

---

No. 35703

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COMMUNITY ANTENNA SERVICE, INC, Plaintiff Below/Appellee,

v.

CHARTER COMMUNICATIONS VI, LLC, Defendant Below/Appellant.

---

**APPELLANT'S BRIEF**

---

Honorable Judge J.D. Beane  
Circuit Court of Wood County, West Virginia  
Civil Action No. 00-C-505

---

Bryant J. Spann (WV Bar No. 8628)  
Allen Guthrie & Thomas, PLLC  
500 Lee Street, Suite 800  
Charleston, WV 25301  
304-345-7250

Robert G. Scott, Jr. (*pro hac vice*)  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, NW  
Suite 800  
Washington, DC 20006  
(202) 973-4200

*Counsel for Charter Communications VI, LLC*

---

---

**TABLE OF CONTENTS**

INTRODUCTION..... 1

KIND OF PROCEEDING AND NATURE OF THE RULINGS ..... 3

STATEMENT OF FACTS..... 7

ASSIGNMENTS OF ERROR ..... 12

ARGUMENT ..... 13

I. STANDARD OF REVIEW ..... 13

II. THE COURT BELOW ERRED BY CREATING A PRIVATE RIGHT OF ACTION FOR DAMAGES TO CHALLENGE CABLE TELEVISION PRICING, CONTRARY TO STATE AND FEDERAL LAW. .... 14

    A. Federal and State Statutes Prohibiting Unduly Discriminatory Cable Rates Do Not Provide a Private Cause of Action for Damages. .... 15

        1. Following Congressional Intent, West Virginia’s Legislature Authorized Only the PSC to Decide When Cable Rates Are Unduly Discriminatory. .... 15

        2. The Federal Communications Act Does Not Allow an Implied Private Right of Action for a Cable Company to Challenge in Court a Competing Company’s Pricing Practices..... 17

        3. CAS Cannot Evade The Legislature’s Refusal to Provide a Private Right of Action By Simply Recasting the Same Alleged Statutory Violation as a Tort. .... 19

    B. The Circuit Court Erred in Deciding that West Virginia Code Provisions Such as Sections 24D-1-22 and 24-4-7 Authorize a Civil Suit for Damages Despite the Legislature’s Directive that the PSC Shall Regulate Cable Television Rates. .... 20

        1. § 24D-1-22 Does Not Authorize a Private Right of Action. .... 21

        2. Chapter 24D Authorizes Private Parties to Seek Only Equitable Remedies, and Only in Circumstances Not Presented By CAS’ Claims. .... 23

        3. The Circuit Court’s Ruling Improperly Subjects a Cable Operator to Regulation as a Public Utility..... 25

        4. The Circuit’s Court’s Interpretation of § 24-4-7 Conflicts With Precedent of This Court..... 27

III.	EVEN IF A RIGHT OF ACTION EXISTED UNDER § 24D-1-13, THE CIRCUIT COURT MISCONSTRUED THE RATIONAL BASIS TEST AS ADOPTED BY THIS COURT AND FAILED TO REQUIRE A SHOWING OF PROXIMATE CAUSE. ....	28
	A. There Was an Obvious Rational Basis for Charter’s Pricing Plans. ....	29
	B. CAS Failed to Prove that Charter’s Conduct Was the Proximate Cause of Any Harm. ....	34
IV.	THE TORTIOUS INTERFERENCE AND PUNITIVE DAMAGE AWARDS SHOULD BE VACATED. ....	38
	A. Charter is Entitled to Relief from the Damages Awarded for Tortious Interference.....	38
	B. No Conduct on Charter’s Part Supports an Award of Punitive Damages.....	40
	1. The Circuit Court Erred By Allowing Punitive Damages in an Uncertain Legal Landscape.....	40
	2. The Circuit Court Did Not Properly Carry Out Its Duty to Meaningfully and Adequately Review the Punitive Damages Award. ....	42
	CONCLUSION AND RELIEF SOUGHT.....	46

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>FEDERAL CASES</b>	
<i>A.A. Poultry Farms v. Rose Acre Farms</i> , 881 F.2d 1396 (7th Cir. 1989).....	44
<i>Adams v. New York State Educ. Dep't</i> , 2010 WL 3306910 (S.D.N.Y. Aug. 23, 2010) .....	29, 31
<i>Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV L.P.</i> , 941 F. Supp. 1189 (S.D. Fla. 1996).....	17, 18
<i>Broder v. Cablevision Sys. Corp.</i> , 329 F. Supp. 2d 551 (S.D.N.Y. 2004), <i>aff'd</i> , 418 F.3d 187 (2d Cir. 2005) .....	18, 19
<i>City of Dallas v. Stanglin</i> , 490 U.S. 19 (1989) .....	29
<i>In re Comcast Corp.</i> , No. Civ. A. 93-6628, 1994 WL 622105 (E.D. Pa. Nov. 10, 1994), <i>aff'd</i> , 77 F.3d 462 (3d Cir. 1996).....	18
<i>Cort v. Ash</i> , 422 U.S. 66 (1975) .....	17
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994) .....	29
<i>DP-Tek, Inc. v. AT&amp;T Global Info. Servs. Co.</i> , 100 F.3d 828 (10th Cir. 1996).....	20
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993) .....	32
<i>Evans v. Kentucky High Sch. Athletic Ass'n</i> , 2010 WL 1643758 (W.D. Ky. Apr. 10, 2010) .....	29
<i>Executive Air Taxi Corp. v. City of Bismarck</i> , 518 F.3d 562 (8th Cir. 2008).....	33
<i>FCC v. Beach Commc'ns, Inc.</i> , 508 U.S. 307 (1993) .....	30, 31
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991) .....	30

<i>Grochowski v. Phoenix Constr.</i> , 318 F.3d 80 (2d Cir. 2003).....	19
<i>Heidbreder, Inc. v. City of Crown Point</i> , 2010 WL 3168411 (N.D. Ind. Aug. 10, 2010).....	33
<i>Highway Materials, Inc. v. Whitemarsh Twp.</i> , 2010 WL 2680996 (3d Cir. July 7, 2010).....	31
<i>Kentucky ex rel. Gorman v. Comcast Cable of Paducah, Inc.</i> , 881 F. Supp. 285 (W.D. Ky. 1995).....	18
<i>Kotch v. Board of River Port Pilot Comm'rs</i> , 330 U.S. 552 (1947).....	32
<i>Lindsley v. Natural Carbonic Gas Co.</i> , 220 U.S. 61 (1911).....	30, 31
<i>Mallenbaum v. Adelpia Commc'ns Corp.</i> , No. 93-7027, 1994 WL 724981 (E.D. Pa. Dec. 29, 1994), <i>aff'd</i> , 74 F.3d 465 (3d Cir. 1996).....	18
<i>Merrifield v. Lockyer</i> , No. C 04-0498, 2005 WL 1662135 (N.D. Cal. July 15, 2005).....	30
<i>Morris v. State Bar of Cal.</i> , 2010 WL 2353528 (E.D. Cal. June 9, 2010).....	29
<i>National Data Payment Sys. v. Meridian Bank</i> , 212 F.3d 849 (3d Cir. 2000).....	20
<i>Parker v. Conway</i> , 581 F.3d 198 (2d Cir. 2009).....	30
<i>Pennsylvania v. Comcast Corp.</i> , No. 94-CV-4142, 1994 WL 568479 (E.D. Pa. Oct. 11, 1994).....	18
<i>R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!</i> , 462 F.3d 690 (7th Cir. 2006).....	45
<i>Schism v. United States</i> , 972 F. Supp. 1398 (N.D. Fla. 1997).....	30
<i>Stand Energy Corp. v. Columbia Gas Trans. Corp.</i> , 373 F. Supp. 2d 631 (S.D. W. Va. 2005).....	44

**STATE CASES**

*Adams v. Sparacio*,  
196 S.E.2d 647 (W. Va. 1973)..... 35

*Appalachian Power Co. v. State Tax Dep't*,  
466 S.E.2d 424 (W. Va. 1995)..... 17

*Arbaugh v. Board of Educ.*,  
591 S.E.2d 235 (W. Va. 2003)..... 24

*Bower v. Hi-Lad, Inc.*,  
609 S.E.2d 895 (W. Va. 2004)..... 38, 40

*C. W. Dev., Inc. v. Structures, Inc.*,  
408 S.E.2d 41 (W. Va. 1991)..... 20, 34

*Charter Commc'ns VI, LLC v. Community Antenna Serv., Inc.*,  
561 S.E.2d 793 (W. Va. 2002)..... 3

*Chrystal R.M. v. Charlie A.L.*,  
459 S.E.2d 415 (W. Va. 1995)..... 13

*City of Wheeling v. PSC*,  
483 S.E. 2d 835 (W. Va. 1997)..... 17

*Community Antenna Serv., Inc. v. Public Serv. Comm'n*,  
633 S.E.2d 779 (W. Va. 2006)..... *passim*

*Edwards v. Hobson*,  
54 S.E.2d 857 (Va. 1949)..... 35

*Elk Hotel Co. v. United Fuel Gas Co.*,  
83 S.E. 922 (W. Va. 1914)..... 30

*England v. Central Pocahontas Coal Co.*,  
104 S.E. 46 (W. Va. 1920)..... 24

*First Am. Title Ins. Co. v. Firriolo*,  
695 S.E.2d 918 (W. Va. 2010)..... 13

*Fredeking v. Tyler*,  
680 S.E.2d 16 (W. Va. 2009)..... 14

*Garnes v. Fleming Landfill, Inc.*,  
413 S.E.2d 897 (W. Va. 1991)..... *passim*

<i>Harless v. First Nat'l Bank</i> , 289 S.E.2d 692 (W. Va. 1982).....	39
<i>Jopling v. Bluefield Water Works &amp; Improvement Co.</i> , 74 S.E. 943 (W. Va. 1912).....	41
<i>Kessel v. Leavitt</i> , 511 S.E.2d 720 (W. Va. 1998).....	39
<i>Kings Daughters Housing, Inc. v. Paige</i> , 506 S.E.2d 329 (W. Va. 1998).....	22
<i>Las Lomas Land Co. v. City of Los Angeles</i> , 99 Cal. Rptr. 3d 503 (Cal. Ct. App. 2009) .....	29, 30
<i>Marcus v. Holley</i> , 618 S.E.2d 517 (W. Va. 2005).....	29, 31
<i>Mott v. Kirby</i> , 696 S.E.2d 304 (W. Va. 2010).....	13
<i>Mullins v. Barker</i> , 107 S.E.2d 57 (W. Va. 1959).....	37
<i>Oates v. Continental Ins. Co.</i> , 72 S.E.2d 886 (W. Va. 1952).....	35
<i>Perrine v. E.I. du Pont de Nemours &amp; Co.</i> , 694 S.E.2d 815 (W. Va. 2010), <i>reh'g denied</i> , 2010 WL 2243936 (W. Va. June 2, 1010) .....	44
<i>Peters v. Rivers Edge Mining, Inc.</i> , 680 S.E.2d 791 (W. Va. 2009).....	14, 41, 43
<i>Pipemasters, Inc. v. Putnam County Comm'n</i> , 625 S.E.2d 274 (W. Va. 2005).....	14
<i>Shepherdstown Observer, Inc. v. Maghan</i> , 2010 W. Va. LEXIS 98 (W. Va. Sept. 23, 2010).....	22
<i>Skaggs v. Elk Run Coal Co.</i> , 479 S.E.2d 561 (W. Va. 1996).....	14
<i>Spencer v. McClure</i> , 618 S.E.2d 451 (W. Va. 2005).....	35, 37

<i>Spencer v. Steinbrecher</i> , 164 S.E.2d 710 (W. Va. 1968), <i>overruled on other grounds</i> , <i>Wells v. Smith</i> , 297 S.E.2d 872 (W. Va. 1982) .....	39
<i>State ex rel. Chesapeake &amp; Potomac Tel. Co. v. Ashworth</i> , 438 S.E.2d 890 (W. Va. 1993) .....	27
<i>State ex rel. Pros. Att’y v. Bayer Corp.</i> , 672 S.E.2d 282 (W. Va. 2008) .....	21
<i>Tolley v. ACF Indus., Inc.</i> , 575 S.E.2d 158 (W. Va. 2002) .....	35, 37
<i>Torbett v. Wheeling Dollar Savings &amp; Trust Co.</i> , 314 S.E.2d 166 (W. Va. 1983) .....	20, 34
<i>West Va. Transp. Co. v. Standard Oil Co.</i> , 40 S.E. 591 (W. Va. 1901) .....	34
<i>Wickline v. Monongahela Power Co.</i> , 81 S.E.2d 326 (W. Va. 1954) .....	37

**ADMINISTRATIVE CASES**

<i>Amendment of Part 74, Subpart K of the Commission’s Rules and Regulations Relative to the Community Antenna Television Systems, Memorandum Opinion and Order on Reconsideration</i> , 36 F.C.C.2d 326, 1972 FCC LEXIS 1550 (1972) .....	26
<i>Community Antenna Serv., Inc. v. Charter Commc’ns, VI, LLC</i> , No. 01-0646-CTV-C, 2001 W. Va. PUC Lexis 4416 (Nov. 2, 2001) .....	4
<i>Community Antenna Serv., Inc v. Charter Commc’ns, VI, LLC</i> , No. 01-0646-CTV-C, 2004 W. Va. PUC LEXIS 581 (Feb. 10, 2004), <i>on recon.</i> , No. 01-0646-CTV-C, 2004 W. Va. PUC LEXIS 1438 (Mar. 23, 2004) .....	4, 41
<i>Community Antenna Serv., Inc. v. Charter Commc’ns, VJ, LLC, Commission Order</i> , No. 01-0646-CTV-C, 2007 WL 1173768 (W. Va. PSC Feb. 14, 2007) .....	5, 41

**FEDERAL STATUTES**

47 U.S.C. § 541(c) .....	26
47 U.S.C. § 543 .....	<i>passim</i>
47 U.S.C. § 556(c) .....	15

**STATE STATUTES**

W. Va. Code § 24-1-2 ..... 25

W. Va. Code § 24-1-7 ..... 22

W. Va. Code § 24-1-9 ..... 22

W. Va. Code § 24-2-3 ..... 26

W. Va. Code § 24-2-7 ..... 26

W. Va. Code § 24-2-10 ..... 22

W. Va. Code § 24-4-1 ..... 26

W. Va. Code § 24-4-2 ..... 26

W. Va. Code § 24-4-3 ..... 26

W. Va. Code § 24-4-4 ..... 26

W. Va. Code § 24-4-5 ..... 26

W. Va. Code § 24-4-6 ..... 26

W. Va. Code § 24-4-7 ..... *passim*

W. Va. Code § 24-4-8 ..... 26

W. Va. Code § 24-5-1 ..... 22

W. Va. Code § 24D-1-1 ..... 16

W. Va. Code § 24D-1-2 ..... 25

W. Va. Code § 24D-1-13 ..... *passim*

W. Va. Code § 24D-1-22 ..... *passim*

W. Va. Code § 24D-1-23 ..... 23, 24, 25

W. Va. Code § 24D-1-26 ..... 25

W. Va. Code § 24D-2-3 ..... 24

W. Va. Code § 24D-2-9 ..... 24

W. Va. Code § 24D-2-10 ..... 3

W. Va. Code § 46A-6-106 .....	24
W. Va. Code § 55-7-9 .....	20, 24
<b>ADMINISTRATIVE RULES</b>	
47 C.F.R. § 76.910(b)(3).....	19
<b>LEGISLATIVE MATERIALS</b>	
<i>Cable Franchise Policy Act and Communications Act of 1984</i>	
H.R. Rep. No. 98-934 (1984), reprinted at 1984 U.S.C.C.A.N. 4655.....	15, 26
<b>OTHER AUTHORITIES</b>	
IIIA Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> ¶ 738a (3d ed. 2008).....	44
IIIB Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> ¶ 805b (3d ed. 2008).....	44
<i>Restatement (Second) of Torts</i> § 768 (1979).....	20

**STATUTORY APPENDIX**

**WEST VIRGINIA CODE**

Chapter 24. Public Service Commission (selected provisions).....	A-1
Chapter 24D. Cable Television (selected provisions).....	A-1 – A-2

## INTRODUCTION

This Court should reverse the Circuit Court of Wood County primarily because it allowed plaintiff to pursue a non-existent private cause of action – created from whole cloth in this case – that usurps the jurisdiction of West Virginia’s Public Service Commission (“PSC”), and for other significant errors built upon this dramatic departure from the Legislature's intent.

