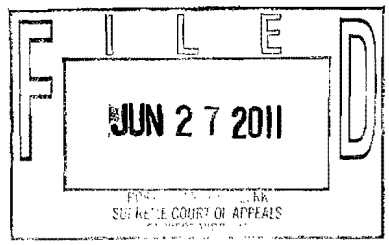
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



THE BURKE-PARSONS-BOWLBY CORPORATION, STELLA-JONES U.S. HOLDING CORPORATION, AND STELLA-JONES, INC.,

Petitioners

Docket No. 11-0183
Appeal from a final order
Of the Circuit Court of
Jackson County (09-C-41)

v.

JEROLD JOHN RICE, JR.,

Respondent

RESPONDENT'S BRIEF

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Jerold John Rice, Jr.

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INTRODUCTION

John Rice was employed by the defendants for twenty-four years. During these years of service his work record was perfect – no write ups or warnings of any kind. After twenty-four years of exemplary service, he was unexpectedly and summarily terminated at age forty-seven and replaced by a twenty-nine year old. Since Mr. Rice was over age forty and was replaced by someone outside his protected class and because Mr. Rice's job performance had been exemplary, a prima facie case of age discrimination was established. *See* Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 485, 457 S.E.2d 152, 162 (1995).

Significantly, the defendants have conceded that there was evidence from which a jury could conclude that the defendants were motivated by Mr. Rice's age in the decision to terminate his employment. Nevertheless, the defendants have filed this appeal. With respect to each of the defendants' allegations of error, they have either: (1) waived the error; or (2) the dispositive issues have been authoritatively decided previously by this Court.

STATEMENT OF THE CASE

Jerold John Rice, Jr., was employed by the defendants for approximately twenty-four years. (A.R. v.3 at 169, 214). After graduating from college with an accounting degree in 1985, Mr. Rice moved back to his hometown of Ripley, West Virginia, to take a job as a staff accountant with The Burke-Parsons-Bowlby Corporation (hereinafter "B.P.B."). (A.R. v.3 at 169). Mr. Rice then began to move up the corporate ladder at B.P.B, receiving raises and promotions. In June of 1995, Mr. Rice was promoted to an assistant controller position and was given the responsibility of running the day-to-day accounting operations. (A.R. v.3 at 170). In August of 2006, Mr. Rice was promoted to the controller position for B.P.B. (A.R. v.3 at 170).

In addition to his duties as controller, Mr. Rice assumed various other responsibilities over the years at B.P.B. Mr. Rice performed maintenance duties, including painting, landscaping, cleaning the gutters, maintaining the electrical system, maintaining the heating and cooling system and plumbing. (A.R. v.3 at 172-173). When asked why he took on these additional responsibilities, Mr. Rice indicated that he wanted to lead by example.

> Q: Did you ever say, "I'm the controller, and maybe I'm not supposed to be fixing the commode that stopped up"?
>
> A: I looked at it more as a lead-by-example attitude, and I went to do it anyway and it wasn't a big deal.

(A.R. v.3 at 173).

Mr. Rice enjoyed working for B.P.B. and turned down other offers of employment over the years to stay there. (A.R. v.3 at 177). Significantly, during Mr. Rice's employment with B.P.B. he was never disciplined and there were never any warnings or negative comments placed in his personnel file. (A.R. v.3 at 175).

In January of 2008, the employees at B.P.B. learned that Stella-Jones, Inc. and Stella-Jones U.S. Holding Corporation (hereinafter collectively referred to as "Stella-Jones") would be merging with B.P.B. (A.R. v.3 at 184). The official merger occurred on April 1, 2008. (A.R. v.3 at 184). Mr. Rice maintained his employment as controller after the merger. (A.R. v.3 at 185). However, his responsibilities increased. (A.R. v.3 at 185). Prior to the merger Mr. Rice had responsibilities for five plants and approximately three-hundred and forty employees. (A.R. v.3 at 186). After the merger, Mr. Rice added responsibilities for two more plants and approximately one-hundred more employees. (A.R. v.3 at 186-187).

Mr. Rice was informed that he would need to work more hours. (A.R. v.3 at 197-198). Accordingly, Mr. Rice worked in excess of sixty hours per week most weeks. (A.R. v.3 at 198).

During the year that he worked for defendants after the merger, Mr. Rice took only six vacation days, leaving nineteen vacation days unused. (A.R. v.3 at 198-199).

After the merger, Mr. Rice continued in excellent work as controller for Stella-Jones. Remi Godin, the corporate controller on the Canadian side of Stella-Jones, informed Mr. Rice that he was going to be "a very big part of the operations in the U.S." and that he "was going to be a key figure in those operations . . ." (A.R. v.3 at 201-202). On December 12, 2008, Mr. Rice received a letter from Brian McManus, President and CEO of Stella-Jones, thanking him for his efforts in helping the company expand and prosper despite an economic downturn. (A.R. v.3 at 202-203; A.R. v.1 at 283). The letter informed Mr. Rice that "in appreciation of [his] contribution this past year" he would receive a raise. (A.R. v.3 at 202-203; A.R. v.1 at 283). Doug Fox, Plaintiff's supervisor, hand-wrote on the bottom of the letter, "Thanks for all your help this year." (A.R. v.3 at 204-205; A.R. v.1 at 283). In fact, there were no warnings or discipline contained in Mr. Rice's personnel file for the entirety of his employment with defendants, including the year he worked for Stella-Jones after the merger. (A.R. v.3 at 201). Mr. Rice received no criticism at all from Stella-Jones. (A.R. v.3 at 213).

In early 2009, Mr. Rice's efforts at Stella-Jones were principally directed toward completing the annual audit for the fiscal year which ended on December 31, 2008. (A.R. v.3 at 205-206). Mr. Rice knew that on March 12, 2009, the top executives in the company were coming to the new Fairplain, West Virginia, facility to participate in a world-wide conference call releasing the financial results of Stella-Jones' performance for the previous fiscal year to stockholders. (A.R. v.3 at 207). Because of the conference call and visit from the top executives, Mr. Rice spent the previous day (until 11:00 p.m.) completing the audit. (A.R. v.3 at

207-208). Mr. Rice also spent time on March 11, 2009 scraping mud and dirt off the parking lot so that it would be presentable for the company executives. (A.R. v.3 at 208).

The next day, the chairman of the board addressed the employees and said that the merger had been a smooth transition. (A.R. v.3 at 209). The chairman further stated that he wanted to specifically thank the accounting department (managed by Mr. Rice) for their efforts during the year, "not only in the integration of Stella-Jones and Burke-Parsons-Bowlby together, but also for the completion of the financial results in a timely and accurate manner." (A.R. v.3 at 209).

The meeting participants broke for lunch. (A.R. v.3 at 210). When Mr. Rice returned from lunch he was promptly informed that his employment was terminated.[1] (A.R. v.3 at 210). The reason given for his termination at the time was that his job had been eliminated. (A.R. v.3 at 210). Eric Vachon, the Stella-Jones Vice President of Finance for U.S. Operations, informed Mr. Rice that after twenty-four years, "he needed to be gone" by the end of the day. (A.R. v.5 at 44).

In reality, Mr. Rice's position was not actually eliminated. Twenty-four days prior to Mr. Rice's termination, on February 16, 2009, Mr. Vachon hired a twenty-nine year old named Jeremy Stover for a position in the accounting department at Stella-Jones. (A.R. v.3 at 214; A.R. v.5 at 51). At trial Mr. Vachon admitted Mr. Stover was hired to fill a "brand-new position" at Stella-Jones as "assistant controller." (A.R. v.5 at 52). On the day of Mr. Stover's hiring, Mr. Vachon told Mr. Rice to "teach Jeremy Stover everything [Mr. Rice] knew about the controller position . . ." (A.R. v.5 at 55; A.R. v.3 at 215). Twenty-four days after Vachon's counsel (and

[1] According to the discovery answers of the defendants and the testimony at trial, the persons involved and/or consulted in the decision to terminate Mr. Rice's employment were Eric Vachon, Remi Godin, Doug Fox and George Labelle. (A.R. v.1 at 313-314; A.R. v.5 at 77, 176).

after the audit was completed),[2] Mr. Rice, who was nearly forty-eight years old at the time, was terminated. (A.R. v.3 at 214).

Importantly, Mr. Vachon admitted that the decision to terminate Mr. Rice as controller was made before Mr. Stover began at Stella-Jones in the newly created "assistant controller" position. (A.R. v.5 at 56). Further, Mr. Stover assumed nearly all of Mr. Rice's duties after his termination. (A.R. v.3 at 100-106; A.R. v.6 at 208-211; A.R. v.5 at 27, 95, 144-146, 159, 174). The defendants never explained why they would need to hire someone in an "assistant controller" position with Mr. Rice's duties when Mr. Rice was already performing those duties. Thus, Mr. Stover's position was "new" in name only. It is clear from the circumstances that Stella-Jones effectively replaced Mr. Rice with Mr. Stover. (A.R. v.3 at 214).

