35703

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

COMMUNITY ANTENNA SERVICE, INC.,
a corporation,

Plaintiff,

vs. /// **Civil Action No: 00-C-505**

CHARTER COMMUNICATIONS VI, LLC,

Defendant.

ORDER ON POST-TRIAL MOTIONS

This Order on Post-Trial Motions is entered based upon the fact that the previous Order on Post-Trial Motions entered on March 31, 2009, was vacated by Agreed Order entered on May 7, 2009, pursuant to the automatic stay in effect as a result of the Defendant's petition in bankruptcy filed on March 27, 2009.

This matter came for hearing on the 19th day of June 2008 pursuant to the Defendant's Combined Motion for Judgment as a Matter of Law or For a New Trial, and to Alter or Amend the Judgment. The Plaintiff, Community Antenna Service, Inc.("Plaintiff", "CAS"), appeared by counsel, Robert W. Full and Kristin Boggs, and the Defendant, Charter Communications VI, LLC ("Defendant", "Charter"), appeared by counsel, Bryant J. Spann, Robert G. Scott, Jr., and Daniel Reing (appearing by phone). The Plaintiff filed a Response to the Defendant's motion and the Defendant filed a Reply thereto.

Whereupon the Court acknowledged receipt of the above-referenced documents and all other accompanying documents. Further, the Court has studied the above-mentioned documents, oral arguments of counsel, and applicable statutory and case law.

The Defendant moves for judgment as a matter of law and relief from the judgment on the following grounds:

ENTERED
CB O.B. No. 282
PAGE 12
JAN - 5 2010
CAROLE JONES
CLERK CIRCUIT COURT

1. The record contains insufficient evidence on which a reasonable jury could award punitive damages against the Defendant;
2. The record contains insufficient evidence on which a reasonable jury could find that any specific pricing plan of the Defendant caused any specific customer of the Plaintiff to switch to the Defendant, or that the Defendant failed to demonstrate a "rational basis" for its pricing practices; and
3. There is no evidence on which a reasonable jury could base an award of compensatory damages for the Plaintiff for Count IV (tortious interference) in addition to damages awarded for Count III (unduly discriminatory rates), and the jury accordingly granted double recovery to the Plaintiff and/or made an award unsupported by proof.

I. Award of Punitive Damages

With its motion, the Defendant alleges that there was insufficient evidence to support the jury's verdict in this case. It is clear that jury verdicts are entitled to substantial deference. *Pipemasters, Inc. v. Putnam Cty. Comm'n*, 218 W.Va. 512, 625 S.E.2d 274, 280 (2005). The Supreme Court of Appeals has provided a framework for the Court to determine the sufficiency of the evidence to support a jury verdict:

> 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). Accordingly, the Court reviews the Defendant's Motion considering the substantial deference of which the jury's verdict is entitled.

The Defendant alleges that there is insufficient evidence in the record to support the jury's verdict awarding punitive damages. The Supreme Court of Appeals has determined that there are two steps in determining and reviewing punitive damages.

> 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).

a. The Defendant's Conduct

For purposes of the present Motion, the Court must first consider whether there is sufficient evidence in the record to support the jury's determination that the Defendant's conduct toward to the Plaintiff entitles the Plaintiff to a punitive damage awarded.

With regard to the Defendant's conduct potentially giving rise to an award of punitive damages, the Supreme Court of Appeals has provided: "[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, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895).

The record indicates that the jury was presented with three emails that could reasonably have led the jury to conclude that the above standard was met:

(1) Tr. Ex. 33: a June 25, 2001, email from Patrick Barclay (then General Manager of Charter's Parkersburg area systems), to Nikki Parks (then Charter's Door-to-Door Sales Manager for Parkersburg), Stanley Howell (then Charter's Director of Marketing for the Mid-Atlantic Region), and Kenny Phillips (then Charter's Marketing Manager for the Mid-Atlantic Region), with a copy to Charter's then Billing Coordinator Lisa McNeil, as part of an inquiry regarding the status of the CAS-specific pricing plans,

consisting of the question posed by Mr. Barclay, "Wasn't our offer to them to be $29.95 ad infinitum, or at least until we crush him?";

(2) Tr. Ex. 17: an October 12, 2000, email from Rick Lucas (then the Group Director of Operations for Charter's Parkersburg area systems), to Dave Bach (then Charter's Regional Division Vice President) and Stanley Howell, suggesting that if a certain Charter marketing initiative was successful it would be "devastating" to CAS; and

(3) Tr. Ex. 23: a March 7, 2001, email from Rick Lucas to Nikki Parks and Stanley Howell stating that Charter would have to "dance delicately" with respect to certain CAS-specific pricing.

