

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CINDY MOSIER,

Respondent/ Plaintiff Below,

v.

DOCKET NO: 11-1330

JAMES DENNY, and
ORKIN LLC, A
Delaware Corporation

Petitioners/ Defendants Below

**RESPONSE TO JAMES DENNY AND ORKIN LLC'S PETITION FOR APPEAL FROM
THE CIRCUIT COURT OF KANAWHA COUNTY, WV
(Civil Action No: 10-C-383)**

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INTRODUCTION AND STATEMENT OF THE CASE

This case arises from a motor vehicle collision that occurred on March 17, 2008. On that date, Cindy Mosier (Plaintiff below, referred to as “Cindy Mosier” or “Respondent”) was operating her vehicle on US Route 119 in Kanawha County, West Virginia near the Oakwood Exit Ramp. As she approached a traffic signal, Cindy Mosier had a green light as she proceeded through the intersection. James Denny, (Defendant below, referred to as “James Denny” or “Petitioner”) was driving a white pickup truck owned by his employer Orkin, LLC, Petitioner and Defendant below. Denny approached the intersection traveling Northbound and suddenly made a left hand turn onto the entrance ramp of the Interstate from Route 119 colliding into Mosier’s vehicle. Mr. Denny failed to yield the right-of-way and caused the collision. (Trial Transcript, pg. ORK0545). The crash was a frontal impact to Mrs. Mosier and severely damaged her vehicle. (ORK0545-0547). The force of the impact rendered both vehicles inoperable and the vehicles were towed from the scene. (ORK0770).

The collision caused Mrs. Mosier severe and permanent injuries, including pain to her neck, shoulder, lower back and leg .(ORK0558). Mrs. Mosier suffered herniated discs in her lumbar spine, requiring surgery to remove the herniation, but her pain was not relieved. (ORK0645). In order to reduce her pain, Mrs. Mosier eventually had a spinal cord stimulator placed in her back by a pain management physician. (ORK0433). Testimony from Mrs. Mosier’s treating physicians and surgeons established that her injuries were related to the collision; were permanent in nature, and would require significant future medical care. (ORK0435; 0438).

Plaintiff asserted James Denny was liable for the automobile collision and Orkin LLC was vicariously liable for the acts of its employee within the scope of his employment.

Petitioners admitted liability prior to trial, but contested the causation for Plaintiff's damages, as well as the extent, reasonableness, and necessity of her medical care for the herniated discs in her lumbar spine. (ORK0328). Orkin had a "Driver Certification Policy" in place at the time of the collision. Under the policy, Orkin drivers are monitored by a point system in which points are accumulated based upon unsatisfactory driving practices. (ORK0731). Points were accumulated for driving offenses, including speeding violations and at-fault collisions. (ORK0732-733). The stated purpose of the policy as described by Orkin's designated corporate representative Mike Gibney¹ was to remove dangerous drivers from Orkin's employment and to eliminate risk to the public. (ORK0785).

In addition to the Driver Certification Policy, Orkin also had a Global Positioning System ("GPS) monitoring policy in place to track the speed of its drivers. Orkin's representative explained that the purpose of the GPS policy was to protect the public and people on the road from overly aggressive drivers. (OPRK0784). Absent from the Petitioner's Statement of Facts was that the evidence offered by Respondent seeking to establish Orkin's failure to enforce its Driver Certification Policy designed to remove aggressive drivers from the road was uncontested at trial. Mr. Denny testified that the Driver Certification policy was used to monitor Orkin drivers under a point accumulation system for infractions. (ORK0731). According to the policy, an at-fault collision accrued four (4) points, and a speeding ticket accrued four (4) points. *Id.*; ORK0732. When a driver accumulated eight points, the employee is considered on probation and is required to take a defensive driving course. Failure to complete the course results in termination. If nine (9) or more points are accumulated, Orkin revoked the employee's driving privileges and the employee was either terminated or moved to a non-driving

¹ Mike Gibney did not appear in person at trial. Pursuant to Rule 32 of the West Virginia Rules of Civil Procedure, the deposition transcript of Orkin's designated corporate representative was read in its entirety to the jury.

position. *Id.* 733. While Petitioner's Statement of the Case represents that the maximum allowed points were not accumulated by Denny prior to the date of the Mosier collision, the jury heard testimony from Mr. Denny that in fact, he had violated the Driver Certification policy. (ORK0740-ORK0741). The evidence regarding Orkin's failure to enforce its policy was presented through Denny and Orkin's designated corporate representative. Petitioners offered no contrary evidence on the policy or its enforcement as applicable to this driver prior to the Mosier collision. Denny's testimony confirmed that he had an at-fault collision while driving for Orkin on July 5, 2000; an at-fault collision on July 3, 2003; and a speeding ticket on September 24, 2005 for going 15 mph over the speed limit. (ORK 0737-0739). Denny also testified that his speeding infractions violated the GPS policy Orkin had in place to monitor the speed of its drivers. Specifically, the GPS policy allowed driver to operate the vehicle over 70 mph three times before being terminated. (ORK0735). Denny testified that he had been written up for GPS violations occurring on November 18, 2000; June 4, 2002; and December 3, 2002. (ORK0736). Yet, Mr. Denny was never terminated by Orkin for the GPS violations, in combination with the prior at-fault collisions and speeding ticket. *Id.* He was never put on probation and had not been instructed to take an aggressive driving course. He was never terminated for his violations. *Id.* Merely six months before the Mosier collision, Mr. Denny received another speeding ticket in June of 2007. (ORK0741).

Orkin's defense at trial for its failure to enforce the Driver Certification policy which would have retrained or removed Denny from a driving position prior to the Mosier collision was that the policy had a three-year accumulation period which would have erased one of Denny's infractions prior to the 2007. Alternatively, Orkin contended it was not aware that Mr. Denny had received the speeding ticket in the year 2005, or 2007 since Denny failed to report the

violation. (ORK0758-ORK0759; ORK0794-ORK0795). Under the policies, each driver had a duty to report any offense and Denny did not report his speeding ticket in 2005. (ORK0791). However, Orkin did not take any disciplinary action against Denny for his failure to report the ticket once a Motor Vehicle Report (“MVR”) was obtained each year from the West Virginia Division of Motor Vehicles (“DMV”) pertaining to Mr. Denny and the speeding tickets were discovered by Orkin. (ORK0811).

After the Mosier collision in March of 2008, Orkin finally suspended Mr. Denny, finding this was his third at-fault accident since 2000. (ORK0745). When questioned by counsel as to whether Denny believed Orkin enforced the safety rules as listed in their own handbook, Mr. Denny testified as follows: “Well, something wasn’t done right by the books. My job was to get out there and work and whatever happens, happens. They have to.. they have to make decisions about it.” (ORK0746).

The evidence at trial established that Orkin failed to remove an aggressive driver from employment and failed to enforce its policies designed to prevent unsafe drivers from operating Orkin vehicles on the road. Orkin driver Denny admitted at trial that if the policy would have been followed, he would have either been required to take an aggressive driving course prior to the Mosier collision or would have been terminated from a driving position. (ORK0733-0734). His testimony was reaffirmed by the testimony of Orkins’ representative Mike Gibney, who testified that between an at-fault accident on July 3, 2003 and a speeding ticket on September 24, 2005, Denny had accumulated the eight points necessary within the thirty-six (36) month period that would required him to attend an aggressive driving course. (ORK0786). Orkin denied that it was aware of the speeding violation in 2005 because Denny did not report it and Orkin did not check his driver’s status until early 2006. (ORK0787). However, Orkin did not retroactively

assess the penalties upon learning of the speeding violation, and no disciplinary action was taken against Denny for his failure to self-report the speeding violation, as required by the Orkin policy. (ORK0789; ORK0792-793). Likewise, Denny received another speeding ticket in 2007, which he failed to report and Orkin argued it did not know about the violation until 2008, just prior to the Mosier collision. (ORK0811). Since liability was admitted by the parties, this evidence formed in part the basis for the punitive damages award against Orkin, as it established that numerous members of the public were exposed to unsafe driving practices exhibited by Orkin drivers, and Orkin LLC employed thousands of drivers on the road.