Despite the fact that Mr. Rice was informed that the reason for his termination was that his position was eliminated, the defendants changed their story at trial and attacked Mr. Rice's job performance as the reason for his termination. Mr. Vachon testified that Mr. Rice was not "cutting it" as a controller, that he was struggling, that he made mistakes and that he lacked both knowledge and leadership. (A.R. v.5 at 57, 60, 103-104, 147-150). These eleventh-hour assertions came without explanation as to why, if Mr. Rice was a poor employee, he had a long career with defendants unblemished by any negative evaluation, reprimand or discipline.

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[2] Mr. Vachon admitted that, although the decision had already been made, he waited until after the audit to terminate Mr. Rice's employment.

> Q: So you just waited. You made the decision months earlier, and you just waited, and it just so happened, when this man got the audit done, that's when you dropped the hammer on him, right?
>
> A: That's what happened.

(A.R. v.5 at 44).

After his termination, Mr. Rice filed a Complaint in the Circuit Court of Jackson County alleging that he had been terminated on the basis of his age in violation of the West Virginia Human Rights Act. (A.R. v. at 4-8). On May 17, 2010, after the trial of this matter, the jury found by a preponderance of the evidence that the defendants unlawfully terminated Mr. Rice's employment on the basis of his age. The defendants subsequently filed a Motion For New Trial. (A.R. v.1 at 218-230). Defendants' Motion was denied by the Honorable Thomas C. Evans, III, on January 11, 2011. (A.R. v.1 at 266-280). It is from that Order that defendants appeal.

SUMMARY OF ARGUMENT

Defendants do not dispute that there was sufficient evidence at trial for the jury to determine that the defendants terminated Mr. Rice on the basis of his age in violation of the West Virginia Human Rights Act. Similarly, defendants do not dispute that there was sufficient evidence at trial for the jury to determine that Mr. Rice's termination was malicious.

Defendants only allege that the Circuit Court committed the following errors: 1) instructing the jury on the malicious discharge exception to the general duty to mitigate damages; 2) permitting an award of front pay beyond the date of the offer of a new position of employment; and 3) admitting the testimony of Robert Crane. A review of the record and the law makes clear that no error was committed by the Circuit Court.

The defendants cannot prevail on an appeal based upon the Court's instruction to the jury on the malicious discharge exception because the defendants have waived any such argument. Although defendants objected to giving the instruction which was based upon syllabus point two of Mason County Bd. Of Educ. v. State Superintendent of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982), the objection was not made on the basis that an award under Mason County was a violation of due process or that it did not apply to front pay. Because at trial the defendants only

objected to the Mason County instruction on the basis that it might lead to a "double recovery," the defendants have waived any other issue that they may have raised before the Circuit Court.

> A party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the matter to which he objects and the grounds of his objection.

Syl.Pt.1, Roberts v. Powell, 157 W.Va. 199, 207 S.E.2d 123 (1974).

Additionally, the defendants have similarly waived any argument that the due process they were allegedly entitled to was not provided by the Circuit Court as the defendants offered no instructions on the issue and did not request that the Circuit Court conduct a post-trial review.

The malicious discharge exception removing a former employee's duty to mitigate his damages is well-established law in West Virginia. Syl.Pt.2, Mason County, 170 W.Va. 632; Syl.Pt.13, Peters v. Rivers Edge Min., Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009). Although the defendants have alleged that it does not apply in the context of a front pay award, this Court has already determined that it does. *See* Seymour v. Pendleton Community Care, 209 W.Va. 468, 549 S.E.2d 662 (2001); Peters, 224 W.Va. at 184.

Defendants have characterized the unmitigated lost wages and benefits award as a punitive damages award. They use this unsupported assertion as a springboard to argue that their due process rights were violated. Nevertheless, it is clear that a lost wage award is compensatory in nature. Although prior decisions of this Court make it apparent that an unmitigated lost wages award is compensatory in nature, it was most recently stated in West Virginia American Water Co. v. Nagy, No. 101229 (W.Va. Supreme Court, June 15, 2011) (memorandum decision) ("Even when not mitigated, a wage loss award is still compensatory in nature.").

Turning to the issue of whether defendants' offer of a new position of employment to Mr. Rice on the eve of trial serves to cut-off any damages award, the Court need not consider this argument. The jury specifically found on the Verdict Form that the defendants' discharge of Mr. Rice was malicious. Pursuant to the Mason County malicious discharge exception, Mr. Rice had no duty to mitigate his damages. Therefore, Mr. Rice had no duty to accept defendants' offer of a new position or the offer of a position from any potential employer. Because Mr. Rice had no duty his lost wage award cannot be cut-off based upon an alleged failure to mitigate damages.

Further, the timing and circumstances of the offer of new employment, combined with defendants' attack of the plaintiff's ability to perform in the controller position, made it a jury question whether or not Mr. Rice should have accepted the offer of a new controller position. As recognized by the Circuit Court, a former employee need not accept a reinstatement "if circumstances are such to render further association between the parties offensive or degrading to the employee." Voorhees v. Guyan Machinery Co., 191 W.Va. 450, 457, 446 S.E.2d 672, 679 (1994). Because there was ample evidence that Mr. Rice considered further association with the defendants "offensive or degrading", the Circuit Court properly submitted the issue to the jury. The jury, on the Verdict Form, specifically found that the circumstances justified Mr. Rice's decision not to return to work for the defendants.

Defendants' final argument on this issue is that the Court should have determined prior to trial that reinstatement was the appropriate remedy in this case, as opposed to front pay. Although courts may determine that issue prior to trial, the defendants *never* asked the Circuit Court to determine the appropriate remedy in this case. The defendants only moved the Circuit Court to cut-off Mr. Rice's wages due to the offer of new employment. Mr. Rice sought front pay in his Complaint, not reinstatement. If the defendants felt front pay was not the proper

remedy it was incumbent upon them to raise the issue. Nevertheless, the facts of this case make it apparent that front pay was the proper remedy given the fractured relationship of the parties.

Defendants next assert that the Circuit Court committed error when it admitted the testimony of Robert Crane pursuant to Rule 404(b) *and*, separately, under McKenzie v. Carroll Intern. Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004). However, it is apparent that the Circuit Court thoroughly engaged in the analysis of the admissibility of Mr. Crane's testimony as required by Stafford v. Rocky Hollow Coal Co., 198 W.Va. 593, 482 S.E.2d 210 (1996). The Circuit Court made each of the findings required by Stafford and gave a limiting instruction to the jury. (A.R. v. 1 at 256-261). In any event, admission of the evidence was proper under McKenzie as well.

Mr. Crane's testimony was admissible given the substantial similarities between his situation and the situation of Mr. Rice. Both were longtime employees of companies taken over by Stella-Jones. Both had spotless histories with their companies. Both were given praise by Stella-Jones for their work shortly before their terminations. Mr. Crane and Mr. Rice were terminated close in time to one another. Both were replaced by substantially younger individuals who were much less experienced. In both cases the replacement employee was in place prior to the termination. Although Mr. Crane worked in the State of Washington, both he and Mr. Rice were supervised by the same person. Further, the same person (Mr. Fox, a supervisor for both Mr. Crane and Mr. Rice) was involved in each of their terminations. The Circuit Court did not abuse its discretion in admitting the testimony of Mr. Crane pursuant to Rule 404(b) and McKenzie and giving a limiting instruction.

Finally, it is apparent that the Circuit Court complied with the directive of Stafford that an *in camera* hearing be held (two were actually held) and that the Circuit Court find that the

prior acts alleged by Mr. Crane actually occurred. Although the defendants take issue with the timing of the Court's ruling, it is apparent that the Court engaged in the requisite analysis. The defendants cite no authority for their assertions that the *in camera* hearing must be held during trial or that the Order admitting evidence pursuant to Rule 404(b) must be formally entered by the Circuit Court prior to trial. Moreover, these are inconsistent assertions. How could a court have a formal order entered on the issue before trial but wait until after trial starts to conduct the *in camera* hearing on the issue of admissibility?

Given the evidence in this case it is clear that the Circuit Court did not abuse its discretion in making the above rulings. The rulings of the Circuit Court were consistent with controlling precedent established by this Court. Therefore, the Circuit Court's Order Denying Defendants' Motion For New Trial should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is completely unnecessary in this case. With respect to each of the defendants' allegations of error, they have either: 1) waived the error; 2) the dispositive issues have been authoritatively decided; or 3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be aided by oral argument.

