IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

2023 Spring Term

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INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

No. 22-ICA-39

JUSTICE HIGHWALL MINING, INC., DYNAMIC ENERGY, INC., and BLUESTONE INDUSTRIES, INC.,
Defendants Below, Petitioners,

v.

RICKY M. VARNEY,
Plaintiff Below, Respondent.

Appeal from the Circuit Court of Wyoming County
Honorable Micheal M. Cochrane, Judge
Civil Action No. CC-55-2018-C-41

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Submitted: April 4, 2023
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Ronald H. Hatfield, Jr., Esq.
General Counsel
Bluestone Resources
White Sulphur Springs, West Virginia
Counsel for Petitioners

Samuel B. Petsonk, Esq.
Petsonk PLLC
Oak Hill, West Virginia

Bren Pomponio, Esq.
Laura Davidson, Esq.
Mountain State Justice, Inc.
Charleston, West Virginia
Counsel for Respondent

JUDGE LORENSEN delivered the Opinion of the Court.

LORENSEN, Judge:

Petitioners Justice Highwall Mining, Inc., Dynamic Energy, Inc., and Bluestone Industries, Inc., defendants below, (hereinafter, collectively, "JHM") appeal a judgment of the Circuit Court of Wyoming County finding that JHM wrongfully terminated Respondent Ricky M. Varney from employment in violation of a substantial public policy. Specifically, JHM appeals: (1) the circuit court's refusal to grant its original and renewed motions for judgment as a matter of law; (2) the circuit court's refusal to order a new trial on various procedural and evidentiary grounds; (3) the circuit court's award of attorney fees to Mr. Varney; and (4) the circuit court's award of prejudgment interest to Mr. Varney.

For the reasons below, we affirm the circuit court's rulings denying JHM's renewed motion for judgment as a matter of law and motion for a new trial. However, we find that the circuit court erred in its award of attorney fees and prejudgment interest. In its attorney fees award, the circuit court explicitly abdicated its responsibility to exercise discretion in determining if an award of fees was appropriate. Instead, it relied wholly on the jury verdict's recommendation to award fees. In awarding prejudgment interest, we find that the circuit court miscalculated the award. Accordingly, we vacate those awards and remand for reconsideration in light of this opinion.

I. Facts and Procedural Background

In 2016, Mr. Varney was employed as a coal mine welder, fabricator, and mechanic by JHM at the Coal Mountain Mining Complex in Wyoming County, West Virginia. Over the course of that year, on two occasions, Mr. Varney refused to perform work he believed would be unsafe.[1]

The first occasion occurred in November 2016, when Mr. Varney refused to perform welding repairs on large mining machinery. Specifically, he told a member of management, Todd Bradford, a mine superintendent, that he could not repair a machine's metal steps and handrails because he lacked the appropriate material to perform a safe weld. Despite Mr. Varney's objection, Mr. Bradford instructed him to "humor me and make something work." Mr. Varney understood this to mean he should use scrap metal to repair the equipment. Mr. Varney again refused, noting the stairs and handrails to be safety sensitive equipment and beyond repair. Upon Mr. Varney's insistence, Mr. Bradford relented and ordered a new set of stairs.

On the second occasion, Mr. Varney refused to operate his assigned welding truck because it was leaking fuel into its coolant system, creating a safety hazard.[2] Mr.

[1] We note that Mr. Varney alleged other instances of safety complaints, but for the purposes of this appeal, we need only to address two.

[2] The record does not specify a date for this event, but it appears this also occurred in late 2016.

Varney reported this to Mr. Bradford, who acknowledged mechanics would need to inspect it, but still required Mr. Varney to continue operating the welding truck in that condition. However, at some point, the welding truck was "red-tagged" and taken out of service. As a result, without his welding truck, Mr. Bradford had to arrange for equipment to be brought to Mr. Varney to perform maintenance.

The events which gave rise to Mr. Varney's termination occurred in January 2017. Prior to his termination, Mr. Varney accrued two consecutive unexcused absences from work. Specifically, on January 6, 2017, Mr. Varney missed work to move into a new house and on January 7, 2017, he missed work to assist his son in recovering from a house fire. Mr. Varney expected to utilize his earned personal days to cover the absences without penalty, which was an accepted practice at JHM.

