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.

RESPONDENT'S BRIEF

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

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I. STATEMENT OF THE CASE

After a three-day trial, the jury in Wyoming County concluded the Petitioners discharged Ricky M. Varney because Mr. Varney refused unsafe work and complained about safety hazards he noticed in his employment as a welder at the Coal Mountain Mining Complex. Petitioners here – Mr. Varney's employers, Justice Highwall Mining Inc., Dynamic Energy, Inc. and their parent company, Bluestone Industries, Inc. – maintained at trial Mr. Varney was discharged not for making safety complaints or refusing unsafe work, but rather because he had failed to call in before taking two personal days in early January 2017. The jury rejected Petitioners' defense as pretext for the true reason for the discharge: retaliation for Mr. Varney's numerous safety complaints.

Petitioners now argue on appeal there was no evidence to support the jury's verdict. However, as set forth below, there was indeed overwhelming evidence upon which the jury could conclude Mr. Varney was discharged for his safety complaints and work refusals. Petitioners resort to mischaracterizing the record at times in order to force error into the trial. But no such error exists. To be sure, Mr. Varney's right to a jury trial was never in dispute: Petitioners never filed a Motion for Summary Judgment arguing a legal bar to Mr. Varney's claims they raised for the first time at the close of evidence and again here on appeal. The Circuit Court quickly and soundly dismissed Petitioners' legal arguments below and committed no error in doing so.

Ricky Varney alleged he suffered an unlawful retaliatory discharge in contravention of substantial public policies of the State of West Virginia. The public policies upon which Mr. Varney relies arise from the well-established protections of miners' health and safety set forth in *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, "[a]ny miner has the right to refuse to work in an area or under conditions which he believes to be unsafe." Petitioners

argue, quite astonishingly, that even if Mr. Varney made safety complaints to his employer – which he undisputedly did – there was no evidence Petitioners discharged him in contravention of the public policy set out in these statutes, which seek to protect the health and safety of miners. Petitioners' contentions here on appeal is refuted by the trial record below.

A. Ricky Varney Makes Safety Complaints to His Supervisor and Refuses to Perform Work that Would Result in Unsafe Conditions at Coal Mountain.

Mr. Varney made a series of safety complaints and work refusals regarding his work on Coal Mountain: (1) refusal to make unsafe welds to repair mining equipment, (J.A. 93, 98-101); (2) unsafe conditions involving leaks and a faulty air compressor on the equipment (truck) he operated, (J.A. 93-95, 97-99); and C) unsafe conditions in which the failure to audibly warn before blasting caused Mr. Varney to experience boulder-sized flyrock falling from the sky around him. (J.A. 91-92.)

The Petitioners misrepresent the record when they state, "Varney admitted during his trial testimony that he never refused to work[.]" (Pet'rs Br. at 2.) In fact, Varney testified under cross examination that indeed he refused to do work that would result in unsafe conditions at Coal Mountain: "I refused to do a particular job because I didn't have anything to do [it] with, but I would go to another job." (J.A. 206.) The fact that Mr. Varney never outright walked off the job site does not mean he did not refuse to operate unsafe equipment or to work in conditions he recognized to be unsafe.

It was undisputed at trial that Mr. Varney refused to make unsafe field repairs. Mr. Varney told his manager, Todd "Shaggy" Bradford, that he refused to make field repairs (welding fatigued metal back together), which Mr. Varney understood to be unsafe, and instead insisted a replacement part must be ordered in order to avoid risks of catastrophic failure. (J.A. 98-101.)

A. After I looked at it, and I told him [Shaggy] that they were beyond repair, there's nothing we could do to them. I told him, I said you are going to have to order a new set of steps for this one.

Q What did Todd say in response to that?

A Find something and repair it.

Q What did you understand he was referring to that you should use to make that repair?

A I guess out of our scrap pile that we, you know, had from old steps. Yeah, he was just wanting to find something to repair it. We didn't have anything available on that.

Q What did he say to do in response when you refused to make that repair?

A Well, he was angry when he walked off.

Q Did they eventually buy the steps that you had demanded?

A Yes. It took them a few days or maybe a week before they came in.

(J.A. 101.)