Several motions *in limine* were filed by the parties prior to trial for the Circuit Court's consideration of evidentiary issues. Petitioners filed a "Motion in *Limine* to Exclude Plaintiff's Punitive Damages Claim" (ORK0082) and a "Motion in *Limine* to Exclude Evidence or Testimony Related to James Denny's Driving Record" (ORK0106). Respondent filed responses in opposition to both motions. (ORK0118; ORK0115 respectively). As a basis for seeking exclusion of Plaintiff's punitive damage claim, Petitioners argued they had only recently been made aware that Plaintiff intended to seek a punitive damages instruction which is also an issue raised by Petitioners in the instant appeal. Plaintiff contested the motion and advised the court that the theory of punitive damages had been developed for several months in discovery and had been the subject of a motion to compel certain documents from Orkin that was heard by the Circuit Court months before trial. (ORK0110; ORK0280; ORK0294). The documents subject to Plaintiff's motion to compel included the entire personnel file containing Mr. Denny's driving record, and the handbook containing Orkin's Driver Certification Policy, which described in detail the accumulation of the point systems for monitoring drivers. *Id.* The Circuit Court heard lengthy oral arguments on the pretrial motions and Respondent presented evidence

demonstrating to the Circuit Court that there was sufficient evidence to present the claim for punitive damages. Specifically, Orkin LLC was in charge of its drivers including Denny and represented to the public that it had a driver safety policy, but the policy clearly was not being enforced, despite having thousands of drivers on the road each day. (ORK0282; ORK0774). While Petitioners contend they were only advised of the punitive aspect of the claim a few weeks before trial, counsel for Respondent asked the Court to amend the Complaint and/or to provide a trial continuance if the evidence was not sufficient to allow the presentation to the jury. (ORK0297-ORK0298). However, Petitioners never requested a trial continuance or more time to develop the facts since both parties had ample time to investigate this case. The Circuit Court concluded that the evidence regarding Orkin's acquiescence in the continued employment of reckless drivers and failure to discipline or terminate its employee by enforcing the Driver Certification Policy was sufficient conduct to present the issue of punitive damages to the jury. (ORK0303).

As a result of the automobile collision, Mosier suffered disc herniations in her back and neck, which impinged upon the nerve roots and caused radiating pain. (ORK0639). She had a microdiscectomy surgery to remove the herniation by a board certified orthopedic surgeon, Dr. Walker. (ORK0635; ORK0642). Unfortunately, Mrs. Mosier continued to suffer from leg pain after the surgery. Dr. Walker referred to her to Dr. Carraway, a pain management physician for further treatment options. Dr. Carraway inserted a spinal cord stimulator into her spine which is designed to block painful nerve signals and relieve some symptoms for individuals suffering from chronic back and hip pain. (ORK0649). Prior to the collision, Ms. Mosier was healthy and walked three to five miles a day. She also greatly enjoyed the outdoors including hunting, camping and riding a motorcycle with her husband. (ORK0544). She worked

part time at the YMCA in Charleston and was a hair dresser at the time of the collision. (ORK0545). The jury heard Mrs. Mosier testify that her life had been completely altered by the collision, as she spent the next two years having medical procedures and surgeries until the stimulator was placed which gave her a better quality of life. (ORK0583).

On May 20, 2011, after a five day trial, the jury returned a verdict for the Plaintiff, finding the Defendants were liable for the automobile collision causing Plaintiff's damages. See Judgment Order, entered June 5, 2011. (ORK0160). The Defendants had admitted liability before trial and the only issues submitted to the jury were proximate cause of damages and the amount of damages. (See Defendant's PreTrial Memorandum, ORK0077-ORK0078; Verdict Form ORK0159-ORK160). The Jury awarded Plaintiff compensatory damages in the following amounts: past medical bills \$123,536.23; future medical bills \$426,245.00; past physical pain and suffering \$100,000; future pain and suffering \$25,000.00; past mental anguish \$100,000; future mental anguish \$25,000.00; past loss of enjoyment of life \$100,000; future loss of enjoyment of life \$25,000.00. Further, the jury found that Orkin acted with purposeful, willful, or reckless conduct or disregarded the rights of others, thereby entitling the Plaintiff to an award of punitive damages in the amount of \$500,000.00. (ORK0159). The punitive damage award is a ratio of less than one half (1/2) to one (1) of the actual compensatory award.

On June 10, 2011, Defendants filed their "*Motion to Vacate the Punitive Damages Award and for an Order Granting New Trial on Compensory Damages Only *Notwithsdanding the Foregoing, Defendants Request a Remittitur of Compensatory Damages and Memorandum of Law in Support of Motion*", arguing that Plaintiff failed to present sufficient evidence to support the jury's verdict of punitive damages, or alternatively, that the Court abused its discretion in evidentiary rulings and jury instructions, which warrant a new trial. The Trial Court denied

the motion by Order entered August 26, 2011. It is from this Order that Petitioners seek relief from this Court to substitute its judgment regarding the weight and sufficiency of the evidence presented at trial for that of a properly empanelled jury and Kanawha County Circuit Court Judge.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

In *Pipemasters Inc. v. Putnam County Commission*, 625 S.E.2d 274 (W.Va. 2005), this Court addressed the standard of review applied to a trial court's ruling on a motion for new trial:

We review the rulings of the circuit court concerning a new trial and its conclusions as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. ...

Id. at 279; citing *Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E.2d 374, (W.Va. 1995). In addressing a motion for a new trial, this Court stated in Syllabus Point 5 of *Orr v. Crowder*, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S. Ct. 384, 83 L. Ed. 2d 319 (1984), that:

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Pipemasters, 625 S.E.2d at 280. This Court has historically favored supporting jury verdicts and will affirm a verdict, short of compelling reasons to set a verdict aside. *Id.* at 280. "An appellate court will not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of the evidence." *Id.*

Determinations of fact made either by a jury or a circuit court are reviewed under a clearly erroneous standard. See e.g., *Syl. pt. 5, Marsch v. American Electric Power*, 530 S.E.2d

173 (W.Va. 1999); (“It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury on such facts will not ordinarily be disturbed by this Court.” Syl. Pt. 2, *Graham v. Crist*, 118 S.E.2d 640, (W.Va. 1961).

“[A] trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion.” *Syl. Pt. 4, State v. Rodoussakis*, 511 S.E.2d 469 (W.Va. 1998). Similarly, the Court’s giving of a jury instruction is reviewed under an abuse of discretion standard. *Syl. pt. 6, Tennant v. Marion Health*, 459 S.E.2d 374 (W.Va. 1995). Moreover, the Trial Court’s rulings on admissibility of evidence are harmless error unless the defendant was substantially prejudiced by it. *See State v. Marple*, 475 S.E.2d 47(W.Va. 1996). The Circuit Court adequately considered all evidentiary issues raised by the parties prior to and throughout the trial in this matter. It cannot be said that any of the Court’s evidentiary rulings raised by Petitioners were erroneous to create substantial prejudice or that the remaining evidence offered did not support the verdict. *See McDougal v. McCammon*, 455 S.E.2d 788 (W.Va. 1995).

This Court has also observed that in reviewing punitive damages awards, the Court will consider the same factors that the jury and trial judge consider, and “...all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case [*Garnes v. Fleming*] with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.” *Syl. Pt. 5, Garnes v. Fleming Landfill, Inc.*, , 413 S.E.2d 897 (W.Va.1991).

Petitioners have raised nine (9) Assignments of Error seeking this Court to review the

Trial Court's rulings on the motion for new trial and/or seeking to set aside the punitive damage award. Petitioners raise multiple evidentiary rulings, and rulings on jury instructions submitted to the jury. In all respects, the Petition's factual recitations in support of the assignments of error do not comport with the standards of appellate review regarding the sufficiency of evidence to support a jury verdict, which is that the evidence be viewed most favorably to the Respondent; that the parties assume all conflicts in the evidence were resolved by the jury in favor of the Respondent; that the parties assume as proven all facts which the Respondent's evidence tends to prove; and that the Respondent be given the benefit of all favorable inferences which reasonably may be drawn from the facts proved. *Pipemasters*, 625 S.E.2d at 280, (quoting *Syl. Point 2, Tanner v. Rite Aid*, 461 S.E.2d 149 (W.Va. 1995)).

In summary, the vast majority of the Assignments of Error raised by Petitioners involve arguments relating to the admission of Denny's driving record and the Driver Certification Policy which supported the jury's verdict for Plaintiff's punitive damages claim. Under numerous legal theories, Petitioners seek to challenge the basis for the award, arguing that Plaintiff failed to establish the appropriate standard of care owed to Plaintiff, which could not be set by Orkin's own internal policies and procedures. All arguments presented in the Petition regarding the applicable standard of care disregard the fact that Petitioners admitted liability prior to trial and the standard of care was not a factual question presented to the jury.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure, Respondent respectfully advises this Court that none of the criteria set forth by the Court for considering a Petition for oral argument are met by Petitioners. This case involves a motor vehicle collision where liability was admitted by the Defendants but causation and damages were disputed. The

Circuit Court carefully considered the evidence before submitting the issue of punitive damages to the jury. The verdict on compensatory damages and punitive damages was not excessive. There are no significant public policy issues present. This case does not involve issues of first impression; issues of fundamental public importance; constitutional questions regarding the validity of a statute or ruling; or inconsistencies or conflicts among the decisions of lower tribunals.

