

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WAYMAN R. FRAVEL, and
W. KEITH WYCKOFF,

Appellants,

v.

32164
APPEAL NO. 040890

SOLE'S ELECTRIC COMPANY, INC.

Appellee.

**The Honorable David A. Janes
Circuit Court of Marion County
Civil Action No. 02-C-69**

**BRIEF OF APPELLEE,
SOLE'S ELECTRIC COMPANY, INC.**

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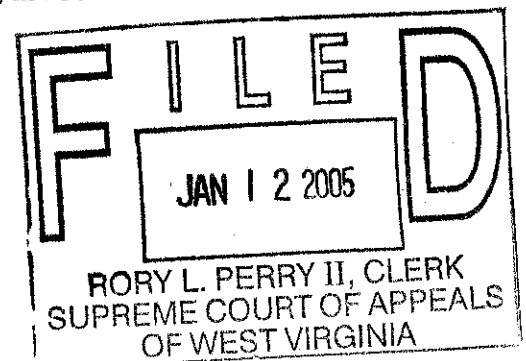


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I.

INTRODUCTION

This is an appeal of two orders entered by the Honorable David Janes in the Circuit Court of Marion County. The first order, entered July 31, 2003, granted summary judgment with respect to Appellant Wyckoff's claim of workers' compensation discrimination based upon the fact that Wyckoff's on-the-job injury occurred over three years prior to his layoff. The second order was a judgment order entered January 7, 2004, resulting from a jury verdict in favor of Appellee and which denied Appellants' motion for a new trial.

Appellants first filed a petition for appeal with this Court on May 13, 2004. This Court heard argument from Appellants' counsel and refused said petition for appeal on September 30, 2004. Appellants thereafter filed a motion to renew their petition for appeal out of time, which motion and petition for appeal was granted by this Court by Order entered November 10, 2004.

II.

STATEMENT OF FACTS

A. **Business Conditions**

Sole's Electric Company, Inc. (hereinafter "Soles" or "Appellee") is in the business of supplying goods and services to various entities in the coal-mining industry, and has therefore been subject to the same cyclical highs and lows in its business conditions as have been experienced in the coal industry. Soles has historically had to increase and decrease its employee roster with the ebb and flow of business conditions. Layoffs among its workers have routinely occurred. In fact, Appellant Fravel had been laid-off on two prior occasions due to lack of work. During the time frame of the layoffs of Appellants, Soles was in one of its cyclical lows. Between 1999 and 2001, Soles permanently lost two major contracts, resulting

in lost revenues of over \$2,400,000.00, and several layoffs, including Appellants. (See Affidavit of Michael Morrone, attached hereto as Exhibit "A" and referred to herein as "Morrone Aff."¹) Additionally, the number of jobs performed under these two contracts decreased from 1501 to 533 for the same period of time. *Id.* Appellants were well aware of the business conditions and testified to the downturn in business. In fact, Appellant Fravel testified that he had seen a decline in the business and assumed that the reason for his lay-off was "lack of work." (See Fravel Deposition at pages 36-40, attached hereto as Exhibit "B".)

B. Appellant W. Keith Wyckoff

Appellant Wyckoff was born on December 23, 1949. He was employed as a welder by Soles from September, 1987 until he was laid off in September, 2000. At the time of his layoff, he was approximately fifty (50) years old. Wyckoff had hernia surgery in May, 1997 and missed work from May, 1997 to August, 1997. He applied for and received workers' compensation benefits for this surgery and lost time, without protest from Soles. At the time of Mr. Wyckoff's layoff, Soles had in its employ one other welder who was the same age as Wyckoff and who remained employed by Soles in that position. At the time of Mr. Wyckoff's layoff, Soles laid off three other workers, two of whom were under the age of forty (40). (Morrone Aff..)

