



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
(CIVIL ACTION NO. 08-C-544
JUDGE JENNIFER F. BAILEY)**

JAMES A. NAGY, Plaintiff Below,

Appellee.

RESPONSE IN OPPOSITION TO APPELLANT'S SUPPLEMENTAL BRIEF

Maria W. Hughes, Of Counsel (WVSB #7298)
Stephen A. Weber (WVSB #3965)
John D. Hoblitzell III, (WVSB # 9346)
Kay Casto & Chaney, PLLC
1500 Chase Tower
P.O. Box 2031
Charleston, West Virginia 25327-2031
Voice: (304) 345-8900
Counsel for Appellee

TABLE OF CONTENTS

- I. ASSIGNMENT OF ERROR 1
- II. STATEMENT OF THE CASE..... 1
 - A. Procedural History 1
 - B. Relevant Facts: 2
- III. SUMMARY OF ARGUMENT2
- IV. STATEMENT REGARDING ORAL ARGUMENT3
- V. ARGUMENT.....3
 - A. Appellant WVAWC Failed to Preserve the Subject Issue For Appeal, and
Consequently, It Has Waived the Right of Review. 3
 - 1. The Court should not consider arguments that have not been properly preserved for
appeal..... 4
 - 2. WVAWC failed to preserve the issue for appeal. 5
 - 3. The issue on appeal is a nonjurisdictional issue which was required to have been
preserved for appeal. 8
 - B. As This Court Affirmed in its Memorandum Decision, Both Punitive Damages and
Unmitigated Wage Loss are Recoverable Under West Virginia Law..... 11
 - 1. There is No Duty To Mitigate Where An Employer Acts Maliciously. 11
 - 2. There Is No Impermissible Double Recovery. 18
 - 3. A Malicious Employer Should Not Benefit From A Wrongfully Terminated
Employee’s Hard Work And Good Efforts In Obtaining Another Job..... 21
 - 4. Sufficient Mechanisms Already Exist In The Law To Address The Situation
WVAWC Complains Of. 22
 - C. If the Court is Inclined to Modify *Seymour* and *Peters*, it Should Do So Prospectively,
Not Retroactively. 25
 - D. Assuming, Arguendo, that Unmitigated Wage Loss Awards are Punitive, the Total
Award in this Case, Using WVAWC’s Argument is Still Appropriate. 28
 - 1. Using WVAWC’s calculations, punitive damages are still only 3.7 times
compensatory damages. 28
 - 2. Even if punitive in nature, the total amount of unmitigated wage loss and punitive
damages is appropriate under a *Garnes* review 29
 - a. Aggravating evidence supporting the punitive damage award..... 32
 - b. The ratio of punitive damages to compensatory damages is appropriate. 35
 - c. Mitigating factors 36
- VI: CONCLUSION39

TABLE OF AUTHORITIES

Cases

<i>Ashland Oil, Inc. v. Rose</i> , 177 W.Va. 20, 23, 350 S.E.2d 531, 534 (1986).....	25
<i>Barney v. Auvil</i> , 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995).....	4, 9
<i>Bradley v Appalachian Power Co.</i> , 163 W. Va. 332, 332-33, 256 S.E.2d 879, 880-81 (1979) ..	25, 26, 27
<i>Caperton v A.T. Massey Coal Co., Inc.</i> , 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)	25
<i>Cnty. Antenna Serv., Inc. v. Charter Communications VI, LLC</i> , 227 W. Va. 595, 712 S.E.2d 504, 509 (2011)	9
<i>Coleman v. Sopher</i> , 201 W.Va. 588, 600-501, 499 S.E.2d 592, 604-605 (1997).....	9
<i>Daily Gazette Co., Inc. v. Comm. on Legal Ethics of W.Va. State Bar</i> , 176 W. Va. 550, 550, 346 S.E.2d 341, 341 (1985).....	26, 27
<i>Garnes v. Fleming Landfill, Inc.</i> , 186 W. Va. 656, 658, 413 S.E.2d 897, 899 (1991) .	9, 18, 29, 31
<i>Hannah v. Heeter</i> , 213 W. Va. 704, 717, 584 S.E.2d 560, 573 (2003)	19
<i>Harless v. First National Bank in Fairmont</i> , 169 W.Va. 673, 289 S.E.2d 692 (W.Va. 1982)....	18, 19, 23
<i>Haynes v. Rhone-Poulenc, Inc.</i> , 208 W.Va. 18, 521 S.E.2d 331 (1999)	18, 27
<i>Hopkins v. DC. Chapman Ventures, Inc.</i> , No. 101530, (Nov. 10, 2011).....	7
<i>Johnson by Johnson v. Gen. Motors Corp.</i> , 190 W. Va. 236, 244, 438 S.E.2d 28, 36 (1993).....	22
<i>Kanawha County Board of Education v Fulmer</i> , No. 101578, *ii (Nov. 10, 2011).....	13, 17
<i>King v. Kayak Mfg. Corp.</i> , 182 W. Va. 276, 277, 387 S.E.2d 511, 512 (1989)	26
<i>Mace v. Charleston Area Medical Center Foundation, Inc.</i> , 188 W.Va. 57, 66, 422 S.E.2d 624, 633 (1992)	12, 13, 14, 21, 23
<i>Mason County Board of Education v State Superintendent of Schools</i> , 170 W.Va. 632, 633, 295 S.E.2d 719, 720-721 (1982)	11, 12, 13, 14
<i>Mowery v. Hitt</i> , 155 W. Va. 103, 103, 181 S.E.2d 334, 335 (1971).....	4
<i>Perrine v. E.I. du Pont de Nemours & Co.</i> , 225 W. Va. 482 599, 694 S.E.2d 815, 932 (2010) ...	5, 29, 31, 32, 33, 34, 36
<i>Peters v. Rivers Edge Mining, Inc.</i> , 224 W. Va. 160, 680 S.E.2d 791 (2009).....	12, 14, 20
<i>Rice v. Community Health Association</i> , 203 F.3d 283 (4 th . Cir. 2000).....	9
<i>Seymour v Pendleton Community Care</i> , 209 W.Va. 468, 469, 549 S.E.2d 662, 663 (2001) 12, 14, 15, 16, 21	12, 14, 15, 16, 21

State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003) 12

TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992) ... 36

Vandevender v Sheetz, Inc., 200 W.Va. 591, 595, 490 S.E.2d 678, 682 (1997)..... 4, 9, 20, 35, 37

Walker v Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001)..... 12

Wang-Yu Lin v. Shin Yi Lin, 224 W. Va. 620, 687 S.E.2d 403, 404 (2009)..... 4, 8, 9

Whitlow v. Bd. of Educ. of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993)5, 8, 10

Statutes

W.Va. Code §5-11-13(c)..... 27, 37

Constitutional Provisions

W. Va. Const. Art. VIII, § 4..... 12

I. ASSIGNMENT OF ERROR

Appellant West Virginia American Water Company (“WVAWC” or “Appellant”) has failed to identify any assignment of error in its Supplemental Appellant Brief. It has not pointed to any error or misapplication of the law in the record below. Instead, it is seeking a wholesale departure from well-established legal principles it has admitted are the law of the case. Further, the arguments WVAWC raises before this Court were not raised and preserved for appeal at the trial level. In fact, as this Court’s June 15, 2011 Memorandum Decision demonstrates, the trial court properly followed existing law. For the reasons set forth *infra*, the judgment below as well as this Court’s June 15, 2011 Memorandum Decision should be affirmed.

II. STATEMENT OF THE CASE

A. Procedural History

On October 1, 2009, a Kanawha County jury unanimously concluded that West Virginia American Water Company engaged in age discrimination by maliciously firing 54-year old James Nagy (“Mr. Nagy” or “Appellee”) after nearly 23 years of service. The jury heard “text-book” evidence of age discrimination: i.e., on the same day that WVAWC fired Mr. Nagy, WVAWC gave 34-year-old Jeff Ferrell only a ten-day suspension, even though Mr. Ferrell had engaged in the same conduct as Mr. Nagy. The jury also heard evidence that WVAWC engaged in a pattern and practice of deliberate discriminatory conduct and that WVAWC recklessly and maliciously treated Mr. Nagy as a common thief. After an 8 day-trial, the jury concluded that Mr. Nagy was entitled to \$200,450 in back pay, \$900,000 in front pay, \$150,000 for emotional distress, \$150,000 for loss of dignity, and \$350,000 in punitive damages. The Honorable Jennifer F. Bailey, Circuit Court of Kanawha County, entered judgment on October 9, 2009.

On October 23, 2009, WVAWC filed a “Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial or, in the Alternative, for Alteration of Amendment of the

Judgment.” (hereinafter “JMOL”). By Order entered May 25, 2010, the Circuit Court substantially denied the Motion, finding that: (1) the jury had more than sufficient evidence to conclude that WVAWC discriminated against Mr. Nagy on the basis of his age; (2) there was sufficient evidence for the jury to award punitive damages; (3) as the jury found malice, Mr. Nagy was absolved of his duty to mitigate; (4) the verdict was not clearly against the weight of the evidence; and (5) the jury instructions and the verdict form were proper. The Circuit Court also found that the lost wages award should be remitted by \$79,317. (See Order on JMOL, JA000324-JA000358).

On September 22, 2010, Appellant filed its Petition for Appeal from the May 25, 2010 Order. Appellee filed his response on or about October 22, 2010. Importantly, this Court affirmed the trial court by Memorandum Decision issued June 15, 2011. WVAWC then moved for rehearing on the single issue of whether an award for unmitigated wage loss was impermissibly duplicative of punitive damages – **an issue that was not raised at the trial court below**. Mr. Nagy filed his Response in Opposition on July 29, 2011, and by Order entered September 14, 2011, this Court granted the motion for rehearing. For the reasons discussed herein, the Circuit Court’s rulings (and this Court’s Memorandum Decision) were based upon sound evidence and existing West Virginia law, and should not be disturbed.