Mr. Varney expected to report to work on Monday, January 9, 2017. However, on his way to work, he was contacted by his direct supervisor, Chris Wells, who instructed him to not report to work. Mr. Wells explained that Mr. Varney needed to speak with Mr. Bradford before returning to work, but because Mr. Bradford was not on-site that day, he needed to wait until tomorrow. On January 10, 2017, as instructed, Mr. Varney arrived at the job site and spoke with Mr. Bradford. There, Mr. Varney was told he was suspended for three days and to report back on January 14, 2017. When he did, Mr. Varney was notified that he was being terminated for missing two consecutive days.

Mr. Varney subsequently brought this civil action against JHM in the Circuit Court of Wyoming County, alleging he was wrongfully terminated in retaliation for his safety complaints and work refusals. At trial, testimony and documents were presented that, when viewed in the light most favorable to Mr. Varney, could establish, among other things, that: (1) policy and practice at JHM permitted consecutive unexcused absences, so long as the employee had personal days to cover the missed time; (2) in his role as a welder, Mr. Varney made safety complaints and refused to perform work he believed would be unsafe; (3) Mr. Varney's co-worker, Nicholas Dove, believed JHM retaliated against Mr. Varney because of his safety complaints; (4) JHM removed Mr. Varney's personal days to engineer a pretextual reason to terminate him; (5) initially, Mr. Varney was not compensated for his remaining personal days in his final paycheck;[3] and (6) Mr. Varney was later compensated for these personal days in a subsequent payment.

At the conclusion of a three-day trial, JHM moved for judgment as a matter of law, arguing that there was insufficient evidence to establish that JHM had violated a substantial public policy, or in the alternative, that JHM had proven it had a legitimate purpose in terminating Mr. Varney. The circuit court denied the motion. Afterward, the case was submitted to the jury, who returned a verdict for Mr. Varney, finding JHM liable for retaliatory discharge. The jury awarded Mr. Varney $148,140.00 in compensatory

[3] Mr. Varney had two personal days remaining in addition to those he attempted to use for his January 6 and 7, 2017, absences.

damages and $11,860.00 in general damages. Further, the jury was instructed on the issue of attorney fees and, in its verdict, found that Mr. Varney should be awarded attorney fees. On January 10, 2022, the circuit court issued an order granting Mr. Varney $26,092.55 and $17,040.00 in fees and costs[4] for the services of his attorneys.[5] Additionally, on March 14, 2022, the circuit court issued an order awarding Mr. Varney $11,200.00 in prejudgment interest.[6] These amounts were memorialized in the circuit court's May 16, 2022, final judgment order, totaling in a $214,332.55 judgment against JHM.

Finally, on July 22, 2022, the circuit court entered an order addressing JHM's renewed motion for judgment as a matter of law, motion for a new trial, and motion to alter or amend the judgment on the issues of attorney fees and prejudgment interest. The circuit court denied each motion, and it is from this order that JHM appeals.

II. Standard of Review

On appeal, JHM argues that: (1) the circuit court erred in refusing to grant it judgment as a matter of law because there was insufficient evidence to support Mr.

[4] The circuit court made two separate awards of fees because below, Mr. Varney was represented by two law firms.

[5] The circuit court's January 10, 2022, order also denied Mr. Varney's motion for front pay, which is not at issue in this appeal.

[6] The circuit court's March 14, 2022, order also denied Mr. Varney's motion to reconsider front pay, which is not at issue in this appeal.

Varney's *Harless* claim;[7] (2) the circuit court erred in refusing to order a new trial when JHM was prejudiced by opposing counsel's repeated references to hearsay; (3) the circuit court erred in refusing to order a new trial when the verdict was against the clear weight of the evidence; (4) the circuit court erred in refusing to order a new trial when the jury was not properly instructed on the burden of proof for an award of attorney fees; (5) the circuit court erred by refusing to amend the judgment to strike the award of attorney fees when the jury was not properly instructed on the burden of proof for an award of attorney fees; and (6) the circuit court erred in awarding prejudgment interest in excess of the statutorily mandated minimum of four percent established by West Virginia Code § 56-6-31 (2018).[8]

In *McClure Management, LLC v. Taylor*, the Supreme Court explained:

> We will set out the standard of review for each issue as it is addressed below. *See State v. Boyd*, 238 W. Va. 420, 428, 796 S.E.2d 207, 215 (2017) ("We will dispense with our usual standard of review section because each of the assignments of error has its own review criteria."); *State v. Dunn*, 237 W. Va. 155, 158, 786 S.E.2d 174, 177 (2016) ("Therefore, we dispense with setting out a general standard of review. Specific standards of review will be discussed separately as we address each assignment of error.").