C. Appellant Wayman R. Fravel

Appellant Fravel (Mr. Wyckoff's nephew) was employed by Soles in the position of maintenance/electrician from approximately 1989 until he was laid off in March, 2000. Fravel suffered an on-the-job injury in March, 1999, and was absent from work from March, 1999 to July, 1999. He also applied for and received workers' compensation benefits for

¹Appellee was not given an opportunity to designate a record; therefore, any portions of the Record referenced herein have been attached to this Brief.

medical costs and lost time without protest from Soles. At the time of his layoff, Soles did not have any other employees in the same position as Fravel.

D. Procedural Summary

Appellants brought this lawsuit, alleging workers' compensation discrimination as the basis for their layoffs, as well as a claim of age discrimination on behalf of Appellant Wyckoff. The trial court granted summary judgment with respect to the claim of workers' compensation discrimination on behalf of Appellant Wyckoff, finding that his layoff in September 2000 was "too far removed temporally from his workers' compensation claim in the Summer of 1997 to support a jury finding of causal connection." (See "Opinion Order Granting In Part And Denying In Part Defendant's Motion For Summary Judgment," entered July 31, 2003, pg. 8., attached hereto as Exhibit "C" and referred to herein as "Order".)

In the same Order, the Court refused to grant summary judgment on Mr. Fravel's claim of workers' compensation discrimination, finding that there "was enough evidence to 'permit a rational trier of fact to infer a discriminatory motive.'" *Id.* The Court also refused Appellant's motion for summary judgment on Wyckoff's age discrimination claim, finding that Wyckoff had "produced enough circumstantial evidence, specifically his age, his lay off, and the contention that the loss of contracts asserted by Soles as the reason for the layoff actually occurred after the lay off, to meet his *de minimis* initial burden of showing circumstances giving rise to an inference of discrimination." *Id.*

The case was tried to a jury in November, 2003 and the jury found in favor of Soles on Appellant Wyckoff's age discrimination claim as well as on Appellant Fravel's workers' compensation discrimination claim. Appellants filed a motion for a new trial under Rules 59 and 60, which was denied by the trial court by Order entered January 7, 2004.

The Motion For Leave to Renew Petition Out of Time was improvidently granted. Rule 3 of the West Virginia Rules of Appellate Procedure provides that no petition for appeal shall be presented “from a judgment, decree or order, which shall have been entered more than four months before such petition is filed.” While Rule 7 (b) of the Rules permits a renewal of a petition for appeal, it must be renewed “during the period prescribed by law for presentation of petitions.” Appellants did not file their first Petition for Appeal until May 13, 2004, which exceeded the four month time limit from the judgment entered on January 7, 2004. Appellants presented their Petition to this Court, which was refused on September 30, 2004. They then filed their Motion on November 1, 2004 without providing any “good cause” basis for an extension of six more months beyond the four month appeal rule. This appeal was therefore improvidently granted.

Further, Appellee notes that, while not addressed in their Brief², Appellants argued in their Motion For Leave To Renew Petition Out Of Time, at the time of filing, “[m]ore than four years after being laid off, [Fravel and Wyckoff] continue to become aware of new employees who are being hired by Soles, even though they continue to be ignored.” (See Motion at Paragraph 12.) Appellee states herein that, in order to preserve its objection to the introduction of such information, without acknowledging the truth of such allegation, such current information is irrelevant to this Court in an appeal of trial error. Further, at trial Appellants put in evidence that Soles had rehired other employees who had been laid off and had hired new employees without recalling either Appellant. This information was presented and

²Therefore, this argument should be deemed waived by Appellants in accordance with syl. pt. 8, *Higginbotham v. City of Charleston*, 157 W. Va. 724, 204 S.E.2d 1 (1974), overruled on other grounds.

argued³ to the jury, and the jury obviously found that such actions did not support Appellants' allegations that Soles had discriminated against them. To now include such information in its Motion is improper and irrelevant, and it should be ignored by this Court.

III.

