IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

JUSTICE HIGHWALL MINING, INC., DYNAMIC ENERGY, INC., and BLUESTONE INDUSTRIES, INC.,

Defendants/Petitioners,

v. **Docket No.: 22-ICA-39**

RICKY M. VARNEY,

Plaintiff/Respondent.

PETITIONERS' BRIEF

Appeal from the Twenty-Seventh Judicial Circuit
Honorable Micheal M. Cochrane
Civil Action No. 18-C-41

Respectfully Submitted By:

Ronald H. Hatfield, Jr. (WVSB No. 8552)
101 Main Street West
White Sulphur Springs, WV 24986
(540) 613-1460
ron.hatfield@bluestone-coal.com
Counsel for Defendants/Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by refusing to grant judgment as a matter of law in favor of the Petitioners, pursuant to Rule 50 of the West Virginia Rules of Civil Procedure, when there was no legally sufficient evidentiary basis developed at trial upon which a jury could find in favor of the Plaintiff on his claim of wrongful discharge.

2. The Circuit Court erred by refusing to award a new trial, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, when the verdict was against the clear weight of the evidence.

3. The Circuit Court erred by refusing to award a new trial, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, when the Petitioners were prejudiced at trial by opposing counsel's repeated references to hearsay.

4. The Circuit Court erred by refusing to award a new trial, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, when the jury was not instructed properly on the burden of proof for an award of attorney fees.

5. The Circuit Court erred by refusing to strike the award of attorney fees in its entirety, pursuant to Rules 52(b) and 59(e) of the West Virginia Rules of Civil Procedure, when the jury was not instructed properly on the burden of proof for an award of attorney fees.

6. The Circuit Court erred by awarding prejudgment interest in excess of the statutorily mandated minimum of 4 percent established by West Virginia Code Section 56-6-31.

STATEMENT OF THE CASE

This is an appeal from an employment case wherein judgment has been entered against the Petitioners, Justice Highwall Mining, Inc., Dynamic Energy, Inc., and Bluestone Industries, Inc.,

finding that the Petitioners wrongfully terminated Ricky M. Varney ("Varney") from employment in violation of substantial public policy.

Varney filed his Complaint alleging in the sole count that he suffered an unlawful retaliatory discharge in contravention of substantial public policies of the State of West Virginia. The public policy upon which Varney relies purportedly exists in the provisions of West Virginia Code Section 22A-2-71, which states that "[n]o miner shall be required to operate unsafe equipment," and West Virginia Code Section 22A-2-71a, which states that "[a]ny miner has the right to refuse to work in an area or under conditions which he believes to be unsafe." Varney admitted during his trial testimony that he never refused to work, so Section 22A-2-71a cannot provide a basis for his claim. Furthermore, Varney was not an equipment operator, so he was never required to operate any unsafe equipment. Rather, Varney testified that when he complained about unsafe repairs to equipment, the Petitioners provided the necessary parts for safe repairs. Varney even admitted that he never felt his job was in danger for bringing these issues to his supervisor's attention.

Petitioners moved the Circuit Court for judgment as a matter of law at the close of all the evidence and prior to submission of the case to the jury based on the principles set forth in Thomas Memorial Hosp. Assoc. v. Nutter, 238 W.Va. 375, 795 S.E.2d 530 (2016), i.e. there was insufficient evidence to establish liability against the Petitioners in this matter. The Circuit Court denied the motion and submitted the case to the jury, which returned a verdict in favor of Varney. Petitioners then renewed the motion pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, and requested a new trial, all of which was denied.

Petitioners Justice Highwall Mining, Inc., Dynamic Energy, Inc., and Bluestone Industries, Inc. respectfully request that this Court reverse the judgment of the Circuit Court, and remand for

proceedings consistent with the provisions of Rules 50, 52, and 59 of the West Virginia Rules of Civil Procedure.

SUMMARY OF ARGUMENT

The evidence at trial was insufficient to prove that Varney was fired in contravention of any right or public policy identified in his Complaint. Accordingly, there is no legally sufficient evidentiary basis upon which a jury could find in favor of Varney on his claim of wrongful discharge, and it was error for the Circuit Court to refuse judgment as a matter of law in favor of the Petitioners.

