

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

**MARY J. WELLS,**

**Appellant,**

**v.**

**DOCKET NO. 091635**

35447

**KEY COMMUNICATIONS, L.L.C.,  
d/b/a WEST VIRGINIA WIRELESS,**

**Appellee.**

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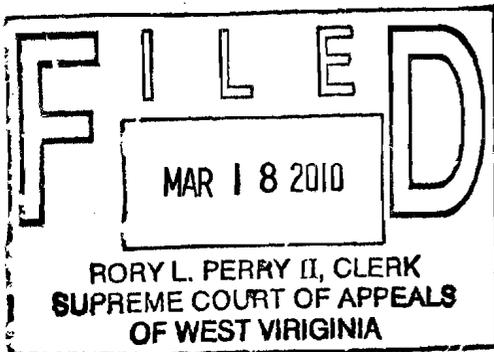
**FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
CIVIL ACTION NO. 06-C-312**

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**BRIEF OF APPELLEE KEY COMMUNICATIONS, L.L.C.,  
d/b/a WEST VIRGINIA WIRELESS**

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## **I. INTRODUCTION**

This Court should affirm the decision of the Circuit Court because the Circuit Court did not abuse its broad discretion in excluding evidence of an allegedly age-based employment action taken against Alfred Nelson (a non-party and Appellant's former co-worker) by an unrelated decision-maker in an unrelated department. First, the Circuit Court properly exercised its broad discretion in finding, under W.Va.R.E. 401 and 402, that the Nelson evidence was not relevant because Mr. Nelson worked in an entirely separate department from Appellant and because the person(s) who decided to terminate Mr. Nelson's employment was not the person(s) who decided to terminate Appellant's employment. Recent precedent of this Court, and several federal courts, is consistent on this issue: unless evidence of discrimination by another employee can logically or reasonably be tied to the adverse employment action at issue in the case – and it cannot here – such evidence is not relevant in assessing discriminatory intent and should not be admitted at trial. Second, the Circuit Court properly exercised its broad discretion by excluding the Nelson evidence based on its determination, under W.Va.R.E. 403, that such evidence would be unfairly prejudicial, confusing and/or wasteful of time. It would have been unfairly prejudicial and confusing to the jury to allow Appellant to attempt to piggy-back on a claim that was wholly unconnected to the termination of her employment. Moreover, the admission of the Nelson evidence would have required a lengthy mini-trial on the unique circumstances involving the termination of Mr. Nelson's employment – in a different department and by a different person(s) – and would have wasted time.

The Circuit Court did not abuse its discretion in excluding the Nelson evidence, and this Court should not second-guess the sound determinations that the Circuit Court made based on its first-hand knowledge of the facts and underlying proceedings. This Court should affirm the Circuit Court's decision.

## II. STANDARD OF REVIEW

Appellant appeals from the Circuit Court's order denying her motion to award a new trial. Appellant acknowledges in her Appeal Brief that this Court "review[s] the rulings of the circuit court concerning a new trial and its conclusions as to the existence of reversible error under an abuse of discretion standard, and [it] review[s] the circuit court's underlying factual findings under a clearly erroneous standard." Williams v. Charleston Area Med. Ctr., 215 W.Va 15, 18, 592 S.E.2d 794, 797 (2003). The rulings of the circuit court regarding a motion for new trial are "entitled to great respect and weight." Id.

Similarly, "[t]he West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard." Reynolds v. City Hosp., Inc., 207 W.Va. 101, 109, 529 S.E.2d 341, 349 (2000); see also Jenkins v. CSX Transportation, Inc., 220 W.Va. 721, 649 S.E.2d 294 (2007). Specifically, this Court has determined that, in order to reverse a lower court's ruling on relevancy (under Rules of Evidence 401 and 402), an abuse of discretion must be shown. Miller v. Lambert, 196 W.Va. 24, 467 S.E.2d 165 (1995). Likewise, the balancing test (under Rule of Evidence 403), providing that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse. Hatcher v. McBride, 221 W.Va. 5, 650 S.E.2d 104 (2006); see also Skaggs v. Elk Run Coal Co., 198 W.Va. 51, 479 S.E.2d 561 (1996) ("[w]hen the trial court already has

balanced prejudice and probativeness in making an evidentiary ruling, this Court is especially reluctant to intervene”).<sup>1</sup>

“Under the abuse of discretion standard, [this Court] will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.” Graham v. Wallace, 214 W.Va. 178, 182, 588 S.E.2d 167, 171 (2003) (internal citations omitted). This Court also has noted that “[o]nly where we are left with a firm conviction that an error has been committed may we legitimately overturn a lower court's discretionary ruling. ‘Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed.’” Covington v. Smith, 213 W.Va. 309, 322-23, 582 S.E.2d 756, 769-70 (2003) (internal citations omitted).

### **III. NATURE OF PROCEEDINGS BELOW**

Appellant filed the underlying action against her supervisor, Dennis Bloss,<sup>2</sup> and her employer, West Virginia Wireless,<sup>3</sup> in February 2006, by filing a Complaint in the Circuit Court of Kanawha County. Appellant alleged that Mr. Bloss and West Virginia Wireless discriminated against her based on her age by eliminating her position of Administrative Manager and terminating her employment. As Appellant admits, Mr. Bloss (West Virginia Wireless' General Manager) terminated Appellant from her position of Administrative Manager, based on the

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<sup>1</sup> A trial court's ruling on a motion *in limine* also 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).

<sup>2</sup> On the first day of trial, and after the Circuit Court had ruled in limine that alleged evidence involving the termination of Mr. Nelson's employment would not be admitted at trial, Appellant voluntarily dismissed Dennis Bloss, thereby leaving West Virginia Wireless as the sole Defendant in this matter.

<sup>3</sup> The “employer” named in the Complaint is Key Communications, L.L.C., d/b/a West Virginia Wireless, and the defendants (and an intervenor, PCM, Inc.) have maintained throughout, although overruled by the Circuit Court, that her employer was actually PCM, Inc. For the sake of simplicity, we will refer to her employer as West Virginia Wireless.

recommendation of Linda Martin (Executive Vice President for PC Management), the primary decision-maker in connection with the termination of Appellant's employment.

