IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2012 Term

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No. 11-0206

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ALBERT POSTLEWAIT, JR.,
Plaintiff Below, Petitioner

v.

CITY OF WHEELING,
Defendant Below, Respondent

Appeal from the Circuit Court of Ohio County
Honorable Martin J. Gaughan, Judge
Civil Action No. 07-C-291

AFFIRMED

Submitted: January 11, 2012
Filed: January 19, 2012

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CHIEF JUSTICE KETCHUM delivered the Opinion of the Court.

JUSTICE DAVIS dissents, and reserves the right to file a separate opinion.

JUSTICE WORKMAN dissents, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "Court rules are interpreted using the same principles and canons of construction that govern the interpretation of statutes." Syllabus Point 2, *Casaccio v. Curtiss*, ___ W.Va. ___, 718 S.E.2d 506 (2011).

2. The term "legal holiday" in Rule 6(a) of the *West Virginia Rules of Civil Procedure* [1998] includes those legal holidays designated by the Legislature in *W.Va. Code*, 2-2-1 [2006].

3. "If it be determined that a juror falsely answered a question on *voir dire* examination, whether or not a new trial should be awarded is within the sound discretion of the trial court." Syllabus Point 3, *West Virginia Human Rights Commission v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 211 S.E.2d 349 (1975).

Ketchum, Chief Justice:

In this appeal from the Circuit Court of Ohio County, we are asked to examine an order granting a defendant's motion for a new trial. We affirm the circuit court's order.

I.

Facts and Background

Plaintiff Albert Postlewait, Jr., filed an age-discrimination lawsuit against the City of Wheeling ("the City") under the West Virginia Human Rights Act.[1] In 2005 – when the plaintiff was 55 years old – he applied for a job with the City as a mechanic. Although the plaintiff had the highest score on the City's application examination, the City instead hired an 18-year-old applicant. At trial, the City contended the plaintiff was not hired because the managers doing the hiring thought he might not "work well" with other employees. The plaintiff, however, produced evidence that he was not hired because those other employees wanted a "younger" mechanic who they could "take under [their] wing" and "mold to [their] way of thinking[.]"

A jury returned a verdict in favor of the plaintiff, and awarded him compensatory damages.[2]

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[1]*See W.Va. Code*, 5-11-1 to -20.

[2]The jury awarded the plaintiff $99,164.98 in lost retirement benefits, and $1,219.28 (continued...)

On November 19, 2010, the circuit court entered a judgment order on the jury's verdict. Eighteen days later, on December 7, 2010, the City filed a motion for a new trial.

In its motion, the City alleged that one of the jurors (Cindi Greathouse) had not been forthright and truthful during voir dire while the jury was being selected. The City contended that the juror had failed to disclose a prior lawsuit against a former employer, and argued that her failure to provide complete information prejudiced the City's ability to either move the circuit court to strike her for cause, or exercise a peremptory challenge.

In an order dated December 30, 2010, the circuit court granted the City's motion for a new trial. The circuit court determined that although the juror "did not intentionally deceive the Court, she did fail to disclose certain information which would have been vital to the [City] in making a motion to strike for cause and in exercising . . . peremptory strikes." The circuit court found the juror's failure to disclose prejudiced the City, and impaired the City's right to a fair trial.

The plaintiff now appeals the circuit court's order granting the City a new trial.

II.
Discussion

The plaintiff appeals the circuit court's order on two grounds. First, the plaintiff argues that the City's motion for a new trial was filed at least one day too late,

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[2](...continued)
for emotional distress.

thereby depriving the circuit court of authority to grant a new trial. Second, the plaintiff argues that the circuit court abused its discretion in finding that one juror failed to disclose information during *voir dire*, and finding that the failure to disclose prejudiced the City's right to a fair trial.

A. Timeliness of the City's Motion for a New Trial

Rule 59(b) of the *West Virginia Rules of Civil Procedure* [1998] states that "[a]ny motion for a new trial shall be filed not later than 10 days after the entry of the judgment." Rule 59(e) says (with emphasis added) that "[i]f a party fails to make a *timely* motion for a new trial . . . the party is deemed to have waived all errors occurring during the trial[.]" "The ramifications of failing to make a motion for a new trial after the entry of judgment . . . are harsh." *Miller v. Triplett*, 203 W.Va. 351, 357, 507 S.E.2d 714, 720 (1998).

The plaintiff argues that the City's motion for a new trial (filed on Tuesday, December 7, 2010) was filed more than 10 days after the entry of the judgment (on Friday, November 19, 2010). The plaintiff therefore asserts that the motion was not timely, and asserts that the City waived any error that might have occurred in jury selection.

The City contends that, even though the motion for a new trial was filed 18 days after entry of the judgment order, it was still "timely" under the *Rules of Civil Procedure*. As we discuss below, we agree.

