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No. 091635

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

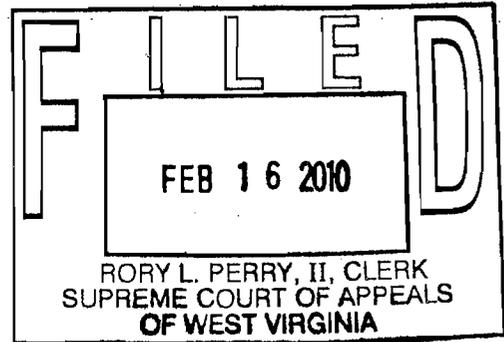
MARY J. WELLS,

Petitioner and
Plaintiff Below,

v.

KEY COMMUNICATIONS, L.L.C.,
d/b/a/ West Virginia Wireless,

Respondent and
Defendant Below.



BRIEF OF APPELLANT, MARY J. WELLS

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

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TABLE OF CONTENTS

Table of Authorities	ii
I. The Kind of Proceeding and Nature of the Ruling Below.....	2
II. Statement of Facts.....	4
III. Assignments of Error	6
Whether trial court committed plain error by prohibiting Appellant from introducing evidence, testimony and argument to the jury that Alfred Nelson, a non-litigant former employee of Appellee, had contemporaneously experienced age discrimination at the hands of Appellee under the same or similar circumstances as the Appellant?	
IV. Points and Authorities Relied Upon.....	7
Standard of Review	7
V. Discussion of Law	8
VI. Conclusion	17
VII. Request for Relief	18

EXHIBITS

EXHIBIT A – *Order Denying Plaintiff's Motion for New Trial*

EXHIBIT B – Alfred Nelson Complaint

EXHIBIT C – Letter to Judge Stucky [Dennis Bloss Testimony re: Alfred Nelson]

EXHIBIT D – Alfred Nelson Deposition Testimony

TABLE OF AUTHORITIES

West Virginia Case Law

<u>Barlow v. Hester Indus., Inc.</u> , 198 W.Va. 118, 479 S.E.2d 628 (1996).....	7
<u>Cartwright v. McComas</u> , 223 W.Va. 161, 672 S.E.2d 297 (2008).....	8, 15, 16
<u>Keesee v. General Refuse Service, Inc.</u> , 216 W.Va. 199, 604 S.E.2d 449 (2004).....	8, 15
<u>Mayflower Vehicle Sytems, Inc. v. Cheeks</u> , 218 W.Va. 703, 629 S.E.2d 762 (2006).....	14
<u>McKenzie v. Carroll International Corp.</u> , 216 W.Va. 686, 610 S.E.2d 341 (2004).....	1, 2, 7, 9, 10, 11, 16, 17
<u>Page v. Columbia Natural Resources, Inc.</u> , 198 W.Va. 378, 480 S.E.2d 817 (1996).....	8, 15
<u>Pritt v. West Virginia Div. of Corrections</u> , 218 W.Va. 739, 630 S.E.2d 49 (2006).....	14
<u>Sanders v. Georgia-Pacific Corp.</u> , 159 W.Va. 621, 225 S.E.2d 218 (1976).....	8
<u>State v. McGinnis</u> , 193 W.Va. 147, 455 S.E.2d 516 (1994).....	7
<u>State v. Miller</u> , 194 W.Va. 3, 459 S.E.2d 114 (1995).....	8, 15
<u>State v. Myers</u> , 204 W.Va. 449, 513 S.E.2d 676 (1998).....	16
<u>State v. Vance</u> , 207 W.Va. 640, 535 S.E.2d 484 (2000).....	7
<u>Tennant v. Marion Health Care Foundation, Inc.</u> , 459 S.E.2d 374, 194 W.Va. 97 (1995).....	7, 8, 17, 18