243 W. Va. 604, 611–12, 849 S.E.2d 604, 611–12 (2020).

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[7] A common law wrongful termination claim under *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978), imposing liability on employers who terminate an employee in violation of a "substantial public policy." Discussed *infra* in greater detail at Section III.A.

[8] We have reordered JHM's assignments of error to accord with our analysis. *See, e.g., Harlow v. E. Elec., LLC*, 245 W. Va. 188, 195 n.25, 858 S.E.2d 445, 452 n.25 (2021).

III. Discussion

A. Renewed Judgment as a Matter of Law

We first address JHM's arguments regarding its renewed motion for judgment as a matter of law.

"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 . . . is de novo." Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009). Further,

> when this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the West Virginia Rules of Civil Procedure [], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.

Id. at Syl. Pt. 2.

At trial, Mr. Varney prevailed on a *Harless* claim, which is a common law cause of action for employees who are wrongfully discharged in violation of substantial public policy. Syl., *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). On appeal, JHM asserts that, as a matter of law: (1) Mr. Varney was not engaged in the

kind of employment or activities triggering substantial public policy concerns; and (2) even if he was, JHM's motivation in terminating him did not jeopardize or undermine any substantial public policy principle.

Harless and its progeny delineate multiple considerations applicable to cases alleging employment termination against public policy:

> 1. [Whether a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
>
> 2. [Whether] dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
>
> 3. [Whether t]he plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
>
> 4. [Whether t]he employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 704, 696 S.E.2d 1, 6 (2010) (quoting *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 750, 559 S.E.2d 713, 723 (2001)); *see also Harless*, 162 W. Va. at 124, 246 S.E.2d at 275.

The Supreme Court of Appeals has long recognized mine safety as an area of substantial public policy interest. *See* Syl. Pt. 5, *Collins v. Elkay Mining Co.*, 179 W. Va. 549, 371 S.E.2d 46 (1988) ("A coal miner may institute a common law retaliatory

discharge action under [*Harless*], for acts that were designed to enforce the mandates of the coal mine health and safety statutes . . .).

JHM argues that the first two *Harless* factors were not supported by sufficient evidence. Regarding the first factor, Mr. Varney relies upon statutory provisions protecting a miner's right to refuse to operate unsafe equipment and refuse to perform unsafe work. Specifically, Mr. Varney cites two code sections in support of his argument. First, West Virginia Code § 22A-2-71 (1985) provides that "[n]o miner shall be required to operate unsafe equipment."[9] Second, West Virginia Code § 22A-2-71a (1987) provides that "[a]ny miner has the right to refuse to work in an area or under conditions which he believes to be unsafe."

Conversely, JHM asserts that Mr. Varney's duties and actions place him outside the scope of these statutes' protections. JHM contends that Mr. Varney was not an "equipment operator," and was not required to operate any unsafe equipment. Further, JHM claims that Mr. Varney testified that he never "refused to work."

We disagree. JHM misinterprets the statutes and the record. While Mr. Varney's job title was not "equipment operator," his work required him to operate various

[9] West Virginia Code § 22A-1-2(7) (1996) (amended 2021) defines "miner" as "any individual working in a coal mine."

types of equipment, such as his welding equipment, his assigned truck (despite the danger it presented to Mr. Varney), and other machinery in order to perform maintenance. We find that Mr. Varney's refusal to operate an unsafe truck is contemplated within the scope of West Virginia Code § 22A-2-71. Additionally, in his testimony, Mr. Varney did not concede that he "never 'refused to work.'" Mr. Varney clarified that when he made a complaint, he would refuse to do a particular unsafe task, but he otherwise continued to work. The record reflects that Mr. Varney specifically refused to perform welds he considered to be unsafe, an activity we find protected by West Virginia Code § 22A-2-71a.

