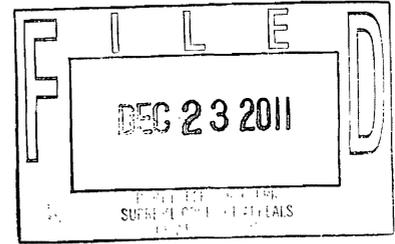


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1330



CINDY MOSIER,

Respondent,

v.

Appeal from a final order of the
Circuit Court of Kanawha County (10-C-383)

JAMES DENNY and
ORKIN, LLC, a
Delaware Corporation,

Petitioners.

PETITIONERS' BRIEF

Counsel for Petitioners, James Denny and Orkin, LLC

Charles M. Love, III (WVSB #2254)
David A. Mohler (WVSB #2589)
BOWLES RICE McDAVID GRAFF & LOVE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
304-347-1100
clove@bowlesrice.com
dmohler@bowlesrice.com

Thomas V. Flaherty (WVSB #1213)
FLAHERTY SENSABAUGH BONASSO PLLC
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338-3843
304-345-0200
tflaherty@fsblaw.com

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	STATEMENT OF CASE.....	3
III.	SUMMARY OF ARGUMENT	10
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	13
V.	ARGUMENT	14
1.	The lower court erred in submitting the punitive damage claim to the jury because plaintiff's complaint failed to assert a claim for punitive damages or assert any allegations that would give rise to a punitive damage claim.	14
2.	The punitive damage award is erroneous and has absolutely no evidentiary basis because plaintiff did not submit evidence of the standard of care to establish that Orkin's failure to terminate or put Mr. Denny on probation amounted to simple negligence, much less constituted malicious, willful or reckless conduct..	15
3.	Plaintiff's punitive damage award is erroneous as a matter of law because the evidence is insufficient to establish that Orkin's conduct rose to the level required to assess punitive damages under <i>Mayer v. Frobe</i> , 22 S.E. 58 (W. Va. 1895). The Court accordingly committed reversible error by giving plaintiff's Instruction Nos. 12, 13 and 16.	19
(a)	Review of punitive damage award under <i>Mayer</i>	20
(b)	Review of punitive damage award for excessiveness	22
(1)	Aggravating circumstances	23
i.	<i>The reprehensibility of defendant's conduct</i>	23
ii.	<i>Whether defendant profited from the wrongful conduct.</i>	23
iii.	<i>The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed.</i>	23
iv.	<i>The cost of litigation to the plaintiff.</i>	24
(2)	Mitigating circumstances	24

	<i>i. 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.</i>	24
	<i>ii. Additional relevant evidence</i>	24
4.	The punitive damage award is erroneous because it was based entirely on a fallacy due to the misrepresentation of the evidence by plaintiff’s counsel that Orkin failed to enforce its Driver Policy.	25
5.	The lower court erred in denying defendants’ motion for a new trial on compensatory damages because the evidence and argument related to punitive damages of Orkin’s net worth, Denny’s driving record, and inflammatory arguments by plaintiff’s counsel were inadmissible, erroneous, and tainted the compensatory damage award.	26
6.	The lower court erred in denying defendants’ motion for a new trial on compensatory damages because the jury’s compensatory damage award was not supported by the evidence.	32
	(a) Future Medical Bills.....	32
	(b) Past and Future Mental Anguish	34
	(c) Past and Future Loss of Enjoyment of Life.....	34
7.	The lower court erred in denying defendants’ motion for a new trial on compensatory damages because Jury Instruction No. 3 which stated that the jury was “obligated to assess the total amount of damages” was misleading, contrary to the law and constitutes reversible error.	35
8.	The lower court erred in denying defendants’ motion for a new trial on compensatory damages because Griffith’s testimony regarding future medical bills and Orkin’s net worth should have been excluded due to unfair surprise.....	36
9.	The lower court erred in refusing defendants’ request for a remittitur of compensatory damages of \$578,245.....	38
VI.	CONCLUSION	39

