

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35703

COMMUNITY ANTENNA SERVICE, INC.,  
Plaintiff below/Appellee,

vs.

CHARTER COMMUNICATIONS VI, LLC,  
Defendant below/Appellant.

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

**APPELLEE'S BRIEF**

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## I.

### **OMISSIONS AND INACCURACIES OF APPELLANT'S STATEMENT OF THE CASE**

Appellant's discussion of this Court's decision in *Community Antenna Service, Inc. v. Public Service Commission of West Virginia and Charter Communications VI, LLC*, 219 W.Va. 425, 633 S.E. 2d 779 (2006)<sup>1</sup> is incomplete in that it ignores the authority and reasoning upon which such decision is based, and which support the rulings of the Circuit Court of Wood County of which Appellant ("Charter") complains in Section III.A. of Appellant's Brief. Such omissions are addressed by Appellee ("CAS") in its argument in Section V.C.1. herein. CAS additionally takes issue with numerous characterizations of the evidence throughout Appellant's Brief, and CAS addresses the same throughout its Additional Statement of Facts and Argument.

## II.

### **ADDITIONAL STATEMENT OF FACTS**

The active litigation and trial of this case followed this Court's decision in *CAS v. PSC, supra*. As Charter correctly asserts, the litigation and trial of this case involve the same pricing practices as were at issue in such decision upon proceedings before the Public Service Commission of West Virginia. As Charter notes and the record reflects those pricing plans, known as "CAS buy-back plans," were in effect from 2000 through 2001, 2002 and into early 2003.<sup>2</sup>

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<sup>1</sup> For purposes of brevity and consistency with Charter's citation the style of such case is hereinafter cited as *CAS v. PSC*.

<sup>2</sup> The proceeding before the Public Service Commission occurred in June, 2002 and the evidence in this case included both instances of the offering and sale of such plans adduced before the Commission and those occurring thereafter into early 2003 pursuant to the CAS buy-back plans. As Charter also correctly notes additional pricing

Accordingly, many of the facts of this case are redundant of the facts of the proceeding before the Public Service Commission. Charter was successful in opposing CAS' motion on the issue of collateral estoppel (Order dated November 21, 2007) and CAS again adduced evidence of individual sales of CAS buy-back plans during the period at issue in such Public Service Commission proceeding and for the period thereafter into early 2003. The parties have been in agreement throughout both such Public Service Commission proceeding and this case that 47 U.S.C. § 551 precludes the disclosure of, and requires the redaction of, personally identifiable information of their respective customers, i.e., names, addresses, telephone numbers, given the nature of the documentation and information involved, and the parties have proceeded accordingly throughout both proceedings. Additionally, Charter was successful on its motion in limine to obtain the exclusion from the trial of this case of CAS' work orders for disconnecting of its customers and the reasons noted thereon that at least some of those customers expressed and summaries thereof. (Order dated November 21, 2007.) Accordingly, CAS' evidence at trial, which identifies the nature of such CAS buy-back plans and the specific individual sales of such CAS buy-back plans, consisted of Charter's own work orders of individual sales, largely door-to-door salesmen's work orders, and other records and data, both hard copy and electronic, including customer histories and billing records, summaries and spreadsheets thereof and correspondence, produced by Charter pursuant to discovery requests seeking evidence of the nature and sales of such CAS buy-back plans and summaries, studies and spreadsheets thereof prepared by CAS and its expert witnesses, admitted into evidence either upon the stipulation of

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plans offered and sold beginning in 2003 thereafter remain the subject of a pending proceeding before the Public Service Commission, but are not at issue in this case, having been excluded by ruling of the Circuit Court on Charter's motion in limine by Order dated November 21, 2007. However, the adjudication before the Commission concerning the sales at issue in this case is complete. (Appellant's Brief, at 5).

the parties or without objection (Trial Exhibits 1-49; 153-160K), the testimony of former Charter employees, Kurtis Leachman (Trial Transcript, Vol. I, 233 – 282), Richard Lucas (Trial Transcript, Vol. I, 282 – 362), David Laughery (Trial Transcript, Vol. II-A, 471 – 511; 568 – 574), and Patrick Barclay (Trial Transcript, Vol. II-A, 512 – 526), throughout their testimony, regarding the nature and function of such work orders and the purpose and design of the CAS buy-back plans. The tedious process of identifying and verifying sales of CAS buy-back plans does not lend itself to “sound bites” from the trial transcript, and is detailed throughout the trial testimony of Lisa Wilkinson, Business Manager of CAS (Trial Transcript, Vol. I, 3 – 154), Keith Morgan, Computer Systems Expert and IT Consultant with Arnett & Foster, retained by CAS in this case (Trial Transcript, Vol. I, 155 – 231), and Dr. Ronald J. Rizzuto, Professor in the School of Finance in the Daniels College of Business at the University of Denver and eminent expert in the cable television industry (Trial Exhibit 89; Trial Transcript, Vol. II, 245-256; 336), retained by CAS in this case, and who also offered evidence of CAS’ damages claimed as a result of Charter’s pricing conduct (Trial Transcript, Vol. II, 245 – 377), who reviewed, analyzed, verified and summarized the records and data Charter provided, and the stipulations of the parties. The result of such process identified 800 sales of CAS buy-back plans during the relevant period. Charter cross-examined Lisa Wilkinson only questioning a very limited number of those 800 as sales of the CAS related plans, and both Mr. Morgan and Dr. Rizzuto testified in the course of their testimony to the reliability and conservative nature of such determination. As all such evidence reflects, the CAS buy-back plans were sold to all CAS customers or those Charter customers stating an intent to leave Charter to subscribe to CAS and were not available to

customers without some connection to CAS. (Stipulations; testimony of former Charter employees and exhibits referenced above).

As the lengthy, involved documentary evidence and testimony reflects, the essence of the CAS buy-back plans which Charter offered and sold was the offering and sale to CAS' customers in the areas where the parties competed, or then current Charter customers who threatened to leave to take CAS' cable service, of various pricing plans for Charter's cable service at reduced rates for periods of time, with cash rebates, credits, forgiveness of debt, and the extension of reduced pricing thereafter to such customers to meet or beat CAS' prices, and which were lower than Charter's prices for comparable service for its customers who did not receive CAS buy-back pricing. The result was that Charter customers who left to take CAS' service, or threatened to do so, and then purchased service through a CAS buy-back plan, received Charter service at rates lower, and sometimes significantly lower, than other Charter customers who did not leave or threaten to leave for CAS. Included among the CAS buy-back plans was a plan including basic tier service, expanded basic tier service and the digital MVP package for a six month term for a rate of \$9.95 per month (Stipulations; testimony of former Charter employees and exhibits referenced above; e.g. Trial Transcript, Vol. I, 287-296). Another prominent CAS buy-back plan was a plan which included basic tier service and expanded basic tier service for a contract term of twelve (12) months at a stated rate of \$29.95 per month, but with a \$200.00 check in payment from Charter to the subscriber, or a \$200.00 credit over the term of the contract (Stipulations; testimony of former Charter employees and exhibits referenced above; e.g. Trial Transcript, Vol. I, 287-296). The net effect of such \$200.00 check or credit is that subscribers to such plans paid only \$13.28 per month for basic

and expanded basic service during the initial twelve-month term of such contracts, which pricing was considerably lower than CAS' pricing of comparable service. (Trial Exhibits 70, 164.) Some subscribers were offered to extend such service after the initial twelve-month period for the same \$29.95 per month rate indefinitely, and it was Charter's practice to extend such subscribers after the initial terms of the plan at rates which would continue to "meet or beat" CAS' price, in any event and which as noted were lower than the rates charged by Charter to its customers not receiving the CAS buy-back pricing. (Trial Exhibit 50, Stipulations; testimony of former Charter employees and exhibits referenced above; e.g. Trial Transcript, Vol. I, 287-296) Additionally, other CAS buy-back plans with additional enhancements in services were sold at reduced rates and with the \$200.00 check or credit in addition. (Stipulations; testimony of former Charter employees and exhibits referenced above; e.g. (Trial Transcript, Vol. I, 287-296). As Richard Lucas, Charter's Group Director of Operations at the time such campaign was instigated, testified, the purpose of such pricing was to entice CAS customers back to Charter, the incumbent carrier from which CAS had acquired customers upon its entry into Parkersburg or keep those who threatened to leave for CAS from doing so. Trial Transcript, Vol. I, 359/7-14)

No evidence whatsoever is introduced which demonstrates or even references any difference in the economic benefits to be derived by Charter from the customers or potential customers to whom CAS buy-back plans were offered and/or sold and those to be derived from the customers or potential customers to whom such plans were not available. Indeed, the evidence, adduced on such issue, including in CAS' case in chief, through the testimony of former Charter employees Richard Lucas and David Laughery, is to the contrary. (Trial Transcript, Vol. I, 361/22-24, 362/1-17; Trial Transcript, Vol. II, 573/8-24, 574/1-4.) In contrast

are CAS' practices regarding its true introductory and promotional offers universally applied and limited in duration, and rates charged to apartment building tenants, which were based upon cost and technological differences, all accordingly justified by differences in economic benefit to CAS as the testimony of both Mr. Cooper and Mr. Lucas describes and explains (e.g. Trial Transcript, Vol. II, 117/15-24, 118/1-24, 119/1-24, 120/1-3; 236/1-24, 237/1-24, 238/1; Trial Transcript, Vol. I, 360/8-24.), and which completely contrary to Charter's continued assertions are in no way similar to Charter's CAS buy-back tactics.