B. Relevant Facts:

For sake of brevity, Mr. Nagy incorporates verbatim herein;(1) the facts set forth at pages 2-8 of its Response to Petition for Appeal; and (2) the facts set forth in the Order entered May 26, 2010, attached as Appendix A to this Court’s June 15, 2011 Memorandum Decision.

III. SUMMARY OF ARGUMENT

Appellant WVAWC attempts to state grounds for this appeal that were never raised or preserved at the trial level. In fact, rather than object at the trial level, WVAWC repeatedly

admitted during and after trial that a discharged employee has no duty to mitigate his damages when his employer acted with malice. Accordingly, WVAWC has waived the right to raise the issue after the fact. Moreover, even if the issue were otherwise reviewable, the trial court properly followed and applied existing law, allowing for the recovery of both unmitigated lost wages and punitive damages, as recognized by this Court in its June 15, 2011 Memorandum Decision. Should the Court be inclined to reverse its well-established precedent allowing recovery of both types of damages, it should do so only prospectively. Finally, even assuming, *arguendo* that the unmitigated wage loss awarded in this matter is punitive as argued by WVAWC, the total such “punitive” damages awarded are still constitutionally permissible and the verdict should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT

Appellant WVAWC has failed to preserve the issues presented for appeal. Moreover, the trial court and this Court, in its June 15, 2011 Memorandum Decision, correctly applied well-established precedent. Consequently, Appellee James Nagy believes that oral arguments are unnecessary under Rule 18(a) of the Revised Rules of Appellate Procedure. To the extent that this Court has already directed this matter be set for oral argument in its September 14, 2011 Order granting a rehearing, Appellee believes that Rule 19 argument is appropriate.

V. ARGUMENT

A. Appellant WVAWC Failed to Preserve the Subject Issue For Appeal, and Consequently, It Has Waived the Right of Review.

WVAWC is requesting this Court to reverse a jury verdict, entered after eight days of trial, on grounds that were never raised or preserved at the trial court below. Specifically, WVAWC “asks the Court to re-examine its Memorandum Decision **as it pertains to the issue of duplicative damages.**” (Pet. for Rehr’g, p. 2)(emphasis added). According to WVAWC, “[t]he

Circuit Court erred in allowing the jury to consider and award both punitive damages and unmitigated lost income damages, and then by refusing to eliminate the unmitigated lost income award as impermissibly duplicative of the punitive damages award.” (WVAWC Supp. Brief, p. 2). However, WVAWC never raised such issue at the trial court level, and consequently, it has failed to preserve the issue for appeal.¹

1. The Court should not consider arguments that have not been properly preserved for appeal.

WVAWC is asking this Court to exceed its appellate jurisdiction by considering matters that were not raised and addressed below. It is well established that, “[i]n the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.” Syl. Pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334, 335 (1971); *See also*, Syl. Pt. 1, *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 687 S.E.2d 403, 404 (2009); *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995); Syl. Pt. 10, *Error! Bookmark not defined. Vandevender Error! Bookmark not defined. v. Sheetz, Inc.*, 200 W.Va. 591, 595, 490 S.E.2d 678, 682 (1997) (“This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.”). As the Court has emphasized in *Whitlow v. Bd. of Educ. of Kanawha County*:

The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. **Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.** Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

¹ Prior to its Petition for Rehearing, WVAWC’s argument was that there was insufficient evidence to allow the jury to consider malice, not that unmitigated wage loss and punitive damages would be duplicative.

Whitlow v. Bd. of Educ. of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) (emphasis added). The purpose of a rehearing is not to allow the losing party to present points that it overlooked previously. See *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482 599, 694 S.E.2d 815, 932 (2010) (reconsideration denied (June 2, 2010)).

2. WVAWC failed to preserve the issue for appeal.

Appellant WVAWC's sole assignment of "error" is that the Circuit Court erred in allowing an award of both unmitigated wage loss and punitive damages. WVAWC lists five reasons why it believes this ruling was erroneous: 1) the made-whole/one recovery rule; 2) the damages are duplicative of punitive damages; 3) unmitigated wage loss is punitive; 4) victims of malicious workplace discrimination should not be permitted to recover both punitive damages and unmitigated wage loss; and 5) unmitigated wage loss should be subject to a *Garnes* style review. (See WVAWC's Supp. Brief, Table of Contents, pp. ii-iii).

A careful reading of the record shows this argument was only raised for the first time in WVAWC's Petition for Appeal. Prior to such time, WVAWC's position, in its JMOL, was only that the award of unmitigated wage loss was unjustified because there was insufficient evidence of malice. The issue of unmitigated wage loss being impermissibly duplicative of a punitive damage award was conspicuously absent from any of WVAWC's arguments.

WVAWC's failure to raise this issue predates the trial. At the September 17, 2009 Pretrial Hearing, the trial court heard several *motions in limine* made by WVAWC regarding punitive damages and wage loss. One of these motions was WVAWC's motion to exclude evidence relating to punitive damages. In that motion, as well as another motion made by WVAWC to exclude/limit evidence of wage loss,² WVAWC failed to argue that punitive

² At issue in this latter motion was whether a vocational expert was needed to establish future wage loss and whether there was evidence of malice to support an award of unmitigated wage loss. (See JA00015—JA00017).

damages and unmitigated wage loss would be a duplicative recovery. (See JA0006 – JA0007).³ Further, the issue of unmitigated wage loss being impermissibly duplicative of punitive damages was not addressed in WVAWC’s pretrial motions. (See JA00015—JA00017).

WVAWC next raised the issue of unmitigated wage loss on Day 7 of the trial, prior to the testimony of Mr. Selby, Mr. Nagy’s expert. At that time, WVAWC moved to limit Mr. Selby’s testimony claiming there was no evidence of malice to allow Mr. Selby to testify about unmitigated wage loss. (See JA000111—JA000126). The issue argued by WVAWC’s counsel was “whether there’s any evidence of record from which the jury could find Mr. Nagy’s discharge to be malicious such that Mr. Selby could testify about his report that does not take mitigation into effect.” (JA000111). The remainder of the argument dealt with whether the evidence of malice was sufficient to allow Mr. Selby to present unmitigated wage loss figures. Again, WVAWC did not raise any issue concerning whether unmitigated wage loss was impermissibly duplicative of punitive damages. At the close of Mr. Nagy’s evidence later that same day, WVAWC moved for directed verdict on the issues of liability and punitive damages. (See JA000135—JA000144). Specifically, WVAWC moved to exclude punitive damages “on the basis that there’s no malice or no evidence from which the jury could find malice in this case.” (JA000138). Again, WVAWC failed to raise the issue of whether punitive damages and unmitigated wage loss were impermissibly duplicative.

Nor was the issue raised during arguments on jury instructions on Day 8 of trial. (See generally JA000146-JA000235). When arguing jury instructions dealing with front pay, back pay, punitive damages, and mitigation, WVAWC did not raise objections that the awards would be impermissibly duplicative; rather, it again argued that there was not sufficient evidence of

³ The transcript of the Pretrial Hearing is located in the Joint Appendix at JA0001—JA00019.

malice to give the instructions. (See JA000170-JA00174). In arguing those instructions, counsel for WVAWC specifically stated, “**Your Honor, I have no qualms with the fact that if they find malice, he had no duty to mitigate.**” (JA000172—JA000173)(emphasis added).⁴ WVAWC, therefore, admitted what existing law holds –there is no duty to mitigate if the employer acts with malice. WVAWC never raised the issue of duplicative damages.⁵ With regard to the punitive damage instructions, again WVAWC’s arguments centered on “the fact we don’t think there’s sufficient evidence that the jury could find malice in this case,” (JA000178), not that it was impermissibly duplicative of unmitigated wage loss. WVAWC never even offered an instruction that would have instructed the jury that an award of unmitigated wage loss – if there was a finding of malice – was punitive such that such an award must be considered under the *Garnes* factors. Finally, in arguments on the verdict form, WVAWC’s position was again that there was no evidence of malice. (See JA000209-JA000212).

Even after the trial was over, WVAWC failed to raise the argument that unmitigated wage loss was impermissibly duplicative of punitive damages in its JMOL. (See JA000238—JA000269). Once again, WVAWC limited its arguments only to whether there was sufficient evidence to award punitive damages (JA000247)⁶ or sufficient evidence to award unmitigated wage loss. (JA000251-JA000252). **Once again, it acknowledged that there is no duty to**

⁴ Admitting there is no duty to mitigate and then later assigning error to the fact that the Circuit Court allowed the jury to consider an unmitigated wage loss award based on the lack of a duty is akin to inviting error. See Syl. Pt. 3, *Hopkins v. DC. Chapman Ventures, Inc.*, No. 101530, (Nov. 10, 2011)(*per curiam*).

⁵ The only time the issue of duplicative damages was raised at the trial court level during jury instructions was when arguing over instructions regarding incidental damages and emotional distress, **not** punitive damages and unmitigated wage loss. (See JA00174—JA000176). WVAWC has not appealed the portion of this Court’s Memorandum Decision affirming the trial court on this issue. (See Mem. Dec., Case No. 101229, §II, pp.5—6).

⁶ At the motion hearing on WVAWC’s post-trial motions, Appellant did argue in oral arguments that unmitigated wage loss had “a punitive element” to it. However, this argument was not that the two were impermissibly duplicative, but rather was made in the context of WVAWC arguing that there was no “further egregious conduct” to support an award of punitive damages – an issue which not currently before this Court as WVAWC has not sought rehearing on the portion of the Memorandum Decision that addresses this issue. (See JA000307).

mitigate damages by accepting similar employment when the termination was malicious.
(See JA000250-000251).

In arguing in its JMOL that the Circuit Court's jury instructions on punitive damages and unmitigated wage loss were erroneous, WVAWC's position was there was insufficient evidence of malice, not that the two were impermissibly duplicative or that an unmitigated wage loss award was anything other than compensatory. (JA000263—JA000264.) WVAWC yet again acknowledged that “[u]pon a jury finding of malice, a plaintiff is relieved of that duty.” (JA00264)(emphasis added).