TABLE OF AUTHORITIES

Cases

<i>Arye v. Dickstein</i> , 337 Pa. 471, 474, 12 A.2d 19, 20 (1940).....	28
<i>Baker v. Pennsylvania National Mutual Casualty Ins. Co.</i> , 536 A.2d 1357, 1361-362. Ct. 1988)	27
<i>Bell v. Maricopa Med. Ctr.</i> , 755 P.2d 1180 (Ct. App. 1988)	16
<i>Bennett v. 3-C Coal Company</i> , 379 S.E.2d 388, 294Va. 1989)	20, 21
<i>Briggs v. Washington Metropolitan Area Transit Authority</i> , 481 F.3d 839, 848 (C.A.D.C. 2007).....	17
<i>Clark v. District of Columbia</i> , 708 A.2d 632, 636-637 (D.C. 1997)	17, 19
<i>Concerned Love One and Lot Owners v. Pence</i> , 383 S.E.2d 831 (W. Va. 1989).....	20
<i>Fass v. Nowasco Well Service, LTD</i> , 350 S.E.2d 562, 564 (W. Va. 1986).....	14
<i>Feld v. Merriam</i> , 506 Pa. 383, 396, 485 A.2d 742, 748 (1984)	28
<i>FFE Transp. Services, Inc. v. Fulgham</i> , 154 S.W.3d 84, 92.....	17
<i>Garnes v. Fleming Landfill, Inc.</i> , 186 W.Va. 656, 413 S.E.2d 897 (1991).....	20, 22
<i>Hoffman v. Memorial Osteopathic Hospital</i> , 342 Pa.Super. 375, 385-386, 492 A.2d 1382, 1388 (1985) (same).....	28
<i>Jones v. Setser</i> , S.E.2d 623 (W.Va. 2009).....	31
<i>Jordan v. Bero</i> , 210 S.E.2d 618, 637 (W. Va. 1974).....	34
<i>Kark-TV v. Simon</i> , 656 S.W.2d 702, 705 (Ark. 1983).....	27

<i>Mayer v. Frobe</i> , 22 S.E. 58 (W. Va. 1895)	1, 10, 11, 19, 20, 22
<i>Muzelak v. King Chevrolet, Inc.</i> , 368 S.E.2d 710 (W. Va. 1988)	21
<i>Painter v. Rains Lincoln Mercury, Inc.</i> , 323 S.E.2d 596 (W. Va. 1984)	21
<i>Perrine v. E.I. Dupont De Nemours & Co.</i> , 694 S.E.2d 815 (W. Va. 2010)	19, 20, 22
<i>Rains v. Faulkner</i> , 48 S.E.2d 393 (W. Va. 1947)	20
<i>Reynolds v. City Hospital, Inc.</i> , 529 S.E.2d 341 (W. Va. 2000)	16
<i>Roberts v. Stevens Clinic Hosp., Inc.</i> , 345 S.E.2d 791 (W. Va. 1986)	38
<i>Stewart v. Peffer</i> , 985 F.2d 553, at *4 (4th Cir. 1993)	36, 37
<i>Titchnell v. United States</i> , 681 F.2d 165 (3rd Cir. 1982)	17
<i>Trimble v. Merloe</i> , 413 Pa. 408, 410, 197 A.2d 457, 458 (1964)	28
<i>Tri-State Asphalt Product, Inc. v. McDonough Company</i> , 391 S.E.2d 907 (W. Va. 1990)	20
<i>TXO Production Corp. v. Alliance Resources Corp.</i> , 187 W.Va. 457, 419 S.E.2d 870 (1992)	20
<i>Varner v. District of Columbia</i> , 891 A.2d 260, 272 (D.C. 2006)	17
<i>Wells v. Smith</i> , 297 S.E.2d 872 (W. Va. 1982)	21
<i>WMATA v. Young</i> , 731 A.2d 389, 398	17

Treatises

<i>Michies Jurisprudence</i> § 66, <i>Damages</i> (1991 Supp.)	21
---	----

William L. Prosser, *The Law of Torts*,
at 11 (4th Ed. 1971).....21

I. ASSIGNMENTS OF ERROR

1. The lower court erred in submitting the punitive damage claim to the jury because plaintiff's complaint failed to assert a claim for punitive damages or assert any allegations that would give rise to a punitive damage claim.

2. The punitive damage award is erroneous and has absolutely no evidentiary basis because plaintiff did not submit evidence of a standard of care to establish that Orkin's failure to terminate or put Mr. Denny on probation amounted to simple negligence, much less constituted malicious, willful or reckless conduct. First, the evidence at trial clearly showed that Orkin did not fail to adhere to its company guidelines and drivers' policy. Second, even if Orkin had so failed to adhere to its own driver policy, under West Virginia law, Orkin's self-imposed policies cannot establish a standard of care.

3. Plaintiff's punitive damage award is erroneous as a matter of law because the evidence is insufficient to establish that Orkin's conduct rose to the level required to assess punitive damages under *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895) (and its more recent progeny). The Court accordingly committed reversible error by giving plaintiff's Instruction Nos. 12, 13 and 16.

4. The punitive damage award is erroneous because it was based entirely on a fallacy due to the misrepresentation of the evidence by plaintiff's counsel that Orkin failed to enforce its Driver Certification Policy.

5. The lower court erred in denying defendants' motion for a new trial on compensatory damages because the evidence and argument related to punitive damages of

Orkin's net worth, Denny's driving record, and inflammatory arguments by plaintiff's counsel were inadmissible, erroneous, and tainted the compensatory damage award.