First, Appellant/Defendant Charter Communications VI, LLC (“Charter”) is entitled to relief from the judgment below because the laws of West Virginia and the United States preclude a private civil action challenging a cable operator’s competitive pricing practices, when those same practices are regulated exclusively by, and are actually being adjudicated before, the PSC. The relevant West Virginia statute requires the PSC (not courts) to regulate cable rates to ensure they are not “unduly discriminatory.” W. Va. Code § 24D-1-13. But the Circuit Court wrongly allowed Appellee/Plaintiff Community Antenna Service, Inc. (“CAS”) to pursue a civil action seeking damages for alleged violations of that statute despite the PSC's ongoing consideration of the same claims. It also allowed CAS to improperly pursue a claim of tortious interference with contracts and business expectancies that effectively duplicated the “undue discrimination” count in its Complaint; this further subverted the Legislature’s carefully crafted regulatory scheme.

In authorizing CAS' action, the Circuit Court relied chiefly on West Virginia Code § 24D-1-22, which does not mention court actions. Instead, that provision explicitly authorizes private parties to file “a formal request” for relief with the PSC, directs the PSC to “resolve all complaints,” and allows the PSC to levy fines or penalties in appropriate cases. By permitting CAS to pursue a civil action for damages, the Circuit Court rendered much of this statute meaningless, contradicted the Legislature's desire for the PSC to resolve allegations of unduly discriminatory cable rates, and evaded the statute's allowance of only fines, penalties, and non-monetary relief in such cases. Compounding these errors, the Circuit Court disregarded careful

and extensive distinctions the Legislature drew between W. Va. Code Chapter 24D, which governs cable operators, and W. Va. Code Chapter 24, which governs public utilities. The Circuit Court also disregarded the plain text of W. Va. Code § 24-4-7, which allows private parties to sue public utilities – but not cable operators – for damages only in limited circumstances that are not present here.

Second, even if § 24D-1-13 did authorize CAS' private right of action, the Circuit Court misapplied the standard for determining whether cable rates actually are “unduly discriminatory,” a standard that this Court established in prior, PSC-based litigation between these same parties. This Court has ordered the PSC to review such pricing under a rational basis test “analogous to that imposed by the Equal Protection Clause of the ... United States Constitution [and] Due Process Clause of ... the West Virginia Constitution.” *Community Antenna Serv., Inc. v. Public Serv. Comm'n*, 633 S.E.2d 779, 794-95 (W. Va. 2006) (“*CAS v. PSC*”). The Circuit Court improperly allocated the burden of proof on this issue, refused to treat the matter as a question of law, and announced – only post-trial – that Charter was required to show something more than is found in any precedent construing the well-known rational basis standard. The Circuit Court also allowed recovery without any proof of causation.

Third, even if a private right of action existed, the Circuit Court still wrongly awarded punitive damages against Charter for engaging in pricing practices that the PSC previously had reviewed and refused to punish with fines, and because other aspects of the court's damage award were improper as well. Ultimately, because the judgment below threatens the PSC's jurisdiction, otherwise conflicts with this Court's established precedent, and improperly awarded CAS punitive and other damages against Charter, this Court should set that judgment aside and order entry of judgment for Charter.

## KIND OF PROCEEDING AND NATURE OF THE RULINGS

The ten-year litigation history between these parties requires some detailed explication.

Commencement of the Dispute. Litigation began in October of 2000, when Charter filed a complaint against CAS in Wood County Circuit Court alleging that agreements making CAS the exclusive provider of cable services for certain apartment buildings violated W. Va. Code § 24D-2-10. CAS counterclaimed, alleging Charter's price competition constituted rate discrimination under federal and state laws that govern cable rates, invoking 47 U.S.C. § 543 and W. Va. Code § 24D-1-13, respectively.<sup>1</sup> CAS also alleged that Charter's prices tortiously interfered with CAS' customer contracts and business expectancies. In this Court's first consideration of the dispute, it declared on appeal of a certified question that state law does not allow the kinds of exclusive contracts CAS had. *Charter Commc'ns VI, LLC v. Community Antenna Serv., Inc.*, 561 S.E.2d 793 (W. Va. 2002). After that decision, this Court remanded to the Circuit Court to consider the remaining allegations in the case, including CAS' counterclaims at issue here.<sup>2</sup>

CAS' PSC Complaint. In the meantime, while this Court considered the certified question, CAS invoked the PSC's jurisdiction over cable television rates by filing a formal complaint against Charter on May 11, 2001, despite the pendency of its counterclaims in Circuit Court. In its PSC complaint, CAS asked the PSC to find that five specific promotional offers Charter made before May 2001 were "unduly discriminatory" in violation of W. Va. Code § 24D-1-13(b)

---

<sup>1</sup> (Ans. & Counterclaim, filed Nov. 20, 2000).

<sup>2</sup> Charter later abandoned its claims against CAS, leaving only CAS' Counterclaims, which at the time alleged attempted monopolization and predatory pricing (Count I), unfair trade practices (Count II), rate discrimination (Count III), tortious interference (Count IV), trespass (Count V), and in Count VI sought equitable relief. The only claims that survived to trial, and thus are at issue here, are Counts III and IV. CAS abandoned all of its other claims. (See Stipulation Regarding Exclusion of Evidence, ¶ 2 (Sept. 28, 2007); Joint Pretrial Memorandum at 1 (Nov. 8, 2007).) As CAS was the only party pursuing claims at trial, the court re-designated CAS as Plaintiff and Charter as Defendant. (Order, entered Nov. 15, 2007.)

and (c).<sup>3</sup> Each subsection of § 24D-1-13 on which CAS relied states that “the *commission* shall regulate” cable television rates to ensure they are “not unduly discriminatory.” W. Va. Code § 24D-1-13 (emphasis added). The PSC found that it had “jurisdiction to determine whether a cable operator is charging discriminatory rates pursuant to W. Va. Code § 24D-1-13,” as well as “primary jurisdiction to hear complaints against cable operators when the[y] address issues over which the Legislature gave the Commission jurisdiction.” *Community Antenna Serv., Inc. v. Charter Commc 'ns, VI, LLC*, No. 01-0646-CTV-C, 2001 W. Va. PUC LEXIS 4416, at \*9, \*10, \*13, \*14 (Nov. 2, 2001). After an evidentiary hearing, on exceptions to the hearing examiner’s recommended decision, the PSC rejected both the examiner’s recommendation and CAS’ complaint, explaining:

8. The Commission concludes that Charter has reasonably defined customer categories that are the target of its reduced or promotional rates. The Commission concludes that offering reduced or promotional rates to customers in such categories is reasonable and not discriminatory.

9. The promotional offers in the Parkersburg/Wood County area have created an environment of more competition and has [sic] resulted in lower prices to consumers. It is not the Commission’s role to dictate market strategy in these competitive situations, particularly when the effect is benefitting the public.

*Community Antenna Serv., Inc v. Charter Commc 'ns, VI, LLC*, No. 01-0646-CTV-C, 2004 W. Va. PUC LEXIS 581, at \*36-37 (Feb. 10, 2004), *on recon.*, No. 01-06460CTV-C, 2004 W. Va. PUC LEXIS 1438 (Mar. 23, 2004). CAS appealed the PSC’s decision to this Court.

*This Court’s Review of the PSC Decision.* On review, this Court disagreed with the PSC decision regarding Charter’s pricing. In its own words, the case required the Court “to navigate a complex maze of interrelating applicable federal and state laws” governing cable television regulation and rates, for which “there is no direct judicial precedent from this or any other jurisdic-

---

<sup>3</sup> See *CAS v. PSC*, 633 S.E.2d at 784.

tions to ... turn for guidance ....” *CAS v. PSC*, 633 S.E.2d at 785, 786 n.14. The Court reversed and remanded on narrow issues of federal and state cable law.<sup>4</sup> More specifically and most relevant for present purposes, it found “a cable operator [may] avoid the rate discrimination prohibition” if it has “a rational basis for classifying or categorizing certain customers ... from other[s],” using a standard “analogous to that imposed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution [and] Due Process Clause of ... the West Virginia Constitution.” *Id.* at 784-85. The Court thus remanded to allow the PSC to determine whether a rational basis existed for Charter’s pricing under that standard.

Remand to the PSC. Charter sold its West Virginia cable systems before this Court filed its order in *CAS v. PSC*. On remand, the PSC found the “matter has become moot,” because “[a]fter 2002 neither Charter nor [its successor] offered any pricing plan similar to those at issue in this case,” and “Charter no longer provided any cable service in West Virginia.”<sup>5</sup> The PSC likewise rejected CAS’ request that it impose fines on Charter, concluding that “[t]his is a case of first impression, and Charter ceased the questioned pricing plans well before the issue was resolved.” *Id.* at \*10. The PSC ultimately ordered that Charter (and any successors) “not offer the pricing plans which are at issue in this proceeding.” *Id.* The case remains pending before the PSC as to certain of Charter’s post-2002 pricing practices, which the Circuit Court below acknowledged were not part of this case.<sup>6</sup>

---

<sup>4</sup> *Id.* at 792 (reversing and remanding on question of “uniform rate structure” provision of federal law), 795 (reversing and remanding on question of “unduly discriminatory” rates under West Virginia law).

<sup>5</sup> *Community Antenna Serv., Inc. v. Charter Commc’ns, VI, LLC, Commission Order*, No. 01-0646-CTV-C, 2007 WL 1173768, at \*8 (W. Va. PSC Feb. 14, 2007) (Findings of Fact ¶¶ 3-4); *id.* at \*10 (Conclusions of Law ¶¶ 1-4).

<sup>6</sup> (Order, entered Nov. 21, 2007, at 7-8.)

Circuit Court Proceedings. After this Court's 2006 remand of the PSC decision, proceedings in the Circuit Court for Wood County resumed in earnest. Charter was required to defend the exact same 2000-2003 pricing practices the PSC had reviewed. As noted, in Count III, CAS contended that Charter engaged in rate discrimination in violation of W. Va. Code § 24D-1-13, 47 U.S.C. § 543, and related PSC and Federal Communications Commission ("FCC") rules. Count IV contended that Charter's allegedly discriminatory rates were "intentional and willful and constitute[d] tortious interference with [CAS'] contractual relationships ... and its expectations of such relationships[.]"

Disposition Below. On August 24, 2007, Charter filed a Motion for Summary Judgment on CAS' two remaining claims. The Circuit Court denied Charter's motion by Order entered November 14, 2007, and CAS' Counts III and IV were tried before a jury from February 20 to February 29, 2008. The jury awarded CAS damages of \$1,150,954 on Count III (unduly discriminatory rates under W. Va. Code § 24D-1-13), \$1,446,350 on Count IV (tortious interference), and \$1,500,000 in punitive damages. The Circuit Court issued a Final Judgment Order on March 5, 2008, entering judgment on the verdict. Charter timely filed a post-judgment motion under Rules 50(b), 59, and 60 on May 29, 2008, which the Circuit Court denied in an opinion dated January 5, 2010.

Appellate Review. Charter timely filed a Petition for Review on March 29, 2010, and this Court granted review on October 13, 2010. This appeal presents errors the Circuit Court committed in six of its rulings: (1) the Order entered November 15, 2007 (denying Charter's Motion for Summary Judgment); (2) the Order entered February 11, 2008 (Section I, establishing elements of CAS' Count III claim of undue rate discrimination); (3) the Amended Order entered February 21, 2008 (amending Section I the Order entered February 11, 2008 as to elements of

Count III undue rate discrimination); (4) the February 8, 2008 Judge's Charge of Jury; (5) the Order entered March 8, 2008 (entering judgment on the jury verdict); and (6) the Order entered January 5, 2010 (denying Charter's combined post-trial motions).

### STATEMENT OF FACTS

*Beginnings of Cable Competition.* Charter operated a cable system serving the City of Parkersburg and parts of unincorporated Wood County from late 1999 to June 20, 2006 (the "Charter system").<sup>7</sup> Prior to 1999, CAS operated a cable system in Preston and Jackson Counties, and in unincorporated areas of Wood County where there were no other cable providers. (*Id.* ¶¶ 3, 4.) In 1999, CAS obtained a franchise agreement with the City of Parkersburg and extended its cable system into areas already served by the Charter system, thus bringing competition to the cable television market both in the City of Parkersburg and other unincorporated areas of Wood County. (*Id.* ¶ 7.) In fact, when Charter acquired its Parkersburg-area cable system, CAS already had constructed a second "overbuild" system in some areas already served by the Charter system.<sup>8</sup> As detailed below, Charter and CAS competed vigorously for customers with each offering various discounts and promotions in an effort to win customers from the other, including former customers who had switched providers.