Regarding the defendants' appeal concerning the Mason County "malicious discharge exception", the defendants have waived any error as they never objected at trial that an unmitigated lost wages award would violate their due process rights or that the exception applies to a front pay award. Syl.Pt.1, Roberts, 157 W.Va. 199. Similarly, the defendants have waived any argument that their due process rights were violated by the Court's failure to instruct the jury properly as the defendants neither offered nor requested instructions which would have protected these alleged due process rights. Moreover, the issue of whether the malicious discharge

exception applies in the context of front pay has already been authoritatively decided in the affirmative. *See* Seymour, 209 W.Va. 468; Peters, 224 W.Va. 184. Finally, Mason County and its progeny have authoritatively decided that an unmitigated award is compensatory in nature.

With respect to defendants' assertion that the Circuit Court committed error when it refused to cut-off Mr. Rice's lost wage award after February 1, 2010, and permitted the jury to decide the issue of whether Mr. Rice properly mitigated his damages, it is unnecessary for the Court to consider this issue. The jury specifically found on the Verdict Form in this case that the defendants' termination of Mr. Rice on the basis of his age was malicious. (A.R. v.1 at 216). Because the discharge was malicious Mr. Rice had no duty to mitigate his damages by accepting an offer of employment with the defendants or otherwise, as has been authoritatively decided by Syl.Pt.2, Mason County, 170 W.Va. 631. Even if the Court were to consider the evidence on this issue it has been authoritatively decided that a former employee need not accept a reinstatement "if circumstances are such to render further association between the parties offensive or degrading to the employee." Voorhees, 191 W.Va. at 457. At trial there was a plethora of evidence that Mr. Rice returning to work for defendants would be "offensive or degrading" to him. The facts and legal arguments on this issue reflected in the submissions to this Court from both sides have been thoroughly detailed. The decisional process would not be aided by an oral argument where counsel simply repeat the facts and legal arguments contained in their briefs.

Finally, the Circuit Court's decision to admit the testimony of Mr. Crane at trial was proper pursuant to the authoritative decisions in Stafford, 198 W.Va. 593, and McKenzie, 216 W.Va. 686. Further, there is no requirement that the *in camera* hearing discussed by Stafford must occur at trial as opposed to before trial. Similarly, there is no requirement that the Court enter an Order carrying its rulings into formal effect prior to trial. To the extent the analysis of

these issues by the Court requires a review of the facts and arguments of the parties, it is apparent that both sides have submitted detailed analysis of the issues in their briefs. There is no dispute that the Stafford and McKenzie decisions control the admissibility of the evidence in question and oral argument on this issue would not significantly aid the Court in its decision.

For the above reasons, it is apparent that oral argument is unnecessary.

ARGUMENT

Before analyzing the defendants' specific allegations of error, it is instructive to recognize one point the defendants *do not* dispute. Defendants do not allege they are entitled to judgment as a matter of law on Mr. Rice's claim of age discrimination in violation of the West Virginia Human Rights Act.[3] Thus, the defendants concede that there was sufficient evidence before the jury for it to find Mr. Rice was terminated due to his age. The defendants do not even allege that the three errors they rely upon in this appeal were instrumental in any way in the jury's finding of age discrimination. Therefore, the defendants concede that even if the alleged errors were removed the jury still had sufficient evidence to support its finding of age discrimination. These concessions are significant given the guidance of this Court with respect to requests for a new trial. "When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." State ex rel. Meadows v. Stephens, 207 W.Va. 341, 345, 532 S.E.2d 59, 63 (2000) (quoting Syl.Pt.4, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958)). Because the defendants have

[3] In fact, the defendants did not move for judgment as a matter of law as part of their post-trial motions, so they could not have appealed this point anyway. (A.R. v.1 at 218-230).

conceded that there was sufficient evidence to support the jury's verdict of age discrimination in this case, it is apparent that the jury's verdict on this issue must stand.

With respect to the present appeal, the defendants allege three errors were committed by the Circuit Court in this case: 1) instructing the jury on the Mason County malicious discharge exception; 2) permitting an award of front pay beyond the date of the offer of a new position; and 3) admitting the testimony of Robert Crane. However, a review of the law, the evidence and the Circuit Court's rulings make clear that its decisions below were correct. The analysis further reveals that the defendants have waived some of their alleged points of error.

1. The Circuit Court Properly Instructed The Jury On The Mason County Malicious Discharge Exception

At trial, the circuit court instructed the jury as follows:

> If you find that the defendants discharged the plaintiff on the basis of his age, and if you further find that defendants' actions were malicious, then the plaintiff has no duty to mitigate damages. Accordingly, if defendants' discharge of the plaintiff was malicious, you do not have to subtract the sums the plaintiff received from employment after being terminated by the defendants from any amount of back pay award. Further if defendants' discharge of plaintiff was malicious, you do not have to subtract the sums the plaintiff expects to receive in the future from any amount of front pay award.

(A.R. v.1 at 207; A.R. v.7 at 45-46).

This instruction detailing the "malicious discharge exception" to a plaintiff's general duty to mitigate damages was based upon a syllabus point drafted by this Court.

> Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from

> any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Syl.Pt.2, Mason County, 170 W.Va. 632. The Court in Mason County further explained that if a wrongful discharge is malicious, the plaintiff is entitled to a "flat" lost wages award, meaning the award would be unreduced by income or potential income after the termination. *Id.* at 638.

The malicious discharge exception was first articulated in Mason County and has been reaffirmed as the law in West Virginia on numerous occasions since. *See* Syl.Pt.7, Orr v. Crowder, 173, W.Va. 335, 315 S.E.2d 593 (1983); Syl.Pt.3, Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990); Syl.Pt.2, Seymour, 209 W.Va. 468; Syl.Pt.13, Peters, 224 W.Va. 160.

In connection with the above instruction, the Circuit Court also required the jury to answer a specific question on this issue contained in the Verdict Form. At question number two of the Verdict Form the jury was asked the following:

> Do you the jury find, by a preponderance of the evidence, that in connection with the termination of the Plaintiff's employment based on Plaintiff's age, that the Defendants acted maliciously?

(A.R. v.1 at 216). The jury answered, "Yes." (A.R. v.1 at 216). In reliance on the instruction received by the Circuit Court based upon the above authority, the jury awarded Mr. Rice $142,659.00 in back pay and $1,991,332.00 in front pay. (A.R. v.1 at 231-233). These amounts were based upon projections of Mr. Rice's wage and benefit losses by an expert economist, Dr. William Cobb, which were unreduced for any potential mitigation. (A.R. v. 5 at 250-251; A.R. v.1 at 292-293).

Significantly, the defendants do not contest that there was sufficient evidence presented to the jury to support its verdict that the defendants acted maliciously in terminating Mr. Rice's employment on the basis of his age. Therefore, the defendants have not only conceded that Mr.

Rice's employment was terminated on the basis of his age, they also concede that the jury could have reasonably concluded that the termination was done maliciously.

Defendants appeal the award to Mr. Rice of lost wages and benefits unreduced by potential mitigation efforts pursuant to Mason County based upon the following allegations of error: 1) it is a violation of due process; and 2) Mason County does not apply to front pay. Although neither of these contentions have any merit, defendants have waived these issues and their appeal fails for that reason alone. Although defendants objected to giving the Mason County instruction at trial, the objection was not made on the basis that an award under Mason County was a violation of due process or that it did not apply to front pay. Defendants objected to the Mason County instruction solely on the basis that an award of lost wages and benefits that did not take mitigation efforts into account combined with an award of punitive damages would be an impermissible "double recovery." (A.R. v.6 at 310-312). Because at trial the defendants only objected to the Mason County instruction on the basis that it might lead to a "double recovery," the defendants have waived any other issue that they may have raised.[4]

> A party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the matter to which he objects and the grounds of his objection.

Syl.Pt.1, Roberts, 157 W.Va. 199; *see also* Syl.Pt.7, Wolfe v. Welton, 210 W.Va. 563, 558 S.E.2d 363 (2001) (quoting syllabus point 1 of Roberts); Vandevender v. Sheetz, Inc., 200 W.Va. 591, 607, 490 S.E.2d 678, 694 (1997) ("We similarly refuse to address the issue of instructional error raised in the first instance on appeal when no objection was made below."); LaFaive v. DiLoreto, 476 A.2d 626, 631 (Conn.App. 1984) ("We will not review a claim, except in

[4] Because the jury did not award punitive damages the sole objection that the defendants preserved on this issue, that there could be an impermissible "double recovery", is moot.

exceptional circumstances, where the claim raised on appeal is different from the objection raised in the trial court."); Plumlee v. Ramsay Dry Goods Co., 451 S.W.2d 603, 605 (Mo.App. 1970) ("Plaintiff is not to be permitted to broaden the scope of her objections on appeal beyond that made to the trial court.").

Because the defendants did not preserve the errors they seek relief based upon by objecting distinctly to the Circuit Court, those errors have been waived. Accordingly, the Circuit Court's Order Denying Defendants' Motion For New Trial was correct.