Petitioners next misrepresent the record when they assert, "Varney was not an equipment operator, so he was never required to operate any unsafe equipment." (Pet'rs Br. at 2.) In fact, Mr. Varney was required to operate various types of equipment, including welding equipment, trucks, and all sorts of machines he operated in order to repair them in his capacity as a welder. Moreover, it was undisputed Mr. Varney operated a truck, and made safety complaints about the unsafe conditions presented by the truck. For example, Mr. Varney testified he made complaints about his truck leaking fuel:

A Yes. The truck had a major leak in the engine. It was letting diesel fuel transfer into the radiator, which should not be there. If you would leave the truck running very long, it was filling up the radiator and spilling diesel on the ground.

Well, that's a fire hazard if you are sitting there close and using a torch and a welder.

Q Who did you complain about that to?

A Todd.

Q That was also the same period in 2016 where you described the issues arising more frequently?

A Yes.

Q Okay.

A And then after that, we red-tagged the truck and we couldn't use it no more.

Q Okay. What did Mr. Bradford say in response when you complained to him about that?

A He would have to get one of the mechanics to see what they could do about it. In the meantime, instead of going to the pit with that truck, we would park around the hill and they would bring the equipment to me to have maintenance done on it.

Q **So Bradford continued to require you to use that truck** even though it was [leaking?]

A **Yes.**

(J.A. 96-97 (emphasis added).)

Mr. Varney refused to operate his truck due to his safety concerns about the leak. He complained about the condition, and eventually "red-tagged" the truck, refusing to operate it at all. This required the company to bring equipment "around the hill" to have Mr. Varney perform maintenance on it, causing operational delays because Mr. Varney was refusing to operate his unsafe truck to drive around and perform repairs at various locations around the mining property.

The truck Mr. Varney operated also had a faulty air compressor:

Q What else did you ask Shaggy or Todd Bradford in connection with your truck?

A Other than the compressor and that bad leak that was on it, yeah, that was about it on the truck.

Q Did he offer to make any repairs regarding the compressor?

A No.

Q What did he say to you as to why --

A Every time I asked him, he was out of budget money. He would try next month. An air compressor is something that you have to have daily on a service truck.

Q Explain why.

A If one of the equipment has got a low tire, you have to use the air compressor to put like 110 - 150 pounds, and to do my job right, there's two systems that you can use for cutting metal. You have a torch that you can cut stuff apart with, and then you have an air arc. It uses the welder and the air compressor.

It's cleaner. It's colder, and it doesn't fatigue the metal the way a torch would do. Without a compressor, you cannot use your air arc system.

Q So your welds done with a torch are apt to cause greater fatigue to the metal that you are welding, right?

A Yes, yes.

Q But they never replaced the compressor or fixed it when you were complaining about that to Todd Bradford?

A No.

(J.A. 97-98.)

Finally, Mr. Varney testified about a dangerous incident where a nearby blast caused flyrock to fly over his head without warning:

> Q Okay. Just to go back starting with this incident where you were trapped in the pit and the [flyrock] came down on you. Who did you complain to about that?
> A I called Todd on the radio.
> Q Todd Bradford?
> A Yes.
> Q What did you say to Mr. Bradford?
> A He came up on the hill and asked what happened, and I told him, and he said that somebody should have come up there and notified us.
> Q Did they do that?
> A No.
> Q Okay.
> A Normally they have someone in a pickup that will go at the pits and tell everybody to pull back to a certain point to a safe zone, but that one particular day, nobody came to us.

(J.A. 94.)

Contrary to Petitioners' assertions now, there was abundant evidence in the form of undisputed testimony that Mr. Varney was required to operate unsafe equipment, complained to management about unsafe conditions, and refused to perform work he believed would result in unsafe conditions.

B. Petitioners Discharge Mr. Varney and Fabricate Payroll Records to Hide Their Bad Faith Retaliation.

Obviously frustrated with Mr. Varney's safety complaints, his employers crafted a rouse to make it appear from payroll records that Mr. Varney was discharged for taking personal days he did not have. It is undisputed that on January 6th and 7th 2017, Mr. Varney took two personal days. Mr. Varney took off from work on January 6th in order to move out of home, which was presenting a health risk to him. (J.A. 106.) The evening of the sixth, Mr. Vaney's son's furnace

caught fire, and Mr. Varney spent January 7th helping his son get the furnace back to working order so that his son and grandkids would have heat in the cold winter months. (J.A. 106-07.) The following day, the company contacted him as he began his work at the mine and told him not to report to work that day, and to come back the next day when the superintendent would be at the mine. (J.A. 108) When Mr. Varney returned for work the following day, his employer suspended him and directed him to return to the job site on the upcoming Friday for a meeting with management. (J.A. 108.)