6. The lower court erred in denying defendants' motion for a new trial on compensatory damages because the jury's compensatory damage award was not supported by the evidence.

7. The lower court erred in denying defendants' motion for a new trial on compensatory damages because Jury Instruction No. 3 which stated that the jury was "obligated to assess the total amount of damages" was misleading, contrary to the law and constitutes reversible error.

8. The lower court erred in denying defendants' motion for a new trial on compensatory damages because Griffith's testimony regarding future medical bills and Orkin's net worth should have been excluded due to unfair surprise.

9. The lower court erred in refusing defendants' request for a remittitur of compensatory damages of \$578,245. This comprises the unproven damages of \$125,000 for past and future mental anguish, \$125,000 for past and future loss of enjoyment of life, and \$328,245 in future medical damages.¹

REST OF PAGE INTENTIONALLY LEFT BLANK

¹ Petitioners assert that plaintiff's proven future medical damages were \$98,000, not \$426,245 as found by the jury. Petitioners therefore seek a remittitur of \$328,245 in future medical damages. In addition, petitioners seek of remittitur of \$250,000 in unproven compensatory damages awarded for past and future mental anguish and past and future loss of enjoyment of life. Thus, in total, petitioners seek a remittitur of compensatory damages in the amount of \$578,245.

II. STATEMENT OF CASE

This appeal is necessary because the trial court allowed the jury to consider evidence of punitive damages, including testimony estimating Orkin's net worth at nearly \$3,000,000,000, in a case arising from a simple vehicular accident. The submission of the punitive damage claim was permitted despite the fact the Complaint did not state a claim for punitive damages or assert conduct which would give rise to a punitive award. To compound the error and the substantial prejudice to the defendants, the trial court allowed the punitive damage claim to be raised after the discovery cutoff and merely a week before trial. Although the punitive damage award of \$500,000 is the single largest element of damages, the trial court also committed errors allowing unsupported elements of compensatory damages to be submitted to the jury. These errors at trial warrant a review and reversal by this Court consistent with this West Virginia jurisprudence requiring a rigorous post trial examination of punitive damage awards.

This case arises out of a motor vehicle accident on March 17, 2008, when a vehicle, operated by defendant, James Denny ("Denny"), and owned by co-defendant Orkin, LLC ("Orkin"), Denny's employer, made a left-hand turn in front of plaintiff's vehicle on US Route 119 South in Charleston, Kanawha County, West Virginia. Plaintiff filed a Complaint against Orkin and Denny on February 26, 2010, in the Circuit Court of Kanawha County, West Virginia.

Plaintiff's Complaint included only one count - negligence - against both Denny and Orkin. (See Complaint at ORK0001 - ORK0005.) Plaintiff alleged that Denny negligently operated his vehicle, and caused her to suffer a herniated disc. *Id.* Plaintiff imputed liability to Orkin on the grounds that Denny was acting within the scope of his employment at the time of

the accident. Defendants admitted liability for Denny's negligent operation of the vehicle prior to trial.

Plaintiff's complaint did not allege punitive damages nor did it contain any allegations against Orkin that would even remotely give rise to a punitive damages claim. Plaintiff's Complaint merely alleged simple negligence in that "Defendant James Denny operated his employer's pickup truck in a negligent manner, and failed to yield the right-of-way." (See ¶ 8 of Complaint at ORK0004.) Nevertheless, the week before trial, plaintiff's counsel informed counsel for defendants that plaintiff was going to seek punitive damages against Orkin.

Plaintiff's punitive damage claim against Orkin was based upon erroneous assertions that Orkin failed to enforce its self-adopted Driver Certification Policy ("Orkin's Driver Policy"). Plaintiff asserted that under Orkin's Driver Policy, Denny should have previously been terminated or removed from his driving position at Orkin due to prior infractions. Importantly, the punitive damage claim was separate and apart from the negligence claim. While liability was admitted for Denny's negligent driving at the time of the accident, Orkin vigorously denied that it failed to enforce its Driver Policy.

At trial, plaintiff's counsel incorrectly and repeatedly claimed that Orkin failed to enforce its company policies (see Trial Transcript at ORK0735 - ORK0737²; ORK0741 -

² Plaintiff's counsel suggests that Denny should have been terminated for his third infraction under Orkin's GPS Policy (not speeding tickets), wherein Orkin had a GPS satellite system that monitored the vehicles during operation. The employee received an infraction for going over 70 mph. However, a driver is only terminated for three infractions over a twelve month period. Denny never had three infractions over a twelve month period. In fact, Denny was only assessed a single warning in 2000, and two warnings in 2002. (See Trial Transcript at ORK0815 - ORK0818.)

ORK0742³; ORK0748 - ORK0749⁴; ORK1133 - ORK1139⁵). This argument formed the entire basis for plaintiff's punitive damage claim. The undisputed evidence, however, establishes precisely the opposite: Orkin never violated its Driver Policy.