Simply put, WVAWC had the opportunity to raise this argument at least six times before the trial court, and it failed to do so. Indeed, it was not until its Petition for Appeal that it first raised this issue. (See WVAWC Pet. Appeal, p. 8.) As the matters at issue now were not raised by WVAWC at the trial level, it would be manifestly unfair to Appellee James Nagy to allow consideration of this assignment of error for the first time on appeal.

3. The issue on appeal is a nonjurisdictional issue which was required to have been preserved for appeal.

As set forth *supra*, matters not preserved for appeal are waived. The only exception to this rule is where the issue is jurisdictional or constitutional in nature and involves substantial public policy concerns that will recur in the future. See *Whitlow*, 190 W. Va. at 226-27, 438 S.E.2d at 18-19; *Wang-Yu Lin*, 224 W. Va. at 624, 687 S.E.2d at 407. It is clear from reviewing this Court's prior decisions that those concerns are not present here.

Most significantly, this Court has previously held that the issue of whether punitive damages may be recovered is a nonjurisdictional issue that must be preserved for appeal. In *Vandevender v. Sheetz*, *supra*, the Court refused to address the issue of whether punitive damages were available for violations of the anti-discrimination provisions of the West Virginia

Workers' Compensation Act or Human Rights Act because the appellant, Sheetz, failed to preserve the issue for appeal. See *Vandever*, 200 W.Va. at 500, 490 S.E.2d at 687.⁷ This Court has also repeatedly held that assignments of error related to the application of *Garnes* factors not specifically raised in the petition "will be deemed waived as a matter of state law." Syl. Pt. 5, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 659, 413 S.E.2d 897, 900 (1991); see also Syl. Pt. 12. *Cmty. Antenna Serv., Inc. v. Charter Communications VI, LLC*, 227 W. Va. 595, 712 S.E.2d 504, 509 (2011); Syl. Pt 5, *Vandevender*, 200 W. Va. at 594, 490 S.E.2d at 681.

Just as in *Vandevender*, Appellant WVAWC is questioning the ability of a plaintiff to recover punitive damages (and unmitigated lost wages) after-the-fact. Only in this case, WVAWC actually conceded during arguments that existing law permits both types of recovery and stated it had "no qualms" with that rule of law. Appellant cannot now argue that both the Circuit Court's rulings and its earlier arguments were erroneous. The fact is that Appellant had every opportunity to make these arguments at the trial level and it failed to do so. See also *Rice v. Community Health Association*, 203 F.3d 283 (4th Cir. 2000) (the Fourth Circuit Court of Appeals refused to review a jury instruction concerning the award of unmitigated front pay and back pay where the appellant failed to preserve the issue at the trial level.); *Wang-Yu-Lin*, 224 W.Va. at 624, 687 S.E.2d at 407 (appellant waived right to argue that W.Va. Code §33-12-32 did not apply where it failed to preserve issue for appeal); *Barney v. Auvil*, 195 W.Va. at 742, 466 S.E.2d at 810 (appellant waived right to argue that twenty-year statute of limitations applied and right to argue that manufacturer could be sued directly where issues were not preserved for appeal); *Coleman v. Sopher*, 201 W.Va. 588, 600-501, 499 S.E.2d 592, 604-605 (1997)

⁷ In *Vandevender* the Court also refused to address an alleged instructional error relating to recovery of emotional distress and punitive damages when Sheetz agreed to an instruction on emotional distress and jointly submitted a jury verdict form that allowed the jury to consider both emotional distress and punitive damages. 200 W.Va. at 607, 490 S.E.2d at 694.

(argument waived where appellant failed to preserve objection related to admissibility of evidence of donation of brain tissue samples without consent). *Compare Whitlow v. Bd. of Educ. of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) (application of different statute of limitations for minors in Governmental Tort Claims and Insurance Reform Act violated the Equal Protection Clause of the West Virginia Constitution).

In summary, WVAWC's challenge is nonjurisdictional, and therefore, it must have been preserved for appeal at the trial level. The record below is replete with occasions wherein WVAWC's counsel (1) admitted that under existing law there is no duty to mitigate if the jury finds malice and, at the same time, (2) failed to argue that recovery of unmitigated wage loss and punitive damages is a duplicative recovery.⁸ At no time did WVAWC argue that unmitigated wage loss was anything other than compensatory or that the jury was required to consider the *Garnes* factors before awarding Mr. Nagy unmitigated wages. Clearly, this appeal boils down to the fact that WVAWC is displeased the jury found it acted with malice, and it is only asking this Court to lend a sympathetic ear. Again, WVAWC acknowledges in its Supplemental Brief that existing law permits recovery of **both** unmitigated wage loss and punitive damages in an employment case when the employer is found to have acted with malice. (*See* WVAWC's Supp. Brief, pp.11-12). It does not couch its plea in "error" that was preserved in the record. Nor does it even argue that there was insufficient evidence of malice. Rather, it (ostensibly, as is addressed *infra*) only wants this Court to "squarely [address] the issue of whether punitive damages and unmitigated or 'flat' lost income awards are impermissible duplicative of each other in the wrongful discharge context." *Id* at p. 22. To now review this issue would be unfair

⁸ Indeed, if WVAWC had contended at any point that the duty to mitigate should apply even when the employer acted with malice, as it argues herein, it could have sought certification of that issue to this Court. Instead, it never challenged that rule of law, never raised the issue for appeal, and now, after-the-fact, seeks a change in law it admitted without question applied throughout the trial.

to Mr. Nagy, when WVAWC has failed to preserve the issue for appeal and acknowledged all along that there is no duty to mitigate upon a finding of malice. Accordingly, the Order of the Circuit Court of Kanawha County should be affirmed.

B. As This Court Affirmed in its Memorandum Decision, Both Punitive Damages and Unmitigated Wage Loss are Recoverable Under West Virginia Law.

1. There is No Duty To Mitigate Where An Employer Acts Maliciously.

For nearly three decades, this Court has recognized that an employee has no duty to mitigate his damages when his employer acted maliciously. *See* Syl. Pt. 2, *Mason County Board of Education v State Superintendent of Schools*, 170 W.Va. 632, 633, 295 S.E.2d 719, 720-721 (1982) (first recognizing unmitigated wage loss). Nevertheless, WVAWC now invites this Court to either overturn thirty years of black and white law or, alternatively, to invoke a new sliding scale of justice for the purpose of deciding the point that unmitigated wage loss becomes a “double recovery” of punitive damages.

WVAWC argues here that the unmitigated wage loss award was really punitive in nature, although during the trial, its counsel had “no qualms” with the fact that unmitigated wage loss would be recoverable if the jury found malice. Counsel did not specify any reservation about how much of an unmitigated wage loss would be permissible. The reason counsel did not do is because West Virginia law does not provide for such a subjective, sliding scale of justice. Rather, West Virginia law only holds that, if an employer acted with malice, the employee has no obligation to mitigate his damages, and it leaves the determination of whether an employer acted with malice in the province of the jury. Yet, WVAWC asks this Court to either reverse 30 years of law altogether and find that there is no occasion which would justify unmitigated wage loss, or modify 30 years of law and create a vague, subjective sliding scale threshold of when

wage loss is compensatory and when it is punitive. As demonstrated below, this Court should not be persuaded to do so.

This Court has repeatedly held that where the plaintiff was discharged maliciously, he is relieved of his duty to mitigate his wage loss. *Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 183-184, 680 S.E.2d 791, 814-815 (2009); Syl. Pt. 2, *Seymour v Pendleton Community Care*, 209 W.Va. 468, 469, 549 S.E.2d 662, 663 (2001) (*per curiam*)⁹; Syl. Pt. 2, *Mason Co* 170 W.Va. at 633, 295 S.E.2d at 720-721); *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W.Va. 57, 66, 422 S.E.2d 624, 633 (1992). Contrary to WVAWC's most recent argument, not one of these decisions holds that an unmitigated wage loss award is punitive or that it is anything other than compensatory in nature.

For example, WVAWC misses the point when it argues that *Mason County* recognized unmitigated wage loss as a substitute for punitive damages only in cases where punitive damages are not available. (See WVAWC Supp Brief, pp. 7—9). The *Mason County* Court did not limit its decision to those instances; rather, it chose to incorporate its holding in Syllabus Point 2 to speak broadly to employers generally, and not to just political subdivisions:¹⁰

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

⁹ “A *per curiam* opinion may be cited as support for a legal argument.” Syl. Pt. 4, *Walker v Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001).

¹⁰ See W. Va. Const. Art. VIII, § 4 making clear that new points of law are constitutionally required to be created and set forth in syllabus points. The relevant language of Art. VIII, § 4 is: “[w]hen a judgment or order of another court is reversed, modified or affirmed by the court, every point fairly arising upon the record shall be considered and decided; the reasons therefore shall be concisely stated in writing and preserved with the record; and **it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case.**” W. Va. Const. Art. VIII, § 4(emphasis added); see also *State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003).

Syl. Pt. 2, *Mason Co.*, 170 W. Va. at 633, 295 S.E.2d at 720-21. See also Syl. Pt. 4, *Kanawha County Board of Education v Fulmer*, No. 101578, *ii (Nov. 10, 2011). If the point of law were to be limited in the fashion WVAWC urges, the Court could have very easily included language such as “in situations where punitive damages are not otherwise available” or “in wrongful discharge cases involving public employees...” It did not. In fact, as the Justice Neely wrote for the majority, the Court’s holding was intended to clarify the rules applicable to mitigation of damages “in wrongful discharge cases.” *Mason Co.*, 170 W. Va. at 633, 295 S.E.2d at 721 (emphasis added).

Likewise, WVAWC’s interpretation of *Mace v. Charleston Area Medical Center*, *supra*, is also misplaced. While the *Mace* Court did affirm an award of unmitigated wage loss and reverse an award of punitive damages, the Court’s opinion does not support WVAWC’s position here today.