Even if the Court were inclined to consider the merits of the alleged errors the defendants have waived, it is apparent that the Circuit Court committed no error. The defendants argue that the damages award in this case based upon the Mason County malicious discharge exception "amounts to a punitive damage award without any of the due process constraints applied to awards of punitive damages." (Petitioner's Brief at 31). In their Brief, defendants characterize the back pay and front pay award to Mr. Rice as a "punitive damage award" without citation to a single authority which stands for that proposition. Notwithstanding defendants' argument to the contrary, in the Circuit Court's Order Denying Defendants' Motion For New Trial Judge Evans correctly found that "Plaintiff's front and back pay awards in this case were compensatory in nature." (A.R. v.1 at 279). Because the Circuit Court found the front and back pay awards to be compensatory in nature and determined that Mason County was still good law in West Virginia, it denied defendants' Motion For A New Trial. (A.R. v.1 at 278-280).

The Circuit Court's findings are correct and are consistent with this Court's recent decision in West Virginia American Water Co. v. Nagy, No. 101229 (W.Va. Supreme Court, June 15, 2011) (memorandum decision). In Nagy, as in the present case, a jury found that a former employee had been terminated on the basis of his age. *Id.* at 2. Because the jury in Nagy

found that the defendant acted with malice, the lost wages award (consisting of back and front pay) was not reduced for mitigation. *Id.* The defendant argued on appeal that the unmitigated wage loss award should be considered punitive in nature, the same argument advanced by the defendants in the present case. *Id.* at 5. This Court disagreed, stating:

> We reject this argument because unmitigated wage loss damages and punitive damages are not the same. Even when not mitigated, a wage loss award is still compensatory in nature.

Id. Because it is clear that an unmitigated wage loss award is compensatory in nature, defendants' unsupported argument that it "amounts to a punitive damage award" entitling the defendants to additional due process must fail.

Defendants further argue in their motion that due process required the Circuit Court to give instructions to the jury relating to punitive damages as required by Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991), applied in the context of an unmitigated award of lost wages and benefits. Although the jury did receive instructions based upon the Garnes factors related to the issue of punitive damages, those instructions did not incorporate or reference the malicious discharge exception. However, defendants did not object to the Garnes instructions which were given to the jury. (A.R. v.6 at 305-313). The defendants never proposed to include language in those instructions which would apply the Garnes factors in the context of the malicious discharge exception. More importantly, the defendants never offered the Circuit Court any instruction which would incorporate the punitive damages factors listed in Garnes in the jury's analysis of an award of unmitigated lost wages and benefits. The defendants also never requested that the Circuit Court conduct a post-trial review of the unmitigated award as would typically be performed when punitive damages are awarded. (A.R. v.1 at 218-230). Therefore, even if an unmitigated lost wages and benefits award was not compensatory and

punitive damages law applied (it does not), the defendants still have waived any error relating to the due process requirements they claim to be entitled to. *See* Syl.Pt.1, Roberts, 157 W.Va. 199.

Finally, defendants argue that the malicious discharge exception does not apply to front pay awards as Mason County only dealt with a back pay award. However, since then this Court has recognized that the exception applies to both back and front pay awards. As observed by the Circuit Court in its Order Denying Defendants' Motion For New Trial, in Seymour this Court explicitly applied the exception in the context of a front pay award. 209 W.Va. 468, 549 S.E.2d 662. In Seymour, the trial court reduced a front pay award because it concluded that the plaintiff failed to mitigate her damages. *Id.* at 472. The West Virginia Supreme Court of Appeals reinstated the full front pay award after it concluded that because her discharge was malicious, plaintiff had no duty to mitigate her damages. *Id.* at 472-473.

The application of the malicious discharge exception to front pay awards has been recognized in other cases as well. In Peters, the jury awarded the plaintiff $513,410 in front pay. 224 W.Va. at 182. The defendant argued that the jury improperly failed to consider the plaintiff's failure to mitigate his damages. This Court found that "Rivers Edge's malicious misconduct in terminating Mr. Peters' employment in retaliation for his application for and receipt of workers' compensation benefits absolves Mr. Peters of the duty to mitigate his damages in this case." *Id.* at 184. This Court upheld the award of unmitigated front pay to Mr. Peters. *Id.* Most recently this Court upheld an unmitigated front pay award in an age discrimination case based upon the malicious discharge exception in West Virginia American Water Co. v. Nagy, No. 101229 (W.Va. Supreme Court, June 15, 2011) (memorandum decision). Given these decisions it is apparent that Mason County applies to front pay awards. Therefore, the Circuit Court's Order Denying Defendants' Motion For New Trial on this issue was correct.

2. The Circuit Court Properly Decided That The Issue Of Whether Mr. Rice Properly Mitigated His Damages Was A Question Of Fact For The Jury

A little over a month before the first trial date in this matter, the defendants offered Mr. Rice a position of employment with Stella-Jones. (A.R. v.3 at 225-227). This offer was not conveyed to Mr. Rice directly, but through two letters received by Mr. Rice's counsel on December 29, 2009.[5] (A.R. v.3 at 225-227). Although the defendants indicated that the offer was for "reinstatement," it is clear that the offer was for a new position. In fact, defendants informed the Plaintiff as follows in the letter:

> As you know, your former Controller position was eliminated. However, Stella-Jones has very recently begun the process of acquiring a company, adding a new chemical and energy division within Stella-Jones, and is creating a Controller position.

(A.R. v.1 at 284).

Mr. Vachon admitted at trial that the controller position being offered to Mr. Rice in the letter prior to the first trial "was not the same job" Mr. Rice previously held with Stella-Jones and that his old job did not exist any longer. (A.R. v.5 at 119). Instead, the new position would have been associated with a new chemical and energy (petroleum) division acquired by Stella-Jones. (A.R. v.4 at 70). The job offered to Mr. Rice was alleged to have been based out of the same office as Mr. Rice's former controller job. (A.R. v.1 at 284). However, there was no petroleum division in Fairplain. (A.R. v.4 at 70). The plants were located in Indiana and Memphis, Tennessee. (A.R. v.5 at 65). This newly created position would report to Mr. Vachon, the person who terminated Mr. Rice's employment on the basis of his age and who

[5] It is undisputed that the letter offering employment to Mr. Rice was transmitted to Mr. Rice's counsel along with a letter to Mr. Rice's counsel on December 29, 2009. (A.R. v.1 at 284; A.R. v.1 at 285).

engineered the pretext of hiring Mr. Stover to replace Mr. Rice but with a slightly different job title. (A.R. v.4 at 92-93; A.R. v.1 at 284).

The letter offering the new position informed Mr. Rice that the offer would only remain open "until the close of business on January 4, 2010." (A.R. v.1 at 284). Thus, the offer was only open for a window of a few days over a holiday and a weekend. Due to these circumstances Mr. Rice did not learn of the offer of employment until approximately two hours before the deadline imposed by the defendants. (A.R. v.3 at 226-227). Despite the extremely narrow window given for Mr. Rice to consider the offer, Mr. Vachon admitted that the defendants still had not filled the position as of the date of his testimony at trial, May 14, 2010 (over four months later).[6] (A.R. v.5 at 129-131).

The defendants placed the start date for the new job to begin on February 1, 2010. (A.R. v.1 at 284). This start date was approximately one week before the trial of the case was scheduled to begin. (A.R. v.4 at 90). As testified to by Mr. Rice, if he accepted the offer of employment "I would begin work on February 1 and then ask for a week off so I could go sue my employer." (A.R. v.4 at 90).

Significantly, the job offer letter came attached to a letter to Mr. Rice's counsel which stated the following:

> Under West Virginia law Stella-Jones' unconditional offer of reinstatement has the effect of cutting off Plaintiff's back pay, as of the effective date of the offered reinstatement, and any front pay sought. Accordingly, we intend to ask the Court to exclude all back pay and front pay damages beyond February 1, 2010 and any evidence related to those damages.

[6] This testimony was in stark contrast to the representation made in the January 11, 2010 letter from defendants' counsel stating: "I am aware that Defendants need to fill the Controller position in the very short term and are not able to hold the position open indefinitely." (A.R. v.1 at 296).

(A.R. v.1 at 285). Given the circumstances of the job offer and the fact that it came attached to a document essentially indicating that the reason for the offer was a legal strategy to cut off any lost wages award, Mr. Rice did not feel the offer was genuine or that the defendants had any real desire to see him return to work. (A.R. v.3 at 228). Additionally, Mr. Rice was aware that during discovery, numerous members of management made negative comments concerning him and his job performance.[7] (A.R. v.4 at 92; A.R. v.1 at 286). Mr. Rice testified as follows:

> Well, I think the original concern was that if I returned to Stella-Jones in a different controller capacity, with or without the lawsuit, would my ability to continue in gainful employment with them be a possibility or would I simply be fired the moment I was five minutes late from lunch or virtually for any cause. That – that was my concern, is that how sincere was the job offer? And I think the earlier exhibit that you showed that said this was simply an attempt to limit damages pretty much told me everything I needed to know about the job offer.