LEGAL ARGUMENT

At trial, Plaintiff clearly established proof necessary under West Virginia law to entitle her to an award of punitive damages. Moreover, the jury received proper instructions under the law to consider the question of imposing punitive damages against Orkin for its reckless conduct in condoning driver Denny's repeated driving offenses, traffic citations and accidents in the time period prior to the Mosier collision.

1. THE TRIAL COURT'S RULING TO ADMIT RESPONDENT'S EVIDENCE ON PUNITIVE DAMAGES WAS PROPER SINCE THERE IS NO REQUIREMENT UNDER WEST VIRGINIA LAW THAT A COMPLAINT SET FORTH A SEPARATE CAUSE OF ACTION FOR PUNITIVE DAMAGES.

In support of its assignment of error that this Court should vacate Plaintiff's punitive damages award, Petitioners state that Plaintiff's Complaint failed to assert a claim for punitive damages. This issue was raised prior to trial by Petitioner in its "Motion *in Limine* to Exclude Plaintiff's Punitive Damages Claim" which the Circuit Court denied. See Trial Transcript, pgs. ORK0082-105; and Plaintiff's response in opposition, pg. ORK0109-0114. The Court's ruling on admission of evidence is harmless error unless the defendant was substantially prejudiced by it. See *State v. Marple*, 475 S.E.2d 47 (W.Va. 1996). All of the evidentiary rulings made by the Circuit Court *in limine* were adequately briefed, argued, and properly ruled upon by the Court after consideration of the applicable law and particular facts in this case prior to trial.

Punitive damages are not a stand-alone cause of action in West Virginia. See *Perrine v. E.I. Dupont De Nemours & Co.*, 694 S.E.2d 815, 900 (W. Va. 2010) (“[T]he right to recover punitive damages in any case is not the cause of action itself, but a mere incident thereto.” [*internal citations omitted, emphasis added*]). As recently stated in *Miller v. Carelink Health Plans, Inc.*, 82 F.Supp.2d 574, 579 n.6 (S.D. W.Va. 2000):

Defendant claims the testimony creates a "cause of action" for punitive damages; such damages are rather, of course, a form of relief. West Virginia law does not recognize an independent cause of action for punitive damages. See *Cook v. Heck's, Inc.*, 342 S.E.2d 453, 461 n.3 (W.Va. 1986).

Thus, there is no legal requirement that Plaintiff must plead a ‘cause of action’ for punitive damages in the Complaint. The Court properly considered Plaintiff’s evidence in *limine* which would support the jury’s award of punitive damages.

2. SUBMISSION OF PLAINTIFF’S CLAIM FOR PUNITIVE DAMAGES TO THE JURY WAS PROPER UNDER THE EVIDENCE PRESENTED AND THE LEGAL STANDARDS NECESSARY FOR INSTRUCTING THE JURY ON PUNITIVE DAMAGE AWARDS. PLAINTIFF WAS NOT REQUIRED TO ESTABLISH THE STANDARD OF CARE FOR ORKIN’S FAILURE TO REMOVE ITS DRIVER SINCE LIABILITY WAS ADMITTED BY THE PARTIES PRIOR TO TRIAL AND THIS ERRONEOUS STATEMENT OF THE LAW CANNOT OVERTURN A PROPERLY SUPPORTED VERDICT IN PLAINTIFF’S FAVOR.

Ample evidence was presented regarding Orkin’s failure to remove its driver from the road despite having multiple motor vehicle collisions which could have prevented the Mosier collision. Orkin’s failure to enforce its Driver Certification Policy designed to remove such aggressive drivers from the road demonstrated a reckless disregard to public safety, sufficient to support the jury’s finding that Orkin’s conduct warrants a punitive award. Plaintiff was never required to establish a ‘standard of care’ for the jury to consider since liability was admitted by Petitioners. The award was proportionate to the conduct established in accordance with Court’s directive in *Garnes v. Fleming*:

Punitive damages should 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. If the

defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

Syl. pt. 3, in part, 413 S.E.2d 897 (W.Va. 1992).

Petitioners assert that as a matter of law, Plaintiff cannot be awarded punitive damages unless she first establishes that Orkin is guilty of simple negligence. Petitioners contend that the punitive claim was 'separate and apart from Count I of the Complaint regarding Denny's negligence that caused the collision and liability for such negligence was admitted prior to trial.' (Petition, pg. 15, n. 12). Overall, Petitioners argues that Respondent failed to establish a standard of care by which a punitive award could be judged by the jury. This argument is fatally flawed and is a misstatement of the legal and factual issues presented at trial. Petitioners admitted liability and 'fault' before trial. (See ORK0276, statements of counsel during hearing on motions *in limine* to exclude punitive damages and Denny driving record, respectively; the Judge's directive to the jury on contested issues at ORK0328).

It is well established that the doctrine of *respondeat superior* applies to impute the negligence of an employee to the employer for establishing liability. See *Zirkle v. Winkler*, 585 S.E.2d 19, 21 (W.Va. 2003) ("The doctrine of *respondeat superior* has a longstanding basis in Anglo-American law. Syl. pts. 3 and 4 (in part) of *O'Dell v. Universal Credit Co.*, 191 S.E. 568 (W.Va. 1937) state the doctrine as follows: The legal relationship of master and servant is commonly understood to arise when one person subordinately serves another, both consenting thereto. . . . The master is answerable to a stranger for the negligent act of a person employed by the [master or] master's authorized agent, if the act is within the scope of the person's employment.)*[internal citations omitted]*. The *Zirkle* court explained that the terms "master and servant," "principal and agent," and "employer and employee" are often used

interchangeably in cases involving respondeat superior liability, and that respondeat superior liability itself is sometimes referred to as "imputed" or "vicarious" liability. *Id.* at n. 2.

Plaintiff's Complaint alleged that Orkin LLC was vicariously liable for the acts of its employee for causing the Mosier collision, since he was driving within the scope of his employment. (ORK0004-0005). Importantly, Defendants admitted liability prior to trial, but contested the proximate cause element, asserting that all of Plaintiff's damages were not caused by Defendants' negligence. (ORK0078). Petitioners' second assignment of error is disingenuous to this Court in representing that Plaintiff failed to establish a 'standard of care' or 'simple negligence' against Orkin for proving liability, since fault was admitted by Petitioners. (ORK0729, 'we've admitted fault in this case;' ORK0742, 'we've admitted fault'; ORK0743; testimony of Denny ORK0763 "You were at fault in this accident with Ms. Mosier? Yes, I was.;" testimony of Denny ORK0766 "It was my fault.")

The evidence at trial established the foundation for imputing the grossly negligent and reckless acts of its driver to Orkin. Plaintiff also established that Orkin was at fault for proximately causing all of Plaintiff's damages. If Orkin would have removed its driver from the road after his numerous collisions, speeding tickets, and speeding infractions caught by the GPS system, Mrs. Mosier would not have been injured by his careless driving that day. It has long been established in West Virginia that an employer can be held liable for punitive damages for conduct of its agent or employee if the agent or employee was acting within the scope of his or her employment when harm occurred to the plaintiff. *See Jarvis v. Modern Woodmen of Am.*, 406 S.E.2d 736 (W.Va. 1991); *See also Syl. pt. 4, Hains v. Parkersburg, M. & I. Ry. Co.*, 84 S.E. 923 (W.Va. 1915) ("If a master knowingly employs or retains a careless and incompetent servant, he thereby impliedly authorizes or ratifies his negligent acts, committed in the course of

his employment, and, if the servant's negligence is wanton and willful or malicious, the master is liable for exemplary or punitive damages.”).²

At trial, the evidence overwhelmingly demonstrated that Orkin was liable for the negligent and reckless acts of its driver. It also established that Orkin failed to remove a known aggressive driver from the road. The fact that Orkin had implemented a policy within its own organization designed to remove aggressive drivers from the road and from Orkin's employment was not the sole basis for the punitive award, but was a supporting factor tending to show the jury that Orkin disregarded public safety. Even without the policy, Orkin should have removed Denny and other aggressive drivers from the highway where the public was at risk every day those drivers remained employed by Orkin. Orkin, having presented itself as a safety conscious company, had enacted rules to re-train aggressive drivers or remove them from a driving position which was strong evidence of Orkin's liability for proximately causing Mosier's damages. Had Orkin followed its policies, it would have either put Denny on probation or removed him from a driving position before the Mosier collision. Orkin's corporate representative testified that the purpose of the driver certification policy was to “eliminate risk to the public.” (ORK0785), while the purpose of the GPS policy was to “protect people on the road from overly aggressive drivers and automobile accidents.” (ORK0784). Those policies were not enforced against Denny and in fact, in his eighteen years of employment with Orkin, Denny could not recall one employee who had ever been terminated for violating the policy. (ORK0748).