*CAS' Competitive Sales Tactics.* In an effort to compete with Charter in this new territory, CAS employed various marketing and sales tactics designed to lure subscribers away from Charter. (Stip. ¶¶ 9-11.) One of CAS' tactics was to appeal to a more conservative segment of

---

<sup>7</sup> By June 2006, Charter sold all its West Virginia cable systems and departed the state. (Stipulations of Fact ("Stip.") ¶ 20.)

<sup>8</sup> (*See* Trial Tr. Vol. II, 182:16 – 184:3.)

the population by refusing to carry certain programming.<sup>9</sup> But CAS did not limit its marketing tactics to content differentiation. It also sought to attract Charter customers with discounts and special offers. For instance, certain CAS packages included free installation, which would typically be an extra cost to the subscriber.<sup>10</sup> Another CAS package targeted Charter customers specifically, and exclusively, with 30 days of free service for subscribers who left Charter for CAS.<sup>11</sup> In another offer, CAS gave select Charter customers over two months of free service when they switched to CAS.<sup>12</sup> In one case, CAS offered a 25% discount off of its regular rate for a group of customers in one apartment building, a discount of \$96 per customer per year.<sup>13</sup> Despite these ongoing offers, there is no evidence that CAS had any kind of retention offer for customers who stated their intention to drop CAS' service, even though CAS' own expert agreed that such retention offers are a common practice in the cable industry.<sup>14</sup>

CAS also undertook aggressive advertising to announce its competition with Charter and to establish itself in the Parkersburg cable TV market. It ran direct comparison ads contrasting its rates and services with Charter's.<sup>15</sup> It also ran advertisements identifying multiple reasons why customers should choose CAS over Charter,<sup>16</sup> and CAS published ads stressing its local

---

<sup>9</sup> CAS made clear it offered a family-friendly, if more limited, cable and Internet alternative. (Stip. ¶ 8; Trial Tr. Vol. I, 136:22-24; Trial Tr. Vol. II, 150:18 – 152:12.) For example, at all times relevant, CAS did not carry sexually explicit pay-per-view programming, it filtered its Internet service to block adult websites, (*id.*), and it refused to carry popular cable networks such as MTV and Comedy Central that offered more “risqué” programming. (*Id.*; Trial Tr. Vol. I, 75:23 – 76:1.)

<sup>10</sup> (Stip. ¶ 10; Trial Tr. Vol. II, 154:1-18, 155:22 – 156:10.)

<sup>11</sup> (Stip. ¶ 10; Trial Tr. Vol. II, 157:5 – 159:14; Tr. Ex. 145.)

<sup>12</sup> (Trial Tr. Vol. II, 169:20 – 170:13; Tr. Ex. 133.)

<sup>13</sup> (Trial Tr. Vol. II, 176:18 – 177:12.)

<sup>14</sup> (Trial Tr. Vol. II, 362:14 – 363:4.)

<sup>15</sup> (Stip. ¶ 11; Trial Tr. Vol. II, 153:20 – 155:21, 157:5 – 158:9; Tr. Exs. 120, 121, 143, 144, 145, 146.)

<sup>16</sup> (Tr. Exs. 144, 146.)

ownership, while vilifying Charter as a large national company.<sup>17</sup> CAS' advertising reflected its management's belief that customers would leave Charter for a variety of reasons that had nothing to do with price, such as its different programming, local customer service, and local ownership.

Charter's Competitive Marketing and Pricing Practices. Charter responded to CAS' tactics with its own marketing efforts. For example, Charter expanded its service into new parts of unincorporated Wood County previously served only by CAS, and developed new competitive pricing. (Stip. ¶ 13.) These plans mimicked and evolved out of offers Charter had used to compete with direct broadcast satellite ("DBS") providers and a competitive cable system in Virginia.<sup>18</sup> The new pricing plans were designed to (1) attract customers from CAS in areas Charter newly served, (2) regain customers CAS had taken from Charter upon moving into Parkersburg and new areas of unincorporated Wood County, and (3) retain customers who indicated an intent to leave Charter for CAS. (Stip. ¶ 13.) Specifically, from 2000 through 2002, Charter offered discounted pricing plans to current CAS customers and Charter customers who indicated a desire to leave Charter for CAS. (Stip. ¶¶ 14-17.) Even after trial, however, it was unclear which of the different Charter plans were the subject of CAS' complaint.<sup>19</sup> In 2003, Charter discontinued its pricing plans that offered discounts specifically to CAS subscribers and to Charter subscribers seeking to leave for CAS. (Stip. ¶ 18.)

Evidence of Rational Basis for Charter's Pricing. Certain of Charter's pricing plans offered from 2000 through 2002 are the core of CAS' lawsuit. At trial, the burden was on CAS to prove that each of the challenged plans was "unduly discriminatory," meaning Charter had no

---

<sup>17</sup> (Stip. ¶ 11; Trial Tr. Vol. II, 154:19 – 155:21, 200:22 – 203:24; Tr. Ex. 136, 137, 144, 146.)

<sup>18</sup> (Stip. ¶ 16; Trial Tr. Vol. I, 348:24 – 349:19.)

<sup>19</sup> (Trial Tr. Vol. II, 189:2 – 190:5) (CAS' CEO Mr. Cooper explaining that he was "not familiar with the multitude of offers that Charter made").

rational basis for offering the plans exclusively to CAS customers. Charter presented evidence showing its pricing practices were necessary to win and retain customers from other subscription video programming providers in a competitive environment (as opposed to attracting customers who had no existing subscription TV service), and were thus rationally based.

Most obviously, the marketing efforts and sales tactics of CAS described above demonstrate it was rational for these cable companies to try and win each other's customers through special pricing offers. Record evidence reflected Charter's experience that it is simply harder to motivate customers who already receive cable or DBS service to switch to another provider than it is to obtain customers who have no multichannel television service.<sup>20</sup> As shown through testimony, Charter's management and sales staff in Parkersburg observed that customers who already received service from another cable provider or a DBS provider required some sort of incentive to try a new service, while customers who previously had no multi-channel service provider were sufficiently enticed by the prospect of receiving any service at all.<sup>21</sup> Record evidence thus showed Charter had a legitimate, rational basis for targeting the pricing plans at issue to its competitors' customers.

*Evidence Defeating Jury Finding of Proximate Cause.* Even if it could be shown that a lack of rational basis existed, CAS still had to prove by a preponderance of the evidence that the specific pricing plan each particular customer took was the proximate cause of the customer leaving CAS for Charter, or reversing an intent to leave Charter for CAS. However, the only facts presented to the jury were that Charter offered discounts to CAS customers, or potential CAS customers, and that some CAS customers or potential CAS customers received those

---

<sup>20</sup> (Trial Tr. Vol. I, 359:4-19; Trial Tr. Vol. II, 569:24 – 570:18.)

<sup>21</sup> (*Id.*; Trial Tr. Vol. I, 358:24 – 359:19.)

discounts.<sup>22</sup> Indeed, the only evidence CAS offered to show that some customers received the prices at issue were Charter work orders and billing statements, none of which purport to identify any particular customer's reason for choosing Charter, and many of which contained no detail about the discounted price that that particular customer may (or may not) have received from Charter.<sup>23</sup> CAS offered no evidence, and there is none in the record, *why* any particular customer actually left CAS for Charter, or was dissuaded from leaving Charter for CAS, much less that any such customer acted *because of* any particular discount, and not for some other advantage offered by Charter's service or as a consequence of a problem with CAS' service.<sup>24</sup>

To the contrary, CAS' President and CEO Art Cooper agreed that customers left CAS for various reasons,<sup>25</sup> and further that "ultimately, obviously," no one knows why customers left CAS except for the customers themselves.<sup>26</sup> CAS did not present any evidence or testimony of any former or potential customers as to *why* they may have chosen Charter over CAS. Moreover, CAS' own expert witness, Dr. Ronald Rizzuto, testified there are a host of reasons why a customer would leave a cable provider, including different programming choices and dissatisfaction with service.<sup>27</sup> He conceded that there was "not enough data" to determine why these customers left.<sup>28</sup>

---

<sup>22</sup> (*See generally*, Trial Tr. Vol. I, 62 – 150 (Testimony of Lisa Wilkinson); Trial Tr. Vol. II, 131 – 244 (Testimony of Arthur Cooper).)

<sup>23</sup> (Trial Tr. Vol. I, 4:18 – 5:13, 5:17 – 6:16, 7:5-9, 8:2 – 12:14, 13:4-12, 18:23 – 19:2, 35:18 – 36:22, 37:14 – 38:24, 44:5-23, 85:14 – 87:13, 90:20 – 92:23, 98:18 – 99:2, 100:3-18, 106:9-23, 110:5-23, 132:22 – 134:9, 136:9-24, 139:21 – 141:1.)

<sup>24</sup> (*Id.*; Trial Tr. Vol. I, 110:9 – 111:7, 125:24 – 127:2, 127:23 – 129:4, 221:20 – 222:3; Trial Tr. Vol. II, 196:13 – 197:9, 198:4 – 199:5, 203:20-24, 204:12 – 205:1, 205:12 – 206:11, 335:8-20, 336:10-14.)

<sup>25</sup> (Trial Tr. Vol. II, 203:20 – 205:1.)

<sup>26</sup> (Trial Tr. Vol. II, 205:12 – 206:11.)

<sup>27</sup> (Trial Tr. Vol. II, 335:8 – 20, 336:10 – 14.)

<sup>28</sup> (Trial Tr. Vol. II, 335:14-20, 336:10 – 337:19.)

Evidence of CAS Success in Competition. Finally, in order to prevail, CAS also bore the burden of proving that Charter's practices harmed CAS. Again CAS failed to offer any evidence of harm it suffered during the period of competition with Charter. Instead, all the evidence in the record shows that CAS experienced a period of unprecedented success during its competition with Charter. CAS itself considered its customer growth "extremely successful," as it represented to its lender.<sup>29</sup> Specifically, CAS' subscriber base grew from 2,078 to 3,065 between 2000 and 2006<sup>30</sup>, and, between 1998 and 2006, its cash flow nearly tripled – from \$546,323 to \$1,519,000.<sup>31</sup>

CAS' appraised value also increased substantially during the period when it complains Charter was causing it financial harm, growing from \$5.9 million in 1999, to \$8.4 million in 2005, then to \$11.4 million in 2007.<sup>32</sup> All the evidence in the record shows that CAS prospered during its competition with Charter and that the companies engaged in spirited competition, using similar or identical tactics. Nevertheless, as set forth above, the jury awarded CAS damages of \$1,150,954 for Charter's supposedly unduly discriminatory rates, \$1,446,350 for Charter's asserted tortious interference with CAS' customer relationships, and \$1,500,000 in punitive damages, all of which the Circuit Court sustained.

#### ASSIGNMENTS OF ERROR

The Circuit Court committed reversible error by:

- I. Recognizing a private right of action under W. Va. Code § 24D-1-13.

---

<sup>29</sup> (Trial Tr. Vol. II, 215:7 – 216:10.)

<sup>30</sup> (Tr. Ex. 83A.)

<sup>31</sup> (Trial Tr. Vol. II, 223:14 – 227:24; Tr. Exs. 51-58.)

<sup>32</sup> *Compare* (Trial Tr. Vol. II, 220:17 – 221:3; Tr. Ex. 73), *with* (Trial Tr. Vol. II, 220:17 – 221:3; Tr. Ex. 74), *and* (Trial Tr. Vol. II, 552:12 – 553:3; Tr. Ex. 75.)

- II. Misapplying the rational basis test established by this Court for the PSC to determine whether Charter’s discount pricing plans were “unduly discriminatory” and allowing CAS to recover despite not proving that Charter actually caused its injury.
- III. Refusing to vacate the jury’s award of compensatory damages for tortious interference and its punitive damages award.

## ARGUMENT

The Circuit Court’s entry of the judgment against Charter should be vacated. Not only do federal and state law bar a competitor from bringing a civil action seeking damages for a cable operator’s competitive pricing practices that have been reviewed and ruled upon by the PSC, the relevant law of this State directs that that body – not private litigants or juries – shall regulate cable rates to ensure they are not unduly discriminatory. The Circuit Court also failed to apply properly the “rational basis” test this Court articulated for the PSC to determine if cable rates are “unduly discriminatory.” It further erred in failing to remit that portion of the jury award that plainly was not supported by the record, and in failing to set aside the jury’s punitive damage award where the PSC previously declined to impose fines on the same operator for the same pricing practices because they raised complex issues of first impression.

### I. STANDARD OF REVIEW

The Circuit Court’s decision finding a private right of action under W. Va. Code § 24D-1-13 is a conclusion of law this Court reviews *de novo*.<sup>33</sup> The Circuit Court’s misapplication of the rational basis test is also a conclusion of law reviewed *de novo*.<sup>34</sup> Likewise, the Circuit Court’s subsequent decision allowing the jury verdict to stand despite a failure to show proxi-

---

<sup>33</sup> *First Am. Title Ins. Co. v. Firriolo*, 695 S.E.2d 918, 925 (W. Va. 2010); *Mott v. Kirby*, 696 S.E.2d 304, 306 (W. Va. 2010).

<sup>34</sup> Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 459 S.E.2d 415 (W. Va. 1995) (“Where the issue on an appeal . . . is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”).

mate causation is reviewed *de novo*, although the underlying evidence relied on by the jury must be viewed in the light most favorable to the nonmoving party.<sup>35</sup> Finally, the Circuit Court's affirmance of the punitive damages award, and its refusal to vacate or reduce the jury's award, receive *de novo* review.<sup>36</sup>

## **II. THE COURT BELOW ERRED BY CREATING A PRIVATE RIGHT OF ACTION FOR DAMAGES TO CHALLENGE CABLE TELEVISION PRICING, CONTRARY TO STATE AND FEDERAL LAW.**

The Circuit Court should have ruled, as a matter of law, that the private right of action CAS pursued in Count III – alleging that Charter's competitive pricing practices “constitute[] rate discrimination in violation of West Virginia Code § 24D-1-13, 47 U.S.C. § 543” and their respective implementing regulations – does not exist. The plain and unambiguous text of the governing laws, and cases considering similar claims, forbid private parties from suing in court for damages claimed to stem from cable pricing practices. West Virginia entrusts enforcement of those laws exclusively to the PSC.

---

<sup>35</sup> Syl. pt. 1, *Fredeking v. Tyler*, 680 S.E.2d 16 (W. Va. 2009) (“The ... standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) ... is *de novo*.”); *Pipemasters, Inc. v. Putnam County Comm'n*, 625 S.E.2d 274, 279 (W. Va. 2005) (“In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. . . . If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of the appellate court to reverse the circuit court and to order judgment for the appellant.”); *Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561, 573 (W. Va. 1996) (“Ordinarily, review of evidentiary rulings is under the abuse of discretion standard. We review *de novo*, however, legal premises upon which a trial court based its evidentiary rulings [and] review of the legal propriety of the trial court's instructions is *de novo*.”).

