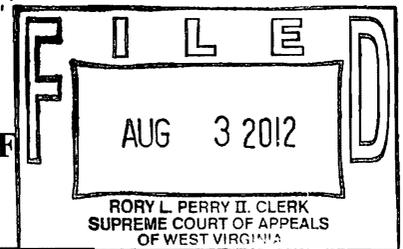


IN THE SUPREME COURT OF APPEALS OF
THE STATE OF WEST VIRGINIA



No. 12-0389

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

Petitioner,

vs.

STEVEN FARRUGIA,

Respondent.

RESPONDENT'S BRIEF

On Appeal From the Circuit Court of Kanawha County,
The Honorable Carrie Webster
Civil Action No. 08-C-720

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STATEMENT OF THE CASE

Procedural History

Plaintiff/Respondent Steven Farruggia ("Farruggia," "Respondent," or "Plaintiff") filed his Complaint against Defendant/Petitioner Baker Installations, Inc., now known as JWCF, LP ("JWCF," "Petitioner," or "Defendant"), on April 11, 2008. (Appendix Record ["AR"] at 15.) The Complaint sought damages for JWCF's violation of the West Virginia Human Rights Act, and damages for retaliatory discharge in violation of West Virginia Code §§ 23-5A-1 and -3. Farruggia voluntarily dismissed his claim for violations of the West Virginia Human Rights Act.

JWCF moved for summary judgment on July 15, 2010. (AR at 1411-91.) The trial court denied the motion for summary judgment on September 13, 2010. (AR at 1613-14.)

Prior to trial, both parties filed motions in limine to exclude evidence at trial. The trial court granted some motions excluding evidence and denied some motions. (AR at 1197-1342.) Specifically, the trial court granted Plaintiff's motion to exclude evidence relating to his prior drug use and evidence pertaining to Farruggia's employment history, which JWCF sought to introduce as an indirect way of bringing in immaterial employment history. (AR at 1403.) The trial court also granted Plaintiff's motion to exclude JWCF's economics expert because he failed to provide a report of his opinions. (AR at 1402.)

A jury trial on the retaliatory discharge action was commenced on September 13, 2010. At the conclusion of Plaintiff's case, JWCF moved for a directed verdict judgment on the evidence. The motion was denied. (AR at 615.)

After deliberations, the jury returned a verdict in favor of Plaintiff, finding that (1) the evidence proved that retaliation for Plaintiff's filing a workers' compensation claim was a significant factor in JWCF's decision to terminate Farruggia; and (2) JWCF failed to reinstate Plaintiff to his former or comparable position. Plaintiff was awarded \$229,619 in compensatory damages and \$30,000 in punitive damages. (AR at 700.)

JWCF filed a motion for new trial on September 29, 2010. (AR at 1350-79.) A hearing on the motion for a new trial was heard on December 22, 2010. On February 21, 2012, the court denied the motion for a new trial. (AR at 1390-1400.)

JWCF filed its notice of appeal on March 22, 2012.

Statement of the Facts

JWCF is a telecommunications company that does contract work in the state of West Virginia and other states for cable companies such as Comcast. In addition to other work, JWCF installs cable into residences and businesses. JWCF is obligated to carry workers' compensation insurance under West Virginia law. Its workers' compensation claims are handled by BrickStreet Insurance. (AR at 142.) Plaintiff/Respondent Farruggia was hired by JWCF, when it was known as Baker Installations, on February 9, 2005, to work as a cable installation technician. (AR at 1712.) On February 14, 2007, Farruggia injured his back while on the job site. (AR at 901-02.) Farruggia initially came back to work five or six weeks after the injury, but due to the seriousness of the injury, he was off work until the early fall. During this time period, on July 19, 2007, Farruggia had corrective back surgery.

(AR at 903.) Also, while on leave, Farruggia filed for and received workers' compensation benefits.

On August 23, 2007, Farruggia informed JWCF that his treating physician at the time, Dr. Christopher Grose, released him to extra-light-duty employment. (AR at 830.) Farruggia went back to work on September 19, 2007, and began to work for JWCF as a "progress evaluator," which was considered a light-duty position. (AR at 846.) JWCF never informed Farruggia that his position as a progress evaluator would end at some point. (AR at 306.)

Farruggia testified that JWCF never required him to produce a written full release statement from his treating physician prior to returning to his former job as a cable installation technician. (AR at 304.) On his own, because he was able, Farruggia returned to full duty as a cable installer in early November 2007. (AR at 304-06.)

During this same time period, Farruggia was offered a \$20,000 lump-sum settlement offer by BrickStreet Insurance for Farruggia's workers' compensation claim, which Farruggia accepted on November 12, 2007. (Trial Transcript ["TR"] 278.) JWCF employees testified, however, that Cinnomin Yohe, a JWCF manager, considered it to be against JWCF policy for the insurer to settle with a JWCF employee, while the employee was working at JWCF, and was strongly opposed to the Farruggia settlement. (TR 215-16, 278.) JWCF managers met on November 12, 2007 and agreed to eliminate any jobs for Farruggia once he had settled his workers' compensation claim with BrickStreet Insurance.