Rule 6(a) of the *Rules of Civil Procedure* [1998] establishes guidelines for computing the various time periods specified by the *Rules*. First, Rule 6(a) says that "the day of the act, event, or default from which the designated period of time begins to run shall not be included." Second, the rule states that "[w]hen the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Under Rule 6(a), the term "legal holiday" includes "Thanksgiving Day."[3]

In this case, excluding the date of entry of the judgment order on Friday, November 19th, 18 days elapsed before the filing of the motion for a new trial on Tuesday, December 7th. Rule 6(a) excludes Saturdays and Sundays from the calculation – and in this case, there were six weekend days. Furthermore, Thursday, November 25th was Thanksgiving Day, omitting one more day. Under the plaintiff's calculations, the City's motion was filed 11 days after entry of judgment, one day too late.

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[3]Concerning legal holidays, Rule 6(a) states:

> As used in this rule . . . "legal holiday" includes New Year's Day, Martin Luther King's Birthday, Lincoln's Birthday, Washington's Birthday, Memorial Day, West Virginia Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day, any day on which a general, special or primary election is held in the state or in the county in which the circuit court sits, and any other day appointed as a holiday by the Governor or by the President of the United States as a day of special observance or thanksgiving, or a day for the general cessation of business.

The City argues, however, that Friday, November 26th was also a "legal holiday" under Rule 6(a) that should be excluded from the computation. The City cites to the Legislature's declaration of "legal holidays," which states: "The following days are legal holidays: . . . (11) The day after Thanksgiving Day is 'Lincoln's Day'[.]" *W.Va. Code*, 2-2-1(a)(11) [2006]. The City argues that the phrase "legal holiday" in Rule 6(a) must be read in conjunction with the "legal holidays" set forth in *W.Va. Code*, 2-2-1.

The plaintiff responds that Rule 6(a) does not list "Lincoln's Day" as a legal holiday that is to be omitted in calculating the deadline for filing a motion for a new trial. The plaintiff asserts that only this Court has the power to amend Rule 6 to designate a day as a legal holiday,[4] and asserts that the Court's *Rules of Civil Procedure* cannot be superseded by legislative enactments. Put simply, the plaintiff contends that the Friday after Thanksgiving Day was not a legal holiday under the *Rules of Civil Procedure*, and therefore the City filed its motion for a new trial one day too late.

The question we must therefore resolve is, does the term "legal holiday" in Rule 6(a) of the *Rules of Civil Procedure* include "Lincoln's Day" (the Friday after Thanksgiving Day) or any other legal holiday designated by the Legislature in *W.Va. Code*, 2-2-1? We hold that it does.

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[4]*See* Article VIII, § 3, *West Virginia Constitution* ("The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.").

The *Rules of Civil Procedure* are liberal and seek substantial justice, and "make clear our intent to avoid placing form over substance in the procedures of our courts." *Talkington v. Barnhart*, 164 W.Va. 488, 493, 264 S.E.2d 450, 453 (1980). The *Rules* "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *W.Va.R.Civ.Pro.* 1 [1998].

Furthermore, "Court rules are interpreted using the same principles and canons of construction that govern the interpretation of statutes." Syllabus Point 2, *Casaccio v. Curtiss*, ___ W.Va. ___, 718 S.E.2d 506 (2011). It is a fundamental rule of construction that enactments which relate to the same subject matter should be read and applied together – that is, they are to be interpreted in *pari materia*. *See* Syllabus Point 3, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975). Statutes or rules "which relate to the same persons or things, or to the same class of persons or things, or . . . which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the [Legislature's or Court's] intent." Syllabus Point 5, in part, *Freuhauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975).

Rule 6(a) states that it "includes" as legal holidays 12 specifically named days (such as "Christmas Day"). Rule 6(a) also "includes" days appointed by the Governor or the President as a "holiday," "a day of special observance or thanksgiving," or "a day for the general cessation of business." We are asked to resolve whether the use of the term

"includes" in Rule 6(a) permits a reading that would also incorporate into the rule days appointed by the Legislature as legal holidays.

Black's Law Dictionary (9th Ed. 2009) defines the term "include" as "to contain as a part of something," and says that the term "typically indicates a partial list . . . But some drafters use phrases such as *including without limitation* and *including but not limited to* — which mean the same thing." Accordingly, by using the word "includes" in Rule 6(a), this Court was setting forth only a partial list of legal holidays.

Furthermore, Rule 6(a) lists certain *named* days as legal holidays — days such as "Martin Luther King's Birthday," "West Virginia Day," or "Columbus Day" — but the Rule does not specify the *actual date* upon which those holidays are to be celebrated. The actual date is specified by the Legislature in *W.Va. Code*, 2-2-1. For instance, Martin Luther King's Birthday is a legal holiday on the "third Monday of January" (*W.Va. Code*, 2-2-1(a)(2)); West Virginia Day is a legal holiday on the "twentieth day of June" (*W.Va. Code*, 2-2-1(a)(5)); and Columbus Day is a legal holiday on the "second Monday of October" (*W.Va. Code*, 2-2-1(a)(8)).

The Legislature specifically contemplated that Rule 6 was to be read in conjunction with *W.Va. Code*, 2-2-1. Paragraph (f) of the statute states:

> With regard to the courts of this state, the computation of periods of time, the specific dates or days when an act, event, default or omission is required or allowed to occur and the relationship of those time periods and dates to Saturdays, Sundays, legal holidays, or days designated as weather or other emergency days pursuant to section two of this article are

> governed by rules promulgated by the Supreme Court of Appeals.