While Petitioners assert that the company's internal policies and procedures cannot establish the standard of care applicable, this argument simply misstates the fact that liability was

² Much of this discussion was excerpted from “Punitive Damages Law in West Virginia,” written by Justice Robin Davis and Louis Palmer, October 2009, presented at Glade Springs, WV, and published by West Virginia Law Review, which can be accessed at www.state.wv.us/wvsca/punitivedamages2010.pdf.

not contested at the trial level, and mischaracterizes the Circuit Court's duty under West Virginia law in its consideration to submit the question of punitive damages to the jury. In support of its position that the punitive award against Orkin cannot be based upon violations of its own policies and procedures, Petitioners cite the case of *Reynolds v. City Hospital*, 529 S.E.2d 341 (W.Va. 2000). The *Reynolds* case was a medical malpractice case which did not even mention the word punitive damages. The Defendants' interpretation of this case is completely inapposite and inapplicable to the issues being considered by this Court in reviewing punitive damages awards on appeal. See *Syl. Pt. 5, Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991), which states: "... In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case [Garnes] with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage." Rather than seeking review by this Court under the *Garnes* factors, Petitioners argue that *Reynolds v. City Hospital Inc.* prevents a company's internal policies to be used against it for establishing the applicable standard of care. In *Reynolds*, the plaintiff contended the court erred when it refused to instruct the jury that the applicable standard of care was the hospital's own internal protocols regarding duties imposed when a patient is restrained. *Id.* at 348. The Court found that the trial court did not err in failing to give that instruction, and further held:

We agree with Bell that such liability may occur, but only where the protocols are synonymous with the standard of care of the **profession**; not where the protocols exceed the standard of care of the **profession**.

Id. at 349. [emphasis added]

The *Reynolds* case is a medical malpractice case discussing the applicable standards of care in the medical profession. This case involves Cindy Mosier's negligence claim against

Defendant Orkin and James Denny for negligently and recklessly operating a motor vehicle into the side of her car. Since the standard of care was never an issue at trial, having been admitted before evidence was even presented, the Circuit Court instructed the jury *only* on the contested elements of negligence, which were proximate cause and damages. (ORK0148; ORK1112).

This Court has long held:

To be actionable, negligence must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury." Syl. Pt. 3, *Hartley v. Crede*, 140 W. Va. 133, 82 S.E.2d 672 (1954).¹ Syllabus Point 4, *Haddox v. Suburban Lanes, Inc.*, 176 W. Va. 744, 349 S.E.2d 910 (1986)."

Syl. Pt. 1, Wehner v. Weinstein, 444 S.E.2d 27 (W.Va. 1994). Petitioners, having admitted fault before the trial, conceded any argument it could have presented regarding the standard of care to be established for Orkin and whether the internal policies or procedures could set the standard. In light of the longstanding legal precedent that a driver's conduct could be imputed to the employer under the vicarious liability theory, any such argument would have been defeated. *See e.g. Wehner*, 444 S.E.2d at 31, n.2, ("Mario's Pizza recognizes that if its driver, David Turner, is negligent, then as the employer it is liable under the doctrine of *respondeat superior*." *See Syllabus Point 3, Musgrove v. Hickory Inn, Inc.*, 281 S.E.2d 499 (W.Va. 1981)).

The issue of the appropriate 'standard of care' in a negligence claim was never raised by Petitioners on the elements of negligence which are: duty, breach, proximate cause, and damages. Petitioners did not submit any evidence or proposed jury instructions on the applicable 'standard of care' to support Orkin's assertion that the internal policies and procedures could not set the standard of care, as that issue was irrelevant to the questions before the jury. The Circuit Court properly instructed the jury that the corporate employer could be held vicariously liable for the acts of its employee. (ORK0145-ORK0146). Plaintiff was not

required at all to introduce evidence of the standard of care in the industry to determine if those standards were synonymous with Orkin's policy. The *Reynolds* holding does not apply in this case. Likewise, the numerous other cases cited by Petitioners from various jurisdictions finding that a company's internal policies and procedures cannot establish the standard of care are similarly inapplicable.

Plaintiff did not present any evidence of the industry standard or similar safety policies in the trucking industry because such evidence was not relevant to the issues being tried before the jury. While the Petitioner asserts that the West Virginia DMV has a similar point system which is not as stringent upon drivers as the Orkin policy, such information was elicited at trial by Petitioners. The jury heard testimony from Mr. Denny that the point system used by the DMV would not have assessed as many penalty points against him as the Orkin policy. (ORK0763). It cannot be said that the jury's factual finding on this issue was against the clear weight of the evidence.

Petitioners assert that the jury's award of punitive damages in this case raises significant public policy issues. Petitioners' argument is that if a violation of the company's self-adopted guidelines subjects the company to punitive damages, then why should the company impose guidelines above the bare minimum or strive for safer standards than those imposed by law. This argument is contrary to West Virginia's important public policy of enforcing safety rules of the road. Setting aside Orkin's internal company policy, the fact remains that Orkin did not remove a driver who by his own testimony, at the very least should have placed on probation until he completed an aggressive driving course before the Mosier collision as required by his employer. Orkin chose to monitor the thousands of drivers it employs for profit by implementing safety rules and policies, in addition to the minimum requirements established by

law and monitored by the DMV. Yet, they ignored those rules. While the propriety of punitive damages has long been the subject of academic debate, it is well settled that punitive damages serve to punish a wrongdoing and deter future wrongdoing. *See Garnes v. Fleming*, 413 S.E.2d 897 (W.Va. 1992). As discussed in *Garnes*:

For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a \$ 10 pair of glasses. A jury reasonably could find only \$ 10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.

Id. at 902. In this case, Mosier's vehicle was struck by an Orkin driver and she suffered serious and permanent injuries. Had Orkin enforced its policy designed to protect the public, the driver would not have been on the road that day. This fact pattern is most analogous to the Court's discussion in *Garnes* regarding the injuries suffered by many guests of the Motel 6 chain due to its lax security policies. *Id.* There, the Court explained:

Until recently (after the lawsuits began), Motel 6 kept no records on crime at its motels. Locks are not changed on rooms when guests depart with keys, leaving open the potential of many unwelcome visitors. Motel 6 managers are given no security training and are encouraged to maintain occupancy rates of over 100 percent. Motel 6 maintained these lax security policies because it made more money on the front end, and its insurance company was covering its rear end. After a \$ 10 million jury award in a case resulting from one of the Forth Worth rapes, however, even Motel 6's insurer is taking notice. Although Motel 6 may not have guest security as a high priority, a \$ 10 million jury verdict encourages its insurer to keep better tabs on the way Motel 6 does business.

Id. at 902. Just like the situation involving the Motel 6 chain, Orkin failed to keep tabs on the way its drivers do business. They failed to monitor each driver's at-fault accidents and speeding tickets under the point system. Once they received the yearly MVR reports from the DMV, they failed to question drivers for their failure to self report speeding tickets as required. The punitive award assessed against Orkin will encourage the company to keep better tabs on its drivers and prevent aggressive and unsafe drivers from exposing thousands of other motor

vehicle operators to potential life-altering collisions or death, as the Orkin vehicles drive in and out of communities and neighborhoods daily. This award does not serve to deter companies from implementing safety policies, but does certainly serve to deter companies from failing to monitor the reckless acts of its employees that pose a public safety risk.

3. THE JURY WAS PROPERLY INSTRUCTED BY THE COURT IN PLAINTIFF'S JURY INSTRUCTIONS NO. 12, 13 AND 16 AS TO LEGAL STANDARD ESTABLISHED BY MAYER V. FROBE AND ITS PROGENY, AND THE JURY RENDERED A PUNITIVE DAMAGE AWARD IN CONFORMITY WITH THE LAW.

As stated recently in *Syl. Pt. 6, Perrine v. E.I. Dupont De Nemours*, 694 S.E.2d 815

(W.Va. 2010),

When this Court, or a trial court, reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), and its progeny. If a punitive damage award was justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992).