Mr. Varney's uncontradicted trial testimony established that his employers attempted to remove two accrued personal days from payroll records in order to fabricate a non-retaliatory basis for discharging Mr. Varney consistent with the United Mine Workers' contract. Testimony at trial established that the practice under the contract was that it was not a dischargeable offense for a miner to miss work without calling in if he had personal days available to him to cover his absence. By removing Mr. Varney's accrued personal days for January 6 and 7, Petitioners attempted to create the false impression that Mr. Varney missed work without having adequate personal days to cover it, thus supporting his employers' pretextual basis for discharging him.

> Q Can you read that and on to the following page, Mr. Varney?
> A Okay, yes. Leslie called and asked if we could pull back this week's direct deposit for Ricky Varney on Justice Highwall. We processed … first thing this morning by 9:00 a.m., so I think the ACH has been put through.
> Okay. They want to remove two personal days from the check and process WO per Leslie. Okay, he has missed a few days of work, and they want to dismiss him, but because if he has personal days on his check, then it's question mark.
> Q Does it say but cannot if he has personal days on his check?
> A Right, but cannot if he has personal days on his check.
> …
> Q What do you know about what that individual did in response to this email?
> A Well, by pulling the days then they could say I didn't get paid for it, and that would be grounds because if you miss a day and they take a personal day for it, that can't be counted against you.

(J. A. at 121-122.)

Mr. Varney explained his final paycheck did not include pay for his accrued personal days when he missed work on this occasion:

> Q Is it the paystub covering that period of the first full week of January, 2017?
> A Yes, it is.
> Q Does it appear that there are any personal days that are paid to you on this pay stub?
> A No.

(J.A. 127.)

When Petitioners discharged Mr. Varney, the Separation Notice stated he missed three consecutive days of work; however, the third of those days was the day on which he was told to go back home and return when his supervisor would be at the job site. (J.A. 112-13.) The Petitioners corporate representative admitted at trial that Mr. Varney did have two personal available to him but that the company did not pay him those days to cover his absence on January 6th and 7th. (J.A. 513-14 (testimony of Pat Graham, Senior Vice President of Human Resources).)

The jury was not persuaded by this rouse, which was the center of Petitioners' defense at trial. The jury quickly returned a verdict in favor of Mr. Varney and awarded him his actual damages and reasonable attorney's fees.

II. SUMMARY OF ARGUMENT

The testimonial and documentary evidence adduced at trial supported a verdict that Petitioners retaliated against Mr. Varney. The uncontroverted evidence established Mr. Varney made numerous complaints about unsafe conditions and refusals to perform unsafe job tasks and suffered a discharge proximate in time to those complaints, which the jury reasonably concluded

to have had a nexus with a retaliatory animus. Moreover, the testimonial evidence tended to show Mr. Varney's employers acted in bad faith, supporting the jury's award of attorney fees.

None of the other proffered bases for a new trial are substantiated by the record. First, Mr. Varney's testimony was admitted regarding the Defendants directing the payroll company to delete personal days that Mr. Varney had available to him was only permitted for the limited purpose of proving the Defendant's motive, which is permissible. The Court excluded the document that contained the hearsay, limiting its prejudicial effect. Second, the jury was properly instructed on the availability of attorney fees for conduct reflecting bad faith. Because a preponderance of evidence supported the verdict, the clear weight of the evidence necessarily was not against the verdict.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent-Plaintiff requests 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. However, the Plaintiff suggests, upon consideration of the issues at oral argument, it may be unnecessary for the Court to issue a full opinion. Instead, the Court may uphold the verdict by memorandum decision.

IV. ARGUMENT

A. Standard of Review.

Petitioners appeal the Circuit court's denial of their Motion for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* and Motion for New Trial pursuant to Rule 59. This Court reviews a denial of a Rule 50 motion *de novo*. Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16, 17 (2009).

