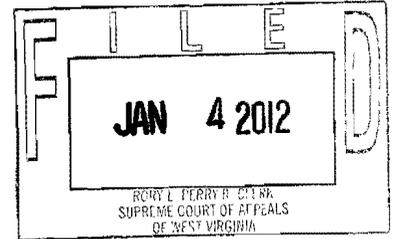


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



**West Virginia-American Water Company,
a West Virginia corporation, Defendant Below,
Appellant,**

v.

**No. 101229
(Kanawha 08-C-544)**

**James A. Nagy, Plaintiff Below,
Appellee.**

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Appellant/Defendant below, West Virginia-American Water Company ("the Water Company" or "the Company"), replies to the *Response in Opposition to Appellant's Supplemental Brief ("Response")* of Appellee/Plaintiff below, James A. Nagy ("Nagy"). As set forth in more detail below, Nagy's Response does not change the Water Company's entitlement to the relief requested.

II. SUMMARY OF ARGUMENT

Nowhere in his Response does Nagy even attempt to cite any authority under West Virginia law that explicitly states that punitive damages and unmitigated lost income damages should both be available to prevailing plaintiffs in wrongful discharge cases. Instead, Nagy contends that the Water Company has failed to preserve the issue for appeal, an argument that has been previously rejected by both the trial court and this Court – and an argument that is irrelevant given the constitutional and public policy concerns raised by this appeal.

Nagy then recites the history of the duty to mitigate in West Virginia. As the Water Company has repeatedly stated, whether Nagy had a "duty" to mitigate is irrelevant to the present appeal. The undisputed evidence of record is that he *did* mitigate. Thus, an unmitigated lost income award did not *compensate* him for anything. The jury clearly awarded such damages to punish the Water Company. They also awarded regular punitive damages, resulting in an impermissible double recovery. This Court originally labeled unmitigated lost income awards as punitive in nature, and to the extent Nagy claims they are compensatory, he has not cited any authority from this Court indicating that to be the case.

The Water Company urges the Court to hold that a plaintiff may not recover *both* punitive damages and unmitigated lost income damages where there is undisputed evidence of record that a plaintiff mitigated his damages. Accordingly, the Company asks that the judgment of the trial court be reversed to the extent it permitted recovery of an unmitigated lost income award in excess of actual loss. The Company asks that this amount, \$1,048,416, be stricken from the jury award in this case.¹

III. ARGUMENT

A. **Nagy fails to identify any precedent from this Court explaining why both punitive damages *and* unmitigated lost income damages should *both* be available in West Virginia wrongful discharge cases**

Nagy's Response is filled with arguments that, "by implication," prevailing plaintiffs in West Virginia wrongful discharge cases are entitled to recover both punitive damages and unmitigated lost income damages. Nowhere in his Response, however, does Nagy identify any express precedent by the Court explaining why both types of damages should be available in wrongful discharge cases. Nowhere in his Response does Nagy address the fact that this Court called unmitigated lost income damages "punitive" in Mason County Bd. of Educ. v. State Superintendent of Schs., 170 W.Va. 632, 295 S.E.2d 719 (W.Va. 1982). And, nowhere in his Response does Nagy identify any other jurisdiction that allows prevailing plaintiffs in wrongful discharge cases to recover both punitive damages and unmitigated lost income damages.

Nagy primarily argues that West Virginia law is well-settled that an employee has no *duty* to mitigate when his discharge was malicious. (Response, pp. 11-18). Nagy does not offer much analysis beyond his recitation of other cases that have reiterated Syllabus Point 2 of Mason

¹ Nagy is correct that the trial court has already granted a remittitur in the amount of \$79,317 from the total lost wage award. This amount can be subtracted from the \$1,048,416, resulting in an actual requested reduction of \$969,099.