JHM next challenges the second *Harless* factor, arguing that Mr. Varney's termination did not jeopardize any substantial public policy principles. JHM relies on *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 795 S.E.2d 530 (2016). In *Nutter*, the plaintiff was a nurse who alleged she was terminated in violation of substantial public policy because she made complaints about various hospital practices. *Nutter*, 238 W. Va. at 385–89, 795 S.E.2d 540–45. However, her complaints amounted to merely hypothetical violations (complaining of potential Medicare fraud without having any job duties or knowledge relating to billing; complaining of patients not being provided no-slip socks and some patients only having one operational shower without any evidence establishing these acts, if true, violated any guideline or standard of care). *Id.* This prompted the *Nutter* Court to expand on what the jeopardy element under *Harless* requires:

> [A] plaintiff cannot simply cite a source of public policy and then make a bald allegation that the policy might somehow have been violated. There must be some elaboration upon the

> employer's act jeopardizing public policy and its nexus to the plaintiff's discharge. "The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates."

Id. at 386, 795 S.E.2d at 541 (quoting *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 705, 696 S.E.2d 1, 7 (2010)). Ultimately, under those facts, the Supreme Court of Appeals found the *Nutter* plaintiff's theoretical complaints insufficient to withstand judgment as a matter of law. *Nutter*, 238 W. Va. at 389, 795 S.E.2d at 544.

JHM argues the facts in this case parallel the facts in the *Nutter* case. Specifically, it contends that because management eventually remedied Mr. Varney's complaints, JHM did not jeopardize any public policy, and, therefore, his complaints are merely theoretical.[10] Again, we disagree. The *Nutter* case is distinguishable—at no point could the *Nutter* plaintiff point to any law or regulation violated by a specific act or omission of the employer. Here, that is not the case. Mr. Varney cited a relevant policy, West Virginia Code § 22A-2-71, prohibiting employers from requiring miners to operate unsafe equipment. At trial, Mr. Varney provided evidence that his welding truck was unsafe, and his employer, at least for a time, still required him to operate it. Therefore, a

[10] On this topic, JHM also contends that because Mr. Varney was never *required* to operate unsafe equipment or perform unsafe work, a violation of public policy never occurred. Our earlier discussion addresses this point; for at least some period of time, Mr. Varney was required to operate a truck that presented a safety hazard. Therefore, we disagree with JHM's argument on this point.

reasonable jury could find that Mr. Varney's concerns about JHM violating a substantial public policy were not merely theoretical.

Further, JHM's begrudging response to safety complaints does not insulate it from a *Harless* claim. Here, a nexus between the jeopardized public policy and Mr. Varney's termination is established in the record. Beyond Mr. Varney's own beliefs regarding the reason for his termination, at trial, another JHM employee testified, without objection, that he believed Mr. Varney was fired due to his safety complaints.[11] As a result, there was testimony that Mr. Varney's termination created a chilling effect on other JHM employees, jeopardizing the public policy of protecting individuals who report mine safety issues.

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[11] At trial, Mr. Dove testified that:

> A. I know that they took [Mr. Varney] in the office for his grievance meeting, and when he come out, they had, to my understanding, he wasn't represented very well and they forced him to resign. They didn't give him no options of trying to keep his job, and he had never been wrote up, never missed work or anything. He was always [thirty] minutes or better for work early.
>
> Q. Why do you think they didn't give him any options?
>
> **A. Because he was bringing attention to safety matters on the job.**

(Emphasis added).

With all facts viewed in a light most favorable to Mr. Varney, we conclude that a reasonable trier of fact could have found for Mr. Varney. Accordingly, the circuit court did not err in denying JHM's renewed motion for judgment as a matter of law.

B. Refusal to Grant a New Trial

We now turn to JHM's denied motion for a new trial. This Court reviews a circuit court's denial of a motion for a new trial under an abuse of discretion standard. Syl. Pt. 3, *In re State 14 Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 454 S.E.2d 413 (1994). Specifically,

> 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, *Grimmett v. Smith*, 238 W. Va. 54, 792 S.E.2d 65, 66–67 (2016) (internal quotation marks and citations omitted).