> 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* [1998], 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., Syl. Pt. 2, 224 W. Va. at 1, 680 S.E.2d at 17; *Herbert J. Thomas Mem. Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 384, 795 S.E.2d 530, 539 (2016). As more fully set forth below, viewing the evidence presented at trial in a light most favorable to Mr. Varney, the jury could have concluded Mr. Varney's employers discharged him in retaliation for his safety complaints.

Additionally, the Circuit Court properly denied Petitioners' Rule 59 motion. "The trial court the trial judge should rarely grant a new trial . . . ." *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 124, 454 S.E.2d 413, 418 (1994). "The ruling of a trial court in . . . 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) (quotations and citations omitted). The trial court should set aside a verdict and grant a new trial only 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 Pub. Bldg. Asbestos Litig.*, 193 W. Va. at 124, 454 S.E.2d at 418.

> 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.

Syl. Pt. 7, *Grimmett*, 238 W. Va. at 54, 792 S.E.2d at 67. This Court reviews the Circuit Court's denial of Petitioners' Rule 59 motion for an abuse of discretion. *See*, *e.g.*, Syl. Pt. 3, *In re State*

Pub. Bldg. Asbestos Litig., 193 W. Va. at 124, 454 S.E.2d at 418. The Circuit court did not abuse its discretion in denying Petitioners' Rule 59 motion.

B. *Harless* Claims Involving Miners' Health and Safety.

The Plaintiff pleaded a cause of action pursuant to the so-called *Harless* doctrine, which recognizes a common law claim for wrongful discharge in violation of public policy. Syl. Pt. 1, *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). The Supreme Court of Appeals of West Virginia has set out a four-part *prima facie* case for *Harless* claims. "[T]his Court, in *Feliciano*, articulated the necessary proof for a claim for relief for wrongful discharge in contravention of substantial public policy as follows:"

> a. Whether a clear public policy exists and was manifested in a state or federal constitution, statute, or administrative regulation, or in the common law (the clarity element);
> b. Whether dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element);
> c. Whether the plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and
> d. Whether the 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)); *Nutter*, 238 W. Va. at 386, 795 S.E.2d at 541 (2016).

This case involves one of the most clear and unequivocal public policies in the State of West Virginia – coal miners' health and safety – which is codified by statute and consistently judiciously safeguarded in a long line of case law. *See* W. Va. Code § 22A-2-71 (prohibiting adverse employment action against miners who have engaged in protected safety activity); § 22A-2-71a (providing that any miner has the right to refuse to work in an area or under conditions which the miner believes to be unsafe); Syl. Pt. 1, *State ex. rel. Perry v. Miller*, 171 W. Va. 509, 510, 300

S.E.2d 622, 623 (1982) ("The Legislature has established a clear and unequivocal public policy that the Department of Mines shall have as its primary purpose the protection of the safety and health of persons employed within or at the mines of this state"); *United Mine Workers of Am. v. Miller*, 170 W. Va. 177, 181, 291 S.E.2d 673, 677 (1982) (same); *see also Davis v. Kitt Energy*, 179 W. Va. 37, 42, 365 S.E.2d 82, 87 (1987) ("A miner who communicates a potential safety hazard to his employer, even under authority of contract, must be deemed to be protected against discrimination where the hazard is one covered by the Mine Safety Act."); Syl. Pt. 4, *Wiggins v. Eastern Associated*, 178 W. Va. 63, 64, 357 S.E.2d 745, 746 (1987) ("The primary purpose of the penalties imposed under the antidiscrimination provisions of the mine safety acts is to ensure the reporting of safety violations, rather than vindication of private interests, and victims of discrimination must look to the courts to receive full compensation for the violation of their legal rights"). To be sure, the Supreme Court of Appeals of West Virginia has recognized a common law claim for retaliatory discharge like Mr. Varney asserted here for decades. *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 v. First Nat'l Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978), for acts that were designed to enforce the mandates of the coal mine health and safety statutes directly in circuit court without first resorting to an administrative remedy."). Here, the jury properly concluded the employers pressured Mr. Varney to break the law and Mr. Varney refused, a classic presentation of protected activity for *Harless* claims. *See, e.g., Lilly v. Overnight Transportation Co*., 188 W. Va. 538, 541-42, 425 S.E.2d 214, 217-18 (1992) (recognizing *Harless* claim "where an employee is discharged from employment in retaliation for refusing to operate a motor vehicle with brakes that are in such an unsafe working condition that operation of the vehicle would create a substantial danger to the safety of the public").