The language of the emails on their face could be reasonably inferred to indicate more than a mere competitive intent. In addition to receiving into evidence the three emails, the respective authors of the emails testified at trial concerning the language used therein as well as the intended meaning. In other words, the authors of the above emails attempted to explain their statements and conduct as competitive and not intended to be injurious to CAS. These two witnesses also testified to the length and extent of the CAS buy-back plans. While the record indicates that the witnesses may have potentially explained these emails away, it is clear that issues of credibility are to be determined by the jury and, accordingly, whether or not the explanations were believed was for it to decide.

The Court acknowledges, as Charter argues, that in certain circumstances the language used in the emails by itself may not necessarily constitute conduct giving rise to punitive damages. However, coupling the evidence of the above emails, the testimony of their authors, and the length of time the CAS buy-back plans were in effect with the jury's finding that Charter's conduct improperly and tortiously interfered with CAS's business expectations and the substantial deference given to the jury's verdict, the jury could reasonably infer that Charter's conduct was sufficiently grievous and of such indifference to the rights of others to warrant an

award of punitive damages. In other words, the possibly "innocent" language used in the emails could reasonably have been inferred by the jury to make the improper and unlawful conduct engaged in by Charter in its unlawful discriminatory pricing scheme malicious, wanton, and/or oppressive.

Charter also argues that punitive damages are not proper in this case as there had not yet been established a standard of conduct as it relates to unduly discriminatory cable rates under West Virginia Code §24D-1-13 when the actors engaged in the conduct at issue here. However, it appears that the statutory prohibition against unduly discriminatory cable television rates has been in effect since at least 1990. Surely, Charter should have been aware that some conduct was prohibited as "unduly discriminatory cable television rates," even though it may not have known, as it alleges, *precisely* the type of conduct that was prohibited. Again, it was within the province of the jury to assess and determine whether Charter's conduct was sufficiently grievous to warrant an award of punitive damages. Further, as one of the essential principles of punitive damages is to deter the present actor as well as future actors, it is consistent with these principles to award punitive damages against the first bad actor.

b. *Garnes* Review

As the Court has found that there was sufficient evidence to support the jury's finding that Charter's conduct warranted an award of punitive damages, the Court must next review whether the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Syllabus Points 3 and 4 of *Garnes* provide the factors to be considered by a trial court in reviewing an award of punitive damages. The factors in syllabus point 3, which are first to be considered by the jury and next upon review by the trial court, are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
> (2) The jury may consider . . . the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear.
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
> (5) The financial position of the defendant is relevant.

The first *Garnes* factor indicates that the punitive damages should bear a reasonable relationship to both the harm that has actually occurred and the harm that is likely to occur from the Defendant's conduct. There was evidence presented of the actual harm to CAS that was caused by Charter's conduct in this case and that harm was dealt with by the jury in its award of compensatory damages. However, this factor also requires the Court to consider the deterrence effect that an award of punitive damages might have on possible future wrongdoing by the Defendant as well as other actors in similar situations. As the Defendant has indicated, it discontinued its pricing practices in this state some time ago and it has, in fact, sold its operations and assets in West Virginia so the possibility of this defendant engaging in similar conduct in this state in the future is minimal. However, the Defendant sold its operations and assets to a cable company that continues to operate in this state and, obviously, there are other cable companies operating in this state that could potentially engage in the type of conduct that occurred in this case. The punitive damages awarded in this case are sufficient to deter any

future cable operator from engaging in unduly discriminatory pricing practices in this State. Therefore, the punitive damages bear a reasonable relationship to both the actual harm in this case and to the harm that is likely to occur.

The second factor deals with the reprehensibility of the Defendant's conduct considering, *inter alia*, how long the Defendant continued in its actions and whether the Defendant was aware its actions were causing or were likely to cause harm. As indicated by the three emails quoted above, the Defendant engaged in its pricing conduct for a period of time, apparently indefinite in duration, in an effort to cause the Plaintiff harm by "devastating," "crushing," or otherwise running the Plaintiff out of business.

