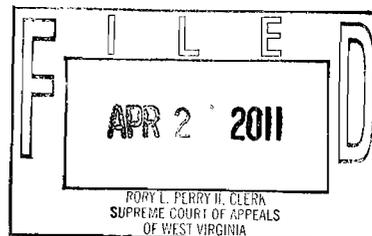


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0694



ANGELA SMITH,
PLAINTIFF/APPELLEE,

vs.

CSX TRANSPORTATION, INC.,
DEFENDANT/APPELLANT

HONORABLE WILLIAM S. THOMPSON, JUDGE
CIRCUIT COURT OF BOONE COUNTY
CIVIL ACTION NO.: 08-C-96

RESPONSE TO PETITION FOR APPEAL

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I. INTRODUCTION

On June 28, 2007, Plaintiff Angela Smith was a ten-year employee of Defendant CSX Transportation, Inc. ("CSX") who had never been disciplined in any way by her employer and who had been promoted several times, ultimately becoming a trainmaster. On that day, the Plaintiff overheard a supervisory employee of the railroad named Wes Knick make the following statement to another CSX employee about the Plaintiff:

So how does Angie Smith taste and feel because I heard she's never had a dick in her?

(Tr. Day 4 at 114).

After hearing this obscene comment, Plaintiff and Clay Newsome, the CSX employee to whom the statement was made, met with CSX management to report it. They reported not only the comment by Mr. Knick, but also a multitude of other harassing comments made by Knick concerning Ms. Smith and another female trainmaster. A previous complaint had also been made by a female employee of CSX against Mr. Knick alleging harassment and intimidation. Although the CSX Human Resources department recommended several sanctions against Mr. Knick in an effort to curb this behavior, those recommendations were completely ignored by CSX management and were never implemented.

Despite its "zero-tolerance" policy, CSX decided not to terminate Wes Knick's employment and instead demoted him from his trainmaster position in Clifton Forge, Virginia and allowed him to accept a position in Grafton, West Virginia. That position was to be under the supervision of Angela Smith. CSX employees were so concerned about this arrangement that the Division Manager called Ms. Smith and told her to pack her things and leave work immediately. Those fears were confirmed the next day when an individual showed up at Ms. Smith's house screaming at her, kicking her door and threatening her with retaliation.

And I heard a voice that was saying, "Come out bitch. Don't be afraid of me. Come out. You cost me my job and I'm going to get you, come on out," constantly for almost an hour.

(Tr. Day 4 at 132-133). The only reasonable inference is that the person at Ms. Smith's house that morning was Mr. Knick, as Ms. Smith's actions did not "cost" anyone else his job. Despite this incident, Ms. Smith was informed by CSX that Mr. Knick would remain in Grafton, but that she could move to an out-of-state job if she wanted. Ultimately, Ms. Smith ended up with two choices: 1) continue working in Grafton as Mr. Knick's supervisor; or 2) go back to being a yardmaster in Danville, West Virginia with a corresponding thirty to thirty-five thousand dollar pay cut. With the advice of her psychiatrist, Ms. Smith decided to accept the demotion in order to avoid Wes Knick.

The same month Ms. Smith accepted the demotion she filed this lawsuit against CSX alleging sexual harassment/hostile work environment, constructive discharge/demotion, retaliation for complaints of sexual harassment and negligent retention of Wes Knick. Within seven months of the filing of the Complaint, CSX had begun the process of terminating Ms. Smith's employment for an alleged violation of the company's policies regarding the railroad taxi service. Ms. Smith had been using the railroad taxi service to go to and from work as her car was being repaired. The reason given for Ms. Smith's termination was clearly pretextual as Ms. Smith had express permission from three of her supervisors to use the taxis. Further, the evidence at trial showed that there was no policy whatsoever regarding use of taxis and that many others used the taxi service for their own benefit, including picking up pizzas, without any disciplinary action taken against them. In fact, the uncontroverted testimony of the defendant's own witnesses at trial established that no one in the history of the railroad had ever been terminated for misusing the taxis until Ms. Smith was. Accordingly, Ms. Smith filed an

Amended Complaint alleging that she was terminated in retaliation for filing a lawsuit against CSX and reporting violations of the West Virginia Human Rights Act.

After the trial of this matter, the jury found as follows: 1) Angela Smith was subjected to a hostile work environment in violation of the West Virginia Human Rights Act; 2) CSX did not investigate and adequately respond to the misconduct alleged by Angela Smith; 3) CSX retaliated against Angela Smith as a result of her complaints of sexual harassment and/or her filing of a lawsuit against it; and 4) CSX negligently retained Wes Knick as an employee and that such negligence proximately caused the damages alleged by Angela Smith.¹

The defendant has appealed this verdict on several grounds. Importantly, CSX *does not* allege that it was entitled to judgment as a matter of law on Plaintiff's claims of retaliation and negligent retention of Wes Knick. Instead, it argues that it was entitled to judgment as a matter of law on Ms. Smith's sexual harassment/hostile work environment claim, that two instructions relating solely to the retaliation claim were improper and that the punitive damages claim was unsupported by the evidence. Therefore, assuming *arguendo* that CSX is correct regarding every error alleged in its Petition For Appeal (it is not), the verdict against CSX for negligent retention of Wes Knick and the compensatory damages awarded by the jury are unchallenged by CSX. As such, the verdict must be affirmed.

Nonetheless, with regard to the errors alleged by CSX, it is apparent that CSX was not entitled to judgment as a matter of law on Ms. Smith's sexual harassment/hostile work environment claim, as even the Defendant's own witnesses admitted that Mr. Knick's conduct amounted to sexual harassment. Further, a review of applicable authority proves that the two

¹ The jury awarded damages for these violations of law as follows: \$277,600 in back pay, \$1,000,000 in front pay, \$280,000 in non-economic damages and \$500,000 in punitive damages.

instructions challenged by CSX were correct statements of the law. Finally, a review of the evidence makes clear that the award of punitive damages and the amount of the award was proper.

II. STATEMENT OF FACTS

Angela Smith was hired by CSX as a yardmaster in August of 1997. (Tr. Day 4 at 100). She worked as a yardmaster at the Danville, West Virginia facility of the Defendant. (Tr. Day 4 at 100). When Ms. Smith started in Danville, she was the only female of approximately 90 to 110 employees at that location. (Tr. Day 4 at 101). Ms. Smith was the first female yardmaster ever at the Danville location. (Tr. Day 4 at 101).²

Ms. Smith was a good employee. She received regular raises and was never written up for any performance or attendance issues. (Tr. Day 4 at 104). Gery Williams, the Plaintiff's Division Manager, testified that he never disciplined Ms. Smith and never had any trouble with her. (Tr. Day 8 at 252). After approximately seven to eight years of employment, Ms. Smith was selected for participation in the Associate Development Program, an exclusive CSX leadership training program. (Tr. Day 4 at 102-104; Tr. Day 3 at 155). A trainer in the management program said of Ms. Smith:

Angie shared with me her ceaseless desire to become part of CSX's management team which she pursued with the passion of a true leader for several years before being promoted to Trainmaster. Angie never tired, gave up or became negative that she was not chosen before now.

.....

You will not be disappointed with choosing Angie Smith for the Associate Development Program. You will be amazed as to how

² During Plaintiff's time in Danville as a yardmaster she was subjected to frequent improper comments of a sexual nature. Plaintiff testified, "I mean they always talked about how big my boobs were and that I didn't have a butt, just teasing me." (Tr. Day 4 at 102). Additionally, Plaintiff testified that her supervisor, Mr. Hall, would call her "all tits and no ass." (Tr. Day 4 at 102-103). Mr. Hall made these comments on a weekly basis. (Tr. Day 4 at 103).

dedicated, enthusiastic and an integral contributor to CSX Transportation she truly is.

(Plaintiff's Exhibit #12; Tr. Day 4 at 70). After Plaintiff finished her training she received a promotion and became a "trainmaster" in Grafton, West Virginia. (Tr. Day 4 at 106-107).

On June 28, 2007 Angela Smith was on a conference call with another CSX employee, Clay Newsome. (Tr. Day 4 at 114; Tr. Day 3 at 22-25; Plaintiff's Exhibit #5). Mr. Newsome was in Clifton Forge, Virginia. He was in his office on speakerphone with Ms. Smith as they worked on a project together. (Tr. Day 4 at 114; Tr. Day 3 at 22-25; Plaintiff's Exhibit #5). Mr. Newsome's phone was lying open on his desk when a yardmaster named Wes Knick opened the door to Mr. Newsome's office. (Tr. Day 3 at 22-25). Mr. Newsome testified he was sure that Mr. Knick knew his speaker phone was on. (Tr. Day 3 at 24). After opening the door to Mr. Newsome's office, Wes Knick made the following statement regarding Angela Smith:

So how does Angie Smith taste and feel because I heard she's never had a dick in her?

(Tr. Day 4 at 114; Trial Day 3 at 23; Plaintiff's Exhibit #5; Plaintiff's Exhibit #14).

After the despicable remark was made Mr. Newsome grabbed his phone immediately and turned it off. (Tr. Day 3 at 24; Plaintiff's Exhibit #5). Of course, Ms. Smith had already heard the comment. (Tr. Day 4 at 114; Plaintiff's Exhibit #14). As CSX had a "zero tolerance" sexual harassment policy, Ms. Smith and Mr. Newsome decided to report Wes Knick's harassment to their supervisor, Jay Fleenor. (Tr. Day 8 at 232; Tr. Day 4 at 121-127; Tr. Day 2 at 69, 70).

Ms. Smith and Mr. Newsome met with Jay Fleenor in Huntington, West Virginia and reported the comment made by Wes Knick about Ms. Smith. (Tr. Day 4 at 126-127). However, that comment was not the only harassing conduct by Mr. Knick reported to Mr. Fleenor. In addition, the following comments were also reported:

Wes has on multiple occasions made sexually oriented jokes about Angie Smith. His jokes include, how does she taste, you know that she has never had a dick in it, does she go both ways or just the other, wonder what it is like when they all pile up, how good is that stuff, and what is it like. He has made reference on several occasions as to what position she takes while performing sex and if she would be the male or female.

(Plaintiff's Exhibit #6; Tr. Day 3 at 17-18, 89-90).

Mr. Fleenor was made aware that Mr. Knick was asked repeatedly to stop making these types of comments about Ms. Smith, but would only stop for a few days. (Plaintiff's Exhibit #6). In the meeting between Ms. Smith, Mr. Newsome and Mr. Fleenor it was reported to Mr. Fleenor that Ms. Smith was not the only target for Wes Knick's harassing behavior. Brenda Coffee, a female trainmaster in Clifton Forge, Virginia had also been a victim of Mr. Knick's.³ Mr. Knick made the following statements concerning Brenda Coffee:

I hate that fucking bitch, I wish she would quit.
I hate that fucking bitch, I wish that I could get her fired.
Brenda can't do anything right, she doesn't know how to railroad.
That bitch has no business out here; she doesn't know anything about railroading.

(Plaintiff's Exhibit #7; Tr. Day 3 at 19, 91-92).