Under the *Mayer v. Frobe* analysis, Petitioners argue that the punitive award should be set aside, as the facts of this case do not approach the threshold of conduct required for punitives. Petitioners incorrectly argue that punitive damages can only be awarded upon a finding of malice. This argument ignores the actual legal requirement for finding punitive damages as first stated in *Mayer v. Frobe*:

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"

Syl. Pt. 4, in part, Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895). [emphasis added]. Since the *Mayer* opinion, the West Virginia Supreme Court has reviewed specific fact patterns on multiple occasions in determining whether the conduct is sufficient to warrant punitive damages.

Only the jury can determine what facts they deem necessary to warrant punitive damages that constitute gross negligence, willful, wanton, recklessness or maliciousness, such fact finding is given deference in this Court's review. See e.g., *Marsch v. American Electric Power*, 207 W.Va. 174, 530 S.E.2d 173 (1999). The jury determined that Orkin disregarded its obligation to protect the public from aggressive drivers and that such conduct was willful and reckless toward Plaintiff and other members of the public.

This Court most recently reviewed an award of punitive damages in *Crawford v. Snyder*, 2011 W. Va. LEXIS 317, (November 16, 2011).³ In that case, the jury awarded punitive damages against Defendant Crawford who had struck and killed a flagman on the highway in a construction zone while transporting passengers for medical appointments under a service contract being paid by Medicare/ Medicaid. *Id.* at 7. In upholding the jury's verdict for punitive damages against Crawford, the Court stated:

In this case, the trial court found that a verdict for punitive damages was supported by evidence presented at trial that indicated that Mr. Crawford saw Michael Snyder standing in the roadway when he was several hundred feet away and instead of driving cautiously knowing that he was in a construction zone, he chose to hunt for a "spit cup" for his smokeless tobacco, taking his eyes off the road for a period of nearly six seconds. The trial court found that Mr. Crawford's lack of attention to the roadway was **grossly negligent warranting an instruction allowing the jury to consider a punitive damages award. Upon review, this Court cannot say that the trial court erred by finding that Mr. Crawford's conduct was willful and reckless warranting a punitive damages assessment by the jury.** *Id.* at 21.

Simply because Petitioners do not agree with the jury's assessment of the evidence as grossly negligent and willful conduct sufficient to warrant punitive damages in this case does not give rise to overturning the punitive award. While Defendant characterizes the evidence on Denny's driving record and Orkin's failure to enforce its Driver Certification Policy as 'merely minor traffic citations and fender benders,' it is without question that the jury determined Orkin's

³ The full citation is not yet available for this opinion.

conduct was a willful disregard to the safety of others. In *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W.Va. 1981), the Court recognized "that punitive damages are also awarded to deter others from pursuing a like course of conduct", and that "[t]he law accords the plaintiff an extra measure of recovery for any number of reasons where the defendant has been found guilty of **gross, reckless or wanton negligence.**" *Id.* at 233 [*emphasis added*]. Moreover, "The punitive damages definition of malice has grown to include not only mean spirited conduct, but also **extremely negligent** conduct that is likely to cause serious harm." *TXO Prod. Corp., v. Alliance Res. Corp.*, 419 S.E.2d 870 (W.Va. 1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, (1993).

The *TXO* Court explained that generally, an award of punitive damages falls into three categories: (1) really stupid defendants; (2) really mean defendants; (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm. *Id.* at 888. The Court went on to discuss the 'really stupid' defendant cases in which great harm could have been caused by the conduct, as a result of extreme carelessness. The Court stated:

As we discussed in *Garnes*, one of the reasons we allow punitive damages in these "stupid" cases is to give individual plaintiffs a sword with which to fight well-armed, bureaucratic defendants. In a world with only smaller closely held businesses, we would not need punitive damages for this type of case. Once Joe, the owner of Joe's Automobile Company, realizes that there is a foul up in his business that is causing problems for his customers, he has plenty of incentive to correct it. However, compensatory damages do not always provide sufficient incentive for the middle managers who make these types of decisions for a major automobile company with hundreds of thousands of employees and agents.

Id. Similar to the conduct discussed by the Court in *TXO, supra*, Orkin is a large corporation employing thousands of drivers on the road. Rather than following their driver certification policy to remove drivers with repeated accidents and traffic violations, they chose to ignore the problem. Clearly, this conduct is grossly negligent and careless, and subjected the public to

great harm as demonstrated by the injuries suffered by Mrs. Mosier when Orkin's driver hit her in March of 2008. This conduct warrants punitive damages. Petitioners' argument within the Petition asserting that Denny's driving record was not that bad and/or that Orkin's failure to enforce its policy was insignificant are evidentiary issues presented to the jury for consideration. The jury determined that these factors were significant to demonstrate Orkin's knowledge that it was exposing Plaintiff and the public to a safety risk, and the conduct was worthy of punishment for deterrence under the civil justice system and in conformity with West Virginia law.

It is within the Trial Court's discretion to permit or refuse the giving of a jury instruction as long as an accurate statement of the law is given to the jury. *Syl. pt. 6, Tennant v. Marion Health*, 459 S.E.2d 374 (W.Va. 1995). Petitioners argue that the instructions were somehow improper. However, Respondent's jury instructions on punitives were nearly exact quotes from cases in West Virginia on punitive damages. It cannot be maintained that the instructions were inaccurate statements of the law. Plaintiff's Instruction No. 12 was taken from the language of *Wells v. Smith*, 297 S.E.2d 872 (1982)(*syl. pt. 3* only overruled by *Garnes v. Fleming*, 413 S.E.2d 897 (W.Va. 1992), and *Garnes v. Fleming, supra*. Both of those cases have authoritative and well reasoned discussions about the development of the common law on punitive damages in West Virginia and the United States Supreme Court decisions regarding the constitutionality of imposing punitive damages. *Garnes*, 413 S.E.2d at 901-904. Plaintiff's Instruction No.13 had a direct quote from *Syl. Pt. 4, Boyd v. Goffoli*, 608 S.E.2d 169 (W.Va. 2004), quoting *Syl. Pt. 13, TXO v. Alliance Resources*, 419 S.E.870 (W.Va. 1992) *aff'd*, 509 U.S. 443, 113 S. Ct. 2711 (1993) which quoted original opinion stated in *Syl. Pts. 3 and 4 in Garnes v. Fleming*, 413 S.E.2d 897 (W.Va. 1992). Despite Defendant's protests to the language of No. 13 which stated that the jury could consider whether Orkin profited from its conduct or

concealed and/or covered up its actions, again, this is a 100% accurate statement of West Virginia law. *See Syl. Pt. 4, Boyd v. Goffoli, supra.*

The jury's punitive damage award was justified under *Mayer v. Frobe* and this Court's subsequent opinions reviewing conduct sufficient to impose punitive damages. However, Petitioners also ask this Court to review the award for excessiveness. The punitive damage award is not remotely close to being considered excessive under the standards announced by this Court in *Garnes v. Fleming*, and its progeny. West Virginia has upheld a ratio for punitives of at least five times the award of damages. "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." *Syl. Pt. 15, in part, TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va. 1992). Where the defendant is found to have been reckless, as opposed to malicious, a punitive to compensatory damages ratio of as much as Five (5) to One (1) can be appropriate and constitutional. *See e.g., Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678 (1997).

The jury in this case awarded Plaintiff total damages in the amount of \$924,781.23. The punitive award was \$500,000, merely **half** of the actual damages awarded. (ORK0159). The punitive damages award in this case was roughly a ratio of ½ to 1 in comparison to the compensatory award. (Verdict of roughly \$900,000 and punitives of \$500,000). Under the standards announced above, there is no basis for overturning the punitive award for being excessive. This Court will examine the award for excessiveness under the four factors set forth in *Garnes v. Fleming*, 413 S.E.2d 897 (W.Va. 1991), which are as follows: reprehensibility of defendant's conduct; whether defendant profited from its wrongdoing; appropriateness of award

to encourage fair and reasonable settlement when a clear wrong has been committed; cost of litigation to plaintiff. *Id.* Further, the Court may consider whether the award should be reduced under any mitigating circumstances. *Id.*; *Syl. Pt. 7, Perrine v. E.I. Du pont de Nemours, supra.*

Under the first factor, Petitioners argue that Orkin's conduct was not reprehensible because its failure to place Denny on probation for traffic violations was excused by the slight degree of the last traffic violation before the Mosier collision which was a speeding ticket on June 26, 2007 for going 1-4 miles over the speeding limit. Alternatively, Orkin contends it was unaware of the speeding ticket. Orkin's conduct was reprehensible because by 2007, Denny's driving history contained an at-fault collision in 2000; an at-fault collision in 2003; a speeding ticket in 2005; a speeding ticket in 2007; and three separate GPS violations for exceeding 70 mph. (ORK 0737-0739). Denny failed to report his speeding tickets and was caught by Orkin when the MVR was requested from the DMV. Only after the Mosier collision was Denny put on probation from the company and required to take an aggressive driving course. The reprehensibility of this conduct is proportional to the punitive damage award imposed.