STANDARD OF REVIEW

A. The Summary Judgment Order

Summary judgment orders are subject to *de novo* review. *Greenfield v. Schmidt Baking Co.*, 199 W. Va. 447, 485 S.E.2d 391 (1997). Summary judgment may be granted when the court determines that there is no genuine issue of material fact to be tried and the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). While this Court has suggested a cautious approach to summary judgment motions where issues of motive and intent must be resolved, it has confirmed that Rule 56 does indeed apply equally to discrimination claims. *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995) (summary judgment may be appropriate where the party resisting judgment relies upon conclusory allegations, improbable inferences, and unsupported speculation as to any essential element in the claim, citing *Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)). The key for trial courts in these types of cases is to “determine whether the ‘proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive.’” *Hanlon*, citing *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 204 (2d Cir. 1995).

³See Transcript of Instructions Conference, pp. 12-13, attached hereto as Exhibit “D” and referred to herein as “Instructions Conf.”

In this case, the trial court correctly determined that, as a matter of law, no inference could be drawn from a layoff that occurred more than three years after a workers' compensation injury occurred, i.e., no rational trier of fact could find a discriminatory motive in this action. The trial court, however, denied Appellee's motion for summary judgment with respect to Appellant Wyckoff's age discrimination claim and Appellant Fravel's workers' compensation discrimination claim and those claims proceeded to trial.

This Court has stated how important summary judgment can be—its role is “to pierce the boilerplate of the pleadings and assay the parties’ proof in order to determine whether a trial is actually required. . . . [It is] the appropriate device for putting a swift end to meritless litigation.” *Hanlon* at 106, 748. This is exactly what transpired in this litigation--the court put a swift end to a meritless claim.

B. Jury Instructions

Appellants allege that several errors occurred in the jury instructions given by the trial court. They claim that the trial court erred in its refusal of certain of their proposed instructions, that it erred on the “business judgment rule” instruction given, and that the instructions as a whole were erroneous.

With respect to the trial court's declination to give Appellants' instructions, this Court has recently held that “[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion.” Syl. pt.6, *Wounaris v. W.Va. State College*, 214 W. Va. 241, 588 S.E.2d 406 (2003).

On the other hand, “whether or not a jury received the proper instruction necessarily implicates a question of law.” *Wounaris* at syl. pt. 4. The standard is that “an instruction is proper if it is a correct statement of the law and if there is sufficient evidence offered at trial to support it.” Syl. pt. 4, *Alley v. Charleston Area Medical Center, Inc.*, ____

W. Va., 602 S.E.2d 506, 2004 W. Va. Lexis 127 (June 24, 2004). Since Appellants have argued generally that the jury was improperly instructed, the review is de novo. See Syl. pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996); *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 63, 479 S.E.2d 561, 573 (1996) (“of course, our review of the legal propriety of the trial court’s instructions is de novo.” (Citation omitted).)

With respect to instructions in general, “deference is given to a trial court’s discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.” Syl. pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.” Syl. pt. 3, *Keesee v. General Refuse Service, Inc.*, ___ W. Va. ___, 604 S.E.2d 449, 2004 W. Va. Lexis 115 (June 29, 2004). This Court is to evaluate the jury verdict thusly: “every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.” Syl. pt. 4, *Keesee*.

Under either the abuse of discretion or the de novo standards, the jury was properly instructed on the law.

IV.

ARGUMENT AND LEGAL AUTHORITY

A. Summary Judgment was proper with respect to a claim of workers’ compensation discrimination when it relates to an injury suffered nearly three years prior to an adverse employment action and there is no other evidence which could support even an inference of discriminatory intent.

The trial court was correct in granting summary judgment with respect to Appellant Wyckoff's claim of workers' compensation discrimination as the basis for his lay-off. The law in West Virginia as to the requirements for a prima facie case of workers' compensation discrimination has been set forth by this Court as follows:

1. An on-the-job injury was sustained;
2. Proceedings were instituted under the Workers' Compensation Act; and
3. The filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.

Syl. pt. 1, *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991). The *Powell* decision described the history of these types of claims, noting that "it is a contravention of public policy and actionable to discharge an employee *because* he filed a workmen's compensation claim against his employer." *Powell* at 703, 720 (emphasis added). This Court went on to state the variety of factors that courts have looked at:

Proximity in time of the claim and the firing is relevant, of course. Evidence of satisfactory work performance and supervisory evaluations before the accident can rebut an employer's claim of poor job performance. Any evidence of an actual pattern of harassing conduct for submitting the claim is very persuasive.