(A.R. v.4 at 88). Given these concerns and his narrow window to respond, Mr. Rice authorized his attorney to send the following correspondence on January 4, 2010:

> I spoke with John Rice about your letter of December 29, 2009. Mr. Rice is understandably concerned about job security, given the fact that he was fired after 24 years of excellent service and after numerous members of management have said negative things about him under oath. Is your client willing to enter into a written contract of employment with John Rice which would state that he could only be terminated in the future for misconduct?
>
> Your letter does not mention past and future bonuses or back pay.
>
> Please feel free to call so we can discuss these matters.

(A.R. v.1 at 286).

[7] Mr. Rice testified at trial as follows: "I had people in power there, my superiors, that went on sworn testimony in depositions that said very negative things about me." (A.R. v.4 at 92).

Defendants responded through a letter from their counsel on January 11, 2010, seven days later. (A.R. v.1 at 296). The letter did not respond to Mr. Rice's concerns raised in his January 4, 2010 letter. After not receiving a response regarding his concerns, Mr. Rice, through his counsel, sent defendants another letter. It stated as follows:

> In my letter to you of January 4, 2010, I explained that Mr. Rice "is understandably concerned about job security, given the fact that he was fired after 24 years of excellent service". Consequently, I asked in that letter if your client was willing to enter into a written contract of employment with John Rice which would state that he could only be terminated in the future for misconduct. In your letter to me of January 11, 2010, you did not respond to Mr. Rice's request. Please let me know your client's response.

(A.R. v.1 at 297).

Mr. Rice did not receive any further correspondence from defendants related to the new offer of employment. (A.R. v.4 at 111-112). Plaintiff's questions and concerns over the new position were never clarified by defendants via a written contract of employment or otherwise. (A.R. v.4 at 111-112).

Defendants have asserted in their Brief before this Court that simply making an "unconditional offer of reinstatement should have precluded an award of back pay or front pay damages after February 1, 2010 . . ." (Petitioner's Brief at 24). Defendants further argue that the Court erred when it permitted the jury to consider awarding damages to the Plaintiff beyond February 1, 2010. However, as noted by the Circuit Court's Order Denying Defendants' Motion For New Trial, defendants' argument ignores the fact that the jury found the defendants' discharge of Mr. Rice to be malicious, relieving him of any duty to mitigate his damages.

> Significantly, the defendants' argument that the Court committed error ignores the jury's finding in this case that the Plaintiff's discharge was malicious (and therefore Plaintiff had no duty to mitigate his damages). (See Verdict Form).

. . . . .

> Therefore, as the jury found the Plaintiff had no duty to mitigate his damages, he obviously had no duty to accept the position of employment offered by the defendants.

(A.R. v.1 at 275-276).

Given that the jury determined the discharge of Mr. Rice was malicious, Mr. Rice had no duty to mitigate his damages by accepting the pre-trial offer of employment from defendants. Therefore, the award of damages past February 1, 2010, was proper even if the offer was legitimate and a reasonable person would have accepted it. Accordingly, the Circuit Court's Order Denying Defendants' Motion For New Trial was correct.

Even if the Court were to ignore the import of the malicious discharge exception in this analysis, it is evident that the Circuit Court made the proper decision in permitting the jury to consider damages beyond February 1, 2010. In Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992), this Court indicated that an employer "may toll the continuing of back pay damages by unconditionally offering the plaintiff the job that was previously denied." Essentially, a defendant may toll the damages by offering reinstatement. However, reinstatement was not offered. Mr. Rice was offered a completely new position with new duties associated with the purchase of an out-of-state company.

Because this circumstance involves offering Mr. Rice a new position as opposed to offering him reinstatement to his former position, the defendants are actually arguing that Mr. Rice has failed to mitigate his damages by not immediately accepting the new position. Of course, "the burden of raising the issue of mitigation is on the employer." Syl.Pt.10, Maxey v. McDowell County Bd. Of Educ., 212 W. Va. 668, 575 S.E.2d 278 (2002). Thus, mitigation is an affirmative defense. This Court has held:

> Once a claimant establishes a prima facie case of discrimination and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of diligence shifts to the defendant. The defendant may satisfy his burden only if he establishes that: (1) there were substantially equivalent positions which were available; and (2) the claimant failed to use reasonable care and diligence in seeking such positions.

Syl.Pt.4, Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990).

Accordingly, the defendant had to establish to the jury that the new position offered to the Plaintiff was "substantially equivalent" to his former position. Courts have held that "the substantial equivalent of the position from which the claimant was discriminatorily terminated must afford the claimant virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status." Rasimas v. Michigan Dept. of Mental Health, 714 F.2d 614, 624 (6th Cir.,1983); *see also* Williams v. Albemarle City Bd. of Ed., 508 F.2d 1242, 1243 (4th Cir. 1974).

The defendant also had to establish to the jury that the Plaintiff "failed to use reasonable care and diligence" in declining to immediately accept this new position. Obviously these are questions for the jury to determine when giving consideration to the defendants' assertion that the Plaintiff has failed to mitigate his damages. Given the circumstances surrounding the offer, the negative comments from members of management concerning Mr. Rice and the indication that the offer was only made to cut off any lost wages award, there was certainly sufficient evidence presented for a reasonable juror to conclude that Mr. Rice was justified in his refusal to return to work for the employer who had previously terminated him on the basis of his age. Therefore, the Circuit Court's Order Denying Defendants' Motion For New Trial correctly applied the law to this issue.

Even if the Court were inclined to agree with defendants' representation that the offer of a new position to Plaintiff was somehow a "reinstatement", the Circuit Court still did not commit error in permitting the jury to consider an award of damages after February 1, 2010. As the Circuit Court found in its Order Denying Defendants' Motion For New Trial, Mr. Rice's situation in this case was similar to the facts in Epstein v. Kalvin-Miller Intern., Inc., 139 F.Supp.2d 469, 483 (S.D.N.Y. 2001), where just before trial (as here) the defendant raised the possibility of reinstatement rather than an award of front pay. The Court in Epstein held that "[t]his attempt by the defendant to reconcile with the plaintiff was too belated to restore the trust that is necessary for a reasonable employee-employer relationship." *Id.* In this case, the jury could have reasonably found that defendants' sudden offer of a new position on the eve of trial was similarly too belated to restore the trust necessary for the Plaintiff and the defendants to maintain a reasonable employee-employer relationship. This Court has held that an employee need not accept reinstatement if "circumstances are such as to render further association between the parties offensive or degrading to the employee." Voorhees v. Guyan Machinery Co., 191 W. Va. 450, 457, 446 S.E.2d 672, 679 (1994) (citing Teich v. Aetna Indus. Corp., 168 N.E.2d 114 (N.Y. 1960); Steranko v. Inforex, 362 N.E.2d 222 (1977)). Given the evidence, a reasonable jury could have found further association between the parties offensive or degrading.

In this case, as shown above, the defendants terminated Mr. Rice's employment on the basis of his age in violation of the West Virginia Human Rights Act. In order to accomplish this goal, they hired a much younger employee for a newly created position and had this employee assume Mr. Rice's duties when Mr. Rice's position was allegedly eliminated. Then, after Mr. Rice brought this case against defendants, the defendants began to tear apart his work performance, despite the fact that he had no problems in his twenty four years of employment,

had received good reviews and had never been disciplined in any manner.[8] Mr. Vachon testified that Mr. Rice "was not a knowledgeable controller", that "he did not demonstrate those skills that we were looking for as a controller" and that he was not "cutting it" as a controller. (A.R. v.5 at 57). Mr. Vachon testified that Mr. Rice was "struggling to demonstrate the abilities of – of controllership . . ." (A.R. v.5 at 60). Mr. Vachon testified that the failure to receive bank reconciliations in a timely manner was one of the reasons Mr. Rice was terminated. (A.R. v.5 at 147-148). Mr. Vachon testified that mistakes made by Mr. Rice lead to his termination (although he admitted that other accountants had committed more severe mistakes but were not terminated). (A.R. v.5 at 66-67, 149-150).

After Mr. Rice's employment was terminated, he was still supposed to receive a bonus that he earned for the year he was employed with Stella-Jones. (A.R. v.5 at 70). Mr. Vachon testified that the bonus was "overlooked." (A.R. v.5 at 70). However, Doug Fox, Senior Vice President of Engineering and Operations (and the highest ranking Stella-Jones employee in the United States) testified that Mr. Vachon told him that Mr. Rice did not receive a bonus "because John Rice's performance in 2008 was substandard that he should not get a bonus". (A.R. v.5 at 164; A.R. v.1 at 315).

