No. 101476 - *Kim Wolfe, in his capacity as Cabell County Sheriff; Cabell County Sheriff's Office; Cabell County Commission; and the Cabell County Civil Service Commission v. Nathaniel Adkins; Jerri Allred; Tim Blevins; Johnny R. Bowman; John Bowman, II; Dianne Brubaker; Darrell Chapman; John Coburn; Kenneth Glover; Wayne Jarrell; Ruth Jones; Gary Lambert; Ronnie Miller; Bonnie Myers; Steven Rappold; Jerry Ryder; Jeremy Skidmore; Karen Spence; Gregg Stiltner; James Vaught; Elgin Ward; and Kevin White*

FILED
October 5, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Justice, concurring, in part, and dissenting, in part:

The instant proceeding was filed by former employees of the Cabell County Jail seeking payment for the unused sick leave they accrued during their employment. At the end of the trial in this case, the jury concluded that the Cabell County Jail had a policy stating that employees who left their employment with the Jail would not be paid for their unused sick leave. The jury also found, however, that the former employees involved in this case were not aware of such policy. Accordingly, the jury found in favor of the former employees and awarded them damages. The trial court then entered judgment in favor of the former employees and ordered the employer to pay each employee for the total number of unused sick leave days he/she had accrued as of the time of his/her departure from employment as well as statutory liquidated damages. On appeal to this Court, the majority has determined that the jury's verdict should be reversed in its entirety; that this case should be remanded for entry of judgment in favor of the employer; and that a new point of law is needed to achieve this result. In short, the majority has determined that the former employees are entitled to

nothing and that this decision can be reached only through the creation of a new syllabus point. I strongly disagree with this result, and, accordingly, I dissent from the majority's decision in this regard. Nevertheless, I concur in the majority's ultimate conclusion to reverse and remand this case, but only to the extent that I believe that the trial court improperly interpreted and applied the employer's policy in calculating the amount of unpaid sick leave recoverable by each employee.

A. This Case Should Have Been Decided Based Upon Existing Precedent

In this case, the employer had a definite policy in place explaining that non-retiring employees who leave their employment are not entitled to payment for their unused sick leave. The adoption of such a policy is entirely permissible and is contemplated by this Court's prior holding in Syllabus point 5 of *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999):

> Pursuant to W. Va. Code § 21-5-1(c) (1987), whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term "wages" are determined *by the terms of employment* and not by the provisions of W. Va. Code § 21-5-1(c). Further, *the terms of employment* may condition the vesting of a fringe benefit right on eligibility requirements in addition to the performance of services, and these terms *may provide that unused fringe benefits will not be paid to employees upon separation from employment.*

(Emphasis added). Despite the existence of a clear, precise, and definite syllabus point that is directly on point with the facts of the case *sub judice*, the majority nevertheless has

adopted a new syllabus point that is unnecessary based upon the facts presently before the Court and does not comport with the doctrine of *stare decisis*. The majority's new syllabus point states, in full:

> Where there is no provision in a written employment agreement, personnel handbook, personnel policy materials or employer documents granting employees payment for unused, accumulated sick leave upon termination from employment, the unused, accumulated sick leave, upon termination from employment, is not a vested, nonforfeitable fringe benefit under the West Virginia Wage Payment and Collection Act and is not payable to the employees.

This "new" statement of law does not resolve an issue that is new or factually distinguishable from those previously addressed by *Meadows*. Thus, the decision of this case should have been based upon *Meadows*, which is the controlling authority for the issues presently before the Court.

1. Unnecessary as factually inaccurate. As this Court previously has recognized, *new* syllabus points are created to announce *new* points of law. In this regard, we specifically have held that "[t]his Court will use signed opinions when *new* points of law are announced and those points will be articulated through syllabus points as required by our state constitution." Syl. pt. 2, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001) (emphasis added). *Accord State ex rel. Med. Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003) (observing that "[i]f this Court were to create a new exception to [a body of law], it would do so in a syllabus point"). Such a practice is

consistent with our constitutional duty to prepare a syllabus in every opinion that we issue. *See* W. Va. Const. art. VIII, § 4 ("[I]t shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case."). The adoption of a new syllabus point correspondingly presupposes that the subject case also presents a new factual predicate that the Court has not previously had occasion to consider and that the new syllabus point is necessary to explain how the law applies to the fact pattern then before the Court.