The second factor under *Garnes* considers whether the defendant profited from its wrongful conduct. Orkin did in fact profit from its wrongful conduct, since Denny continued to drive for Orkin years after he should have been suspended and/or terminated under the Driver Certification Policy. No evidence was presented to the jury by Petitioners on this factor.

Under the third *Garnes* factor, the punitive award was appropriate to encourage fair settlements since liability had been admitted by Petitioners. Rather than negotiating a clear claim for a reasonable amount, Orkin subjected Mrs. Mosier to a year of litigation and a jury trial, even after admitting liability. While Petitioners assert that punitive damages were not considered in settlement negotiations, Respondents advised Petitioners early in this case that

punitive damages were an aspect of the claim. Petitioners failed to appreciate the weight of the evidence entitling Mosier to a punitive award during settlement negotiations. As such, the punitive award clearly encourages fair and reasonable settlement offers by corporations who have no defense to liability.

Finally, Petitioners contend that mitigating circumstances exist to show that the punitive award does not bear a reasonable relationship to the harm likely to occur. Petitioners rely upon the argument that the 2007 speeding ticket which would have subjected Denny to the aggressive driving course was only for going 1-4 mph over the speed limit. It should be noted that Petitioner's argument is a fallacy of evidence presented at trial, which was that Orkin should have disciplined Denny after the speeding ticket in 2005- not 2007, which was a speeding violation of 15 mph over the speed limit, rather than the 2007 citation for going 4 mph over the limit. (ORK0787). The speeding ticket received in 2007 occurred just six months before the Mosier collision, and yet again, Denny failed to report the ticket and Orkin denied knowledge of it even after Orkin received the MVR at the end of the year 2007. (ORK0811).

The jury was presented sufficient evidence to find that either Orkin knew of Denny's propensity to cause motor vehicle collisions and speed in violation of the law or should have known of these driving infractions under its own Driver Certification policy. There are no mitigating circumstances present in this case. The punitive award should be upheld to encourage companies to monitor their employees and enforce their safety rules to protect the public from dangerous drivers, and to prevent similar conduct from occurring again. *See e.g. TXO Prod. Corp., v. Alliance Corp.*, 419 S.E.2d 870 (W.Va. 1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, (1993), discussion *infra*. pg. 22.

4. THE JURY'S AWARD OF PUNITIVE DAMAGES WAS SUPPORTED BY THE EVIDENCE AS THE JURY DETERMINED THAT ORKIN'S CONDUCT WAS RECKLESS, WILLFUL CONDUCT WORTHY OF PUNISHMENT AND DETERRENCE.

The uncontested evidence presented at trial established that Orkin's Driver Certification Policy assessed penalty points against its drivers including Denny for various driving infractions including speeding tickets and accidents. Plaintiff's counsel did not misrepresent the evidence of Orkin's failure to enforce the Driver Certification Policy but nevertheless, statements of counsel are not evidence and the jury was properly instructed regarding the weight and sufficiency of evidence.

While Petitioners argue that the jury received a 'misrepresentation of this evidence' it should be noted that the majority of evidence on the Certification Policy came from Defendants' witnesses. Specifically, the testimony of Mr. Gibney, Orkin's designated corporate representative was read into evidence. Mr. Gibney unequivocally testified that prior to Mosier collision on 3-17-08, Denny had two incidents on his driving record- 7/3/03 was an at-fault accident (4 points assessed under policy) and 9/24/05 speeding ticket (4 points assessed under policy.)

Orkin admitted in testimony that those two incidents occurred between the time period of 7-3-03 and 9-24-05 which is less than three years and both infractions should have been assessed four penalty points each. (ORK0787-790). Denny admitted he should have been required to take an aggressive driving course at eight points and moved to a non-driving position or terminated at nine points. Rather than following its policy to protect the public from aggressive drivers, Orkin did not assess any points for the speeding ticket of 9-24-05 because Denny didn't tell his employer about it. When it was discovered by running the MVR report at the end of the year, Orkin still took no action to either retroactively assess the points, or discipline Denny for

failing to advise them of the ticket. Mr. Gibney and Mr. Denny admitted that the points should have been assessed under the policy but they were not and Denny was never required to undergo an aggressive driving course.

While Petitioners contend the evidence did not establish that Orkin violated its policy, the jury heard the evidence presented, which included Orkin's defenses that 1) it did not violate its policy; or 2) the prior infractions on Denny's driving record dropped off due the thirty-six (36) month window; or 3) Orkin did not know about all of the violations. (See Denny cross examination, ORK0758-759). The jury had substantial evidence to find that Orkin created a policy designed to monitor its drivers for legal driving violations as reported by the state DMV; the policy was designed to protect the public from aggressive and unsafe drivers by virtue of its penalty point system; that driver Denny had repeated violations which were assessed and/or should have been assessed under the policy; and that Orkin did not require him to undertake any form of retraining or defensive driving instruction during the course of his employment. This evidence was not misrepresented at all since it came through Petitioners' own witnesses and opposing counsel had the opportunity to question the witnesses on these issues. The jury has the final decision regarding the weight and credibility of all witnesses in a civil case. See *Syl. Pt. 5, Marsch v. American Electric Power*, 530 S.E.2d 173 (W.Va. 1999)("It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury on such facts will not ordinarily be disturbed by this Court. ")(internal citations omitted).

Petitioners have shown no improper representation by Respondent or counsel concerning the Driver Certification Policy and Orkin's failure to follow the same. It is immaterial that the policy itself is more stringent than the DMV's point policy. The Petitioners presented evidence

to that jury that Orkin's policy was more stringent than DMV's policy and that under the DMV policy, as Denny's license was never subject to suspension by the DMV. However, as apparent from the jury's verdict, the jury placed greater weight on the fact that Orkin's policy was designed to protect the public from aggressive drivers like Denny to prevent accidents but was not followed or enforced. Further, the jury was properly instructed by the Circuit Court that statements of counsel were not evidence. ("Nothing said or done by the attorneys who have tried this case is to be considered by you as evidence of any fact.") (ORK1096). Accordingly, it cannot be said that the jury's determination on these issues was against the clear weight of the evidence.

5. THE CIRCUIT COURT'S DENIAL OF PETITIONERS' MOTION FOR NEW TRIAL WAS NOT ERRONEOUS AS PLAINTIFF'S AWARD FOR COMPENSATORY DAMAGES IS SUPPORTED BY THE EVIDENCE AND THE LAW RATHER THAN ANY PERCEIVED NOTION OF INFLAMMATORY ARGUMENTS OF COUNSEL OR PUNITIVE EVIDENCE.

Petitioners contend that the Circuit Court erred by admitting testimony of expert Roger Griffith, Certified Public Accountant ("CPA"), on the net worth of Rollins Inc., the parent corporation of Defendant Orkin LLC, and after hearing that testimony, the jury was unable to render a fair verdict on compensatory damages which must have tainted the entire verdict. First, Petitioners did not object at all to the amounts presented by Griffith or the way it was calculated from the parent company before his testimony. Second, Defendant had the opportunity to cross exam Griffith on his testimony and how he arrived at the figure. However, he was not asked about this opinion during cross examination. (ORK0845-ORK0855). Third, the financial information was deemed relevant by the Court as to the punitive damages claim. Finally, the Court properly admitted this testimony on the corporate worth analysis under the clear authority of West Virginia law: "The financial position of the defendant is relevant." *Syl. pt. 4, in part, Boyd v. Goffoli*, 608 S.E.2d 169 (W.Va. 2004).

Roger Griffith's expert opinions concerning the net worth of the corporation were undisputed at trial. Presenting evidence of the parent corporation on the relevant question of corporate worth for a punitive claim has been upheld by this Court. In *TXO*, this Court stated:

The worth of the TXO Division of USX, [parent corporation] and the worth of USX for that matter, is relevant. **If we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporating separate departments as a number of undercapitalized subsidiaries.** It is the management of USX that must ultimately make the decision that its employees will not engage in malicious and nefarious business activities, and, therefore, it is the pocketbook of USX that the jury verdict must reach.