Finally, Mr. Vachon testified that Mr. Rice did not assume a leadership role and that he did not show the skills necessary for a finance leadership position. (A.R. v.5 at 104-105). Mr. Fox did not feel that Mr. Rice had enough knowledge of the accounting systems "to be able to support the team." (A.R. v.5 at 103). Mr. Fox made the statement that there was a "lack of leadership" within the team. (A.R. v.5 at 103). Mr. Fox testified that Mr. Rice "didn't fulfill all

[8] *See* Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1066 (8th Cir. 1988) (refusing to order reinstatement because of the employer's hostility and attacks on the plaintiff's honesty, motives, and job performance).

the expectations of that role" as controller. (A.R. v.5 at 172). At trial, for the first time in the case, Mr. Fox testified that his "biggest issue" with Mr. Rice was that he had a "lack of enthusiasm." (A.R. v.5 at 192).

Again, defendants did not do anything during Mr. Rice's employment to inform him of the above alleged issues in order to facilitate a correction. Mr. Rice heard nothing but positive reviews (including on the day of his termination) from defendants until after his Complaint was filed. Mr. Rice was informed only that the reason for his termination was that his position was being eliminated.

It is incredible that after making the above statements concerning Mr. Rice, including that "he did not demonstrate those skills that we were looking for as a controller", defendants would want to offer Mr. Rice a new position just before trial as . . . a controller! Mr. Rice testified at the trial concerning this contradiction by the defendants.

> Mr. Atkinson and I spoke by telephone, I told him, you know, it is very interesting, I find if(sic) tremendously ironic that very close to the trial date that they suddenly would come up with a – "they," I mean, Stella-Jones would – would offer me a job and after all of the things that were said in deposition, in sworn testimony, against me, that I was not there at the office, that I wasn't accurate, that I didn't show leadership skills and other things, I found it tremendously interesting that you would offer me a job as a controller when I was a controller for you since August 1st of 2006. It is interesting that something I heard my managers tell me that I was not suited to do, now they're offering a job to return to that location. I found that [a] little bit ironic.

(A.R. v.4 at 78).

Mr. Rice further testified that he "would be very hesitant to enter into a situation of which could become very volatile and uncomfortable for me . . ." (A.R. v.4 at 79). Finally, Mr. Rice testified that the level of trust necessary in the relationship had been broken.

> Something else, Mr. Oliff, I mean, if I returned to employment with Stella-Jones. I had people in power there, my supervisors, that went on sworn testimony in depositions that said very negative things about me. I had a fiduciary responsibility to Burke-Parsons-Bowlby and Stella-Jones, there was a level of trust there, and the level of trust had been broken at that point.

(A.R. v.4 at 92). Given the circumstances of the offer and the comments made by the people who would be supervising Mr. Rice if he returned to work, it is evident that there was sufficient evidence from which a reasonable juror could find that a return to Stella-Jones would have "render[ed] further association between the parties offensive or degrading" to Mr. Rice. *See* Voorhees, 191 W. Va. at 457. That is the finding that the Circuit Court made at the close of Mr. Rice's case-in-chief when defendants renewed their motion to cut-off Mr. Rice's damages after February 1, 2010.

> But some of the other things that were said as reasons for termination, I think a rational juror could find that that was offensive and would prevent or – excuse me, justify the failure to accept it. So I think that is a jury issue. I'm going to deny your motion.

(A.R. v.6 at 74). It is clear from the Verdict Form that the jury felt that Mr. Rice was justified in declining to accept defendants' pre-trial offer under the circumstances. (A.R. v.1 at 215-217). At defendants' insistence[9] the Circuit Court included the following as question number three of the Verdict Form:

> 3. Do you, the jury, find by a preponderance of the evidence:
>
> (1) that Defendants made Plaintiff an unconditional offer of reinstatement to the same or substantially equivalent job; and,
>
> (2) that Plaintiff failed to accept the offer of reinstatement; and,

[9] See argument contained at A.R. v.6 at 297-305.

> (3) that nothing occurred between Defendants and Plaintiff since March 12, 2009, the date of Plaintiff's termination from employment, that rendered further association between the parties offensive to the Plaintiff, so as to reasonably justify Plaintiff in refusing to accept any such offer of reinstatement?

(A.R. v.1 at 216). The jury answered, "No." (A.R. v.1 at 216). Because there was sufficient evidence for a jury to reasonably conclude that accepting the new position with defendants would be offensive or degrading to Mr. Rice, and the jury specifically found that Mr. Rice was not required to accept the offer, it is clear that the Circuit Court did not commit error in presenting the issue to the jury for decision. Accordingly, the Circuit Court's Order Denying Defendants' Motion For New Trial should be affirmed.

Defendants make one last argument with respect to their assertion that Mr. Rice's lost wages and benefits award should have been cut-off by the offer of employment. Defendants argue that the Court erred by permitting the jury to consider the issue instead of cutting off the Plaintiff's damages claim before trial. In support of this argument the Plaintiff cites Peters for the proposition that, "[w]hether the facts of a particular case warrant an award of front pay in lieu of reinstatement is a decision committed to the circuit court . . ." 224 W.Va. at 182. The defendant then complains, "[h]owever, in this case the Court did not rule on whether reinstatement was or was not appropriate and instead submitted the issue for the jury's determination." (Petitioner's Brief at 26).

Defendants completely fail to mention that the Circuit Court was never asked to rule that reinstatement was the appropriate remedy as opposed to front pay. In response to Mr. Rice's decision not to accept the new position of employment with defendants the defendants filed a motion *in limine* entitled, "Defendants' Motion *In Limine* to Limit Evidence of Back Pay and Front Pay Damages Following Effective Date of Defendants' Unconditional Offer of

Reinstatement". (A.R. v.1 at 77). In that Motion, as might be expected, the relief sought by the defendants was "an order precluding the introduction at trial [of] any evidence of Plaintiff's back pay after February 1, 2010 and evidence of any reference to the accrual of damages." (A.R. v.1 at 81). Quite simply, the defendants never moved the Court to determine that reinstatement was the appropriate remedy in this case.

In Plaintiff's Complaint he sought front pay, not reinstatement. If the defendants felt that reinstatement was the appropriate remedy, it was incumbent upon them to bring the issue to the attention of the Circuit Court through a motion. Instead, the defendants have waived the issue. *See* Syl.Pt.1, Roberts, 157 W.Va. 199. At the very least, defendants have "elected" front pay as the remedy due to their failure to bring the issue before the Circuit Court. *See* Casteel v. Consolidation Coal Co., 181 W. Va. 501, 507, 383 S.E.2d 305, 311 (1989) (finding defendant "elected front pay rather than reinstatement" when it insisted on its right to oppose reinstatement). Accordingly, the Circuit Court's Order Denying Defendants' Motion For New Trial correctly decided this issue.

3. The Testimony Of Robert Crane Was Properly Admitted At Trial

At the trial of this matter the jury heard the testimony of a witness named Robert Crane. (A.R. v.4 at 127). Mr. Crane worked for JH Baxter & Company for approximately thirty-five years in the "wood preserving" business at an Arlington, Washington facility. (A.R. v.4 at 128, 131-132). He started out as a "pole trainer to a treating engineer" then progressed up the corporate ladder, became a yard foreman, yard superintendent, plant supervisor, assistant plant manager and, eventually, plant manager. (A.R. v.4 at 128-129). , Mr. Crane testified at trial that he never had any derogatory evaluations in all those years of employment. (A.R. v.4 at 129).

On January 28, 2007, JH Baxter & Company was purchased by Stella-Jones. (A.R. v.4 at 129-130). Mr. Crane remained in his position of plant manager of the facility. (A.R. v.4 at 130). His supervisor initially was Doug Fox. (A.R. v.1 at 306; A.R. v.4 at 130). Mr. Crane testified that that at the time of his termination he was supervised by both Doug Fox and Buddy Downey. (A.R. v.4 at 130, 136).

During Mr. Crane's last full year of employment he increased the revenue of the Arlington, Washington facility from approximately twenty-one or twenty-two million dollars to thirty-seven million dollars. (A.R. v.4 at 131-132). Subsequently, Mr. Crane received a letter from the CEO of Stella-Jones, Brian McManus, concerning his "good performance." (A.R. v.4 at 133). In a face-to-face meeting Mr. McManus told Mr. Crane to "keep doing the good job that I did . . ." (A.R. v.4 at 133).