Contrary to Charter's assertions that CAS was not harmed, Dr. Rizzuto calculated CAS' compensatory damages, determining to a reasonable degree of certainty that CAS had suffered three distinct categories of injuries as a result of Charter's discriminatory pricing conduct: (i) \$1,150,954 for lost past profits from the customers CAS lost to CAS buy-back plans in the areas where the parties competed, (ii) \$992,194 for lost business opportunity profits for those areas of Parkersburg in which CAS was unable to extend and build cable due to cash flow problems resulting from its loss of customers to Charter's CAS buy-back plans, and (iii) \$3,156,377 for lost future profits, a total of \$5,299,525. (Trial Transcript, Vol. II, 307, 3008, 315, 328; Trial Exhibits 162A, 162B, 162C, 162D)

### III.

#### **CONCISE STATEMENT TO MEET ALLEGED ERRORS**

CAS opposes Charter on all issues Charter raises and summarizes such opposition as follows. In regard to the issue of a private cause of action, Charter ignores the import of 47

U.S.C. 543(e) which excludes regulation of discriminatory cable rates and charges from the scheme of federal cable law. Accordingly, Charter's argument that no implied private cause of action is afforded by federal cable law is misplaced. Charter also argues against the clear, unambiguous West Virginia statutory provisions which expressly provide a right to bring a state action for damages, such as CAS has done in this case, and case law pursuant thereto.

Regarding the rational basis test applied by the Circuit Court, Charter relies on the body of law regarding the rational basis for legislative enactments and other governmental classifications, which afford the same great deference without factual support and a presumption that the same are rational, which in turn affects the burden of proof and determination of the same as a matter of law in such cases, none of which deference or presumptions would be applicable to Charter in this civil action for damages. In doing so Charter also ignores the impetus for this Court's remand in *CAS v. PSC*, *supra* and the authority this Court discussed and relied upon therein, as well as ignoring the jurisprudence in West Virginia for proceedings on matters in the nature of affirmative defenses and the shifting burden of proof in regard thereto. Additionally, Charter's narrow proximate cause argument ignores the nature, function and competence of circumstantial evidence, generally and as adduced in this case, and the function of a jury in considering such evidence.

Charter has waived its arguments regarding both the jury's damages awarded on CAS' tortious interference claim and for a review of at least most of the *Garnes* factors in regard to the jury's punitive damages award. Even in the absence of such waiver, the awarding of economic, compensatory damages to CAS on its tortious interference claim does not constitute double recovery, given the additional elements to the claim of tortious interference, the differing

elements and categories of economic, compensatory damages to CAS to which Dr. Rizzuto testified, and the total amount of compensatory damages awarded being substantially less than the total to which he testified. Likewise, the Circuit Court conducted an appropriate *Garnes* review. Additionally, Charter's argument that punitive damages were not appropriate relies upon in part inapplicable federal antitrust authority and a treatise regarding the same and seeks to ignore the role of the jury.

For all of such reasons, as fully discussed below, Charter's arguments fail and the judgment of the Circuit Court of Wood County should be affirmed.

#### IV.

#### **AUTHORITIES RELIED UPON**

##### **West Virginia Supreme Court of Appeals**

*Community Antenna Service, Inc. v. Public Service Commission of West Virginia, and Charter Communications, VI, LLC*, 219 W. Va. 425, 633 S.E. 2d 779 (2006)

*Hicks ex rel. Saus v. Jones*, 217 W. Va. 107, 617 S.E.2d 457 (2005)

*Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E. 2d 807 (2002)

*Peters v. Rogers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E. 2d 791 (2009)

*Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E. 2d 561, (1996)

*Pipemasters, Inc. v. Putnam Cty. Comm'n*, 218 W. Va. 512, 625 S.E.2d 274, (2005)

*Reynolds v. City Hospital, Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000)

*Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983)

*Stenger v. Hope Natural Gas Co.*, 141 W. Va. 347, 90 S.E.2d 261 (1955)

*Hedrick v. Grant County Pub. Serv. Dist.*, 209 W.Va. 591, 550 S. E. 2d 381 (2001)

*State ex rel. Bell Atlantic-W. Va. v. Ranson*, 201 W.Va. 402, 497 S. E. 2d 755 (1997)

*Carter v. Willis*, 145 W.Va. 779, 117 S. E. 2d 594 (1960)

*Charleston Apts. Corp. v. Appalachian Elec. Power Co.*, 118 W.Va. 694, 192 S. E. 294 (1937)

*Natural Gas Co. of W. Va. v. Sommerville*, 113 W.Va. 100, 166 S. E. 852 (1932)

*Wheeling Steel Corp. v. PSC*, 90 W.Va. 74, 110 S. E. 489 (1922)

*State ex rel. The Chesapeake & Potomac Tel. Co. of W. Va. v. Ashworth*, 190 W.Va. 547, 438 S. E. 2d 890 (1993)

*State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E. 2d 353 (1959)

*Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 609 S.E. 2d 895 (2004)

*Shepherdstown Observer, Inc. v. Maghan*, 2010 WL 3730337 (W.Va. Sept. 23, 2010)

*Belt v. Cole*, 172 W. Va. 383, 305 S. E. 2d 340 (1983)

*State, ex rel. Simpkins v. Harvey*, 172 W. Va. 312, 305 S. E. 2d 268 (1983)

*Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S. E. 2d 757 (1980)

*Jenkins v. J. C. Penney Casualty Ins. Co.*, 167 W. Va. 597, 280 S.E. 2d 252 (1981)

*Reed v. Phillips*, 192 W. Va. 392, 452 S.E. 2d 708 (1994)

*Addair v. Bryant*, 168 W. Va. 306, 284 S.E. 2d 374 (1981)

*Voorhees v. Guyan Machinery Co.*, 191 W. Va. 450, 446 S.E. 2d. 672 (1994)

*State v. Daniel*, 182 W. Va. 642, 391 S.E. 2d 90 (1990)

*Carper v. Kanawha Banking & Trust Company*, 157 W.Va. 477, 207 S.E.2d 897 (1974)

*Shepherdstown Observer, Inc. v. Maghan*, 2010 WL 3730337 (W.Va. Sept. 23, 2010)

*Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W. Va. 210, 314 S.E. 2d. 166 (1983)

*Marcus v. Holley*, 217 W. Va. 508, 618 S. E. 2d 517 (2005)

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

*Cale v. Napier*, 186 W. Va. 244, 412 S.E. 2d 242 (1991)

*Holbrook v. Poole Associates, Inc.*, 184 W. Va. 428, 400 S.E. 2d 863 (1990)

*Anderson v. Chrysler Corporation.* 184 W. Va. 641, 403 S.E. 2d 189 (1991)

*Moore v. Tearney*, 62 W. Va. 72, 57 S.E. 263 (1907)

*Nutter v. Owens-Illinois, Inc.*, 209 W. Va. 608, 550 S.E. 2d 398 (2001)

*Brady v. Deals on Wheels, Inc.*, 208 W. Va. 636, 542 S.E. 2d 457 (2000)

*Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E. 2d 152 (1995)

*Oates v. Continental Ins. Co.*, 137 W. Va. 501, 72 S. E. 2d 886 (1952)

*Tudor v. Charleston Area Medical Center, Inc.* 203 W.Va. 111, 506 S.E.2d 554 (1997)

*Adams v. Sparacio*, 156 W. Va. 678, 196 S. E. 2d 647 (1973)

*Tolley v. ACF Industries, Inc.*, 212 W. Va. 548, 575 S. E. 2d 158 (2002)

*Spencer v. McClure*, 217 W. Va. 442, 618 S. E. 2d 451 (2005)

*Mullins v. Barker*, 144 W. Va. 92, 107 S.E. 2d 67 (1959)

*Wickline v. Monongahela Power Co.*, 139 W. Va. 732, 81 S.E. 2d 326 (1954)

*Combs v. Hahn*, 205 W. Va. 102, 516 S.E. 2d 506 (1999)

*Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E. 2d 692 (1982)

*Stump v. Ashland, Inc.*, 201 W.Va. 541, 499 S.E.2d 41 (1997)

*Reed v. Wimmer*, 195 W. Va. 199, 465 S.E.2d 199 (1995)

*Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895)

*C.W. Development, Inc. v. Structures, Inc. of West Virginia*, 185 W.Va. 462, 408 S.E. 2d 41 (1991)

*Perrine v. E.I. duPont de Nemours and Co.*, 225 W.Va. 482, 694 S.E. 2d 815 (2010)

*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E. 2d 897 (1991)

### **West Virginia Statutes and Rules**

W. Va. Code §§ 24D-1-13(b), (c)

W.Va. Code §24D-1-1

W. Va. Code § 24D-1-22(c)

W. Va. Code § 24D-1-23(e)

W. Va. Code § 24-4-7

W. Va. Code § 55-7-9

W. Va. Code § 24D-1-22(d)

W. Va. Code § 5-18-16 (1990) (repealed)

### **Other Authority**

47 U.S.C. § 551

47 U.S.C. § 543(e)

47 U.S.C. § 521, *et seq.*

47 U.S.C. § 543(d)

*Pennsylvania v. Comcast Corp.*, 1994 WL 568479 (E.D. Pa. 1994)

*Kentucky ex rel. Gorman v. Comcast Cable of Paducah, Inc.*, 881 F. Supp. 285 (W.D. Ky. 1995)

*Mallenbaum v. Adelpia Comms. Corp.*, 1994 WL 724981 (E.D. Pa. 1994), *aff'd*, 74 F. 3d 465 (3<sup>rd</sup> Cir 1996)

*Florida v. Comcast Corp.*, 1994 WL 908873 (N.D. Fla. 1994)

47 U.S.C. § 552(c)(1)

*Adventura Cable Corp. v. Rifkin*, 941 F. Supp. 1189 (S.D. Fla. 1996)

*Stand Energy Corporation v. Columbia Gas Transmission Corporation*, 373 F. Supp. 2d 631 (S.D. W.Va. 2005)

*In The Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 F.C.C.R. 5631, 5896-5902 (1993)

47 C.F.R. § 76.983

*FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993)

*Railroad Co. v. Commission*, 162 U.S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935 (1896)

*Cleckley, Handbook on Evidence* (Fourth Edition), Vol. 2, §12-3(a)(2)

*AmJur 2d, Evidence*, §§174, 177

*Cavcon, Inc. v. Endress + Hauser, Inc.*, 557 F.Supp.2d 706 (S.D. W.Va. 2008)

*Cleckley, Handbook on Evidence* (Fourth Edition), Vol. 1 §§1-2(F)(2),(3).