On November 29, 2007, Farruggia was terminated from employment with no explanation. (AR at 306-07, 897.) Yet, when Farruggia questioned why he was being terminated, he was told by Austin Cantrell, his supervisor, that it was because he had settled

his workers' compensation claim while he was employed by JWCF, in violation of JWCF policy. (AR at 306-07; TR 195.) On February 14, 2008, approximately one year later, Farruggia asked to be reinstated to his former job as a cable installation technician. (AR at 308-09.) Brent Cheesebrow, a JWCF manager, testified that he received Farruggia's reinstatement request to return to work as a cable installer but that JWCF refused to consider Farruggia for the job. (AR at 74-75.) Farruggia never received a response to his request for employment. (AR at 310.)

SUMMARY OF THE ARGUMENT

After a full and fair jury trial on the merits, the trial court properly denied JWCF's preverdict West Virginia Rules of Civil Procedure, Rule 50 motion for directed verdict because the jury had ample evidence upon which it could find in favor of Farruggia on his claim that JWCF's termination of his employment violated West Virginia Code §§ 23-5A-1 and -3 and was motivated by retaliation for Farruggia's workers' compensation claim and settlement. Likewise, the trial court properly denied JWCF's postverdict Rule 59 motion for new trial because the jury misapprehended neither the law nor the evidence presented in reaching its verdict against JWCF.

The trial court did not abuse its discretionary authority in allowing a jury instruction on punitive damages. At trial, evidence was introduced about JWCF's wrongdoing leading to the termination of Farruggia and the inexplicable elimination of Farruggia's job. This evidence was more than sufficient to meet the state standard for an award of punitive damages beyond the actual damages awarded to Farruggia.

Immediately prior to trial, Farruggia informed his attorney that he had accepted employment at the local Wal-Mart approximately one month before. As soon as he learned of Farruggia's change in employment, Farruggia's attorney notified JWCF's attorney about it. The trial court allowed the parties to argue the issue as to whether this new information prejudiced the defense in the case, in light of the fact that the court had earlier excluded JWCF's economics expert from testifying at trial. Rather than delaying the trial, the court sanctioned Plaintiff's counsel for the failure to timely supplement discovery, and counsel for Plaintiff was ordered to pay Defendant's consulting economist's fees for his review of the new evidence. JWCF also declined the court's offer of further sanctions, and the trial court properly declined JWCF's offer to sanction Plaintiff by striking Plaintiff's expert as a witness. The trial court did not abuse its discretion when it sanctioned Farruggia's attorney for not supplementing discovery in a timely fashion, and in denying JWCF's motion for a continuation of trial, or in a new trial based on the new evidence about Farruggia's employment immediately prior to trial.

The trial court did not err in excluding evidence from the jury about Plaintiff's prior job termination based on the parties' pretrial stipulation not to raise issues relative to this issue. JWCF's desire to introduce evidence that it was a "good guy" employer in the past, as a backhanded way of introducing Plaintiff's previous employment history—which the parties had previously stipulated that JWCF would not introduce—was properly excluded by the trial court. The court's rulings on evidentiary issues were well within its discretionary authority under Rules 401, 403, and 404(b) of the West Virginia Rules of Evidence.

Finally, Farruggia's testimony regarding his terminally ill sister in law did not improperly prejudice the jury as evidenced by the jury's minimal award of \$15,000 for aggravation, annoyance, and inconvenience, and the admission of this evidence did not warrant a new trial or reversal of the jury's final verdict.

STATEMENT REGARDING ORAL ARGUMENT

Respondent Farruggia respectfully requests oral argument pursuant to West Virginia Rule of Appellate Procedure 19.

ARGUMENT

I. STANDARD OF REVIEW.

The West Virginia Court of Appeals reviews whether the trial court erred in denying a motion for judgment pursuant to West Virginia Rule of Civil Procedure 50 under the de novo standard. *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009); *see also Stevenson v. Indep. Coal Co.*, 227 W. Va. 368, 709 S.E.2d 723 (2011). "The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. Pt. 2, *Peters*, 224 W. Va. 160, 680 S.E.2d 791.

A trial court has broad discretionary authority to order a new trial or deny a motion for a new trial. The trial court's decision on a Rule 59 motion is not subject to appellate review unless the trial judge abused his discretionary authority. *Neely v. Belk, Inc.*, 222 W. Va. 560, 668 S.E.2d 189 (2008).