On November 2, 2008, Mr. Crane turned sixty-two years old. (A.R. v.4 at 134). Mr. Crane went on vacation just before Thanksgiving in 2008. (A.R. v.4 at 134). His first day back to work was December 8, 2008. (A.R. v.4 at 134). That morning one of his supervisors, Buddy Downey, informed him that Stella-Jones was "giving me retirement." (A.R. v.4 at 135). Mr. Crane was informed that a lunch for the full crew had already been set up for two days later wherein, Mr. Crane testified, "I was to announce to my crew that I was going to retire." (A.R. v.4 at 135). He was told that, after that meeting, he would be taking vacation for the rest of the year. (A.R. v.4 at 135). Mr. Crane was told that he would speak first because, after he spoke, Mr. Downey would announce his replacement, Jon Younce, who was approximately forty years

old.[10] (A.R. v.4 at 135-136, 139). When Mr. Crane inquired regarding his forced retirement: "There is no choice?", Mr. Downey responded, "No. No choice." (A.R. v.4 at 151, 174-175).

Mr. Crane was offered a Separation Agreement after he was informed of his termination. (A.R. v.4 at 139-140). When Mr. Crane was negotiating the terms of the Separation Agreement he was informed by Mr. Downey that Mr. Fox was involved in the decision-making process relating to the terms of separation. (A.R. v.4 at 154-155). Mr. Crane was told that he had to return the agreement to Mr. Fox by December 31, 2008. (A.R. v.4 at 152-153). Mr. Fox signed the agreement on behalf of Stella-Jones. (A.R. v.1 at 305, 307). Finally, Mr. Crane testified that he had a conversation with Mr. Fox two days after his termination. (A.R. v.4 at 172). Regarding Mr. Crane's termination, he was informed by Mr. Fox in that conversation, "[w]e wanted to make a change." (A.R. v.4 at 173) (emphasis added). Given the above it is apparent that Mr. Fox was involved in Mr. Crane's termination.

Mr. Crane subsequently filed a claim against Stella-Jones in the Equal Employment Opportunity Commission alleging his employment was terminated illegally on the basis of his age. (A.R. v.4 at 142; A.R. v.1 at 298-302).

These facts are all substantially similar to the facts of Mr. Rice's case. Thus, prior to the trial of this matter Mr. Rice filed a Notice Of Intent To Introduce Evidence Of Prior Acts Of Defendants. (A.R. v.1 at 95-101). That notice informed the Circuit Court and the defendants that Mr. Rice planned to introduce the testimony of Robert Crane under Rule 404(b) of the West Virginia Rules of Evidence. West Virginia Rule of Evidence 404(b) states:

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[10] Mr. Younce was clearly "substantially younger" than Mr. Crane as there was an age difference of approximately twenty-two years. *See* Laber v. Harvey, 438 F.3d 404, 430 (4th Cir. 2006) (prima facie case of age discrimination in violation of the ADEA requires the comparator employee to be "substantially younger than the plaintiff, whether within or outside the class protected by the ADEA.") (citing O'Conner v. Consol. Coin Caterers Corp., 517 U.S. 308, 310-312 (1996)).

> (b) *Other crimes, wrongs, or acts.* – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

The Notice of Intent informed the Court and the defendants about the required standards for admitting evidence pursuant to Rule 404(b). According to Stafford v. Rocky Hollow Coal Co., 198 W. Va. 593, 482 S.E.2d 210 (1996), "[t]he beginning point of any Rule 404(b) analysis is that the party offering the evidence of prior bad acts must first identify the specific and precise purpose for which the evidence is being offered." *Id.* at 599. In his Notice of Intent, Mr. Rice informed the Court and the defendants that the testimony of Mr. Crane was being offered "to prove motive, intent and plan with respect to the termination of the Plaintiff on the basis of age." (A.R. v.1 at 98). Following the satisfaction of this threshold requirement, the trial court must hold an *in camera* hearing to determine that the acts or conduct identified in the threshold inquiry actually occurred. *Id.*; State v. Dolin, 176 W. Va. 688, 347 S.E.2d 208 (1986). "Once the trial court determines by a preponderance of the evidence that the prior bad acts did in fact occur, the trial court must conduct a relevancy analysis under Rules 401, 402, and 104(b) of the West Virginia Rules of Evidence. Stafford, 198 W. Va. at 599; Syl.pt.2, State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994). Then the trial court must conduct a balancing test under W. Va. R. Evid. 403, to ensure that the probative value of the testimony outweighs the danger of unfair prejudice. Stafford, 198 W. Va. at 600. Finally, if satisfied as to the admissibility of the prior bad acts evidence, the trial court should, where requested, give the jury a limiting instruction at the time the evidence is offered explaining the reason for limiting the use of the evidence. *Id.*

In his Notice of Intent Mr. Rice also notified the Court and the defendants that the evidence was not only admissible under Rule 404(b), but also pursuant to Syl.Pt.2, McKenzie v. Carroll Intern. Corp., 216 W. Va. 686, 610 S.E.2d 341 (2004). (A.R. v.1 at 96). Syllabus point two of McKenzie states as follows:

> In an action for employment discrimination, a plaintiff may call witnesses to testify specifically about any incident of employment discrimination that the witnesses believe the defendant perpetrated against them, so long as the testimony is relevant to the type of employment discrimination that the plaintiff has alleged.

Id. In addition to the Notice of Intent, Mr. Rice also filed a Motion *In Limine* to Admit Testimony of Robert Crane. (A.R. v.1 at 123-127). That Motion repeated Mr. Rice's assertion that the evidence was admissible pursuant to both McKenzie and Rule 404(b). (A.R. v.1 at 123-127). Defendants filed a Motion *In Limine* To Exclude All References to Other Lawsuits or Claims. (A.R. v.1 at 26-29).[11]

On January 7, 2010, at the original pre-trial conference, the Circuit Court considered these issues and heard argument from counsel.[12] (A.R. v.2 at 355, 377-389). The Circuit Court deferred ruling on the motions and permitted the evidentiary deposition of Mr. Crane to be taken for the Court's consideration at a subsequent hearing. (A.R. v.2 at 388). The subsequent hearing was held on April 26, 2010. (A.R. v.2 at 449-478). During that hearing the defendants never attempted to call any witness, despite the fact that Mr. Downey was present.[13] (A.R. v.2 at 449-

[11] Both sides filed responses to the motions of the opposing parties. (A.R. v.1 at 41-49, 133-136).

[12] Not all of the briefs on the issue were filed at the time of the first hearing.

[13] Although defendants did not seek to introduce any evidence at the hearing, they sought to proffer the testimony of Mr. Downey on the issue at trial after the Court's ruling and prior to the testimony of Mr. Crane. (A.R. v.4 at 113-125). The Court reasoned as follows:

> The Court: The issue while you're at the bar of the Court is on whether or not the Court should allow Mr. Crane's videotaped testimony.

478). At the end of the hearing the Circuit Court indicated that it would take the matter under advisement as it wanted to closely review the materials again. (A.R. v.2 at 477).

On May 4, 2010, eight days before the trial began, the Circuit Court drafted a letter to counsel informing them of its ruling that the testimony of Robert Crane was admissible pursuant to both Rule 404(b) and McKenzie. (A.R. v.1 at 181-182). The Circuit Court further explained some of the reasoning behind its ruling in the letter. At the end of the letter, the Circuit Court asked that an order be drafted and circulated carrying the rulings into effect. (A.R. v.1 at 182). However, as the trial was to begin in eight days, no order was circulated or entered prior to trial.

Plaintiff's counsel subsequently drafted an Order carrying the Circuit Court's rulings on the admissibility of Mr. Crane's testimony into effect. The Circuit Court entered the Order Granting Plaintiff's Motion *In Limine* to Admit Testimony of Robert Crane on August 16, 2010. (A.R. v.1 at 256-261). The Order contained all of the analysis required by Stafford, McGinnis and McKenzie and incorporated the Court's reasoning as laid out in its May 4, 2010 letter.[14]

The Circuit Court found that the circumstances of Mr. Crane's termination and Mr. Rice's termination were substantially similar. (A.R. v.1 at 256-261). It is apparent upon a review of the evidence that the Circuit Court was correct on this issue. Both Mr. Rice and Mr. Crane were long-time employees who worked decades for their original employers. Both had

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> Mr. Oliff: Sure.
> The Court: You objected to that because the Court refused to hear the – or hadn't conducted the hearing to hear the testimony of –
> Mr. Oliff: Right.
> The Court: -- Mr. Downey. However, Mr. Downey is not on any witness list, and the Court was never requested to hear the testimony of Mr. Downey. So I'm going to overrule your objection –

(A.R. v.4 at 124-125).

[14] At trial, the Circuit Court gave a limiting instruction concerning the effect of Mr. Crane's testimony. (A.R. v.1 at 204).

exemplary records. Both had risen through the ranks at their respective locations to become managers. Stella-Jones bought both facilities. Mr. Fox, the highest-ranking U.S. employee of Stella-Jones, supervised both Mr. Rice and Mr. Crane. Mr. Rice and Mr. Crane were given praise for their performance shortly before their terminations. The termination of Mr. Crane and the decision to terminate Mr. Rice were close in time. There was evidence that Mr. Fox was involved in both terminations. (A.R. v.1 at 313-314; A.R. v.5 at 77, 176; A.R. v.4 at 152-155, 172-173). Both Mr. Rice and Mr. Crane were replaced by substantially younger individuals with much less experience. The replacements for both Mr. Rice and Mr. Crane were in place before they were informed of their terminations. Given the similarities, it is apparent that the Court did not err in permitting Mr. Crane to testify at trial pursuant to Rule 404(b) and McKenzie.