<sup>36</sup> See syl. pt. 16, *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791 (W. Va. 2009).

**A. Federal and State Statutes Prohibiting Unduly Discriminatory Cable Rates Do Not Provide a Private Cause of Action for Damages.**

**1. Following Congressional Intent, West Virginia’s Legislature Authorized Only the PSC to Decide When Cable Rates Are Unduly Discriminatory.**

Both the relevant federal and state statutes invoked in Count III leave no room for the Circuit Court’s conclusion that “Chapter 24D provides for a private cause of action.” (Order, entered Nov. 15, 2007, at 2.) As this Court has explained, “West Virginia may ... regulate the rates of cable operators only to the extent permitted by federal law.” *CAS v. PSC*, 633 S.E.2d at 786. From the inception of federal legislation governing cable television rates, Congress has assured that state and local governments exercise whatever authority they have over cable rates through uniform standards applicable to all regulated cable systems nationwide.<sup>37</sup> In fact, Congress clarified that a “state or franchising authority may not, for instance, regulate the rates for cable service in violation of [47 U.S.C. § 543], and attempt to justify such regulation as a ‘consumer protection’ measure.”<sup>38</sup> Insofar as they are at all regulated, cable television rates are controlled by the comprehensive scheme enacted by Congress in 47 U.S.C. § 543, which CAS invokes in Count III.

Section 543(e) of the federal Act, however, unambiguously allows only federal agencies, state governments, and “local franchising authorities” to regulate alleged rate discrimination:

**(e) Discrimination \* \* \* \***

Nothing in this subchapter shall be construed as prohibiting any *Federal agency, State, or a franchising authority* from—

---

<sup>37</sup> See, e.g., 47 U.S.C. § 543(a)(1) (providing that “[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612 ....”). See also *id.* § 556(c) (providing express preemption of “any provision of law of any State ... or franchising authority ... which is inconsistent with this [Act] ....”).

<sup>38</sup> *Cable Franchise Policy Act and Communications Act of 1984*, H.R. Rep. No. 98-934, at 79 (1984), reprinted at 1984 U.S.C.C.A.N. 4655, 4716.

(1) prohibiting discrimination among subscribers and potential subscribers to cable service ....

47 U.S.C. § 543(e) (emphasis added). It does not give private entities any right to bring an action to “prohibit[ ] discrimination among subscribers and potential subscribers to cable service.”

Consistent with this limited grant of authority, the West Virginia Legislature enacted W. Va. Code § 24D-1-13(b) & (c) to place the state’s regulatory power on this issue squarely in the hands of the PSC:

(b) To the extent permitted by federal law, *the commission* shall regulate rates to ensure that they are just and reasonable both to the public and to the cable operator and are not unduly discriminatory.

(c) To the extent permitted by federal law, *the commission* shall regulate charges other than those related to rates for the provision of basic cable service to ensure that they are just and reasonable and not unduly discriminatory.

*Id.* (emphasis added); *see also* W. Va. Code § 24D-1-1 (legislative intent “to establish just, reasonable and nondiscriminatory rates and charges for the provision of cable service ... by all means not in conflict with federal law rules or regulations.”). Section 24D-1-13 makes no mention of any right of private parties to challenge perceived discriminatory rates in court. Any “affected parties” however, may file a complaint with the PSC to challenge a perceived violation of state cable television laws, and those parties may seek relief through the PSC process. W. Va. Code § 24D-1-22(a). But, ultimately, the federal statute allows only government entities to “prohibit discrimination” in cable pricing, and § 24D-1-13 directs the PSC – not the courts – to determine when cable television rates are “unduly discriminatory.”

The Circuit Court expanded upon this carefully crafted and interrelated set of federal and state laws when it allowed CAS to proceed to the jury on its claim that Charter’s competitive practices were “unduly discriminatory” under § 24D-1-13. As a result, the Circuit Court’s

decision undermines the PSC's role as the expert agency issuing uniform statewide decisions. Moreover, it nullifies the substantial deference this Court has held is due when the Legislature directs the PSC to prevent unduly discriminatory pricing practices. *See* syl. pt. 3, *City of Wheeling v. PSC*, 483 S.E.2d 835, 841-42 (W. Va. 1997) (where Legislature directs PSC to determine whether utility rates are discriminatory but leaves ultimate decisions to PSC's *ad hoc* judgment, PSC decision is entitled to substantial deference and should be reversed only if arbitrary and capricious) (citing syl. pt. 4, *Appalachian Power Co. v. State Tax Dep't*, 466 S.E.2d 424, 429-30 (W. Va. 1995)).

**2. The Federal Communications Act Does Not Allow an Implied Private Right of Action for a Cable Company to Challenge in Court a Competing Company's Pricing Practices.**

Because the state statute on which CAS' fundamental claim rests authorizes regulation of unduly discriminatory cable rates only "to the extent permitted by federal law," if CAS had any right to bring a claim for damages under cable-specific rate laws, it would have to be a right permitted under 47 U.S.C. § 543. Every court to have considered the issue has agreed that, under a well-known four-factor test established by *Cort v. Ash*, 422 U.S. 66 (1975),<sup>39</sup> there is no right of action for any private party to sue under the federal cable rate laws.

In *Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV L.P.*, 941 F. Supp. 1189 (S.D. Fla. 1996), the plaintiff cable company's claims were strikingly similar to those of CAS. As here, two operators competed for the same customers in the same town. As here, one of the cable operators claimed that the other had unlawful competitive prices. Like CAS, one

---

<sup>39</sup> The *Cort* factors are: "First, is the plaintiff one of the class for whose especial benefit the statute was enacted ... [;] [s]econd, is there any indication of legislative intent ... either to create such a remedy or to deny one ... [;] [t]hird, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy ... [;] [a]nd finally is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* at 78 (internal quotation marks and citations omitted).

company alleged antitrust claims,<sup>40</sup> violations of the federal cable rate law, and tortious interference with business relationships. *Id.* at 1192. The court analyzed all of the *Cort* factors and, ultimately, joined the other federal courts holding that no implied right of action exists under Section 543. *Id.* at 1192, 1194-95 (citing *Mallenbaum v. Adelphia Commc'ns Corp.*, No. 93-7027, 1994 WL 724981, at \*6 (E.D. Pa. Dec. 29, 1994), *aff'd*, 74 F.3d 465, 469-70 (3d Cir. 1996); *In re Comcast Corp.*, No. Civ. A. 93-6628, 1994 WL 622105, at \*4-5 (E.D. Pa. Nov. 10, 1994), *aff'd*, 77 F.3d 462 (3d Cir. 1996); *Kentucky ex rel. Gorman v. Comcast Cable of Paducah, Inc.*, 881 F. Supp. 285, 287-88 (W.D. Ky. 1995); *Pennsylvania v. Comcast Corp.*, No. 94-CV-4142, 1994 WL 568479, at \*2 (E.D. Pa. Oct. 11, 1994) (order remanding case); *see also Broder v. Cablevision Sys. Corp.*, 329 F. Supp. 2d 551, 558 n.6 (S.D.N.Y. 2004) (“The courts have uniformly ruled that § 543(d) does not create an implied right of action.”), *aff'd*, 418 F.3d 187 (2d Cir. 2005). This analysis applies fully to Section 543(e), which allows states and franchising authorities to prohibit undue discrimination in cable rates, but does not suggest in any way that Congress intended competing cable companies to have a right to sue in court for damages alleged as a result of pricing competition.

The Circuit Court is the only court to have allowed a private cable company to sidestep the comprehensive, complex process for administrative regulation and control of a competitor's cable rates. Although the Circuit Court acknowledged that Charter presented it with *Aventura* and these other authorities, it failed to address them other than to conclude that CAS “is asserting its claims under West Virginia law which clearly authorizes a suit in state court.”<sup>41</sup> Yet the state Legislature demonstrated its understanding of the limits of the federal statute by explicitly

---

<sup>40</sup> CAS later abandoned its antitrust claims and pursued only its undue discrimination and tortious interference claims. *See supra* note 1.

<sup>41</sup> (Order, entered Nov. 15, 2007, at 3.)

directing the PSC to regulate cable rates to ensure they are not unduly discriminatory. In fact, the Legislature afforded even greater protection to consumers and others than required by Federal law by providing a right for any “affected party” to file a PSC complaint (and participate through appeal) when the Communications Act and FCC rules only require state and local procedures to “provide a reasonable opportunity for the consideration of the views of interested parties.”<sup>42</sup> CAS, of course, did just that by filing a complaint in the parallel PSC case.

This Court should reverse the Circuit Court and order judgment entered for Charter to assure that West Virginia’s common law, like its statutes, conforms to federal standards.

**3. CAS Cannot Evade The Legislature’s Refusal to Provide a Private Right of Action By Simply Recasting the Same Alleged Statutory Violation as a Tort.**

Allowing CAS to create a claim where Congress and the Legislature did not provide one is “an impermissible ‘end run’ around [ ] limitations the legislatures set.” *Broder v. Cablevision Sys. Corp.*, 329 F. Supp. 2d at 559; *see also Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (prohibiting state common law “end run” around “underlying purpose of the legislative scheme [which] would interfere” with Congressional intent “to the same extent as would a cause of action directly under the statute”) (citations omitted). By allowing CAS to proceed on a tortious interference claim based solely on allegations that Charter’s pricing violated the cable rate laws, the Circuit Court circumvented the comprehensive regulatory and remedial scheme of Congress, the FCC, and West Virginia, warranting this Court’s review.

The Circuit Court’s error in this regard thus not only upset the carefully structured federal and state law regime described above, it also allowed CAS to proceed on its claim for tortious interference without any evidence that Charter violated any discernible standard of conduct, as

---

<sup>42</sup> 47 U.S.C. § 543(a)(3)(C); 47 C.F.R. § 76.910(b)(3).

required by well-settled tortious interference law. This Court has applied *Restatement (Second) of Torts* § 768 (1979) to disputes involving tortious interference with future business relationships and at-will contracts, such as those on which CAS bases its claims in this dispute.<sup>43</sup> The weight of authority applying this provision of the *Restatement* requires independently actionable conduct by the defendant.<sup>44</sup> Under these precedents and the *Restatement's* own commentary, “wrongful means” requires some independently actionable conduct, yet CAS did not allege or prove Charter used any “improper method” other than the same pricing CAS challenged under § 24D-1-13.<sup>45</sup>

**B. The Circuit Court Erred in Deciding that West Virginia Code Provisions Such as Sections 24D-1-22 and 24-4-7 Authorize a Civil Suit for Damages Despite the Legislature’s Directive that the PSC Shall Regulate Cable Television Rates.**

The Circuit Court erred when it held that W. Va. Code §§ 24D-1-22, 24-4-7, and 55-7-9 authorize CAS’ claim for damages alleged to be caused by unduly discriminatory cable rates. Indeed, CAS’ claims for relief do not mention any of these statutes. Moreover, none of those provisions supports the Circuit Court’s ruling, or supersedes the Legislature’s plain direction in § 24D-1-13 that the PSC “shall regulate” rates to assure they are not unduly discriminatory.

---

<sup>43</sup> *Torbett v. Wheeling Dollar Savings & Trust Co.*, 314 S.E.2d 166, 172-73 (W. Va. 1983). See also Stip. ¶ 12 (none of CAS’ customers had contracts that required them to retain CAS’ service).

<sup>44</sup> See *DP-Tek, Inc. v. AT&T Global Info. Servs. Co.*, 100 F.3d 828, 835 (10th Cir. 1996) (weight of authority holds that “wrongful means” under § 768 requires independently actionable conduct); *National Data Payment Sys. v. Meridian Bank*, 212 F.3d 849, 858 (3d Cir. 2000) (“independently actionable” approach borne out by comment (e) to § 768).

<sup>45</sup> Even if the lack of a private cause of action for “unduly discriminatory” cable rates did not preclude CAS from pursuing a tortious interference claim for the same conduct, the Circuit Court should have ruled for Charter as a matter of law, because it could not be held to have violated any “established standard[s] of a trade or profession,” which this Court has deemed to be a vital “means of evaluating a[n] ‘actor’s conduct [as] to tortious interference.’” *C. W. Dev., Inc. v. Structures, Inc.*, 408 S.E.2d 41, 44 (W. Va. 1991). Charter’s pricing at that time cannot be understood to have violated any “established standard[s] of a trade or profession,” because they were the subject of disagreement and differing opinion at the PSC – the body responsible for regulating the industry. See also *infra* at 40-42 (Argument IV.B.1).

**1. § 24D-1-22 Does Not Authorize a Private Right of Action.**

The Circuit Court erroneously accepted CAS' arguments that § 24D-1-22 provides for a private cause of action. This statute authorizes private parties to participate in cable television complaint proceedings before the PSC, not to bring civil actions in circuit court:

(c) In the event that *the commission* cannot resolve the complaint to the satisfaction of all parties, *the complainant may file a formal request to the commission* and the complainant and cable operator shall be afforded all rights including the right of appeal as set forth in chapter twenty-four of this code.

(Order, entered Nov. 15, 2007, at 2-3 (emphasis added).) CAS argued, and the Circuit Court erroneously agreed, that this provision incorporates “all rights” under another chapter of the Code – Chapter 24 – and that those rights include a right to “bring suit ... for the recovery of damages” through § 24-4-7. As discussed below, the Circuit Court’s interpretation of § 24-4-7 was reversible error independent of its misapplication of § 24D-1-22. As an initial matter, however, the text of § 24D-1-22(c) cannot support the Circuit Court’s expansive reading.

“In order to safeguard the expressed legislative intention, it is imperative to view the precise language and terms employed in the statute at issue.” *State ex rel. Pros. Att’y v. Bayer Corp.*, 672 S.E.2d 282, 287 (W. Va. 2008). The Circuit Court, however, read § 24D-1-22(c) so as to carve the words “all rights . . . in chapter twenty-four” from the rest of the subsection. Read as a whole and giving meaning to each word and phrase, this subsection merely allows that “the complainant may file a formal request *to the commission*,” and confirms that in the ensuing PSC proceeding, “the complainant and cable operator shall be afforded all rights including the right of appeal” under chapter 24. The phrase “all rights” in this sentence cannot be read to mean “all rights . . . in chapter 24” independent of the predicate act in the sentence: a complainant must “file a formal request to the commission” before the rights-triggering language has any meaning.

The provision is an assurance that complainants and cable operators will receive the procedural protections afforded to all parties in cases before the PSC, including “all rights of appeal” from any PSC decision.