In *Mace*, Charleston Area Medical Center (“CAMC”) appealed an adverse jury verdict, finding that CAMC had retaliated against Mr. Mace and awarding him \$55,700.29 in lost wages, \$50,000.00 for emotional distress, and \$125,000.00 in punitive damages. See *Mace*, 188 W. Va. at 60, 422 S.E.2d at 627. CAMC argued that the lost wage award should have been offset by approximately \$10,600.00 based upon testimony from Mace’s wife that he had earned income after his discharge. *Id.* 188 W. Va. at 66, 422 S.E.2d at 633 (1992). The Court disagreed, finding that the evidence of mitigation was not particularly strong. More importantly, the Court also found:

[W]e also emphasized that “in those cases where an employee has been wrongfully discharged out of malice, by which we mean that the discharging agency or official willfully and deliberately violated the employee’s rights under circumstances where the agency or individual knew or with reasonable diligence should have known of the employee’s rights, then the employee is entitled to a flat back pay award.”

Id. 188 W. Va. at 66, 422 S.E.2d at 633.

Significantly, the Court continued:

“The jury was not bound to consider mitigating income, particularly if it perceived that CAMC had engaged in willful and wanton behavior in discharging Mace. Therefore, we will not disturb the jury’s award of \$55,770.29 for lost wages.”

Id. (emphasis added).

Although the Court reversed the jury’s award of punitive damages, it did so for reasons unrelated to the wage loss award –i.e., it did not find the “requisite types of willful or malicious conduct” sufficient to award punitive damages in retaliatory discharge cases. *Id.*, 188 W. Va. at 67, 422 S.E.2d at 634. Thus, *Mace* does not support WVAWC’s position that an employee may not recover both punitive damages and unmitigated wage loss. Instead, *Mace* actually brings into focus the only pertinent issue –i.e., whether an employee has a duty to mitigate. As the *Mace* Court succinctly stated, where there is malice, “the jury was not bound to consider mitigating income.” *Id.* 188 W. Va. at 66, 422 S.E.2d at 633. Where there is no duty, the issue of whether the employee actually mitigated or not (**much less by how much he mitigated**) is irrelevant. The issue is one of duty, not whether the damages are compensatory or punitive. Clearly, the *Mace* Court could have reversed punitive damages as a double recovery. It did not. Clearly, *Mace* suggests just the contrary -- the two are not impermissibly duplicative and can both be recovered, as the Court would later hold in in *Seymour* and *Peters*.

Indeed, since *Mason County* in 1982, and then *Mace* in 1992, this Court has affirmed its earlier holdings and held in two wrongful discharge cases that both unmitigated wage loss and punitive damage awards were proper. *See Peters*, 224 W.Va. at 184, 195, 680 S.E.2d at 815, 826 (both unmitigated wage loss award and punitive damage award upheld); *Seymour*, 209 W.Va. at 473, 549 S.E.2d at 667 (same). In *Seymour* **Error! Bookmark not defined.**, the plaintiff was awarded \$75,000.00 in back pay and \$125,000.00 in front pay. Both awards were unmitigated. The trial court, finding that plaintiff failed to mitigate, eliminated the front pay award and

reduced the back pay award. It also reduced the punitive damage award from \$300,000.000 to \$98,314.92 in order to keep that award proportional to the compensatory award. *See Seymour*, 209 W. Va. at 471, 549 S.E.2d at 665 (2001). Nevertheless, this Court, relying on *Mason Co.*, found there was sufficient evidence of malice such that plaintiff was absolved of the duty to mitigate. Thus, it reversed the trial court and restored the original award of \$125,000.00 in front pay. In doing so, it wrote:

This Court, like the circuit court, believes that there was sufficient evidence to support a jury conclusion that the appellees acted with “malice, or wanton, willful, or reckless conduct or criminal indifference.” The Court further believes that an inference which may be reasonably drawn from this is that the conduct of the appellees was sufficiently malicious, under the principles set forth in Mason County Board of Education v. State Superintendent of Schools, *supra*, to alleviate Ms. Seymour of the duty of mitigating by seeking new employment, **even if comparable employment was available.**

Seymour, 209 W. Va. at 473, 549 S.E.2d at 667(emphasis added).

In finding that plaintiff was relieved of the duty to mitigate “**even if comparative employment was available,**” the Court implied necessarily that the plaintiff would have been relieved of the duty even if she had found subsequent employment and no matter the amount she had earned in such subsequent employment. Again, the gravamen of a finding of malice is whether a duty exists, not whether the employee actually mitigated or not and not by how much. If malice exists, whether the wrongfully terminated employee mitigated by actually earning income becomes essentially irrelevant.

What is even more significant is that *Seymour* also restored the *original* amount of the punitive damages award, even though the trial court had reduced it and even though the plaintiff was awarded unmitigated wage loss. *See Id.*, 209 W. Va. at 473, 549 S.E.2d at 667 (2001). This yet again demonstrates that unmitigated lost wages are considered compensatory and have not been viewed as impermissibly duplicative of punitive damages.

Indeed, in her concurrence in *Seymour*, Justice Davis wrote that the majority did not even need to address the issue of whether the plaintiff mitigated once it had been found the employer acted with malice:

I do not agree, though, with my brethren's subsequent determination that Ms. Seymour attempted to mitigate her damages. **First, such a conclusion is simply unnecessary to the Court's decision of this case.** It is true that a plaintiff in a wrongful discharge action is required to mitigate his/her damages arising therefrom by seeking other employment. **However, the employee's mitigation duty is obviated when a judge or jury concludes that the employer acted maliciously in wrongfully discharging said employee:**

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Syl. pt. 2, Mason County Bd. of Educ. v. State Superintendent of Schs., 170 W.Va. 632, 295 S.E.2d 719 (1982) (emphasis added). In the case *sub judice*, such a finding was, in fact, made as the jury's award of punitive damages was based upon a finding of malice or other wrongful conduct equivalent thereto.² **Thus, the malice with which the defendants acted in wrongfully discharging Ms. Seymour obviated her duty to mitigate her damages and renders the Court's discussion thereof unnecessary to its ultimate decision of this case.**

Id., 209 W. Va. at 474, 549 S.E.2d at 668 (2001)(Davis, J., concurring)(emphasis added).

Justice Davis further recognized that the evidence demonstrated that Ms. Seymour did not, in fact, meet her duty to mitigate. She wrote that “the record evidence before this Court requires the opposite conclusion, *i.e.*, that Ms. Seymour's efforts did not constitute the mitigation required of a plaintiff employee in a wrongful discharge case who seeks an award of back pay.” *Id.***Error! Bookmark not defined.** However, because there was a finding of malice, whether Seymour mitigated or not became an irrelevant and unnecessary exercise. It would be patently unfair to uphold an award of unmitigated wage loss if a plaintiff made absolutely no attempt to mitigate and could have --- as Justice Davis believes Ms. Seymour could have – and allow that person to recover an unmitigated wage loss award as well as punitive damages, but to conversely

punish a wrongfully terminated employee who has, in fact, done the socially responsible thing and found other employment, as WVAWC urges the Court to do in this case. Rather, the point that *Mace* and the concurrence in *Seymour* make abundantly clear is that if there is no **duty to mitigate**, the jury need not consider whether there was actual mitigation. In short, if the wrongfully terminated employee is relieved of the duty to mitigate, actual mitigation (or conversely the failure to mitigate as Justice Davis points out in *Seymour*) becomes an unnecessary and irrelevant exercise.

Finally, just recently, on November 10, 2011, this Court once again cited Syl. Pt. 2 of *Mason County*, for the general rule regarding mitigation of damages in employment cases. See Syl. Pt. 4 *Kanawha County Board of Education v Fulmer*, No. 101578, *ii (Nov. 10, 2011). While not directly on point, *Fulmer* is instructive in this case. Respondent Robert Fulmer was terminated on July 11, 2005 after an investigation into allegations of inappropriate sexual conduct towards a classroom aide and a student at Nitro High School. *Id.* at *1. After a Level IV grievance hearing, Fulmer was ordered reinstated on December 15, 2008. *Id.* at *3. During the time he was not teaching, he worked at Smoker Friendly, earning approximately \$58,000.00. *Id.* at *2. The Grievance Board did not compute damages or consider mitigation of damages. *Id.* at *3. On a writ of mandamus, the Circuit Court of Kanawha County awarded Fulmer damages of \$259,566.99. *Id.* at *4. The Board of Education appealed claiming there was insufficient evidence on the issue of mitigation. Fulmer claimed the Board waived the issue. This Court found the damages award was deficient based on the failure to include an assessment of mitigation and reversed and remanded the case to the circuit court to perform that assessment. *Id.* at *10. Although malice was not at issue in *Fulmer*, what is significant from *Fulmer* is that the Court once again cites Syllabus Point 2 of *Mason County* approvingly, again reasserting the

long-established precedent that when the discharge is with malice, the employee is relieved of the duty to mitigate – even in cases, such as *Fulmer*, where the employee actually had mitigated. *Id.* at *7.

In summary, it is clear from the above cases that this Court has long sanctioned, and continues to sanction, the award of unmitigated wage loss when the employer acts with malice even when the employee has actually mitigated. The analysis of whether the punitive damage awards in many of these cases, such as *Seymour* and *Peters* were excessive included, as required by the law, a determination of whether they were reasonably related to compensatory damages. See Syl. Pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 658, 413 S.E.2d 897, 899 (1991)**Error! Bookmark not defined.** Logically, this presented the opportunity, more than once, for this Court to find punitive damages to be excessive by way of being impermissibly duplicative of unmitigated wage loss, which the Court has declined to do. Finally, as WVAWC even points out, *Mason* was decided well-before *Haynes v Rhone-Poulenc Inc.*, 208 W.Va. 18, 521 S.E.2d 331 (1999),¹¹ which definitely held that punitive damages are an available form of remedial relief in West Virginia Human Rights Act cases. Thus, it is evident the Court intends that both sets of damages, unmitigated wage loss and punitive, are properly available.