During the course of trial, the Circuit Court allowed Appellant to present evidence of other alleged age bias on the administrative/sales side of the business (the side of the business on which Appellant worked) by Ms. Martin. Specifically, the Circuit Court allowed Appellant to present evidence and/or arguments that Ms. Martin discharged Bob Wilson (West Virginia Wireless' previous General Manager) and hired Mr. Bloss (to replace Mr. Wilson) based on age instead of work performance or abilities. The Circuit Court also permitted Appellant to present evidence regarding the general makeup and ages of employees working on the administrative/sales side of the business at West Virginia Wireless. The Circuit Court permitted Appellant to argue, based on this evidence, that the ages of workers comprising the administrative/sales workforce could compel the jury to infer age discrimination in the part of the business in which Appellant worked and which Mr. Bloss and Ms. Martin managed. The Circuit Court, however, refused to allow Appellant to present evidence of an allegedly biased decision made against Alfred Nelson (a non-party and Appellant's former co-worker) because Mr. Nelson was employed in a different department – the separate technical side of the business – and was terminated by a different person(s). The Circuit Court ruled, and rightfully so, that evidence relating to Mr. Nelson's termination was not relevant, and, even if relevant, was unduly prejudicial and would confuse and mislead the jury.<sup>4</sup>

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<sup>4</sup> At the time the Circuit Court ruled on the motion *in limine* to exclude the Nelson evidence, Appellant alleged that her supervisor, Mr. Bloss, was the person responsible for the alleged age discrimination against her. In Mr. Nelson's Complaint, he alleged that his supervisor, James Williams (and not Mr. Bloss or Robert Martin, as Appellant now alleges), was the person who allegedly discriminated against him because of his age. It is undisputed that Williams did not play any role in the decision to terminate Appellant's employment.

After a five day trial, the jury returned a verdict for West Virginia Wireless. The propriety of the Circuit Court's refusal to grant Appellant a new trial as a result of the exclusion of the "Nelson evidence" is the sole basis for this appeal.

#### **IV. STATEMENT OF THE CASE**

Although Appellant designates the whole record in support of her appeal, and despite the fact that West Virginia Wireless raised the issue of Appellant's misstatement of several key facts in its Response to her Petition for Appeal, Appellant continues to fail to point this Court to any evidence within the record that supports her statement of the facts. Significantly, several of the "facts" included in Appellant's Brief continue to misstate the record evidence and completely disregard the findings of fact made by the Circuit Court in the Order denying Appellant's Motion for A New Trial.<sup>5</sup> As mentioned above, the standard of review on the Circuit Court's underlying factual findings is a clearly erroneous standard. Appellant has not – and cannot – meet this standard (and, has apparently conceded her inability to meet this standard by not even making an effort to direct this Court to record evidence supporting facts which are crucial to her appeal).<sup>6</sup>

#### **The Parties**

West Virginia Wireless was a start-up wireless communications business in West Virginia that provided cell phone services in West Virginia and portions of Ohio, Kentucky and Virginia.

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<sup>5</sup> Significantly, Appellant continues to misstate the record and completely disregard the Circuit Court's finding of fact that James Williams and/or Ron Doyle (and not Robert Martin, Linda Martin and/or Dennis Bloss) were involved in the decision to terminate Alfred Nelson.

<sup>6</sup> In consideration of this Court's time and the page limitations set by this Court's Rules of Appellate Procedure, West Virginia Wireless has not provided this Court with citations to evidence in the record for each "background" fact; however, it has provided this Court with citations to evidence in the record on several key facts that Appellant misrepresents in her Brief (as those facts – and Appellant's misrepresentation of those facts – are significant to the issue raised in this Appeal).

On April 8, 2002, Appellant was hired and assigned to work at West Virginia Wireless in the position of Office Administrator. At the time of her hire, Appellant was 50 years of age.<sup>7</sup> In October 2002, at the age of 51, Appellant was promoted to the position of Administrative Manager. In both positions, Appellant worked on the administrative/sales side of the business as an assistant to the General Manager, until her position was eliminated and her employment was terminated, on June 30, 2005.

Apart from its office-based administrative/sales function, West Virginia Wireless also had an operations/technical department that dealt with the technical aspects of the business, such as maintenance and repair of the wireless facilities in the field. Alfred Nelson (a non-party and Appellant's former co-worker) worked as a field technician on the operations/technical side of the business. As discussed further below, Mr. Nelson was discharged by James Williams and/or Ron Doyle, not Dennis Bloss or Linda Martin who decided to eliminate Appellant's position (and not by Robert Martin).

#### **West Virginia Wireless' Financial Difficulties**

By late 2003, West Virginia Wireless was experiencing financial difficulties, was not profitable, and was not meeting the objectives set forth in its operating budget. As a result of these difficulties, a task team comprised of some of the company's leadership determined that, in order to reduce costs but still maintain efficiency and try to improve sales, several changes would need to be made at West Virginia Wireless. Among other things, the task team determined that a reduction in force was required which would eliminate one position on the administrative/sales side of the business and one position on the operations/technical side of the business.

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<sup>7</sup> Appellant's date of birth is August 18, 1951.

**The Decision to Eliminate A Sales/Administrative Position Resulting In Appellant's Termination**

Linda Martin, who is one year younger than Appellant,<sup>8</sup> spent several weeks at West Virginia Wireless overseeing a number of changes and evaluating its staff. During this time, Ms. Martin had the opportunity to work extensively with Appellant, to observe Appellant's job duties and performance, and to evaluate which duties could most easily be absorbed by other personnel. Based on her observations and evaluation of staffing at West Virginia Wireless, Ms. Martin recommended to Mr. Bloss that West Virginia Wireless eliminate the Administrative Manager position (which was Appellant's position). As Appellant concedes, Ms. Martin was the primary decision-maker in regard to the decision to eliminate the Administrative Manager position and the resulting termination of Appellant's employment.

**The Decision to Eliminate An Operations/Technical Position Resulting In Mr. Nelson's Termination**

Alfred Nelson was employed by West Virginia Wireless as a field technician, which was part of the operations/technical side of the business. Mr. Nelson served as one of three field technicians at West Virginia Wireless. Tracy Clark and Rob Dozier were the other two field technicians.