West Virginia Statutory Law

West Virginia Code § 5-11-1, et seq..... 2, 5
West Virginia Code § 56-6-28 18

West Virginia Rules of Civil Procedure

Rule 59 18

West Virginia Rules of Evidence

Rule 401 12
Rule 402 13
Rule 403 2, 13
Rule 404(b)..... 7, 11

Federal Case Law

Aman v. Cort Furniture Rental Corp.,
85 F.3d 1074 (3rd Cir.1996) 10

Buscemi v. Pepsico, Inc.,
736 F.Supp. 1267 (S.D.N.Y.1990)..... 10

Dartmouth Review v. Dartmouth College,
889 F.2d 13 (1st Cir.1989)..... 14

Estes v. Dick Smith Ford, Inc.,
856 F.2d 1097 (8th Cir.1988) 10

George v. Leavitt,
407 F.3d 405 (D.C.Cir.2005) 14

Glass v. Philadelphia Elec. Co.,
34 F.3d 188 (3rd Cir.1994) 10

Graham v. Long Island R.R.,
230 F.3d 34 (2nd Cir.2000) 14

Harpring v. Continental Oil Co.,
628 F.2d 406 (5th Cir.1980) 10

Herber v. Boatmen's Bank of Tennessee,
781 F.Supp. 1255 (W.D.Tenn.1991)..... 10

Heyne v. Caruso,
69 F.3d 1475 (9th Cir.1995) 10

Kneisley v. Hercules Inc.,
577 F.Supp. 726 (D.Del.1983)..... 10

LaDolce v. Bank Admin. Inst.,
585 F.Supp. 975 (N.D.Ill.1984)..... 10

Mandell v. County of Suffolk,
316 F.3d 368 (2nd Cir.2003) 14

Minshall v. McGraw Hill Broad. Co., Inc.,
323 F.3d 1273 (10th Cir.2003) 9

Mitchell v. Toledo Hosp.,
964 F.2d 577 (6th Cir.1992) 14

Mullen v. Princess Anne Volunteer Fire Co.,
853 F.2d 1130 (4th Cir.1988) 10

Perkins v. Brigham & Women's Hosp.,
78 F.3d 747 (1st Cir.1996)..... 14

Spulak v. K Mart Corp.,
894 F.2d 1150 (10th Cir.1990) 9

Stair v. Lehigh Valley Carpenters Local Union No. 600
of United Bhd. of Carpenters & Joiners of America,
813 F.Supp. 1116 (E.D.Pa.1993) 10, 11

Stumph v. Thomas & Skinner, Inc.,
770 F.2d 93 (7th Cir.1985) 9

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APPELLANT'S BRIEF

Comes now your appellant, Mary J. Wells ("Appellant"), by counsel, and states that she is aggrieved by the *Order Denying Plaintiff's Motion for New Trial* entered by the Circuit Court of Kanawha County, West Virginia on September 24, 2009. (**EXHIBIT A - Order 09.24.09**). Appellant prays that this Honorable Court will reverse said *Order* and remand this matter for a new trial, on the grounds that the trial court committed plain and reversible error when it refused to follow this Court's holding in McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004), and thus erroneously excluded relevant and admissible evidence and testimony by a non-litigant employee that also experienced age discrimination at the hands of the Appellee.

I. THE KIND OF PROCEEDINGS AND NATURE OF THE RULING BELOW

Appellant brought the underlying age-discrimination employment action against Key Communications, LLC, d/b/a West Virginia Wireless (“Appellee”), because she was discharged from her position of employment as Administrative Manager in violation of the “West Virginia Human Rights Act” (hereinafter, “WVHRA”), Chapter 5, Article 11, et seq., West Virginia Code. It is undisputed that Appellant is a member of an age-protected class and that she was discharged from employment by the Appellee. Appellant contends the adverse employment decision would not have been made but for her age, and that Appellee’s age-based discharge decision constitutes unlawful discriminatory practices.

Appellant sought to prove her case at trial by introducing evidence that both she AND her former co-worker, Alfred Nelson, were subjected to age-based discriminatory conduct by the Appellee.¹ Just prior to trial, the Appellee brought on a *motion in limine* to exclude any and all evidence, testimony and argument regarding Appellee’s discharge of Alfred Nelson. Appellee argued that the evidence, testimony and argument would be too prejudicial, and that it should be excluded under Rule 403 of the *West Virginia Rules of Evidence*. Appellant argued the evidence was clearly admissible, based upon this Court’s decision in McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004) (recognizing that non-litigant employees may testify about age discrimination they experienced at the hands of their employers).

¹ Appellant’s intentions were well-founded, in that her counsel had also represented Alfred Nelson and they were both very familiar with the factual basis for his claims. Likewise, Appellee’s counsel represented the same employer in that case. Mr. Nelson’s case was settled prior to trial.