The third *Garnes* factor indicates that punitive damages should remove a defendant's profit and more gained from its conduct, *if any profit was made*. In this case, there was no evidence that Charter profited from the conduct at issue and, therefore, this factor is of no consequence to the Court's review.

The fourth *Garnes* factor states, "As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages." The jury awarded CAS $1,446,355.00 in compensatory damages on its tortious interference claim and $1,500,000.00 in punitive damages. The punitive damage award only slightly exceeds the compensatory damage award. The relationship between the punitive and compensatory damage awards is reasonable.

The final *Garnes* factor for consideration by the jury and the Court indicates that "[t]he financial position of the defendant is relevant." Charter argues that there was no evidence presented to the jury regarding its financial position and, therefore, this factor cannot be relied upon as supporting or justifying an award of punitive damages. The Court agrees with CAS's position that, while the financial position of Charter may be relevant to the jury's consideration

of punitive damages, the lack of evidence as to Charter's financial position does not negate the jury's award of punitive damages.

The trial court's review of the punitive damage award should additionally consider the following factors from syllabus point 4 of *Garnes*:

> (1) The costs of litigation;
> (2) Any criminal sanctions imposed on the defendant for his conduct;
> (3) Any other civil actions against the same defendant, based upon the same conduct; and
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

The Court is aware that the costs of litigation of this case for both parties have been substantial and the award of punitive damages to the Plaintiff in this case supports the Supreme Court of Appeals' position that plaintiffs should be encouraged to bring wrongdoers to trial. Further, it is the understanding of the Court that there have not been any criminal sanctions imposed upon Charter nor have any other civil actions been filed against Charter for the conduct that was in issue in this case. Therefore, those two factors do not mitigate against the award of punitive damages in this case. Finally, while the Court does not dispute that Charter proceeded in good faith in this litigation arguing genuinely disputed and complex legal and factual issues, the Court believes that the award of punitive damages in this case may likely serve as a continuing incentive to Charter, its successor in interest, and others to engage in fair and reasonable settlement negotiations in the future.

Therefore, based upon all of the above, the Court finds that the jury's award of punitive damages was proper, reasonable, supported by the evidence, and should not be disturbed.

II. Evidence of Causation and Rational Basis

a. Proximate Cause

The Defendant alleges that there was insufficient evidence of causation produced at trial to support the jury's verdict. The Defendant indicates that the evidence presented at the trial merely establishes that the Defendant's discount pricing was only one of multiple possible causes of the harm claimed by the Plaintiff and, as such, does not constitute sufficient evidence of proximate causation.

The Defendant quotes the following from *Oates v. Continental Ins. Co.*, 137 W.Va. 501, 511, 72 S.E.2d 886, 892 (1952), in support of its position that a jury cannot determine whether proximate cause is established by speculation and conjecture: "Whenever . . . the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be." Likewise, the Plaintiff quotes the following from *Oates* in arguing that the evidence presented in this case has "selective application" to support the jury's finding that the pricing practices of the Defendant were the proximate cause of the harm to the Plaintiff:

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deductible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Id, 137 W.Va. at 512, 72 S.E.2d at 892.

In this case, evidence was presented to establish the specific number of sales of CAS buy-back plans to CAS customers or those Charter customers stating an intent to subscribe to CAS.

The same types of buy-back plans were not offered or available to other Charter customers. On the other hand, as the Defendant indicates, there was evidence presented to the jury of potential other reasons why a CAS customer or Charter customer may have accepted a CAS buy-back plan. Further, the evidence established the monthly rates for cable charged under the CAS buy-back plans and the regular Charter monthly rate during the applicable time period. A simple comparison of these rates indicates a substantial monthly and/or yearly benefit to those individuals taking a CAS buy-back plan over those not receiving such plans. In addition, testimony was presented reflecting the opinions of at least a couple of the witnesses that these types of special pricing plans are what actually causes, or is the incentive for, customers to switch, while those witnesses acknowledged that there may be other potential reasons.