*Edwards v. Hobson* 189 Va. 948, 54 S.E.2d 857 (1949)

22 *AmJur2d, Damages*, §36

*R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F. 3d 690 (7<sup>th</sup> Cir. 2006)

V.

ARGUMENT

A.

Standard of Review

To the extent that this appeal presents a review of the Circuit Court's ruling denying a motion for summary judgment in regard to the issues raised in Section II of Appellant's Brief, such issues are reviewed *de novo*. See *Hicks ex rel. Saus v. Jones*, 217 W. Va. 107, 111, 617 S.E.2d 457, 461 (2005) (“[W]hen review of a circuit’s court’s denial of summary judgment is properly before this Court, we examine anew the circuit court’s ruling. ‘This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.’ Syllabus Point 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E. 2d 807 (2002).” To the extent that this appeal presents a review of the Circuit Court’s ruling on Charter’s post trial motions herein and questions of law or interpretation of a statute this Court reviews the same as follows:

1. “The appellate 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) of the *West Virginia Rules of Civil Procedure* (1998) is *de novo*.” Syllabus point 1, of *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E. 2d 16 (2009).
2. “[T]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court’s ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.’ Syl. pt. 4, in part, *Sanders v. Georgia-Pacific Corp.* 159 W. Va. 621, 225 S.E. 2d 218 (1976).” Syllabus point 2, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.* 223 W. Va. 209, 672 S.E. 2d 345 (2008).
3. “The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is

the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.” Syllabus point 1, *Wickland v. American Travellers Life Insurance Co.*, 204 W. Va. 430, 513 S.E. 2d 657 (1998).

4. “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E. 2d 415 (1995).

Syl. pts. 1, 2, 34, *Peters v. Rogers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E. 2d 791 (2009).

This Court has additionally held as follows:

...  
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.

...  
Of course, our review of the legal propriety of the trial court’s instructions is *de novo*.

*Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 62, 479 S.E. 2d 561, 572 (1996) (Internal citations omitted).

“16. When reviewing an award of punitive damages in accordance with Syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E. 2d 897 (1991), and Syllabus point 5 of *Alkire v. First National Bank of Parsons*. 197 W. Va. 122, 475 S.E. 2d 122 (1996), this Court will review *de novo* the jury’s award of punitive damages and the circuit court’s ruling approving, rejecting, or reducing such award.

Syl. pt. 16, *Peters, supra*.

“Questions of fact resolved by the jury will be accorded great deference.”

*Pipemasters, Inc. v. Putnam Cty. Comm’n*, 218 W. Va. 512, 625 S.E.2d 274, 280 (2005).

In determining whether there is sufficient evidence to support a jury verdict, the Court should (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party’s evidence tends to prove; and (4) give

to the prevailing party of all favorable inferences which reasonably may be drawn from the facts proved.

Syl. Pt. 4, *Reynolds v. City Hospital, Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000); Syl. Pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983). “On appellate review of a case wherein a jury verdict has been rendered, it is the duty of the reviewing court to treat the evidence as being favorable to the verdict ‘and give it the strongest probative force of which it will admit . . . [s]o long as there is nothing so inherently or otherwise manifestly improbable in the character of the evidence as to justify the court ignoring it.’” Syl. Pt. 4, *Stenger v. Hope Natural Gas Co.*, 141 W. Va. 347, 90 S.E.2d 261 (1955) citing *Roberts v. Toney*, 100 W. Va. 688, 693, 131 S.E.2d 552, 553 (1926).

## B.

**Circuit Court Did Not Create A Private Cause Of Action, But Followed Clear And Unambiguous Provisions Of Law And Long Standing Precedent In Permitting CAS’ Claims For Damages Against Charter To Proceed**

### 1.

**Charter Mischaracterizes The Nature Of CAS’ Claim, And Its Discussion And Argument Of Federal Regulatory And Case Law Is Completely Inapplicable.**

CAS’ cause of action rests solely upon violation of West Virginia law. The federal statute, 47 U.S.C. § 543(e), enables states to prohibit discrimination in cable rates and charges such as West Virginia has done by the adoption of its statutory scheme. That federal statute provides as follows:

(e) Discrimination; services for the hearing impaired. Nothing in this title [47 USCS §§ 521 et seq.] shall be construed as prohibiting any Federal agency, State, or a franchising authority from—

(1) prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.

47 U.S.C. § 543(e). Pursuant to such enablement, West Virginia law provides as follows:

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

...

(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. Acts 1999, c. 224, eff. 90 days after March 13, 1999.

W. Va. Code §§ 24D-1-13(b), (c). 47 U.S.C. § 543(e) does not prohibit discrimination in rates and charges. What it does, subject to certain limited exceptions not applicable to this discussion, is remove the practice of such discrimination and the ability to prohibit it from the restrictions of title 47 U.S.C. § 521, *et seq.* and in turn the regulatory scheme it begets and upon which Charter relies in trying to argue that no implied right of a private action exists. Charter's argument that no right of such action can be implied under federal cable law and regulation, particularly that related to 47 U.S.C. § 543(d), and the case authority Charter has cited, is completely inapposite. No such right is claimed by CAS or was relied upon by the Circuit Court. The absence of a

federal cause of action does not preclude a state cause of action as Charter argues, but rather enhances the argument that a state cause of action exists, as hereinafter discussed.

Charter has cited federal cases which have held for the most part that no federal private cause of action exists under certain provisions of federal cable law. CAS' claim is based upon, and permissibly may be based upon, state law violations. Many of the very cases which Charter has cited, while finding no federal cause of action under certain provisions of federal law, often in the context of whether federal question jurisdiction exists, nevertheless recognize, either explicitly or implicitly, that the right of a state law cause of action upon the conduct alleged is not precluded by lack of a federal remedy. See, e.g. *Pennsylvania v. Comcast Corp.*, 1994 WL 568479 (E.D. Pa. 1994); *Kentucky ex rel. Gorman v. Comcast Cable of Paducah, Inc.*, 881 F. Supp. 285 (W.D. Ky. 1995); *Mallenbaum v. Adelpia Comms. Corp.*, 1994 WL 724981 (E.D. Pa. 1994), *aff'd*, 74 F. 3d 465 (3<sup>rd</sup> Cir 1996). See also *Florida v. Comcast Corp.*, 1994 WL 908873 (N.D. Fla. 1994). *Kentucky ex rel. Gorman, supra*, and *Florida v. Comcast Corp., supra*, involved a cited provision of the federal cable enactments which, in a fashion similar to § 543(e), provided that “ ‘[n]othing in this subchapter [title] shall be construed to prohibit any state or any franchising authority from enacting or enforcing any consumer protection law to the extent not specifically preempted by this subchapter [title]’ ”, 47 U.S.C. § 552(c)(1), and the remand of such cases to state court for litigation of viable claims under such states' consumer protection laws. Even the decision in *Adventura Cable Corp. v. Rifkin*, 941 F. Supp. 1189 (S.D. Fla. 1996), prominently cited by Charter, and which, *inter alia*, included state common law claims of tortious interference of business relationship, did not speak to such state law claims which were

not the subject of the motion to dismiss therein, but only the attempt to pursue an implied federal cause of action pursuant to provisions of the federal statute.

As § 543(e) clearly and unambiguously provides, “nothing” restricts the states from prohibiting discrimination such as that which is the subject of this case, and West Virginia has done just that. The effect is the exact opposite of federal preemption. The prefatory language of W. Va. Code §§ 24D-1-13(b) and (c), “[t]o the extent permitted by federal law...” and the admonition of §24D-1-1 that the purpose of the article is to achieve the goals stated therein “by all available means not in conflict with federal law, rules or regulations,” including “to establish just, reasonable and nondiscriminatory rates and charges for the provision of cable service . . .” are satisfied and defined by 47 U.S.C. §543(e).<sup>3</sup>

## 2.

**This Private Cause Of Action For Damages Is Expressly Authorized By State Law, And Is Not In Conflict With The Precedent Of This Court. Although Our Test For An Implied Private Cause Of Action Is Also Satisfied, Resort To The Same Is Unnecessary.**

The provisions of the West Virginia Code relevant to this discussion are as follows:

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

...

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<sup>3</sup> Charter’s argument is akin to a preemption argument, at least in so far as it relates to private state law causes of action. However, even if such argument is asserted, reference is made to *Stand Energy Corporation v. Columbia Gas Transmission Corporation*, 373 F. Supp. 2d 631 (S.D. W.Va. 2005), cited by Charter in another context, wherein the Court held that Plaintiff’s state law causes of action were not preempted by the federal Natural Gas Act and the regulatory authority of the Federal Energy Regulatory Commission (“FERC”) because such claims did not “directly affect FERC’s authority to ‘regulate comprehensively’ nor do they present ‘the prospect of interference with federal regulatory power.’ . . . Instead, Plaintiffs simply seek damages for the business they contend they lost as a result of Defendant’s actions.” *Id.*, at 640. Such rationale likewise applies to CAS’ state law claims in this case.