JHM asserts three grounds for a new trial: (1) opposing counsel's repeated references to hearsay during trial prejudiced JHM; (2) the jury's verdict was against the clear weight of the evidence because JHM proved, by a preponderance of the evidence, that Mr. Varney would have been terminated regardless of his safety complaints; and (3) the circuit court failed to instruct the jury on the proper burden of proof when considering attorney fees, prejudicing JHM.

1. Hearsay

We first address JHA's concerns about references to inadmissible evidence. The Supreme Court has explained:

> The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Syl. Pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 232, 455 S.E.2d 788, 791 (1995). Further,

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

Id. at Syl. Pt. 3.

JHM asserts that counsel for Mr. Varney made repeated references to hearsay throughout the trial. From the record, JHM's complaints revolve around an email produced in discovery and discussed during Mr. Varney's direct examination. This email was expected to establish that JHM instructed its third-party payroll servicer to remove accrued personal days from Mr. Varney's record because JHM was preparing to terminate him under the pretext of excessive work absences. At trial, the circuit court found the email

itself inadmissible hearsay, as Mr. Varney lacked personal knowledge of the conversation, but the circuit court permitted Mr. Varney's testimony regarding the contents of the email within his knowledge.

JHM maintains it was prejudiced at trial due to opposing counsel's references to the contents of the email and, in its brief, provides a string citation of references to the record, each an instance of this alleged prejudicial effect. However, upon our review of the record, we find no merit in JHM's argument. Most of the instances are, at different points throughout the trial, the parties arguing about the admissibility of the email before the circuit court—outside the presence of the jury. Because these arguments happened without the jury present, we find they did not prejudice JHM. Other instances cited are attempts by Mr. Varney's counsel, while questioning various witnesses, to lay a foundation to admit the email into evidence. While this was done before the jury, Mr. Varney's counsel only inquired into matters that would be within the personal knowledge of the respective witness, such as questioning if a specific witness ordered the removal of the personal days, or if a witness was aware of JHM's correspondence with its payroll servicer. Again, we fail to find prejudice to JHM.

The most concerning references are from Mr. Varney's direct testimony, where, in the presence of the jury, he read a portion of the email. At that time, counsel for JHM made appropriate objections on the record and moved to strike the exhibit and associated testimony. The circuit court partially agreed, ruling the exhibit inadmissible and

striking testimony outside Mr. Varney's knowledge. We find that the circuit court did not abuse its discretion in doing so. The circuit court made a considered ruling based upon JHM's concerns and protected JHM's interests. If JHM had further concerns, it could have sought a limiting instruction to the jury on this matter. Further, as discussed *infra*, even without any evidence pertaining to the email, a sufficient basis still existed to support the jury's verdict.

Finally, JHM claims that a question from the jury, during deliberations, establishes that it was prejudiced by the email.[12] In its brief, JHM asserts that the jury requested additional information regarding the inadmissible email and the JHM employee referenced in the email, establishing that the jury was swayed by inadmissible evidence. However, the transcript and circuit court order discussing the jury question paint a less certain picture:

> THE COURT: The jury has a question. Is there anything in writing from [u]nion representative or a deposition in reference to these texts? I am going to answer this question that all evidence is in front of you and we cannot say anything else.

The circuit court, in denying JHM's motion for a new trial, explained that "[t]he question did not reference any names or ask for any e-mail communication(s)." Despite JHM's arguments, we are unwilling to set aside a jury verdict on this basis. *See Lunsford v. Shy*, 243 W. Va. 175, 181, 842 S.E.2d 728, 734 (2020) ("Indeed, a new trial should not be

[12] The jury question at issue was not included in the appendix record.

granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.") (quoting *McInaray v. Hall*, 241 W. Va. 93, 98, 818 S.E.2d 919, 924 (2018)). Further, even if the question *was* referencing JHM's communications with its payroll servicer, the circuit court admitted testimony from Mr. Varney as to his personal knowledge of the removal of his personal days, offering a possible independent, nonprejudicial basis for the jury's question. Without more, it is not reasonably clear that inadmissible hearsay evidence influenced the jury's deliberations. Accordingly, we find that the circuit court did not abuse its discretion in denying JHM a new trial on this ground.