Also, the Circuit Court erred by refusing to award a new trial when the verdict was against the clear weight of the evidence. Indeed, the clear weight of the evidence proved by a preponderance of the evidence that Varney would have been discharged if he had never raised any safety concerns, because he violated the attendance policy established by his union that provides just cause for termination. The Petitioners also are entitled to a new trial in this matter because the Petitioners were prejudiced at trial by opposing counsel's repeated references to hearsay, and the jury was not instructed properly on the burden of proof for an award of attorney fees.

The Circuit Court's Orders addressed herein ignore legal precedent established by the West Virginia Supreme Court in the field of employment law, and violate principles of fairness concerning the burden of proof and awards of damages and interest in employment law matters, and this Court should review the issues to ensure that an employer's personnel management decisions cannot be challenged unless a substantial public policy has, in fact, been jeopardized.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request oral argument pursuant to Rule 20 of the Revised Rules of Appellate Procedure, as this appeal involves multiple questions and issues of fundamental public importance;

and Petitioners further request that this Court issue a full opinion to consolidate various legal principles underlying this appeal, and to provide guidance to the Circuit Courts with regard to the burden of proof and awards of damages and interest in employment law matters.

ARGUMENT

I. Standard of Review

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure is *de novo*." Syl. Pt. 1, Fredeking v. Tyler, 224 W.Va. 1, 680 S.E.2d 16 (2009).

"The decision to grant or deny a new trial rests within the sound discretion of the trial court" and such decision will be reversed only upon a clear abuse of that discretion. In re State Public Bldg. Asbestos Litigation, 454 S.E.2d 413, 426 (W.Va. 1994) (Cleckley, J., concurring). The West Virginia Supreme Court "is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial." Id. at Syl. Pt. 3.

"The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W.Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt. 1, Wickland v. American Travellers Life Insurance Co., 204 W.Va. 430, 513 S.E.2d 657 (1998). "[T]he question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 12, CSX Transp., Inc. v. Smith, 729 S.E.2d 151 (W.Va. 2012).

Finally, "[w]here the issue on an appeal from the circuit court is clearly a question of law ... involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, in part, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

II. The Circuit Court erred by refusing to grant judgment as a matter of law in favor of the Petitioners, pursuant to Rule 50 of the West Virginia Rules of Civil Procedure, when there was no legally sufficient evidentiary basis developed at trial upon which a jury could find in favor of the Plaintiff on his claim of wrongful discharge.

Pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure, after "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party." Petitioners moved the Circuit Court for judgment as a matter of law at the close of all the evidence and prior to submission of the case to the jury based on the principles set forth in Thomas Memorial Hosp. Assoc. v. Nutter, 795 S.E.2d 530 (W.Va. 2016), i.e. there was insufficient evidence to establish liability against the Petitioners in this matter. The Circuit Court denied the motion and submitted the case to the jury, which returned a verdict in favor of the Plaintiff. Petitioners then renewed the motion pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, which also was denied. (J.A. 0680).

Varney filed this Complaint alleging in the sole count that he suffered an "unlawful retaliatory discharge in contravention of substantial public policies of the State of West Virginia." Complaint at ¶39. The public policy upon which Varney relies purportedly exists in the provisions of West Virginia Code Section 22A-2-71, which states that "[n]o miner shall be required to operate unsafe equipment,"[1] and West Virginia Code Section 22A-2-71a, which states that "[a]ny miner has the right to refuse to work in an area or under conditions which he believes to be unsafe."[2] See Complaint at ¶33-34. Varney admitted during his trial testimony that he never refused to work,

[1] It is important to note that Varney omitted from his Complaint the language in this code section that refers to a procedure established by the Board of Coal Mine Health and Safety "for resolving disputes arising out of the refusal by a miner to operate such alleged unsafe equipment," which Varney admittedly did not pursue. See W.Va. C.S.R. § 36-8-1 *et seq*.