This plain-language reading of § 24D-1-22(c)’s reference to “rights ... in chapter twenty-four” is also compelled by the maxim *noscitur a sociis*, which requires statutory language – although apparently general on its face – to be limited in operation or effect where its clear intent encompasses only certain purposes or things, based on associated words and phrases found in the statute. *See, e.g., Shepherdstown Observer, Inc. v. Maghan*, No. 09-C-169, 2010 W. Va. LEXIS 98, at \*10 (W. Va. Sept. 23, 2010) (“In resolving issues pertaining to the meaning to be ascribed to words used in a statute, we have previously noted that ‘[i]t is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used.’”) (internal citation omitted); Syl. pt. 3, *Kings Daughters Housing, Inc. v. Paige*, 506 S.E.2d 329, 331-32 (W. Va. 1998) (“[T]he meaning of a word or phrase [is] ascertained by reference to the meaning of other words or phrases with which it is associated.”). Properly limited by this principle, the kinds of “rights under chapter 24” that *are* triggered through § 24D-1-22 involve procedural provisions that augment and are consistent with the complaint process in § 24D-1-22. These include: § 24-1-7 (“Rules of procedure”); § 24-1-9 (“Recommended decision by hearing examiner”); § 24-2-10 (Commission power to require the production of evidence); and § 24-5-1 (“Review of final orders of commission”).

Other subsections of § 24D-1-22 confirm that the plain language of § 24D-1-22(c) allows only PSC complaint proceedings and does not authorize private suits for damages. Section 24D-1-22(a) first specifies that “[c]omplaints of affected parties regarding the operation of a cable

system must be made in writing and *filed with the commission.*” W. Va. Code § 24D-1-22(a) (emphasis added). Subsection (b) requires that “[t]he commission shall resolve all complaints, if possible informally[.]” *Id.* § 24D-1-22(b) (emphasis added). If the PSC finds against the cable operator on the complaint, subsection (d) authorizes the PSC to impose “a fine or civil penalty.” *Id.* § 24D-1-22(d). Each of these subsections – the requirements of a complaint to the PSC, the directive that the PSC “resolve all complaints,” and the specification of PSC fines or penalties (but not damages) as a consequence of adjudicated violations – reinforces the conclusion that § 24D-1-22(c) speaks only to “all rights” in actions before the PSC. Together, these provisions strongly refute the Circuit Court’s view that “affected parties” are allowed to file both a PSC complaint and a civil damages action on the exact same allegations, under the exact same statute.

**2. Chapter 24D Authorizes Private Parties to Seek Only Equitable Remedies, and Only in Circumstances Not Presented By CAS’ Claims.**

The Circuit Court’s interpretation of § 24D-1-22 cannot be reconciled with the provision that follows it, § 24D-1-23, which specifically governs potential direct court actions (as opposed to appeals) against cable operators for alleged violations of Chapter 24D or PSC orders and rules. Section 24D-1-23(e) states:

(e) The commission or other aggrieved party may institute, or intervene as a party in, any action in any court of law *seeking a mandamus, or injunctive or other relief to compel compliance* with this chapter, or any rule, regulation, or order adopted hereunder, *or to restrain or otherwise prevent or prohibit* any illegal or unauthorized conduct in connection with this article.

W. Va. Code § 24D-1-23(e) (emphasis added). The Legislature thus considered the possibility that private parties might be “aggrieved” by a perceived violation of Chapter 24D or the PSC’s cable rules and orders, and allowed those parties to pursue only equitable, coercive forms of relief. In doing so, it necessarily considered, and rejected, authorizing suits for damages for

alleged violations of Chapter 24D, including § 24D-1-13. *Compare, e.g.,* W. Va. Code § 46A-6-106(a) (authorizing both damages actions and equitable relief for violations of Consumer Credit and Protection Act).

Of course, § 24D-1-23 does not authorize any private party to bring a court action to enforce a provision like § 24D-1-13, which directs the PSC to act in the first instance, and places no express duty or limit directly on cable operators.<sup>46</sup> In such cases, “aggrieved parties” may only seek a court’s aid to compel compliance with provisions of Chapter 24D or rules and orders of the PSC *after* it has fulfilled its duty to “resolve all complaints” pursuant to § 24D-1-22(b). The Circuit Court’s reading of the statute simply deprives the PSC of the jurisdiction granted by the Legislature, and deprives consumers and cable operators like Charter of the agency’s expertise, statewide perspective, and uniformity of decisions.<sup>47</sup>

---

<sup>46</sup> By way of contrast, a very few provisions of Chapter 24D give a cable operator express rights that may be enforced through an action seeking equitable relief, and do not require a PSC complaint. For example, cable operators have a right to retain ownership of wiring installed in apartment buildings, § 24D-2-3(d), as well as the right to continue serving such buildings if any tenant desires the service. W. Va. Code § 24D-2-9. These provisions, which formed the basis of Charter’s abandoned claims against CAS, do not require or anticipate any PSC involvement. Instead, they confer affirmative statutory rights, for which § 24D-1-23(e) authorizes a court action “to compel compliance with this chapter.” The same is not true for CAS’ claim under § 24D-1-13.

<sup>47</sup> The Circuit Court also erred to the extent it relied on W. Va. Code § 55-7-9 to hold that “a suit may be brought regardless of whether a penalty or forfeiture may also be imposed as a result of a statutory violation.” (Order, entered Nov. 15, 2007, at 2.) Section 55-7-9 does not authorize “suits” of any kind, but rather “was merely enacted to preserve *existing causes of action* and to prevent defendant[s] from setting up the payment of the statutory penalty in bar thereof.” *England v. Central Pocahontas Coal Co.*, 104 S.E. 46, 47 (W. Va. 1920) (emphasis added). *See also Arbaugh v. Board of Educ.*, 591 S.E.2d 235, 238-39 (W. Va. 2003) (finding no private cause of action for violation of statutory duty, even while recognizing § 55-7-9 would allow damages if the right of action exists). Section 55-7-9 simply does not speak to existence or non-existence of any private cause of action, and the Circuit Court’s reliance on it was improper.

### 3. The Circuit Court's Ruling Improperly Subjects a Cable Operator to Regulation as a Public Utility.

The Circuit Court also erred when it accepted CAS' invitation to use § 24D-1-22(c) as a gateway to § 24-4-7, which in turn specifically authorizes private actions against a "public utility" under Chapter 24 in certain circumstances. The Circuit Court explained that it found a private right of action in § 24-4-7, which provides in part:

Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the commission, as provided herein, *and bring suit in his own behalf for the recovery of the damages* for which such public utility may be liable under this chapter in any circuit court having jurisdiction.

(Order, entered Nov. 15, 2007, at 2-3 (emphasis original).) The Circuit Court did not address the express terms of the statute that make it operative only where a party "claim[s] to be damaged by any violation of *this* chapter," which means Chapter 24, not Chapter 24D. Nor did it consider the statute's express limitation that such violation be committed "by any *public utility* subject to the provisions of this chapter," or its limitation to "recovery of [ ] damages for which [a] *public utility* may be liable *under this chapter*." W. Va. Code § 24-4-7 (emphases added). And it ignored the Legislature's specific provision that allows "any aggrieved party" to obtain only equitable relief for violations of cable-specific statutes, administrative rules or orders. W. Va. Code § 24D-1-23(e). Simply put, this provision has no application to Charter, and the Circuit Court erred in finding that it does.

Charter is a cable operator within the meaning of Chapter 24D. *See, e.g.*, W. Va. Code § 24D-1-2(5) (definition of "cable operator"). It is not, and never was, a public utility under Chapter 24. *See id.* § 24-1-2 (definition of "public utility"). More importantly, the Legislature explicitly provided that the PSC has no "power to regulate the cable television industry as a public utility." *Id.* § 24D-1-26. Read in the context of Article 4 of Chapter 24, Section 24-4-7 spe-

cifies only the procedures and remedies available when a *public utility* violates a provision of Chapter 24 or the PSC's rules and orders.<sup>48</sup> A cable operator, by definition, cannot conceivably "be liable under this chapter [24]" for anything, because it is not a public utility, and therefore has no substantive obligations under Chapter 24.

Federal communications law reinforces the reasons behind the Legislature's clear distinction between cable systems under Chapter 24D and public utilities under Chapter 24. The Communications Act declares that "[a]ny cable system[s] shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c). Congress enacted this provision as an "evolutionary approach" to "protect[ ] cable companies from unnecessary regulation."<sup>49</sup> This provision, first enacted in 1984, codifies an even earlier decision of the FCC to reject proposals that cable systems be regulated as common carrier utilities, because that approach "does not afford the industry the flexibility that we desire to encourage experimentation and innovation" and would impose "unnecessarily restrictive formulas on the evolution of the new [cable] technology."<sup>50</sup>

---

<sup>48</sup> The explicit purpose of Article 4 of Chapter 24 is to prescribe remedies and procedure for consideration of violations of Chapter 24 and/or any PSC rule or order by a *public utility*. See, e.g., W. Va. Code § 24-4-1 (general provisions for violations of "this chapter [24]"); § 24-4-2 (penalty for falsifying books of "any public utility subject to" Chapter 24); § 24-4-3 (penalties for violations of §§ 24-2-3, 24-2-7 (which governs unreasonable "or unjustly discriminatory" practices of *public utilities* under Chapter 24)), § 24-4-4 (catch-all penalty for entities subject to Chapter 24); § 24-4-5 (contempt for violations of PSC orders); § 24-4-6 (allowing complaints to be filed at PSC by persons or entities "complaining of anything done or omitted to be done by any public utility subject to this chapter [24]"); § 24-4-8 (defining separate violations of Chapter 24). Surely the Legislature did not intend for cable operators to be subject to overlapping, and in many cases inconsistent, procedures and remedies, as would be the case if Charter were subject to these provisions, all of which otherwise govern only "public utilities" and persons or entities affected by them.

<sup>49</sup> *Cable Franchise Policy Act and Communications Act of 1984*, H.R. Rep. No. 98-934, at 29 (1984), reprinted at 1984 U.S.C.C.A.N. 4655, 4666.

<sup>50</sup> *Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to the Community Antenna Television Systems*, Memorandum Opinion and Order on Reconsideration, 36 F.C.C.2d 326, 352 ¶ 69, 1972 FCC LEXIS 1550, at \*352 ¶ 69 (1972).

The plain language of the relevant provisions of Chapter 24D and Chapter 24 demonstrates that the Legislature did not intend its reference in § 24D-1-22 to a complainant’s “rights under” Chapter 24 to eradicate the distinction between cable companies and public utilities that the Legislature carefully maintained throughout Chapter 24D and Chapter 24. The Legislature surely did not intend to superimpose the terms of § 24-4-7 onto the “complex maze of interrelating federal and state laws,”<sup>51</sup> that specifically address cable regulation. The Circuit Court was wrong to conclude otherwise, and its decision undermines the Legislature’s careful delineation of cable regulation as a matter wholly distinct from – and governed by a different chapter of the Code than – public utilities.

**4. The Circuit’s Court’s Interpretation of § 24-4-7 Conflicts With Precedent of This Court.**

Even if Charter somehow could be treated as a public utility, the Circuit Court’s application of § 24-4-7 contravenes this Court’s interpretation of that statute. As to public utilities clearly subject to § 24-4-7, this Court’s limited case law compels an interpretation that does not authorize a civil suit such as CAS’, which deprives the PSC of jurisdiction to decide matters the Legislature assigned to the PSC in the first instance:

Although the general rule is that one must exhaust administrative remedies before going into court to enforce a right, *W. Va. Code 24-4-7 [1923] confers concurrent jurisdiction on the PSC and the circuit court in a limited number of cases – namely, those cases seeking a refund based on rules and practices of the PSC that are clear and unambiguous*. In these limited cases, a plaintiff can proceed either before the PSC or the circuit court.

Syl. pt. 1, *State ex rel. Chesapeake & Potomac Tel. Co. v. Ashworth*, 438 S.E.2d 890, 894 (W. Va. 1993) (emphasis added). On the other hand, even as to complaints against public utilities, where a “case raises policy issues that should be considered by the PSC in the interest of a

---

<sup>51</sup> *CAS v. PSC*, 633 S.E.2d at 785.

uniform and expert administration of the public utilities' regulatory scheme,” the exception in § 24-4-7 is inapplicable, and the matter must proceed before the PSC. *Id.* at 894. In this dispute, even if § 24-4-7 somehow could apply to CAS’ underlying challenge to Charter’s pricing competition, the PSC would be the proper forum for resolution because the issues are complex, unsettled, and require the agency’s expertise.

**III. EVEN IF A RIGHT OF ACTION EXISTED UNDER § 24D-1-13, THE CIRCUIT COURT MISCONSTRUED THE RATIONAL BASIS TEST AS ADOPTED BY THIS COURT AND FAILED TO REQUIRE A SHOWING OF PROXIMATE CAUSE.**

Even if the Legislature provided a private cause of action under § 24D-1-13 (which it did not), the Circuit Court committed reversible error in applying this Court’s explanation that “a cable operator [may] avoid the rate discrimination prohibition” if it has “a rational basis for classifying or categorizing certain customers ... from other[s].”<sup>52</sup> In *CAS v. PSC*, the Court required that whether Charter had a rational basis must be analyzed under standards:

analogous to that imposed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the equal protection guarantee inherent in the Due Process Clause of Art. III, Sec. 10 of the West Virginia Constitution for a rational basis to justify the disparate treatment of identifiable classes of citizens.

*Id.* at 794-95. These standards should have been surpassingly easy for Charter to meet – so much so that a judgment in Charter’s favor on this point should have been entered as a matter of law. And even if it was proper for the jury to consider the rational basis question, CAS failed to prove that Charter’s pricing was the proximate cause of the harm CAS claimed to suffer.

---

<sup>52</sup> *CAS v. PSC*, 633 S.E.2d at 794-95.

**A. There Was an Obvious Rational Basis for Charter’s Pricing Plans.**

The Circuit Court misapplied the rational basis standard this Court established, and the law relevant to it, in several of ways. The U.S. Supreme Court has stated that “the term ‘rational basis’” as a test derived from equal protection safeguards “describes [a] minimal level of scrutiny,”<sup>53</sup> and this Court has agreed the test imposes “the least level of scrutiny.” *Marcus v. Holley*, 618 S.E.2d 517, 532 (W. Va. 2005); *accord, e.g., Evans v. Kentucky High Sch. Athletic Ass’n*, 2010 WL 1643758, at \*4 (W.D. Ky. Apr. 10, 2010) (“Rational basis review is ‘the most relaxed and tolerant form of judicial scrutiny ...’”) (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989)); *Morris v. State Bar of Cal.*, 2010 WL 2353528, at \*8 (E.D. Cal. June 9, 2010) (“The rational-basis inquiry is a very lenient one ....”) (internal quotation marks omitted). As one court recently recognized, “[t]he rational basis test is extremely deferential” and courts turn aside challenges to conduct subject to only rational-basis review “if it is plausible [ ] there were legitimate reasons for the action.”<sup>54</sup> “Proving the absence of a rational basis [is] an exceedingly difficult task,” *id.*, and “[i]f the question of a rational basis is at least debatable,” the test is satisfied.<sup>55</sup> Yet the Circuit Court committed reversible error through procedural mistakes, discounting of relevant evidence, and use of an improperly heightened rational basis standard without any foundation in law.