Based upon the above-mentioned evidence and the Court's instructions to the jury with regard to proximate causation and the jury's function in weighing the evidence, the jury could make the reasonable inference that the discriminatory rates at issue in this case were the reason customers switched to Charter or did not complete their intended switch to CAS. As such, the jury could properly determine that the actions of the Defendant proximately caused the harm claimed by the Plaintiff as the evidence indicates a "logical sequence of cause and effect" thereby creating a "juridical basis" for such a determination.

Therefore, the Court finds that there was sufficient evidence of causation to support the jury's verdict.

b. Rational Basis

The Defendant asserts that the evidence at trial does not support the jury's determination that the Defendant failed to demonstrate a rational basis for its challenged pricing practices. In support of its argument that it is entitled to a judgment in its favor on Count III, Charter posits

that the rational basis test the Supreme Court of Appeals referred to 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), is a very low threshold that can be met by any reasonably conceivable state of facts that supports a rational basis for the distinction between classes of customers, even if the state of facts are not the actual motivation for the distinction. The rational basis test that the Defendant advocates is the same as that required for governmental actors wherein the federal scheme requires that the challenged classifications must bear a "reasonable relationship to a proper governmental purpose." *Marcus v. Holley*, 217 W.Va. 508, 618 S.E.2d 517 (2005).

However, the Court in *Community Antenna Service, Inc.* indicates that the rational basis test to be applied in this case requires more than the very low threshold applied in cases involving state imposed discrimination and violations of the principles of equal protection. While indicating that the rational basis test in this context is "analogous" to the very low threshold in the equal protection and state imposed discrimination context, the Supreme Court of Appeals held that the same test is instructive but "is not dispositive of the issues herein." *Id.* at 436, 633 S.E.2d at 790. The Court also held that the CAS buy-back plans were "simply rate discrimination" and cited a lack of proof of a rational basis for the discrimination and that the record did "not demonstrate an economic benefit to Charter other than the stifling of competition." *Id.* Based upon the above, this Court finds that, in order to justify the rate discrimination at issue in this case, the Defendant must prove a rational basis for its customer categories based upon justifiable differences in the economic benefits that Charter derives from servicing such categories.

Here, the Defendant offers as a rational basis for its rate discrimination the economic benefit that it obtains from gaining customers from its competitor, CAS. It appears to this Court that this offered economic benefit is the same as that presented to, and rejected by, the Supreme Court of Appeals in *Community Antenna Service, Inc.* Other than this proposed economic benefit, the Defendant did not offer any evidence to the jury of a justifiable difference in the economic benefits it derives from servicing the customers it obtained through the CAS buy-back plans.

Therefore, the Court finds that the Defendant failed to satisfy the rational basis test required in this case and the evidence supports the jury's determination that the Defendant failed to demonstrate a rational basis for its challenged pricing practices.

Finally, based upon the above, the jury's determination that the Defendant's rate discrimination did not constitute legitimate competition and, therefore, finding the Defendant liable on the theory of tortious interference is additionally supported by the evidence.

III. Count IV – Tortious Interference

The Defendant moves the Court for judgment on CAS' claim of tortious interference, or, at a minimum, to amend the judgment awarded under that claim based upon the following: (1) there was no evidence in the record from which a reasonable jury could conclude that CAS had contractual or business relationships that it had a legitimate expectancy to continue; (2) the finding of the amount of liability for tortious interference is not supported by the evidence or is impermissible double recovery.

In order to sustain an action for interference with prospective business expectancies, the Plaintiff must demonstrate: (1) the existence of a contractual business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof

that the interference caused the harm sustained; and (4) damages. Syl. Pt. 2, *Bryan v. Massachusetts Mut. Life Ins. Co.*, 178 W.Va. 773, 364 S.E.2d 786 (1987). Further, "[t]o prove the existence of a business expectancy, a party must demonstrate an objective expectation of future business. . . . The plaintiff must establish a probability of future economic benefit, not a mere possibility." *Southprint, Inc. v. H3, Inc.*, 208 Fed.Appx. 249, 253 (4th Cir. 2006) (internal quotes and citation omitted). It appears clear to this Court that the Plaintiff's opportunity to obtain and retain customers is among the expectancies to be protected. Based upon the Defendant's conduct in using the unlawful CAS buy-back plans to attract customers away from CAS, it was reasonable for the jury to find that, without Charter's interference, CAS would have continued to benefit from its current customers, at least to some extent, and to potentially obtain new customers. Therefore, there was sufficient evidence to support the jury's finding of liability on CAS' tortious interference claim (Count IV).