County. He continues, however, to miss the point. Whether Nagy had a “duty” to mitigate his lost income damages and whether he fulfilled that “duty” is not an issue in this case. Regardless of whether he had a “duty” to mitigate, the uncontested fact is that he *did* almost completely mitigate his lost income damages when he found a job making comparable money within months of his termination from the Water Company. The Water Company does not contend that Mason County needs to be overruled. Indeed, the decision makes sense on the facts presented to the Court in that case. It is the *subsequent* application of Mason County that is the problem. As the Water Company has argued, punitive damages were not otherwise available in Mason County; and the holding must be considered in that context. Nagy’s citation of the recent case of Kanawha County Board of Education v. Fulmer, No. 101578 (November 10, 2011), adds nothing to the equation, as Syllabus Point 4 of that case simply reiterates Syllabus Point 2 from Mason County.

Mason County must also be considered in the context of Harless v. First National Bank in Fairmont, 169 W.Va. 673, 289 S.E.2d 692 (W.Va. 1982) (“Harless II”). In that case, the Court warned against the dangers of duplicative punitive damages, albeit in the context of emotional distress and punitive damages. Specifically, the Court stated that “the jury may weigh the defendant’s conduct in assessing the amount of damages and to this extent emotional distress damages may assume the cloak of punitive damages.” Id. at 702.

Importantly, however, Harless II did not involve any issue related to unmitigated lost income damages. Nor did Mason County involve punitive damages. The problem of duplicative punitive damages did not even arise until more recent decisions applied principles from these two distinct cases so as to allow both punitive damages *and* unmitigated lost income damages in the very same wrongful discharge case. As expected, Nagy primarily relies upon these

decisions: Seymour v. Pendleton Community Care, 209 W.Va. 468, 549 S.E.2d 662 (2001), and Peters v. River's Edge Mining, Inc., 224 W.Va. 160, 172, 680 S.E.2d 791, 803 (2009). As the Water Company has already pointed out, both of these cases upheld jury verdicts containing both punitive damages and unmitigated lost income awards. Neither case, however, squarely addressed the issue that is now before the Court. That is, the Court was not asked to address whether unmitigated lost income damages and punitive damages were impermissibly duplicative of each other. Moreover, neither case provides any rationale for why the Mason County rule should be extended to cases where punitive damages *are* otherwise available.

Instead of citing to express language from this Court to support his position (which he cannot do, because there is none), Nagy argues his case by implication. For example, he states that, in Seymour, this Court “*implied* necessarily that the plaintiff would have been relieved of the duty [to mitigate] even if she had found subsequent employment and no matter the amount she had earned in subsequent employment.” (Response, p. 15; emphasis added).

In addition to relying on “implied” determinations of the Court, Nagy relies on a concurring opinion in Seymour to support his contention that, once malice is found, mitigation is irrelevant. The fact that Nagy spends over a page of his brief discussing a concurring opinion highlights the fact that this Court has never explained in a majority opinion why punitive damages and unmitigated lost income damages should both be available in the same wrongful discharge case. The fact that Nagy has to rely on implication to support his argument should make it abundantly clear that West Virginia law needs to be clarified regarding the relationship between unmitigated lost income damages and punitive damages in wrongful discharge cases.

Nagy dismissively points out in a footnote that the “many cases from foreign jurisdictions” cited by the Water Company do not “deal with a rule similar to West Virginia’s, wherein the wrongfully terminated employee is relieved of the duty to mitigate when the employer is found to have acted with malice.” (Response, p. 20 n. 13). *That is precisely the point.* There does not appear to be another jurisdiction with the same alleged “rule” as West Virginia. That fact alone is highly indicative of the problem of duplicative punitive damages in West Virginia.