The defendants argue in their Brief that the Circuit Court erred by failing to conduct an *in camera* hearing at trial on the issue of the admissibility of Mr. Crane's testimony. However, there was no need for an *in camera* hearing to take place at trial when two *in camera* hearings had already been held on these issues prior to trial and the Circuit Court had informed the parties of its ruling through the May 4, 2010 letter. Neither Stafford nor McGinnis requires the *in camera* hearing to take place during trial as opposed to before trial. Further, the defendants do not cite this Court to any authority requiring such a procedural oddity. Therefore, the Circuit Court did not commit error by holding the two *in camera* hearings prior to trial.

The defendants next assert that the Circuit Court committed error because it did not find that the alleged prior bad acts actually occurred. The defendants base this argument on the fact that the Circuit Court did not *explicitly* mention this point in its May 4, 2010, letter to the parties eight days before trial informing them of its ruling admitting the testimony of Mr. Crane. (Petitioner's Brief at 18). Obviously, the letter to the parties was not meant to constitute the

Circuit Court's Order on the issue, as the letter specifically requested Plaintiff's attorney to draft an order implementing the Court's decision. Additionally, the Circuit Court was fully aware of all the requirements for the admission of Mr. Crane's testimony as the issue had been extensively briefed and argued on two occasions. Even if the letter had simply stated that Mr. Crane's testimony would be admissible and asked Plaintiff's counsel to prepare an Order effectuating that ruling it would be enough. Evidently, the defendants expected the letter to contain the Circuit Court's entire ruling on the issue.

Of course, the Court did enter an Order explicitly finding that the acts alleged by Mr. Crane actually occurred.[15] (A.R. v.1 at 258). Defendants complain that the Order was not entered until after the trial, but fail to identify any legitimate reason why such a distinction is relevant. As long as the Circuit Court performed the proper analysis and did not abuse its discretion, then the timing of the Order carrying the Court's ruling into effect is irrelevant.

When confronted with this assertion of error at the hearing on Defendants' Motion For New Trial, the Circuit Court responded as follows: "On the 404(b) evidence issue, my recollection is that [the] testimony of Mr. Crane was uncontradicted." (A.R. v.2 at 492). When

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[15] In the Circuit Court's Order Granting Plaintiff's Motion *In Limine* To Admit Testimony of Robert Crane, it found as follows:

> As required by Stafford, the court has conducted an *in camera* hearing in order to determine that the acts or conduct identified in the threshold inquiry actually occurred. After a review of the evidence, including reviewing the videotaped evidentiary deposition of Robert Crane, the court hereby FINDS and CONCLUDES that the acts alleged by Mr. Crane actually occurred. Essentially, the only material portion of Mr. Crane's testimony that defendants contend is incorrect is his assertion that his employment was terminated. Instead, defendants assert that Mr. Crane retired. However, Mr. Crane's testimony makes clear that he was given no choice but to resign. There was no evidence presented to the court which contradicts Mr. Crane's testimony on this issue.

(A.R. v.1 at 258).

defendants argued that there was no specific finding in the letter that Mr. Crane was terminated because of his age, the Circuit Court replied:

> That is what the whole issue was, wasn't it? I thought that was the whole issue, whether or not that situation was sufficiently similar to what was alleged in this case in order to make it admissible. So, if I found that it was – well, whether it was stated expressly or not – I mean, if it wasn't age discrimination it would have absolutely no bearing in this case. So I am going to overrule that objection. If I omitted that, [it] was inadvertent. I can assure you of that.

(A.R. v.2 at 496-497).

Accordingly, the Circuit Court denied Defendants' Motion For New Trial on this issue. (A.R. v.1 at 267-272). In admitting the testimony of Mr. Crane at trial the above evidence makes clear that the Circuit Court did not abuse its discretion. Therefore, the Circuit Court's Order Denying Defendants' Motion For New Trial was clearly correct on this issue.

Finally, the defendants argue that the Court erred by admitting the testimony of Mr. Crane pursuant to McKenzie despite defendants' allegation that Mr. Crane's situation was too dissimilar from Mr. Rice's situation. In response to this argument the Circuit Court found as follows:

> Defendants' argument that Crane's circumstances when compared to Plaintiff's circumstances are "too dissimilar" to be admissible is unavailing.
>
> . . . . .
>
> Dissimilar circumstances, sufficient to conclude that Crane's testimony would be irrelevant on the issue of discriminatory motive or intent relating to Plaintiff's termination from employment, would mean circumstances which by reason of logic and common sense fail to make it more likely that defendants' motive and intent in this case was discriminatory. For instance, age discrimination by the defendants occurring ten years ago would mean little to the pending case. In like manner, age discrimination by a subsidiary corporation occurring prior to acquisition by Stella-Jones would also be irrelevant even if it was close in time to Plaintiff's termination from employment, because

> the decision was not made by the management group that terminated Plaintiff from his employment.
>
> The "dissimilar circumstances" cited by the defendants between Plaintiff's circumstances and Mr. Crane's circumstances do not relate to anything material regarding whether this evidence tends to prove discriminatory motive or intent. While it is argued that Crane "retired" from his employment, his deposition leaves no question but that he retired only because Stella-Jones told him he had "no choice" but to do so.

(A.R. v.1 at 270-271). Defendants' "dissimilar" argument appears to be principally based upon the defendants' reading of Wells v. Key Communications, LLC, 226 W.Va. 547, 703 S.E.2d 518 (2010) (per curium), and their strained attempt to apply the Court's conclusion in that case to the present one. In Wells, the circuit court found the record established that the discharge of the plaintiff and another individual were too dissimilar to make the evidence concerning the other individual relevant under McKenzie. *Id.* at 521. This Court upheld the decision of the circuit court and found that it did not abuse its discretion. *Id.* at 522-524.

In Wells, the record was clear that the two employees had different supervisors and that the decision-makers for the two discharges were completely different. 703 S.E.2d at 524. The defendants argue that the decision-makers in the present case were different and that, as in Wells, the evidence should be deemed inadmissible. However, the defendants' argument ignores the fact that Mr. Fox supervised both Mr. Rice and Mr. Crane at the time of their terminations. (A.R. v.3 at 205; A.R. v.1 at 306; A.R. v.4 at 130, 136). Defendants focus their analysis on the persons who informed Mr. Crane and Mr. Rice of their termination and ignore the persons involved in those decisions. (Petitioner's Brief at 21-22). Defendants' argument ignores the evidence that Mr. Fox was involved in Mr. Crane's termination. (A.R. v.4 at 152-155, 172-173; A.R. v.1 at 305, 307). Similarly, it ignores the evidence that Mr. Fox was involved in Mr. Rice's

termination. (A.R. v.1 at 313-314; A.R. v.5 at 77, 176). Because there was a common supervisor involved in both decisions, the decision of Wells, to the extent it can be extended beyond its own facts, does not apply.

Because there is sufficient similar evidence to support the Circuit Court's ruling under McKenzie, it is evident that the Court did not abuse its discretion. Therefore, the Circuit Court's Order Denying Defendants' Motion For New Trial was correct.

4. Any Error Was Harmless Error

Mr. Rice asserts that the Circuit Court committed no error in this case. However, to the extent there may have been error it was harmless error as defined by West Virginia Rule of Civil Procedure 61, in that it did not affect the substantial rights of the parties and setting aside the verdict, modifying it or granting a new trial would be inconsistent with substantial justice. Further, "[a] judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syl.pt.7, Starcher v. South Penn Oil Co., 81 W.Va. 587, 95 S.E. 28 (1918); Syl.pt.7, Torrence v. Kusminsky, 185 W.Va. 734, 408 S.E.2d 684 (1991). These pronouncements are particularly applicable in the present case given defendants' previously mentioned concessions that there was sufficient evidence presented at trial to support both a finding of age discrimination and that Mr. Rice's termination was malicious.

CONCLUSION

Based upon the foregoing evidence and authority, it is apparent that the Circuit Court did not commit error as alleged by the defendants. Therefore, the Circuit Court's Order Denying Defendants' Motion For New Trial must be affirmed and the judgment for Mr. Rice should stand.

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CERTIFICATE OF SERVICE

I, Mark A. Atkinson, counsel for Respondent, do hereby certify that service of the "RESPONDENT'S BRIEF" was made upon the parties listed below by mailing a true and exact copy thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 27th day of June, 2011.

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