[2] Both of these statutes are found in an article of the West Virginia Code that is designated to apply to underground mining operations, and Varney's place of employment at Coal Mountain was not an underground mining operation.

see October 25, 2021 Trial Transcript at 198-99 (J.A. 0206-07), so Section 22A-2-71a cannot provide a basis for his claim. Furthermore, Varney was not an equipment operator, so he was never required to operate any unsafe equipment. Rather, Varney testified that when he complained about unsafe repairs to equipment, the Petitioners provided the necessary parts for safe repairs. (J.A. 0178-79). Varney even admitted that he never felt his job was in danger for bringing these issues to his supervisor's attention. (J.A. 0187-88).

To succeed on his claim for retaliatory discharge, Varney must prove that "the employer's motivation for the discharge [was] to contravene some substantial public policy principle." Syl. Pt. 1, Harless v. First Nat. Bank in Fairmont, 246 S.E.2d 270 (W.Va. 1978). However, much like our Supreme Court found in Nutter, there simply is "no evidence to support the jury's conclusion that the [Petitioners] wrongfully discharged [Varney] in order to jeopardize or undermine a specific public policy." Nutter, 795 S.E.2d at 535. There are

> four factors courts should weigh to determine whether an employee has successfully presented a claim of relief for wrongful discharge in contravention of substantial public policy: 1) That 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) That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); 3) The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); 4) The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).
>
> Under this test, 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 541 (internal quotations and citations omitted). The goal of this analysis "is to ensure that an employer's personnel management decisions will not be challenged unless a public policy has, in fact, been jeopardized." Id.

Varney did not produce any evidence at trial "specifically demonstrating whether and how a public policy was being broken or undermined by the [Petitioners'] actions." Id. at 543. He discussed interactions, and perhaps disagreements, between himself and his supervisor, but ultimately the testimony revealed that he was not *required* to operate unsafe equipment, make unsafe repairs, or work under unsafe conditions. (J.A. 0183-87). In fact, Varney never felt that his job was in danger until he missed two consecutive days of scheduled work, without notice and without proven illness, which is grounds for termination under the union contract. See October 26, 2021 Trial Transcript at 124-26 (J.A. 0359-61).

In Nutter, the plaintiff was a registered nurse who was hired by the defendant hospital in August 2008. Six months later, the plaintiff was placed on an improvement period due to time management issues and disorganization. 795 S.E.2d at 536. The plaintiff successfully completed her improvement period, but in November 2009 she was accused of charting fraud and her employment was terminated. Id. at 537-38. The plaintiff thereafter filed a complaint against defendant hospital alleging that the firing was a "retaliatory discharge" in contravention of substantial public policy. A jury returned a verdict in favor of the plaintiff. Id. at 538. The circuit court denied defendant hospital's motion for judgment as a matter of law, and the defendant appealed. Id. at 539.

Our Supreme Court recognized that the employer's "overall contention is that, as a matter of law, the plaintiff failed to produce sufficient evidence to support the jury's . . . verdict." Id. Specifically, the employer argued that "the plaintiff failed to prove the elements of a cause of

action for wrongful discharge" because "there was no evidence supporting the plaintiff's allegation that the hospital violated the federal regulations quoted by the judge as public policy." Id. at 539-40. The same is true in this case, i.e. there is no evidence supporting Plaintiff Varney's allegation that the Petitioners violated the West Virginia Code provisions adopted by this Court as public policy.

The plaintiff in Nutter, an at-will employee like Plaintiff Varney in this case, "testified that she complained about numerous issues . . . during her employment," and "the circuit court instructed the jury on six federal regulations as sources of substantial public policy." Id. at 540. The law in West Virginia recognizes that an employer has an absolute right to discharge an at-will employee. However, that general rule is "tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge." Id. at 540-41. Our Supreme Court scoured the eight-day trial transcript, and noted that the "record [was] scattered with questions and statements that suggest Thomas Memorial's actions *might* have involved" violations of public policy, id. at 541-42 (emphasis in original), but ultimately concluded that the record was void of "any evidence by which a jury could actually find that these '*might have*' events violated a specific policy." Id. at 542 (emphasis in original). The Court explained that it took "the plaintiff's testimony that she complained about these issues as true, and [accepted] as correct the inference that these complaints were known to the hospital," but still found "no evidence specifically demonstrating whether and how a public policy was being broken or undermined by the hospital's actions." Id. at 542-43; see also id. at Syl. Pt. 3. Finally, the Court "scrutinized the parties' briefs, seeking specific links to say what evidence supports a breach of each regulation cited" and found none. Accordingly, there was "no legally sufficient evidentiary

basis upon which a jury could find in favor of the plaintiff on her claim of wrongful discharge. The circuit court should have granted the defendant hospital's motion for judgment as a matter of law on the wrongful discharge claim, and it erred when it failed to do so." Id. at 544.