First, reversal is necessary because the Circuit Court improperly imposed on Charter the burden of showing a rational basis for the CAS-specific pricing plans instead of requiring CAS to prove lack of rational basis, and it ultimately refused to find that a rational basis existed as a

---

<sup>53</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

<sup>54</sup> *Las Lomas Land Co. v. City of Los Angeles*, 99 Cal. Rptr. 3d 503, 521 (Cal. Ct. App. 2009).

<sup>55</sup> *Adams v. New York State Educ. Dep’t*, 2010 WL 3306910, at \*24 (S.D.N.Y. Aug. 23, 2010) (internal quotation marks omitted).

matter of law. As Charter proposed in its jury instruction on this point, the burden should have been on CAS to prove the lack of a rational basis.<sup>56</sup> The Supreme Court held in *Beach Communications* that “those attacking the rationality” of classifications under the rational basis test “have the burden to negative every conceivable basis.” 508 U.S. at 314-15. This Court agrees that “the burden [is] always [ ] on the complaining party” who asserts particular rates are unreasonable based on similar or dissimilar conditions and circumstances.<sup>57</sup> Further, as Charter urged below, the Circuit Court should have found a rational basis as a matter of law, rather than simply holding that the evidence allowed the jury to find no rational basis.<sup>58</sup> The trend has been to recognize that “whether a rational basis exists ... is not [an issue] of fact, but is a purely legal question.”<sup>59</sup> It was thus error to allow the jury to decide whether a rational basis existed for Charter’s challenged plans.<sup>60</sup>

---

<sup>56</sup> (See Charter’s Mot. for Judgment as a Matter of Law or New Trial and to Alter or Amend Judgment (“Charter Post-Tr. Mot.”) at 18 n.11 (citing Pretrial Mem. App. E at 9 (citing, *inter alia*, *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-15 (1993))); see also Charter Proposed Verdict Form at 1; Charter Proposed Jury Charge and Instructions at 9; Trial Tr. Vol. II, 5:12 – 7:14, 8:19 – 9:4; Charter Objections to Jury Instructions and *Voir Dire* Proffered By CAS at 4 n.3.)

<sup>57</sup> *Elk Hotel Co. v. United Fuel Gas Co.*, 83 S.E. 922, 924 (W. Va. 1914); see also *Las Lomas Land Co.*, 99 Cal. Rptr. 3d at 521 (under rational basis, “plaintiff must show that the difference in treatment was ... unrelated to the achievement of any combination of legitimate purposes”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991)) (internal quotation marks omitted, emphasis added); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911) (“One who assails the classification ... must carry the burden of showing that it does not rest upon any reasonable basis.”).

<sup>58</sup> (Charter Post-Tr. Mot. at 19.)

<sup>59</sup> *Merrifield v. Lockyer*, No. C 04-0498, 2005 WL 1662135, at \*3 n.5 (N.D. Cal. July 15, 2005) (discussing *Beach Commc’ns*). See also, e.g., *Schism v. United States*, 972 F. Supp. 1398, 1407 (N.D. Fla. 1997) (“Whether a rational basis exists [for an equal protection claim] is a question of law for the court to determine.”); *Parker v. Conway*, 581 F.3d 198, 202 (2d Cir. 2009) (“[R]ational basis review ... ‘is not subject to courtroom fact finding...’”) (quoting *Beach*, 508 U.S. at 315).

<sup>60</sup> Charter noted in its post-trial motions that treating the rational basis question as purely legal would have avoided the likelihood that a jury would struggle to apply “rational basis” to private party conduct. (Charter Post-Tr. Mot. at 19 n.13.) In this regard, the Circuit Court’s jury charge was flawed in predominantly accepting CAS’ proffered instruction that confusingly discussed potential justifications for differing rates in terms of economic benefit and technological and cost differences, but otherwise did not ex-

In any event, the Circuit Court erred in not ultimately holding there was a rational basis for the challenged Charter pricing. The equal-protection-based rational basis test this Court adopted establishes a very low threshold:

[E]qual protection ... is implicated when a classification treats similarly situated persons in a disadvantageous manner .... [T]his Court explained the three types of equal protection analyses. First, when a suspect classification, such as race, or a fundamental, constitutional right, such as speech, is involved, the legislation must survive “strict scrutiny” .... In the second type of analysis, a[n] intermediate level of protection is accorded ... classifications, such as those which are gender-based .... Third, *all other [ ] classifications, including those which involve economic rights, are subjected to the least level of scrutiny, the traditional equal protection concept that the [ ] classification will be upheld if it is reasonably related to the achievement of a legitimate [ ] purpose.*

*Marcus*, 618 S.E.2d at 532 (emphasis added, citations omitted). Under this standard of review, even classifications “result[ing] in some inequality” are permissible so long as there is “some reasonable basis” for them. *Lindsley*, 220 U.S. at 78-79. In the highly analogous context of differing statutory treatment of communications companies, the U.S. Supreme Court held that:

[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of ... economic[s], a [ ] classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld ... *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*

*Beach Commc’ns*, 508 U.S. at 313 (emphasis added); *see also Marcus*, 618 S.E.2d at 532 (quoting *Beach*’s “any conceivable state of facts” language); *Adams v. New York State Educ. Dep’t*, 2010 WL 3306910, at \*24 (“Where rational basis scrutiny applies, the[re is] no obligation to produce evidence, or empirical data to sustain the rationality ... but rather, ... rational speculation [or] any reasonably conceivable state of facts will suffice.”) (internal quotation marks omitted). *Cf. Highway Materials, Inc. v. Whitmarsh Twp.*, 2010 WL 2680996, at \*7-8

---

plain the phrase “rational basis.” (See Judge’s Charge of Jury at 6, 7 & compare Pretrial Mem. App. E-1 at 3 with *id.* App. E-2 at 9 (competing instructions offered by parties).)

(3d Cir. July 7, 2010) (for actions to lack rational basis, there must be “irrational and wholly arbitrary” conduct and not merely fair ground for dispute regarding its merit). Given these interpretations, Charter’s challenged plans readily satisfy this Court’s rational basis standard.

Specifically, the evidence did not permit a reasonable finding that there was no rational basis for the challenged plans Charter offered to CAS customers. Both Charter and CAS targeted their competitors’ customers – the obvious group of potential new customers – with special offers.<sup>61</sup> Charter presented testimony based on personal knowledge and years of experience selling cable service, which showed that it is harder to motivate customers who already had CAS service to switch to Charter than to obtain customers who had no competitive service.<sup>62</sup> Testimony also showed that, for such customers, Charter’s choices were either (a) to forego making special offers like those at issue and all revenue from those customers, or (b) use incentives to win them back or over for the first time.<sup>63</sup> This is a clear economic benefit realized from special offers to non-customers served by CAS (or satellite competitors), and is thus a coherent rational basis for Charter’s pricing.

These reasons for Charter’s pricing at issue easily satisfy the low threshold of the rational basis test. By comparison, the U.S. Supreme Court upheld a rule that limited membership in riverboat pilot associations to those pilots “agreeable to” existing members of the association, which meant in practice that nepotism was a valid rational basis. *Kotch v. Board of River Port*

---

<sup>61</sup> (Trial Tr. Vol. II, 155:22 – 157:3, 157:19 – 159:14, 168:19 – 169:10, 174:17 – 176:6, 177:6-15 (the evidence showed that CAS gave free service to customers who left Charter, that customers in apartment buildings or complexes who left Charter and went to CAS received free installation, free new wiring, free new outlets, and service discounted by \$96 per year, and that such offers were not available to “all” CAS customers, just those who left Charter or DBS competitors).)

<sup>62</sup> (Trial Tr. Vol. I, 359:4-19; Trial Tr. Vol. II, 570:2-18.) Cf. *Edenfield v. Fane*, 507 U.S. 761, 764 (1993) (crediting plaintiff’s showing that, compared to measures needed to maintain one’s own clientele, different steps may be necessary to win over customers from competitors).

<sup>63</sup> (Trial Tr. Vol. II, 570:10 – 571:20; Trial Tr. Vol. I, 359:3-18.)

*Pilot Comm'rs*, 330 U.S. 552 (1947). Indeed, “even if there are facts casting [a given action] as one taken out of animosity ... only when courts can hypothesize no rational basis for the action” does it fail the rational basis test. *Heidbreder, Inc. v. City of Crown Point*, 2010 WL 3168411, at \*4 (N.D. Ind. Aug. 10, 2010). Even more on point, it was recently held that the “legitimate interest in generating revenue” that otherwise would flow to a competitor – the precise interest that motivated Charter here – readily provides a rational basis under equal protection analysis. *Executive Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 566 (8th Cir. 2008).

The Circuit Court’s refusal to grant judgment for Charter as a matter of law on this point, or a new trial or amended judgment, was erroneous in several ways. Despite this Court’s instruction that the applicable standard is a rational basis test incorporating equal protection precepts,<sup>64</sup> the Circuit Court rejected the significant body of case law invoked above that establishes a low rational basis threshold. (Post-Tr. Order at 11-12.) Rather, it held the “test to be applied ... requires more than [this] very low threshold,” on the purported ground that this Court said the relevant test was “analogous to” that standard. (*Id.* at 11.) This “equal protection plus” test appears nowhere in this Court’s *CAS v. PSC* decision – or anywhere else – and the Circuit Court does not explain what, exactly, it requires. The main reason the Circuit Court gave for imposing a higher burden was that, in a different section of the *CAS v. PSC* decision, this Court stated that the rational basis test was “not dispositive” of the issues before it. (*Id.* (citing 633 S.E.2d at 790, where this Court discussed the requirement of a geographically uniform rate structure under 47 U.S.C. § 543(e), a provision not at issue below).)

The Circuit Court compounded this error by misreading *CAS v. PSC* as a decision on the merits of CAS’ claim that Charter’s rates were unduly discriminatory, when in fact *CAS v. PSC*

---

<sup>64</sup> *CAS v. PSC*, 633 S.E.2d at 795.

did no such thing. This Court held only that “the PSC did not properly [find] a rational basis for the ‘customer categories’ to which Charter offer[ed] [the] rates,” and thus “reversed and remanded [for] the PSC to make that determination.” 633 S.E.2d at 795. This did not preclude a showing of rational basis, but the Circuit Court apparently concluded otherwise. Its decision on this, and on all points described above arising under the rational basis test, should be reversed.<sup>65</sup>

**B. CAS Failed to Prove that Charter’s Conduct Was the Proximate Cause of Any Harm.**

Independent of any error applying the rational basis standard, the Circuit Court erred because, after correctly ruling that “the burden will remain on [CAS] to show why the customers changed service providers and how many customers left for what reasons,”<sup>66</sup> it failed to hold CAS to this standard. The trial record contains no proof that could meet the burden established by this Court which precludes juries from speculating regarding causation, as occurred here. Charter was thus entitled to judgment because CAS failed to offer evidence that Charter’s pricing caused CAS to lose customers.

Specifically, where there are multiple possible causes of a plaintiff’s alleged injury, only one (or some) of which may be attributable to defendant’s actions, and no proof links the challenged conduct to the claimed harm, this Court has affirmed the refusal of other trial courts to

---

<sup>65</sup> If this Court reverses the decision below on rational basis and orders judgment entered for Charter on that basis, judgment also must be entered on CAS’ tortious interference claim. As noted, tortious interference with contractual relations requires an intentional act that was illegal or independently tortious. *See supra* at 19-20 (Argument II.A.3). It also – and separately – is a complete defense for defendant to show it was engaged in legitimate competition. *Torbett v. Wheeling Dollar*, 314 S.E.2d 166; *C.W. Dev.*, 408 S.E.2d at 44; *West Va. Transp. Co. v. Standard Oil Co.*, 40 S.E. 591, 597 (W. Va. 1901). *See also* Judge’s Charge of Jury at 8-9. If there was a rational basis for the Charter pricing plans, there is no violation of W. Va. Code § 24D-1-13 to serve as an independently tortious act, and further, Charter should be deemed to have been engaged in legitimate competition. In such a case, no claim or damage award for tortious interference consequently could survive.

<sup>66</sup> (Order, entered Nov. 15, 2007, at 4.)

allow a jury to find causation.<sup>67</sup> For example, in *Tolley v. ACF Indus., Inc.*, this Court stressed the significance of the fact that plaintiff's medical expert "cannot identify the actual cause" of the claimed injury. 575 S.E.2d at 168. In *Spencer v. McClure*, an expert likewise offered causation testimony "that was speculative in nature,"<sup>68</sup> supplemented by plaintiff's own testimony, which lacked personal knowledge or other "evidence from which a jury could conclude that [defendant] proximately caused or contributed" to the injury. 618 S.E.2d at 456 (citing and following *Tolley*). In each case, although circumstantial evidence existed that the defendant may have caused the plaintiff harm, this Court followed the long-standing common law rule that parties who claim actions of another caused them injury must show something more than "a mere possibility of causation."

The Circuit Court erred because, at the close of trial, there was no direct evidence that any customer who left CAS for Charter did so "because of" Charter's pricing that CAS challenged. The only evidence CAS proffered regarding why its subscribers left CAS for Charter pertained to no single subscriber, but to all of them, as if they all left CAS for the same reason. There was absolutely no evidence why *any* specific customer, among the 800 claimed, made the change. This lack of individualized evidence that any particular customer changed from CAS to Charter due to pricing warrants this Court's review under the *Tolley* line of cases. None of the Charter work orders CAS relied upon showed any reason why the customer to whom the work

---

<sup>67</sup> *Tolley v. ACF Indus., Inc.*, 575 S.E.2d 158, 168 (W. Va. 2002) (judgment for defendant where plaintiff's own expert could testify only that defendant's chemicals were one of three potential causes of Tolley's injuries); *Spencer v. McClure*, 618 S.E.2d 451, 456 (W. Va. 2005). See also syl. pt. 1, *Oates v. Continental Ins. Co.*, 72 S.E.2d 886 (W. Va. 1952); Syl. pt. 3, *Adams v. Sparacio*, 196 S.E.2d 647 (W. Va. 1973); *Edwards v. Hobson*, 54 S.E.2d 857, 859 (Va. 1949) ("Where the evidence shows that any one of several things may have caused the injury, for some of which defendant is responsible, and for some of which defendant is not responsible, and leaves it uncertain as to what was the real cause, then plaintiff has failed to establish his case.").