James Williams (who served as the West Virginia Wireless Network Operations Manager) was charged with identifying the position and/or the person to be eliminated on the operations/technical side of the business. (See Williams' Affidavit, attached hereto as Exhibit A and Williams' Depo. Transcript, p 43, ln. 2-4 and p. 47-49, attached hereto as Exhibit B). In evaluating the operations/technical workforce, Mr. Williams determined that the position to be eliminated needed to come from one of the three field technician positions. See Id. After discussing the need to eliminate one of the three field technician positions with Ron Doyle (the

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<sup>8</sup> Linda Martin's date of birth is September 28, 1952.

field technicians' immediate supervisor), Mr. Williams decided to eliminate Mr. Nelson's position and terminate his employment. (See Id.; see also Bloss' Depo. Transcript, p. 51, ln. 20-23, pg. 57. ln. 4-7, attached hereto as Exhibit C).<sup>9</sup>

After his termination, Mr. Nelson filed a Complaint in the Circuit Court of Kanawha County, styled Alfred Nelson v. Key Communications, LLC d/b/a West Virginia Wireless and James Williams, Case No. 06-C-311. In his Complaint, Mr. Nelson alleged that Mr. Williams' decision to terminate his employment was based on age discrimination.<sup>10</sup> Defendants denied Mr. Nelson's allegations. The parties settled Mr. Nelson's case.

### **West Virginia Wireless' and Dennis Bloss' Motion In Limine**

Prior to trial, West Virginia Wireless and Mr. Bloss filed a motion *in limine* to exclude evidence about any alleged discrimination against Mr. Nelson. (See Motion In Limine To Exclude Evidence Regarding Alleged Discrimination Against Other Employee; see also Reply in Further Support of Defendants' Motion in Limine to Exclude Evidence Regarding Alleged Discrimination Against Other Employee). The motion argued, inter alia, that alleged discrimination against Mr. Nelson – who worked on a different side of the business from Appellant and who was supervised and discharged by different supervisors than Appellant – was not relevant. Alternatively, the motion argued that the unfair prejudice, confusion of the issues,

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<sup>9</sup> During the course of this litigation, in addition to the Williams Affidavit and Deposition Transcript and the Bloss Deposition Transcript, West Virginia Wireless provided the Circuit Court with Robert Martin's deposition transcript. Mr. Martin testified that he did not have any role in Mr. Nelson's termination. (Robert Martin's Depo. Transcript, p. 27, ln. 8-10, attached hereto as Exhibit D). West Virginia Wireless also provided the Circuit Court with Linda Martin's deposition transcript wherein Ms. Martin testified that she did not have any role in the decision to terminate Mr. Nelson. (Linda Martin's Depo. Transcript, p. 9, ln. 11-14, attached hereto as Exhibit E). There is NO evidence to the contrary with respect to this testimony. Appellant's entire appeal completely ignores the uncontradicted facts that Appellant and Mr. Nelson: (1) worked in entirely different departments, and (2) were terminated by completely different people. Further, Appellant has made the patently false statement that Robert Martin, Linda Martin's husband, was involved in the decision to terminate Mr. Nelson's employment and the patently absurd argument that a decision by the husband is the same as a decision by the wife. Appellant goes to these lengths in an attempt to avoid the obvious – completely different decisions by completely different decision-makers are not inter-related.

<sup>10</sup> Accordingly, even Mr. Nelson related his termination to Mr. Williams (and not Mr. Martin, Ms. Martin and/or Mr. Bloss).

waste of time and undue delay which would result from admitting such evidence, under the circumstances present in this case, substantially outweighed any probative value.

On June 11, 2009, after the issue was fully briefed by both parties and after hearing oral arguments by both parties, the Circuit Court granted Defendants' Motion *In Limine* and ruled that Appellant was prohibited from introducing any testimony, evidence or arguments of counsel regarding alleged discrimination against Mr. Nelson because such evidence was: (1) not relevant and (2) unfairly prejudicial. (See Order Granting Defendants' Motion *In Limine* To Exclude Evidence Regarding Alleged Discrimination Against Other Employee).

#### **Appellant's Motions in Limine**

On June 10, 2009, Appellant filed a Motion *In Limine* To Exclude Any Evidence, Testimony Or Counsel Argument Regarding Termination of Alfred Nelson and a Motion *In Limine* To Exclude Any Evidence, Testimony Or Counsel Arguments That Defendants Retained Any Employees Age 40 or Over. During the course of arguments on Appellant's Motions *In Limine*, the Circuit Court ruled that both parties would be permitted to present evidence, testimony and arguments regarding employees who worked on the administrative/sales side of the business at West Virginia Wireless, i.e., employees who worked under the general supervision of Linda Martin and/or Dennis Bloss. The Circuit Court further ruled that evidence regarding employees who worked on the technical/operations side of the business (under the supervision of other managers) would be excluded.

Consistent with those rulings, Appellant presented evidence and arguments at trial that Ms. Martin made the decision to discharge former General Manager Bob Wilson and hire Dennis Bloss based on age instead of work performance or abilities. Appellant also presented evidence regarding the overall makeup of the administrative/sales side of the business at West Virginia Wireless and argued that the jury should infer age discrimination from the fact that the overall

makeup of the administrative/sales side of the business was largely comprised of employees under 40 years of age. Contrary to the contention in her “Statement of Facts,” the Circuit Court did not make Appellant rely solely on an “isolated incident” relating to her own termination but instead permitted Appellant to admit into evidence information regarding any and all other employees as long as those employees’ situations were logically or reasonably tied to Appellant’s situation. In the context of this case, the Circuit Court clearly understood the relevance and lack of relevance of the evidence presented to it.

### **Jury Trial and Verdict**

The jury trial began on June 15, 2009. Appellant’s trial theme was that the poor performance of the sales department at West Virginia Wireless demonstrated West Virginia Wireless’ alleged discriminatory intent against her. Specifically, Appellant argued that West Virginia Wireless’ poor sales record somehow demonstrated that its retention of Sheila Wilson (a younger sales manager who Appellant claimed was the person who replaced her) and hiring of Dennis Bloss (a younger person who replaced Bob Wilson) was based on age instead of on work performance and/or abilities. Appellant also argued that Linda Martin, who was virtually the same age as Appellant, was the person responsible for all this alleged age discrimination.<sup>11</sup>

On June 22, 2009, the jury returned a verdict in favor of West Virginia Wireless. A final order was entered on the jury’s verdict on July 15, 2009. (See Final Order Entering Judgment).