Although this Court also must take Varney's testimony that he complained about various issues as true, and accept as correct the inference that these complaints were known to the Petitioners, the defense is even stronger here. Whereas the Court in Nutter dealt with "*might have*" evidence, the trial testimony in this case "*did not*" support a breach of either code provision relied upon by Varney. Indeed, Varney admitted that he *did not* refuse to work, and the Petitioners *did not* require him to operate unsafe equipment or make unsafe repairs. (J.A. 0206-07; 0178-79). There were, at worst, episodes of disagreement, but Varney was never *required* to perform any activity that violated the public policy that the cited provisions clearly mandate. See Nutter, 795 S.E.2d at 541.

Varney is not a whistleblower. He simply complained to his boss about some things that he did not agree with, and if he did not like what his supervisor had to say, he had other avenues to seek a remedy; but the evidence proved that was not necessary. The evidence at trial was insufficient to prove that Varney was fired in contravention of any right or public policy identified in his Complaint. Accordingly, there is "no legally sufficient evidentiary basis upon which a jury could find in favor of the plaintiff on [his] claim of wrongful discharge," and it was error for the Circuit Court to refuse judgment as a matter of law in favor of the Petitioners. See Nutter, 795 S.E.2d at 544.

III. The Circuit Court abused its discretion by refusing to award a new trial, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, when the verdict was against the clear weight of the evidence.

"The main function of a motion for a new trial is to give the trial court an opportunity to correct errors in the proceedings before it without subjecting the parties to the expense and the inconvenience of prosecuting a proceeding in review." State v. Cruikshank, 76 S.E.2d 744, 748 (W.Va. 1953). The trial court should set aside a verdict and grant a new trial when "the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice." Syl. Pt. 3, In re State Public Bldg. Asbestos Litigation, 454 S.E.2d 413 (W.Va. 1994). "Under Rule 59, the trial judge has the authority to weigh the evidence as if he or she were a member of the jury" and it is within the trial court's discretion to "set aside the verdict even though there is substantial evidence to support it." Id. at 419. The trial court is "not required to take that view of the evidence most favorable to the verdict-winner," id., and a new trial is proper when "it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." Id. at 418. "A trial judge is not merely a referee but is vested with discretion in supervising verdicts and preventing miscarriages of justice, with the power and duty to set a jury verdict aside and award a new trial if it is plainly wrong even if it is supported by some evidence." Id. at 419.

Under West Virginia law,

> [o]nce 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. Resources, Inc., 480 S.E.2d 817 (W.Va. 1996). The Petitioners maintain that Varney failed to establish that his discharge was motivated by an unlawful factor contravening substantial public policy, but in any event, the clear weight of the evidence proved by a preponderance of the evidence that Varney would have been discharged if he had never raised

any safety concerns, because he violated the attendance policy established by his union that provides just cause for termination. (J.A. 0348-76). Varney did not dispute that he missed two consecutive days of work without notifying his employer. (J.A. 0149-50). Varney relied heavily upon his assertion that no one had been fired under this attendance policy, but his own subjective belief is insufficient to rebut the defense. Varney even called a witness specifically to address this issue, but Wallace Frank Adkins testified that he has no knowledge what happens to employees who miss more than one working day without prior notice. (J.A. 0226-27).

"The decision to grant or deny a new trial rests within the sound discretion of the trial court." 454 S.E.2d at 426 (Cleckley, J., concurring). The Circuit Court has inherent power to "weigh the evidence independently to determine whether there is sufficient evidence to support the verdict." Id. at n.1, 4. Clearly in this case, substantial justice has not been done, and in the interests of judicial economy, the Circuit Court should have granted a new trial to avoid a "full blown and costly appeal." Id. at n.2.