The trial court has the discretionary authority to determine the formulation of jury instructions, and the trial court's decision to allow a jury instruction is reviewed under an abuse-of-discretion standard. Syl. Pt. 1, *Radec, Inc. v. Mountaineer Coal Dev. Co.*, 210 W. Va. 1, 552 S.E.2d 377 (2000). The actual terms and language of the jury instruction will be reviewed to determine whether the instruction is a correct statement of the law. *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001).

The supreme court of appeals should review each of Petitioner's numerous evidentiary assignments of error and the trial court's evidentiary rulings pursuant to an abuse-of-

discretion standard. *Smith v. First Cmty. Bancshares, Inc.*, 212 W. Va. 809, 575 S.E.2d 419 (2002).

II. ARGUMENTS REGARDING PETITIONER'S ASSIGNMENT OF ERROR.

A. The Trial Court Properly Denied Petitioner's Motion For Judgment As A Matter Of Law.

At any point prior to the submission of a case to the jury, a party may move for judgment. Pursuant to Rule 50, once the plaintiff completes the presentation of evidence before the jury, the defendant may move for a directed verdict if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." W. Va. R. Civ. P. 50(a)(1). Petitioner JWCF appealed the circuit court's denial of its Rule 50(a) motion for directed verdict at the completion of Plaintiff's case and before the case went to the jury for deliberations. To prevail on a Rule 50(a) motion, however, JWCF had to show the absence of any evidence upon which the jury could find in favor of Farruggia in this case. *Stewart v. Johnson*, 209 W. Va. 476, 549 S.E.2d 670 (2001) (citing Syl. Pt. 3, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996)). JWCF could not meet this burden, and the trial court properly denied JWCF's motion for a directed verdict.

In determining a motion for directed verdict, the court must assume as true the facts before the jury. *Radec*, 210 W. Va. 1, 552 S.E.2d 377; *see also Akers v. Cabel Huntington Hosp., Inc.*, 215 W. Va. 346, 599 S.E.2d 769 (2004) (holding that in determining a motion for a directed verdict, the court must decide whether the plaintiff has established a prima facie case while weighing the evidence in a light most favorable to the plaintiff).

This means that in the instant case, to survive a directed verdict, Farruggia had to introduce enough evidence upon which a jury could find that JWCF's decision to terminate Farruggia violated West Virginia Code §§ 23-5A-1 to -4. Specifically, it is Farruggia's claim that retaliation for his having filed a workers' compensation claim was a significant factor that motivated JWCF's decision to terminate his employment in violation of § 23-5A-1, and that JWCF failed to reinstate him to his former position or a similar position in violation of § 23-5A-3.

It is the clear public policy of West Virginia that an employer may not discriminate against present or former employees because the employee receives or attempts to receive workers' compensation benefits, to which he or she is allowed under the law. W. Va. Code § 23-5A-1; *Peters*, 224 W. Va. 160, 680 S.E.2d 791; *see also* Syl. Pt. 2, *Nestor v. Bruce Hardwood Floors, LP*, 210 W. Va. 692, 558 S.E.2d 691 (2001) ("It is a contravention of public policy and actionable to discharge an employee because he has filed a workmen's compensation claim against his employer."). Both parties agree that to establish a prima facie case of discriminatory retaliatory discharge under the West Virginia Workers' Compensation Act, the plaintiff must present evidence that (1) the employee suffered an on-the-job injury; (2) the employee filed for workers' compensation benefits; and (3) the filing of the workers' compensation benefits was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. Syl. Pt. 3, *Huggins v. City of Westover Sanitary Sewer Bd.*, 22 W. Va. 573, 712 S.E.2d 482 (2011) (citing Syl. Pt. 1, *Powell v. Wyo. Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991)).

The trial court properly denied JWCF's directed verdict motion at the conclusion of Farruggia's evidence because the evidence was uncontested, as stated in the Complaint, that Farruggia suffered a work-related injury on February 14, 2007. (AR at 1711-15.) In addition, it is uncontested that Farruggia filed for and received workers' compensation benefits. (AR at 1711-15.) The dispute in this case centers on the third element. Farruggia presented substantial evidence at trial that his filing of a workers' compensation claim, and Farruggia's acceptance of the insurer's settlement of his claim, were significant factors in JWCF's decision to discharge Farruggia. It is important to note that in determining the directed verdict motion on the issue of whether there has been a violation of ' ' 23-5A-1 to -4, the trial court understood that direct proof of employment discrimination is not required and is rarely available. *Nestor*, 210 W. Va. 692, 558 S.E.2d 691. The court in *Nestor* stated that the plaintiff must "show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." *Id.* at 695, 558 S.E.2d at 694 (quoting *Conaway v. E. Associated Coal Corp.*, 178 W. Va. 164, 170-71, 358 S.E.2d 423, 429-30 (1986)).

During Plaintiff's case at trial, Jason Armstrong, the lead technician at JWCF while Farruggia was employed there, testified that he was present when Farruggia was terminated by Austin Cantrell, his direct supervisor at the time. (TR 195.) Armstrong further testified that Farruggia was told that the workers' compensation settlement he had agreed to the day before had something to do with his termination. (TR 195.)