2. Clear Weight of the Evidence

We next consider if the jury's verdict was against the clear weight of the evidence:

> "In 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." Syllabus Point 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

Syl. Pt. 3, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

JHM argues that the jury's verdict was against the clear weight of the evidence, warranting a new trial. Specifically, JHM maintains that Mr. Varney would have been terminated regardless of his safety complaints, and therefore, he was not terminated in contravention of a substantial public policy.

The Supreme Court has set forth, in syllabus, the following standard:

> "Once the plaintiff in an action for wrongful discharge based upon the contravention of a substantial public policy has established the existence of such policy and established by a preponderance of the evidence that an employment discharge was motivated by an unlawful factor contravening that policy, liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive." Syl. Pt. 8, *Page v. Columbia Nat. Res., Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996).

Syl. Pt. 4, *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999).

In support, JHM claims that Mr. Varney's consecutive two-day absence provided a just cause for termination. JHM points to areas of the record that indicate Mr. Varney's absences violated the terms of his employment. However, Mr. Varney's testimony contradicts this evidence. Mr. Varney testified that, in practice, other employees were never punished for missing more than one day. In fact, Mr. Varney provided an example of another employee who had missed four or five days without being terminated. Further, Mr. Dove provided evidence about the union agreement's terms governing the use of personal days:

> Q. And it says, "In the event an employee is absent from work and has not requested a personal or sick leave day in advance

> of the absence, the employer may pay the employee for that day, and charge the employee with a person or sick leave day if the employee has not already exhausted his days. **The employer may charge up to two personal or sick leave days for each absence occurrence of more than one consecutive day.**" Do you see that?
>
> A. Yes.

(Emphasis added). JHM presents a similar defense to the one raised by the employer in *Rodriguez*:

> Basically, the [Employer's] contention, in the instant case, is that it proved by a preponderance of the evidence that the [Employee] would have been terminated even in the absence of the unlawful motive . . . The [Employer]'s argument, however, is fatally premised on its assertion that when it offered an explanation for the termination, the jury was obligated to accept that explanation as true. That is simply not the case. While the [Employer] did offer evidence that the [Employee] was terminated [for a non-prohibited reason] the jury obviously did not believe that the reason given was the reason the [Employee] was terminated . . . . Based on our review of the evidence in the instant case, we cannot conclude that the jury verdict was against the preponderance of the evidence.

Rodriguez, 206 W. Va. at 326, 524 S.E.2d at 68.

We reach the same conclusion. Mr. Varney's account of events prevailed before the jury. Our standard of review requires us to consider all evidence in a light most favorable to Mr. Varney. Mr. Varney provided ample evidence for a jury to adopt his theory over JHM's. Accordingly, we find that the circuit court did not abuse its discretion in

denying a new trial and in finding that the jury's verdict was not against the clear weight of the evidence.

3. Jury Instruction

JHM's final argument for a new trial asserts it was prejudiced by an improper jury instruction regarding attorney fees. Because, *infra*, we vacate and remand the circuit court's award of attorney fees on other grounds, we decline to address JHM's arguments regarding the circuit court's jury instruction and request for a new trial on the issue of attorney fees.[13]

C. Attorney Fees

We now consider the circuit court's award of attorney fees. "This Court reviews an award of costs and attorney's fees under an abuse of discretion standard." Syl. Pt. 2, *Auto Club Prop. Cas. Ins. Co. v. Moser*, 246 W. Va. 493, 874 S.E.2d 295 (2022).

JHM argues the circuit court erred in its award of attorney fees. We agree. An award of attorney fees is within a trial court's equitable power. Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 49, 365 S.E.2d 246, 247 (1986) ("There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith,

[13] *See* Section III.C, *infra*.

vexatiously, wantonly or for oppressive reasons."). Further, a trial court's decision to award fees lies in the discretion of the court, not the jury. Syl. Pt. 5, *Harlow v. E. Elec., LLC*, 245 W. Va. 188, 858 S.E.2d 445, 447 (2021) (quoting *Beto v. Stewart*, 213 W. Va. 355, 359, 582 S.E.2d 802, 806 (2003)) ("'The decision to award or not to award attorney's fees rests in the sound discretion of the circuit court . . . .'"); *see also* Syl. Pt. 3, *Richardson v. Kentucky Nat. Ins. Co.*, 216 W. Va. 464, 607 S.E.2d 793 (2004) (holding that in first-party insurance claims under *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986), "the amount of the attorney's fee is to be determined by the circuit judge and not by a jury").