It was also reported that Wes Knick called Brenda Coffee "a whore." (Tr. Day 3 at 19). Such comments by Knick were "an every-day practice." (Tr. Day 3 at 20). Mr. Knick not only made these comments to others, but also directly to Brenda Coffee. (Tr. Day 3 at 20). Brenda Coffee subsequently confirmed to Mr. Fleenor in an email that she heard Wes Knick make inappropriate comments.

Statements Wes Knick has made about me or to me:

³ Division Manager Gery Williams testified that in early 2007 the entire Huntington Division only had two female trainmasters, Angela Smith and Brenda Coffee. (Tr. Day 8 at 252-253). He testified that Wes Knick harassed both of them. (Tr. Day 8 at 252-253).

I have overheard Wes Knick refer to me as that Bitch on two occasions while on the telephone talking with Charlie Litchford. This happened about four months ago.

About a year ago, Wes Knick was in the company of a former Trainmaster and a male clerk, when he made a comment about that F___ing Bitch. I am sure they knew that I heard this comment.

In January of 2007, in front of Clay Newsome, Wes Knick made the statement that he would do what he wanted, when he wanted and anything he wanted. Nobody was going to do anything to him.

Statements I have heard Wes Knick make about Angie Smith:

I have heard Wes Knick make remarks to the effect that Angie Smith is gay.

Jay, I don't know what else I can tell you. You and I have had several conversations concerning Wes. He is a very arrogant man and as you told me one time, he does not know how to get along with people.

I don't know what this is all about but as I said in our telephone conversation about a week ago, his history is well known.

(Plaintiff's Exhibit #1). Of course, the behavior and comments of Wes Knick were no surprise to Jay Fleenor or CSX. Several weeks prior to Mr. Knick's June 28, 2007 comment about Angie Smith, Clay Newsome and Brenda Coffee met with Mr. Fleenor concerning Wes Knick. (Tr. Day 3 at 62, 69). Clay Newsome told Mr. Fleenor in that meeting that Wes Knick had called Brenda Coffee a "whore." (Tr. Day 3 at 69). Mr. Newsome also attempted to report additional "comments and harassment" to Mr. Fleenor perpetrated by Mr. Knick but was told, "we weren't there to discuss that." (Tr. Day 3 at 62). Brenda Coffee was told, "Oh, girl, we've been dealing with this for a long time and we're trying to change the future of the railroad. Just hang in there." (Tr. Day 3 at 69). However, there were no consequences to Wes Knick as a result of the allegations made at the early June, 2007 meeting between Mr. Fleenor, Mr. Newsome and Brenda Coffee. In fact, the reports by Mr. Newsome and Brenda Coffee did not even prompt an investigation or a discussion with Wes Knick. Despite being clearly put on notice of Wes

Knick's tendency to make sexually harassing and discriminatory statements, Defendant CSX did nothing to address the situation other than telling Brenda Coffee, "just hang in there."

Incredibly, CSX was aware of serious problems with Wes Knick's behavior, including harassing and intimidating conduct towards women, well before the meeting with Brenda Coffee and Clay Newsome in early June of 2007. In 2001 a female CSX employee named Wanda Yopp made complaints of harassment and intimidating language by Mr. Knick toward her. (Tr. Day 4 at 64).⁴ Terri Schray, the Defendant's Director of Human Resources, testified at trial that she investigated the allegations made by Wanda Yopp in 2001. (Tr. Day 4 at 64-65). As a result of that investigation the CSX Human Resource Department concluded that "we definitely have a behavioral problem with Terminal Manager Knick". (Tr. Day 4 at 65). Mrs. Schray personally recommended that Mr. Knick be placed on a formal management performance improvement plan. (Tr. Day 4 at 65). She also recommended that Mr. Knick be placed on a "cautionary status" for six months. (Tr. Day 4 at 66). Finally, Mrs. Schray recommended that there should be regular, bi-weekly meetings with Mr. Knick in an effort to change his improper behavior. (Tr. Day 4 at 66-67). Mrs. Schray's supervisor agreed with all of these recommendations. (Tr. Day 4 at 66-67). However, CSX completely ignored the recommendations of its own Human Resources Department and instead chose to do nothing about Wes Knick's behavior. (Tr. Day 4 at 67-68; Tr. Day 6 at 82-83). In fact, Mr. Knick testified at trial that he was never even informed that Wanda Yopp had made a harassment complaint against him. (Tr. Day 6 at 83).

Having declined to address Wes Knick's improper behavior on two previous occasions, CSX finally began an investigation into Mr. Knick after Angie Smith and Clay Newsome

⁴ Mrs. Schray confirmed at trial that some of the allegations against Mr. Knick were that he yelled and cursed at women. (Tr. Day 4 at 79).

reported the June 28, 2007 comment and other instances of harassment to Mr. Fleenor. (Tr. Day 4 at 71-72). Although CSX had a separate, specialized group in Human Resources to handle sexual harassment issues, no one from that group participated in the investigation. (Tr. Day 4 at 94-95). Mr. Knick was interviewed by Gery Williams as part of the investigation. (Tr. Day 8 at 256-257). Mr. Knick was asked “about any comments in general that he might have made in front of either lady.” (Tr. Day 8 at 256-257). Tellingly, Mr. Knick did not deny making harassing and improper statements to Angie Smith and Brenda Coffee, he simply told Mr. Williams, “I don’t recall.” (Tr. Day 8 at 257).⁵ As a result of the investigation, Human Resources Director Terri Schray, Division Manager Gery Williams and Jay Fleenor all testified that CSX concluded Angie Smith, Clay Newsome and Brenda Coffee were telling the truth about the allegations against Wes Knick. (Tr. Day 4 at 71-72; Tr. Day 2 at 89; Tr. Day 8 at 270). Consistently, CSX also concluded that Wes Knick was not telling the truth. (Tr. Day 4 at 72; Tr. Day 2 at 89; Tr. Day 8 at 267). Further, Terri Schray, Gery Williams and Jay Fleenor all admitted that the conduct of Wes Knick toward both Angie Smith and Brenda Coffee constituted sexual harassment. (Tr. Day 4 at 62-64; Tr. Day 8 at 253; Tr. Day 2 at 71-74).

The same day that Angie Smith had the initial meeting reporting the conduct of Wes Knick she was called by Gery Williams, who told her “he was going to investigate it and he would be calling to check on me.” (Tr. Day 4 at 128). However, Ms. Smith was not contacted by CSX about the investigation for four to five weeks. (Tr. Day 4 at 129). Instead, Ms. Smith called Gery Williams to “let him know that I was afraid and wanted to know what was going on.” (Tr. Day 4 at 129). Clay Newsome, who worked in Clifton Forge with Mr. Knick, had

⁵ Wes Knick testified at trial that Brenda Coffee, Wanda Yopp, Clay Newsome and Angela Smith all were lying when they made sexual harassment allegations against him and that he was the only one telling the truth. (Tr. Day 6 at 77-83).

informed Ms. Smith that he feared violence from Knick.⁶ (Tr. Day 3 at 21-22). Ms. Smith was concerned as she lived alone in Grafton and felt there may be some retaliation from either Mr. Knick or his family (Mr. Knick's son worked approximately five minutes from where Ms. Smith lived). (Plaintiff's Exhibit #13). Further, Ms. Smith was starting to hear reports from others about how angry Mr. Knick was about the situation and that she was being blamed by Knick for ruining his career. (Tr. Day 5 Excerpt at 117; Plaintiff's Exhibit #13).

Ultimately, CSX, instead of terminating Mr. Knick's employment, simply removed him from his supervisory position and permitted him to go back to a union job with the railroad. (Tr. Day 4 at 129). CSX took this action in spite of its "zero-tolerance" harassment policy that was admittedly broken by Wes Knick on several occasions in the past. Incredibly, this meant that Wes Knick would be moving to the Grafton location to work under the supervision of Angela Smith! (Tr. Day 4 at 80-81, 87). Although CSX argued at trial that it had no choice but to allow Mr. Knick to work in Grafton due to his union seniority, Defendant's witnesses testified that CSX had the power to completely terminate Mr. Knick's employment but simply chose not to do so. (Tr. Day 4 at 80 (Terri Schray); Tr. Day 8 at 258 (Gery Williams); Tr. Day 2 at 126 (Jay Fleenor). Even Wes Knick admitted CSX could have completely terminated his employment as opposed to permitting him to return to work in Grafton. (Tr. Day 6 at 92)

After the decision to demote Mr. Knick was made, Gery Williams and Terri Schray called the plaintiff to inform her that Wes Knick would be working in the Grafton area under her supervision. (Tr. Day 4 at 129). Ms. Smith told Mr. Williams, "[t]hat scares me, Gery". (Tr. Day 4 at 130). Ms. Smith was told, "you need to leave your office immediately and go." (Tr.

⁶ In fact, Mr. Newsome informed Ms. Smith that on several occasions he had witnessed Wes Knick telling his subordinates that "he couldn't do anything to them while on company property, but go ahead and meet him across the street and he would take care of them." (Tr. Day 5 Excerpt at 5-6).

Day 5 Excerpt at 81). When Ms. Smith asked what was meant by that comment, she was told she would be placed on administrative leave with pay and that she should “[p]ack your things up and take them, and we’re going to figure out where else to send you.” (Tr. Day 4 at 130; Tr. Day 5 Excerpt at 81). Gery Williams admitted at trial that “I told her not to go back to work.” (Tr. Day 8 at 268). Ms. Smith packed up her things and left work as she was told. (Tr. Day 4 at 132).

Thus, far from believing Ms. Smith’s fears were unfounded, CSX conceded that Ms. Smith’s fears of retaliation were legitimate and told her to pack up her things and leave. In fact, Terri Schray wrote an email to the Vice President of the Southern Region about the situation and in that message stated her belief that Ms. Smith “may have some legitimate concerns in my opinion.” (Exhibit #13).⁷ The email from Terri Schray stated:

I believe Gery has shared with you that I spoke to Angie, and she has no issues with either Gery or Jay, but does have a real concern with Wes Knick returning to his seniority where she is working in Grafton. She’s concerned because she is there alone, and feels there may be some retaliation from either Wes or his family (his son works five minutes from where she lives).

She seemed pretty solid, and wants to follow the right procedures to get this addressed, but is very strong in that she does not have any desire to continue working in Grafton if Wes Knick returns there to work. She may have some legitimate concerns in my opinion. She is a victim in this circumstance, but feels as if she is being blamed for ruining his career as told to her by others that work for her, and are friends with Wes’ son.

⁷ Terri Schray also testified that as Human Resources Director she wanted Wes Knick “to go to an alternative location.” (Tr. Day 4 at 83).

(Plaintiff's Exhibit #13). Unfortunately, Ms. Smith's fears of retaliation were confirmed the next morning when a person (presumably Wes Knick)⁸ showed up at her home screaming and threatening her.⁹

Q: What happened the next morning?

A: The next morning I remember I was getting all my clothes together and I was getting them out of the dryer and I hear somebody coming up to the house and I heard beating on my front door and kicking it.

Q: You heard what?

A: Someone beating on the door and kicking it.

Q: Somebody was beating and kicking your door?

A: Yes, sir.

Q: Go ahead.

A: And I heard a voice that was saying, "Come out bitch. Don't be afraid of me. Come out. You cost me my job and I'm going to get you, come on out," constantly for almost an hour.