The jury also heard testimony from Cherrie Lyttle, the claims handler for Farruggia's workers' compensation claim with JWCF's insurer. Ms. Lyttle testified that she was informed by Cinnomin Yohe, JWCF's manager, that JWCF had a policy to never settle worker compensation claims with current employees and that the insurance company's offer to settle Farruggia's claim was contrary to this policy. (TR 275.) It was Ms. Yohe's position that settlements were not allowed as a policy "to keep current employees from going to other employees and making it look like they received a lump sum for having an injury." (TR 276.) Ms. Lyttle testified that Cinnomin Yohe was unhappy and upset when Farruggia accepted the settlement offered to him on November 12, 2007. (TR 278.) After the settlement, Ms. Lyttle testified that Cinnomin Yohe decided that once Farruggia signed the settlement, he would be terminated by informing him that his job no longer existed. (TR 279.)

While JWCF presented testimony that Farruggia was terminated because his light-duty position was no longer available, Jason Armstrong testified that that was not the full reason for his termination. (TR 201-02.) Furthermore, the evidence presented at trial was unequivocal that at the time Farruggia was terminated he was no longer working at the light-duty position but had returned to his original job as a cable installer. Specifically, Farruggia testified that he was engaged in heavy-duty work just prior to his termination on November 29, 2007. (TR 327.) Plaintiff's Trial Exhibits 3 and 4 and the Daily Truck Reports for November 20, 2007 and November 23, 2007 reflect Farruggia's employment as a cable installer and contain Farruggia's signature. (TR 130-31.) Further, Plaintiff's Trial Exhibit 1, the Affidavit of Austin Cantrell, Farruggia's supervisor, states that Farruggia returned to work

as a cable technician. (TR 122.) Armstrong testified, contrary to JWCF's claims, that Farruggia was not accompanied by a trainee in late November because the Daily Truck Reports did not contain the signature of the trainee. (TR 200.) This testimony was corroborated by Farruggia, who testified that he had returned to his former job as a cable installation technician on his own, and performed the job without assistance. (AR at 303-08.) In other words, the evidence at trial plainly showed that at the time of Farruggia's termination, Farruggia had returned to his former job as a cable installer and was doing the work without assistance, and that the elimination of the light-duty job was not the reason for Farruggia's termination.

Finally, there was substantial and uncontroverted evidence presented to the jury that JWCF refused to reinstate Farruggia after he was terminated. It was uncontested that after Farruggia was terminated, he notified JWCR that he wanted to be reinstated to his former job. (AR at 308-10; TR 331.) Brent Cheesebrew, the Area Manager for Baker Installations in 2007, testified that he saw Farruggia's request for this job but did not respond. (TR 74-75.) In fact, the evidence showed that JWCR never considered Farruggia for any job, and Farruggia never received a response from JWCR about his request for reinstatement. (AR at 310.)

Reviewing the testimony presented to the jury in a light most favorable to Farruggia, Farruggia made a prima facie case that his termination from JWCR was motivated by a retaliatory response to Farruggia's workers' compensation claim, and his decision to accept a lump-sum settlement while he was working. The evidence showed that JWCF's contention that it terminated Farruggia because his light-duty position was extinguished and because

Farruggia never presented a medical release for cable installation work, was false. The evidence presented to the jury demonstrated that a medical release was irrelevant because Farruggia had already returned to his former position as a cable installer with JWCF's knowledge and acquiescence. Further, JWCF never presented evidence to rebut Armstrong's testimony that Farruggia was terminated because he had accepted the workers' compensation settlement in violation of West Virginia law.

Viewing the evidence presented by Farruggia in a light most favorable to Farruggia, the trial court did not err in denying JWCF's preverdict motion for directed verdict, and in allowing the case to proceed to a full and fair consideration of the evidence by the jury. JWCF's appeal on this assignment of error should be denied in its entirety.

B. The Trial Court Properly Denied JWCF's Motion For A New Trial.

At the conclusion of the evidence and after hearing the jury instructions and the arguments of counsel, the jury returned its verdict, finding that by a preponderance of the evidence, Defendant's retaliation for Plaintiff's having filed a workers' compensation claims was a significant factor in its decision to discharge Plaintiff and that Defendant had failed to reinstate Plaintiff in violation of West Virginia law. The jury awarded both compensatory and punitive damages. JWCF then moved for a new trial pursuant to West Virginia Rule of Civil Procedure 59, which the trial court denied. JWCF appeals the trial court's denial of its motion for new trial solely on the grounds that the jury's verdict that JWCF had improperly

failed to reinstate Farruggia in violation of West Virginia Code ' 23-5A-3(b) was contrary to law and against the weight of the evidence.