419 S.E.2d at 890. Upon review by the United States Supreme Court on this issue, the TXO Court explained that like many other states, West Virginia has determined that the financial condition of the defendant is a relevant factor to consider in a punitive award. *TXO v. Alliance Resources Corp.*, 509 U.S. 443, 463, 113 S. Ct. 2711 (1993).

Additionally, the Court did not err in admitting evidence of Denny's driving record and Orkin's GPS policy as relevant to the punitive damages claim. While Petitioners assert that Plaintiff's counsel misrepresented the accumulation of points for Denny's various driving infractions, all of the evidence was presented to the jury for its determination of whether Orkin's conduct should be punished with a punitive damages award. The issues raised by Petitioners concerning the interpretation of the GPS policy accumulation period and/or appropriateness of penalty point assessments was a jury issue, as the jury had the actual policies submitted to them as evidence to weigh and consider for itself. Petitioners have made no convincing argument at all that the verdict was against the clear weight of the evidence. To the contrary, Petitioners have spent multiple pages in its brief simply disagreeing with the jury's interpretation of the evidence. In considering the applicable standard of review, this Court has stated:

In determining whether there is sufficient evidence to support a jury verdict the court

should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Syllabus Point 5 of Orr v. Crowder, 315 S.E.2d 593 (W.Va. 1983), *cert. denied*, 469 U.S. 981, 105 S. Ct. 384, (1984). Courts have historically favored supporting jury verdicts and will affirm a verdict, short of compelling reasons to set a verdict aside. "An appellate court will not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of evidence." *Id.*

Overall, the totality of evidence submitted was that Orkin had two policies to prevent unsafe drivers from being on the road, *i.e.* the Driver Certification Policy and the GPS policy. Denny had multiple violations under both policies while working for Orkin. Orkin failed to enforce its policies and failed to protect the public from the safety hazards posed by its corporation everyday when it exposed the public to thousands of Orkin drivers and trucks on the road. Clearly, the punitive factors are well supported by the evidence.

The last argument asserted by Petitioners in this assignment of error is the quotation taken from Plaintiff's counsel in closing arguments. The argument essentially told that the jury that by imposing a punitive damages award, 'It's got to be big enough that this company representative goes back to Atlanta or goes out in the hallway and makes a phone call and says 'we need to get so and so let's have a board meeting. We've got to make some changes guys.' (ORK1137-ORK1138). This statement by counsel in closing argument is not evidence. This Court has considered statements of counsel in support of new trials on numerous occasions and has consistently refused to set aside a verdict or grant a new trial based upon the statement of counsel. In *Skibo v. Shamrock Co.*, 504 S.E.2d 188 (W.Va. 1998) the lawyer made a statement

in closing nearly identical to the one made by Mr. Warner in closing:

"If you're going to make him [Mr. Mascaro] pay the price for what he did and send - send a message - to this community, you have to give a verdict big enough ..." *Id.* at 191. The Court declined to award a new trial on those statements and held:

"This court will not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper remarks, and duly excepted to such refusal.' *McCullough v. Clark*, 88 W. Va. 22, 106 S.E. 61, pt. 6, syl." *Syl. Pt. 1, Black v. Peerless Elite Laundry Co.*, 113 W. Va. 828, 169 S.E. 447 (1933).

Syl. Pt. 4. The compensatory award was not tainted by the punitive evidence or statements from counsel, but was properly supported by the evidence.

6. THE JURY'S AWARD FOR COMPENSATORY DAMAGES IS SUPPORTED BY THE EVIDENCE.

Petitioners contend generally that the award of compensatory damages was not supported by the evidence. All of the compensatory awards made by the jury were unquestionably supported by the testimony of witnesses presented by Respondent. Dr. Carraway testified that Mrs. Mosier's injuries were permanent; that she would need future medical care to a reasonable degree of medical certainty; and that future costs of such procedures would be \$60,000 per battery replacement procedure for the implanted spinal cord stimulator recommended to occur every seven (7) years. (ORK0435). The jury's verdict was well supported by the medical testimony offered, as future medical expenses must be proven to a "... degree of reasonable certainty which will indicate costs within an approximate range as well as the necessity and reasonableness of such prospective medical charges." *See Jordan v. Bero*, 210 S.E.2d 618 637 (W.Va. 1974).

The jury awarded Plaintiff future medical bills in accordance with the combined testimony of Roger Griffith, CPA, who prepared an expert report on present day value costs of

the future medical care that Mosier would require for replacing batteries in her spinal cord stimulator and other future medical care costs. Mr. Griffith's opinions were based upon the medical testimony of Dr. Caraway, Mosier's treating physician and surgeon who actually performed the procedure. Petitioners disputed the actual costs as presented by Dr. Caraway and Roger Griffith, and hired a physician, Dr. Whiting, who testified that he had knowledge of the costs of the procedure over the past few years. The jury simply did not believe the testimony of Dr. Whiting that despite prevailing economic issues, and rising health care costs which are well publicized by the media every day, the cost of Mosier's procedure in the future will actually **drop** not **rise** over her lifetime. Based upon the fact that competing experts' opinions were submitted on this issue, the jury chose to believe Plaintiff's medical experts and accountant who testified about how he reached the inflation factor that he applied to the costs. Again, the Petitioners cross-examined Griffith on his procedures and opinions. Like the Court stated in *Reynolds*, an opinion cited by Petitioner:

This case turned on the credibility of the witnesses. . . . The jury chose to believe Dr. Gibson and the defendants' experts on this liability issue. **We find no reason to disturb the trial court's denial of Ms. Reynolds' motion for a new trial on the issue of sufficiency of the evidence.**

Id., 529 S.E.2d, 351-352. [emphasis added].

While Petitioners argue to this Court that Mr. Griffith misstated the medical testimony of Dr. Caraway concerning the recommendation of replacing the batteries to the spinal cord stimulator, Mr. Griffith was conservative in his future costs as he projected replacement needed based upon five (5) procedures until the age of 78, (ORK0835), while Dr. Caraway testified Mosier would need this procedure every seven (7) years for the **rest of her life**. (ORK0437). There is no validity to Petitioners' claim that Mr. Griffith calculated costs of \$30,000 for back brace or therapy was unsupported by medical evidence, since the Circuit Court sustained

objection to these figures and limited the expert witness to the costs associated only for spinal cord stimulator replacement. (ORK0836; ORK0839). Similarly, Dr. Carraway's testimony regarding the itemized costs of the battery replacement is inaccurate. While Dr. Carraway did not agree to the itemized projections as stated by Petitioners' counsel, Dr. Carraway simply testified that he had reviewed the actual medical bills for Mosier's surgery and they were \$60,000. Based upon the actual charge incurred, Dr. Carraway opined that he would assume each future procedure to be at least equal to that amount for future costs of care. (ORK0436; ORK0466). This figure was never discredited by Dr. Carraway's testimony and Mr. Griffith's economic opinions were based upon the medical testimony of Dr. Carraway regarding costs of the procedure.

Mr. Griffith explained to the jury that in his evaluation for future costs of the medical procedures, an inflation rate was added to the cost each year, and then he reduced the overall amount to present day value. That amount was \$426, 245; the amount that was actually awarded by the jury for future care. (ORK0842). Importantly, Petitioners presented no contrary evidence on the costs of future care, other than Dr. Whiting's opinions that the costs were inflated by Dr. Carraway.

Petitioners also argue that the jury's verdict awarding Mrs. Mosier noneconomic damages for her mental anguish and loss of enjoyment of life was not supported by the evidence. Both awards are proper since there is no mathematical formula for which a jury can measure those losses. The jury heard testimony that Mrs. Mosier continues to suffer back pain every day of her life, although the pain has been somewhat relieved by the spinal cord stimulator. She will be required to undergo repeated surgeries every five to seven years for battery replacements on the spinal cord stimulator. Rather than having the liable party accept responsibility for her

damages, Mrs. Mosier was forced to undertake litigation against the Petitioners for nearly two years of her life. "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." *Syl. Pt. 6, Skibo v. Shamrock*, 504 S.E.2d 188 (W.Va. 1998). The jury in this case awarded Mrs. Mosier a total award of \$250,000 for past and future mental anguish and loss of enjoyment of life. This amount is compensation for the rest of her life, and does not even come close to 'enormous and outrageous' compensation for the injuries Cindy Mosier sustained that left her with permanent limitations and pain requiring the surgical procedure of a microdiscectomy to remove the herniation in her lumbar spine and a spinal cord stimulator for pain control.

7. THE COURT PROPERLY INSTRUCTED THE JURY ON THE LAW IN WEST VIRGINIA TO AWARD ALL OF THE DAMAGES TO WHICH PLAINTIFF WAS ENTITLED UNDER JURY INSTRUCTION NO.3.