The syllabus point adopted in the instant case, however, does not state a new point of law based upon a new set of facts that the Court has not previously considered. Rather, the facts of the instant appeal are directly on point with those already considered and addressed by this Court's prior opinion in the *Meadows* case: what happens to an employee's accrued sick leave upon his/her separation from employment when the employer has a defined policy? Nevertheless, the "new" syllabus point adopted by the majority of the Court in the case *sub judice* seems to pertain to cases in which an employer does not have a defined policy. This syllabus point would be perfectly acceptable in a case with a factual predicate to support its adoption. However, the facts contemplated by the majority's "new" syllabus point *are not* the facts presented by the instant proceeding! In this case, both a jury and the majority opinion have concluded that the employer herein *had* a defined policy governing the

treatment of sick leave upon an employee's departure from employment. Specifically, said policy provides that

> [w]hen the services of an employee have been terminated, all sick leave credited shall be cancelled as of the last working day with the department. However, accumulated sick leave may be reinstated if a permanent employee is rehired by the Employer within a period of six (6) months from the date of separation.[1]

(Footnote added).

In light of the existence of such an employment policy, the majority simply should have applied *Meadows* to the facts of the case *sub judice* because *Meadows* specifically provides guidance for cases in which an employer has a defined policy in place. Since the facts of the case *sub judice* do not differ from those already addressed by *Meadows* and are not precisely as they are portrayed by the majority's "new" syllabus point herein, the Court's "new" syllabus point is not necessary. Moreover, the majority's "new" syllabus point

---

[1]The employer's policy also addressed sick leave benefits, generally, as well as the treatment of an employee's accrued sick leave upon his/her retirement:

> Sick leave eligibility is granted each year to be used for bona fide personal illness absences during that year or as hereinafter set forth for maternity. Employees accrue sick leave at the rate of one and one-half days per month. The carryover of the sick leave time for bona fide personal illness absences is limited to 30 days; provided, however, for retirement purposes there is unlimited carryover of sick leave time.

is somewhat misleading insofar as the factual predicate that it portrays is not an accurate depiction of the facts upon which the Court's decision is based.

2. *Stare decisis*. The majority's adoption of its "new" syllabus point herein also is improper on a more fundamental level because it ignores the longstanding doctrine of *stare decisis* with no explanation for its marked departure from our established precedent in *Meadows*. "Stare decisis is the policy of the court to stand by precedent." *Mayhew v. Mayhew*, 205 W. Va. 490, 499, 519 S.E.2d 188, 197 (1999) (internal quotations and citation omitted). In this regard, we have observed that

> [a] judicial precedent attaches . . . a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

Banker v. Banker, 196 W. Va. 535, 546 n.13, 474 S.E.2d 465, 476 n.13 (1996) (internal quotations and citation omitted). Moreover,

> [*s*]*tare decisis* . . . is a matter of judicial policy. . . . It is a policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. . . . In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted.

Woodrum v. Johnson, 210 W. Va. 762, 766 n.8, 559 S.E.2d 908, 912 n.8 (2001) (internal quotations and citations omitted). *Accord* Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va.

1023, 207 S.E.2d 169 (1974) ("An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law."). *Cf.* Syl. pt. 13, *Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975) ("The rule of *stare decisis* does not apply where the former decisions have misinterpreted or misapplied a rule or principle of law."), *superseded by statute on other grounds as stated in Pritchard v. Arvon*, 186 W. Va. 445, 413 S.E.2d 100 (1991).

The parties in the case *sub judice* have asked the Court to determine whether the plaintiff former employees are entitled to payment for their accrued sick leave when the employer terminated their employment. To resolve this controversy, our prior holdings in *Meadows* direct that this Court must review the employment policy that governs the employees' employment. The facts of *Meadows* are nearly identical to those at issue in the instant proceeding, and the legal conclusions of *Meadows* remain good law that have not been overruled or abrogated since their adoption. As such, *Meadows* provides clear guidance for cases involving an employment policy addressing the treatment of an employee's fringe benefits upon his/her departure from employment. Adherence to our *Meadows* decision promotes the aims of *stare decisis* to provide clarity and to afford certainty in the operation of the law and its application to a given set of facts. Absent a compelling justification for

departing from this Court's established precedent in *Meadows*, *stare decisis* demands that the majority follows its prior holdings. The majority's refusal to follow *Meadows* and its corresponding adoption of a "new" syllabus point in this opinion amount to a flagrant disregard of this established principle of judicial comportment.

B. The Jury Properly Determined That the Employees Did Not Know About the Employer's Policy

Pursuant to Syllabus point 6 of *Meadows*, once it has been determined that an employer has a fringe benefits policy in place to determine whether unpaid benefits will be paid to an employee upon his/her separation from employment, the next inquiry is whether such policy was "express and specific" so as to adequately inform the subject employees about the policy's terms:

> Terms of employment concerning the payment of unused fringe benefits to employees must be *express and specific* so that employees understand the amount of unused fringe benefit pay, if any, owed to them upon separation from employment. Accordingly, this Court will construe any ambiguity in the terms of employment in favor of employees.