C. The Petitioners Were Not Entitled to Judgment as a Matter of Law Because Overwhelming and Often Undisputed Evidence Established That Mr. Varney Made Several Safety Complaints to His Employers and That His Employers Attempted to Conceal an Improper Motive for the Discharge.

Petitioners first make three representations about the factual record they contend entitled them to judgment as a matter of law. None of these three factual assertions are consistent with the evidence presented at trial. First, Petitioners contend Mr. Varney testified he never refused to work. (Pet'rs Br. at 6.) However, reference to the trial transcript cited by Petitioners actually refutes their assertion. The full testimony of Mr. Varney in the citation provided by Petitioners is as follows:

> Q I apologize. I do just kind of want to back up to these safety complaints that you made. Did you ever flat out refuse to work because of any of these complaints that you made?
> A Not to work. I refused to do a particular job because I didn't have anything to do [it] with, but I would go to another job.
> Q You never walked off at Coal Mountain?
> A No.

(J.A. 206-07.) The fact that Mr. Varney never outright walked off the job site does not mean he did not refuse to operate unsafe equipment or refuse to work in conditions he recognized to be unsafe. Indeed, there are several undisputed examples of Mr. Varney refusing to do work because of safety concerns. (J.A. 96-97 (refusal to use truck leaking fuel); 101 ("Q What did he say to do in response when you refused to make that repair? A Well, he was angry when he walked off.").)

Second, Petitioners argue, "Varney was not an equipment operator, so he was never required to operate any unsafe equipment." (Pet'rs Br. at 6.) Petitioners again plainly misrepresents the record. It is undisputed that in his job as a welder at Coal Mountain, Mr. Varney operated various types of equipment, including welding equipment, trucks, and other machines he operated in order to repair them. More specifically, Mr. Varney testified he operated a truck and made safety complaints about the unsafe conditions presented by the truck. (J.A. 96-98.)

Third, Petitioners argue that Mr. Varney "never felt his job was in danger for bringing these [safety concerns] issues to his supervisor's attention." (Pet'rs Br. at 6.) It is true Mr. Varney believed he was a valued employee and was simply doing his job in raising the safety concerns. He did not foresee that he would be discharged for doing what he considered was his job. (J.A. 187-88.) This belief is not inconsistent with the theory asserted at trial that he was ultimately retaliatorily discharged for refusing to do unsafe work and making safety complaints.

These three mischaracterizations of the trial testimony are the sole basis for Petitioners' argument that there was no evidence Mr. Varney was discharged in contravention of "any public policy . . . ." (Pet'rs Br. at 9.) Petitioners' argument is refuted by the undisputed testimony and overwhelming credible evidence that Mr. Varney made complaints about safety hazards at Coal Mountain, refused to operate unsafe equipment, and refused to perform work he believed would create unsafe conditions at the mine in furtherance of West Virginia's clear and unequivocal public policy of encouraging miners to refuse to operate unsafe equipment and to refuse to perform work they believe to be unsafe.

The Court recently analyzed in *Nutter* what it means under *Harless* for a Defendant's adverse employment action to jeopardize a clear public policy, finding that such jeopardy requires:

a. An elaboration on how the employer's conduct jeopardized the public policy;

b. Establishing a nexus between the public policy and the employee's discharge; and

c. A showing that the discharge violated the relevant public policy.

Nutter, 238 W. Va. at 386, 795 S.E.2d at 541. The evidence presented at trial established Petitioners' conduct jeopardized the public policy and there was a nexus between the safety complaints and the discharge. The jury could have reasonably concluded Mr. Varney's refusal to perform unsafe work caused his employers to experience an inconvenience and operational

inefficiency. (J.A. 96-97 ("Every time I asked him [for an air compressor], he was out of budget money.").)