2. There is no impermissible double recovery.

As stated in Section B.1, *supra*, this Court has affirmed awards of unmitigated wage loss when the wrongfully terminated employee has *actually* mitigated, because once a finding of malice is made there is no duty to mitigate. However, there is no duplication of damages. The mere fact that emotional distress damages, for example, may be opened-ended and may have as a

¹¹ Notably, *Mason* was also decided after *Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (W.Va. 1982).**Error! Bookmark not defined.** Indeed the fact that *Harless* and *Mason County* were decided just a few months apart, March and September 1982, respectively is another indication that this court has long approved recovery of both punitive damages and unmitigated wage loss in employment discrimination cases, as the *Harless* and *Mason County* decisions were issued by the Court.

part of their objective a punitive element, does not make them impermissibly duplicative. *See* Syl. Pt. 5, *Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 674, 289 S.E.2d 692, 694 (1982) (referred to herein as “*Harless II*”). In *Harless II*, the Court noted that the opened-ended nature of emotional distress damages allowed for the award of such damages to carry a punitive component with it, as it noted:

Additionally, a 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. These same arguments, of course, can be made with regard to an amount for pain and suffering attendant to a physical injury. Obviously, the jury's common sense plays a vital role in both areas and certainly by instruction the element of emotional distress may be defined to properly guide the jury's consideration.

Id. 169 W. Va. at 690, 289 S.E.2d at 702 (1982).

Conversely, this Court has also held that one of the purposes of punitive damages is to compensate the plaintiff. In *Harless II*, the Court listed the multiple policy purposes of punitive damages. “Among the primary ones are: (1) to punish the defendant; (2) to deter others from pursuing a similar course; and, (3) **to provide additional compensation for the egregious conduct to which the plaintiff has been subjected.**” *Id.*, 169 W. Va. at 691, 289 S.E.2d at 702 (1982)(emphasis added); *see also Hannah v. Heeter*, 213 W. Va. 704, 717, 584 S.E.2d 560, 573 (2003).¹² Thus, the fact that types of damages may have overlapping objectives (i.e. compensatory or punitive) does not make them impermissibly duplicative. Otherwise, one could never recover punitive damages and emotional distress or other general damages – or vice versa – as one objective of punitive damages is to compensate and a potential objective of a jury in awarding emotional distress damages could be to punish.

¹² WVAWC quotes this exact citation from *Hannah* in the portion of its Supplemental Brief discussing the evolution of *Mason County* and the purposes of punitive damages. However, in doing so, it conveniently omitted the portion of the quote that discusses the compensatory element of punitive damages. (*See App. Supp Brief*, p. 10). WVAWC's exact quote from *Hannah* was “(‘punitive damage awards achieve a number of important objective...[including] to punish the defendant...’)” (*See Id.*)

Front pay and back pay are compensatory damages. “[F]ront pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.” *Peters*, 224 W.Va. at 181, 680 S.E.2d at 812. “[F]ront pay damages, when appropriate, must be proved to a reasonable probability and are a form of compensatory damages...” *Id.*, 224 W. Va. at 183, 680 S.E.2d at 814 (2009).¹³ The fact that Appellant’s own conduct in terminating Mr. Nagy was malicious and therefore absolved him of his duty to mitigate does not change the nature of the damages. The fact that the categorization of damages remains unchanged has also been recognized by this Court in discussing emotional distress and punitive damages. In *Vandevender*, Sheetz argued that emotional distress damages and punitive damages were duplicative. The Court spoke to this issue in Footnote 25 of the opinion, when it wrote:

In its petition, Sheetz notes that it included the \$170,000 awarded to Appellee for noneconomic damages as part of the punitive damages award on the grounds that “damages for emotional distress without proof of physical trauma are essentially punitive damages....” As support for this proposition, Sheetz cites *Harless v. First National Bank*, 169 W.Va. 673, 289 S.E.2d 692 (1982). **While that decision discusses how a jury award of emotional distress damages where no physical trauma exists can be likened to that of a punitive damages award in that the jury may have assessed defendant’s conduct in making the award, *Harless* clearly categorizes emotional distress damages as compensatory in stating that “[t]he recovery for emotional distress as well as other compensatory damages such as lost wages should adequately compensate the plaintiff.”** *Id.* at 690-92, 289 S.E.2d at 702-03 (emphasis supplied).

Vandevender, 200 W. Va. at 603, 490 S.E.2d at 690, n. 25 (italics original, bold added).

¹³ WVAWC cites to many cases from foreign jurisdictions citing to front pay as compensatory in nature and discussing the duty to mitigate generally. However, upon review it does not appear that any of those cases 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. As such, beyond standing for a general principle of law, those cases are not applicable to the instant situation.

Front pay is categorized as compensatory in nature, and the fact that a maliciously terminated plaintiff is relieved of his duty to mitigate does not change that categorization. Rather, what a jury finding of malice means is that it is immaterial whether the wrongfully terminated employee did or did not mitigate, much less by how much he mitigated. *See Seymour*, 209 W. Va. at 474, 549 S.E.2d at 668 (2001) (Davis, J., concurring); *Mace*, 188 W. Va. at 66, 422 S.E.2d at 633.

3. **A malicious employer should not benefit from a wrongfully terminated employee's hard work and good efforts in obtaining another job.**

What WVAWC is asking this Court to do is to reverse nearly three decades of precedent, which continues to be cited by this Court with approval. *See Fulmer*, No. 101578. With its proposed new rule –i.e., that a prevailing plaintiff may not recover both unmitigated wage loss and punitive damages in situations “where the defense carries its burden of proving that either the plaintiff mitigated his damages or that he **could have mitigated his damages**” –WVAWC is not seeking any “clarification” of existing law; rather, it is seeking an outright reversal of current law that the employee has no duty to mitigate if the termination is malicious. (App. Supp Brief, p. 18)(emphasis added). What WVAWC has continually failed to grasp, and what this Court has repeatedly said, is that if the termination is malicious, there is no duty. If there is no duty, it does not matter whether the plaintiff mitigated or by how much he mitigated.¹⁴

¹⁴ WVAWC sought rehearing only on the narrow issue of whether unmitigated wage loss is recoverable when there is actual mitigation. It then expands its argument to urge this Court to adopt its proposed rule, stating that when a defendant meets its burden of showing a plaintiff actually mitigated “**or that he could have mitigated**” his damages, the Court should not permit recovery of unmitigated wage loss and punitive damages. (WVAWC Supp. Brief, p.18). Thus, what WVAWC is really advocating is overruling of *Mason County*, *Mace*, *Seymour*, *Peters*, *Fulmer*, etc., and adoption of a rule that there is a general duty to mitigate in all cases, regardless of whether the employer acted with malice. This end result is not what WVAWC represented to the Court was the issue here. If the Court is going to overturn such long standing precedent it should do it in a case where the issue is properly preserved and in a case where the Appellant is up front about what it is asking for, rather than in a case where the issue was not preserved and Appellant is trying to sneak in a fundamental change in law in disguise.

As has been repeatedly stated, this case involves the well-recognized exception to the duty to mitigate placed on a wrongfully terminated employee when the termination is malicious. It is socially desirable to encourage employment and to encourage victims of employment discrimination to work hard to find new work. A vindictive, malicious employer, like the jury found WVAWC to be, should not benefit from its wrongfully terminated employee's good fortune in finding work when the law absolves that employee of any duty to do so. This rationale is similar to that behind the collateral source rule. *See generally, Johnson by Johnson v. Gen. Motors Corp.*, 190 W. Va. 236, 244, 438 S.E.2d 28, 36 (1993) (“[t]he collateral source rule was established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant.”)

4. Sufficient mechanisms already exist in the law to address the situation WVAWC complains of.

A wholesale reversal of long-standing West Virginia jurisprudence on mitigation of damages in employment cases is not warranted. Rather, the Court need look no further than its existing holdings related to recovery of emotional distress damages and punitive damages in wrongful discharge cases to see that sufficient protections exist to guard against an alleged impermissible double recovery.

This Court has addressed the issue of compensatory damages being “cloaked” as punitive damages when addressing recovery of emotional distress damages in wrongful termination cases. In *Harless II*, the Court dealt with the recovery of emotional distress and punitive damages and issued the following syllabus points on the issue:

3. The tort of retaliatory discharge carries with it a sufficient indicia of intent, thus, damages for **emotional distress may be recovered as a part of the compensatory damages.**

4. **“Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for willfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.”** Syllabus Point 1, *O'Brien v. Snodgrass*, 123 W.Va. 483, 16 S.E.2d 621 (1941).

5. **Because there is a certain open-endedness in the limits of recovery for emotional distress in a retaliatory discharge claim, we decline to automatically allow a claim for punitive damages to be added to the damage picture. We do recognize that where the employer's conduct is wanton, willful or malicious, punitive damages may be appropriate.**

Harless II, 169 W. Va. at 674, 289 S.E.2d at 694(emphasis added).

In *Harless II*, the Court allowed recovery for punitive damages in retaliatory discharge claims when there was wanton, willful or malicious conduct. “The mere existence of a retaliatory discharge will not automatically give rise to the right to punitive damages. The plaintiff must prove further egregious conduct on the part of the employer.” *Harless II*, 169 W. Va. at 692-93, 289 S.E.2d at 703. *See also Mace, supra*, where the Court dealt with an award of unmitigated wage loss and punitive damages. There, the Court upheld an award of unmitigated wage loss, writing “[t]he jury was not bound to consider mitigating income, particularly if it perceived that CAMC had engaged in willful and wanton behavior in discharging Mace. Therefore, we will not disturb the jury's award of \$55,770.29 for lost wages.” *Mace*, 188 W.Va. at 66, 422 S.E.2d at 633. However, applying *Harless II*, it reversed an award of punitive damages, only because it did not find the “requisite types of willful or malicious conduct” sufficient to award punitive damages in retaliatory discharge cases. *Id.*, 188 W. Va. at 67, 422 S.E.2d at 634.