Under West Virginia law, the moving party has a heavy burden to prevail on appeal from a trial court's determination of a Rule 59 motion for a new trial. The standards a court follows for a Rule 50 motion for directed verdict are different from the standards applied when determining a Rule 59 motion of a new trial. As stated in *In re State Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413, *cert. denied*, 515 U.S. 1160 (1994),

A motion for a new trial is governed by a different standard from a directed verdict motion. . . . Under Rule 59 of the Federal Rules of Civil Procedure, a trial judge may weigh the evidence and consider the credibility of the witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial.

Id. at 126, 454 S.E.2d at 420 (internal quotation marks omitted). Similarly, in *Neely*, 222 W. Va. 560, 668 S.E.2d 189, the court stated:

Although subjecting the trial court's decision to review for an abuse of discretion, we also noted in *In re State Public Building Asbestos Litigation* that a new trial should rarely be granted and then granted only where it is "reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *In re State Public Building Asbestos Litigation*, 193 W.Va. at 124, 454 S.E.2d at 418 (quoting 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* ' 2803 at 32-33); *see also, Morrison v. Sharma*, 200 W.Va. 192, 194, 488 S.E.2d 467, 470 (1997)

Id. at 566, 668 S.E.2d at 195.

In the instant case, pursuant to these standards, the trial court's decision to deny JWCF's motion for a new trial may be reversed only for abuse of discretion. To reverse, JWCF would have to show that the trial court failed to both weigh the evidence and consider

the credibility of the witnesses and, in doing so, abused its discretionary authority in failing to see that the jury verdict constituted a grave injustice. No such showing is presented in Petitioner's Brief.

JWCF's assignment of error on the issue of the court's denial of its motion for a new trial does not address the trial court's broad discretionary authority to grant or deny a new trial. Instead, JWCF focuses on the jury verdict form, which concluded that JWCF failed to reinstate Farruggia to his former or comparable position with JWCF. JWCF contends that this conclusion was clearly contrary to the law because Farruggia never obtained a full written release from his treating physician. West Virginia law, however, does not require a worker to present a written medical release from a physician prior to returning to work. As the trial court's Order Denying Defendant's Motion For A New Trial reflects, it is JWCF that fails to apply the law of West Virginia, not the trial court and not Plaintiff. (AR at 1390-1400.)

The trial court's order properly states that § 23-5A-3(b) does not require an employee to provide a written release to work from a treating physician before the employee can claim a violation of the statute. That section states:

(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(b) (emphasis added).

The statute plainly states that discrimination may arise when an employee has sustained an injury, seeks benefits under the Workers' Compensation statute, and when there is evidence that 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*, 184 W. Va. at 703, 403 S.E.2d at 720. When a written statement from a medical provider is presented that states that the injured employee may return to work, the statute provides that the statement will be prima facie evidence that the worker is able to perform the duties stated. Contrary to Petitioner's Brief, however, a written statement from a medical provider is not required to prove a failure on the part of an employer to reinstate the injured employee. The court may interpret a statute and determine the legislature's intent only from the plain language of the statute. *Harrison v. Comm'r, DMV*, 226 W. Va. 23, 697 S.E.2d 59 (2010). A court can neither imply something into a statute that does not exist nor rewrite the statute and add terms. *Matheny v. White*, 88 W. Va. 270, 106 S.E. 651 (1921).

Indeed, in the instant case, the jury properly applied the terms of the statute and the evidence presented to conclude that the West Virginia law had been violated. The evidence

presented to the jury showed that Farruggia had initially returned to light-duty work as a progress evaluator. Sometime prior to November 20, 2007, however, Farruggia returned to his former unrestricted job as a cable installer. Two JWCF truck reports and a report from Farruggia's supervisor, Austin Cantrell, which acknowledged that Farruggia was back working at this former job, were admitted into evidence. On November 29, 2007, however, Farruggia was terminated purportedly because the job as a progress evaluator had expired, notwithstanding the fact that at the time of the termination, Farruggia had moved on to a cable installer. The jury also heard evidence that Farruggia formerly asked for his job back on February 14, 2008, but that no one at JWCF responded to this request. (TR 310.)

Applying the evidence to the statutory language, the jury's verdict on the ' 23-5A-3(b) violation for failing to reinstate Farruggia to his prior position or a comparable position was supported and consistent with the law. Likewise, there is nothing in the record to suggest that the trial court, in considering the motion for a new trial on this issue, failed to consider the evidence in a light most favorable to the prevailing party, or failed to assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party and generally to give the prevailing party the benefit of all favorable inferences. *Bowyer v. HiLad, Inc.*, 216 W. Va. 634, 609 S.E.2d 895 (2004). The trial court did not err in denying JWCF's motion for a new trial.

C. The Trial Court Properly Allowed Respondent's Punitive Damages Jury Instruction, And Punitive Damages Were Properly Considered By The Jury.