B. Nagy cannot cite to any precedent from this Court which states that unmitigated lost income damages are compensatory when the plaintiff has mitigated his damages

To counter the Water Company’s argument that unmitigated lost income damages are punitive, where the undisputed evidence of record is that the plaintiff has mitigated his damages, Nagy does not cite to any express language from this Court indicating that such damages are compensatory. Instead, he again argues by implication, citing Seymour, stating that “unmitigated lost wages are considered compensatory and have not been viewed as impermissibly duplicative of punitive damages.” (Response, p. 15). Nagy does not cite to any actual language from this Court stating that unmitigated lost income damages, where the plaintiff has mitigated his damages, are compensatory. Nor does he address the fact that this Court originally labeled such damages as “punitive” in nature.

The Mason County Court observed that, when the rules governing public employment were so “well-established” and violations “clear[,]” then “it was possible to accept with equanimity the proposition that the employee should receive an award that, in effect, *punishes* the agency or other employer that is the wrongdoer.” *Id.* (emphasis added). Critically, this Court further acknowledged the punitive aspect of an unmitigated lost income award when it noted

that, “[w]hile a simple rule regarding damages may be easy for those administering the judicial system to apply, and may adequately recompense the injured party, its *punitive* effects are imprecise.” Mason County, 170 W.Va. at 636, 295 S.E.2d at 723 (emphasis added).

It is extremely telling that Nagy does not even mention the above language from Mason County in his brief. The fact of the matter is that this Court originally labeled unmitigated lost income damages as punitive in nature. Nagy does not cite to any subsequent language from this Court describing such damages as compensatory. The closest he can get is by citing to language in Peters that front pay is a form of compensatory damages. “Front pay damages, when appropriate, must be proved to a reasonable probability and are a form of compensatory damages, because they ‘restore[] the terminated employee to the economic position that the employee would have enjoyed, were it not for the employer’s conduct.’” Peters, 224 W.Va. at 181, 680 S.E.2d at 812 (quoting Thompson v. Town of Alderson, 215 W.Va. 578, 580, 600 S.E.2d 290, 292 n. 1 (W.Va. 2004)) (quoting, in part, Tadsen v. Praegitzer Industries, Inc., 324 Ore. 465, 472 n. 5, 928 P.2d 980, 981 n. 5 (1996)). This language, however, does *not* mean that lost income damages are *always* “compensatory,” and neither West Virginia law nor common sense dictates such a broad conclusion. Indeed, such damages cannot possibly “restore” Nagy to “the economic position that [he] would have enjoyed was it not for [the Water Company’s] conduct” because the unmitigated lost income award puts Nagy in a far better economic position than he otherwise would have been. In this case, the lost income damage award is not “compensatory,” and to call it such would be to simply engage in fiction.

C. The relief requested by the Water Company is straightforward and easily applied

Contrary to Nagy’s argument, the Water Company is not asking this Court to overrule “30 years of precedent” from Mason County or Harless II. Nor is the Company asking the Court

to create a “subjective sliding scale threshold of when wage loss is compensatory and when it is punitive.” (Response, pp. 11-12). Quite the contrary, the relief requested is straightforward and easy to apply.

This Court should hold that a prevailing plaintiff in West Virginia wrongful discharge cases, whether such case is brought under statutory or common law grounds, may recover punitive damages or unmitigated lost income damages, but not both. Moreover, the requested relief should apply to this case. As Nagy correctly points out, the general rule is a presumption that “appellate judicial decisions apply retroactively.” Ashland Oil, Inc. v. Rose, 177 W.Va. 20, 23, 350 S.E.2d 531, 534 (W.Va. 1986). In any event, as set forth above, the Water Company is asking for a clarification of the relationship between unmitigated lost income awards and punitive damages awards in wrongful discharge cases – not that any one particular case be overruled. Thus, the factors outlined in Syllabus Point 5 of Bradley v. Appalachian Power Co., 163 W.Va. 332, 332-33, 256 S.E.2d 879, 880-81 (1979), would favor retroactive application of the relief requested by the Water Company.