These same protections were available in this case. WVAWC argued in its Petition for Appeal that there was no evidence to support an award of punitive damages under *Harless II* (*See Pet. for App*, pp. 11-18). However, properly applying *Harless II*, the jury, the trial court,

and this Court in its Memorandum Decision all found that there was sufficient beyond the unlawful discharge to award punitive damages:

The Water Company argues that in employment cases, punitive damages are appropriate only when the employee can show evidence of egregious conduct by the employer over and above the improper conduct necessary to establish wrongful termination. *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W.Va. 57, 67, 422 S.E.2d 624, 634 (1992); *Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 691-692, 289 S.E.2d 692, 702 (1982) (Harless II); *Peters*, 224 W.Va. at 187, 680 S.E.2d at 818. The Company argues that Nagy failed to prove such further egregious conduct. Nagy responds that there was ample evidence of such conduct. The circuit court found sufficient evidence to allow the issue of punitive damages to go to the jury and, upon a review of the record, we find no error in this decision. The circuit court's detailed post-trial order is herein incorporated by reference.

(See Mem. Dec., June 15, 2011, p. 4, §I).

This Court, in issuing its Memorandum Decision, attached and incorporated the trial court's Order denying WVAWC's post-trial motions. (See Appendix to Memorandum Decision).¹⁵ That Order made detailed findings regarding WVAWC's actions supporting an award of unmitigated wage loss and punitive damages. Mr. Nagy relied upon those actions in his response to WVAWC's Petition for Appeal. (See Resp. to Pet. for App., pp.16-24).¹⁶

Having lost that protection given the egregious facts of the case, WVAWC has now shifted its focus to argue that the unmitigated wage loss is duplicative of punitive damages (without having preserved the same for appeal). However, just because the jury found the requisite level of intent to award both punitive and unmitigated wage loss does not mean that the

¹⁵ The trial court's order is also contained in the Joint Appendix at pages JA000325 to JA000358.

¹⁶ The discussion related to conduct supporting the award of punitive damages is contained on pages 19—24 of Appellee's Response. The citations to trial testimony therein have been reproduced as part of the Joint Appendix as follows:

Tr. Day 2: pp. 66-68, 71-73, 82 (JA00024-00026, 00027-00029, 00030);

Tr. Day 3: pp. 40, 69-70, 81-83, 94, 135, 172-173 (JA00031—37, 00039, 00043-44);

Tr. Day 4: pp. 40-41, 63, 115 (JA00046-47, 00052, 00055);

Tr. Day 5: pp. 44, 53-54, 56, 68, 153-154, 194 (JA00056-62, 00065);

Tr. Day 6: pp. 20, 61, 72, 156-157, 161-162, 192, 198-199, 201-204, 206 (JA00071, 00074-75, 00080-92);

and;

Tr. Day 7: pp. 111-112, 132 (JA000102--000104)

recovery was duplicative. The Circuit Court properly upheld both the unmitigated wage loss and punitive damage awards under *Harless II*. Accordingly, this Court should affirm the trial court, as well as this Court's holding in its Memorandum Decision, and decline WVAWC's invitation to completely unwind three decades of West Virginia jurisprudence.

C. If the Court is Inclined to Modify *Seymour* and *Peters*, it Should Do So Prospectively, Not Retroactively.

WVAWC is asking this Court to overrule well-established law that an employee is absolved of his duty to mitigate when the employer is found to have acted with malice. (See WVAWC. Supp. Brief, p. 7). If the Court sees fit to do so, it should only do so prospectively, and without disturbing the verdict and punishing Mr. Nagy for following the rules and exercising the rights provided to him by this Court over the last three decades in *Mason Co.*, *Mace*, *Seymour*, and *Peters*.

Mr. Nagy recognizes that “[a]lthough the common law rule presumes that appellate judicial decisions apply retroactively, ‘[t]he courts of this country long have recognized exceptions to the rule of retroactivity[.]’ *Ashland Oil, Inc. v. Rose*, 177 W.Va. 20, 23, 350 S.E.2d 531, 534 (1986). The seminal case addressing retroactivity is *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).” *Caperton v. A.T. Massey Coal Co., Inc.*, 223 W. Va. 624, 651, 679 S.E.2d 223, 250 (2008)(rev'd and remanded on other grounds, *Caperton v A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)).¹⁷

In determining whether a decision should be applied retroactively or prospectively, the following factors are to be considered:

First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished

¹⁷ “Retroactivity” means the decision is applied to the parties to the case in which the issue is addressed as well as to all other parties in pending cases. *Caperton*, 223 W. Va. at 650, 679 S.E.2d at 249.

from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. **Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded.** Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. **Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored.** **Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity.** Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions

Syl. Pt. 5, *Bradley v Appalachian Power Co.*, 163 W. Va. 332, 332-33, 256 S.E.2d 879, 880-81 (1979); see also Syl. Pt. 4, *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 277, 387 S.E.2d 511, 512 (1989).

In *Bradley*, the Court modified West Virginia's old contributory negligence doctrine and adopted the doctrine of comparative negligence and made it fully retroactive. *Id.*, 163 W. Va. at 351, 256 S.E.2d at 890. In doing so, it established guidelines to consider in making such decisions. While retroactivity is designed generally to bring equality of application and correct a flawed area of the law¹⁸, such concerns are counterbalanced by the factors set forth by the Court in Syllabus Point 5. *Id.*, 163 W. Va. at 349, 256 S.E.2d at 889. The Court noted that the adoption of comparative negligence involved private parties and was therefore a limited class. It was also extremely significant that other jurisdictions that have addressed the issue applied the change retroactively. *Id.*, 163 W. Va. at 350, 256 S.E.2d at 889.

However, the Court, in *Daily Gazette Co., Inc. v. Comm. on Legal Ethics of W.Va. State Bar*, 176 W. Va. 550, 550, 346 S.E.2d 341, 341 (1985) did not adopt a retroactive approach to a change in law. In *Dailey Gazette*, at issue was the application of the Court's prior ruling in the same case that there was a public right of access to lawyer disciplinary files. The *Daily Gazette*

¹⁸ Appellee does not admit, and specifically denies, that West Virginia's law regarding mitigation of damages in wrongful discharge cases is flawed and in need of correction.

Company then sought access to files for proceedings prior to the Court's ruling regarding public access. *Id.*, 176 W. Va. at 550, 346 S.E.2d at 341. Applying the *Bradley* factors, and relying in particular on the fourth factor, the Court applied the decision prospectively.

Application of the *Bradley* factors to the present case demonstrates that WVAWC's proposed new rule, if adopted, should be adopted prospectively only and without disturbing the jury's verdict. The first factor favors prospective application. As stated in Section B.3 and 4, *supra*, it has long been the law of West Virginia that where an employer has acted with malice in terminating an employee, the employee is relieved of a duty to mitigate. This has been the law since 1982, and after 29 years, it is well settled.

The second factor also favors prospective application, as WVAWC is seeking a substantive, rather than procedural, change in the law. Under *Bradley*, retroactivity is more readily accorded procedural changes. *Bradley*, 163 W. Va. at 332-33, 256 S.E.2d at 880-81.

Appellee concedes the third factor may narrowly favor retroactive application, as WVAWC is seeking a change in the common law related to tort claims. However, the application of this change is much broader than in *Bradley*, as it also impacts statutory damages available under the West Virginia Human Rights Act permitting generally recovery of "...any other legal or equitable relief as the court deems appropriate." *See* W.Va. Code §5-11-13(c); *see also Haynes v. Rhone-Poulenc, Inc.*, 208 W.Va. 18, 521 S.E.2d 331 (1999) (allowing recovery of punitive damages under Human Rights Act.) Thus, in this case, changing the common law will have a much broader impact than in *Bradley*, because it will necessarily result in changing the damages available under the WVHRA.

The fourth and fifth factors weigh in favor of prospective application. This proposed change involves substantial public policy issues, as it would result in a wholesale change in thirty

years of precedent. Further, to the extent WVAWC characterizes unmitigated wage loss as punitive damages that are subject to *Garnes* analysis, such a change constitutes a clear departure from long-standing precedent. Such a radical re-characterization of the nature of these damages and departure from the decades old principle of law under which Mr. Nagy prevailed in this case warrants prospective application of any change in law the Court may see fit to adopt. Finally, if the Court is inclined to accept WVAWC's proposed rule change, it should do so prospectively so as not to reward WVAWC for its dilatory conduct in failing to preserve this issue for appeal.

D. Assuming, Arguendo, that Unmitigated Wage Loss Awards are Punitive, the Total Award in this Case, Using WVAWC's Argument is Still Appropriate.

Even assuming, for the limited sake of argument that Appellant WVAWC is correct, the total verdict should be affirmed as appropriate even after an application of the *Garnes* factors to the entire portion of the award WVAWC contends is "punitive."

1. Using WVAWC's calculations, punitive damages are still only 3.7 times compensatory damages.

WVAWC argues that all but \$52,034 of the jury's award for wage loss is "punitive." It arrives at this figure by stating that \$52,034 represents the actual out-of-pocket award and that the remainder represents unmitigated wage loss and is therefore "punitive," not "compensatory." (See WVAWC's Supp. Brief, pp.3-4). Assuming for the sake of argument this is the case; the jury's verdict is broken down as follows:

Compensatory Damages:

Wage loss:	\$52,034.00;
Humiliation, embarrassment, loss of dignity:	\$150,000.00; and
Emotional distress:	\$150,000.00;
Total Compensatory:	\$352,034.00

"Punitive" Damages:

Unmitigated wage loss:	\$969,099.00; ¹⁹
Punitive Damages:	\$350,000.00;
Total Punitive:	\$1,319,099.00

This amount is only **3.7 times** the award of compensatory damages.