### **Appellant’s Post Trial Motion For A New Trial**

On July 16, 2009, Appellant filed A Motion for New Trial. Both parties fully briefed the issues raised in that motion, and, on September 2, 2009, the Circuit Court conducted a hearing on that motion. (See Defendant’s Response To Plaintiff’s Motion For New Trial; see also Defendant’s Surreply To Plaintiff’s Motion For A New Trial). Thereafter, on September 22,

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<sup>11</sup> Please note that Ms. Martin played no role in the decision to terminate Mr. Nelson’s employment.

2009, the Circuit Court entered an Order Denying Plaintiff's Motion for a New Trial. (See Order Denying Plaintiff's Motion For A New Trial).

In that Order, the Circuit Court held – after presiding over the five day trial and being fully aware of the role that the evidence in question would have played – that “the evidence relating to Mr. Nelson’s termination was properly excluded by this Court because such information was not relevant, unduly prejudicial and would have confused and misled the jury.” Moreover, the Circuit Court held that “the exclusion of the Nelson evidence did not affect any of Plaintiff’s substantial rights and was consistent with substantial justice.” **In reaching that decision, the Circuit Court adopted the following findings of fact:**

- 1. Plaintiff worked on the Administrative/Sales side of the business at West Virginia Wireless.**
- 2. Alfred Nelson worked on the Operations side of the business.**
- 3. Linda Martin and/or Dennis Bloss were involved in the decision to terminate Plaintiff.**
- 4. James Williams and/or Ron Doyle were involved in the decision to terminate Alfred Nelson.**
- 5. Any alleged discrimination against Nelson was dissimilar from Plaintiff’s situation.**

See September 22, 2009 Order Denying Plaintiff’s Motion For A New Trial.

**Appellant’s Misstatement Of Key Facts In Her Appeal Brief**

As mentioned above, several of the “facts” Appellant claims in her Brief do not present an accurate portrayal of the evidence. Moreover, several of the “facts” set forth in Appellant’s Brief are inconsistent with the specific findings of fact that the Circuit Court made in the Order denying Plaintiff’s Motion for a New Trial, which were based on uncontradicted facts in the

record. For instance, in addition to numerous other mischaracterizations of the record, Appellant makes the following unsupported factual claims in her Appeal Brief: (1) “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),” (2) “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,” and (3) the husband-owner of West Virginia Wireless (i.e., Robert Martin) terminated Mr. Nelson. (Appellant’s Appeal Brief, p. 5, 6, 12).<sup>12</sup> Not only are these “statements of fact” in complete disregard of the findings of fact that the Circuit Court made in the Order denying Appellant’s Motion for New Trial, but Appellant has not – and cannot – direct this Court to any evidence in the record that would permit this Court to find that the factual findings that the Circuit Court made in the Order Denying Plaintiff’s Motion for A New Trial were “clearly erroneous” or implausible in light of the record viewed in its entirety.<sup>13</sup> Appellant’s invention of facts in an attempt to convince this Court to remand the case for a new trial should not be rewarded. This Court should affirm the decision of the Circuit Court and deny Appellant’s request for a new trial.

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<sup>12</sup> Likewise, Appellant misstates that she and Mr. Nelson were terminated under the same or similar circumstances and for the same reason. Instead, Ms. Martin made the decision to terminate Appellant based upon her review of the staff and needs of the administrative/sales side of the business. Mr. Williams, with feedback from Mr. Doyle, made the decision to terminate Mr. Nelson based upon their review of the staff and needs of the operations/technical side of the business.

<sup>13</sup> This Court has defined the “clearly erroneous standard,” by stating that a “finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” Weaver v. Ritchie, 197 W.Va. 690, 478 S.E.2d 363, fn 11 (1996).

V. CONCISE STATEMENT TO MEET APPELLANT'S  
ASSIGNMENT OF ERROR

**The Circuit Court Did Not Abuse Its Broad Discretion In Excluding Testimony About Alleged Discrimination Against Mr. Nelson Because Such Evidence Was Not Relevant, Since It Was Unrelated To Appellant's Situation, AND Any Minimal Probative Value of Such Evidence Was Outweighed By Concerns Of Undue Prejudice, Waste Of Time, and Confusion Of The Issues.**

VI. LAW AND ARGUMENT

**A. The Circuit Court Did Not Abuse Its Broad Discretion In Excluding The Nelson Evidence Because It Was Unrelated To Appellant And Did Not Involve The Same Decision-Makers Or Department And, Therefore, Was Not Relevant.**

The Circuit Court's holding that the Nelson evidence was inadmissible rests soundly on common sense. Like any corporation, West Virginia Wireless can only act through agents. It is uncontested that Appellant was terminated by Mr. Bloss based on the recommendation of Ms. Martin, who was the primary decision-maker in this regard, after having spent months on-site observing Appellant's work, interacting with her, and assessing which position could most easily be eliminated. Accordingly, in order to prevail, Appellant needed to prove that Ms. Martin's and/or Mr. Bloss' decision to discharge Appellant was tainted by age bias. The alleged bias of a different supervisor/decision-maker, in a different department, against a different employee, was in no way relevant to the issue of Ms. Martin's and/or Mr. Bloss' alleged bias against Appellant.

The Circuit Court's finding of facts – and the undisputable evidence in the record – demonstrates that Mr. Nelson was terminated by Mr. Williams and/or Mr. Doyle. Neither Mr. Williams nor Mr. Doyle had any role or authority in the administrative/sales side of West Virginia Wireless. Evidence purporting to show that Mr. Williams and/or Mr. Doyle discriminated against Mr. Nelson in terminating his employment with West Virginia Wireless would not add any clarity to the issue of whether Ms. Martin and/or Mr. Bloss discriminated against Appellant. Evidence regarding Mr. Nelson's termination would not shed any light on

Ms. Martin's and/or Mr. Bloss' motive, intent or purpose with respect to the elimination of Appellant's position or termination of her employment.

Appellant, hoping to connect the two separate and distinct employment decisions, misinforms this Court that Dennis Bloss and Robert Martin (Linda Martin's husband) were involved in Mr. Nelson's termination. The Circuit Court specifically rejected this allegation, and the record does not support it. The Circuit Court specifically adopted the following contrary findings of fact:

1. Plaintiff worked on the Administrative/Sales side of the business at West Virginia Wireless.
2. Alfred Nelson worked on the Operations side of the business.
3. Linda Martin and/or Dennis Bloss were involved in the decision to terminate Plaintiff.
4. James Williams and/or Ron Doyle were involved in the decision to terminate Alfred Nelson.
5. Any alleged discrimination against Nelson was dissimilar from Plaintiff's situation.