JWCF argues on appeal that the trial court's decision to give a jury instruction on the issue of punitive damages was "misleading and prejudicial error, and incorrectly suggested to the jury that the acts of the employer were sufficient to meet the standards for an award of punitive damages." (Pet'r's Br. 20.) Under West Virginia law, however, the trial court has the discretionary authority to give jury instructions. To show that the punitive damages instruction constitutes prejudicial error, JWCR must demonstrate that the trial court abused its discretion.¹ This was not shown in Petitioner's Brief, and there is no basis for reversal on Petitioner's Assignment of Error No. 3.

In *Fravel v. Sole's Electric Co.*, 218 W. Va. 177, 624 S.E.2d 524 (2005), the court stated: "The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard." *Id.*, Syl. Pt. 2 (quoting Syl. Pt. 6, *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 459 S.E.2d 374 (1995)). A jury verdict arising from the contested jury instruction should not be disturbed based on the formulation of the language of the instruction so long as the instruction given was fair to both parties. *Gillingham v. Stephenson*, 209 W. Va. 741, 551 S.E.2d 663 (2001).

JWCR contends that prejudicial error occurred because no evidence was presented "sufficient to show that JWCF had acted in a manner that suggested malicious intent or reckless disregard for [Farruggia's] rights." (Pet'r's Br. 20.) Yet, this argument blatantly

¹ In the Petitioner's Brief, JWCF complains only about the trial court's decision to give the punitive damages jury instruction, which falls within the trial court's discretionary authority, and not about the language of the instruction itself, which would be reviewed de novo. *Gillingham v. Stephenson*, 209 W. Va. 741, 551 S.E.2d 663 (2001).

ignores the uncontroverted evidence heard by the jury that a JWCR manager unlawfully terminated Farruggia, solely because he had accepted a workers' compensation settlement, to which he was fully entitled under West Virginia law. This testimony was corroborated by the introduction of a number of emails by the JWCR benefits manager that plainly express the manager's anger and hostility about the settlement offer made to Farruggia by the company's workers' compensation agency, and her plan to retaliate against Farruggia by extinguishing any light-duty work available to him.

Based on this evidence alone, the trial court acted well within its discretionary authority to instruct the jury on punitive damages. It is also important to emphasize that the jury awarded only \$30,000 in punitive damages, demonstrating that the jury was not overwhelmingly impressed with the maliciousness of the acts against Farruggia. The relatively minimal amount of punitive damages awarded to Farruggia in light of the damaging evidence against JWCR further demonstrates that the trial court did not abuse its discretionary authority on the issue of jury instructions.

D. The Trial Court Did Not Err In Its Handling Of New Evidence About Respondent's Employment Immediately Prior To Trial.

During the weekend prior to the Monday morning start of trial, Farruggia's attorney learned for the first time that three weeks earlier, his client had accepted employment with Wal-Mart. Farruggia apparently did not understand or appreciate the relevance of the Wal-Mart employment to his three-year-old lawsuit case against JWCR and never discussed his new job with his attorney immediately after he took the job. On the day before trial,

however, Farruggia informed his attorney that he may be eligible for benefits from Wal-Mart. (TR 311-25.) Farruggia's attorney then informed his expert economist, Will Cobb, of this new evidence to determine if it changed the expert's opinion, which he was assured it did not.

Farruggia's attorney also informed defense counsel just prior to the start of trial. Defendant's counsel sought a continuance of the trial on the ground that she was prejudiced by the nondisclosure of the employment information prior to trial. The trial court allowed the parties several hours to argue their positions prior to its decision to sanction Plaintiff's attorney and Defendant's motion for a continuance.

JWCF has not demonstrated, in either its Motion for a New Trial or in Petitioner's Brief, how it was actually harmed or prejudiced by the late employment information. It is uncontested that Farruggia's attorney did not intentionally withhold material information as he only learned of the new employment information the day before trial. Also, to the extent that JWCF was prejudiced, the trial court sanctioned Plaintiff for not timely supplementing discovery. Specifically, Plaintiff's counsel was ordered to pay JWCF's economist the amount of \$1,800 for his review of the new employment information. The trial court also offered as further sanctions to strike \$142,208 from Plaintiff's damages claim, but this offer was rejected by JWCF. (AR at 1397.)

JWCF contends on appeal that its expert did not have adequate time to address the new employment information so that appropriate "responsive testimony might be presented."

Yet, JWCF does not explain why it rejected the court's offer to reduce the amount of damages requested by Plaintiff by over \$140,000. In addition, the jury's relatively modest

award of front pay damages reflects that JWCF was not prejudiced by the late information or the way the court handled the discovery issues.

For each of the reasons stated, JWCF fails to show any damage or prejudice from the trial court's handling of the late information or how the trial court abused its broad discretionary authority to address and control discovery issues at the time of trial.