Q: And what did you do while this was going on?

A: I hid in my bedroom. I didn't know what to think and I was going to call the police, but my cell phone was in the living room, that's where I leave it on the charger, so I was scared to go in there, so I just hid in my bedroom beside the bed, in the curtain.

Q: Was this person saying things about the railroad or about the job?

A: Yes. At one point he screamed what was I going to do in the middle of the night if I got called out on a road crossing where there wouldn't be anybody there to save me.

(Tr. Day 4 at 132-133).

As soon as the incident was over Ms. Smith threw her clothes in her car, left her home and called Gery Williams to report it. (Tr. Day 4 at 134-135; Tr. Day 8 at 247). Ms. Smith also called Terri Schray and informed her of the incident. (Tr. Day 4 at 94). In her phone call with Gery Williams, Ms. Smith told him that she was leaving Grafton and was going to Charleston to

⁸ Ms. Smith testified that when she looked out her bedroom window all she could see was the back and side of a man's head and could not tell who it was. (Tr. Day 4 at 133-134).

⁹ Mr. Knick admitted at trial that after his termination he went to live with his son near Grafton and that he could have obtained Ms. Smith's address from the CSX computers. (Tr. Day 6 at 89-91).

stay at the Ramada hotel until she received further instructions from him. (Tr. Day 4 at 135). CSX paid for Ms. Smith to stay at the hotel for eight days. (Tr. Day 4 at 136; Plaintiff's Exhibit #4). Despite Ms. Smith's report of the above incident, it was never investigated by CSX and Mr. Knick was never questioned about it. (Tr. Day 4 at 85, 135; Tr. Day 2 at 94; Tr. Day 6 at 90).

Ms. Smith eventually was called to meet with Gery Williams and Rich Greenwood (a member of the CSX Human Resources Department) in Huntington. (Tr. Day 4 at 137). In that meeting Mr. Williams told Ms. Smith that there was nothing wrong with Wes Knick being in Grafton and that she could move to a position in Erwin, Tennessee or Russell, Kentucky. (Tr. Day 4 at 140-141). When Ms. Smith asked why she was the one being asked to move out of state, she was told "they didn't have any choice because Wes Knick has the seniority." (Tr. Day 4 at 141). However, she was also informed by Gery Williams in the meeting that CSX could have terminated Mr. Knick. (Tr. Day 4 at 140). Gery Williams also told the Plaintiff, "[i]t wouldn't be the first time or the last time that I took someone's seniority if I wanted to." (Tr. Day 4 at 140). Mr. Williams admitted making this statement at trial. (Tr. Day 8 at 248). Regarding the decision to permit Mr. Knick to remain employed by CSX and go to Grafton, Mr. Greenwood revealed the Defendant's justification for the move when he asked Ms. Smith, "Angie, what would you have us to do? The man has 27 years of service. He's close to retirement." (Tr. Day 4 at 139). At the end of the meeting Ms. Smith was informed she had three days to make up her mind what she wanted to do. (Tr. Day 4 at 143).

The next day the Plaintiff went to a previously scheduled appointment with Dr. Tara Ray, a board certified psychiatrist/neurologist to whom she was referred by an employment counselor

employed by CSX. (Tr. Day 4 at 4-5, 135-136, 143).¹⁰ Dr. Ray performed a comprehensive psychiatric evaluation. (Plaintiff's Exhibit #8). She testified that Ms. Smith "presented for treatment of anxiety and depression in the context of occupational harassment." (Tr. Day 4 at 8). Dr. Ray noted on her records that Ms. Smith "[f]eels employer is not supporting during this difficult time, actually exacerbating the problem." (Tr. Day 4 at 11). Dr. Ray diagnosed Ms. Smith with adjustment disorder, anxiety, occupational harassment, clinical/medical depression and increased blood pressure¹¹ relating to her employment. (Tr. Day 4 at 11-13, 19; Plaintiff's Exhibits #8-11). As a result of the increased blood pressure, Ms. Smith's endocrinologist took her off work, a decision Dr. Ray agreed with. (Tr. Day 4 at 13). Dr. Ray referred Ms. Smith to therapy and began prescribing her sleeping medication and antidepressants. (Tr. Day 4 at 143-144; Plaintiff's Exhibits #8-11).

Ultimately, Ms. Smith missed approximately six months of work while treating for the above issues. (Tr. Day 4 at 143). During this time Ms. Smith testified that she frequently received harassing phone calls. (Tr. Day 4 at 145-146). Concerning these phone calls, Ms. Smith testified as follows:

Q: Why would you feel that fear of going in and out of the house?

A: Because I kept getting phone calls calling me a bitch and saying, "I'm not finished with you." It was a male voice. That's what I was worried about. I don't have a lot of male friends.

Q: So you were getting phone calls during this time?

A: Yes, sir.

Q: How often?

A: Sometimes once or twice a day, maybe once a day. It was at least every other day.

¹⁰ Gery Williams had asked Ms. Smith to call the employment counselor, who referred her to Dr. Ray. (Tr. Day 4 at 135).

¹¹ The increased blood pressure was particularly worrisome as Ms. Smith underwent surgery in 2006 to remove a tumor which resulted in her losing two-thirds of her pancreas. (Tr. Day 4 at 109-110).

Q: Were these phone calls blocked phone calls?

A: They said "private call."

Q: Private?

A: Yes, that's what it said.

Q: And tell me what those phone calls – what was said.

A: Sometimes they wouldn't say anything, they'd just hang up. Other times he'd says(sic), "Hey, bitch, I haven't forgotten what you've done. Watch your back. I'm going to get you."

Q: Did he say things about the railroad?

A: Just the same comment I told you when he was standing outside my door about road crossings and things.

Q: Okay. So the person who was calling knew about the railroad?

A: Obviously, yes.

(Tr. Day 4 at 145-146). Ms. Smith testified that she was forced to change her number three times as a result of these phone calls. (Tr. Day 4 at 147). Ms. Smith reported the phone calls to a CSX supervisor and to the railroad police.¹² (Tr. Day 5 Excerpt at 70-72).

In April of 2008 the plaintiff was released by her doctor to return to work. (Tr. Day 4 at 147). She called Gery Williams, who told her to call Terri Schray. (Tr. Day 4 at 147). Plaintiff called Terri Schray and asked what her options were. (Tr. Day 4 at 148). She was informed by Mrs. Schray, "[y]ou really don't have any options. You're going back to your tools." (Tr. Day 4 at 148). This meant that either Ms. Smith could go to Grafton and supervise Wes Knick or accept a demotion and return to her old position in Danville – along with a \$30,000 to \$35,000 cut in pay. (Tr. Day 4 at 87, 148-151). Faced with these options, Ms. Smith resigned the position in Grafton and moved to Danville in order to avoid Wes Knick. (Tr. Day 4 at 149-150). Importantly, Dr. Ray told Ms. Smith that she did not want her to work around Mr. Knick. (Tr. Day 4 at 18-19). At trial even Terri Schray admitted that Ms. Smith's concerns were reasonable and that she would have made the same decision. (Tr. Day 4 at 87).

¹² Ms. Smith testified that railroad police attempted to retrieve information related to those phone calls but were unable to do so. (Tr. Day 5 Excerpt at 70).

I felt her concerns were reasonable for why she didn't want to stay there. I can understand her decision. I would have made the same decision if I had been in the same situation. She actually in that location would have been Wes Knick's supervisor.

(Tr. Day 4 at 87). After her resignation, Ms. Smith began working at the Danville location as a yardmaster in May of 2008. (Tr. Day 4 at 152). Also, in May of 2008, Ms. Smith filed this lawsuit against CSX alleging sexual harassment/hostile work environment, constructive discharge/demotion, retaliation for complaints of sexual harassment and negligent retention of Wes Knick. (See Complaint).

After her return to work, Ms. Smith received another threatening phone call. The caller asked, "Hey, bitch, did you hear about Clay Newsome." (Tr. Day 4 at 155). Plaintiff had not spoken to Mr. Newsome or his wife in several weeks but soon received a phone call from Mr. Newsome's wife from a hospital. (Tr. Day 4 at 155). Ms. Smith learned that Mr. Newsome had been out working on a train and someone hit him on the back of the head producing a severe concussion which caused him to be hospitalized for two or three days. (Tr. Day 4 at 155-156). Ms. Smith testified that the phone call and the attack on Mr. Newsome "scared me to death." (Tr. Day 4 at 156). The plaintiff reported the threatening phone call to her supervisor and the railroad police. (Tr. Day 4 at 156).

In the summer or early fall of 2008 Ms. Smith began having car trouble. (Tr. Day 5 Excerpt at 4-5). The first time Ms. Smith's car broke down she was on her way home from work. (Tr. Day 5 Excerpt at 7). CSX sent a railroad taxi to take her home. (Tr. Day 5 Excerpt at 7). As a result of continued car trouble Ms. Smith spent several months without transportation while an acquaintance attempted to fix her car. (Tr. Day 5 Excerpt at 6; Tr. Day 8 at 58). Ms. Smith informed her supervisor, Randy Hall, that she did not know what was going on with her

car. (Tr. Day 5 Excerpt at 10). She told him she had a fear of driving home at night due to the attack on Mr. Newsome and the threats made against her. (Tr. Day 5 Excerpt at 10). Mr. Hall told Ms. Smith:

Angie, just don't get in trouble for attendance. If you have to ride a taxi, take a taxi. I have no problem with that whatsoever.

(Tr. Day 5 Excerpt at 11).

In addition to the permission received from Mr. Hall, Ms. Smith received permission to use the taxis from two other supervisors, Shiloh Campbell and Dwayne Pelham. (Tr. Day 5 Excerpt at 10). Accordingly, Ms. Smith rode railroad taxis back and forth to work. The taxi service was used frequently by the railroad to deliver items and pick up employees. (Tr. Day 5 Excerpt at 22). Ms. Smith testified that as a yardmaster she might order thirty or more taxis a shift and one hundred to three hundred per week. (Tr. Day 5 Excerpt at 22). Each of the five yardmasters in Danville would order a similar amount of taxis. (Tr. Day 5 Excerpt at 22-23).

Ms. Smith testified that on most occasions she would catch a ride with a taxi that was going to her destination already with other CSX employees or for another reason. (Tr. Day 5 Excerpt at 7-10). Ms. Smith only ordered a taxi for herself alone approximately five to ten times. (Tr. Day 5 Excerpt at 10). As noted above, she had obtained permission from three supervisors to do so.

In December of 2008, approximately seven months after Ms. Smith filed her Complaint against CSX, the company began an "investigation" of Ms. Smith's taxi use.¹³ (Tr. Day 8 at 144-145). Although Defendant's witness Jack Vierling testified that the investigation was initiated at the request of Randy Hall, Mr. Hall expressly denied turning in information to CSX

¹³ Ms. Smith did not know until later that an investigation into her taxi use had begun. (Tr. Day 5 Excerpt at 19).

about Ms. Smith's taxi usage.¹⁴ Then, in late December of 2008 or early January 2009, Ms. Smith was questioned regarding a train that ended up on the wrong track. (Tr. Day 5 Excerpt at 13). Prior to Ms. Smith's questioning by Mr. Pelham, the train conductor "had taken all responsibility and said he put his crew on the wrong track that morning." (Tr. Day 5 Excerpt at 16). Nevertheless, Mr. Pelham forcefully attempted to get Ms. Smith to take some responsibility for the incident, which she refused to do. (Tr. Day 5 Excerpt at 16-17). While Ms. Smith was attempting to explain to Mr. Pelham what happened, he stopped her and said, "Look, Angie, I'm not on with CSX trying to get rid of you." (Tr. Day 5 Excerpt at 17). Such a comment from her supervisor made clear to Ms. Smith that CSX was searching for a way to terminate her employment. (Tr. Day 5 Excerpt at 17).