See September 22, 2009 Order Denying Plaintiff's Motion for a New Trial.

Appellant's continued invention of facts in an attempt to convince this Court of a relationship between the decision-maker(s) who discharged Appellant and the decision-maker(s) who discharged Mr. Nelson only highlights the weakness of her position. By continuing to argue facts that are not supported by the record (and which are directly contrary to the findings of fact made by the Circuit Court), Appellant has made clear that she cannot succeed on her Appeal based on the facts in the record.

There simply is no evidence in the record that logically or reasonably ties the decision to terminate Appellant to the decision to terminate Mr. Nelson. It is clear that any testimony or evidence regarding Mr. Nelson would not have related to the issue of whether Appellant was subjected to discrimination by Ms. Martin and/or Mr. Bloss. Accordingly, the Circuit Court properly excluded evidence regarding any alleged discrimination against Mr. Nelson.

1. **The Circuit Court Properly Excluded The Nelson Evidence Because It Was Unrelated To Appellant's Situation.**

Under West Virginia Rule of Evidence 401, evidence is relevant if it has “any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence.” W.Va.R.E. 401 (emphasis added). West Virginia Rule of Evidence 402 further provides that only relevant evidence is admissible at trial. W.Va.R.E. 402.

The precedent set by this Court clearly indicates that evidence of alleged discrimination against other employees is not per se admissible and is not per se inadmissible; instead, admissibility is fact-dependent. McKenzie v. Carroll Int'l Corp., 216 W.Va. 686, 691, 610 S.E.2d 341, 346 (2004); see also Sprint/United Mgmt. Co. v. Mendelsohn, 128 S.Ct. 1140 (2008) (relevance of evidence of discrimination against other employees is fact based and depends on how closely related such evidence is to the plaintiff-employee's circumstances and theory of the case). In McKenzie, a case that the Circuit Court considered when ruling on the Motion *In Limine* to exclude the Nelson evidence and Appellant's Motion for a New Trial, this Court held that evidence about alleged discrimination against another employee is not relevant if such evidence is “dissimilar from [the] plaintiff's situation.” 216 W.Va. at 692, 610 S.E.2d at 347. In reaching that holding, this Court indicated that it was relying on federal cases in which testimony about alleged discrimination against another employee was relevant only in assessing the employer's discriminatory intent if the employee's “testimony [could] logically or reasonably be

ted to the adverse employment action taken against the plaintiff.” 216 W.Va. at 690, 610 S.E.2d at 345. Appellant’s Brief fails even to mention this critical holding.

Applying the same principles that this Court adopted in McKenzie (and the same principles the United States Supreme Court adopted in Mendelsohn), various federal courts have made clear that evidence of discrimination against another employee by a different supervisor/decision-maker is not relevant unless there is a connection between the adverse employment decision made against the plaintiff and the adverse employment decision made against the other employee(s). For instance, in Mendelsohn v. Sprint/United Mgmt. Co. – a case which is directly on point with the facts in this case – the District Court of Kansas held that a plaintiff’s proffered evidence of discrimination against other employees (who worked in other departments), by other supervisors, was not admissible and was properly excluded as being both not relevant and unduly prejudicial. 587 F.Supp. 2d 1201 (D. Kan. 2008) (applying, on remand, the principles set forth by the United States Supreme Court in Sprint/United Mgmt. Co. v. Mendelsohn, 128 S.Ct. 1140 (2008)); see also Schrand v. Federal Pacific Elec. Co., 851 F.2d 152 (6<sup>th</sup> Cir. 1988) (finding that testimony of two other discharged employees about their terminations was not relevant, and its admission required reversal, because the person who made the decision to terminate the plaintiff-employee was not involved in the decision to terminate the two other employees and neither of the two employees worked in the region or division in which the plaintiff employee worked).

In Mendelsohn, just as in this case, the defendant-employer, a phone company, decided to reduce costs by implementing a reduction in workforce. 587 F.Supp. 2d at 1201. The plaintiff was terminated as part of the workforce reduction. Id. She then sued the employer, alleging that the employer terminated her because of her age. In support of her age discrimination claim, the plaintiff sought to introduce the testimony of other employees who claimed to have been

discriminated against on the basis of age. Id. The other employees did not work in the same division as the plaintiff, nor did they have the same supervisor. Id. In holding that evidence regarding alleged discrimination against the other employees should be excluded, the District Court of Kansas stated:

To the extent that the proffer identified discrete acts of discrimination, plaintiff **did not tie them to [the employer's] decision to terminate her employment.** . . . [T]he excluded testimony consisted of anecdotal, subjective claims of age discrimination . . . . **Plaintiff presented no evidence that any supervisor who allegedly discriminated against the five witnesses had any connection to plaintiff's chain of command.** . . .

Id. at 1218 (emphasis added).

Applying these principles to this case, it becomes abundantly clear that the Circuit Court properly excluded the Nelson evidence. As in Mendelsohn, Appellant was terminated as part of a cost-saving reduction in the workforce, and, as in Mendelsohn, Appellant sought to introduce evidence regarding perceived age discrimination against another employee, Mr. Nelson. Furthermore, like in Mendelsohn, Mr. Nelson and Appellant were employed in different departments and were terminated as a result of evaluations and actions by completely different supervisors/decision-makers. Thus, consistent with the rule promulgated in McKenzie, and the analysis in Mendelsohn, since Mr. Nelson did not share a common decision-maker with Appellant – and he worked in a different department from Appellant – whether Mr. Nelson's employment was terminated because of his age has no bearing whatsoever on whether Appellant was terminated because of her age. Accordingly, evidence of alleged discrimination against Mr. Nelson was not relevant to Appellant's claim and the Circuit Court properly excluded it.