D. Unmitigated lost income damages are impermissible in cases such as this because there is no provision for a Garnes-style constitutional review

Nagy argues that, even if the unmitigated lost income damages in this case are actually punitive damages, they would nevertheless survive a Garnes analysis. His argument in this regard ignores the fact that, if the unmitigated lost income damages are punitive, that means the jury awarded *two sets* of punitive damages in this case. Those two sets of damages cannot magically be combined. One set has to be eliminated, and in this case, it has to be the unmitigated lost income damages because the Water Company never received due process regarding those damages. Specifically, the jury was not instructed on the Garnes factors as it relates to unmitigated lost income damages. Garnes, 186 W.Va., 413 S.E.2d at Syllabus Point 3.

Indeed, the trial court instructed the jury, over the Water Company's objection, that if it found malice, it *had* to award unmitigated lost income damages. Moreover, the trial court did not perform any Garnes analysis on the damages. The fact that there is no Garnes-style process available for instructing juries and reviewing unmitigated lost income awards serves to highlight the fact that they should not even be available in cases like this.

E. The Water Company Preserved the Issue of Duplicative Punitive Damages for Appeal

Nagy argues that the Water Company has failed to preserve the present issue. Nagy's position has repeatedly been rejected, both by the trial court and this Court. Moreover, Nagy cites selective portions of the Joint Appendix in an effort to make it seem like the Water Company conceded that unmitigated lost income damages may be appropriate in this case. In reality, the Water Company consistently tried to avoid the problem of duplicative punitive damages. First, it argued from pre-trial forward that *neither* punitive damages nor unmitigated wage loss damages should be available in this case, as a matter of law. Second, the Water Company argued that the trial court should *not* instruct the jury that, if it found malice, it was *required* to award a flat lost income award. (JA 26-27). According to the Company, the evidence of mitigation could not be ignored, even if the jury found malice. This would have prevented any problem with duplicative punitive damages.

Post-trial, the Water Company continued to argue that neither item of damages was appropriate, and as a result of the trial court's refusal to exclude one or both types of damages, the jury had actually awarded what amounted to duplicative punitive damages. In its *Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial or, in the Alternative, to Alter or Amend the Judgment*, the Water Company specifically argued that "while the amount of punitive damages is less than the

compensatory award, it is nevertheless unreasonable by virtue of the fact that the compensatory damages, by including emotional distress and unmitigated wage loss, already contain a punitive element.” (JA 268-269). Moreover, the Company continued to argue that “the jury should have been required to take mitigation into account.” (JA 265).

During the post-trial hearing on the motion, the Company argued that the unmitigated lost income award was punitive in nature, and, therefore, duplicative of the punitive damages award:

[The lost income award] has a punitive element to it, because for example, in this case, Mr. Nagy was able to obtain comparable employment within a matter of weeks of his discharge. However, the jury awarded him one point one million dollars in lost wage damages. He did not suffer one point one million dollars of actual lost wages in this case. The jury awarded that amount after they found that the discharge was malicious. Those aren't compensatory damages. The only other thing they could be is punitive to punish an employer and say, 'Next time you discharge someone, it shouldn't be malicious, because if it is, you get punished with a flat weight [sic] award.'

(Motions Hearing, January 19, 2010, p. 5; JA 307). Later in the hearing, the Company again stated that “the lost wage damages already have a punitive element to them.” (Motions Hearing, p. 16; JA 310). Moreover, the Company also continued to argue that the trial court erred by instructing the jury that it *had to* award unmitigated lost income if it found malice. (Motions Hearing, p. 13; JA 309).

During the hearing, Nagy's counsel argued that the Water Company has not previously raised the issue of duplicative punitive damages, stating “for the first time today, I've heard opposing counsel argue that there's a punitive element to the front pay damages and that they couldn't be considered as compensatory damages as a result.” (Motions Hearing, p. 32; JA 314). Nagy's counsel proceeded to argue that the lost income damages were compensatory, not

punitive. (Motions Hearing, p. 32; JA 314). Thus, the parties have been contesting this issue since well before the present appeal.