The very next day Ms. Smith was called at home and informed that another issue had arisen. (Tr. Day 5 Excerpt at 18). When she got to work she was put on speakerphone with an attorney for CSX who questioned her about missing three or four days of work due to a scratched cornea. (Tr. Day 5 Excerpt at 18). When Ms. Smith informed the attorney she had a doctor's excuse, the attorney told Ms. Smith "just because I had a doctor's excuse didn't mean that I didn't need to cover my position, and that CSX doesn't accept excused doctor's absences." (Tr. Day 5 Excerpt at 18).

¹⁴ Mr. Vierling testified: "In December of 2008, one of my trainmasters, Randy Hall, came to me and said that he believed he had an issue where one of his yardmasters was utilizing taxis for their own personal needs. He called me and told me about it." (Tr. Day 8 at 144). Mr. Hall testified that he knew Ms. Smith's car was broken down and that she was riding a taxi. (Tr. Day 3 at 162). However, when asked, "And you didn't turn that in to anybody, did you?", Mr. Hall replied, "No sir." (Tr. Day 3 at 162-163). In yet another contradictory statement by CSX, Ms. Smith was told by Randy Hall and another supervisor that "they had an anonymous phone call saying that I was misusing the taxis." (Tr. Day 5 Excerpt at 19).

The next day Ms. Smith was called into the office again and questioned about her taxi usage. Ultimately, Ms. Smith was suspended without pay in January of 2009 and terminated in March of 2009 for using the taxis to get to and from work.¹⁵ (Tr. Day 5 Excerpt at 37).

Substantial evidence supported the jury's conclusion that the reason given for Ms. Smith's termination was pretextual. Ms. Smith could not have been legitimately terminated for using the taxis to get to and from work because she had received express permission from three different supervisors to use the taxis. (Tr. Day 5 Excerpt at 10). A taxi driver testified that Ms. Smith told her on multiple occasions that she had permission from her supervisors to use the taxis. (Tr. Day 6 Excerpt at 29). The taxi driver also testified that Ms. Smith never tried to hide her taxi use and that everybody knew about it as the taxi driver would frequently wait around the office for Ms. Smith to get off work. (Tr. Day 6 Excerpt at 29, 36-37).

¹⁵ Additionally, CSX introduced evidence at trial to suggest that Ms. Smith filled out the taxi request forms incorrectly, ostensibly in an effort to prove Ms. Smith knew her use of the taxis was improper. Nevertheless, Ms. Smith testified that she filled out the taxi forms in the manner she was trained. (Tr. Day 5 Excerpt at 25-36). Ms. Smith testified that one of the taxi forms CSX relied upon in terminating her employment was clearly false as it indicated that she made an incorrect entry before she even showed up for work that day. (Tr. Day 5 Excerpt at 24-25). Ms. Smith testified that the CSX system was slow giving new yardmasters access to the system which necessitated yardmasters using the identification numbers of other yardmasters to perform their job duties. (Tr. Day 5 Excerpt at 26-27). Ms. Smith testified that because of this the other yardmasters could have filled out some of the taxi forms using her identification number. (Tr. Day 5 Excerpt at 26-27). Ms. Smith also testified that it was common practice for the yardmaster who worked the shift prior to her to forget to give the taxi drivers an order number, which would require Ms. Smith to give a number to the driver on her shift for a taxi that was ordered on another shift. (Tr. Day 5 Excerpt at 28-29). Ms. Smith testified that she would sometimes sign for deliveries that she would send on taxis when there was no one at the destination to sign for the delivery. (Tr. Day 5 Excerpt at 29-30). Ms. Smith was trained to handle the issue in this manner. (Tr. Day 5 Excerpt at 30). Ms. Smith testified that she was trained to generate a random train number to order taxis for deliveries not associated with trains. (Tr. Day 5 Excerpt at 30-31). Significantly, Ms. Smith testified that she filled out the taxi forms in the manner she was trained for approximately ten years and there were no negative consequences: "That's the way I was taught to do it and the way I did it for ten years, and nobody ever said anything about it negative to me towards it." (Tr. Day 5 Excerpt at 32). Ms. Smith's supervisor, Randy Hall, testified concerning the procedure for filling out taxi forms and supported Ms. Smith's testimony concerning her methods. (Tr. Day 3 at 158-161). Incredibly, the person CSX sent to investigate Ms. Smith's taxi use never spoke with her to get her side of the story and explain the taxi forms despite his assertion that he wanted the investigation to be fair and he wanted to hear both sides. (Tr. Day 8 at 175).

Further, the use of the taxis for personal (and sometimes frivolous) reasons was commonplace. Ms. Smith ordered taxis for others to get home, including a yardmaster named Mike Hill and her supervisor, Dwayne Pelham. (Tr. Day 5 Excerpt at 12). Mr. Pelham had Ms. Smith order a taxi to take him home several times after his car broke down, the same reason Ms. Smith used the taxi.¹⁶ (Tr. Day 5 Excerpt at 12). Ms. Smith, Mr. Hill and Mr. Pelham were not the only people who used the taxi to get to work with the approval of CSX. Clay Newsome was instructed by Jay Fleenor to order taxis as many as ten times for an employee who did not have a car so that he could get to work.¹⁷ (Tr. Day 3 at 54-56). Trainmasters would even have yardmasters order taxis to pick up pizzas. (Tr. Day 5 Excerpt at 12). Mr. Vierling testified that on at least four or five occasions he is aware of, an employee came to work smelling of alcohol and was sent back home in a taxi ordered by Defendant.¹⁸ (Tr. Day 8 at 177). None of those individuals were terminated. (Tr. Day 8 at 177-178). Mr. Vierling also testified that sometimes people who are sick at work use the taxis to go home and face no consequences. (Tr. Day 8 at 178). One of the taxi drivers testified at trial that the drivers talked about driving CSX employees to their homes. (Tr. Day 6 Excerpt at 42). The taxi driver also testified that it was

¹⁶ Mr. Pelham admitted that he used the taxi in order to get to and from work when his car broke down. (Tr. Day 3 at 110-119). CSX tried to distinguish Mr. Pelham's use of the taxis from Ms. Smith's by arguing that Mr. Pelham was a trainmaster and that he did not take the taxi all the way to his home. However, Gery Williams testified that Mr. Pelham's use of the taxis was improper as well. (Tr. Day 8 at 264-265). Notably, Mr. Pelham remained employed by the Defendant and was never disciplined for his "improper" use of the taxis.

¹⁷ In fact, Mr. Fleenor was aware that for those taxi rides, the paperwork showed that the taxi was carrying an "end of train device", which was not true. (Tr. Day 3 at 95-96).

¹⁸ Although Mr. Vierling tried to assert that the individuals smelling of alcohol were sent home in a taxi pursuant to a CSX policy on public safety, Gery Williams (the manager of the Huntington Division) testified that there was no such policy. (Tr. Day 8 at 270).

common practice, if a car was down, for a yardmaster, conductor or trainmaster to use a taxi to get to work. (Tr. Day 6 Excerpt at 27).

Moreover, although Defendant claims it terminated Ms. Smith because she violated policy by using the taxis, every witness asked in the case testified that: 1) there was no policy regarding taxi use; and 2) no one had ever been terminated for misusing taxis. Each of the following witnesses testified to those two facts: Angela Smith (Tr. Day 5 Excerpt at 21); Dwayne Pelham (Tr. Day 3 at 121, 129); Randy Hall (Tr. Day 3 at 169, 171); Terri Schray (Tr. Day 4 at 85-86); Jay Fleenor (Tr. Day 2 at 101-102); Jack Vierling (Tr. Day 8 at 177, 184).¹⁹

Given the above, the evidence is overwhelming that the reason given for Ms. Smith's termination was pretextual. Accordingly, after her termination Ms. Smith amended her Complaint to add an allegation of retaliatory discharge. See Amended Complaint.

III. DISCUSSION OF LAW

Before analyzing the Defendant's claims of error, it is significant to note what CSX does not claim. Plaintiff prevailed at trial on three separate causes of action: 1) sexual harassment/hostile work environment; 2) retaliation; and 3) negligent retention of Wes Knick. Defendant does not allege it is entitled to judgment as a matter of law on Plaintiff's claim of retaliation. Similarly, CSX does not allege it is entitled to judgment as a matter of law on Plaintiff's negligent retention claim. Further, the Defendant's alleged errors regarding jury instructions relate solely to the retaliation claim. Even assuming CSX is correct regarding every error alleged in its Petition For Appeal (it is not), the verdict on plaintiff's behalf for negligent retention of Wes Knick and the compensatory damages awarded by the jury are unchallenged by

¹⁹ Additionally, Wes Knick testified that in his 29 years at the railroad he had never heard of anyone being terminated for using a taxi. (Tr. Day 6 at 91). Gery Williams testified that there was no written policy governing the use of taxis. (Tr. Day 8 at 263).

CSX. That in and of itself is sufficient reason to affirm the verdict for the plaintiff. Due to the Defendant's concession that the verdict for negligent retention of Mr. Knick contains no error, the Court need not review the Trial Court's denial of Defendant's motion for judgment as a matter of law on Plaintiff's sexual harassment/hostile work environment claim or the allegations of error in the instructions relating to the claim of retaliation. Such a review would be fruitless as CSX has conceded it is liable to Plaintiff for negligent retention of Wes Knick and the compensatory damages which the jury ruled were proximately caused by such negligence.²⁰ This Court should not undertake a review where the outcome of the review will not affect the outcome of the case. *See Velogol v. City of Weirton*, 212 W.Va. 687, 688-89, 575 S.E.2d 297, 299 (2002) (per curiam) (“[M]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or property are not properly cognizable by a court.”); Syl.Pt.3, *State ex rel. Kutil v. Blake*, 223 W.Va. 711, 679 S.E.2d 310 (2009) (“Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes.”).

In any event, the Defendant's assignments of error are without merit. CSX first argues that it was entitled to judgment as a matter of law on Plaintiff's claim of sexual harassment/hostile work environment. CSX also argues that giving Plaintiff's Instruction No. 7 and Instruction No. 26 constituted error. Finally, CSX argues that the trial court erred in permitting the issue of punitive damages to go to the jury. However, review of the evidence and the law does not support the Defendant in any of these assertions of error.

A. The Jury's Finding That Angela Smith Was Subjected To A Hostile Work Environment Is Supported By The Evidence

²⁰ A decision on the errors raised by the Defendant would also not affect Plaintiff's award of attorney fees as Defendant has not appealed the award.