Nonetheless, the trial court granted the Appellee's *motion in limine*, and all evidence, testimony and argument regarding the Appellee's discharge of Alfred Nelson was kept secret from the jury.

Because the trial court's ruling *in limine*, Appellant was prevented from introducing evidence to the jury: (1) that her former age-protected co-employee had also made a claim of age-based discriminatory conduct against the Appellee; (2) that both former co-employees had been discharged by the Appellee on the same date (June 30, 2004); (2) that both former co-employees had been discharged by the Appellee under the same circumstances (retaining younger employees with lower performance ratings); and (3) that both former co-employees had been discharged by the Appellee for the same pretextual reason (financial hardship). Appellant submits that the exclusion of this relevant and probative evidence adversely affected Appellant's ability to meet her burden of proof on the most difficult aspect of most discrimination cases—the employer's motive, intent or discriminatory animus. In turn, the Appellee succeeded with characterizing Appellant's discharge as an isolated incident lacking any nexus to an age-based discriminatory motive.

In denying Appellant's motion for a new trial, the Honorable James C. Stucky of the Kanawha County Circuit Court found that "the evidence relating to [Alfred] Nelson's termination was properly excluded . . . because such information was irrelevant, unduly prejudicial and would have confused and misled the jury." (EXHIBIT A – Order, p. 5).

Judge Stucky further found that “the exclusion of the Nelson evidence did not affect any of Plaintiff’s substantial rights and was consistent with substantial justice.” (EXHIBIT A – Order, p. 5). It is from this Order that said Appellant brings her *Petition for Appeal* praying that this Honorable Court accept her appeal, reverse said Order of the trial court and order a new trial.

II. STATEMENT OF FACTS

Appellant, Mary J. Wells

Ms. Wells was hired to work at Key Communications, LLC, d/b/a West Virginia Wireless (“WV Wireless”)² on April 8, 2002, in Charleston, West Virginia. Appellant was fifty (50) years old at the time of hire. Ms. Wells was initially hired in the position of Office Administrator, and six months later she was promoted to the position of Administrative Manager. In both positions, Ms. Wells worked as an assistant to the General Manager at WV Wireless.

In February of 2004, Appellee hired Dennis Bloss as the new General Manager for WV Wireless, in Charleston, West Virginia. On June 30, 2004, Mr. Bloss terminated Ms. Wells from her position of Administrative Manager, based upon the recommendation of owner and primary decision maker, Linda Martin. Ms. Wells was fifty-two (52) at the time of her termination. Ms. Wells was replaced by Sheila D. Wilson, an employee nearly fifteen years younger with lower performance ratings. Ms.

² WV Wireless was owned by Robert Martin and Linda Martin, husband and wife.

Wells alleged age discrimination with regards to her discharge, all in violation of the "West Virginia Human Rights Act" (hereinafter WVHRA), Chapter 5, Article 11, et seq., West Virginia Code.

Co-Employee, Alfred Nelson

Mr. Alfred Nelson was born on June 28, 1948. Mr. Nelson was also employed by WV Wireless, on or about September 17, 2001, in Charleston, West Virginia. At the time of his hire, Mr. Nelson was fifty-three (53) years of age. Mr. Nelson was continuously thereafter employed by WV Wireless as a technician, until his termination on June 30, 2004 (the same day as Appellant), at the age of fifty-six (56). Mr. Nelson was terminated by his supervisor, who acted in conjunction with Mr. Bloss and co-owner and decision-maker, Robert Martin (husband of Linda Martin). Mr. Nelson was terminated, despite having a higher performance rating than younger and more recently hired co-workers at WV Wireless. Mr. Nelson alleged age discrimination as the basis of his termination, in violation of the "West Virginia Human Rights Act" (hereinafter WVHRA), Chapter 5, Article 11, et seq., West Virginia Code. Mr. Nelson instituted an age discrimination claim in the Circuit Court of Kanawha County, styled *Alfred Nelson v. Key Communications, LLC, et al.*, Civil Action No. 06-C-311. Mr. Nelson's case was settled prior to trial.