IV. The Circuit Court abused its discretion by refusing to award a new trial, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, when the Petitioners were prejudiced at trial by opposing counsel's repeated references to hearsay.

Early in this trial Varney made reference to hearsay in an effort to persuade the jury that the Petitioners engaged in a scheme to cover up their wrongdoing and to manufacture a valid basis for Varney's termination. Specifically, Varney's counsel attempted to introduce and question Varney about an email communication between employees of a non-party, which purportedly included comments made by Leslie Wells, who is associated with the Petitioners. Counsel for the Petitioners objected to the hearsay, and the Court agreed. Nevertheless, Varney's counsel made repeated references to the hearsay. (J.A. 0119-26; 0390-96; 0437-49; 0521-24; 0548-49; 0554-58; 0587-88; 0594).

A new trial is necessary "where the jury acted under some mistake or under some improper motive, bias, or feelings." 454 S.E.2d at 426 (Cleckley, J., concurring). The prejudicial effect of repeated and improper reference to this hearsay became clear during jury deliberations, when the jury sent a question to the Court inquiring whether there was any additional information regarding comments allegedly made by Leslie Wells. (J.A. 0624).[3] The Court responded that no additional information was available for the jury's consideration, and shortly thereafter the jury returned a verdict in favor of Varney. Here, "it is reasonably clear that prejudicial error has crept into the record" because the jury clearly placed special emphasis on the hearsay evidence concerning Leslie Wells, which appears to have created bias in favor of Varney. Accordingly, the Circuit Court should have exercised its discretion, power, and duty to award a new trial in this matter. See 454 S.E.2d at 418-19.

V. The Circuit Court abused its discretion by refusing to award a new trial, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, when the jury was not instructed properly on the burden of proof for an award of attorney fees.

An award of attorney fees is authorized only when the prevailing party shows by ***clear and convincing evidence*** that the other party has acted in bad faith. See Syl. Pt. 4, Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc., 425 S.E.2d 144 (W.Va. 1992); see also Harlow v. Eastern Electric, LLC, 858 S.E.2d 445, 451-52 and n.33 (W.Va. 2021) (recognizing throughout that "clear and convincing" is the standard of proof for an award of attorney fees under Sally-Mike Properties). Although the jury did determine that the "Defendants should be assessed reasonable attorney's fees and costs incurred by the Plaintiff," (J.A. 0662), the Circuit Court is not bound by such a finding because: 1) "[t]he decision to award or not to award attorney's fees rests in the

[3] Although the written transcript does not identify Leslie Wells as the subject of this inquiry, counsel's notes indicate that she was identified expressly in the jury's written question, so perhaps a review of the audio record is necessary.

sound discretion of the circuit court," Harlow, 858 S.E.2d at 455; and 2) the jury was not properly instructed on the "clear and convincing" burden of proof.

The Circuit Court gave Plaintiff's Jury Instruction No. 8, over Petitioners' objection (J.A. 0258, 0680), which instructed the jury that it could "assess reasonable attorney's fees and costs incurred by Plaintiff Rick Varney" in accordance with the principles set forth in Bowling and McClung. However, the instruction failed to mention Varney's heightened burden of clear and convincing evidence to support such an award. (J.A. 0651). Jury instructions, as a whole, must be "accurate and fair to both parties." Syl. Pt. 9, CSX Transp., Inc. v. Smith, 729 S.E.2d 151 (W.Va. 2012). Moreover, a "trial court's instructions to the jury must be a correct statement of the law and supported by the evidence." Id. at Syl. Pt. 10. Here, the subject instruction was an incomplete statement of the law and was likely to mislead the jury because the members elsewhere had been instructed that Varney had the burden "to prove every essential element of [his] claim [by] a preponderance of the evidence." (J.A. 0631). "An erroneous instruction is presumed to be prejudicial." Miller v. Allman, 813 S.E.2d 91, 96 (W.Va. 2018) (quoting Syl. Pt. 2, Hollen v. Linger, 151 S.E.2d 330 (W.Va. 1966)). Instructions that have the potential to mislead a jury are not fair and cannot sustain a verdict, or in this case, an award of attorney fees. See Syl. Pt. 7, Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374 (W.Va. 1995). It is apparent in this case that the jury's decision to award attorney fees was based upon an improper standard of proof (preponderance of the evidence), because the members were never instructed otherwise. Consequently, the Circuit Court should have set aside the award of attorney fees and held a new trial on the issue of attorney fees so the jury could be properly instructed on the burden of proof.