To establish a claim for sexual harassment under the West Virginia Human Rights Act based upon a hostile or abusive work environment, a plaintiff must prove:

1. The subject conduct was unwelcome;
2. it was based on the sex of the plaintiff;
3. it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and
4. it was imputable on some factual basis to the employer.

Syl.pt.3, Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996).

CSX did not contest these elements at trial. In fact, Defendant's witnesses *admitted* Mr. Knick's conduct constituted sexual harassment of the Plaintiff. Human Resources Manager Terri Schray testified it was sexual harassment. (Tr. Day 4 at 63). Division Manager Gery Williams testified it was sexual harassment. (Tr. Day 8 at 253). Even Defendant's corporate representative at trial, System Vice President of Coal and Bulk Operations Jay Fleenor, testified specifically that Ms. Smith was sexually harassed by Mr. Knick.

Q: Okay, let me start with the easy question, okay. As somebody who has worked for the railroad for 30 plus years, as the vice president over all the coal operations, as their corporate representative here, you would agree with me as that person that that was sexual harassment, wouldn't you?

A: Yes, sir.

Q: Okay, so we agree that a manager of CSX sexually harassed Angie Smith, correct?

A: Yes, sir.

(Tr. Day 2 at 71). As Defendant's witnesses (including the corporate representative) testified specifically to the jury that Ms. Smith was sexually harassed by management employee Wes Knick, CSX cannot now seriously argue that the conduct of Wes Knick does not constitute sexual harassment. Yet, that is precisely what CSX argues in its Petition.

The Defendant's contention in its Petition is that the Plaintiff does not have evidence that the conduct was sufficiently severe or pervasive for a reasonable juror to find in favor of the Plaintiff. In making this argument, CSX contends that the only piece of evidence the Plaintiff presented of harassment was the disgusting comment Mr. Knick made to Plaintiff and Clay Newsome while the Plaintiff was on a phone call with Mr. Newsome.

It was clear from the testimony at trial that Mr. Knick knew the plaintiff was listening on speakerphone and wanted her to hear his despicable comment. CSX alleges this comment is not sufficiently "severe or pervasive" to establish Plaintiff's claim. To the contrary, the comment is an extremely severe instance of harassment. Moreover, the decision of whether the comment is severe enough to establish a hostile environment claim is obviously one of fact for the jury as the Trial Court ruled before the trial of this matter.

Although Defendant's brief indicates that that the Plaintiff must prove the conduct was sufficiently "severe or pervasive" CSX simply ignores the possibility that this single incident could be severe enough to establish Plaintiff's claim and focuses its efforts on whether the conduct could be considered pervasive. In this regard CSX states that the only evidence to support Plaintiff's claim for hostile work environment was the comment above. While the Plaintiff asserts that the above comment alone is sufficiently severe to establish her claim, CSX ignores much of the evidence at trial, as well as West Virginia law.

In fact, there was ample evidence at trial which proved that Angela Smith was subjected to a hostile environment. For instance, the testimony at trial established that shortly after the above comment was made, the Plaintiff learned that Mr. Knick had been making those comments for some time. (Plaintiff's Exhibit #6; Tr. Day 3 at 89-90). The additional comments regarding Ms. Smith are detailed as follows:

Wes has on multiple occasions made sexually oriented jokes about Angie Smith. His jokes include, how does she taste, you know that she has never had a dick in it, does she go both ways or just the other, wonder what it is like when they all pile up, how good is that stuff, and what is it like. He has made reference on several occasions as to what position she takes while performing sex and if she would be the male or female.

(Plaintiff's Exhibit #6; Tr. Day 3 at 17-18, 89-90).

Additionally, Plaintiff became aware of the harassing comments made by Wes Knick concerning Brenda Coffee as Plaintiff was in the meeting when Mr. Newsome revealed these comments to Jay Fleenor. (Tr. Day 3 at 89-92). Mr. Newsome testified that Wes Knick called Brenda Coffee a whore and also made harassing statements about Ms. Coffee. See Plaintiff's Exhibit #7; Tr. Day 3 at 19, 91-92.

Importantly, the statements made about Brenda Coffee also form part of Ms. Smith's working environment for a claim of sexual harassment. West Virginia law is clear that any evidence of harassment of employees other than a plaintiff may be considered by a jury in determining whether a hostile work environment existed and whether the harassment was severe and pervasive. See Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996); State ex rel Tinsman v. Hott, 188 W.Va. 349, 424 S.E.2d 584 (1992); W.Va. C.S.R. § 77-4-2.4.5 ("A person who has been harassed on an isolated basis may offer evidence of harassment suffered by other employees as proof that the harassment was pervasive or severe."). The jury was instructed consistent with this authority. (Court's Jury Instructions at 2, 4).

Further, at trial there was substantial evidence of Mr. Knick's hostile or physically aggressive behavior toward the Plaintiff. Significantly, as the Trial Court noted in its Order, harassment is not confined to unwanted sexual conduct. It may also be based upon "hostile or physically aggressive behavior." W.Va. C.S.R. § 77-4-2.5.

In this case, Ms. Smith reported Mr. Knick's harassing conduct to her superiors. After her report, she began to receive phone calls from a number that had been blocked. Plaintiff testified that the person calling her would state:

“Hey, bitch, I haven't forgotten what you've done. Watch your back. I'm going to get you.”

(Tr. Day 4 at 145-146). Plaintiff testified that the person would then hang up the phone. She testified that these calls would occur frequently. (Tr. Day 4 at 145-146).

Just a few weeks after the Plaintiff reported the harassing conduct of Mr. Knick, she received a call while she was at work from her superiors at CSX. During this call CSX informed her that Mr. Knick had been demoted as a result of his harassment of her. Plaintiff was further informed that Mr. Knick was headed to the plaintiff's territory and would be working as a yardmaster under Plaintiff's supervision. (Tr. Day 4 at 129). Ms. Smith was told, “you need to leave your office immediately and go.” (Tr. Day 5 Excerpt at 81). When Ms. Smith asked what was meant by that comment she was told she would be placed on administrative leave with pay and that she should “[p]ack your things up and take them, and we're going to figure out where else to send you.” (Tr. Day 4 at 130; Tr. Day 5 Excerpt at 81). Gery Williams admitted at trial that “I told her not to go back to work.” (Tr. Day 8 at 268).

Thus, the evidence at trial indicated that CSX was so concerned for the Plaintiff's safety that it had her leave work immediately. Ms. Smith had been told by a number of people that Mr. Knick was blaming her for ruining his career. (Plaintiff's Exhibit #13). Ms. Smith told Terri Schray that she feared retaliation from Mr. Knick. (Plaintiff's Exhibit #13). Terri Schray admitted to her supervisor, “[s]he may have some legitimate concerns in my opinion.” (Plaintiff's Exhibit #13).

The Plaintiff testified at trial that the next morning there was another incident of someone beating, kicking and screaming at her door. See Tr. Day 4 at 132-133.

After that horrifying incident, Ms. Smith left her home in Grafton and went to Charleston. Nevertheless, she testified she received harassing phone calls on a regular basis for months. At trial, evidence was presented that some time later Ms. Smith received another phone call. The caller asked, "Hey, bitch, did you hear about Clay Newsome?" (Tr. Day 4 at 155). Plaintiff had not spoken to Mr. Newsome or his wife in several weeks but soon received a phone call from Mr. Newsome's wife from a hospital. (Tr. Day 4 at 155). Ms. Smith learned that Mr. Newsome had been out working on a train and someone hit him on the back of the head producing a severe concussion which caused him to be hospitalized for two or three days. (Tr. Day 4 at 155-156).

Of course, Ms. Smith and Mr. Newsome both had complained to CSX that Mr. Knick made the above-referenced comments about the Plaintiff. In its Petition CSX attempts to distance Mr. Knick from these harassing phone calls and the threatening appearance at Ms. Smith's door the day after his demotion. CSX would have the Court believe someone other than Mr. Knick was responsible for saying the day after the demotion: "Come out bitch. Don't be afraid of me. Come out. You cost me my job and I'm going to get you, come on out." (Tr. Day 4 at 132-133) CSX would have the Court believe someone other than Mr. Knick was responsible for making the threatening phone calls referencing the railroad. Nevertheless, a reasonable jury could find that Mr. Knick was to blame for the harassing phone calls and hostile behavior.

The evidence is clear that the Plaintiff reported this harassing and threatening conduct to her supervisors and to the railroad police, who failed to even question Mr. Knick. Additionally, the evidence shows that the harassment at Plaintiff's home and the harassing phone calls

contributed to the Plaintiff's hostile work environment. CSX argues in its Petition that this evidence is "unconnected" to CSX because it occurred at Plaintiff's home, even though it arose from workplace sexual harassment and involved an employee's hostile threats against another employee as retaliation for a complaint to management concerning improper comments. CSX argues that the evidence is somehow "unconnected" even though the caller threatened violence against Ms. Smith while she was at work and specifically referenced a violent act committed against Mr. Newsome while he was at work.

Even if the jury did not consider the evidence of the harassment at Plaintiff's home and the harassing phone calls, there is still ample evidence of harassment found in the comments of Mr. Knick concerning Ms. Smith and Brenda Coffee to support the jury's verdict. Such evidence was properly considered by the Trial Court as part of Plaintiff's hostile work environment. Although the threats at Plaintiff's home and in phone calls to her did not occur while she was working, they were obviously made in retaliation for Plaintiff's complaints about comments which did occur during working hours. Moreover, the threats obviously contributed to Plaintiff's fear of Mr. Knick and her desire to avoid becoming his supervisor. Other courts have held that harassment which occurs outside the workplace may create a hostile work environment for an employee if the victim of the harassment "is subsequently forced to work alongside the [harasser]". P. v. Delta Air Lines, Inc., 102 F.Supp2d 132, 138-139 (E.D.N.Y. 2000)²¹,

²¹ In that case, a female flight attendant brought a Title VII action against the airline for hostile work environment after she was allegedly raped by a male co-worker during off-duty hours. The Court explained its holding as follows:

A more difficult-though related-question is: can an actionable Title VII claims for hostile work environment be brought against the employer because the victim of an off-duty non-work-related sexual assault is subsequently forced to work alongside the attacker? The answer is yes. When a violent sexual assault on a co-worker occurs outside of the work environment during the employees'

overruled on other grounds, Ferris v. Delta Air Lines, Inc., 277 F.3d 128 (2nd Cir. 2001) (reversing summary judgment granted by district court on hostile work environment claim as evidence showed that plaintiff's fears were reasonable that she might encounter her harasser at work). As stated above, Ms. Smith informed CSX of the encounter at her home the day after she was told to leave work by the Defendant because Mr. Knick was coming to the area. Similarly, Ms. Smith informed CSX about the harassing phone calls. Defendant's knowledge of this behavior as well as the other harassing statements and conduct by Mr. Knick made it unreasonable for CSX to require Ms. Smith to work in a position where she would be Mr. Knick's direct supervisor. It absolutely created a hostile work environment for Ms. Smith.

off-duty personal hours, continuing resentment and fear on the job can affect employment "terms, conditions, or privileges[.]"

Depending on the nature of the off-duty conduct alleged, the employer may face liability for continuing to employ the victim and the attacker in close proximity where the presence of the attacker can reasonably be expected "to alter the conditions of the victim's employment[.]" and the victim in fact experiences such a change.