E. The Trial Court Did Not Abuse Its Discretion In Refusing To Admit Evidence Of Respondent's Previous Employment.

At the parties' pretrial conference, JWCF agreed and stipulated that it would not raise issues or seek to introduce evidence during trial about or arising out of Farruggia's previous termination from Baker Installations for refusing to take a drug test. Yet, in blatant violation of this pretrial stipulation, JWCF's attorney sought permission from the trial court to recall Farruggia to the witness stand for the purpose of soliciting testimony and information about his prior employment with Baker Installations and how he was treated—in other words, evidence about Farruggia's previous termination for refusing to take a drug test. The trial court rightly refused JWCF's request.

On appeal, JWCF contends that the trial court abused its broad discretionary authority to handle discovery matters because evidence of Farruggia's past employment history would have arguably shown that at one point in history JWCF was kind. Perhaps, but as the trial court stated in its order denying new trial, such information was immaterial to the jury deliberations over Farruggia's claim that in November 2007, JWCF willfully and maliciously violated West Virginia statutory law when it terminated Farruggia for settling his workers'

compensation claim. (AR at 1398.) The trial court ruled within its authority that evidence of JWCF's past treatment of Farruggia, which involved Farruggia's past drug problems, was on balance more prejudicial than material. In light of JWCF's pretrial *written stipulation* to exclude such evidence, the trial court properly refused JWCF's last-minute about-face to try to bring such evidence to the jury.

As JWCF states, relevant evidence may be excluded under West Virginia Rule of Evidence 403, if its prejudicial value outweighs its probative value. "As to the balancing under Rule 403 [of the West Virginia Rules of Evidence], the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." Syl. Pt. 2, *Hatcher v. McBride*, 221 W. Va. 5, 650 S.E.2d 104 (2006) (internal quotation marks omitted); *see also State v. McFarland*, 228 W. Va. 492, 721 S.E.2d 62 (2011) (holding that a court abuses its discretion only when it fails to conduct the balance test prior to admitting evidence).

Yet on appeal, JWCF contends that the court erred in applying the balancing test.

Specifically, JWCF states that

[t]he 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.

(Pet'r's Br. 25.) This sort of circular argument is not only unpersuasive, but it does not address the appellate review standard.

The trial court properly conducted a balancing test prior to its decision not to allow JWCF's attempt to introduce evidence regarding Farruggia's prior employment relationship with JWCF. The court determined well within its discretionary authority that such evidence was not material to Plaintiff's claims and that to the extent that it was probative, the potential prejudice far outweighed any value. If JWCF wanted to introduce evidence about its goodwill toward employees, it could have done so within the context of Farruggia's most recent employment relationship with JWCF.

F. The Trial Court Did Not Err In Admitting Respondent's Testimony About His Family Circumstances At The Time Of His Termination.

In its appeal, JWCF seeks to reverse the trial court's denial of JWCF's motion for a new trial on the ground that the trial court erred in allowing Farruggia to testify at trial about his terminally ill sister-in-law, who was living with and under the care of Farruggia and his family in November 2007. JWCF contends that such sympathy evidence was improper and unduly prejudicial to JWCF so as to warrant a reversal of the trial court's denial of the motion for a new trial. Importantly, JWCF is *not* contending that the jury verdict awarding Farruggia \$15,000 for aggravation, annoyance, and inconvenience, and for loss of enjoyment of life arising from JWCF's violation of West Virginia law was inappropriate. JWCF is contending that the jury's verdict should be set aside and a new trial be ordered based on the court's decision to allow this particular testimony.

Again, under Rule 59, a new trial is rarely granted and will be granted only where it clearly appears that "prejudicial error has crept into the record or that substantial justice has

not been done." *Neely*, 222 W. Va. at 566, 668 S.E.2d at 195 (quoting *State Pub. Bldg. Asbestos Litig.*, 193 W. Va. at 124, 454 S.E.2d at 418). In *Smith v. Cross*, 223 W. Va. 422, 675 S.E.2d 898 (2009), the court further held that a new trial will not be granted where, looking at the evidence and proceedings as a whole, there does not appear to be a clearly erroneous outcome. Specifically, the court stated:

We further explained in *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 106, 459 S.E.2d 374, 383(1995), that:

unless error affected the outcome of the trial, a new trial should not usually be granted. In other words, when a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on error that has no appreciable effect on the outcome, it is this Court's duty to reverse.

Likewise, in Syllabus Point 3 of *Neely v. Belk Inc.*, 222 W.Va. 560, 668 S.E.2d 189 (2008), we held that "[t]he action of the trial court in setting aside a verdict and awarding a new trial will be reversed by this Court where it appears that the case, as a whole, was fairly tried and no error prejudicial to the losing party was committed during the trial."

Id. at 427, 675 S.E.2d at 903.