(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. (Emphasis supplied.)

...

**§ 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. (Emphasis supplied.)

**§ 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....

This Court has long recognized the right of injured parties to pursue actions for damages for injuries in the courts of this State under W.Va. Code § 24-4-7, the concurrent jurisdiction of the Public Service Commission and courts of this State, and limited jurisdiction and authority of the Public Service Commission, and over the years a number of plaintiffs have availed themselves of §24-4-7 on various legal theories seeking various damages. See *Hedrick v. Grant County Pub. Serv. Dist.*, 209 W.Va. 591, 550 S. E. 2d 381 (2001) (action for compensatory damages for lost revenues and undue delay caused by defendant's failure to extend water service at a reasonable cost and for punitive damages); *State ex rel. Bell Atlantic-W. Va. v. Ranson*, 201 W.Va. 402, 497 S. E. 2d 755 (1997) (underlying class action seeking antitrust and other damages for telephone company's fraudulent misconduct with respect to selling residential wire maintenance

plans); *Carter v. Willis*, 145 W.Va. 779, 117 S. E. 2d 594 (1960) (action against public contractor for personal and property damage injuries occasioned by failure to provide sufficient water); *Charleston Apts. Corp. v. Appalachian Elec. Power Co.*, 118 W.Va. 694, 192 S. E. 294 (1937) (action for recovery of alleged excess in rates); *Natural Gas Co. of W. Va. v. Sommerville*, 113 W.Va. 100, 166 S. E. 852 (1932) (underlying action to recover illegal charges); *Wheeling Steel Corp. v. PSC*, 90 W.Va. 74, 110 S.E. 489 (1922), (discussing availability of breach of contract action to recover for excess charges). Unlike the facts of *State ex rel The Chesapeake & Potomac Tel. Co. of W. Va. v. Ashworth*, 190 W.Va. 547, 438 S.E.2d 890 (W.Va. 1993), which Charter cites for a contrary proposition, CAS' administrative remedies for the actions of Charter which remain the subject of this civil action were exhausted (Appellant's Brief, at 3, 4, 5), although such exhaustion is not necessarily a predicate to a civil action, under the primary jurisdiction doctrine or otherwise, as the above cited authority establishes.

The language of § 24D-1-22(c) is clear and unambiguous in incorporating "all rights" of chapter twenty-four. Accordingly, resort to rules of construction are unnecessary. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5, *State v. General Daniel Morgan Post No. 548*, V.F.W., 144 W. Va. 137, 107 S.E. 2d 353 (1959)." Syl. pt. 7 *Bowyer v. Hi-Lad, Inc.* 216 W. Va. 634, 609 S.E. 2d 895 (2004). Charter seeks to limit the application of §24D-1-22(c) by arguing the maxim of *noscitur a sociis* and citing *Shepherdstown Observer, Inc. v. Maghan*, 2010 WL 3730337 (W.Va. Sept. 23, 2010). However, in doing so Charter ignores the continued discussion in that opinion, upon which

the Court's decision was based, concerning the interpretation of the associated word "includes," used in the statute at issue in that case, and "including," used in the statute at issue in this case, as follows:

We have previously recognized that the term "includes" is not exclusive. In *Davis Memorial Hospital*, 222 W.Va. at 684,671 S.E.2d at 689, we recognized that "[t]he term 'includ[es]' in a statute is to be dealt with as a word of enlargement and this is especially so where . . . such word is followed by 'but not limited to' the illustrations given." (Citations omitted). In ascribing a "common, ordinary and accepted meaning," Syllabus Point 1, *Miners in General Group v. Hix, supra*, to the word "includes," we have also considered the meaning accorded that word in other legislative enactments where it has been defined by the Legislature. We discussed one such example of this latter consideration in *Apollo Civic Theatre, Inc. v. State Tax Commissioner*, 223 W.Va. 79, 87, 672 S.E.2d 215, 223 (2008), citing *W.Va. Code*, 11-15-2(9)[2003], where we noted that the Legislature had given the following definition to the word "includes":

"Includes" and "including," when used in a definition contained in this article, does not exclude other things otherwise within the meaning of the term being defined.

*Id.*, at 4, 5. This Court in that case followed such principles in holding "the word 'includes' be given its common, ordinary and accepted meaning, which is that of a word of enlargement," *Id.*, at 5, and to the extent any interpretation is required in this case, such meaning of "including" as a word of enlargement is also applicable.

Charter's argument that West Virginia Code § 24-4-7 only applies in cases involving public utilities, and therefore does not have application to cable operators, despite the provisions of § 24D-1-22(c) affording "all rights including the right of appeal as set forth in chapter twenty-four of this code," overlooks the fact that the entirety of chapter twenty-four applies to public utilities. Accordingly, to follow Charter's reasoning, the reference in § 24D-1-

22(c) would be rendered meaningless. Such is contrary to the black letter principles of West Virginia law requiring meaning to be given to all provisions of a statutory scheme, that no part thereof be rendered meaningless and the presumption that those who drafted and adopted statutes were familiar with all existing law on the subject, and in this instance those which they incorporated by the cited reference in W. Va. Code § 24D-1-22(c). *Belt v. Cole*, 172 W.Va. 383, 305 S.E.2d 340 (1983); *State, ex rel. Simpkins v. Harvey*, 172 W. Va. 312, 305 S. E. 2d 268 (1983).

Charter also argues that W. Va. Code §24D-1-23(e) only applies to equitable remedies. However, the language of such statute underlined for emphasis in this discussion would seem to belie such argument.

The West Virginia Code §55-7-9 providing in that “[a]ny person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages” reflects the Legislature’s deference to private causes of action for damages, even though other remedies, including administrative ones, are available, such as W.Va. Code §24D-1-22(d) in providing for fines or civil penalties.

Additionally, this Court has provided the following four-part test for determining whether a statute impliedly gives rise to a private action:

The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the

underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.

*Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S. E. 2d 757, Syl. Pt. 1 (1980) *Jenkins v. J. C. Penney Casualty Ins. Co.*, 167 W. Va. 597, 280 S.E. 2d 252, Syl. Pt. 1 (1981) *overruled on other grounds by State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E. 2d 721 (W. Va. 1994); *Reed v. Phillips*, 192 W. Va. 392, 452 S.E. 2d 708, Syl. Pt. 2 (1994).

The above cited Code sections and cases demonstrate a clear satisfaction of elements (2) and (3) of such four-prong test, while this Court's opinion that CAS is an "affected party" with the right to proceed under W. Va. Code § 24D-1-22(c) satisfies element (1). *CAS v. PSC*, *supra*, 633 S. E. 2d, at 787. Additionally, the very authority which Charter recites regarding absence of a federal private cause of action only works to satisfy element (4) of the test.

Of particular note is this Court's opinion by Justice Miller in *Jenkins*, *supra*, wherein the Court found an implied private right of action under W. Va. Code § 33-11-4(9), noting the historic deference of the Court to find such an implied cause of action, *Id.* 280 S. E. 2d, at 254, 255, and that the existence of an administrative remedy did not preclude a private right of action, *Id.*, 280 S. E. 2d, at 257, and found that such a private right of action was not inconsistent with the administrative remedies and underlying purpose of the act. *Id.*, 280 S. E. 2d, at 258. A similar analysis applies in this case, although the same is not necessary given the express right to such an action clearly and unambiguously provided as discussed above.

**Accordingly, The Circuit Court's Ruling Does Not Conflict With The Jurisdiction Of The Public Service Commission Of West Virginia, Nor Subject Cable Operators To Regulation As Public Utilities.**

Charter's argument that the Circuit Court's application of W. Va. Code § 24-D-1-22(c) results in cable operators being regulated as public utilities is the result of an obvious misreading of that section. That section extends by reference the rights of chapter 24 to "the complainant and cable operator" only. It does not afford or extend to the Public Service Commission in its dealings with cable television service any regulatory authority under chapter 24. Moreover, the right of any affected party to pursue a claim for damages does not conflict in any manner with the regulatory authority of the Public Service Commission under chapter 24D. Rather, it compliments it in the same manner as such damage claims have long complimented the authority of the Commission under chapter 24, as noted in the examples cited above and in the manner noted in *Jenkins, supra*, the awarding of damages to an affected party not being within the jurisdiction of the Commission, as the case law cited in Section V.B.2 variously discusses, e.g. *Ashworth, supra*, 438 S.E.2d at 893, 894, citing *Wheeling Steel Corp., supra*. Such a long recognized action for damages likewise in no way inhibits or conflicts with the regulatory authority of the Commission and the other enforcement actions pursuant thereto which do reside within its exclusive jurisdiction.

4.

**Accordingly, Independently Actionable Conduct Existed Upon Which To Base CAS' Tortious Interference Claims**

Charter's conduct in charging "unduly discriminatory" rates in violation of W. Va. Code §§ 24-D-1-13(b) and (c) and the private cause of action for damages therefor afforded as

discussed above satisfies any requirement that independently actionable conduct is required upon which to base a claim for tortious interference with business expectations based upon at-will relationships, and refutes Charter's argument thereon.

C.

**The Circuit Court Properly Defined And Applied The Rational Basis Test That Is Articulated By This Court, Properly Instructed The Jury Thereon In Accordance With West Virginia And Other Jurisprudence, And Charter Failed To Demonstrate Such Rational Basis For Its Discriminatory Pricing To The Jury's Satisfaction; The Record Contains Sufficient Evidence Of Proximate Causation Under West Virginia Law To Sustain CAS' Burden Thereon As Found By The Jury.**

1.