A contrary conclusion—that an employer is never obligated to mitigate the *work related consequences* of an off-duty, violent sexual assault by one co-worker on another—would have the effect of penalizing the victim by "detract[ing] from job performance" and "discourage[ing] [her] from remaining on the job" because of predictable psychological pressures.

To avoid liability for the work-related consequences from off-duty sexual attacks, therefore, an employer must provide a reasonable avenue for complaint. Additionally, once put on notice of the off-duty sexual assault and its consequences to the victim's work environment, the employer must take prompt corrective action.

P. v. Delta Air Lines, 102 F.Supp.2d at 138-139 (citations omitted). Despite the above recitation of the law, the District Court granted summary judgment to the defendant airline because plaintiff conceded that she was never forced to work with her attacker again, only that she had a fear that she would be forced work with him again. Agreeing that the defendant could be held liable, the Second Circuit Court reversed the grant of summary judgment because "we do not think that Ferris's fear of encountering her rapist at her workplace is too hypothetical and speculative to sustain an award of damages." Ferris, 277 F.3d. at 137.

Although the facts of the Delta case indicate more severe harassment than what Ms. Smith suffered, the analysis relating to employer liability for the work related consequences of harassment are equally applicable to Ms. Smith's case.

Accordingly, the above evidence is clearly “connected” to Plaintiff’s work environment for purposes of Ms. Smith’s sexual harassment/hostile work environment claim.

Given the admissions of CSX, the evidence of outrageous and severe comments as well as hostile and physically threatening behavior, it is clear that the Plaintiff met her burden of producing evidence from which a reasonable jury could find that the Plaintiff was subjected to a hostile work environment. Moreover, it is also apparent that CSX did not properly respond to Ms. Smith’s harassment claims as the jury found in answer to Question # 2 on the Verdict Form that, not only was the Plaintiff subjected to a hostile work environment by the Defendant, but that CSX did not investigate and adequately respond to the misconduct.

B. Plaintiff’s Instruction No. 7 Was A Correct Statement Of The Law

CSX alleges in its Petition that it is entitled to a new trial because the Court gave Plaintiff’s Instruction No. 7 to the jury. This instruction reads as follows:

The Court instructs the jury that proof of pretext can by itself sustain a conclusion that the defendant engaged in retaliation. “Pretext” means a false reason or motive advanced to hide the actual reason or motive. Therefore if the jury disbelieves the defendant’s explanation for its termination of the plaintiff, the jury may conclude that the logical explanation for the action was the plaintiff’s complaints of harassment or her filing of a lawsuit.

(Court’s Jury Instructions at 3-4).

Significantly, this instruction only relates to one of Plaintiff’s claims: her claim of retaliation. Therefore, even if the instruction was improper, it would not affect the validity of Plaintiff’s claims for sexual harassment/hostile work environment or negligent retention.

However, it is apparent that the instruction is proper. The language for this instruction was taken from a syllabus point in a case decided by this Court. This syllabus point reads, in relevant part, as follows:

In disparate treatment cases under the West Virginia Human Rights Act, W.Va. Code, 5-11-9 (1992), proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination.

Syl.Pt.5, Skaggs v. Elk Run Coal Co., 198 W.Va. 51, 479 S.E.2d 561 (1996). Further, the Court has stated that, “[a] finding of pretextuality allows a juror to reject a defendant’s proffered reasons for a challenged employment action and, thus, permits the ultimate inference of discrimination.” Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 487, 457 S.E.2d 152, 164 (1995).

Although CSX asserts that the present case is not a disparate treatment case,²² the defendant does not argue that the law contained in this syllabus point does not apply to Plaintiff’s Human Rights Act claims. Instead CSX argues that the instruction somehow lowered the burden of proof applicable to Plaintiff’s claims because the instruction did not specifically state that the Plaintiff must prove pretext by a preponderance of the evidence. However, the Court’s instructions to the jury made clear that the Plaintiff had to prove her claims by a preponderance of the evidence. The Court gave Plaintiff’s Instruction No. 26, which read, in part, as follows: “Nevertheless, the ultimate burden of persuasion remains at all times with the plaintiff to prove that she was terminated in retaliation for engaging in protected conduct.” (Court’s Jury Instructions at 7-8). The Court also instructed the jury in its General Charge that:

²² Plaintiff notes that disparate treatment was part of her case at trial as she proved that several others who engaged in the same type of conduct as she did regarding the taxis were not punished while she was terminated. There was no evidence introduced at trial that these persons had made complaints of sexual harassment or had filed lawsuits against CSX.

The burden is on the Plaintiffs in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any element of Plaintiff's claim by a preponderance of the evidence in the case, or if the Defendant's evidence outweighs the Plaintiff's, or if the evidence is evenly balanced in the case, the jury should find for the Defendant.

(Court's General Charge To The Jury at 4-5).

Not every single instruction must contain the "preponderance of the evidence" language. The Court should not accept the Defendant's invitation to read one instruction outside of the context of the entirety of the instructions given to the jury. "The formulation of jury instructions is within the broad discretion of a circuit court . . . 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." Syllabus Point 6, Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995).

Significantly, Plaintiff's Instruction No. 7 was not the final word given to the jury on the issue of pretext. The Court also gave Defendant's Instruction No. 12, which stated:

In assessing Plaintiff's claim for retaliatory discharge, you must consider any legitimate, nondiscriminatory reason or explanation stated by Defendant for its decision to terminated Plaintiff. If you determine that Defendant has stated such a reason, they you must decide in favor of Defendant unless Plaintiff also proves by a preponderance of the evidence that the stated reason was not the true reason, but was only a pretext or excuse for Defendant's retaliation against Plaintiff because of her sexual harassment complaint.

(Court's Jury Instructions at 14) (emphasis added).

Accordingly, the very language that the Defendant argues should have been included in Plaintiff's Instruction No. 7 was given by the Circuit Court through Defendant's Instruction No. 12. The Circuit Court also gave an instruction informing the jury that pretext is not established

“just because you disagree with the business judgment of Defendant.” (Defendant’s Instruction #13; Court’s Jury Instructions at 14).

As the language that CSX argues was omitted from Plaintiff’s Instruction No. 7 was included by the Circuit Court in additional instructions on the issue of pretext, there is obviously no error. Further, despite Defendant’s assertion in its Petition, a plaintiff does not have to prove that the defendant’s stated reasons for the discharge were pretextual. “[T]he plaintiff is not required to show that the defendant’s proffered reasons were false or played no role in the termination, but only that they were not the only reasons and the prohibited factor was at least one of the ‘motivating’ reasons.” Barefoot, 193 W. Va. at 487 (citations omitted) (emphasis added).

Although the Plaintiff was not required to show the Defendant’s reason was a pretext for discrimination, there was plenty of evidence presented to support that finding. Plaintiff testified that she was given specific permission by three of her supervisors to ride the taxis to and from work. The evidence above shows that many others used the taxis for personal use but were never reprimanded. The evidence at trial suggested that personal use of the taxis was widespread among the employees of CSX. Despite this, it was uncontroverted that Plaintiff was the only individual ever terminated by CSX for violation of the Defendant’s “policies” regarding taxi use. Importantly, it was also uncontroverted that there were no policies governing the use of taxis. This evidence was clearly sufficient to support a finding that the reason CSX gave for the Plaintiff’s termination was pretextual.

Because the jury was aware that the Plaintiff had to prove each of her claims by a preponderance of the evidence and that at all times the burden of persuasion remained with the Plaintiff to prove her claims, the Defendant’s assertion that the “bar for success on [plaintiff’s]

retaliatory discharge claim was substantially lowered” is obviously incorrect. Plaintiff’s Instruction No. 7 was a correct statement of the law and there was no error in giving the instruction.

C. Plaintiff’s Instruction No. 26 Was A Correct Statement Of The Law

CSX alleges in its Petition that it is entitled to a new trial because the Court gave Plaintiff’s Instruction No. 26 to the jury. This instruction reads as follows:

If the plaintiff proves, by a preponderance of the evidence, that she was terminated in retaliation for her complaints of harassment or for filing a lawsuit against the defendant, you may find in favor of the plaintiff. However, if you find that the plaintiff was terminated for a legitimate, non-discriminatory reason, you may find in favor of the defendant.

Finally, if you find that the defendant was motivated by both a retaliatory reason and a non-retaliatory reason in its decision to terminate the plaintiff, then defendant will be able to avoid liability only if it can prove that the same result would have occurred even without the unlawful motive. Nevertheless, the ultimate burden of persuasion remains at all times with the plaintiff to prove that she was terminated in retaliation for engaging in protected conduct.

(Court’s Jury Instructions at 7-8).

Importantly, this instruction only relates to one of Plaintiff’s claims: her claim of retaliation. Therefore, even if the instruction was improper, it would not affect the validity of Plaintiff’s claims for sexual harassment/hostile work environment or negligent retention of Wes Knick.

However, it is apparent that the instruction is a proper statement of the law. CSX does not take issue with the first two sentences of this instruction. Instead, CSX argues that the third sentence is an inaccurate statement of the law. To the contrary, the language contained in this

instruction mirrors the law in West Virginia as announced by this Court's holdings concerning mixed motive cases.²³ See Syl.Pt.6, Skaggs, 198 W.Va. 51 (Once plaintiff proves defendant motivated by contravention of public policy “[l]iability will then be imposed on a defendant unless it proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.”); Syl.Pt.8, Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 480 S.E.2d 817 (1996) (“liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.”).

Therefore, it is apparent that Defendant's claim that it was improper (once the jury found that the defendant was motivated by both a retaliatory reason and a non-retaliatory reason) to place the burden on CSX to prove the same result would have occurred even in the absence of the unlawful motive, is incorrect. Well-established West Virginia law supports this instruction.

Defendant's argument that the instruction improperly failed to require plaintiff to prove that her complaints of harassment and the filing of a lawsuit were a “motivating” factor for her termination in the context of a mixed motive case is similarly unavailing. The instruction makes clear that, if the jury found that “the defendant was motivated by both a retaliatory reason and a non-retaliatory reason,” only then would the burden shift to the Defendant. Of course, this requires a finding by the jury that the Defendant was “motivated” by a retaliatory reason.

Importantly, CSX completely ignores the last line of the instruction: “Nevertheless, the ultimate burden of persuasion remains at all times with the plaintiff to prove that she was

²³ Defendant mentions in its Petition that the Skaggs mixed motive theory may not be applicable in a retaliatory discharge case. However, Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 391, 480 S.E.2d 817, 830 (1996) makes clear that it does. (holding that pretext and mixed motive theories are applicable in retaliatory discharge cases).

terminated in retaliation for engaging in protected conduct.” This statement reminded the jury that although the burden shifted to CSX to prove it would have terminated the Plaintiff even in the absence of the retaliatory motive, the ultimate burden remained with the Plaintiff. This is a correct statement of the law and the instruction given to the jury accurately reflects the burdens on each party in a mixed motive case.

Thus, contrary to Defendant’s argument, Plaintiff’s Instruction No. 26 was an accurate statement of the law and did not improperly shift the ultimate burden from the Plaintiff.