Co-Employees Were Similarly Situated

Both Ms. Wells and Mr. Nelson were employed by the defendant, WV Wireless,

in Charleston, West Virginia. Both Ms. Wells and Mr. Nelson were employed within approximately seven (7) months of one another. Both Ms. Wells and Mr. Nelson were terminated on the same date, June 30, 2004. Both Ms. Wells and Mr. Nelson were in a protected class, based upon their respective ages of fifty-two (52) and fifty-six (56). Both Ms. Wells and Mr. Nelson were terminated under the general management of Dennis Bloss and the decision-makers and owners, Linda Martin and Bob Martin. Both Ms. Wells and Mr. Nelson allege that the non-discriminatory explanation proffered by WV Wireless in both cases (i.e., "financial difficulties") was simply pretext for age discrimination.

The trial court excluded all evidence, testimony and argument at trial regarding Mr. Nelson's age discrimination claim. Accordingly, the jury was totally unaware of the discharge of Mr. Nelson and the circumstances surrounding the same. On the other hand, WV Wireless was free to lead the jury to believe that Ms. Wells' discharge was an isolated incident. The jury was never informed that Ms. Nelson' had been discharged under the same or similar circumstances and that he too had made a claim of age-based discrimination against WV Wireless.

III. ASSIGNMENTS OF ERROR

Whether trial court committed plain error by prohibiting Appellant from introducing evidence, testimony and argument to the jury that Alfred Nelson, a non-litigant former employee of Appellee, had contemporaneously experienced age discrimination at the hands of Appellee under the same or similar circumstances as the Appellant?

IV. POINTS AND AUTHORITIES RELIED ON

STANDARD OF REVIEW

"In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syllabus Point 3, State v. Vance, 207 W.Va. 640, 535 S.E.2d 484 (2000).

"[A] trial court's ruling on a motion in limine is reviewed on appeal for an abuse of discretion. See Barlow v. Hester Indus., Inc., 198 W.Va. 118, 130-31, 479 S.E.2d 628, 640-41 (1996); Tennant v. Marion Health Care Found., Inc., 194 W.Va. 97, 113, 459 S.E.2d 374, 390 (1995). Additionally, "we are required to address specific areas of evidence law regarding motions in limine." Tennant, 194 W.Va. at 112, 459 S.E.2d at 389. In that regard, this Court reviews a circuit court's decision on whether "to admit evidence pursuant to Rule 404(b) under an abuse of discretion standard." State v. McGinnis, 193 W.Va. 147, 159, 455 S.E.2d 516, 528 (1994)." McKenzie v. Carroll International Corp., 216 W.Va. 686, 691, 610 S.E.2d 341, 346 (2004).

"To trigger application of the 'plain error' doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness,

integrity, or public reputation of the judicial proceedings. Syllabus Point 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). Syllabus Point 7, Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 480 S.E.2d 817 (1996). Syllabus Point 12, Keesee v. General Refuse Service, Inc., 216 W.Va. 199, 604 S.E.2d 449 (2004).” Syllabus Point 2, Cartwright v. McComas, 672 S.E.2d 297, 223 W.Va. 161 (2008).

"Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. pt. 4, Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976). A party is entitled to a new trial if there is a reasonable probability that the jury's verdict was affected or influenced by trial error. Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374, 194 W.Va. 97 (1995).

V. DISCUSSION OF LAW

Whether trial court committed plain error by prohibiting Appellant from introducing evidence, testimony and argument to the jury that Alfred Nelson, a non-litigant former employee of Appellee, had contemporaneously experienced age discrimination at the hands of Appellee under the same or similar circumstances as the Appellant?

Relevant Evidence of Age Discrimination Should Have Been Admitted

The law in West Virginia is clear that non-litigant employees may testify about

age discrimination they experienced at the hands of their employers. In Syllabus Point 2 of McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004), the West Virginia Supreme Court of Appeals held: "In an action brought 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." (emphasis added). In that case, this Court found "that it was reversible error for the trial court to preclude Mr. McKenzie from calling witnesses to testify about their own alleged experiences with age discrimination by Carroll." Id., at Syl. Pt. 1.

In McKenzie, supra, 216 W.Va. at 690, 610 S.E.2d at 345, the Court pointed out that federal courts admit such testimony because "[t]he testimony of employees, other than plaintiff, is relevant in assessing the employer's discriminatory intent if the employees' testimony can logically or reasonably be tied to the adverse employment action taken against the plaintiff." Minshall v. McGraw Hill Broad. Co., Inc., 323 F.3d 1273, 1285 (10th Cir.2003). See Stumph v. Thomas & Skinner, Inc., 770 F.2d 93, 97-98 (7th Cir.1985) (permitting plaintiff to call two witnesses to testify that they were discriminated against by employer because of their age); Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir.1990) ("As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent."); Kneisley v. Hercules Inc., 577 F.Supp. 726, 731 (D.Del.1983)

(allowing plaintiff to call four former employees to testify that they were victims of age discrimination by employer).