<sup>68</sup> 618 S.E.2d at 456.

order pertained switched to Charter.<sup>69</sup> Nor did any other documentary evidence – consisting of some 148 exhibits across 12 binders – show why any particular customer left CAS.

Instead, documentary evidence – in the form of CAS’ own print ads and flyers – showed there are multiple reasons customers might switch video service providers.<sup>70</sup> CAS’ own witnesses acknowledged at trial that they could not eliminate other potential reasons for which any of its customers could have left. CAS’ President and CEO, Mr. Cooper, affirmatively testified he did not know why any specific customers left CAS for Charter.<sup>71</sup> Instead, he *agreed* that some CAS customers left for reasons other than Charter’s pricing plans.<sup>72</sup> And the experts CAS presented, Dr. Rizzuto and Mr. Morgan, each corroborated this by testifying they had no personal knowledge why any customer left CAS, with Dr. Rizzuto readily admitting there are “a host of reasons” other than price why cable customers might have left CAS for Charter, including dissatisfaction with service or different programming options offered by the competition.<sup>73</sup>

In fact, Mr. Cooper testified it was an “obvious” point that, “ultimately,” no one knows the reason why a customer leaves one video service provider for another,<sup>74</sup> except that person.<sup>75</sup> Yet no one interviewed any of these individuals as potential witnesses, no one sought their sworn

---

<sup>69</sup> (See Trial Tr. Vol. I, 4:18 – 5:13, 5:17 – 6:16, 7:5-9, 8:2 – 12:14, 13:4-12, 18:23 – 19:2, 35:18 – 36:22, 37:14 – 38:24, 44:5-23 (introducing Charter work orders and billing statements).)

<sup>70</sup> (See Tr. Exs. 137, 143, 144, 145, 146.)

<sup>71</sup> (Trial Tr. Vol. II, 205:12 – 206:11).

<sup>72</sup> (*Id.* Vol. II, 203:20-24, 204:12 – 205:1.) Mr. Cooper testified he had “no knowledge” whether those who left CAS for Charter did so due to price, but he was “sure” that “they left for other reasons.” (Trial Tr. Vol. II, 203:20-24.) When asked whether he “believe[d] people left CAS for Charter for many reasons,” Mr. Cooper testified that “I don’t dispute that.” (*Id.*)

<sup>73</sup> (Trial Tr. Vol. II, 335:8-20, 336:10-14; Trial Tr. Vol. I, 221:20 – 222:3.)

<sup>74</sup> (Trial Tr. Vol. II, 205:12-15.)

<sup>75</sup> (*Id.* Vol. II, 205:16-19.)

statements, and despite knowing the names and contact information of each of their former customers, CAS certainly did not put these individuals' motivations into evidence.<sup>76</sup>

The only witness who testified that at least 800 customers left CAS for Charter because of Charter's pricing practices was Mr. Cooper's daughter, Ms. Wilkinson. Yet like the others, she admitted she lacked personal knowledge about why any CAS customer left for Charter.<sup>77</sup> And she admitted she could not know whether it was price – and not something else – that tipped the balance regarding any particular customer's decision to leave CAS for Charter.<sup>78</sup> Her testimony accordingly is analogous to the plaintiff in *McClure*, who “never observed” the vehicles she claimed had caused her injury, and “never indicated which collision [out of three] caused her to hit her head.” *McClure*, 618 S.E.2d at 451. Just as the evidence in *McClure* and *Tolley* failed to establish more than a mere possibility that a defendant's actions were the cause of the claimed injury, CAS failed to do anything beyond speculating that it was Charter's conduct – out of all the possible reasons a CAS customer might have left CAS for Charter – that caused 800 disparate individuals to do so.

The Circuit Court thus committed reversible error when it deferred to the jury on grounds it “could make *the reasonable inference* that the discriminatory rates at issue in this case were the reason customers switched to Charter or did not complete their intended switch to CAS.”<sup>79</sup> The Circuit Court did not attempt to reconcile this ruling with this Court's precedent on causation. This Court should therefore vacate the judgment below.

---

<sup>76</sup> (*Id.* Vol. II, 196:13 – 197:9, 198:4 – 199:5.)

<sup>77</sup> (*Id.* Vol. I, 111:16– 113:7, 127:24 – 131:8.)

<sup>78</sup> (*Id.* Vol. I, 128:16 – 129:2, 129:24 – 131:48.)

<sup>79</sup> (Order, entered Jan. 10, 2010, at 10 (emphasis added).) Compare, e.g., *Mullins v. Barker*, 107 S.E.2d 57, 63, 64 (W. Va. 1959); *Wickline v. Monongahela Power Co.*, 81 S.E.2d 326, 332 (W. Va. 1954).

**IV. THE TORTIOUS INTERFERENCE AND PUNITIVE DAMAGE AWARDS SHOULD BE VACATED.**

The Circuit Court erred in refusing to vacate the judgment as to both Count IV of the Complaint and as to punitive damages. (Order, entered Jan. 20, 2010.) The \$1,446,350 jury award on Count IV (tortious interference) has no support in the record – at all – and can result only from pure speculation. Separately, the Circuit Court should have struck the punitive damages as there was no evidence from which a reasonable jury could find “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference” as is necessary for such an award.<sup>80</sup>

**A. Charter is Entitled to Relief from the Damages Awarded for Tortious Interference.**

The \$1,446,350 jury award on Count IV is unsupported by the record and accordingly can be the result only of the jury’s confusion or speculation. The jury awarded CAS \$1,150,954 in damages on Count III (unduly discriminatory cable rates), an amount that CAS’ expert, Dr. Rizzuto testified represented CAS’ lost past profits.<sup>81</sup> However, neither of the other elements in Dr. Rizzuto’s calculations of damages, which he categorized as CAS’ lost future earnings and its lost opportunities in Parkersburg, reflects a figure of \$1,446,350 in any manner.<sup>82</sup> In fact, the amount the jury awarded for Count IV does not appear anywhere in, and is not otherwise derivable from, Dr. Rizzuto’s damage calculations.

The jury’s tortious interference award does not match CAS’ claimed “lost opportunity” profits or the future profits it claimed at trial. If it was somehow intended to award CAS for

---

<sup>80</sup> *Bower v. Hi-Lad, Inc.*, 609 S.E.2d 895, 909 (W. Va. 2004). (See also Judge’s Charge of Jury at 12-13.)

<sup>81</sup> (Tr. Exs. 162A & 162B; Trial Tr. Vol. II, 307:20 – 308:5.)

<sup>82</sup> (Tr. Exs. 162A-162D; Trial Tr. Vol. II, 315:10-18, 328:14-22 (explaining that total damages CAS claimed was \$922,194 for “lost opportunity profits” resulting from inability to build as much of Parkersburg as intended, and \$3,156,377 for lost future profits in Wood County and Parkersburg).)

either of these categories of damages, it must be vacated because it is unsupported by any proof. As this Court has held, “[i]n proving compensatory damages, the standard or measure by which the amount may be ascertained *must* be fixed with reasonable certainty, otherwise a verdict is not supported and must be set aside.” *Spencer v. Steinbrecher*, 164 S.E.2d 710, 715 (W. Va. 1968), *overruled on other grounds*, *Wells v. Smith*, 297 S.E.2d 872 (W. Va. 1982) (emphasis added). Such an award that is unsupported by proof in the record and that reflects confusion or mistake on the part of the jury must be set aside.<sup>83</sup>

The Circuit Court also should have granted Charter relief from the award of \$1,446,350 on Count IV for the separate reason that there is a significant likelihood it constitutes a grant of double recovery to CAS, which violates well-settled law. Syl. pt. 7, *Harless v. First Nat’l Bank*, 289 S.E.2d 692 (W. Va. 1982). “Double recovery of damages is not permitted,” and a “plaintiff may not recover damages twice for the same injury simply because he has two legal theories.” *Id.* Here, the jury awarded CAS \$1,150,954 on Count III. This award must be deemed a remedy for all past profits CAS claimed it lost, from all 800 customers from whom it claimed it lost those profits, because that is precisely the amount Dr. Rizzuto claimed would make CAS whole for that harm.<sup>84</sup> CAS was thus fully compensated for its lost past profits.

CAS did not claim, or offer proof, that it lost different groups of customers to Charter under Count IV than those it allegedly lost to Charter under Count III. Nor did any proof allow the jury to conclude that CAS lost different sub-groups of customers under Count IV than it

---

<sup>83</sup> See *Kessel v. Leavitt*, 511 S.E.2d 720, 810 (W. Va. 1998) (“[A] verdict of a jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case.”) (internal citations omitted).

<sup>84</sup> (Tr. Exs. 162A & 162B; Trial Tr. Vol. II, 307:20 – 308:5.)

claimed under Count III. In any event, the Circuit Court wrongly allowed the jury verdict to give CAS a double recovery for the same lost past profits from Charter's conduct.

**B. No Conduct on Charter's Part Supports an Award of Punitive Damages.**

To meet its burden to recover punitive damages, CAS was required to show ill will, spite or grudge; unnecessary harshness or severity; misuse or abuse of authority or power; or exploiting a weakness, disability or misfortune of another.<sup>85</sup> CAS did not seek to show most of these (*i.e.*, that Charter had authority or power it could misuse or abuse; any weakness, disability or misfortune of CAS' that could be exploited, etc.) so they could not, obviously, serve as a basis for punitive damages. The remaining bases for punitive damages also were absent, and the Circuit Court thus failed in conducting the detailed and careful review required by, *e.g.*, *Bower*, 609 S.E.2d at 910, and in applying this Court's multifactor test for meaningful and adequate review of punitive damage awards. *See* syl. pts. 3-4, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).

**1. The Circuit Court Erred By Allowing Punitive Damages in an Uncertain Legal Landscape.**

Even assuming a valid cause of action existed, the Circuit Court should have held that punitive damages are wholly inappropriate here. As noted, this is a case of first impression in an area of law this Court described as "a complex maze of interrelating applicable federal and state laws," for which there was "no direct judicial precedent from this or any other jurisdictions" at the relevant time.<sup>86</sup> Consequently, "rules of the road" had yet to be established for "unduly discriminatory" cable rates under § 24D-1-13, which effectively governs both of CAS' claims. To this day, the legal standards governing a claim alleging unduly discriminatory cable rates remain

---

<sup>85</sup> (Judge's Charge of Jury at 13.)

<sup>86</sup> *CAS v. PSC*, 633 S.E.2d at 785, 786 n.14.

unclear. Given the degree of uncertainty that prevailed, Charter's employees had no reason to believe the pricing plans they created were impermissible. *Cf.*, syl. pt. 3, *Jopling v. Bluefield Water Works & Improvement Co.*, 74 S.E. 943 (W. Va. 1912) ("A wrongful act, done under a *bona fide* claim of right, and without malice in any form, constitute no basis for [punitive] damages.") (cited in *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 821 (W. Va. 2009)). As a matter of law, their conduct could not have demonstrated willful indifference or intent to violate legal standards.

Charter did not cross any line of conduct that is recognized or known, and as this Court noted, "[d]ue process demands not only that penalties be abstractly fair, but also that a person not be penalized without reasonable warning."<sup>87</sup> Notably, the PSC and this Court had difficulty defining or agreeing what pricing conduct by Charter in its competition with CAS was or was not allowed by the governing law,<sup>88</sup> and the PSC twice held that Charter should not be punished for this exact same pricing conduct, despite CAS' requests for fines in that forum.<sup>89</sup> This warrants elimination of the punitive damages award under *Garnes* syllabus point 4, which looks to whether criminal sanctions were imposed on a defendant for its conduct or there were other civil actions against the same defendant based on the same conduct, and whether a "clear wrong" has

---

<sup>87</sup> *Garnes*, 413 S.E.2d at 909. CAS' closing all but admitted punitive damages were requested not because the relevant standard was met, but simply "punitive damages are pleaded in this case because they can be." (Trial Tr. Vol. II, 679:19-20.) CAS' counsel merely recounted a few bits of evidence – without explaining how they tied to the relevant standard (*id.* Vol. II, 680:3-24) – and repeated that an award of punitive damages "is not CAS' focus." (*Id.* Vol. II, 681:1-2.)

<sup>88</sup> See *Community Antenna Serv., Inc. v. Charter Commc 'ns, VI, LLC*, No. 01-0646-CTV-C, 2004 W. Va. PUC LEXIS 581 (Feb. 10, 2004), *on recon.*, 2004 W. Va. PUC LEXIS 1438 (Mar. 23, 2004) ("PSC Orders of 2004"); *Community Antenna Serv., Inc. v. Charter Commc 'ns, VI, LLC*, No. 01-0646-CTV-C, 2007 WL 1173768, at \*8 (W. Va. PSC Feb. 14, 2007) ("PSC Order, Feb. 14, 2007"); *CAS v. PSC*, *supra*.

<sup>89</sup> Initially, the PSC refused to assess any penalty against Charter for the same practices that are now the basis of the jury's punitive damages award. PSC Orders of 2004. Subsequently, on remand from this Court, the PSC held, again with respect to the same rates at issue in the jury trial below, that "this is not an appropriate case in which to levy fines," because it "is a case of first impression, and Charter ceased the questioned pricing plans well before the issue was resolved." PSC Order, Feb. 14, 2007, at \*8, \*13.

been committed. *Garnes*, 413 S.E.2d at 909. Yet the Circuit Court’s Post-Trial Order failed to consider Charter’s point that punitive damages should be precluded given the PSC’s determination that fines were inappropriate. *Compare* Charter Post-Tr. Mot. at 4 *with* Post-Tr. Order at 5.

The Circuit Court concluded that because “the statutory prohibition against unduly discriminatory cable rates has been in effect since at least 1990 ... Charter should have been aware that some conduct was prohibited.”<sup>90</sup> But this merely begs the question of what that prohibited conduct was. No doubt, it is possible to imagine conduct that would be so egregious that punitive damages could have been appropriate even without established “rules of the road” on unduly discriminatory rates. It is not Charter’s position that punitive damages can never be awarded, no matter how egregious the conduct, simply because the line between permissible and impermissible conduct has yet to be concisely defined. But where the line is still unclear and all parties conducted themselves similarly – such as in *this* case – punitive damages are inappropriate. In *this* case, Charter did not do anything all that different in nature from what CAS did, from what DBS providers did, or from what Charter itself did with respect to its DBS competitors. Ultimately, everyone in the market engaged in the same kinds of conduct.