Syl. pt. 6, *Meadows*, 207 W. Va. 203, 530 S.E.2d 676 (emphasis added). As noted previously, both the jury and the majority of this Court have found that the employer in this case had a defined policy regarding the treatment of accrued sick leave upon an employee's departure from employment. The issue that remained to be resolved in this case, then, was whether the employer's policy was "express and specific" so that the employees knew of its

terms and application to their employment. The parties disputed whether the policy satisfied these criteria and even whether the employer had informed its employees about this policy. These inquiries thus constituted questions of fact that should have been, and properly were, submitted to the jury for its consideration and decision. The jury determined that the plaintiff former employees "[d]id [not] . . . know of any such policy, either written or unwritten, regarding what happened to sick leave benefits upon the termination of their employment"; rendered its verdict in favor of the former employees; and allowed the case to proceed to the trial judge for entry of an award of damages to the employees. The majority of the Court, however, has concluded, instead, that the plaintiff former employees are not entitled to the relief that they seek in this case. By reversing the lower court's entry of judgment in favor of the employees, the majority has refused to give credence to the jury's verdict on this point when there is absolutely no indication that either the evidence or the basis for the jury's reasoning was flawed, tainted, biased, or otherwise rendered in error.

We long have held that the jury serves as the finder of fact, meaning that the function of the jury is to resolve factual disputes in the evidence presented to it for its consideration.

> "It is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed." Syllabus point 2, *Skeen v. C & G Corp.*, 155 W. Va. 547, 185 S.E.2d 493 (1971).

Syl. pt. 12, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009). *Accord* Syl. pt. 3, *Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832 ("It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony is conflicting."). *See also Stevenson v. Independence Coal Co., Inc.*, 227 W. Va. 368, ___, 709 S.E.2d 723, 726 (2011) (per curiam) ("It is not our job to weigh the evidence . . . or to disregard stories that seem hard to believe. Those tasks are for the jury." (internal quotations and citation omitted)); *Pauley v. Bays*, 200 W. Va. 459, 464, 490 S.E.2d 61, 66 (1997) (per curiam) (observing that "the function of the jury is to weigh the evidence with which it is presented and to arrive at a conclusion regarding damages and liability"); *Nesbitt v. Flaccus*, 149 W. Va. 65, 77, 138 S.E.2d 859, 867 (1964) ("It is a general rule of law that it is the duty of the jury to take the law from the court and to apply that law to the facts as it finds them from the evidence."). Therefore, once the factual dispute regarding the specificity of the employer's policy and the employees' knowledge thereof was raised during the underlying trial of this case, the resolution of this dispute rested with the jury.

In this case, however, the majority has usurped the jury's essential role as finder of fact by substituting its own assessment of the evidence for the jury's properly rendered findings of fact. Such a practice is a perversion of the judicial process that entrusts

juries with the resolution of factual disputes, and from this decision of the majority, I emphatically dissent.

C. The Trial Court Miscalculated the Employees' Damages

While I dissent from the majority's holding creating a "new" syllabus point when the existing points of law from our *Meadows* opinion adequately address the legal issues before the Court and further disagree with the majority's substitution of its own judgment of the facts for that of the jury, I nevertheless concur in the majority's decision to reverse and remand this case insofar as further proceedings are needed in this matter. In this regard, the trial court's order should be reversed to the extent that it erred in its calculation of the amount of damages awarded to the plaintiff former employees. In calculating the employees' damages, the trial court permitted each employee to receive payment for every day of accrued sick leave that he/she had accumulated but had not used as of the date of that employee's termination. This method of calculating damages was wrong because it is contrary to the employer's policy governing the terms of the employees' employment.

As noted previously, the plaintiff former employees' employment was governed by the employer's policy defining the various terms of employment. Pursuant to this policy, employees may carry over no more than thirty days of sick leave pay: "[t]he carryover of the sick leave time for bona fide personal illness absences is limited to 30

days[.]" Given this clear limitation on the carry-over accumulation of sick leave days, it would appear that an employee would have at his/her disposal no more than thirty days of sick leave at any given point in time. Despite the limited accumulation of sick leave time permitted by the employer's stated policy, the trial court nevertheless permitted each employee to recover damages for *every* day of sick leave he/she had accrued since the beginning of his/her employment even though the amount of sick leave that can be carried over is limited to thirty days. The trial court's ruling in this regard was wrong and contrary to this Court's holdings in *Meadows*, 207 W. Va. 203, 530 S.E.2d 676, governing the interpretation of employment terms pertaining to fringe benefits. Accordingly, the trial court's order calculating damages in this fashion should be reversed, and this case should be remanded for the entry of a new damages order to correct this error.

For the foregoing reasons, I respectfully concur, in part, and dissent, in part, from the majority's opinion in this case.