The Court in McKenzie, *supra*, 216 W.Va. at 691, 610 S.E.2d at 346, also noted that federal courts admit such evidence of other employees because the "[t]he probative value of [evidence of] the employer's [discrimination] of other ... employees is especially high 'because of the inherent difficulty of proving state of mind.' " ³ Proving intent, motive and state of mind of an employer is nearly always very difficult for a plaintiff in any discrimination case. McKenzie, *supra*. Given this difficulty in employment discrimination cases, relevant evidence should be welcomed.

The Court in McKenzie, *supra*, also noted that the relevant evidence is actually

³ Citing, Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir.1995) (quoting Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1133 (4th Cir.1988)). See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1086 (3rd Cir.1996) ("Evidence of discrimination against other employees ... is relevant to 'whether one of the principal non-discriminatory reasons asserted by [an employer] for its actions was in fact a pretext for ... discrimination.' " (quoting Glass v. Philadelphia Elec. Co., 34 F.3d 188, 194. (3rd Cir.1994))); Harpring v. Continental Oil Co., 628 F.2d 406, 409 (5th Cir.1980) ("[T]he testimony of ... similarly situated employees and the reasons for their discharge are relevant in proving a pattern and practice of age discrimination."); Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1104 (8th Cir.1988) ("Evidence of prior acts of discrimination is relevant to an employer's motive even where this evidence is not extensive enough to establish discriminatory animus itself."); Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir.1995) ("Evidence of [employer's] sexual harassment of other female workers may be used ... to prove his motive or intent in discharging [plaintiff]."); Stair v. Lehigh Valley Carpenters Local Union No. 600 of United Bhd. of Carpenters & Joiners of America, 813 F.Supp. 1116, 1119 (E.D.Pa.1993) ("[E]vidence of past conduct or prior incidents of alleged discrimination has a tendency to make the existence of a fact that is of consequence--the defendant's discriminatory motive or intent--more probable than it would be without the evidence, and therefore such evidence is, as a general rule, relevant."); Herber v. Boatmen's Bank of Tennessee, 781 F.Supp. 1255, 1259 n. 3 (W.D.Tenn.1991) ("[E]vidence of discrimination against other employees may on occasion be probative of whether a defendant's employment action against a plaintiff employee was motivated by intentional discrimination."); Buscemi v. Pepsico, Inc., 736 F.Supp. 1267, 1271 (S.D.N.Y.1990) ("[T]estimony or other evidence regarding discriminatory treatment of other employees would be probative of a discriminatory termination policy such as the one alleged here."); LaDolce v. Bank Admin. Inst., 585 F.Supp. 975, 977 (N.D.Ill.1984) ("[E]vidence or testimony regarding [employer's] prior discriminatory conduct with respect to employees other than [plaintiff] should [not] be excluded. Such evidence might support an inference of discrimination and is clearly relevant.").

admitted pursuant to Rule 404(b) of the *West Virginia Rules of Civil Procedure*.⁴ The Court made clear, "Therefore, we hold that in an action brought 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.***" McKenzie, *supra*, 216 W.Va. at 691, 610 S.E.2d at 346. (emphasis added).

Appellant acknowledges that "[t]here are, however, limitations to the admissibility of such evidence. Incidents that are too remote in time or too dissimilar from a plaintiff's situation are not relevant." Stair v. Lehigh Valley Carpenters Local Union No. 600 of United Bhd. of Carpenters & Joiners of America, 813 F.Supp. 1116, 1119 (E.D.Pa.1993)." McKenzie, *supra*, 216 W.Va. at 691-92, 610 S.E.2d at 346-47. Although the Appellees contend the two discharges were too dissimilar, they were not. The two employee discharges in the case hereinbelow occurred on the exact same date, therefore Alfred Nelson's discharge is clearly not too remote in time. The two discharges occurred for the same purported reason (financial hardship), although in both cases younger employees with lower job performance ratings were retained. Although the Appellee attempts to separate the decision-makers in order to establish

⁴ Rule 404(b) provides, in part, that

"[e]vidence of other ... 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[.]"

dissimilarity, it is simply disingenuous to argue that the husband-owner termination of one employee and the wife-owner termination of the other employee are too dissimilar because it was not the same decision-maker in both discharges. Moreover, the standard is not exact likeness, it is *similarity*. The similarity in the motive and method are profound in this case.