2. **The Case Law Cited By Appellant Does Not Establish Or Even Suggest Any Abuse Of Discretion By The Circuit Court In Excluding The Nelson Evidence.**

The cases Appellant cited in her Appeal Brief do not support her contention that evidence regarding discrimination against other employees is admissible when such alleged discrimination

involved different supervisors/decision-makers and employees who worked in different departments. Moreover, those cases cannot possibly stand for the required proposition that the Circuit Court abused its discretion in deciding to exclude the Nelson evidence in this case, particularly given the undisputable findings of fact made by the Circuit Court. A careful review of the cases Appellant cited in her Appeal Brief establishes that the underlying facts supporting the admission of evidence regarding alleged discrimination against other employees in those cases is easily distinguishable from the facts in this matter.

In Minshall v. McGraw Hill Broad. Co., 323 F.3d 1273 (10<sup>th</sup> Cir. 2003), evidence of discrimination against other employees was admitted only because the same decision-maker was responsible for both decisions. Specifically, a television station declined to renew the contract of a reporter. Id. The news director decided to market to a younger demographic audience and made personnel decisions accordingly. Id. Because the same decision-maker was involved in all alleged discriminatory decisions, the Tenth Circuit Court of Appeals held that evidence of adverse actions against other employees by this same decision-maker should be admitted because such evidence was “logically or reasonably tied” to the decision involving the plaintiff. Id. at 1286. Similarly, in Kneisley v. Hercules, Inc., 577 F.Supp. 726, 729, 731 (D. Del. 1983), the other employees who provided testimony regarding an alleged discriminatory reduction-in-force worked in the same department as the plaintiff and were supervised by the same department general manager.

In Appellant’s case, the alleged discriminatory termination of Mr. Nelson cannot logically or reasonably be tied to the decision to terminate Appellant. There is no debating this point here: The “evidence” is undisputable and directly supports the factual findings made by and relied upon by the Circuit Court.

The case of Spulak v. K-Mart Corp., 894 F.2d 1150 (10<sup>th</sup> Cir. 1990), cited in Appellant's Brief, also is distinguishable from the facts in this case. In Spulak, evidence regarding alleged discrimination against another employee was admitted only based on facts indicating that the decision-makers involved in the termination decisions coordinated their actions. Id. Specifically, the second decision-maker specifically referred to Spulak's early retirement in asking the other employee "if he [was] going to do the same" and then fired the other employee a few days later over minor insubordination. Id. at 1156. In Spulak, the reference to "Spulak's early retirement" established the requisite link between the two firings. Id. at 1157.<sup>14</sup> Similarly, in Stumph v. Thomas & Skinner, Inc., there were facts to support a requisite link between the alleged acts of discrimination. 770 F.2d 93, 97 (7<sup>th</sup> Cir. 1985) (on summary judgment, the court considered the testimony of two employees who felt that they were pressured to retire following "Company's President and Chairman" alleged statement that "the Company was going to have to get rid of some of its older employees").<sup>15</sup> No such link exists in regard to the distinct decisions

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<sup>14</sup> The string cite of cases contained in footnote 3 of Appellant's Appeal Brief do not support the admission of the Nelson evidence. Instead, in those cases evidence regarding discrimination against another employee was only admitted because the plaintiffs were able to make a showing that the alleged discriminatory conduct against the other employee(s) was similar to the plaintiff's situation. Appellant has not – and cannot – make this showing in this case. Specifically, in several of the cases Appellant cited in footnote 3, the same decision-maker and/or supervisor was involved in the decision involving the plaintiff and the other employee(s). See Mishall v. McGraw Hill Broad Co., Inc., 323 F.3d 1273 (10<sup>th</sup> Cir. 2003); Heyne v. Caruso, 69 F.3d 1475 (9<sup>th</sup> Cir. 1995); Herber v. Boatmen's Bank of Tennessee, 781 F.Supp. 1255 (W.D. Tenn. 1991); Buscemi v. Pepsico, Inc., 736 F.Supp. 1267 (S.D.N.Y. 1990) (plaintiff and other employee were employed in the same department and presumably had the same supervisor). In Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8<sup>th</sup> Cir. 1988), the employees allegedly responsible for acts of discrimination against the other employee were supervised by – and not disciplined by – the same supervisor who discharged the plaintiff. In Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3<sup>rd</sup> Cir. 1996), there were allegations of a hostile work environment which was allegedly created by the plaintiff's and other employee's supervisor. In Stair v. Lehigh Valley Carp. Local Union, 813 F.Supp. 1116 (E.D.Pa. 1993), the person who allegedly harassed both the plaintiff and the other employee had a common identity. Unlike Appellant's claims in this matter, in Harpring v. Continental Oil Co., 628 F.2d 406 (5<sup>th</sup> Cir. 1980), the plaintiff was attempting to prove a pattern and practice of discrimination. The only case Appellant cited that cannot be easily distinguished is LaDolce v. Bank Admin. Inst., 585 F.Supp. 975, 977 (N.D. Ill. 1984). In LaDolce, the court failed to recite enough facts to show whether or not the "other employee[s]" were similarly situated to the plaintiff. Accordingly, the court's opinion in LaDolce does not provide any guidance as to whether that court would have admitted or excluded the Nelson evidence. Whether Appellant cites five distinguishable cases or 25 distinguishable case, they are still distinguishable and do not support the argument that the Circuit Court abused its discretion in this case.

<sup>15</sup> Moreover, in Stumph, since the Seventh Circuit Court of Appeals was ruling on an issue of summary judgment, the Court never considered the issue of whether the testimony of the two witnesses who alleged that they had been discriminated against would or should be admissible at trial because that issue was not before the Court.

made by separate supervisors, in separate departments, to terminate Appellant's employment and Mr. Nelson's employment.

3. **The Circuit Court Permitted Appellant To Present Evidence Regarding Alleged Discrimination Against Other Employees When The Circuit Court Determined That Such Evidence Might Be Linked To Appellant's Termination.**

Appellant's argument that the Circuit Court's decision permitted West Virginia Wireless to characterize Appellant's discharge as an "isolated incident" simply ignores the record and Appellant's own theme that she emphasized throughout the five-day trial. The Circuit Court specifically permitted Appellant to present evidence that Ms. Martin discriminated against Bob Wilson by discharging the 50-year-old former General Manager and replacing him with the younger Dennis Bloss. Likewise, the Circuit Court permitted Appellant to present evidence that Ms. Martin and/or Mr. Bloss hired and retained younger employees on the sales/administrative side of the business at the same time that they terminated Appellant's employment. And, of course, Appellant was permitted to put on evidence concerning the termination of her employment and the retention of younger Sheila Wilson, who Appellant claimed replaced her.

