's exclusion of evidence that JWCF had in fact previously treated the plaintiff/respondent in a fair manner, was unduly prejudicial, and could serve only to confuse or prejudice the jury. Given the actual facts and circumstances of this matter as revealed through discovery prior to trial, the overall picture presented to the jury was simply inaccurate. The plaintiff/respondent was protected from the slightest hint of prejudice, resulting from acts that he had unquestionably committed, at the cost of denying to the jury the opportunity to consider that the JWCF had indisputably engaged in reasonable and even laudable conduct toward the plaintiff/respondent.

As noted above, the plaintiff/respondent was also allowed to arouse the jury's emotions by testifying about his family, and to effectively portray himself in the most sympathetic light

possible. The sole possible effect of such evidence would be to elicit sympathy for the plaintiff/respondent, and to render his employer unsympathetic by comparison. Wholly lacking in probative value, it could serve only to inspire prejudice against JWCF for reasons completely unrelated to the incidents actually at issue and, thus, to mislead the jurors in their determination of liability and damages. Hence, the overall effect of the trial court's evidentiary rulings, as noted herein, was to deprive the jury of an adequate picture of actual relevant events, resulting in a miscarriage of justice.

CONCLUSION

Wherefore, for the reasons set forth above, petitioner, JWCF, LP, requests that the Court reverse the trial court's denial of judgment as a matter of law, and grant the petitioner judgment in its favor as set forth herein, or, in the alternative, that the Court reverse the trial court's denial of petitioner's motion for a new trial, on the grounds that the jury verdict was clearly contrary to law and against the weight of the evidence, or alternatively, on the grounds that a new trial is warranted due to several erroneous or otherwise improper procedural and evidentiary rulings by the trial court, and that the petitioner be granted such other and further relief as the Court may deem proper.

JWCF, LP

By Counsel,



Barbara G. Arnold, (W. Va. Bar I.D. 4672)
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, West Virginia 25332
304-344-5600 Telephone
304-344-8141 Facsimile

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JWCF, LP, (formerly known as
Baker Installations, Inc.), a foreign
corporation conducting business in
West Virginia, Defendant Below,
Petitioner

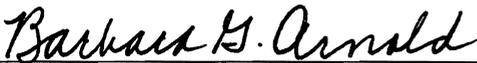
vs.) No. 12-0389

Steven Farruggia, Plaintiff Below
Respondent

CERTIFICATE OF SERVICE

I, Barbara G. Arnold, counsel for Petitioner, hereby certify that service was made of the foregoing, Petitioner's Brief, upon counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows on this, the 22nd day of June, 2012:

Stephen P. New, Esquire
328 Neville Street, Suite 100
P.O. Box 5516
Beckley, WV 25801


Barbara G. Arnold, (W. Va. Bar I. D. 4672)
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, West Virginia 25332
304-344-5600 Telephone
304-344-8141 Facsimile