Additionally, Charter argues that the jury's award of damages on Count IV (tortious interference) is unsupported by proof and/or constitutes double recovery. It is clear that "[t]he jury should not assess damages according to their fancy, or base them upon visionary estimates, probabilities or chances. The verdict must be based upon facts proven and reasonable deductions therefrom." *Pittsburgh-Wheeling Coal Co. v. Wheeling Pub. Serv. Co.*, 106 W.Va. 206, 145 S.E. 272, 275 (1928). "[T]he assessment of damages is peculiarly the province of the jury." *Id.* Further, "Double recovery of damages is not permitted," and a "plaintiff may not recover damages twice for the same injury simply because he has two legal theories." Syl. Pt. 7, *Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982).

Here, the evidence of damages indicated $1,150,954 for past profits, $922,194 for "lost opportunity profits," and $3,156,377 for lost future profits. On Count III (unduly discriminatory

cable rates) the jury awarded $1,150,954 that clearly appears to be damages for past profits. The jury awarded judgment to CAS on Count IV (tortious interference) in the amount of $1,446,350, the award contested by the Defendant. The award on Count IV does not clearly or neatly match any of the categories of damages in evidence; however, it is clearly less than the combined total of all categories of damages, the combined total of "lost opportunity profits" and past profits, as well as the total for lost future profits. The Court is entirely without knowledge as to how the jury arrived at its damage calculation on Count IV and the record has no indication as to the possible components of the damage award, though it should be no surprise that, without a verdict form requesting such information, the record would not contain the jury's deliberations. Further, it is not for the Court to speculate as to how the jury deliberated to arrive at the damage calculation it did.

The Defendant argues that because the jury's damage award on Count IV does not neatly fit the damage amounts presented in evidence the award is unsupported by the evidence and should be reduced or eliminated. The Court does not agree. The jury could have calculated the award in any number of ways and the amount is reasonable based upon the evidence presented, especially considering the multitude of exhibits concerning the specific customers and their accounts, any number of which could have been eliminated or discounted by the jury in its deliberations. It is reasonable for the jury to have discounted the total value of the claimed damages specifically in light of Charter's arguments to the jury that the damage calculations were inflated. Finally, there is no evidence that the jury's damage award on Count IV is excessive considering that the amount is considerably less than the total damages claimed by the Plaintiff.

Lastly, Charter argues that, because it is unclear as to how the jury arrived at the $1,446,350 amount, the damages awarded by the jury on Count IV are significantly likely to constitute double recovery for past profits as those damages were already awarded as compensatory damages for Count III. The Court finds that there is no evidence that the total damages on Count IV also constituted compensatory damages for lost past profits, specifically as the dollar amount is clearly higher than the $1,150,954 claimed, and awarded for that category of damages. Additionally, the sum of $1,446,350 is clearly within the claimed combined total of "lost opportunity profits" and past profits as well as the total for lost future profits. As indicated above, the jury was clearly within its discretion to discount or eliminate some of the claimed damages based upon the evidence presented at trial and its role as the finder of fact in this case.

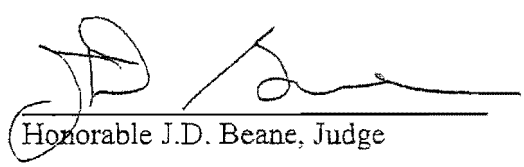
Therefore, based upon the foregoing, the Court finds that the jury's finding of liability for tortious interference and the corresponding monetary award is supported by the evidence and does not need to be disturbed.

Accordingly, the Court ORDERS:

1. Combined Motion for Judgment as a Matter of Law or for a New Trial, and to Alter or Amend the Judgment of Defendant Charter Communications VI, LLC is **DENIED**; and

2. The Clerk of the Court is directed to deliver a copy of this Order on Post-Trial Motions to the parties or their respective counsel of record.

ENTER this 5th day of January 2010:



Honorable J.D. Beane, Judge

STATE OF WEST VIRGINIA,
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 5th day of Jan, 10, as fully as the same appears to me of record.

Given under my hand and seal of said Circuit Court, this the 5th day of Jan, 10.

Carole Jones
Clerk of the Circuit Court of Wood County, West Virginia

By: [illegible], Deputy