**The Circuit Court Properly Defined And Applied The Rational Basis Test, Properly Instructed The Jury Thereon In Accordance With West Virginia And Other Jurisprudence, And Charter Failed To Demonstrate Such A Rational Basis For Its Discriminatory Pricing To The Satisfaction Of The Jury.**

As this Court held, the CAS buy-back plans "are simply rate discrimination," CAS *v. PSC, supra*, and the evidence in the trial in this case referenced above in the Additional Statement of Facts clearly again made out such a *prima facie* case, in that the rates for those receiving the CAS buy-back plans were considerably less than for those Charter customers receiving the same services but not the special CAS buy-back pricing and that such plans did not constitute introductory or promotional rates universally applied within the franchise areas in issue, at a given time, but subsequently discontinued. Additionally, CAS' evidence included evidence that there were no differences in the economic benefits Charter derived from those receiving the CAS buy-back pricing and its other customers receiving similar services at

Charter's higher regular rates. The Court properly instructed the jury, that in order to be justified such rates must "be offered to reasonable categories of subscribers reflecting a rational basis for such categories based upon justifiable differences in the economic benefits the cable operator derives from serving such categories." *Id.* (Judge's Charge of Jury, Trial Transcript, Vol. IIA, 627, 628), in accordance with this Court's opinion in *CAS v. PSC*, *supra*, and authority relied upon therein, including the Report and Order of the Federal Communications Commission ("FCC") *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 F.C.C.R. 5631, 5896-5902 (1993) ("Report and Order"). The Court also properly instructed the jury on the burden of proof of such rational basis, such justification being in the nature of an affirmative defense for which our jurisprudence recognizes the shifting of such burden. (Judge's Charge of Jury, Trial Transcript, Vol. IIA, 628, 629).

a.

**The Circuit Court Properly Defined And Applied The Rational Basis Test.**

In *CAS v. PSC*, *supra*, this Court discusses at length the statutory and regulatory provisions which governed the actions of the parties in this case. In discussing the prohibition of cable rate discrimination in this state, the Court states as follows:

We note that 47 U.S.C. § 543(e) provides but two exceptions to the authority it gives to states to prohibit "discrimination among subscribers and potential subscribers to cable service"; namely, states may not prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts." We likewise note that at no portion of the statute does Congress in any way delimit the term "discrimination."

...  
at no portion of the regulations does the FCC in its regulation delimit the term, “discrimination.” The FCC has, however, also addresses this discrimination provision by stating:

430 .... Cable operators will also have the discretion to create *subcategories of economically disadvantaged individuals*, so as to limit the scope of discounts that may be available, *if a rational basis exists for such subclassification* . . . .

431. We also believe that the “discrimination” which [47 U.S.C. § 543(e)] entitles federal, state and local authorities to prohibit *does not include reasonable categories of subscribers based on justifiable differences in the economic benefits the operator derives from serving such categories*. As stated in supra Section II.A.5.c., the local franchising authority and the Commission will address the reasonableness of such categories as the need arises in concrete situations.

8.F.C.C.R. at 5901-02 (emphasis added).

*Id.* 633 S.E.2d, at 793. It also discussed in the context of rate discrimination the concept of introductory or promotional rates as follows:

The FCC has indicated that “introductory or promotional rates universally applied at a given time but subsequently discontinued would not be permitted.” 8 F.C.C.R. at 5897.

*Id.*, 633 S.E.2d, at 794. The Court also noted the regulation of the FCC relating to rate discrimination as follows:

47 C.F.R. 76.893 [*sic*] provides:

(a) No Federal agency, state, or local franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or to economically disadvantaged groups.

(1) Such discounts must be offered equally to all subscribers in the franchise area who qualify as members of these categories, or any reasonable subcategory thereof.

(2) For purposes of this section, members of economically disadvantaged groups are those individuals who receive federal, state or local welfare assistance.

(b) Nothing herein shall preclude any Federal agency, state, or local franchising authority from requiring and regulating the reception of cable service by hearing impaired individuals.

*Id.*, at 793, FN 23.

This case does not involve the customer categories of senior citizens, economically disadvantaged individuals, or hearing impaired individuals and the errors claimed on this appeal do not implicate the concept of introductory or promotional offers.

The uniform rate structure requirements for the basic tier of cable service provided by 47 U.S.C. §543(d), the FCC's implementing regulations therefor and the portions of the aforesaid Report and Order concerning the same are also cited and discussed by the Court. *Id.*, at 987, 988, 989. While the uniform rate structure requirements are limited in scope to rates for the basic tier of service, the ability to prohibit discrimination in cable rates enabled by §543(e), and the West Virginia statutes in furtherance of such enablement, §§24-D-1-13(b) and (c), are not. As previously noted, it is upon such State prohibition of discriminatory cable rates that this case is based. Nevertheless, it is noted that none of the circumstances articulated in such authority constituting exceptions to such uniform rate requirements is involved in this case.

As discussed, 47 U.S.C. §543(e) enables states to prohibit discrimination in cable rates and charges. However, the authority to prohibit discrimination is subject to the exceptions set forth in that Section, in 47 C.F.R. §76.983, and in the aforesaid Report and Order of the FCC. However, such authority is not otherwise limited, and the stated intent of Articles 24D of the West Virginia Code is to promote the stated goals, including “. . . to establish just, reasonable and nondiscriminatory rates and charges for the provision of cable service. . . by all available means not in conflict with federal law, rules and regulations,” W.Va. Code §24-D-1-1, and to do

so “[t]o the extent permitted by federal law . . .” W.Va. Code §§24D-1-13(b) and (c). (Emphasis supplied) Accordingly, to avoid the application of the prohibition against unduly discriminatory rates prohibited by W.Va. Code §§24D-1-13(b) and (c), a cable provider must satisfy one of the above stated exceptions articulated in federal law, rule and regulation. The only exception available to Charter in this case is the one stated at paragraph 431 of the aforesaid FCC Report and Order, that being “reasonable categories of subscribers based on justifiable differences in the economic benefits the operator derives from serving such categories.” 8 F.C.C.R., at 5901-02. Accordingly, the Circuit Court’s defining of the rational basis required to excuse Charter’s discrimination in rates and charges by such standard was entirely proper, and, in fact, required.

Contrary to such requirement, Charter tries to gain acceptance of its arbitrary classification of customers and potential customers, which was the very practice this Court found wanting, in *CAS v. PSC*, *supra*, and minimize its burden, by citing authority regarding legislative and other governmental classifications, which classifications are afforded great deference by the Courts. As noted in *Marcus v. Holley*, 217 W. Va. 508, 618 S. E. 2d 517 (2005):

10. “In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [*W. Va. Const.* art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.’ Syl. pt. 1 *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S. E. 2d 351 (1965).” Syl. Pt. 2 *West Virginia Pub. Employees Retirement*

*Sys. v. Dodd*, 183 W. Va. 544, 396 S. E. 2d 725 (1990), *overruled on other grounds by Booth v. Sims*, 193 W. Va. 323, 456 S. E. 2d 167 (1995).

...

15. “There is a presumption of constitutionality with regard to legislation. However, when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated.” Syl. Pt. 6 *Gibson v. West Virginia Dept. of Highways*, 185 W. Va. 214, 406 S. E. 2d 440 (1991).

*Id.*, Syl. Pts. 10, 15. The process of determining rational basis in such cases as Charter cites is part of a determination of whether the classifications in issue bear a “reasonable relationship to a proper governmental purpose.” *Id.*, 618 S.E. 2d, at 535. Such deference and such presumption are not afforded to a private entity, such as Charter in this case, just as concerns about the separation of powers and whether Charter’s discriminatory classifications bear a reasonable relationship to a proper governmental purpose, have no role in this case. Charter’s misplaced reliance in this case on such authority in regard to the nature of the rational basis standard, the burden of proof regarding the same and determination of the same as a question of law is actually illustrated by the United States Supreme Court’s opinion in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), which Charter cites, wherein the Court discusses the strong “presumption” of the validity of legislative classifications, that such classifications need not be based on fact, but rather may be based on “rational speculation and unsupported by evidence or empirical data” which is not subject to “courtroom fact finding,” all of which is necessary “to preserve to the legislative branch its rightful independence.” *Id.*, at 314, 315. Such presumption, and the burden of rebuttal it spawns, and such deference without reference to fact, are the cornerstones upon which the holdings regarding burden of proof and determination

of rational basis as a question of law are based in such cases. None of the same are appropriate to the context of this civil action for damages or the private party litigants herein, nor are indicated as being intended by this Court to be so applied. *CAS v. PSC, supra*. Moreover, the passage Charter cites from *Elk Hotel Co. v. United Fuel Gas Co.*, 83 S.E. 922, 924 (W. Va. 1914) is not a holding in that case, but is attributed to a United States Supreme Court opinion, which involves Interstate Commerce Commission proceedings and which does not appear to support the proposition for which it is cited, but rather could be cited for the contrary proposition. *Railroad Co. v. Commission*, 162 U.S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935 (1896).

As this Court also stated in *CAS v. PSC, supra*:

As stated above, the phrase “rational basis” is mentioned in the federal scheme concerning the providing of cable services by private entities. In that regard, we are not unmindful that the phrase “rational basis” is also associated with prohibited state imposed discrimination and violations of the principles of equal protection. While the latter use of that phrase and its related line of cases is instructive, it is not dispositive of the issues herein. (Emphasis supplied.)

*Id.*, 633 S. E. 2d, at 790. Such statement is equally appropriate to this Court’s discussion of discriminatory pricing as it is to the discussion of uniform rate requirements, and the context of the Court’s discussion throughout the opinion clearly indicates as much.