Accordingly, it is clear that the Circuit Court admitted evidence of alleged discrimination against other employees when it found that such evidence could logically or reasonably be tied to the decision to terminate Appellant's employment.<sup>16</sup> The Circuit Court, however, specifically found as a fact that "any alleged discrimination against Nelson was dissimilar from Plaintiff's situation." That determination deserves this Court's deference, and this Court should affirm the Circuit Court's decision.

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<sup>16</sup> Of course, West Virginia Wireless presented its own evidence showing that Appellant's "evidence" of age discrimination was nothing more than baseless innuendo. The jury evidently agreed with West Virginia Wireless.

**B. The Circuit Court Did Not Abuse Its Broad Discretion in Excluding The Nelson Evidence Because, If Relevant, The Unfair Prejudice Substantially Outweighed Any Probative Value Of Such Evidence.**

Under West Virginia Rule of Evidence 403, a trial court is authorized to exclude relevant evidence when unfair prejudice, confusion or waste of time substantially outweighs the probative value of such evidence. W.Va.R.E. 403. When granting the Motion *in Limine* to exclude the Nelson evidence, and when denying Plaintiff's Motion for A New Trial, the Circuit Court determined that the Nelson evidence should be excluded because, in addition to being irrelevant, the evidence also was unduly prejudicial and would have confused and misled the jury. This holding by the Circuit Court provides an alternative basis for denying this appeal and also is due deference from this Court.

To allow Appellant to piggy-back on claims that are wholly unconnected with her termination clearly would have been unfair and highly prejudicial to West Virginia Wireless. Schrand v. Federal Pacific Elec. Co., 851 F.2d 152 (6<sup>th</sup> Cir. 1988), which West Virginia Wireless cited in support of the motion in limine and in response to Appellant's Motion for a New Trial, is directly on point. In Schrand, the Sixth Circuit Court of Appeals held that the District Court abused its discretion by **not** excluding testimony by two non-party former employees about alleged age discrimination against them. Id. The Sixth Circuit held that such testimony was unfairly prejudicial because it had no direct bearing on the issue to be decided – i.e., whether Schrand was discharged because of his age – but tended to embellish circumstantial evidence directed to that issue. Id. at 156. It offered an emotional element that was otherwise lacking as a basis for a verdict in Schrand's favor. Id. Moreover, the evidence “tended to confuse the issue by focusing the jury's attention on two totally unrelated events.” Id.

Similarly, in Mendelsohn v. Sprint/United Mgmt. Co., 587 F.Supp.2d 1201 (D. Kan. 2008), the District Court of Kansas determined that the limited probative value of evidence of

discrimination by other supervisors was substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, and by considerations of undue delay or waste of time.

In this case, Appellant offered to prove that unrelated supervisors/decision-makers had allegedly discriminated against Mr. Nelson, who worked in a different department than her. The admission of the Nelson evidence would have required a mini-trial regarding Mr. Nelson's widely divergent claim. If Mr. Nelson was allowed to testify, West Virginia Wireless would have had to have called other witnesses to refute Mr. Nelson's claims. This testimony would have required a detailed explanation of the operations/technical department, its needs, Mr. Nelson's performance relative to the two technicians who were retained, and the reasons why Mr. Williams and/or Mr. Doyle decided that Mr. Nelson was the technician who would be terminated. None of that evidence would have had anything to do with Appellant, her position, or the realities in the administrative/sales department that caused Ms. Martin to decide to eliminate the Administrative Manager position and terminate Appellant's employment. The prospect of confusion, waste of time and unfair prejudice from the admission of such evidence is obvious, particularly given the undisputable evidence that Mr. Nelson was terminated by Mr. Williams and/or Mr. Doyle and Appellant was terminated by Ms. Martin and/or Mr. Bloss.

The decision to exclude or admit evidence under Rule 403 is within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. Hatcher v. McBride, 221 W.Va. 5, 650 S.E.2d 104 (2006). The Circuit Court, in this case, was well within its broad discretion in holding that the unfair prejudice and confusion produced by Appellant's proffered evidence substantially outweighed any probative value of the evidence. The Circuit Court's decision should be affirmed.

**C. The Circuit Court Did Not Abuse Its Broad Discretion In Refusing To Grant Appellant A New Trial.**

The issue regarding the admissibility of the Nelson evidence was before the Circuit Court on two separate occasions (i.e., the Motion *in Limine* and Plaintiff's Motion for New Trial), and, on both occasions, Appellant briefed the issue and set out her arguments as to why she maintained that this evidence should be admissible. On both occasions, the Circuit Court, which presided over this case for more than three years, considered Appellant's arguments and concluded that the Nelson evidence was not relevant and was unduly prejudicial and would have confused and misled the jury. See Order Granting Defendants' Motion *In Limine* To Exclude Evidence Regarding Alleged Discrimination Against Other Employee; see also Order Denying Plaintiff's Motion for New Trial.

To prevail on appeal, Appellant must demonstrate that the Circuit Court's decision was "a clear error of judgment or exceed[ed] the bounds of permissible choices in the circumstances," Graham, supra, at 214 W.Va. at 182, 588 S.E.2d at 171, and leave this Court with a "firm conviction that an abuse of discretion has been committed." Covington, supra, 213 W.Va. at 322-23, 588 S.E.2d at 769-70. Appellant cannot make such showing.

After considering the applicable case law (the same case law cited by both Appellant and West Virginia Wireless in this appeal), the Circuit Court properly concluded that there was no reasonable or logical connection between the Nelson evidence and Appellant's termination. Accordingly, based on its findings of fact that Mr. Nelson worked in a different department than Appellant and was discharged by different supervisors/decision-makers than Appellant, the Circuit Court properly determined that "[a]ny alleged discrimination against Nelson was dissimilar from Plaintiff's situation" and held that the "evidence relating to Nelson's termination was properly excluded by this Court because such information was irrelevant, unduly prejudicial and would have confused and misled the jury." Appellant has not – and cannot – demonstrate

that the Circuit Court committed a plain error or abused its broad discretion in reaching that holding.