**2. The Circuit Court Did Not Properly Carry Out Its Duty to Meaningfully and Adequately Review the Punitive Damages Award.**

Ultimately, the only evidence on punitive damages was a handful of emails from rank-and-file Charter employees involving how it should respond to competitive challenges CAS posed,<sup>91</sup> and any remaining relevant *Garnes* factors militate against such an award.<sup>92</sup> Even

---

<sup>90</sup> (Post-Tr. Order at 5.)

<sup>91</sup> (Post-Tr. Order at 3-5.)

taking a view of the record most favorable to CAS, the sum total of its “evidence” comprised three brief passages in emails – (1) the question whether “[w]asn’t our offer to them to be \$29.95 ad infinitum, or at least until we crush him,”<sup>93</sup> (2) a prediction that if a certain marketing initiative was successful it would be “devastating” to CAS,<sup>94</sup> and (3) an observation that Charter may have to “dance delicately” when talking to existing customers about certain CAS-specific pricing.<sup>95</sup> This innocuous and/or out-of-context language cannot support punitive damages as a matter of law.<sup>96</sup>

The idea of “crushing” or striking a “devastating” blow to business rivals simply reflects a spirit of competition that in no way indicates the kind of malice or intent to harm necessary to award punitive damages. Such “mere intention to prevail” over one’s competitors – even statements that specify a particular rival or manifest an intent to compete vigorously – do not

---

<sup>92</sup> We address here only the *Garnes* factors necessary to conclude the Circuit Court failed in its *Garnes* review and the punitive damage award should be vacated. For example, analyzing the reasonableness of the relationship between the compensatory and punitive awards is not necessary. Syl. pt. 3 *Garnes*. Similarly, on the duration of Charter’s conduct at issue, *see id.*, while the Circuit Court appeared to consider this in the context of Charter’s employees’ intent, it did not rely on the duration of the pricing plans, in of itself, as a factor justifying punitive damages. *See* Post-Tr. Order at 7.

<sup>93</sup> (Tr. Ex. 33 (June 25, 2001 email from Patrick Barclay (then General Manager of Charter’s Parkersburg area systems), to Nikki Parks (then Charter’s Door-to-Door Sales Manager for Parkersburg), Stanley Howell (then Charter’s Director of Marketing for the Mid-Atlantic Region), and Kenny Phillips (then Charter’s Marketing Manager for the Mid-Atlantic Region), with a copy to Charter’s then Billing Coordinator Lisa McNeil, as part of an inquiry regarding the status of the CAS-specific pricing plans, consisting of a sole question posed by Mr. Barclay).)

<sup>94</sup> (Tr. Ex. 17 (Oct. 12, 2000 email from Rick Lucas (then the Group Director of Operations for Charter’s Parkersburg area systems), to Dave Bach (then Charter’s Regional Division Vice President) and Stanley Howell).)

<sup>95</sup> (Tr. Ex. 23 (March 7, 2001 email from Rick Lucas to Nikki Parks and Stanley Howell).)

<sup>96</sup> Whatever inferences these emails allowed the jury to make, they should have been offset by the PSC’s refusal to impose fines on Charter, *supra* at 41 & n. 89, particularly because the jury was unaware of it. *See Peters*, 680 S.E.2d at 817-18. It was thus reversible error for the Circuit Court to not weigh this fact, *id.*, in its *Garnes* review. (*See* Post-Tr. Order at 3-8.)

indicate unlawful purposes, particularly in markets where firms know their competitors and factor them into their business plans.<sup>97</sup> It is especially relevant here that:

[I]n a two-firm market where output is not expanding, a firm can increase its own sales only by stealing them from its only rival. In that case, a query to a jury such as, “did the defendant intend to increase its own business, or did it intend to injure its rival?” is simple nonsense. The intent to sell more cannot be disaggregated from the intent that rivals sell less, and memoranda or other evidence predicting consequences for rivals do not change this fact.<sup>98</sup>

Such sentiments – including, specifically, even a stated intent to “crush” business rivals – thus do not give rise to a cause of action, much less punitive damages.

For example, the Seventh Circuit (relying on Areeda & Hovenkamp) held that competitors seek “to do all the business they can, to *crush their rivals* if they can,” but held that, “without more [this is] too vague a standard in a world where executives may think no further than ‘Let’s get more business.’”<sup>99</sup> Courts cannot countenance the extent to which, in business disputes, “[l]awyers rummage through ... records seeking to discover tidbits that [ ] sound impressive (or aggressive) when read to a jury.” *Rose Acre Farms*, 881 F.2d at 1402. Such “misleading evidence ... reduces the accuracy of decisions,” *id.*, as it did with the jury here in awarding

---

<sup>97</sup> IIIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 805b (3d ed. 2008); *see also, inter alia, Stand Energy Corp. v. Columbia Gas Trans. Corp.*, 373 F. Supp. 2d 631, 642 (S.D. W. Va. 2005) (relying on Areeda & Hovenkamp as an authority on antitrust law).

<sup>98</sup> IIIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 805b. This treatise also recognizes that, for example, should a “defendant[ ] name specific other firms and declare a desire to injure them, reduce their sales, or even destroy them,” it “says little or nothing about whether ... the defendant [is acting in a manner that] is competitive or anticompetitive,” IIIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 738a (3d ed. 2008) (emphasis added), or, by extension, whether a defendant acted out of malice. And Charter certainly did not engage in any conduct rising to the level of “an aggressive, dishonest strategy” or concealment or misrepresentation that this Court recently acknowledged as grounds for punitive damages. *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 884 (W. Va. 2010), *reh’g denied*, 2010 WL 2243936 (W. Va. June 2, 1010).

<sup>99</sup> *A.A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1401 (7th Cir. 1989) (emphasis added). *Rose Acre* further notes that because such competition is “harsh, and consumers gain the most when firms slash costs to the bone and pare price down ... in pursuit of more business,” courts risk “penalizing the ... forces of competition” if they view “vigorous, nasty pursuit of sales as evidence of a forbidden ‘intent.’” *Id.* at 1401-02.

punitive damages.<sup>100</sup> A statement by a Charter employee alluding to a possible intent to “crush” a business rival or deal it a “devastating” blow accordingly does not, in any manner cognizable for allowing punitive damages, relate to malice, ill will, or an intent to cause compensable harm to CAS.<sup>101</sup> Thus, insofar as, *e.g.*, syllabus pt. 3 in *Garnes* requires consideration of the reprehensibility of Charter’s actions, such malice simply did not exist.

Application of other *Garnes* factors also requires vacating the punitive damages award, or at minimum reducing them downward substantially. Insofar as punitive damages should bear a reasonable relationship to the harm caused, or likely to be caused in similar situations,<sup>102</sup> as noted, the “harm” was that cable subscribers in the relevant market – including both those of CAS and of Charter – enjoyed lower prices charged by cable systems operating in a competitive environment. As for seeking to ensure that punitive damages are, at least in part, aimed at deterring future wrong-doing,<sup>103</sup> Charter discontinued approximately seven years ago the pricing practices for which the jury awarded punitive damages here, and did so voluntarily, as the PSC recognized. *See supra* note 89. A substantial punitive damage award cannot motivate Charter to cease a practice it has long since abandoned on its own, and the fact that the company sold its

---

<sup>100</sup> In *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696, 698 (7th Cir. 2006), in construing potential evidence of a “memo ... discuss[ing] ways to ‘shut down’ and ‘kill’ Cigarettes Cheaper!,” the Seventh Circuit held the trial court “sensibly” agreed that the email could serve no purpose, even though, ostensibly, punitive damages would be available. Implicit in this was that, even if admitted, the memo could not support punitive (or any other) damages, and the same is true of the emails at issue here.

<sup>101</sup> Reliance on the notion of “dancing delicately” with respect to Charter’s CAS-specific pricing to support punitives is even more egregious because it did not even pertain to conduct or sentiments directed toward CAS *at all*. This language reflected a need for sensitivity by Charter in dealing with *its own* customers who might want to receive the plans. (Trial Tr. Vol. I, 317:15 – 318:4; *see also* Tr. Ex. 23 (corroborating that the “dance delicately” language in context refers to Charter’s own customers).) Accordingly, this language CAS introduced in hopes – ultimately fulfilled – that a jury could misconstrue it, cannot, by definition, speak to ill will, malice, or any intent required for punitive damages.

<sup>102</sup> Syl. pt. 3, *Garnes*.

<sup>103</sup> *Id.* at 901-02.

operations and assets in West Virginia makes future misconduct in this state impossible. Further, removing any profit gained from the wrongful conduct, and the financial position of Charter,<sup>104</sup> do not support an award of punitive damages. No evidence was adduced regarding what, if any, profit was gained by Charter through the challenged pricing plans. This Court should vacate the punitive damage award to rectify these errors.

### **CONCLUSION AND RELIEF SOUGHT**

The Circuit Court allowed CAS to proceed on its claims in contravention of the Legislature's clear direction that the PSC – not the courts – must decide whether cable rates are “unduly discriminatory” under West Virginia Code § 24D-1-13. In doing so, the Circuit Court eviscerated § 24D-1-22, which directs the PSC to resolve all complaints against cable operators, and allows no role for the courts before the conclusion of a PSC proceeding.

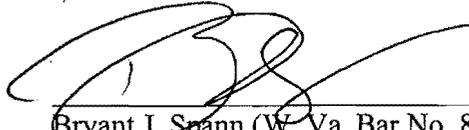
The Circuit Court compounded its fundamental error in recognizing CAS' claims by (1) misapplying the rational basis test, (2) allowing the jury to find causation without proof, and (3) awarding punitive damages in violation of this Court's requirements. For these reasons, this Court should vacate the Circuit Court's judgment and direct it to enter judgment for Charter. In the alternative, this Court should order judgment entered for Charter on Count III of CAS' complaint and, by extension, Count IV as well, and/or should vacate the jury's awards of damages on Count IV and of punitive damages.

---

<sup>104</sup> Syl. pt. 3(3)-(5), *Garnes*.

Respectfully submitted this 12th day of November, 2010.

Robert G. Scott, Jr. (*pro hac vice*)  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, NW, Suite 800  
Washington, DC 20006  
(202) 973-4200  
(202) 973-4499 (fax)



Bryant J. Spann (W. Va. Bar No. 8628)  
Allen Guthrie & Thomas, PLLC  
500 Lee Street, Suite 800  
Charleston, WV 25301  
(304) 345-7250  
(304) 345-9941 (fax)

Attorneys for Defendant

**STATUTORY APPENDIX  
WEST VIRGINIA CODE (SELECTED PROVISIONS)**

**CHAPTER 24. PUBLIC SERVICE COMMISSION.**

**ARTICLE 1. GENERAL PROVISIONS.**

**§ 24-1-2. Definitions.**

Except where a different meaning clearly appears from the context the words “public utility” when used in this chapter shall mean and include any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service. . . .

**ARTICLE 4. VIOLATIONS OF PROVISIONS OF THIS CHAPTER OR ORDERS OF COMMISSION.**

**§ 24-4-7. Damages recoverable for violations.**

Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction. In any such action, the court may compel the attendance of any agent, officer, director or employee of such corporation as a witness and require also the production of all books, papers and documents which may be used as evidence, and in the trial thereof such witnesses may be compelled to testify, but any such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.

**CHAPTER 24D. CABLE TELEVISION.**

**ARTICLE 1. CABLE TELEVISION SYSTEMS ACT.**

**§ 24D-1-13. Rates; filing with public service commission; approval.**

(a) The commission shall require each cable operator to file a schedule of its rates of service on a form and with the notice that the commission may prescribe. The schedule shall be filed with the annual report referenced in section twenty-four of this article.

(b) To the extent permitted by federal law, the commission shall regulate rates to ensure that they are just and reasonable both to the public and to the cable operator and are not unduly discriminatory.

(c) To the extent permitted by federal law, the commission shall regulate charges other than those related to rates for the provision of basic cable service to ensure that they are just and reasonable and not unduly discriminatory.

**§ 24D-1-22. Complaints; violations; penalties.**

(a) Complaints of affected parties regarding the operation of a cable system must be made in writing and filed with the commission. The commission shall take up such complaints with the cable operator complained against in an endeavor to bring about satisfaction of the complaint without formal hearing. The commission shall not consider any complaint involving programming or any other issue that is preempted by federal law.

(b) The commission shall resolve all complaints, if possible informally. No form of informal complaint is prescribed, but the writing must contain the essential elements of a complaint, including the name and address of the complainant, the correct name of the cable operator against which the complaint is made, a clear and concise statement of the facts involved and a request for affirmative relief.

(c) In the event that the commission cannot resolve the complaint to the satisfaction of all parties, the complainant may file a formal request to the commission and the complainant and cable operator shall be afforded all rights including the right of appeal as set forth in chapter twenty-four of this code.

(d) A cable operator may be subject to a fine or civil penalty in accordance with subsection (e) hereof, upon a determination by the commission or court that the cable operator has violated any of the following:

(1) The material terms of its cable franchise; or

(2) Substantial compliance with this article or rules or orders prescribed by the commission.

(e) The commission may fine or obtain civil penalties against a cable operator for each violation of subsection (d) of this section in an amount not less than one hundred dollars nor more than one thousand dollars for each violation. Any penalty assessed under this section is in addition to any other costs, expenses or payments for which the cable operator is responsible under other provisions of this section.

...  
**§ 24D-1-23. Other duties of commission; suit to enforce chapter.**

...  
(e) The commission or other aggrieved party may institute, or intervene as a party in, any action in any court of law seeking a mandamus, or injunctive or other relief to compel compliance with this chapter, or any rule, regulation, or order adopted hereunder, or to restrain or otherwise prevent or prohibit any illegal or unauthorized conduct in connection with this article.

\* \* \*

**§ 24D-1-26. Cable television industry not regulated as a utility.**

No provision of this article may be construed to grant the commission the power to regulate the cable television industry as a utility.

\* \* \*

**CERTIFICATE OF SERVICE**

I, Bryant J. Spann, certify that I caused a copy of the foregoing Petition for Appeal to be served this 12th day of November, 2010, by electronic mail and postage-prepaid, first class United States mail on the following counsel of record to Plaintiff/Appellee Community Antenna Service, Inc.:

Robert W. Full  
Goodwin & Goodwin  
201 Third Street  
Parkersburg, West Virginia 26101  
*Counsel for Community Antenna Service, Inc.*



---

Bryant J. Spann (WV Bar #8628)  
ALLEN GUTHRIE & THOMAS, PLLC  
500 Lee Street, Suite 800  
Charleston, West Virginia 25301  
(304) 345-7250