The questionable testimony by Farruggia was simply a statement that at the time he was terminated, his terminally ill sister in law was living with his family and that it was a very difficult period. (AR at 307-08.)² JWCF's counsel did not object to the testimony. As a whole, the point of fact Farruggia made did not arouse unprecedented or prejudicial

²JWCF also contends that the trial court improperly allowed Farruggia to testify about his emotions even though he was not seeking emotional distress damages. Again, there is no basis for this appellate claim. The testimony JWCF refers to concerned Farruggia's loss of financial stability after he was wrongly terminated and was not testimony for the purpose of establishing emotional distress damages under West Virginia law. (AR at 313-15.) Furthermore, JWCF counsel did not object to the testimony at trial.

emotions in the jury. At the conclusion of the trial, the jury awarded Farruggia \$15,000 for aggravation, annoyance, inconvenience, and loss of enjoyment of life.

G. The Trial Court's Evidentiary Rulings Were Neither Abusive Nor Prejudicial.

JWCF's catchall Assignment of Error No. 7 is based on neither law nor fact and should be summarily rejected. It contends that, taken as a whole, the trial court's numerous evidentiary rulings before, during, and after trial were so prejudicial to JWCF as to warrant reversal of the trial court's denial of its motion for a new trial. The gravamen of this ambiguous and unsupported assignment of error appears to be the same claim JWCF made in previous assignments of error—that is, that JWCF should have been allowed to introduce evidence of JWCF's previous decision to rehire Farruggia years before the 2007 events that led to Farruggia's wrongful termination. Yet, each assignment of error that raises this evidentiary issue completely ignores the fact that JWCF's attorney stipulated before trial that it would *not* introduce evidence concerning Farruggia's prior employment and the reasons for his prior termination.

Additionally, JWCF's assignments of error ignore the fact that it could have introduced evidence of JWCF's reasonable employer behavior toward Farruggia in November 2007 when he was terminated, but it did not. Likewise, JWCF was not precluded from introducing evidence of its reasonable behavior toward Farruggia in February 2008 when Farruggia sought reinstatement and was completely rebuffed by JWCF, but no such evidence was introduced. Petitioner's Brief complains that "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 undisputably engaged in reasonable and even laudable conduct toward the plaintiff/respondent." (Pet'r's Br. 27.) Again, JWCF was not precluded from introducing evidence of reasonable and laudable conduct toward plaintiff/respondent during the period of time relevant and material to Farruggia's lawsuit; it simply chose not to.

Finally, Assignment of Error No. 7 also ignores the burden and standard an appellant must meet before the appellate court will consider reversing the trial court's decision to deny a motion for new trial. In *Peters*, 224 W. Va. 160, 680 S.E.2d 791, this Court sets forth in detail the appellant's burden on appeal when challenging the circuit court's ruling denying a motion for a new trial. Specifically, the court stated:

When reviewing a circuit court's decision on such a motion, we have held that

"[t]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. pt. 4, in part, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976).

Syl. pt. 2, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W.Va. 209, 672 S.E.2d 345 (2008). *Accord Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995) ("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 State v. Crouch*, 191 W.Va. 272, 275, 445 S.E.2d 213, 216 (1994) ("The question of whether a new trial should be granted is within the sound discretion of the trial court and is reviewable only in the case of abuse."). Furthermore,

[i]n determining whether there is sufficient evidence to support a jury verdict the 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.

Syl. pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983).

Id. at 172-73, 680 S.E.2d at 803-04.

In the instant case, Assignment of Error No. 7 does not demonstrate or even allege that the trial court abused its discretion or that the jury did not have sufficient evidence to support the jury's verdict against JWCF. This assignment of error does not properly challenge the trial court or the jury verdict and should be denied in its entirety.

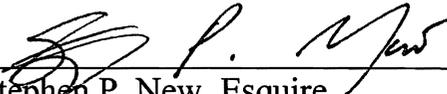
CONCLUSION

Substantial evidence was presented to the jury to support the trial court's decision to deny JWCF's motion for a directed verdict and JWCF's subsequent motion for a new trial. JWCF fails to demonstrate that the trial court abused its discretionary authority during the trial or during pretrial evidentiary motions. For each of the reasons stated herein, Plaintiff/Respondent Steven Farruggia respectfully requests this Court to deny Defendant/Petitioner JWCF, LP's appeal and to affirm the jury's verdict in this case and the Circuit Court of Kanawha County's orders, and for whatever further relief the Court deems just and proper at this time.

Respectfully submitted,

Plaintiff/Respondent Steven Farruggia

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IN THE SUPREME COURT OF APPEALS OF
THE STATE OF WEST VIRGINIA

No. 12-0389

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

Petitioner,

vs.

STEVEN FARRUGGIA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Respondent's Brief to be mailed, first-class postage prepaid, on August 3rd, 2012, to Barbara G. Arnold, MacCorkle, Lavender & Sweeney, PLLC, Suite 800, 300 Summers Street, Post Office Box 3283, Charleston, West Virginia 25332.


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