Below, the circuit court instructed the jury to consider an award of attorney fees to Mr. Varney. Ultimately, in its verdict, the jury found that Mr. Varney should be awarded attorney fees. Afterward, when the circuit court issued its January 10, 2022, order granting those fees, it stated its rationale for doing so:

> The Court concludes that it is appropriate to award reasonable attorney fees in the matter **based upon the verdict of the jury**.

(Emphasis added). From the language of the order, the circuit court *solely* relied on the jury's decision to justify the award of fees. We find this to be error. In doing so, the circuit court abdicated its responsibility to exercise its discretion in awarding attorney fees. Further, the circuit court failed to indicate that it had made its own conclusion as to whether JHM "acted in bad faith, vexatiously, wantonly or for oppressive reasons" to warrant an

award of fees. *Sally-Mike*, at Syl. Pt. 3. Accordingly, we find that the circuit court abused its discretion in awarding attorney fees based solely upon a jury's recommendation.[14]

D. Prejudgment Interest

Lastly, we turn to the circuit court's award of prejudgment interest. Such review is governed by the following standard:

> "In reviewing a circuit court's award of prejudgment interest, we usually apply an abuse of discretion standard. When, however, a circuit court's award of prejudgment interest hinges, in part, on an interpretation of our decisional or statutory law, we review *de novo* that portion of the analysis." Syllabus Point 2, *Hensley v. W. Va. Dep't of Health & Human Res.*, 203 W. Va. 456, 508 S.E.2d 616 (1998).

Syl. Pt. 14, *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 814 S.E.2d 205, 209 (2018).

JHM contends that the circuit court improperly awarded prejudgment interest in excess of the statutorily mandated minimum of four percent established by West Virginia Code § 56-6-31(b)(1) (2018).

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[14] To be clear, this holding is not to be understood as a prohibition on the use of advisory juries, but a reminder that, on matters ultimately in the discretion of the court, a judge must exercise independent judgment when reaching a ruling. *See* W. Va. R.C.P 39(c) (authorizing a court to appoint an advisory jury on issues not normally tried by jury); *see also* Syl. Pt. 2, *Lambert v. Peters*, 143 W. Va. 588, 103 S.E.2d 788 (1958) (permitting a trial court to appoint an advisory jury on issues of equity). Here, the circuit court failed to indicate that the jury was advisory on this issue and appeared to rely exclusively on the jury's determination rather than conducting its own analysis.

Below, in his motion for prejudgment interest, Mr. Varney requested a seven percent simple interest rate running from January 2017. In its March 14, 2022, order, the circuit court granted Mr. Varney's prejudgment interest motion, found that the cause of action accrued in 2017, considered his entire $160,000.00 jury award to be subject to interest, and awarded him $11,200.00 in prejudgment interest. Notably, the circuit court did not indicate what interest rate it adopted. However, per this Court's calculation, $11,200.00 is seven percent of $160,000.00, indicating that the circuit court awarded a single year of prejudgment interest at seven percent.

West Virginia Code § 56-6-31(b) (2018) controls the award and calculation of prejudgment interest, which, in relevant part, provides:

> (b) In any judgment or decree that contains special damages, as defined below, or for liquidated damages, **the court may award prejudgment interest on all or some of the amount of the special or liquidated damages**, as calculated after the amount of any settlements. Any such amounts of special or liquidated damages shall bear simple, not compounding, interest.
>
> (1) the rate of prejudgment interest is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on **January 2, of the year in which the right to bring the action has accrued**, as determined by the court and **that established rate shall remain constant from that date until the date of the judgment** or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree: ***Provided,* That the rate of the prejudgment interest may not** exceed nine percent per annum or **be less than four percent per annum.**

(Emphasis added).