Charter also sought at trial, and herein seeks, to satisfy the Circuit Court’s instruction by minimizing its burden arguing that the mere “economic benefit” of obtaining the competitor’s customers, without more, and apparently by whatever means, justifies its discriminatory pricing conduct. Again, such superficial rationale is precisely what this Court rejected in *CAS v. PSC, supra*, and conveniently omits any showing, upon which the Circuit

Court properly instructed the jury as cited above, that discrimination, to be justified, must be based upon “justifiable differences in the economic benefits” (emphasis supplied) the operator derives from servicing the categories of customers to whom special pricing is offered.<sup>4</sup> As noted above, no evidence whatsoever is introduced which demonstrates or even references any difference in the economic benefits to be derived by Charter from the customers or potential customers to whom CAS buy-back plans were offered and/or sold and those to be derived from the customers or potential customers to whom such plans were not available. Indeed, the evidence, adduced on such issue, including in CAS’ case in chief, upon the testimony of former Charter employees, Richard Lucas and David Laughery, is to the contrary. (Trial Transcript, Vol. I, 361/22-24, 362/1-17; Trial Transcript, Vol. II, 573/8-24, 574/1-4.) Accordingly, there is no evidence of differences in economic benefits to justify Charter’s conduct. Moreover, contrary to Charter’s protestations, which are also recycled from the previous proceedings before the Public Service Commission and on appeal therefrom to this Court, CAS’ practices regarding its true introductory and promotional offers universally applied and limited in duration, and rates charged to apartment building tenants, which were based upon cost and technological differences, all accordingly justified by differences in economic benefit to CAS, as the testimony of Mr. Cooper and Mr. Lucas describes and explains, only adds emphasis to the deficiency in

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<sup>4</sup> The concept of differences to justify classifications where appropriate is not inimical to the cases involving legislative and government classifications which Charter cites even with the deference and presumptions afforded in those cases which are not applicable in this case. In particular, even in *Marcus v. Holley, supra*, where the above cited deference to governmental classification and presumption of constitutionality was afforded, the Court discussed and analyzed the differences in claimants’ income levels as a valid rational basis for corresponding differences in benefits for such claimants and, accordingly, a “reasonable relationship to a proper governmental purpose.” *Id.* 618 S.E. 2d, at 535.

Charter's argument and its own practices. (e.g. Trial Transcript, Vol. II, 117/15-24, 118/1-24, 119/1-24, 120/1-3; 236/1-24, 237/1-24, 238/1; Trial Transcript, Vol. I, 360/8-24.)<sup>5</sup>

b.

**The Circuit Court Properly Instructed The Jury On The Burden Of Proof Regarding Justification Of Charter's Rate Discrimination In Accordance With West Virginia And Other Jurisprudence.**

In addition to the concept of differences, in economic benefits required by the FCC standard, is the concept of justification. Moreover, the concept of rational basis, when stripped of the almost absolute deference afforded legislative and government classification discussed above and which are not appropriate to the actions of the private parties involved in this litigation, inherently involves an affirmative allegation. The burden of proof for such affirmative allegations generally resides with the party asserting the same or which would bear loss if the same, e.g. rational basis, is not established, i.e. a defendant bears the burden of proof for affirmative defenses. *Cleckley, Handbook on Evidence* (Fourth Edition), Vol. 2, §12-3(a)(2); *AmJur 2d, Evidence*, §§174, 177. Proof of such a rational basis, which as previously discussed is an exception to the prohibition of discriminatory rates and would serve to justify the same is plainly in the nature of an affirmation defense for which our jurisprudence recognizes the shifting of the burden of proof. See, e.g., *Skaggs v. Elk Run Coal Co., Inc.* 198 W. Va. 51, 479 S.E. 2d 561 (1996); *Addair v. Bryant*, 168 W. Va. 306, 284 S.E. 2d 374 (1981); *Voorhees v. Guyan Machinery Co.*, 191 W. Va. 450, 446 S.E. 2d 672 (1994); *State v. Daniel*, 182 W. Va. 642, 391 S.E. 2d 90 (1990); *Carper v. Kanawha Banking & Trust Company*, 157 W. Va. 477, 207 S.E.2d 897 (1974). Such justification defense is of the same nature as the defense of

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<sup>5</sup> Such stark distinction between CAS' practices and Charter's practices at issue in this case was also noted by this Court in *CAS v. PSC*, *supra*, 633 S.E.2d at 783, FN6, and Charter's continued argument that it "did not do anything all that different in nature from what CAS did" (Appellant's Brief, at 42) ignores the facts and is completely without credibility.

legitimate competition to the tortious interference claim herein and in fact constitutes a part of it. See *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W. Va. 210, 314 S.E. 2d. 166 (1983) and its progeny. “If a plaintiff makes out a *prima facie* case, a defendant may prove justification or privilege, affirmative defenses . . .” *Torbett supra*, Syl. pt. 2. See also *Cavcon, Inc. v. Endress + Hauser, Inc.*, 557 F.Supp.2d 706 (S.D. W.Va. 2008) applying The Restatement (Second) of Torts §768 in a case involving an at will contract, which Charter also references, regarding the elements of such defense which a defendant must prove, including that it did “not employ wrongful means” or “create or continue an unlawful restraint of trade.” *Id.*, at 726, 727. The Circuit Court’s rulings and instruction concerning the justification required as a defense to the underlying claim of unduly discriminatory rates is certainly consistent with the burden shifting to Charter for its claimed defense of legitimate competition.

Additionally, the impetus of this Court’s remand in *CAS v. PSC, supra*, was the lack of proof in that case of a rational basis for the discrimination which the Court found, indicated no deference or presumption as to the categorization of customers which Charter claimed, but rather required proof of such rational basis. “Neither the PSC nor Charter offer a rationale for the PSC’s determination that former Charter customers who became CAS customers or who threatened to do so formed a reasonable category to whom discriminatory rates could be charged. *Id.*, 633 S.E. 2d, at 794. (Emphasis supplied) That the Circuit Court required the same of Charter in this case, is consistent with *CAS v. PSC, supra*, and the authority cited therein and settled West Virginia jurisprudence regarding litigation of affirmative defenses in civil actions such as this case, as discussed above.

**The Record Contains Sufficient Evidence Of Proximate Causation To Sustain The Jury's Verdict Thereon Under West Virginia Law.**

Charter argues that the evidence, consisting of Charter's own individual work orders and other records which evidence specific sales of CAS buy-back plans, does not sufficiently evidence the cause of the harm to CAS from the loss of such customers who were sold such plans by Charter, because in essence each of the 800 person to whom such were sold did not testify that they were motivated to switch from CAS, or not switch to CAS as they threatened, because of the offer of such pricing. The essence of Charter's argument is that CAS should not have been allowed to prove its case by circumstantial evidence, but should have been required to prove it by direct evidence. Forgetting the other obvious incongruities of such argument, such position is, of course, in no way supported by the law. As Professor Cleckley notes:

Circumstantial evidence is information that tends directly to prove or disprove not a fact in issue but a fact or circumstance from which, either alone or in connection with other facts and circumstances, one may, according to the common experience of mankind, reasonably infer the existence or nonexistence of a fact that is in issue. Therefore, unlike direct evidence, circumstantial evidence, even if believed, does not resolve the issue unless *additional reasoning* is used. Often, it is necessary for the trier of facts to draw several inferences in order to arrive at the conclusion desired by counsel.

...

In West Virginia and in federal courts, civil and criminal verdicts may be based entirely upon circumstantial evidence.

...

Direct evidence has been defined as evidence that, if believed, proves the existence of the fact in issue without inference or presumption, whereas circumstantial evidence is evidence that, without going directly to prove existence of a fact, gives rise to a logical inference that such fact does exist.

...

The basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to the common experience of mankind.

*Cleckley, Handbook on Evidence* (Fourth Edition), Vol. 1 §§1-2(F)(2),(3).

At the least, the fact of such sales constitutes strong circumstantial evidence from which it can be directly inferred that the CAS buy-back plans constituted the reason such customers who purchased such plans switched from Charter to CAS or abandoned their intent to switch to CAS and stayed with Charter. *Cale v. Napier*, 186 W. Va. 244, 412 S.E. 2d 242 (1991); *Holbrook v. Poole Associates, Inc.*, 184 W. Va. 428, 400 S.E. 2d 863 (1990); *Anderson v. Chrysler Corporation*. 184 W. Va. 641, 403 S.E. 2d 189 (1991); *Moore v. Tearney*, 62 W. Va. 72, 57 S.E. 263 (1907); *Nutter v. Owens-Illinois, Inc.*, 209 W. Va. 608, 550 S.E. 2d 398 (2001); *Brady v. Deals on Wheels, Inc.*, 208 W. Va. 636, 542 S.E. 2d 457 (2000); *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 479 S.E. 2d 561 (1996); *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E. 2d 152 (1995). Every other possible cause is not required to be excluded. *Anderson, supra*. CAS' evidence has "selective application" to the CAS buy-back plans as the reason those customers chose to either switch from CAS to Charter or remain with Charter rather than switching to CAS. *Oates v. Continental Ins. Co*, 137 W. Va. 501, 72 S. E. 2d 886 (1952). In other words, such is "...evidence which points to any one theory of causation, indicating a logical sequence of cause and effect..." and as such "...is a juridical basis for such a determination notwithstanding the existence of other possible theories with or without support in the evidence." *Id.*, 72 S. E. 2d 886, at 892. A comparison of the pricing of the CAS buy-back

plans with the cost of those same services for the Charter customers not receiving such discriminatory pricing, as described above, provides additional strong evidence of such “...logical sequence of cause and effect...” *Id.*, 72 S. E. 2d 886, at 892. Simply put, the customers who were sold CAS buy-back plans were either current CAS customers or current Charter customers who threatened to leave for CAS service. They were offered cable service from Charter, pursuant to the CAS buy-back plans, at rates lower than those for Charter customers not receiving service pursuant to such plans, often significantly lower, and lower than for comparable services from CAS. A number of them, conservatively 800 according to the testimony of Mr. Morgan and Dr. Rizzuto, either switched service from CAS to Charter or remained with Charter, not leaving for CAS service. “[T]he common experience of mankind” reasonably infers those that purchased the CAS buy-back plans they were offered did so because of the price.