Id at 704, 721, citing with approval *Axel v. Duffy-Mott*, 47 N.Y.2d 1, 6, 416 N.Y.S.2d 554, 556, 389 N.E.2d 1075, 1077.

Wyckoff was off work due to his workers' compensation injury from May, 1997 until August, 1997, yet was not laid-off from work until September, 2000. As the trial Court found, the time frame was "simply too far removed temporally from his workers' compensation claim . . . to support a jury finding of a causal connection." (Order, pg. 8.) But the Court did not base its decision on this fact alone. "Further, there is no evidence of the employer's criticism of Mr. Wyckoff's work performance or harassing conduct at the time of the layoff.

To the contrary, Soles appeared to be satisfied with Mr. Wyckoff's job performance." *Id.* Additionally, Appellant offered no evidence of harassment of Appellant Wyckoff (or Fravel) by the employer for filing a workers' compensation claim.

In fact, evidence submitted by Soles' revealed that nearly forty percent (40 %) of its nonexempt employees had had some type of workers' compensation claims. (Morrone Aff.) But perhaps the most telling evidence of all as to the basis for Appellant Wyckoff's lay-off came from Appellant himself. When asked why he believed he was laid-off, he testified that: "I have my suspicions. . . . I think it's who you're friends with down there." (See Deposition of Mr. Wyckoff at page 48, attached hereto as Exhibit "E".) His response to an inquiry as to what reasons he had, other than his feeling, that Soles had discriminated against him, prompted the following response: "None." (Wyckoff Depo at 56.)

The trial court correctly concluded, citing syl. pt. 4, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995), that at the summary judgment phase, its function was to "determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." Appellant incorrectly focuses only on the passage of time issue, and claims that the question for this Court is "whether a claim for workers' compensation discrimination should be dismissed as a matter of law based solely on the amount of time that elapses between the injury and the termination notwithstanding evidence that the employer previously had no reason to take adverse action against the employee." (See App. Br., pg. 10.)

Appellant Wyckoff has missed the point. The trial court did not grant summary judgment on the sole basis of the passage of time, but on the fact that there was insufficient evidence offered by Wyckoff to permit a jury to infer a discriminatory motive. Even Wyckoff

himself stated that he thought the basis was one of “friendship,” not a motive to eliminate workers who had workers’ compensation claims.

In order to survive a motion for summary judgment, “the plaintiff must make some showing of fact which would support a prima facie case for his claim.” Syl. pt. 2, *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986). The Appellant failed to show the required “inference” of discrimination as set forth in syl. pt. 2, *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 12 (1995). Notably, the trial court denied Appellee’s motion for summary judgment on Mr. Fravel’s claim of workers’ compensation discrimination, stating that the jury *could* infer an inference of discrimination based on the evidence, which included the fact that Fravel’s layoff came approximately a year after his return to work. (See Order, pg. 8.)

The only case in which this Court has considered the passage of time issue was in the *Nestor v. Bruce Hardwood Floors*, 210 W. Va. 692, 558 S.E.2d 691 (2001), a case in which the Plaintiff was terminated the day after he received an on-the-job injury. *Nestor* reiterated the factors set forth in *Powell* to determine if a causal connection exists: i.e., looking at a “variety of factors that include proximity in time of the claim and the firing, evidence of satisfactory work performance and supervisory evaluations before the accident, and evidence of an actual pattern of harassing conduct for submitting the workers’ compensation claim. *Nestor* at syl. pt. 12. This Court noted that while the issue of a discriminatory animus is generally a question of fact for the jury, especially where a prima facie case exists, it could indeed become a question of law if “only one conclusion could be drawn from the record.” *Nestor* at 695. This is the very type of case in which only one conclusion could be made with respect to a lack of discriminatory intent.