Moreover, Mr. Varney's safety complaints and refusals to operate unsafe equipment were well known among the workforce. As a result, his discharge jeopardized and violated the policy of protection mine safety complainants from retaliation because the firing conveyed a chilling effect on future mine safety complaints among the workforce. Co-worker Cody Dove testified he knew about Varney's safety complaints and knew his employers attempted to discharge Mr. Varney shortly thereafter for reasons that would have violated the UMWA contract. (J.A. 293, 297-99.) A reasonable inference from this testimony is, if you complain about safety on Coal Mountain, the employers would find a way to fire you. Mr. Dove testified as follows:

> A. . . . .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 30 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.

(J.A. 299.)

Because there exists sufficient factual support for the jury's verdict, Petitioners were not entitled to judgment as a matter of law. Accordingly, the Circuit Court did not err in denying Petitioners Rule 50 motions.

D. The Circuit Court Did Not Abuse Its Discretion in Refusing to Grant Petitioners a New Trial Because the Jury Could Have Reasonably Concluded the Employers' Stated Basis for Discharging Mr. Varney was Transparently Pretextual and Fabricated.

Petitioners argue they are entitled to a new trial because the "clear weight of the evidence proved . . . that Varney would have been discharged . . . because he violated the attendance policy . . . ." (Pet'rs Br. at 10-11.) Petitioners' argument for new trial plainly ignores the standard for setting aside a jury's verdict:

> 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.

Syl. Pt. 7, *Grimmett*, 238 W. Va. at 54, 792 S.E.2d at 67. Petitioners maintained this defense – namely that Mr. Varney's discharge was due to a violation of the employers' attendance policy – from the moment they discharged him up and through trial. However, when the Circuit Court considered the evidence most favorably to Mr. Varney, resolved any conflicts in the evidence in Mr. Vareny's favor, assumed all the facts presented by Mr. Varney as true, and provided Mr. Varney the benefit of all favorable inferences, it was clear the jury's verdict was supported by the evidence, rather than against the clear weight of it. The conflict between Mr. Varney's evidence that he was discharged in retaliation for his safety complaints and the employers' position that he was fired for a non-retaliatory reason is purely a jury question:

> "We have consistently held 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." *Shiel v. Ryu*, 203 W. Va. 40, 46, 506 S.E.2d 77, 83 (1998). Indeed, a firmly-established principle of our jurisprudence is: "Where, in the trial of an action at law before a jury, the evidence is conflicting, it is the province of the jury to resolve the conflict, and its verdict thereon will not be disturbed unless believed to be plainly wrong." Syl. Pt. 2, *French v. Sinkford*, 132 W. Va. 66, 54 S.E.2d 38 (1948). Elaborating further in syllabus point two of *Skeen v. C and G Corp.*, 155 W. Va. 547, 185 S.E.2d 493 (1971), this Court stated: "[i]t 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."

Grimmett, 238 W. Va. 54, 60, 792 S.E.2d 65, 71 (2016).

The jury evidently resolved the dispute whether the employers were justified under the UMWA contract or otherwise against the employers. There is substantial evidence upon which the jury could have arrived at this conclusion. First, the Separation Notice indicated Mr. Varney

missed three days; however, this was undisputedly untrue because Mr. Varney's employer called instructed Mr. Varney and told him to return home and come back to the job site when his superintendent would be there. (J.A. 108.)

Second, the evidence tended to show, and the jury ultimately agreed, that the employers fabricated their stated reason for the discharge by wrongfully eliminating Mr. Varney's personal days from his payroll records. Testimony at trial established Mr. Varney's employers attempted to create the false impression that Mr. Varney missed work without having adequate personal days to cover it, thus supporting his employers' pretextual basis for discharging him.

> Q Can you read that and on to the following page, Mr. Varney?
> A Okay, yes. Leslie called and asked if we could pull back this week's direct deposit for Ricky Varney on Justice Highwall. We processed … first thing this morning by 9:00 a.m., so I think the ACH has been put through.
> Okay. They want to remove two personal days from the check and process WO per Leslie. Okay, he has missed a few days of work, and they want to dismiss him, but because if he has personal days on his check, then it's question mark.
> Q Does it say but cannot if he has personal days on his check?
> A Right, but cannot if he has personal days on his check.
> …
> Q What do you know about what that individual did in response to this email?
> A Well, by pulling the days then they could say I didn't get paid for it, and that would be grounds because if you miss a day and they take a personal day for it, that can't be counted against you.