Circumstantial evidence is of particular note in cases where an actor’s motive or intent is the issue. *Moore, supra, Skaggs, supra.* See *Nutter, supra*, a deliberate intent action wherein this Court recognized that proof of an employer’s “ ‘subjective realization and appreciation’ of an unsafe working condition . . . must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn.” *Id.*, 209 W.Va. at 613, 550 S.E.2d, at 403. See also *Tudor v. Charleston Area Medical Center, Inc.* 203 W.Va. 111, 506 S.E.2d 554 (1997).

On the other hand, the evidence introduced and cited by Charter does not have the “selective application” discussed in *Oates, supra*, to the particular customers who purchased the

CAS buy-back plans. Charter's statements that "no proof links the challenged conduct to the claimed harm" and that "[t]here was absolutely no evidence why any specific customer, among the 800 claimed, made the change" (Appellant's Brief, at 34), both strains credulity and ignores the law regarding the nature and function of evidence, particularly circumstantial evidence, and the role of the jury, upon which black letter principles the Court properly instructed the jury, consistent with the authority cited herein. (Judge's Charge of Jury, Trial Transcript, Vol. IIA, 623. In fact, it is Charter which attempts to insert conjecture and speculation into the issue at hand, attempts which the jury, in exercising its function as the trier of fact upon which it was properly instructed, obviously rejected. Charter cites testimony of Art Cooper and Lisa Wilkinson (Appellant's Brief, at 36) as to the reasons observed that some CAS customers leave CAS service, without regard or relation to the specific instances of CAS buy-back sales identified by the specific work orders and other documentary evidence and data produced by Charter and admitted. What third parties may have done in some instances does not provide evidence of specific conduct by specific persons in the specific instances which are represented by the specific work orders and other documentation and data of specific sales, and the jury obviously agreed. Of the 800 sales reflected in the evidence, Charter cross-examined Lisa Wilkinson only questioning a very limited number of the same as sales of CAS related plans. (Trial Transcript, Vol. I, 62 - 154.) Moreover, Charter ignores in this portion of its argument the very testimony it cites from Mr. Lucas in another context as to the "incentive" such particular special pricing plans provide to get customers to switch (Trial Transcript, Vol. I, 359/7-14) and from the testimony of Dr. Rizzuto it partially cites (Appellant's Brief, at 36), the remainder of his answer to the question as to why customers might have left CAS for Charter, being "...again, the

preponderance of the information with this kind of offer, suggested it would be price, but you are right, there could be other reasons.” (Trial Transcript, Vol. II, 336/10-16).

The cases Charter cites are distinctly distinguishable from the case at bar.<sup>6</sup> Such cases primarily involve a complete lack of evidence of negligence and fact. It is particularly noteworthy that all of said cases involve the issue of proof of specific physical events, several requiring specific technical or expert evidence, rather than issues of motive as questioned in this case. Likewise, the doubts as to the cause of such specific physical events in such cases were specific to such events, contrary to this case as noted above wherein Charter seeks to impose doubt based upon generalities without any specific connection to the specific instances CAS has proved, except for the 16 possible instances noted above. In the case at bar the sale of the CAS buy-back plans give rise, at the least, to a direct and reasonable inference which is supported and bolstered by the testimony of Charter’s former employee, Mr. Lucas, cited above, to the effect that such pricing is the reason for such customers switching from CAS to Charter, although it need only constitute “a juridical basis for such a determination notwithstanding the existence of other plausible theories with or without support in the evidence.” *Oates, supra*, 72 S. E. 2d 886, at 892.

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<sup>6</sup> *Oates, supra*; *Adams v. Sparacio*, 156 W. Va. 678, 196 S. E. 2d 647 (1973); *Tolley v. ACF Industries, Inc.*, 212 W. Va. 548, 575 S. E. 2d 158 (2002); *Spencer v. McClure*, 217 W. Va. 442, 618 S. E. 2d 451 (2005); *Mullins v. Barker*, 144 W. Va. 92, 107 S.E. 2d 67 (1959); *Wickline v. Monongahela Power Co.*, 139 W. Va. 732, 81 S.E. 2d 326 (1954); *Edwards v. Hobson* 189 Va. 948, 54 S.E.2d 857 (1949)

**D.**

**Both The Damage Award For Tortious Interference And The Award Of Punitive Damages Are Reasonable And Supported By The Evidence; While The Circuit Court Properly Applied the *Garnes* Principles To Meaningfully Review The Punitive Damage Award, Charter Has Waived Its Right To Question The Same Or Certain Aspects Of The Same.**

**1.**

**The Jury's Finding In Favor Of CAS On Its Tortious Interference Claim Is Reasonable, Supported By The Evidence, And Should Not Be Disturbed.**

**a.**

**Charter has waived its objection to the awarding of damages on the tortious interference claims on the grounds it now raises.**

As an initial matter, Charter has waived any argument it has that any monetary award for the finding of liability on the tortious interference claim is double recovery. It is noteworthy that the Verdict Form employed by the Circuit Court in this case was that form which was largely drafted and offered by Charter itself. (See Charter Proposed Verdict Form; Trial Transcript, Vol. II-A, 601 - 617.) Moreover, this Court has held that, “[a]bsent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury’s discharge, constitutes a waiver of the defect or irregularity in the verdict form.” Syl. pt. 2, *Combs v. Hahn*, 205 W. Va. 102, 516 S.E. 2d 506 (1999). Unlike in *Combs*, no extenuating circumstances prevented Charter from objecting before the jury’s discharge and allowing any questions about the verdict form or form of verdict to be pursued. The verdict was read aloud verbatim, Charter then polled the jury, and if Charter had issues with the verdict it could have raised them at that time. (Trial Transcript, Vol. II-A, 743 - 746.)

b.

**The Finding of Liability for Tortious Interference Is Not Impermissible Double Recovery and Is Supported by the Evidence**

A “. . . jury is not prohibited from allocating a total damages award between different theories of recovery, and a jury’s award is not duplicative simply because it allocates damages under two distinct causes of action.” 22 *AmJur2d, Damages*, §36. “[T]here is no duplication of recovery if damages are awarded for separate injuries.” *Id.*

In cases such as *Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E. 2d 692 (1982), cited by Charter, there does not appear from the opinion to have been any evidence of separate categories of damages, i.e. different wrongs or injuries suffered by the Plaintiff. At least there is no discussion of the same. Moreover, in accord with the general principles cited above, West Virginia recognizes that separate injuries arising out of the same event support separate damage awards for each injury. *Stump v. Ashland, Inc.* 201 W.Va. 541, 550-552; 499 S.E.2d 41, 50-52 (1997).

In this case, CAS has suffered three different identifiable injuries or wrongs, being (i) lost past profits, (ii) lost business opportunity profits, and (iii) lost future profits. Moreover, the elements of the claims alleged by CAS as to tortious interference are not the same as those for the charging of unduly discriminatory rates, which constitutes but one element of the tortious interference claim, *i.e.* the independently actionable conduct upon which the interference is based in this case. The tortious interference claim also includes additional factual elements of intentionally interfering with CAS’ prospective business expectations and a determination of whether Charter’s conduct constituted legitimate competition. Additionally, the jury was

instructed that punitive damages could be awarded if they found Charter had tortiously interfered with CAS' contractual relations or business expectations, but were given no such option on the claim for the charging of unduly discriminatory rates. (Judge's Charge of Jury, Trial Transcript, Vol. IIA, 636.

For the finding of liability for charging unduly discriminatory rates, the jury awarded CAS an amount equal to its past lost profits of \$1,150,954 (Verdict), and which Charter describes as an award of such past lost profits (Appellant's Brief, at 39). For the finding of liability for tortious interference, the jury awarded a figure, \$1,446,355 (Verdict), that is slightly less than half of the sum of \$3,156,377 Dr. Rizzuto calculated to be CAS' lost future profits (Trial Transcript, Vol. II, 328; Trial Exhibit 162D), and a lesser portion yet of the sum of those damages and the damages in the amount of \$992,194 he calculated for lost business opportunity profits. (Trial Transcript, Vol. II, 315, Trial Exhibit 162C). Both such elements or categories of the compensatory damages are uniquely appropriate to the loss of CAS' business expectations as a result of Charter's tortious interference therewith, and such a determination is the jury's right and prerogative as the finder of facts in this case.

This Court has held as follows:

Because the verdict below is entitled to considerable deference, an appellate court should decline to disturb a trial court's award of damages on appeal as long as that award is supported by some competent, credible evidence going to all essential elements of the award.

From Syl. pt. 4, *Reed v. Wimmer*, 195 W. Va. 199, 465 S.E.2d 199 (1995). In the instant case, the jury's verdict is supported by the competent, credible evidence presented by Dr. Rizzuto. The jury simply awarded a portion of Dr. Rizzuto's total calculation. Moreover, the total compensatory award is well within the total figure presented and explained by Dr. Rizzuto,

\$5,299,525 (Trial Transcript, Vol. II, 329, 330; Trial Exhibit 162A). The fact that it did not fit some neat mathematical portion, or the entirety, of the calculated damages is hardly objectionable, but such is the essence of Charter's argument. Contrary to the cases Charter cites, such verdict, being well within the amount of CAS' economic, compensatory damages calculated by Dr. Rizzuto to a reasonable degree of certainty, does not clearly show jury passion, partiality, prejudice or corruption, or a mistaken view of the case by the jury, or that the jury totally misapprehended the evidence, or that the verdict substantially exceeded any rational estimate of damages or was not supported by the weight of the of the evidence.