W.Va. Code, 2-2-1(f).

Hence, because the computation of time under Rule 6 of the *Rules of Civil Procedure* cannot be properly done without reference to the Legislature's designated holidays in *W.Va. Code*, 2-2-1,[5] the rule and the statute must be read in *pari materia*. We therefore hold that the term "legal holiday" in Rule 6(a) of the *Rules of Civil Procedure* includes those legal holidays designated by the Legislature in *W.Va. Code*, 2-2-1.

We conclude that, in light of *W.Va. Code*, 2-2-1(11), the day after Thanksgiving Day 2010 — that is, Friday, November 26th — was a legal holiday for the computation of filing days in this case. We therefore find that the City's motion for a new trial was filed within 10 days of entry of the circuit court's judgment on November 19th, and the circuit court had the authority to consider the motion.

[5]Further, the computation sometimes cannot properly be done without reference to other outside sources. Rule 6(a) designates Lincoln's Birthday and Washington's Birthday as legal holidays, but *W.Va. Code*, 2-2-1(a)(3) designates only "Presidents' Day" as a holiday. Lincoln's Birthday is no longer recognized by the Legislature as a state holiday, and has never been recognized as a federal holiday, but it is traditionally celebrated on February 12th. Washington's Birthday is a federal holiday celebrated on the third Monday of February (even though Washington's actual birthday is February 22nd). 5 U.S.C. § 6103(a) [1998].

B. Award of a New Trial

The plaintiff asserts that the circuit court erred in granting the City's motion for a new trial, after finding that a juror failed to disclose material information during *voir dire*. We review the rulings of a circuit court concerning a new trial under an abuse of discretion standard. *See, State v. Crouch*, 191 W.Va. 272, 275, 445 S.E.2d 213, 216 (1994) ("The question of whether a new trial should be granted is within the sound discretion of the trial court and is reviewable only in the case of abuse."); *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995) ("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."); Syllabus Point 4, in part, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976) ("[t]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.").

Juror Cindi Greathouse was among the prospective jurors placed under oath prior to voir dire examination. The prospective jurors were asked whether they had "ever participated in a criminal or civil case either as a plaintiff or a defendant," or "ever been in or filed a lawsuit." Ms. Greathouse answered that she "had a workers comp issue" that "was settled out of court." No further questions were asked to elucidate what Ms. Greathouse

meant by her answers, and she did not specifically mention a lawsuit. Ms. Greathouse was thereafter a member of the jury that returned a verdict in favor of the plaintiff.

In its motion for a new trial, the City asserted that it had discovered that Ms. Greathouse had been a party to a 1996 deliberate intent lawsuit — filed pursuant to West Virginia's workers' compensation laws[6] — against her employer for injuries sustained in the course of her employment. After approximately two years of litigation, the parties to the lawsuit apparently resolved the matter through settlement. The City contended that Ms. Greathouse's failure to disclose this lawsuit impaired the City's ability to challenge her qualifications for cause or to exercise a peremptory strike.

After conducting a post-trial hearing, and questioning Ms. Greathouse, the circuit court found that Ms. Greathouse "did not intentionally deceive the Court" because she "referred to the lawsuit as a workers' compensation claim." Nevertheless, the circuit court concluded that Ms. Greathouse's failure to disclose more information about the 1996 lawsuit prejudiced the City and impaired its right to a fair trial. Solely on this ground, the circuit court granted the City a new trial.

Voir dire of potential jurors is designed "to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges." Syllabus Point 2, in part, *Michael*

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[6]*W.Va. Code*, 23-4-2 [2005] permits an employee injured through the "deliberate intention" of her employer to bring suit for damages.

on Behalf of Estate of Michael v. Sabado, 192 W.Va. 585, 453 S.E.2d 419 (1994). In *West Virginia Human Rights Commission v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 211 S.E.2d 349 (1975), we held that "meaningful and effective voir dire examination" is a requirement of a fair trial; that this procedure must allow counsel "to be informed of all relevant and material matters that might bear on possible disqualification of a juror;" and that such an examination "is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily." *Id.* 158 W .Va. at 355, 211 S.E.2d at 353. "If it be determined that a juror falsely answered a question on *voir dire* examination, whether or not a new trial should be awarded is within the sound discretion of the trial court." Syllabus Point 3, *West Virginia Human Rights Commission v. Tenpin Lounge, Inc.*, *supra*.

This case falls squarely into the realm of judicial discretion. The circuit court was able to question Ms. Greathouse and assess her demeanor and veracity, and to balance the effect of Ms. Greathouse's answers upon the City's ability to obtain a fair trial. Upon the record presented, we believe that the circuit court did not abuse its discretion in awarding the City a new trial.

III.

Based on the foregoing, we hold that the City's motion for a new trial was timely, and the circuit court did not abuse its discretion in granting the motion.[7] Accordingly, the decision of the circuit court is affirmed.

Affirmed.

[7]The City raised various cross-assignments of error in its brief. We decline to address these issues.