2. Even if punitive in nature, the total amount of unmitigated wage loss and punitive damages is appropriate under a *Garnes* review²⁰

The total punitive damages of 3.7:1 (taking WVAWC's arguments as true) is appropriate, constitutional, and should be affirmed. WVAWC, after arguing for a wholesale change in West Virginia law, also asks the Court to strike the unmitigated wages loss award because it has not been subject to a review under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897. (See WVAWC's Supp. Brief, pp. 19-22).²¹ *Garnes* sets forth the following syllabus points related to a review of a punitive damages award:

¹⁹ According to the verdict form (JA000236-237), the jury awarded Mr. Nagy the following:

Back Pay:	\$200,450;
Front Pay:	\$900,000;
Humiliation, embarrassment, etc.:	\$150,000;
Emotional distress:	\$150,000; and
Punitive damages:	\$350,000

The total wage loss award was \$1,100,450. The trial court granted a remitter on this award of \$79,317. (See JA000355-000356). Thus, after remitter, the total wage loss award was \$1,021,133.00. Subtracting \$52,034 from this gets to a figure of \$969,099 that WVAWC contends is punitive in nature. WVAWC in asserting that \$1,048,416 (See WVAWC's Supp. Brief, p. 4) does not represent lost income damages, does not appear to be taking the remitter into account in making its calculations (\$1,048,416 - \$969,099 = \$79,317). Therefore, WVAWC's alleged amount of punitive damages is incorrect.

²⁰ Merely striking the award of unmitigated wage loss if this Court determines such an award to be punitive is improper. Essentially, this Court would, if it did this, be granting a remitter. With regard to punitive damages, "[w]hen a court grants a remitter, the plaintiff must be given the option of either accepting the reduction in the verdict or electing a new trial." Syl. Pt. 9, *Perrine*, 225 W.Va. at 494, 694 S.E.2d at 827.

²¹ In Section V.E of its brief, WVAWC again inserts arguments related to the trial Court's jury instruction. This argument related to instructions regarding malice and the award of unmitigated wage loss was addressed in this Court's Memorandum Decision. (See Mem. Dec., June 15, 2011 Case No. 101229, §IV, p. 7.) This Court found no error in the giving of the instruction, noting:

The Water Company also asserts that, even if it was proper to instruct the jury that it could award unmitigated lost wage damages if it found that the termination was malicious, it was error for the court to instruct that the jury was required to award unmitigated damages if it found malice. We have held that "[u]nless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment . . . and the actual wages received, or the wages the employee could have received . . . will be deducted from any back pay award[.]" Syl. Pt 2, in part, *Mason County Bd. of Educ.*; Syl. Pt. 13, in part, *Peters*. Thus, if the

2. Under our system for an award and review of punitive damages awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal.

3. When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors 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 (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), 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 to him.

(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.

4. When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

discharge was malicious, there was no duty to mitigate. If there was no duty to mitigate, then there was no basis to reduce the wages award and we find no error.

Mem. Dec., §IV, p. 7 (emphasis added).

WVAWC only sought rehearing on the limited issue of whether unmitigated wage loss was impermissibly duplicative of punitive damages. It has not sought rehearing on its claims relating to instructional error. Thus, to the extent WVAWC is attempting to claims of instructional error, the Court should reject that attempt.

(3) Any other civil actions against the same defendant, based on 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.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury

Syl. Pts 2, 3, & 4, *Garnes*, 186 W. Va. at 658-59, 413 S.E.2d at 899-900.

“The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards.” *Perrine*, 225 W. Va. at 554, 694 S.E.2d at 887. West Virginia punitive damages jurisprudence involves 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...; 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...*” *Vandevender*, 200 W.Va. at 600, 490 S.E.2d at 687. In this case, the jury found punitive damages were appropriate. WVAWC is not appealing the jury’s finding that its conduct was sufficient to justify an award of punitive damages or that portion of this Court’s Memorandum Decision affirming the trial court’s finding that its conduct entitled Mr. Nagy to an award of punitive damages. Thus, all that is at issue is whether the award is excessive.

In reviewing an award of punitive damages for excessiveness under *Garnes*, *Perrine* clarified the analysis and provided the following framework for conducting such a review:

When a trial or appellate court reviews an award of punitive damages for excessiveness under Syllabus points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), the court should first determine whether the amount of the punitive damages award is justified by aggravating evidence including, but not limited to: (1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the

wrongful conduct; (3) the financial position of the defendant; (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff. The court should then consider whether a reduction in the amount of the punitive damages should be permitted due to mitigating evidence including, but not limited to: (1) whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct; (2) whether punitive damages bear a reasonable relationship to compensatory damages; (3) the cost of litigation to the defendant; (4) any criminal sanctions imposed on the defendant for his conduct; (5) any other civil actions against the same defendant based upon the same conduct; (6) relevant information that was not available to the jury because it was unduly prejudicial to the defendant; and (7) additional relevant evidence.

Syl. Pt. 7, *Perrine*, 225 W. Va. at 494, 694 S.E.2d at 827.²²

Even if the unmitigated wage loss award is considered punitive, at a 3.7:1 ratio, it is still appropriate and should be affirmed. A *Perrine* analysis shows the jury's verdict is unquestionably appropriate.

a. Aggravating evidence supporting the punitive damage award.

Under *Perrine*, aggravating factors to consider include, but are not limited to:

1. The reprehensibility of the defendant's conduct;
2. Whether the defendant profited from the conduct;
3. The financial position of the defendant;
4. The appropriateness of punitive damages to encourage fair settlements when a wrong has been committed: and
5. The cost of litigation to the Plaintiff.

Id.

With regards to the first factor, Appellant WVAWC's conduct in this case is reprehensible. The jury found that WVAWC's conduct was malicious. It found that punitive damages were warranted under *Harless II* and other case law supporting the award of punitive

²² *Perrine* was issued March 26, 2010. The hearing on WVAWC's post-trial motions in this case was held on January 19, 2010. (See JA000306). At that hearing, Appellee submitted a proposed order on disk, (See JA000319), and the trial court provided Appellant ten (10) days to also submit a proposed order. (See JA000320). Thus, both parties submitted their proposed orders prior to the *Perrine* decision.

damages in wrongful termination cases.²³ As the factual record set forth by the Trial Court in its ruling on WVAWC's JMOL demonstrates, the ruling with regard to the reprehensibility of WVAWC's conduct is sound and should not be disturbed. (See JA000324-JA000358).

With regard to the second factor – profitability of the wrongful conduct – WVAWC profited indirectly from terminating Mr. Nagy because it gained the potential to save on legacy costs such as employee retiree and pension costs by terminating an older employee. See e.g. *Perrine*, 225 W.Va. at 554-555, 694 S.E2d at 887-888 (considering indirect savings to company by virtue of being able to avoid mitigation and cleanup costs of zinc smelter in profitability analysis). WVAWC then attempted to exact additional consideration from Mr. Nagy by offering him these benefits after termination in exchange for a release of all claims. Thus, not only is potentially avoiding legacy costs a profit to WVAWC, but gaining additional advantage in the form of a release of claims related to the termination should be considered profit to WVAWC.

The third factor – the financial position of WVAWC – likewise supports affirming the verdict. While the financial position of WVAWC was not presented to the jury, WVAWC is part

²³ The Trial Court, in denying WVAWC's post-trial motions, found Mr. Nagy was fired for the manner in which he reviewed invoices even though WVAWC could not point to any policy he violated and its own internal auditors were unable to conclude he was derelict in the performance of his duties. (See JA000339). It found that a younger employee, Jeff Ferrell, reviewed more invoices in question than Mr. Nagy, but was only suspended for a short period of time while Mr. Nagy was fired. (*Id.*). It found WVAWC lacked any standard policies or procedures as to review of contractor invoices, but yet accused Mr. Nagy of being unethical, having violated the public trust, and committing severe misconduct – allegations that became known through the company. (*Id.* at JA000339-000340). For months after the termination WVAWC's in-house counsel hounded Mr. Nagy to sign a release of all claims in exchange for a retiree benefits package. Indeed, weeks after Mr. Nagy was fired, additional discrepancies in invoices reviewed and approved by two younger employees, Mr. Ferrell and Jeff Carmichael, were discovered, yet no effort was made by WVAWC to discipline these employees. (*Id.* JA000340). The justification for this disparate treatment was that these offenses were "stale" and it was therefore unfair to discipline them. Yet, WVAWC held Mr. Nagy responsible for forgetting events surrounding invoices dated nine months prior to its audit; and after the lawsuit was filed, came up with additional "reasons" for his termination that were not given to Mr. Nagy, including alleged issues regarding payment of invoices for the "Stonegate" project, which occurred five years earlier, which were never included in Mr. Nagy's personnel file, and for which he had never been even verbally reprimanded. (See *Id.* at JA000341.) Moreover, WVAWC claimed that Nagy attempted to pressure a field inspector to sign off on invoices, yet that same field inspector testified Nagy was an honest and upstanding individual. (*Id.*). Finally, with regard to the invoices Mr. Nagy was accused of allowing that contained overpayments to Tralyn; WVAWC admitted many were legitimate and later paid Tralyn over \$600,000.00 in settlement of litigation related to those invoices. (See JA000333-334, 341). Simply put, WVAWC manufactured reasons to terminate Mr. Nagy and continued to do so even after filing suit.

of American Water, a public utility conglomerate that serves over 15 million people in 30 states and Canada.²⁴ WVAWC can certainly bear this verdict given its size and backing and the fact that it has had more than two years to date to account for the verdict in its budgeting process.

This award also encourages fair and reasonable settlements of wrongful termination cases. This factor is not about “punishing” a defendant for not settling, but as this Court has noted:

[the factor is focused on] the impact it is likely to have on future litigants. That is, was the award large enough so that a future defendant who has committed a clear wrong will be encouraged to accept a fair and reasonable settlement rather than force the wronged plaintiff into litigation and risk incurring a similarly large punitive damages award.

Perrine, 225 W.Va. at 556, 694 S.E.2d at 889.

In this case, WVAWC terminated Mr. Nagy maliciously. Nevertheless, despite the overwhelming evidence that WVAWC’s actions were clearly wrong, it dug in its heels and forced this case to trial, thereby exposing itself to this award. WVAWC should be discouraged from engaging in such conduct that unnecessarily exposes itself to future awards. Moreover, WVAWC refused to reinstate Mr. Nagy, although it clearly had the option of doing so. Thus, striking the jury’s verdict in this case will not achieve this purpose.