D. The Evidence At Trial Supported The Jury’s Award Of Punitive Damages

As noted by the Defendant, Courts must conduct a post-verdict punitive damages review pursuant to the requirements set forth in Alkire v. First National Bank of Parsons, 197 W. Va. 122, 475 S.E.2d 122 (1996) and Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991). In this case, the Circuit Court conducted a thorough and proper review pursuant to the required standards.

In Syllabus Point 7 of Alkire, the Court held:

Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under Mayer v. Frobe, 40 W. Va. 246, 22 S.E.58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if *the* punitive damage award is excessive under Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991).

(emphasis in original). *See also* Syl.Pt.9, Vandevender v. Sheetz, Inc., 200 W.Va. 591, 490 S.E.2d 678 (1997). Thus, a court’s post-verdict review has two components—first, review of plaintiff’s entitlement to punitive damages and then, review of the amount of punitive damages. In describing this process, the Supreme Court of Appeals has observed that, “[o]ur jurisprudence

establishes the complimentary roles of the judge and the jury in the area of punitive damages. A short-hand formula for this relationship is: juries decide, judges review.” Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC, 209 W.Va. 318, 337 n.21, 547 S.E.2d 256, 275 n.21 (2001).

1. The Record Support’s The Jury’s Finding That The Defendant’s Conduct Warranted An Award Of Punitive Damages

In Syllabus Point 4 of Alkire, (as restated in Syllabus Point 11 of Vandevender) the Court reiterated the standard for the type of conduct that justifies an award of punitive damages that Mayer v. Frobe had established over a century ago:

“In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.” Syllabus Point 4, Mayer v. Frobe, 40 W. Va. 246, 22 S.E.58 (1895).

In the context of a violation of the West Virginia Human Rights Act, this Court has held that punitive damages are an available form of relief that a court may award. Syl.pt.5, Haynes v. Rhone-Poulenc, Inc., 206 W. Va. 18, 521 S.E.2d 331 (1999). Thus, in reviewing Plaintiff’s entitlement to a punitive damage award, the Court need only satisfy itself that the jury could reasonably conclude that the Defendant’s conduct in harassing Ms. Smith, improperly retaining Mr. Knick and retaliating against Ms. Smith, was “wanton, willful or malicious.” Or, as this Court framed the question in Alkire: “Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations

that no reasonable jury could have reached a verdict against the [defendant] on the issue of punitive damages?” 197 W.Va. at 129, 475 S.E.2d at 129.

To properly accomplish the initial task of determining whether sufficient evidence existed to meet the type of conduct required under Mayer v. Frobe and Haynes to justify an award of punitive damages, it is helpful to review the question of what type of conduct constitutes “wanton, willful or malicious” conduct. In Stone v. Rudolph, 127 W. Va. 335, 32 S.E.2d 742 (1945), the Court undertook an “investigation as to what is meant by willful and wanton misconduct.” Id. at 345, 32 S.E.2d at 748.

In Stone, the Court observed that:

Wanton negligence is defined in Black’s Law Dictionary, 3rd Ed. 1233, as “Reckless indifference to the consequences of an act or omission, where the party acting or failing to act is conscious of his conduct and, without any actual intent to injure, is aware, from his knowledge of existing circumstances and conditions, that his conduct will inevitably or probably result in injury to another.” And in the same work on page 1234, it is stated that “‘Willful negligence’ implies an act intentionally done in disregard of another’s rights, or omission to do something to protect the rights of another after having had such notice of those rights as would put a prudent man on his guard to use ordinary care to avoid injury.”

Id. at 345-46, 32 S.E.2d at 748. The Court has also noted that:

The usual meaning assigned to ‘wilful,’ ‘wanton’ or ‘reckless,’ according to taste as to the word used, is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a *conscious* indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable.

Cline v. Joy Manufacturing Co., 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983), quoting W. Prosser, Handbook of the Law of Torts 185 (4th Ed. 1971)(emphasis added by the Court). Additionally, in the context of punitive damages, the Court stated in Addair v. Huffman, 156 W.Va. 592, 603, 195 S.E.2d 739, 746 (1973), that, “[t]he foundation of an inference of malice is *the general disregard of the rights of others*, rather than an intent to injure a particular individual.” (emphasis added.) See also, Peters v. Rivers Edge Mining, Inc., 224 W. Va. 160, 190, 680 S.E.2d 791, 821 (2009).

In this case, the jury could have reasonably concluded that the CSX specifically disregarded the rights of Ms. Smith and intentionally terminated her employment in retaliation for her complaints of harassment and/or her filing of a lawsuit. As recounted above, the jury heard evidence of the hostile work environment permitted by CSX in this case. Even before Plaintiff’s hostile environment arose courtesy of Mr. Knick, CSX was aware of multiple problems with Mr. Knick’s harassment of others. Despite a recommendation from its own employees that Mr. Knick be reprimanded for this conduct, no action was taken.

Then, Mr. Knick, while he knew plaintiff was listening, said “So how does she taste and feel inside because I heard she’s never had a dick in her?” Plaintiff and Mr. Newsome complained about this comment and prior similar comments to Defendant. As a result, CSX investigated the circumstances surrounding Mr. Knick’s behavior and found the allegations were true. CSX also found that Mr. Knick had created a hostile environment for another female employee.

As CSX had a zero tolerance harassment policy, it would be expected that Mr. Knick’s employment would be terminated. Instead of following this policy, CSX simply demoted Mr.

Knick from his position and permitted him to return to employment in another capacity in Grafton, West Virginia. In this position Ms. Smith would have been his supervisor.

Plaintiff then was subjected to multiple occasions of threats and harassment relating to her complaint against Mr. Knick. Instead of terminating Mr. Knick's employment at that point, CSX informed the Plaintiff that if she did not like working in Grafton she could move. As a result, Plaintiff was forced to resign her job and take a much lesser paying job just to leave Grafton and avoid Mr. Knick. Thus, the jury properly found on the verdict form that CSX did not investigate and adequately respond to the misconduct alleged by the Plaintiff.

Plaintiff subsequently filed this lawsuit alleging hostile work environment and a constructive termination/demotion. A few months after the lawsuit was filed, her employment was terminated. The reason given for Plaintiff's termination was that she violated the company policy on taxi use. This reason was proven at trial to be a pretext for retaliation. The evidence made clear that the Plaintiff had been authorized to use the taxi. Further, the another employee, Mr. Pelham, also used the taxi because his car needed to be repaired (the same reason plaintiff was permitted to use the taxi). Nevertheless, his employment was not terminated. Other employees used the taxis on a regular basis and that there were no rules governing the use of the taxis. Importantly, the testimony at trial was uncontroverted that no one in the history of CSX had been terminated for using the taxis improperly prior to Ms. Smith.

From the evidence above the jury could have properly concluded that the Plaintiff was subjected to intentional harassment which created a hostile work environment for her. The jury could have properly concluded that CSX intentionally and recklessly retained an individual that it knew would harass and retaliate against employees. Further, the jury properly found that the Plaintiff was intentionally and maliciously terminated due to her complaints of harassment

and/or her filing of a civil action. The jury could have reasonably determined that CSX then created a pretext in an attempt to cover up its retaliation. Given the evidence a reasonable jury could conclude that CSX attacked the Plaintiff's character in order to justify its illegal actions, falsely accusing her of dishonesty and theft. These clearly intentional acts are sufficient for a jury to conclude that CSX engaged in "wanton, willful or malicious" conduct directed toward the Plaintiff which would support a punitive damages award.

In its Petition, CSX argues that there is a heightened standard for awarding punitive damages when a plaintiff has been illegally terminated. It cites Harless v. First Nat. Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982), for the proposition that the mere existence of a retaliatory discharge will not automatically give rise to the right of punitive damages and that a plaintiff must prove further egregious conduct on the part of the employer. *Id.* at 169 W.Va. 692. Despite the Defendant's argument, it is clear that Harless did not change punitive damages jurisprudence to require something more than willful, wanton and malicious conduct. The recent case of Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009), addressed this issue and reaffirmed that the punitive damages standard announced in Mayer v. Frobe is still the law in West Virginia. The Peters Court acknowledged that the language in Harless regarding "further egregious conduct" was consistent with notion that a wrongful act done under *bona fide* claim of right and without malice would not support an award of punitive damages. Peters, 224 W.Va. at 190, 680 S.E.2d at 821.

Undeterred by this Court's reaffirmation of Mayer v. Frobe in its decision in Peters, CSX argues that employment cases should have a different standard entirely for punitive damages:

“actual malice.”²⁴ (See Petition at 27). However, Defendant’s Petition is the first time in this case that it has asserted that “actual malice” is the proper standard for punitive damages. In fact, at trial CSX offered two punitive damages instructions of its own which reiterated that the familiar Mayer v. Frobe standard was the applicable law in this case. Defendant’s Instruction No. 20 reads as follows:

Plaintiff also claims that Defendant’s conduct was willful, malicious and oppressive so as to entitle her to an award to punitive damages. An award of punitive damages would be appropriate in this case only if you find for Plaintiff, and then further find by a preponderance of the evidence that Defendant’s alleged conduct was malicious, oppressive, wanton, willful, reckless, or with criminal indifference to civil obligations.

Defendant’s Instruction No. 20 reads as follows:

You may also award additional damages known as punitive damages against Defendant as punishment for any willful, wanton, malicious or other similar aggravation of the wrong allegedly done to the Plaintiff. Punitive damages are something in addition to full compensation that is not given to Plaintiff as due, but given rather to punish Defendant and, thus, make an example of them so that others may be deterred from committing similar offenses. The law awards compensatory damages when the unlawful act is done without intent to do wrong or where there is no malice or where the offense is not oppressively or recklessly committed. Punitive damages are only awarded where the wrongful act is done with a bad motive, or in a manner so wanton or reckless as to manifest a willful disregard of the rights of others.

²⁴ Defendant’s justification for changing the standard is that in the absence of that standard, “the threshold for punitive damages in wrongful termination cases is virtually meaningless and nearly every employment case will involve a punitive damages award . . .” (See Petition at 30). This is obviously incorrect. “A wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for such damages.” GMAC v. D.C. Wrecker Service, 220 W.Va. 425, 647 S.E.2d 861, 867 (2007). Further, in a case where “the defendant acted on the basis of some subconscious motive or stereotype about the plaintiff’s class” punitive damages would likely be inappropriate as well. See Skaggs v. Elk Run Coal Co., 198 W.Va. 51, 78, 479 S.E.2d 561, 588 (1996). However, where, as here, a defendant specifically terminates an individual due to the exercise of her rights and tries to cover up its true motive with a pretext that the plaintiff engaged in dishonesty and theft, punitive damages are appropriate.

Plaintiff did not object to Defendant's above instructions and the Court gave them to the jury. (Tr. Day 10 at 140-141, 146-147). The offering of these instructions at trial is obviously contrary to the position CSX now takes that "actual malice" should be the standard. Significantly, even in its post-trial motions CSX never made such an argument. Therefore, not only is the "actual malice" standard clearly inapplicable in the current context, CSX has waived any right to assert error below relating to the Circuit Court's failure to instruct the jury based upon an "actual malice" standard. This Court has held that "counsel cannot remain silent in the trial court and then for the first time on appeal spring out an objection that if made in the trial court would have given the trial judge an opportunity to correct the alleged error." State v. Lease, 196 W.Va. 318, 323, 472 S.E.2d 59, 64 (1996). This raise or waive rule is designed "to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error." Wimer v. Hinkle, 180 W.Va. 660, 663, 379 S.E.2d 383, 386 (1989).²⁵ As Defendant failed to preserve the issue below its argument relating to changing the standard for punitive damages is waived.