2.

**The Jury's Award Of Punitive Damages Is Reasonable, Supported By The Evidence, And Should Not Be Disturbed.**

a.

**The Jury Properly Found that Charter's Conduct Warranted an Award of Punitive Damages**

The evidence adduced at trial was sufficient for the jury to find that Charter acted oppressively, maliciously, and/or wantonly in its ongoing use of unduly discriminatory cable rates to tortiously interfere with CAS' business expectations. This Court has held that

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

Syl. Pt. 9, *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 609 S.E.2d 895 (2004). *Mayer*, in turn, instructs us that "[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear . . . the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous." Syl. pt. 4, *Id.*, 22 S.E., at 58.

In the instant case, the jury received evidence not only in the form of Charter's internal electronic mails, which clearly show Charter's intent to do more than simply fairly compete with CAS, but also in the form of testimony and other documentary evidence concerning how long the CAS buy-back plans were in effect, from Charter's former employees, and its documents and correspondence.. (e.g. Trial Transcript, Vol. I, 295/16-24, 296/1-6; Trial Transcript, Vol. IIA, 484/20-24, 485/1-24; Trial Transcript, Vol. IIA, 514/4-24, 515/1-24, 516/1-6; Trial Exhibits 14, 15, 48, 49). Taken together, the jury could reasonably infer from the evidence admitted at trial that Charter developed its unduly discriminatory pricing scheme maliciously (i.e. prompted or accompanied by ill will or spite), wantonly (i.e. with callous disregard of or indifference to the rights of CAS), and/or oppressively (i.e. injuring or damaging or otherwise violating CAS' rights with unnecessary harshness or severity, as by misuse or abuse of authority or power) to "crush" or "devastate" CAS. (Judge's Charge of Jury, Pg. 13; W. Va. Supreme Court of Appeals Model Instructions, "Punitive Damages"). Further, the jury could reasonably infer from the evidence that Charter was willing and able to continue the CAS buy-back plans for however long it took to become the only cable service provider in Wood County, West Virginia. In sum, the jury could properly conclude that Charter continued interfering with CAS' business expectations through the use of its unlawful pricing scheme *over a period of years* not with the intent to fairly and legitimately compete with CAS, but to drive CAS, a smaller and economically weaker company, out of business. As the *Mayer* Court held, "although the intent cannot make a wrongful act more wrongful, it may make the consequences of it much

more serious, and of the extent of these consequences the jury is the judge, and the only possible judge.” *Id.*, 22 S.E., at 61.

Charter’s argument that punitive damages are not warranted because of the “uncertain” legal landscape that prevailed at the time period relevant to this litigation is unavailing. West Virginia’s statutory prohibition against unduly discriminatory cable television rates has been in effect since at least 1990, first in the form of W. Va. Code § 5-18-16 and then succeeded by § 24D-1-13. Additionally, the “FCC Report and Order,” 8 F.C.C.R. 563 prominently cited by this Court in *CAS v. PSC*, *supra*, was issued in 1993. Charter knew, or reasonably should have known, that its pricing scheme did not conform to the parameters outlined therein. Additionally, CAS’ counterclaim herein was filed in late 2000, its complaint in the P.S.C. proceeding filed in May, 2001, and the ALJ’s Recommended Decision issued therein in August 2002. In the face of such landscape Charter continued to offer the pricing which is the subject of this case into the year 2003, and as the evidence reflects continued to “meet or beat” CAS prices thereafter. (Trial Exhibits 47, 48, 49; Stipulation). More importantly, the idea that acting in an oppressive or malicious manner could garner a punitive damage award against the oppressive, malicious actor has been around since Biblical times, according to Justice Dent, the author of the *Mayer* opinion. See *Mayer*, 22 S.E. at 61. Moreover, Charter’s claim of ignorance is contrary to this Court’s decision in *Voorhees v. Guyan Machinery Co.*, 191 W.Va. 450, 446 S.E. 2d 672 (1994), wherein the claim that one seeking to enforce a noncompetition agreement legitimately believed it to be a valid agreement did not defeat the jury’s award of punitive damages. *Id.* 191 W.Va., at 455, 446 S.E. 2d, at 677. “At the same time, however, the jury also

must have concluded that the *corporation*, Guyan Machinery, had an obligation to place matters of this sort in the hands of competent lawyers and that the corporation's entrustment of matters of this type to a layman constituted such willful and wanton negligence as to amount to reckless and willful disregard of the rights of others – in other words, the act was intentional on the part of the corporation. Although we might have reached other conclusions, we cannot say that the jury was clearly wrong or decided the case contrary to the law and the evidence.” *Id.* The same can be said of Charter in this case. Additionally, Charter's conduct herein is also consistent with that which supported a punitive damages award in *C.W. Development, Inc. v. Structures, Inc. of West Virginia*, 185 W.Va. 462, 408 S.E. 2d 41 (1991). Finally, as this Court noted in *CAS v. PSC*, *supra*, the marketing of the CAS buy-back plans by door-to-door sales people “. . . is targeted and does not have a high potential for other similarly situated customers to learn or demand similar low rates.” *Id.*, 633 S.E.2d, at 994, FN 26. Such intent to conceal is also reflected in Trial Exhibit 17 and Mr. Lucas' testimony concerning the same, and is consistent with one of the factors relied upon by this Court in *Perrine v. E.I. duPont de Nemours and Co.*, 225 W.Va. 482, 694 S.E. 2d 815 (2010).

Charter did not object to the admission of Exhibits 17 and 23, and although it did object to the admission of Exhibit 33, the Court's finding that the Barclay e-mail was admissible was wholly proper, especially in light of the fact that Mr. Barclay was available to testify and explain his statement. The fact that the jury did not find his explanation credible does not make its consideration of his message improper. The same is true of Mr. Lucas' testimony as cited by

Charter. The fact that the jury did not believe his explanation does not make its consideration of his messages improper. Such findings of credibility are solely within the province of the jury.

The jury found that Charter tortiously interfered with CAS' business expectations and it did so to such an extent so as to warrant an award of punitive damages. This case is analogous to the Court's finding in *Bowyer* that "the jury in the instant case properly assessed whether or not the conduct of [Charter] was sufficiently grievous and of such indifference to the . . . rights of others to warrant an award of punitive damages." 609 S.E.2d, at 909.

b.

**The Jury's Award Of Punitive Damages Is Supported By A *Garnes* Review Which Was Properly Conducted By The Circuit Court; However, Charter Has Limited Its Right To Such Review In This Court.**

Pursuant to *Bowyer*, the jury having found that an award of punitive damages was proper, the Court must then review that award using the process outlined in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 879 (1991), to determine whether or not it is excessive, which the Court did appropriately. (Order on Post-Trial Motions, entered January 5, 2010, pgs. 5, 6, 7 and 8.) Syl. Pt. 9, *Bowyer* 216 W. Va. at 634, 609 S.E.2d at 895. Such review leads to the conclusion that the punitive damages award is not excessive and bears a reasonable relationship to the compensatory damage determination.

However, Charter did not address most of the *Garnes* factors with specificity, and, accordingly, has waived any assignments of error based thereon. "All petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity,

summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.” Syl. pt. 5, *Garnes, supra.*; Syl. pt. 14, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E. 2d 791 (2009).

Charter does make certain passing references to certain of such factors. At page 41 of its Brief Charter references the lack of sanctions in the form of fines in the Public Service Commission proceeding, which actually supports a punitive damage award, rather than mitigates it. Its reference to the reprehensibility of its conduct on page 45 follows an extension of its discussion in its previous section of its Brief and is addressed in the previous section of this Brief.<sup>7</sup> On pages 45 and 46 Charter references the issue of deterrent effect. Finally, Charter’s discussion references the issues of profit and financial position on page 46, but it is noted that it was Charter which on its objection obtained the exclusion of evidence of profit on Charter’s sale of its systems in 2006, although the sale price of \$770,000,000 was admitted. (Trial Transcript, Vol. IIA, 433 – 440; 458-460). The Circuit Court properly considered all of such factors in its Order on Post-Trial Motions, at 2 – 8.

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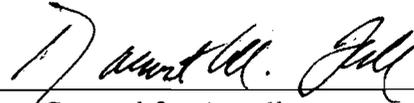
<sup>7</sup> CAS notes the citation of certain federal antitrust cases and a treatise concerning antitrust law, and asserts that the same only provides confusion, not clarification, to a discussion of the law of punitive damages in West Virginia. e.g. *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F. 3d 690 (7<sup>th</sup> Cir. 2006), the memo in issue was of absolutely no moment because as the court stated “a bad intent is not part of the plaintiff’s *prima facie* case under § 13(a), and a ‘good’ intent...does not excuse price discrimination.” *Id.* at 698.

V.

**CONCLUSION AND RELIEF REQUESTED**

For the reasons stated Charter's Appeal is without merit, and the Judgment of the Circuit Court of Wood County should be affirmed.

Respectfully submitted this 13th day of December 2010.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35703

COMMUNITY ANTENNA SERVICE, INC.,

Plaintiff below/Appellee,

vs.

CHARTER COMMUNICATIONS VI, LLC,

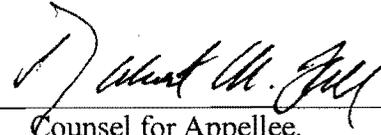
Defendant below/Appellant.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 13th day of December 2010 he served Appellee's Brief upon Appellant by depositing true copies thereof in the United States mail, first class postage prepaid, addressed as follows:

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