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' REPLY BRIEF

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

Respectfully Submitted By:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Judgment as a Matter of Law

Contrary to Respondent's position, the Petitioners have not misrepresented anything about the substance of Plaintiff Varney's trial testimony. The record is clear and fully available to this Court, and without question indicates that Varney was never *required* "to operate unsafe equipment," which is protected by West Virginia Code Section 22A-2-71, and he never *refused* "to work in an area or under conditions which he believes to be unsafe," which is protected by West Virginia Code Section 22A-2-71a. See J.A. 0206-07; 0178-79. With respect to equipment, Respondent refers specifically to his testimony about his work truck, see Respondent's Brief at 16, but examination of the transcript reveals that the truck was "red-tagged" and he "couldn't use it no more" after complaining to his supervisor (J.A. 0096), so he certainly was not *required* to operate an unsafe truck. Furthermore, Respondent attempts to equate his refusal "to do a particular job" with his right to refuse unsafe work, see Respondent's Brief at 16, but again, examination of the transcript reveals that Respondent refused to perform a particular job because he did not have the proper supplies, so he "would go to another job." (J.A. 206-07; 187).

Respondent's position is that "the undisputed testimony and overwhelming credible evidence [establish] that Mr. Varney made complaints about safety hazards." Respondent's Brief at 17. Petitioners do not dispute that Respondent discussed his safety concerns with his supervisor. Nevertheless, to succeed on his claim for retaliatory discharge, Respondent 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, Respondent did not produce any evidence at trial "specifically demonstrating whether and how a public policy was being broken or undermined by the [Petitioners'] actions." Thomas Memorial Hosp. Assoc. v. Nutter, 795 S.E.2d 530, 543 (W.Va. 2016). 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. (J.A. 0359-61).

Respondent 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 Respondent 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. Respondent "cannot simply cite a source of public policy and then make a bald allegation that the policy might somehow have been violated." Id. The law of West Virginia requires more "to ensure that [Petitioners'] personnel management decisions will not be challenged unless a public policy has, in fact, been jeopardized." Id.

Respondent 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. Even if there was not a legitimate business justification for his discharge (which indisputably exists in this case, see J.A. 0361), the statutes at issue do not protect any right to complain to his supervisor. The evidence at trial was insufficient to prove that Respondent 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.

II. New Trial – Weight of the Evidence

Respondent asserts that "Petitioner's argument for new trial plainly ignores the standard for setting aside a jury's verdict," Respondent's Brief at 18, then proceeds to quote a "methodology for assessing a jury's verdict" that pre-dates Petitioners' authority on this issue,[1] and which is drawn from a case where the ultimate conclusion relies on principles that are "misleading in light of the purpose of Rule 59." In re State Public Bldg. Asbestos Litigation, 454 S.E.2d 413, 419 (W.Va. 1994).[2] Clearly, "[u]nder 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. The trial court is "not required to take that view of the evidence most favorable to the verdict-winner," id., and if "the trial judge finds the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial." Id. at 420. "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.

At the trial of this matter, the clear weight of the evidence proved by a preponderance of the evidence that Respondent 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

[1] Respondent quotes Syllabus Point 7 of Grimmett v. Smith, 792 S.E.2d 65 (W.Va. 2016), which adopts the methodology set forth in Syllabus Point 5 of Orr v. Crowder, 315 S.E.2d 593 (W.Va. 1983).

[2] In Asbestos Litigation, the West Virginia Supreme Court considered "standards regarding how the evidence should be weighed" that were set forth in Syllabus Point 3 of McNeely v. Frich, 415 S.E.2d 267 (W.Va. 1992), and determined that the analysis in McNeely "is misleading in light of the purpose of Rule 59." The ultimate conclusion in Grimmett, relied upon here by Respondent, rests upon the same misleading analysis. See Grimmett, 792 S.E.2d at 72 ("Having carefully considered record in this case, we reach the same decision as the McNeely court.").

cause for termination. (J.A. 0348-76). Respondent did not dispute that he missed two consecutive days of work without notifying his employer. (J.A. 0149-50). Therefore, the clear weight of the evidence proved "that the same result would have occurred even in the absence of [an] unlawful motive." Syl. Pt. 8, Page v. Columbia Nat. Resources, Inc., 480 S.E.2d 817 (W.Va. 1996).

The trial court has inherent power to "weigh the evidence independently to determine whether there is sufficient evidence to support the verdict." Asbestos Litigation at n.1, 4 (Cleckley, J., concurring). 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.

III. New Trial – Prejudice of Repeated References to Hearsay

Respondent is correct that the trial court properly excluded hearsay evidence concerning an email communication between employees of a non-party, and that "the parties fought hard about the admissibility of this evidence." Respondent's Brief at 21. Respondent conveniently ignores the reason that the parties fought hard, and often, was because Respondent's counsel made repeated references to the hearsay *after* the evidence was excluded by the trial court. (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). During jury deliberations, the jury sent a question to the trial court inquiring whether there was any additional information regarding the excluded communications, and clearly placed special emphasis on the hearsay evidence, which appears to have created bias in favor of Respondent. (J.A. 0624). Accordingly, the trial 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.

IV. Attorney Fees

Respondent asserts that Petitioners have waived any objection to the award of attorney fees because Petitioners failed to move to alter or amend, and failed to timely appeal, the Order entered by the trial court on January 10, 2022. Pursuant to West Virginia Code Section 58-5-1(a), "[a] party to a civil action may appeal . . . a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties *upon an express determination by the circuit court* that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties." (emphasis added). The January 10, 2022 Order contains no such "express determination by the circuit court" and therefore was not an appealable order until it became part of the final judgment entered on May 16, 2022. (J.A. 0676-77). The issues and objections concerning attorney fees were properly preserved for appeal. (J.A. 0680-81).

Petitioners maintain that 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). The jury's decision to award attorney fees in this case was based upon an improper standard of proof (preponderance of the evidence), because the members were never instructed otherwise. (J.A. 0258; 0651; 0680). 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. Alternatively, the Circuit Court should strike the award of attorney fees in its entirety.

V. Prejudgment Interest

Petitioners are confused by Respondent's statement that "the Petitioners' Brief utterly fails to assert or establish what is the proper rate they seek to establish." Respondent's Brief at 24. Petitioners do not imply that "4% could be an appropriate rate in some cases," id., but plainly state that the trial court "erred by awarding prejudgment interest in excess of the statutorily mandated minimum of 4 percent." Petitioners' Brief at 17. The effective Fifth Federal Reserve District secondary discount rate is set forth in Plaintiff's Motion for Prejudgment Interest at Exhibit A, which is available for verification by this Court. See W.Va. R. App. P. 6(b) ("The Intermediate Court or the Supreme Court may consider portions of the record other than those provided by the parties."). Petitioners had no reason to believe their assertion of the applicable numbers would be challenged, as the information came directly from Respondent's own motion before the trial court.

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,

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioners, Justice Highwall Mining, Inc., Dynamic Energy, Inc., and Bluestone Industries, Inc., hereby certifies that on **January 26, 2023**, the foregoing **"Petitioners' Reply Brief"** was served electronically via File & ServeXpress upon the following:

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