Alfred Nelson Evidence was Relevant

The Alfred Nelson evidence was relevant. Rule 401 of the *West Virginia Rules of Evidence* defines “relevant evidence” “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action [i.e., intent, motive or state of mind of the employer] more probable or less probable than it would be without the evidence.” The Appellant was prohibited by the trial court from presenting the following “relevant” evidence at trial:

- a co-employee (Alfred Nelson)
- working in the same location (Charleston, WV)
- in the same protected class (age)
- of approximately the same age (50s)
- was simultaneously terminated (same date – June 30, 2004)
- under the same or similar circumstances (younger employee with lower performance ratings retained)
- for the same pretextual reason (financial difficulties)
- who formerly alleged, sued and settled age discrimination case

The Alfred Nelson evidence was admissible. Rule 402 of the *West Virginia Rules of Evidence* provides: “All relevant evidence is admissible,” Clearly, the above-cited evidence is relevant to Appellant’s complaint of age discrimination against the Appellee, in that it has a “tendency” to make it “more probable” that Appellant’s claim of

age discrimination against Appellee is factual “than it would without the evidence.”

Appellees failed to meet their burden of proof to exclude the Alfred Nelson evidence. The burden of excluding *relevant* evidence shifts to the defendants, pursuant to Rule 403 of the West Virginia Rules of Evidence. Specifically, Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Thus, by arguing to the trial court that the Alfred Nelson evidence should be excluded under Rule 403, the Appellees have acknowledged that the evidence is *relevant*. As a result, the Appellees must demonstrate that the probative value of the *relevant* evidence is outweighed by one of the following:

- the danger of unfair prejudice
- confusion of the issues
- misleading the jury
- by considerations of undue delay
- waste of time
- needless presentation of cumulative evidence

The only substantive Rule 403 argument advanced by the Appellees in their *motion in limine* was that the “[d]efendants will be forced to respond to the merits of such allegations and will, essentially be forced to create a separate trial on the collateral, non-probative issue.” While difficult to decipher, it appears that that defendants believe the probative value of the evidence is outweighed by a “waste of

time.” While the defendants may deem it a waste of time for Appellant to demonstrate at trial that other employees of Appellee claimed that it had engaged in age-based discrimination, Appellant asserts otherwise. Indeed, Appellant asserts that this relevant evidence is highly probative and will, at a minimum, tend to prove WV Wireless’ motive, intent and state of mind with respect to the age-based discriminatory terminations of two employees at the same location on the same date for the same pretextual reasons.

Jury Should Determine “Similarly Situated”

“A similarly situated determination is necessarily factual in nature. See, Graham v. Long Island R.R., 230 F.3d 34, 39 (2nd Cir.2000) (“Whether two employees are similarly situated ordinarily presents a question of fact for the jury.”); George v. Leavitt, 407 F.3d 405, 414-15 (D.C.Cir.2005) (quoting Graham); Mandell v. County of Suffolk, 316 F.3d 368, 379 (2nd Cir.2003).” Pritt v. West Virginia Div. of Corrections, 630 S.E.2d 49, 218 W.Va. 739 (2006).

Moreover, in Mayflower Vehicle Systems, Inc. v. Cheeks, 629 S.E.2d 762, 774-75, 218 W.Va. 703, 715-16 (2006), this Court established guidelines to be used when examining whether employees are similarly situated, as follows:

[I]t must be considered whether the employees were "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir.1996), quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir.1992). The test is whether a "prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989). Exact correlation between employees' cases is not necessary;

the proponent of the evidence must only show that the cases are "fair congeners." *Id.* . . . [A] finder of fact must look at all of the factors relevant to the comparison

In this instance, the Appellee seeks to impose a standard that requires the Appellant's case and that of her co-employee, Alfred Nelson, have ***exact correlation***. However, this is not the standard. This Court has clearly found that Appellant is only required to show that the cases are "fair congeners." It is the jury (fact finder) who must look at all of the factors relevant to the comparison.