Finally, Mr. Nagy has expended significant resources and incurred significant costs in prosecuting this action, which WVAWC has strung out for more than two years since the jury’s verdict. Like in *Perrine*, the high cost of the litigation supports the amount of damages awarded.

Id.

²⁴ See <http://www.amwater.com/wvaw/about-us/corporate-information/company-history.html>. WVAWC provides service to 580,000 people in 288 communities in West Virginia. Per its own website, American Water, company wide reported over \$2 Billion dollars in revenue and \$748 Million dollars in operating income in 2010. See <http://amwater.com/corporate-responsibility/corporate-responsibility-reporting/our-company/about-american-water/index.html>

- b. The ratio of punitive damages to compensatory damages is appropriate.

The aggravating factors clearly support affirming the jury's award even if the unmitigated wage loss award was classified as punitive. However, the amount must be scrutinized for mitigating factors and must nevertheless be within constitutional boundaries. *See Id.* Taking WVAWC's position as true, the award is still appropriately proportional to compensatory damages. Syl. Pt. 6 of *Vandevender* addresses this point:

The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with **extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1**. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional." Syl. Pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

Syl. Pt. 6, *Vandevender*, 200 W. Va. at 594, 490 S.E.2d at 681 (1997)(emphasis added).

At issue in *Vandevender* was a punitive damage award in a wrongful termination case of \$2,699,000.00. Plaintiff received \$130,066 in special damages and \$170,000 for noneconomic damages. *Id.*, 200 W.Va. at 597, 490 S.E.2d at 684. Plaintiff recovered on claims for both wrongful termination/failure to rehire and retaliation. With regard to the wrongful termination claim, the court found that Sheetz's conduct constituted reckless disregard of plaintiff's rights, **rather than malice**, and reduced the punitive damages to a **5:1 ratio**. *Id.*, 200 W.Va. at 606, 490 S.E.2d at 693. However, with regard to the retaliation claim, which was based on Sheetz's feigning ignorance of plaintiff's medical restrictions, making her work in spite of those restrictions, and subjecting her to surveillance; the Court found such conduct was sufficiently akin to fraud, trickery or deceit to support of much larger award and found a **15:1 ratio** did not offend due process. *Id.*

In the present case, even assuming WVAWC's arguments are true, the ratio of punitive to compensatory damages is 3.7:1. This is within the lower range ratio of 5:1 that is appropriate for cases of extreme negligence or recklessness. However, the jury in this case did not find extreme negligence or recklessness, it found intentional, malicious conduct. Again, WVAWC is not appealing the jury's finding of malice. As such, even assuming, *arguendo*, that the unmitigated wage loss is punitive, as WVAWC urges this Court to do, at a ratio of only 3.7:1, it is still a reasonable award when compared to the compensatory damages awarded.²⁵

c. Mitigating factors

There are no mitigating factors that warrant a reduction in punitive damages. Though punitive damages may be reduced – even if constitutionally permissible – if warranted, such a reduction is not warranted herein. *See Perrine*, 225 W.Va. at 557, 694 S.E.2d at 890. Mitigating factors include: 1) whether the punitive damages bear a reasonable relationship to compensatory damages; 2) whether the damages bear a reasonable relationship to the harm likely to occur; 3) the cost of litigation to the defendant; 4) criminal sanctions imposed on the defendant; 5) any other civil actions against the defendant based on the same conduct; 6) relevant information that was not available to the jury; and 7) additional relevant evidence. *Id.*, 225 W.Va. at 558, 694 S.E.2d at 891.

The first factor – whether the punitive damages bear a reasonable relationship to the compensatory damages – has been addressed in part D.2.b, *infra*. As stated therein, a ratio of 3.7:1 is appropriate.

²⁵ In *Perrine*, the ratio of punitive damages to compensatory was 3.5:1 before recalculation based on the Court's holding that punitive damages were not recoverable on medical monitoring claims. After recalculation the ratio was 2.1:1. *See Perrine*, 225 W.Va. at 557, 694 S.E.2d at 815. Both figures are well within the permissible range set forth in *Vandevender* and *Error! Bookmark not defined.TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), (*aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)).

With regard to the second factor, the harm that has occurred is an intentional, malicious violation of the West Virginia Human Rights Act by WVAWC in engaging in age discrimination when it terminated Mr. Nagy for manufactured reasons but did not terminate similarly situated younger employees. It then engaged in a smear campaign, calling Mr. Nagy unethical and accusing him of engaging in severe misconduct and violating the company ethics policy. Those allegations became known throughout the Company. WVAWC then attempted to buy Mr. Nagy's silence and, when it could not, it manufactured additional reasons for Mr. Nagy's termination for which he had never even been verbally reprimanded. There is nothing in WVAWC's conduct that warrants mitigation under this factor.

The third factor – litigation costs to the defendant – also does not warrant mitigation. WVAWC chose to draw a hard line and take this case to trial. It did so with full knowledge that it would be incurring defense costs and could be liable for Nagy's attorney fees under W. Va. Code § 5-11-13(c). WVAWC should not now be permitted to seek a reduction of damages based on its defense costs, and should live with the consequences of the decisions it made.

The fourth mitigating factor is criminal sanctions imposed on the defendant. This also does not warrant mitigation. Addressing this issue in the context of employment cases in *Vandevender*, the Court noted there were no civil or criminal penalties available for comparison purposes, and while the West Virginia Human Rights Act gives an express cause of action for violations of antidiscrimination provisions, it does not establish a penalty limit, and thus mitigation was not warranted. *See Vandevender*, 200 W.Va. at 605, 490 S.E.2d at 692. For the same reasons, mitigation herein is not warranted.

The fifth factor – other civil actions against the same defendant based on the same conduct – is also of no help to WVAWC. In *Perrine*, the Court assessed that factor and noted

that mitigation may be warranted based on costs and expenses incurred in defending other actions. Here, this is not an issue, WVAWC was not exposed to other actions. Instead, it convinced Mr. Nagy's 54 year old supervisor, Ron Belcastro, to settle before he filed suit by giving him a retiree benefit package, which is a cost deferred over a long period of time. (See JA000330, ¶ 16).

The sixth and seventh factors – additional relevant evidence not considered by the jury and additional relevant evidence generally – are also unavailing. In not one of its briefings on punitive damages has WVAWC identified any issues that should have been considered by the court that the jury did not otherwise hear. Indeed, in its JMOL, WVAWC did not point to any other information that it argued the trial court should have considered. (See JA000266-000269).²⁶ Moreover, no additional reasons were set forth in its Petition for Appeal. (See WVAWC's Pet. for App, pp. 27-29). Finally, WVAWC's Supplemental Brief does not point to any other relevant factors it maintains should have been considered but were not. (See WVAWC's Supp. Brief, pp. 19-21). Thus, other relevant information not considered by the jury or other relevant information generally should not be considered as mitigation factors to reduce the award in this case.

Therefore, based upon the foregoing, even if the Court was to adopt WVAWC's position and consider the unmitigated wage loss portion of the award as punitive, it should nonetheless affirm the award. As stated herein, even when applying the *Garnes* factors (as clarified by *Perrine*), to this case, the award is clearly appropriate. Further, if this Court is inclined not to conduct its own review of the award, it should, rather than strike the award altogether, remand

²⁶ Further, its contention therein regarding the impact of other criminal sanctions and other civil actions shows that it misapprehends the impact of those factors in that it argues the lack of other actions and lack of available criminal sanctions is a basis for reduction of the award when *Perrine* applies those factors in the opposite way.

the matter to the trial court for the purpose of conducting a *Garnes* review of whatever portion of the award is newly determined to be punitive.

VI: CONCLUSION

The jury's verdict in this case is correct, and it and the trial court's order denying WVAWC's JMOL should be affirmed. As this Court correctly held in its Memorandum Decision, an award of unmitigated wage loss and punitive damages is permitted by West Virginia law. The awards are not impermissibly duplicative, and the Court should not adopt WVAWC's proposed rule, which would completely eliminate the long established rule of law that when a discharge is malicious, an employee is absolved of the duty to mitigate. Moreover, WVAWC has failed to preserve the issue for appeal as it never claimed unmitigated wage loss was impermissibly duplicative of punitive damages before the trial court. Thus, WVAWC should not be permitted to raise this issue for the first time on appeal. Finally, if the Court is to consider the issue, it should apply any rule change prospectively and not retroactively; or, alternatively it should run the full amount of whatever it determines to be punitive through the *Garnes* analysis, which leads to the inescapable conclusion that – even taking WVAWC's position as true with regard to the amount of punitive damages – that award is still constitutionally appropriate.

Therefore, Mr. Nagy respectfully prays that this Court affirm the Circuit Court of Kanawha County and affirm its June 15, 2011 Memorandum Decision in this case and uphold the properly considered and awarded verdict in this case.

Submitted this 15th day of December, 2011.

JAMES A. NAGY,
Appellee,
By Counsel,



Maria W. Hughes, Of Counsel (WVSB #7298)
Stephen A. Weber (WVSB #3965)
John D. Hoblitzell III, (WVSB # 9346)
Erin J. Webb, (WVSB # 10847)
Kay Casto & Chaney, PLLC
1500 Chase Tower
P.O. Box 2031
Charleston, West Virginia 25327-2031
Voice: (304) 345-8900
Counsel for Appellee

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
(CIVIL ACTION NO. 08-C-544
JUDGE JENNIFER F. BAILEY)

JAMES A. NAGY, Plaintiff Below,

Appellee.

CERTIFICATE OF SERVICE

The undersigned counsel for the Appellee James A. Nagy, does hereby certify that on this 15th day of December, 2011 a true copy of the foregoing "*Response In Opposition To Appellant's Supplemental Brief*" has been served upon counsel of record as indicated below by hand delivering a true copy thereof to:

Mychal S, Schultz, Esquire
DINSMORE & SHOHL LLP
Huntington Square
901 Lee Street
Suite 600
Charleston, V 25301
Counsel for Appellant



Stephen A. Weber
West Virginia State Bar 3965