Finally, CSX argues that the award of both emotional distress damages and punitive damages was improper as "there is a certain open-endedness in the limits of recovery for emotional distress in a retaliatory discharge claim." See Harless v. First Nat'l Bank, 169 W.Va. 673, 289 S.E.2d 692, 703 (1982). Despite Defendant's argument, Harless does not state that emotional distress damages and punitive damages cannot both be awarded in a retaliatory discharge case. Although Defendant does not cite the case, it appears to be relying upon

²⁵ There is another justification for the raise or waive rule. That is, "[i]t prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result)." Perrine v. E.I. du Pont de Nemours and Co. 225 W.Va. 482, 601, 694 S.E.2d 815, 934 (2010), quoting State v. LaRock, 196 W.Va. 294, 316, 470 S.E.2d 613, 635 (1996).

language from Tudor v. CAMC, 203 W.Va. 111, 506 S.E.2d 554 (1997). In that case, this Court considered whether punitive damages and damages for intentional infliction of emotional distress were duplicative. It held as follows:

In cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages and, therefore, an additional award for punitive damages would constitute an impermissible double recovery. Where, however, the jury is presented with substantial and concrete evidence of a plaintiff's serious physical, emotional or psychiatric injury arising out of the intentional infliction of emotional distress, i.e. treatment for physical problems, depression, anxiety, or other emotional or mental problems, then any compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing the defendant(s) and deterring such future conduct, a punitive damage award in such cases would not constitute an impermissible double recovery. To the extent that this holding conflicts with our decision in Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 445 S.E.2d 219 (1994), it is hereby modified.

Syl.Pt.14, Tudor, 203 W.Va. 111.

Although Ms. Smith did not present a cause of action to the jury based upon “intentional infliction of emotional distress” she did recover damages for “emotional distress” as part of her non-economic damages, along with damages for “aggravation, inconvenience, indignity, embarrassment, humiliation.” (See Verdict Form). However, contrary to the situation Tudor cautions against, Ms. Smith presented specific testimony and evidence from her treating psychiatrist (Dr. Tara Ray) regarding her treatment for adjustment disorder, anxiety, occupational harassment and clinical/medical depression relating to the harassment. (Tr. Day 4

at 4-57; Plaintiff's Exhibits #8-11). Therefore, according to the principles announced in Tudor, an award for emotional distress and a punitive damages award in this case does not "constitute an impermissible double recovery" as the "compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing defendant(s)". Syl.Pt.14, Tudor, 203 W.Va. 111. Therefore, the argument that the non-economic damage award and punitive damage award are duplicative is incorrect.

In conclusion, the evidence at the trial of this case supports a finding that CSX did not act under a *bona fide* claim of right or without malice. There is evidence to support a conclusion that the defendant's agent, Mr. Knick, intentionally harassed and threatened Plaintiff. The jury could have reasonably found that Mr. Knick was responsible for the harassing and threatening phone calls and visits and that CSX ignored the consequences of this harassment in order to get Plaintiff to resign her position as a trainmaster. There is evidence that in order to retaliate against the Plaintiff, CSX concocted a scheme to terminate the Plaintiff's employment for obviously pretextual reasons. Instead of simply stopping at a termination, however, the Defendant attacked the Plaintiff's character, maliciously accusing her of dishonesty and theft. Given the evidence, it is apparent that the record supports the jury's finding that the Defendant's conduct was willful, wanton, malicious and warranted the imposition of punitive damages.

2. The Amount Of Punitive Damages Awarded By The Jury Was Proper

This Court has repeatedly instructed the circuit courts on the process of post-trial reviews of the amount of punitive damages awards:

"Every post-trial analysis as to the amount of the punitive damage award should be conducted by the trial court exclusively within the boundaries of Syllabus Points 3 and 4 of Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991), and

Syllabus Point 15 of TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992).” Syllabus Point 6, in part, Alkire v. First Nat. Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996).

Syl.Pt.2, Boyd v. Goffoli, 216 W.Va. 552, 608 S.E.2d 169 (2004). *See also* Syl.Pt.8, Vandevender, *supra*.

In this case, the Circuit Court clearly conducted a proper post-trial review regarding the amount of the punitive damages award. As the jury was instructed, Syllabus Point 3(1) of Garnes requires that punitive damages “bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred.” Further, Syllabus Point 3(4) of Garnes requires that punitive damages “should bear a reasonable relationship to the compensatory damages.” In this case, the jury determined that a compensatory damage award of 1,557,600 represented the harm that actually occurred to Angela Smith. The jury awarded punitive damages of \$500,000. In this case, the ratio of punitive damages to compensatory damages (not including mandatory pre-judgment interest on the back pay award, which is a form of compensatory damage)²⁶ is approximately 0.321 to 1. This Court has held that in cases such as the present one, the ratio of punitive damages to compensatory damages may be much higher than 5 to 1.

²⁶ Syllabus Point 1, Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc., 186 W.Va. 583, 413 S.E.2d 404, (1991) (“Prejudgment interest, according to West Virginia Code § 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned.”).

The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.

Syl.pt.15, TXO Prod. Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992).

In this case it is clear that the jury could have reasonably found that CSX (through its agent) intentionally and maliciously harassed the plaintiff and retaliated against her. The jury could have also reasonably found that CSX misrepresented the reasons for the Plaintiff's termination in order to cover up its illegal motive. To cover up its illegal motive, CSX attacked the Plaintiff's character by maliciously accusing her of dishonesty and theft. Thus, it is clear that the jury could have reasonably concluded that the defendant had an "actual intention to cause harm" as contemplated by TXO. Accordingly, a ratio higher than 5 to 1 would have been appropriate in this case. Nevertheless, the jury awarded punitive damages with a 0.321 to 1 ratio, clearly below the upper limit for cases of even extreme negligence.

The ratio of punitive damages to compensatory damages in this case bears a reasonable relationship to the harm actually caused by Defendant's conduct as well as a reasonable relationship to the compensatory damages. The "reasonable relationship" factor weighs heavily in favor of upholding the jury's punitive damages award. See also Vandevender v. Sheetz, Inc., *supra*, where this Court held that, because the employer's conduct in an unlawful termination/failure to rehire case fell into the category of reckless disregard of the employee's rights, rather than malice toward the employee, a five to one ratio of punitive to compensatory damages would be appropriate; Boyd v. Goffoli, *supra*, reiterating rule in TXO that five to one ratio appropriate when defendant has acted with extreme negligence or wanton disregard.

Syllabus Point 3(2) of Garnes allows the jury (and, in the context of this review, the Circuit Court) to consider the reprehensibility of the defendant's conduct as a factor in determining the amount of punitive damages. Among the reprehensibility factors recognized by Garnes are "how long the defendant continued in his actions" and "whether [the defendant] was aware his actions were causing or were likely to cause harm . . ." In the present case, as established above, CSX intentionally and maliciously terminated the Plaintiff's employment in retaliation for her engaging in protected conduct. Moreover, the Plaintiff was subjected to intentional harassment and threats from Defendant's agent, Mr. Knick. CSX misrepresented the reasons for the plaintiff's termination in order to cover up its illegal motive. CSX also attacked the Plaintiff's character by maliciously accusing her of dishonesty and theft.

In its Petition, CSX argues that it acted under a *bona fide* claim of right and did nothing wrong. This is an incredible argument given the evidence at trial regarding the pretextual nature of the reasons given for Plaintiff's termination. It demonstrates that CSX to this day refuses to recognize the illegality of its actions. Further, Defendant knew that the harassment and threats Plaintiff was forced to endure would cause her harm. In fact, Plaintiff was treated for depression due to Mr. Knick's conduct. CSX was aware of Plaintiff's treatment even before Plaintiff was forced to take a demotion. Additionally, CSX obviously knew that terminating the Plaintiff's employment would cause her substantial harm.

Syllabus Point 3(2) of Garnes also permits the Court to consider "whether [the defendant] attempted to conceal or cover up his actions or the harm caused by them . . ." Given the above evidence of pretext and the false accusations of theft and dishonesty, it is clear that the Defendant attempted to conceal or cover up its actions. Therefore, this factor weighs heavily in favor of upholding the jury's punitive damages award.

Syllabus Point 3(2) of Garnes further allows courts to consider “whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once [its] liability became clear to [it].” At mediation the Defendant offered nothing to settle this case, despite the fact that the Plaintiff’s loss of earnings alone was determined by the jury to be \$1,277,600. Given the amount of Plaintiff’s compensatory damages and the complete lack of any offer of settlement, it is apparent that CSX did *not* make reasonable efforts to make amends by offering a fair and prompt settlement. Therefore, this factor weighs heavily in favor of upholding the jury’s punitive damages award.

Syllabus Point 3(5) of Garnes states that in considering punitive damages awards, “[t]he financial position of the defendant is relevant.” In this case, given the financial position of CSX as evidenced at trial, there is no reason to consider reducing the punitive damages award to avoid undue harm to the Defendant. Simply put, CSX is quite capable of satisfying the judgment against it in this matter without threat of insolvency. Therefore, this factor weighs heavily in favor of upholding the jury’s punitive damages award.

Indeed, when considering the Garnes factors, a much higher punitive award would easily be justified. The actual punitive damages award by the jury in this case is factually and legally sound and appropriate. As a result, the Court should fully uphold the jury’s verdict and reject the Defendant’s Petition For Appeal on this issue.

E. Any Error Was Harmless Error

The Plaintiff asserts that the Trial Court committed no error in this case. However, to the extent there may have been error it was harmless error as defined by West Virginia Rule of Civil Procedure 61, in that it did not affect the substantial rights of the parties and setting aside the verdict, modifying it or granting a new trial would be inconsistent with substantial justice.

Further, “[a] judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby.”

Syl.pt.7, Starcher v. South Penn Oil Co., 81 W.Va. 587, 95 S.E. 28 (1918); Syl.pt.7, Torrence v. Kusminsky, 185 W.Va. 734, 408 S.E.2d 684 (1991).

IV. CONCLUSION

For all the above reasons, the Defendant’s Petition For Appeal should be returned and the jury’s verdict should be affirmed.

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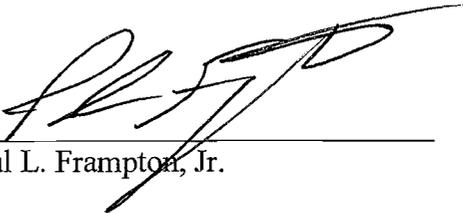
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CERTIFICATE OF SERVICE

I, Paul L. Frampton, Jr., counsel for Plaintiff/Appellee, do hereby certify that service of the “**RESPONSE TO PETITION FOR APPEAL**” was made upon the parties listed below by mailing a true and exact copy thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 20th day of April, 2011.



Paul L. Frampton, Jr.