Moreover, the Circuit Court found that a new trial was not warranted because the exclusion of the Nelson evidence did not affect any of Appellant's substantial rights and was consistent with substantial justice. The Circuit Court based that holding on the fact that, during the course of the five-day trial, Appellant's overall trial theme was based on her contention that the poor performance **of the sales department** at West Virginia Wireless demonstrated West Virginia Wireless' alleged discriminatory intent. In support of this theme, Appellant presented evidence that West Virginia Wireless' poor sales record demonstrated that its retention of Sheila Wilson (instead of Appellant) and hiring of Dennis Bloss (while terminating Bob Wilson) was based on age instead of work performance and/or abilities. Furthermore, Appellant also maintained that the decision to terminate her employment based on a "financial hardship" (her terminology) was pretextual given the alleged poor performance by the younger sales force. Clearly, the Circuit Court was in the best position to consider the evidence presented by Appellant at trial and determine whether its decision to exclude the Nelson evidence had any effect on the verdict that was rendered by the jury. Based on the Circuit Court's observations at trial, and its consideration of Appellant's arguments in her Motion for a New Trial, the Circuit Court found that the exclusion of the Nelson evidence "did not affect any of Plaintiff's substantial rights and was consistent with substantial justice." Clearly, Mr. Nelson's termination had no parallel with Appellant's trial theme, and the Nelson evidence had nothing to do with sales functions at West Virginia Wireless, which was the entire focus of Appellant's case. The Circuit Court did not commit any error and/or abuse its broad discretion in excluding the Nelson evidence. This Court should affirm the Circuit Court's decision.

**D. Appellant's Contention That A Jury Should Determine "Similarly Situated" Is Not Properly Before This Court And Lacks Merit.**

In addition to inventing facts (which are not supported by the record and contrary to the finding of facts that the Circuit Court made), Appellant makes a last-ditch effort to get a second trial by claiming that a "similarly-situated" determination is a factual consideration that should be determined by a jury. This contention was not raised before the Circuit Court and, accordingly, is not properly before this Court. Moreover, this contention lacks merit because it relies on a completely different legal principle than the issue before this Court.

**1. Appellant's Contention That A Jury Should Determine "Similarly Situated" Is Not Properly Before This Court Because It Was Raised For the First Time In Appellant's Brief (And Not Even Raised In Her Petition For Appeal).**

This Court has held that "the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal grounds upon which the parties intend to rely." Arnold v. Palmer, 224 W.Va. 495, 501, 686 S.E.2d 725, 731 (2009), citing State ex rel. Cooper v. Caperton, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996). This Court has further determined that "when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." Porter v. McPherson, 198 W.Va. 158, 166, 479 S.E.2d 668, 676 (1996), citing Whitlow v. Board of Educ., 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993).

In this case, in her Appeal Brief, Appellant for the first time raised the argument that a jury should determine the issue of "similarly situated." Since Appellant did not raise this issue at the Circuit Court, despite having numerous opportunities to do so, Appellant's contention is not properly before this Court and should not be considered now.

2. **The Case Law Appellant Cites In Support Of Her Contention That A Jury Should Determine “Similarly Situated” Is Not Applicable To The Issue Before This Court And, Instead, Is A Completely Separate Legal Principle.**

Moreover, Appellant’s contention that a jury should determine “similarly situated” completely lacks merit because the case law cited in support of this contention relates to a completely separate legal principle which is not before this Court. Specifically, the case law Appellant cites in support of her contention that the issue of “similarly situated” should be determined by a jury relates to the issue of whether employees who were treated differently by an employer were “similarly situated” for purposes of trying to prove a discrimination claim under the West Virginia Human Rights Act and/or federal employment laws. Stated another way, the legal issue Appellant cites relates to the issue of whether an employee can prove discrimination because she was treated less favorably than a similarly-situated employee.

The issue before this Court is whether evidence about alleged discrimination against another employee is admissible at trial. In deciding this issue, this Court has stated that evidence of discrimination against another employee is not relevant if such evidence is “dissimilar from [the] plaintiff’s situation.”

Although both legal principles use similar terminology (i.e., “similarly situated” and/or “dissimilar”), the two principles of law are completely different (and the case law relating to each legal principle is separate and distinct). The issue before this Court, i.e., whether evidence was properly excluded, is not a factual consideration that should be determined by a jury. Instead, if such an issue had to be presented to the jury, it would eviscerate the purpose of a motion *in limine* to keep inadmissible evidence away from the jury in the first place. Moreover, it would make all alleged evidence about alleged discrimination against another employee per se admissible, which is clearly not the law set forth in McKenzie. Instead, under West Virginia law, as Appellant concedes, there are limitations to the admissibility of evidence. For the

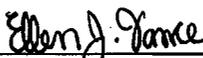
reasons set forth above, the Circuit Court properly excluded the evidence relating to Mr. Nelson, and this Court should affirm the Circuit Court's decision.

## **VII. CONCLUSION**

When Appellant's mischaracterizations of the facts surrounding this case are set aside – and they must be, because the Circuit Court did not agree with them and Appellant has not pointed to any evidence in the record showing that the Circuit Court's factual findings were “clearly erroneous” – Appellant simply has not demonstrated that the Circuit Court abused its discretion in excluding the Nelson evidence and/or in denying Plaintiff's Motion for a New Trial. Accordingly, for the reasons set forth herein, this Court should affirm the Circuit Court's decision.

**KEY COMMUNICATIONS, LLC d/b/a  
WEST VIRGINIA WIRELESS**

By SPILMAN THOMAS & BATTLE, PLLC

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

**MARY J. WELLS,**

**Appellant,**

**v.**

**DOCKET NO. 091635**

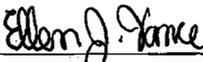
**KEY COMMUNICATIONS, L.L.C.,  
d/b/a WEST VIRGINIA WIRELESS,**

**Appellee.**

**CERTIFICATE OF SERVICE**

I, Ellen J. Vance, do hereby certify that service of the foregoing "Brief of Appellee Key Communications, L.L.C., d/b/a West Virginia Wireless" has been made upon counsel for the Appellant, on this 18<sup>th</sup> day of March, 2010, by hand delivery to the following address:

J. Michael Ranson  
George B. Morrone, III  
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Charleston, West Virginia 25336-3589

  
\_\_\_\_\_  
Ellen J. Vance (WV State Bar #8866)

**EXHIBITS**

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