Finally, it is within the sound discretion of the trial court to determine whether a plaintiff has presented clear and convincing evidence of bad faith, or vexatious, wanton, or oppressive

conduct that will sustain an award of attorney fees. See Aetna Cas. & Sur. Co. v. Pitrolo, 342 S.E.2d 156, 161 (W.Va. 1986); Harlow, 858 S.E.2d at 455. No such evidence exists in this matter.

VI. The Circuit Court erred by refusing to strike the award of attorney fees in its entirety, pursuant to Rules 52(b) and 59(e) of the West Virginia Rules of Civil Procedure, when the jury was not instructed properly on the burden of proof for an award of attorney fees.[4]

Pursuant to Rule 52(b) of the West Virginia Rules of Civil Procedure, "the court may amend its findings or make additional findings and may amend the judgment accordingly." Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, a court may alter or amend a judgment when "it becomes necessary to remedy a clear error of law or . . . to prevent obvious injustice." Syl. Pt. 1, in part, Acord v. Colane Co., 719 S.E.2d 761 (W.Va. 2011).

"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, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 5, McClung v. Marion County Com'n, 360 S.E.2d 221 (W.Va. 1987) (quoting Syl. Pt. 3, Sally-Mike Properties v. Yokum, 365 S.E.2d 246 (W.Va. 1986)). However, an award of attorney fees is authorized only when the prevailing party shows by ***clear and convincing evidence*** that the other party has acted in bad faith. See Syl. Pt. 4, Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc., 425 S.E.2d 144 (W.Va. 1992); see also Harlow v. Eastern Electric, LLC, 858 S.E.2d 445, 451-52 and n.33 (W.Va. 2021) (recognizing throughout that "clear and convincing" is the standard of proof for an award of attorney fees under Sally-Mike Properties).

[4] Although this case was held before a jury and the issue of attorney fees was presented to the jury, the Circuit Court has authority to alter or amend the award of attorney fees pursuant to Rules 52(b) and 59(e) because "the decision as to the amount of attorney's fees was made by the trial court without a jury." Aetna Cas. & Surety Co. v. Pitrolo, 342 S.E.2d 156, 161 (W.Va. 1986).

Although the jury did determine that the "Defendants should be assessed reasonable attorney's fees and costs incurred by the Plaintiff," the Circuit Court is not bound by such a finding because: 1) "[t]he decision to award or not to award attorney's fees rests in the sound discretion of the circuit court," Harlow, 858 S.E.2d at 455; and 2) the jury was not properly instructed on the "clear and convincing" burden of proof.

The Circuit Court gave Plaintiff's Jury Instruction No. 8, over Petitioners' objection (J.A. 0258, 0680), which instructed the jury that it could "assess reasonable attorney's fees and costs incurred by Plaintiff Rick Varney" in accordance with the principles set forth in Bowling and McClung. However, the instruction failed to mention Varney's heightened burden of clear and convincing evidence to support such an award. (J.A. 0651). Jury instructions, as a whole, must be "accurate and fair to both parties." Syl. Pt. 9, CSX Transp., Inc. v. Smith, 729 S.E.2d 151 (W.Va. 2012). Moreover, a "trial court's instructions to the jury must be a correct statement of the law and supported by the evidence." Id. at Syl. Pt. 10. Here, the subject instruction was an incomplete statement of the law and was likely to mislead the jury because the members elsewhere had been instructed that Varney had the burden "to prove every essential element of [his] claim [by] a preponderance of the evidence." (J.A. 0631). "An erroneous instruction is presumed to be prejudicial." Miller v. Allman, 813 S.E.2d 91, 96 (W.Va. 2018) (quoting Syl. Pt. 2, Hollen v. Linger, 151 S.E.2d 330 (W.Va. 1966)). Instructions that have the potential to mislead a jury are not fair and cannot sustain a verdict, or in this case, an award of attorney fees. See Syl. Pt. 7, Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374 (W.Va. 1995). It is apparent in this case that the jury's decision to award attorney fees was based upon an improper standard of proof (preponderance of the evidence), because the members were never instructed otherwise.