(J. A. at 121-122.)

It was undisputed that Mr. Varney's final paycheck did not include pay for his accrued personal days when he missed work on this occasion. (J.A. 127.) Indeed, the employers' corporate representative admitted at trial that Mr. Varney did have two personal days available to him but that the company did not pay him those days to cover his absence on January 6th and 7th. (J.A. 513-14 (testimony of Pat Graham, Senior Vice President of Human Resources).)

That the jury did not buy the employers' transparently pretextual reason for Mr. Varney's discharge does not entitle them to a new trial. To be sure, the clear weight of the evidence supported the jury's verdict. Accordingly, the Circuit Court did not err when it denied Petitioners' Rule 59 motion.

E. Petitioners Were Not Prejudiced By the Admission of Improper Hearsay.

Petitioners make the perplexing argument they were prejudiced by hearsay evidence the Circuit Court excluded from evidence. In discovery, Mr. Varney obtained an email conversation between the employers' agent responsible for payroll, Leslie Wells, and the employers' third-party contractor responsible for processing payroll. The email detailed instructions from the employers to the third-party contractor to eliminate Mr. Varney's accrued personal days. Understandably, the parties fought hard about the admissibility of this evidence. However, ultimately, the Circuit Court ruled that the email was not admissible. In addition, because the email was excluded, the Circuit Court ultimately concluded Mr. Varney failed to establish an entitlement to punitive damages. Finally, the Petitioners never requested a limiting instruction regarding the excluded hearsay evidence. Nevertheless, Petitioners now say they are entitled to a new trial because the excluded hearsay evidence unfairly prejudiced them.

There is no merit to this ground for new trial. The Circuit Court properly instructed the jury on the evidence they should consider, and the Petitioners did not object to the instructions as insufficient in this respect. (J.A. 633.) Mr. Varney was never permitted to introduce the statements the circuit Court ruled were inadmissible. However, Mr. Varney was able to testify as to his personal knowledge about his personal days having been removed from his final paycheck, and the employers' witnesses were cross-examined as to their personal knowledge about whether Mr. Varney's personal days were omitted from his final paycheck. Petitioners fail to identify any

hearsay evidence presented to the jury. Accordingly, the Circuit Court did not err by denying the employers' Rule 59 motion.

F. Petitioners Waived Their Right to Appeal the Award of Attorney's Fees.

The Circuit Court entered an Order on January 10, 2022, awarding Mr. Varney his attorney's fees and costs. (J.A. 667-69.) The Petitioners failed to move to alter or amend the Order within ten days. *See* W. Va. R. Civ. P. 52(b); 59(e). Petitioners also failed to appeal timely the Order, and the Order became final on February 10, 2022. *See* W. Va. R. App. Proc. 5(b). Accordingly, any objection Petitioners make to the award of attorney's fees is waived. Further, the jury verdict awarding attorney's fees was purely an advisory opinion, which was considered by the Court when it entered its Order awarding attorney's fees. (J.A. 667 ("The court concludes it is appropriate to award reasonable attorney's fees in this matter based upon the verdict of the jury.").) Accordingly, any objection Petitioners assert to the jury instruction was at best harmless error.

Despite having waived this ground for appeal, Petitioners' fifth assignment of error nonetheless argues a clear and convincing standard applies to the jury's determination of attorney's fees. This is not an accurate statement of law.

The Court gave the following instruction as to fees:

PLAINTIFF'S JURY INSTRUCTION NO. 8

ATTORNEY'S FEES

> The jury may assess reasonable attorney's fees and costs incurred by Plaintiff Rick Varney against the Defendants if you find the Defendants acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Bad faith may be found in conduct leading to the litigation or in conduct in connection with the litigation.

__X__ Given
____ Refused

(J.A. 651.) The jury ultimately concluded that Mr. Varney was entitled to his reasonable attorney's fees and costs. (J.A. 662-63.)

> 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. *Hechler v. Casey*, 175 W. Va. 434, 450, 333 S.E.2d 799, 815 (1985); *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 250, 332 S.E.2d 262, 263–64 (1985); *Nelson v. [W. Va. Pub. Emp. Ins. Bd.]*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258–59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141, 154 (1975). *See also* 1 S. Speiser, Attorneys' Fees § 12:11 (1973); annot., 31 A.L.R.Fed. 833 (1977). "Bad faith" may be found in conduct leading to the litigation or in conduct in connection with the litigation. *Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702, 713 (1973).