Trial Court Committed Plain Error

The Circuit Court of Kanawha County committed plain error when it excluded the Alfred Nelson evidence from the jury. "To trigger application of the 'plain error' doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syllabus Point 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). Syllabus Point 7, Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 480 S.E.2d 817 (1996). Syllabus Point 12, Keese v. General Refuse Service, Inc., 216 W.Va. 199, 604 S.E.2d 449 (2004)." Syllabus Point 2, Cartwright v. McComas, 672 S.E.2d 297, 223 W.Va. 161 (2008).

"In an action brought 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.” Syllabus Point 2, McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004). “[A]n error may be plain under existing law, which means that the plainness of the error is predicated upon legal principles that the litigants and trial court knew or should have known at the time of the prosecution [of the case] Syllabus Point 6, in part, State v. Myers, 204 W.Va. 449, 513 S.E.2d 676 (1998).” Syllabus Point 3, Cartwright v. McComas, 672 S.E.2d 297, 223 W.Va. 161 (2008).

In view of this Court’s holding in McKenzie, *supra*, (which was brought to the attention of the trial court prior to the trial conducted hereinbelow), it was reversible error for the trial court to preclude Appellant from calling Alfred Nelson as a witness to testify about his own alleged experiences with age discrimination by Appellee. By excluding the evidence and testimony of Alfred Nelson, Appellee was free to lead the jury into believing the termination of Appellant was an isolated incident and that it had no nexus to age-based discrimination.

The jury in this case should have heard evidence and testimony from Alfred Nelson that he had experienced age-based employment discrimination at the hands of the Appellee. Mr. Nelson’s testimony would have provided the jury with evidence that he had experienced the same type of employment discrimination that Appellant had alleged; that he was subjected to the age-based discriminatory conduct at the same time as the Appellant; and that he had been subjected to the age-based discriminatory

conduct under very similar circumstances as that experienced by the Appellant.

A party is entitled to a new trial if there is a reasonable probability that the jury's verdict was affected or influenced by trial error. Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374, 194 W.Va. 97 (1995). It is certainly reasonable to conclude that Appellant's jury was affected or influenced by the exclusion of the Alfred Nelson evidence, in that such evidence would prove or tend to prove that Appellant's claim of age-based discrimination was meritorious.

VI. CONCLUSION

All relevant evidence is admissible. Nonlitigant employees may testify about age discrimination they experienced at the hands of their employers. McKenzie v. Carroll International Corp., 216 W.Va. 686, 610 S.E.2d 341 (2004). Both state and federal courts admit such testimony on the grounds that the testimony of employees, other than plaintiff, is relevant in assessing the employer's discriminatory intent if the employees' testimony can logically or reasonably be tied to the adverse employment action taken against the plaintiff. The probative value of evidence of the employer's discriminatory conduct toward other employees is especially high because of the inherent difficulty of proving state of mind. The defendants' argument that the admission of such relevant evidence is a waste of time is baseless, and is nothing more than an effort to keep the truth from the jury.

The trial court committed plain error by excluding evidence expressly authorized by the West Virginia Supreme Court of Appeals. A party is entitled to a new trial if there is a reasonable probability that the jury's verdict was affected or influenced by trial error. Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374, 194 W.Va. 97 (1995). The trial court should have granted Appellant a new trial, pursuant to West Virginia Code § 56-6-28 and Rule 59 of the *West Virginia Rules of Civil Procedure*.

VII. REQUEST FOR RELIEF

The Appellant respectfully requests that this Court reverse the Circuit Court of Kanawha County and remand the action with directions that it be reinstated on the docket of the lower court for a new trial.

MARY J. WELLS
By Counsel



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**IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**

MARY J. WELLS,

**Appellant and
Plaintiff Below,**

v.

**KEY COMMUNICATIONS, L.L.C.,
d/b/a/ West Virginia Wireless,**

**Appellee and
Defendant Below.**

CERTIFICATE OF SERVICE

I, George B. Morrone III, hereby certify that I have served a true and exact copy of the foregoing **APPELLANT'S BRIEF** by U.S. Mail, postage prepaid, to counsel of record this **16th day of February, 2010**, as follows:

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EXHIBITS

ON

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CLERK'S OFFICE