Appellant is attempting to play out the very scenario which Justice Maynard described in his dissenting opinion in *Nestor*:

The majority opinion indicates to me that it is impossible, without having to suffer the ordeal of a trial, for an employer to terminate an employee for any reason if that employee has *recently* filed a workers' compensation claim. As a practical matter, that employee enjoys immunity from discharge for a certain period of time after filing his or her claim. The only valid evidence of workers' compensation discrimination in the instant case is the proximity in time of the claim and the firing. Yet this alone, under our law, does not prove a prima facie case of discrimination sufficient to escape summary judgment. Nevertheless, the majority opinion finds that the appellant can take such an insufficient case to trial.

Id at 697 (emphasis added).

Appellant's theory of the law would always preclude summary judgment in a workers' compensation discrimination case. Appellant's position would require only that a plaintiff have filed a workers' compensation claim. Thereafter, should his or her employer take any adverse employment action, the workers' compensation discrimination claim would be preserved for a jury. Appellant's theory is that the *jury* could consider the passage of time, but not a trial court. However, that is not the law. That theory would make any employee who files a workers' compensation claim eligible to bring an employment discrimination claim should he or she ever suffer an adverse employment action. Such employees would be forever immune from termination by the employer for any reason. Indeed, trial courts would have no role in managing cases—all of these types of cases would simply be tried to juries.

Moreover, if time were the only element that the court could evaluate, as Appellant would propose, how far out would the time frame have to be for a trial court to decide the case on summary judgment where there is no evidence of a bad motive—five years? Ten years? Twenty years? Perhaps Appellant would prefer a bright line test that if an employee

has ever made a workers' compensation claim, his or her employer would be potentially liable in damages for terminating him or her thereafter for any reason whatsoever.

This theory is ludicrous. This Court should affirm the trial court for doing what it is supposed to do---preserving jury trials for matters in which plaintiffs are able to meet a prima facie case, and no others.

B. The instructions given by the trial court were correct statements of the law, were based upon evidence submitted at trial and this Court should give proper deference and affirm those instructions.

1. Jury Instructions Refused.

Appellants argue that the trial court erred by refusing to give three of their proposed jury instructions. However, the court's refusal to give the instructions was proper, as the instructions were not accurate statements of the law.

Appellants offered an instruction based upon dicta from the case of *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 704, 403 S.E.2d 717, 721 (1991):

Indeed, employers who discriminate against employees who have filed workers' compensation claims rarely broadcast their intentions to the world. Employers who engage in conduct of this kind may be expected to try to avoid detection and they typically will try to accomplish their objections by subtle, rather than obvious means.

The Court denied this instruction, explaining correctly that this language "was not a syllabus point." (See Instructions Conf., pg. 10.)

Additionally, Appellants contend that the court erred in refusing an instruction that was crafted by counsel, and stated to be based in part upon dicta from *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 74, 479 S.E.2d 561, 584 (1996):

[I]t is possible that subconscious or stereotypical thinking motivated Soles Electric Company to take adverse action against [Mr. Fravel and Mr. Wyckoff] and for example, Soles Electric Company management employees could testify quite honestly that they did not consider Mr. Fravel's work-related injury or Mr. Wyckoff's age in making the

decision to lay them off and not recall them. Yet, they might still be able to prove pretext by showing that management unconsciously considered these factors in terminating their employment, while at the same time, calling back from layoff other employees and hiring new employees.

This language is clearly not a syllabus point of law. Moreover, Appellants offered no evidence that management “unconsciously considered” the prohibited factors in their layoffs.

Appellants further argue that the trial court erred in refusing the following instruction:

Because discrimination is essentially an element of the mind, there probably will be very little direct proof available. Gone are the days, if, indeed, they ever existed, when an employer freely will admit to taking adverse action against an employee for illegal reasons.

This statement, taken from a footnote in *Skaggs*, is a cite to *Geraci v. Moody-Tottrup, Intern., Inc.*, 82 F.3d 578, 581 (3rd Cir. 1996), but is clearly dicta. In the conference on jury instructions, the trial court described this proposed instruction as “editorial” in nature and refused it. (See Instructions Conf., pg. 16.)