Finally, it is within the sound discretion of the trial court to determine whether a plaintiff has presented clear and convincing evidence of bad faith, or vexatious, wanton, or oppressive conduct that will sustain an award of attorney fees. See Aetna Cas. & Sur. Co. v. Pitrolo, 342 S.E.2d 156, 161 (W.Va. 1986); Harlow, 858 S.E.2d at 455. No such evidence exists in this matter. Accordingly, the Circuit Court should strike the award of attorney fees in its entirety.

VII. The Circuit Court erred by awarding prejudgment interest in excess of the statutorily mandated minimum of 4 percent established by West Virginia Code Section 56-6-31.

The standard for awarding prejudgment interest is set forth in W.Va. Code § 56-6-31 (2022). West Virginia Code Section 56-6-31 requires that "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." W. Va. Code § 56-6-31(b)(1).

Petitioners objected to prejudgment interest at the rate of seven percent (7%) simple interest in this matter, as requested by Varney. See Defendants' Response to Plaintiff's Motion for Prejudgment Interest. The rate in 2017, when the cause of action accrued, was based on a floor of 7%, see Plaintiff's Motion for Prejudgment Interest at Exhibit A, which has been reduced by the West Virginia Legislature to a floor of 4%. See W. Va. Code § 56-6-31(b)(1). Although the Code provision indicates that the rate shall remain constant "notwithstanding changes in the federal reserve district discount rate," there is no requirement that the rate should remain constant when the law changes and the floor drops.

The secondary discount rate in effect on January 2, 2017 (the year in which the cause of action accrued) was 1.75 percent. Pursuant to W.Va. Code Section 56-6-31, the rate of prejudgment interest is two percentage points above that rate, resulting in a rate of 3.75 percent. Consequently, the Circuit Court erred by awarding prejudgment interest in excess of the statutorily mandated minimum of 4 percent. (J.A. 0671).

CONCLUSION

WHEREFORE, for all the foregoing reasons and those apparent to the Court, the Petitioners respectfully request that this Honorable Court will reverse and remand this matter to the Circuit Court of Wyoming County, West Virginia, for further proceedings consistent with the provisions of Rules 50, 52, and 59 of the West Virginia Rules of Civil Procedure; and the Petitioners pray for such other relief as the Court deems just and proper.

Respectfully Submitted,

JUSTICE HIGHWALL MINING, INC.,
DYNAMIC ENERGY, INC. and
BLUESTONE INDUSTRIES, INC,
By Counsel,

/s/ *Ronald H. Hatfield, Jr.*
Ronald H. Hatfield, Jr. (WVSB No. 8552)
General Counsel - Litigation
101 Main Street West
White Sulphur Springs, WV 24986
Tel: 540-613-5795
Fax: 540-301-0761
ron.hatfield@bluestone-coal.com
Counsel for Petitioners

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

JUSTICE HIGHWALL MINING, INC.,
DYNAMIC ENERGY, INC., and
BLUESTONE INDUSTRIES, INC.,

Defendants/Petitioners,

v. **Docket No.: 22-ICA-39**

RICKY M. VARNEY,

Plaintiff/Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioners, Justice Highwall Mining, Inc., Dynamic Energy, Inc., and Bluestone Industries, Inc., hereby certifies that on the 21 day of November, 2022, the foregoing "Petitioners' Brief" and "Joint Appendix" were served electronically via File & ServeXpress upon the following:

Samuel B. Petsonk, Esquire
Petsonk PLLC
PO Box 1045
Beckley, WV 25802

and

Bren Pomponio, Esquire
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, WV 25301
Counsel for Plaintiff

Ronald H. Hatfield, Jr.