If the trial court had accepted the Water Company's arguments, this would have cured any problem of duplicative punitive damages. Unfortunately, the trial court rejected them, but in ruling on the arguments in the first place, the trial court also necessarily rejected any contention by Nagy that the Water Company had not adequately preserved the issue.

The Water Company continued to argue before this Court that the punitive damages and unmitigated lost income damages awarded by the jury were impermissibly duplicative. (Petition for Appeal, pp. 11-27). In his *Response in Opposition to Petition for Appeal*, Nagy did not contend that the Water Company failed to preserve its argument regarding duplicative punitive damages. He did argue that the Company failed to preserve its argument pertaining to violation of West Virginia's "one recovery rule." (Response in Opposition to Petition for Appeal, p. 31). This Court necessarily rejected Nagy's argument regarding waiver, however, when it issued its Memorandum Decision on June 15, 2011. The Court did not rule in that decision that the Water Company had failed to preserve *any* issues for appeal. If Nagy believed that it was error for this Court to address the substance of the Water Company's arguments, then he should have raised the matter in a cross-assignment of error. He did not. Thus, he is the party that has waived that argument during this appeal. See Noland v. Va. Ins. Reciprocal, 224 W.Va. 372, 378, 686 S.E.2d 23, 29 (W.Va. 2009) ("VIR did not set out in its brief, as a cross-assignment of error, the trial court's determination . . . any error in that ruling has been waived for purposes of this appeal").

Finally, the Water Company notes that the issue of duplicative punitive damages involves constitutional issues and/or substantial public policy concerns that are likely to recur in the

future. Thus, the Court is obligated to address the issue. See Whitlow v. Bd. of Educ. of Kanawha County, 190 W.Va. 223, 226-27, 438 S.E.2d 15, 18-19 (1993) (addressing constitutional issue that was also a matter of “substantial public interest that may recur in the future”); Wang-Yu Lin v. Shin Yi Lin, 224 W.Va. 620, 624, 687 S.E.2d 403, 407 (2009). As pointed out in Appellant’s Supplemental Brief, the constitutional rights of West Virginia employers are implicated here. Subjecting employers to unmitigated lost income awards, without the review afforded to regular punitive damages awards by Garnes v. Fleming Landfill, 186 W.Va. 156, 413 S.E.2d 897 (1992), clearly affects their constitutional right to due process. Moreover, it defies common sense for Nagy to argue that public policy concerns are not implicated here and/or that the issue is not likely to recur in the future. An environment where both punitive damages and unmitigated lost income damages, which this Court has clearly described as punitive in nature, are available in wrongful discharge cases is clearly hostile to employers attempting to operate in West Virginia. No other jurisdiction appears to have a similar “rule.” This issue will recur again and again unless the Court addresses it here.

IV. CONCLUSION

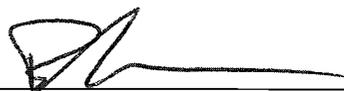
While this Court has reviewed and affirmed wrongful discharge cases where both punitive damages and unmitigated lost income were awarded, it has never squarely addressed the issue of whether punitive damages and unmitigated or "flat" lost income awards are impermissibly duplicative of each other in the wrongful discharge context. The Water Company urges the Court to hold, consistent with other jurisdictions, that a plaintiff may not recover both punitive damages and unmitigated lost income damages where there is undisputed evidence of record that a plaintiff mitigated his damages. Accordingly, the Company would ask that the

judgment of the trial court be reversed to the extent it permitted recovery of an unmitigated lost income award in excess of actual loss.

Submitted this 4th day of January, 2012.

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West Virginia-American Water Company,
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No. 101229
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James A. Nagy, Plaintiff Below,
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CERTIFICATE OF SERVICE

I, Brian J. Moore, do hereby certify that the foregoing *Appellant's Reply Brief* has been served upon counsel of record via U.S. Mail on this the 4th day of January, 2012, addressed as follows:

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