As set forth in Syl. pt. 42 of *Skaggs*, Appellants must show as a threshold matter that the instructions they proposed correctly stated the law. In this case, none of these three instructions refused by the trial court were statements of the law. In fact, had the court *given* such instructions, it would have been error.

2. Jury Instruction Given.

a. Business Judgment Rule

Appellants also contend that the trial court’s instruction on the “business judgment rule” was in error:

Whether the defendant’s decision seemed fair or wise to you is not a basis upon which you may rely in finding that the defendant unlawfully discriminated against the plaintiffs.

The basis for Appellants' objection is unclear. The objection set forth in the record stated as follows: "We also object to the inclusion of the following sentence from Page 29 of the 'Draft Charge'", which was the referenced sentence. (See Transcript of Plaintiffs' Objections at page 3, attached hereto as Exhibit "F".) No basis was given then or now, merely that Appellants object. Again, as set forth in Syl pt. 43 of *Skaggs*: "As a general rule, objections to trial judge's charge must be clear and explicit enough to tell trial judge what the parties want done to correct the alleged error." However, assuming *arguendo* that Appellants somehow preserved their objection by this meager, bald objection without basis, it is clearly a proper statement of the law.

The business judgment rule is derived from the at-will employment rule. Employers can hire and fire employees for any reason, so long as it is not a discriminatory one. See *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). Syl. pt. 78 of *Skaggs* reiterates this point:

Employment discrimination laws are not a form of job assurance for handicapped individuals or any other protected class members; employers retain the right to restructure jobs and exercise business judgment, including even bad judgment, and employee can be let go for any reason or for no reason, provided the reason is not a prohibited one.

As recently as the October, 2004 term, this Court again set forth this ultimate right of employers in the case of *Pittsnogle v. W. Va. Dept. of Transportation*, ___ W. Va. ___, ___ S.E.2d ___, 2004 W. Va. Lexis 136 at syl. pt. 9 (October 22, 2004):

Not all unfair or unpopular business decisions are discrimination. Certain employer actions may appear unjust or unacceptable to a juror or even to a reviewing court; yet such actions do not necessarily constitute discrimination. The reason need not be a particularly good one. It need not be one which the judge or jury would have acted upon. The reason can be any other reason except that the plaintiff was a member of a protected class. . . .

This instruction was a clear and correct statement of the law, and was properly given to the jury.

b. Jury Instructions as a Whole

Appellants also argue that the trial court erred in the manner of instructions given. The Court took the proposed jury instructions from the Plaintiffs and the proposed jury instructions from the Defendant. These were modified after a conference between the judge and counsel, and the final charge was given which set forth the court's general charge, then the plaintiffs' instructions, followed by the defendant's instructions. Appellants argue that the charge failed to provide a "unitary charge that touches on all relevant issues separately." (See Appellant Brief at 7.) The charge to the jury is submitted herewith for this Court's review at Exhibit "G".

As this Court has recently reiterated:

Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Alley v. CAMC at syl. pt. 3.

The trial court gave the jury the instructions on the law based upon its standard charge, and the law as set forth in the parties' proposed instructions. The Court did not blindly combine all of the instructions, but rather considered them as proposed, considered the objections, and made the changes the court thought necessary to fully instruct the jury on the law as impartially as possible. The instructions were legally proper, and the actual wording was clearly within the trial court's discretion. Notably, Appellants made no objections to this issue in their formal objections. This Court should affirm the jury instructions given as correct.

V.

CONCLUSION

The Appellee prays that this Court affirm the Orders of the Marion County Circuit Court and affirm the jury instructions and verdict as proper.

Respectfully submitted by:

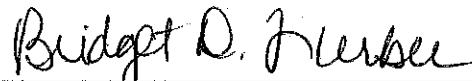


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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2005, I served a copy of the foregoing "**Brief of Appellee, Sole's Electric Company, Inc.**" upon the following counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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