Sally-Mike Properties v. Yokum, 179 W. Va. 48, 51, 365 S.E.2d 246, 249 (1986). As the Petitioner correctly notes, the decision to award attorney's fees is reserved to the sound discretion of the Circuit court – not the jury.

> We also accord substantial deference to a circuit court's decision about whether to award attorney fees. We have emphasized, and we now hold, that "[t]he decision to award or not to award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse."

Harlow v. E. Elec., LLC, 245 W. Va. 188, 198, 858 S.E.2d 445, 455 (2021) (citation omitted). Because the Circuit court entered the award of attorney's fees, any instruction to the jury was harmless error. In any event, Petitioner cannot cite to any authority that requires a showing by clear and convincing evidence to support an award of attorney's fees. The clear and convincing standard is a fact-finder standard of proof and inapplicable to a court awarding attorney's fees consistent with its inherent equitable powers. *See Sally-Mike Properties*, 179 W. Va. at 51, 365 S.E.2d at 249.

Nevertheless, there was adequate evidence of bad faith to support the Circuit Court's award of attorney's fees. As set forth above, Mr. Varney's testimonial evidence at trial, which was never

refuted by the Defendants' witnesses (Mr. Bradford, Mr. Graham, or any others), tended to show the employers deleted or withheld Mr. Varney's two personal days when they sought to discharge him on the pretextual basis of missing work without having adequate personal days to cover the absence. The proffered basis for the discharge is thus highly suspect and reasonably appeared to the jury to have been the product of deceit and alteration of documents to conceal an improper motive for the discharge.

G. The Court Did Not Err by Awarding Prejudgment Interest at the Applicable Rate of 7%.

The standard for awarding prejudgment interest is set forth in W. Va. Code § 56-6-31, which is interpreted at the discretion of the trial court. The Petitioners concede "[t]he rate in 2017, when the cause of action accrued, was based on a floor of 7%[.]" (Pet'rs Br. at 16.) The Petitioners generally object to the rate assessed by the Court below. However, the Petitioners' Brief utterly fails to assert or establish what is the proper rate they seek to establish. Their briefing implies 4% could be an appropriate rate in some cases. However, their argument here is entirely bereft of any representation as to what rate should apply, or how the record or the rules support any rate other than that assessed by the Court.

The Petitioners could have presented argument and supporting documentation that the Fifth Federal Reserve District secondary discount rate in effect on January 2 of the year in which the right to bring the action had accrued, plus two percentage points, equals less than four, but they did not. In any event, the trial court reasonably exercised its discretion to decline to apply the 4% floor retroactively. There is a strong presumption against retroactive application of legislative enactments, and a trial court may decline to apply a procedural or remedial legislative enactment retroactively when doing so would preserve a party's reliance interest in the protection of a their rights. *See generally State ex Rel. Parsons v. Zakaib*, 207 W. Va. 385, 390, 532 S.E.2d 654, 659

(2000); *Joy v. Chessie Employees Fed. Credit Union*, 186 W. Va. 118, 121, 411 S.E.2d 261, 264 (1991) (citing *Pnakovich v. SWCC*, 163 W. Va. 583, 589, 259 S.E.2d 127, 130 (1979)); *Public Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996). Accordingly, the trial court here was within its discretion to decline to apply the 4% minimum rate retroactively because the Plaintiff had a reliance interest in securing the full benefit of his rights to refuse to operate unsafe equipment and work under conditions he believed to be unsafe.

Regardless, the Petitioners have not tendered a record to this Court to support the assessment of a different rate. Accordingly, Petitioners have failed to sustain this argument with any specific request for relief, and have effectively waived it. Even if they had not waived it, they have failed to demonstrate why this Court should overturn the trial court's judgment that the statute, as it was in effect at the time the cause of action accrued, should not be applied.

V. CONCLUSION

For the reasons set forth herein, and any others appearing to the Court, the Plaintiff urges that the Petition for Appeal be **DENIED**.

Petitioner,
Ricky Varney,
By counsel,

/s/ Samuel B. Petsonk

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