On appeal, JHM notes that in 2017, when the cause of action accrued, the Federal Reserve District secondary discount interest rate was 1.75 percent. JHM also notes that, in 2017, the prior version of West Virginia Code § 56-6-31(b) (2006) (amended 2018), if applicable, would have set prejudgment interest at a minimum rate of seven percent.[15] However, JHM contends that the new version of West Virginia Code § 56-6-31 (2018) is applicable, and under the new statute, the interest rate should be at the new statutory minimum rate of four percent.[16]

Conversely, Mr. Varney defends the circuit court's calculation of interest at seven percent. In effect, Mr. Varney contends the circuit court was applying the prior version of West Virginia Code § 56-6-31(b) (2006) (amended 2018), which had a statutory minimum rate of seven percent. However, the circuit court's prejudgment interest order

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[15] West Virginia Code § 56-6-31(b) (2006) (amended 2018), in relevant part, provides:

> the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is **three** percentage points above the Fifth Federal Reserve District secondary discount rate . . . *Provided*, That the rate of prejudgment and post-judgment interest shall not exceed eleven percent per annum or be less than **seven** percent per annum.

(Emphasis added).

[16] JHM provides the following calculation applying West Virginia Code § 56-6-31 (2018): In 2017, when the cause of action accrued, the Federal Reserve District secondary discount interest rate was 1.75 percent, and pursuant to the statute, two percentage points are to be added, resulting in a rate of 3.75 percent, which then must be rounded to the statutory minimum rate of four percent.

specifically notes that "the rate of prejudgment interest is **two** percentage points above the Fifth Federal Reserve District secondary discount rate . . . ." (Emphasis added). Because the statute the circuit court cited contained a two—rather than a three—percentage point increase, we conclude that the circuit court applied the 2018 version of West Virginia Code § 56-6-31(b).

Next is the issue of the circuit court's application of West Virginia Code § 56-6-31(b) (2018) to a cause of action that accrued in 2017. In determining whether a statute is to have prospective or retrospective application, the Supreme Court has held:

> "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect. Syl. pt. 4, *Taylor v. State Comp. Comm'r*, 140 W.Va. 572, 86 S.E.2d 114 (1955)." Syllabus Point 2, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014). [However,] "[s]tatutory changes that are purely procedural in nature will be applied retroactively." Syllabus Point 4, *Miller v. Smith*, 229 W.Va. 478, 729 S.E.2d 800 (2012).

Syl. Pts. 2–3, *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017).

While raised by the parties, before considering if West Virginia Code § 56-6-31(b) (2018) *may* be applied retroactively, a more fundamental question must be

answered: is the statute *being* applied retroactively? A law does not have retroactive application unless it is modifying a prior acquired right:

> "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; **only when it operates upon transactions which have been completed or upon rights which have been acquired** or upon obligations which have existed prior to its passage can it be considered to be retroactive in application. Syl. pt. 3, *Sizemore v. State Workmen's Comp. Comm'r*, 159 W.Va. 100, 219 S.E.2d 912 (1975)." Syllabus Point 3, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014).

Id. at Syl. Pt. 5 (emphasis added). Here, the statute governs pre*judgment* interest. Therefore, the statute only modifies the rights of litigants who have obtained a judgment. The parties are focused on the date the cause of action accrued, but at that moment, Mr. Varney had not acquired any right this statute affected. Because the amended prejudgment interest statute became effective in 2018 and Mr. Varney's judgment was entered in 2022, the statute was applied prospectively, not retroactively. Therefore, we conclude that four percent was the correct interest rate to apply. Accordingly, we find that the circuit court abused its discretion in its prejudgment interest award.

IV. Conclusion

For the foregoing reasons, we affirm in part and vacate in part the July 22, 2022, order of the Circuit Court of Wyoming County. Specifically, we (1) affirm the circuit court's denial of JHM's renewed motion for judgment as a matter of law; (2) affirm the circuit court's denial of JHM's motion for a new trial; and (3) vacate and remand the circuit

court's denial of JHM's motion to alter or amend the judgment on the issues of attorney fees and prejudgment interest. On remand, the circuit court shall (1) determine, in its discretion, if an award of attorney fees is appropriate, and if so, to calculate an appropriate fee award; and (2) recalculate the prejudgment interest award in light of this opinion.

Affirmed in part, Vacated in part, and Remanded.