Petitioners assign as error the Circuit Court's discretion in giving a jury instruction on the inadmissibility of collateral source consideration which read in part that the jury was 'obligated to assess the total amount of damages' in Jury Instruction No. 3. The Petitioners' argument on this issue is without merit. The Circuit Court instructed the jury as to the proper law in West Virginia which is that **if you find the defendants' liable to Plaintiff, you may proceed to award damages.** (See ORK1103; ORK1104). Jury Instruction No. 3 was an instruction designed for preventing the jury from decreasing Mrs. Mosier's damages based upon collateral sources once they had arrived at the duty to award damages. The instruction was read in its entirety by the Circuit Court. Thus, the jury was ever instructed in isolation that it was 'obligated to assess any damages against the defendant.' The language quoted in Jury Instruction No: 3, (ORK0134) reflects multiple cases in West Virginia holding that the jury is not

permitted to speculate about payment rendered by any other source for any of Plaintiff's damages. See *Ratlief v. Yocum*, 280 S.E.2d 584, 590 (W.Va. 1981); *Ilosky v. Michelin Tire Corporation*, 307 S.E.2d 603 (W.Va. 1983).; *Jones v. Appalachian Electric Power Company*, 115 S.E.2d 129 (W.Va. 1960). There was nothing improper or confusing about the instruction. There was no directive that the jury was **obligated** to award Plaintiff damages unless liability and causation had been established. The jury heard instructions given by the Court for nearly an hour and when viewed in totality, it is clear this instruction pertains only to prevent inadmissible collateral source payments from creeping into the jury's verdict.

8. MR. GRIFFITH'S TESTIMONY AND OPINIONS WERE PROPERLY SUBMITTED TO THE JURY AS THERE WAS NO UNFAIR SURPRISE REQUIRING EXCLUSION, AND PETITIONER'S OBJECTIONS TO THE EVIDENCE WERE DENIED BY THE CIRCUIT COURT BECAUSE THEY WERE NOT RAISED PRIOR TO TRIAL.

Petitioners were timely provided with all of Mr. Griffith's expert opinions prior to trial, including his report on medical costs and Orkin's net worth. Petitioners did not object to the timeliness of any report provided by Griffith until the Mr. Griffith was called to the stand to testify regarding his opinions on future medical costs and corporate worth of Orkin LLC. (ORK0835)(ORK0844). Prior to trial, Petitioners did not request to take Mr. Griffith's deposition during the nearly two years the case was pending and further, never asked the Court for a short trial continuance to obtain its own expert opinions on either the future cost opinions or the corporate valuation. Defendant's failure to object waives any argument submitted regarding the untimeliness calling for the exclusion of evidence. In *Maples v. WV DOC*, 475 S.E.2d 410 (W.Va. 1996), the Court addressed the necessary requirement that counsel render an object over the admission of evidence and state the basis for the same or else it is waived on review:

In the instant case, there has been no allegation that appellants were denied the opportunity to object. Therefore, in order to preserve this alleged error, it must be apparent from the record that counsel made known to the court his ground for objecting

and the action he desired the court to take. The record is void of such evidence. When he complained of testimony was first offered, counsel was silent. The following day, counsel made no objection or motion to strike, yet put on rebuttal evidence. Finally, on the third day, counsel objected to the admission of the reports only, which were excluded. Counsel subsequently acquiesced to the admission of the testimony regarding the reports. "A litigant may not silently acquiesce to [an alleged] error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." *In Interest of S.C.*, 168 W. Va. 366, 374, 284 S.E.2d 867, 872 (1981).

Id. at 415. The *Maples* opinion is directly on point in this case. Like the situation presented in *Maples*, defense counsel had ample time prior to trial to object to the evidence offered by Roger Griffith. However, Petitioners proceeded to question Griffith on the opinions and even put on rebuttal evidence by virtue of his cross examination, including opinions elicited from their own medical expert Dr. Whiting that the future costs were inflated and too high. There was no unfair surprise at all since again, counsel had the information before trial –not during the trial which was the situation presented in *Stewart v. Peffer*, 985 F.2d. 553 (4th Cir. 1993), the case cited by Petitioners. In *Stewart*, the Court found that the late disclosure of expert opinions was a ‘knowing concealment’ by plaintiff’s counsel and constituted unfair surprise since the defendant’s expert could not testify live at trial to contradict the opinions, but had provided a deposition previously for use at trial. *Id.* at 10. Since the opposing party’s medical expert was unable to testify as to the newly disclosed opinions, the Court held the evidence should have been excluded. *Id.*

In this case, Respondent timely disclosed all expert opinions prior to trial. More importantly, Petitioners hired their own medical expert Dr. Whiting who testified specifically that he disagreed with Plaintiff’s report on future care costs prepared by Roger Griffith. It cannot be said that Petitioners were prejudiced in any way by the timing of disclosures for the future care costs. Similarly, Petitioners were advised in advance of trial that Mr. Griffith intended to provide testimony on the corporate worth of Orkin LLC. At that time, if Petitioners

thought they could not adequately prepare for a cross examination, they should have objected to its admission, deposed the expert, or moved to exclude it. Instead, Petitioners were so adamant in denying the causation for Plaintiff's damages that no timely and well supported objection was raised to its submission on damages. This cannot form the basis of reversing a verdict supported by the weight of the evidence.

9. PETITIONERS ARE NOT ENTITLED TO A REMITTITUR OF PLAINTIFF'S COMPENSATORY DAMAGES AWARD SINCE THE VERDICT IS SUPPORTED BY THE IRREFUTABLE PRESENTATION OF EVIDENCE BY PLAINTIFF ON THE NEED FOR FUTURE MEDICAL CARE AND THE JURY DID NOT CREDIT THE DEFENDANT'S MEDICAL EXPERT ON THIS ISSUE.

Petitioners seek a remittitur of the compensatory award, claiming that the damages are either excessive or not supported by the evidence. The jury has the discretion to determine the amount of noneconomic damages that can adequately compensate a Plaintiff for the loss of her good health. "Compensatory damages consist of intangible damages since they are "unliquidated" in the sense that there is no precise monetary calculation that can be used to determine the amount of the loss. The most obvious of these is pain and suffering. Another element of unliquidated damages arises from the plaintiff's permanent injuries. ..." *Jordan v. Bero*, 297 S.E.2d 433, 435 (W.Va. 1982). As such, the jury's verdict on noneconomic damages was proper. At trial, Mrs. Mosier testified that she managed to ride her motorcycle after the collision, but that isolated activity does not negate all of the other testimony she provided concerning her pain and suffering and loss of enjoyment of life. (ORK0579-ORK0583). In fact, she testified that at the time of 770 mile motorcycle trip taken after the accident, she was apprehensive and not sure she wanted to go. She told the jury: "Physically, probably wasn't up to the trip as much as I thought but I was going to try it. I was going." (ORK0569).

The jury also properly weighed the evidence presented on the economic damages

including past and future medical care costs. The jury heard testimony from Mrs. Mosier's four treating physicians on the causation, extent, permanency and future care requirements Mosier would need from her injuries. Dr. Carraway, Dr. Collias, Dr. Walker, and Dr. Rubin all testified at trial, as they had collectively seen and treated Plaintiff on repeated occasions since the collision in 2008 occurred. The jury heard testimony from Petitioners' hired expert Dr. Whiting who had actually never seen, evaluated or treated Plaintiff Mosier. The jury believed the testimony of Plaintiff's experts on these issues and the Defendant's proposed remittitur of Plaintiff's award of future medical costs to the amount of \$98,000 is completely unfounded.

CONCLUSION

Petitioners have failed to demonstrate that any of the assignments are error support awarding a new trial or granting the Defendant a remittitur of damages. The jury verdict was properly supported by the evidence at trial. The Trial Court's rulings on the admissibility of evidence, application of the law, and the giving of jury instructions were proper in this case. Accordingly, Respondent herein and Plaintiff below, Cindy Mosier, respectfully requests this Court enter an Order denying the Petition for Appeal of James Denny and Orkin LLC, an Order denying a remittitur of damages, and granting such other and further relief as this Court deems appropriate under the circumstances.

CINDY MOSIER
By Counsel



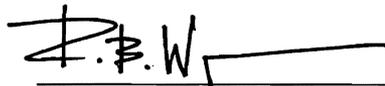
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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Cindy Mosier, does hereby certify that on this 6th day of February, 2012, a true copy of the foregoing “**RESPONSE TO RESPONSE TO JAMES DENNY AND ORKIN LLC’S PETITION FOR APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WV**” has been served upon the opposing counsel via hand delivery as follows:

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