Orkin's Driver Policy assesses penalty points to the employee driver for various infractions (see Orkin Driver Policy at ORK0088 - ORK0095). The maximum allowable points by an Orkin driver is eight (8) (*Id.* at ORK0091 - ORK0092). Points are removed from the record three (3) years after the infraction. *Id.* If nine (9) or more points are accumulated, the employee's Driver Certification is cancelled and the employee is terminated or moved to a non-driving position. *Id.* The undisputed evidence establishes that Denny never reached the nine (9) penalty point threshold prior to the subject accident. If the employee Driver accumulates eight (8) penalty points, the employee is considered to be on probation and must complete a defensive driving class, but does not lose driver certification (ORK0092).

Denny had five (5) incidents as an Orkin driver prior to the subject accident involving plaintiff on March 17, 2008. However, some of the incidents had already been removed from his points' record prior to the March 17, 2008, accident because they occurred more than three (3) years prior. Further, one incident did not result in the issuance of any penalty points under the Orkin policy because it was determined he was not at fault for the accident.

³ Plaintiff's counsel suggests that Orkin failed to enforce its policy by failing to order Denny to complete a defensive driving class after the June 20, 2007 speeding ticket. However, as explained *infra*, Orkin was not aware of that ticket prior to the subject accident in March of 2008, because it did not appear on the 2007 MVR. Thus, Denny's Orkin driving record did not reflect that Denny had accumulated eight (8) penalty points such that Denny was under a requirement to take a defensive driving class.

⁴ Again, plaintiff's counsel incorrectly suggests that Denny should have been terminated under the GPS policy for three infractions of exceeding 70 mph. See fn. 1, *supra*, for explanation of the GPS policy.

⁵ Plaintiff's counsel, in closing, continued to incorrectly assert that Orkin failed to enforce its Driver Policy.

Importantly, the most recent incident occurring on June 20, 2007, as explained below, was unknown to Orkin prior to the subject accident on March 17, 2008.

Specifically, the incidents included the following:

	Date	Type	Location	Description	Orkin Policy Points
1	7/05/2000	Accident	Roundhill Road, Charleston	Sideswiped a vehicle going uphill to Imperial Towers	4 (removed in 2003)
	3/26/2002	Accident	Cedar Grove	Disputed and found not chargeable	0
	7/03/2003	Accident	Contemporary Galleries furniture store, Charleston	Backed into another car	4 (removed in 2006)
	9/24/2005 ⁶	Speeding Ticket	Alloy	1-15 mph over the speed limit; discovered in 2006 MVR check	4
5	6/20/2007	Speeding Ticket	Gauley Bridge	1-4 mph over the speed limit	4 (unknown to Orkin prior to March 17, 2008)

(See Documentation for Accidents and Speeding Tickets at ORK0099 - ORK0104).

As shown above, at the time of the March 17, 2008, accident involving plaintiff, the points from the two accidents preceding 2005 had been removed from Denny's record, as the accidents occurred more than three (3) years prior. Thus, Denny had less than nine (9) penalty points under Orkin's policy prior to the subject accident and was not subject to termination or reassignment to a non-driver position.

Further, Orkin obtains Motor Vehicle Reports ("MVR") annually every September in order to determine how many points have accumulated as a result of an employee's

⁶ This is the date of the violation, and Denny was not convicted until 10/25/2005 (see ORK0198).

⁷ This is the date of the violation, and Denny was not convicted until 7/26/2007 (see ORK0198).

driving record (see ORK0090; see also Gibney Trial Testimony at ORK0809 - ORK0811). However, a violation will not appear on the MVR until 30-60 days after a conviction. As such, when Orkin obtained Denny's MVR in September of 2007, the speeding ticket from June 20, 2007, which Denny was convicted of on July 26, 2007, did not appear on the MVR (See 2007 MVR at ORK0197).⁸ Thus, as far as Orkin was aware, prior to the subject accident in March of 2008, Denny had only four (4) penalty points on his driving record and was not considered to be on probation, and thus not obligated to complete a defensive driving test. As a result, the entire predicate for plaintiff's punitive damage claim was non-existent.

In support of the punitive damages claim, on May 12, 2011, a mere two (2) business days prior to trial, plaintiff's counsel provided defendants' counsel with the supplemental expert disclosure of expert witness, Roger A. Griffith ("Griffith"). The disclosure provided that Griffith would offer testimony that Orkin had a net worth of approximately \$2,960,000,000.00. (See Plaintiff's Second Supplemental Expert Disclosure at ORK0054 - ORK0058.)

Plaintiff also untimely disclosed Griffith's expert report on plaintiff's future medical bills on May 6, 2011, subsequent to the pretrial (See Plaintiff's First Supplemental Expert Disclosure at ORK0047 - ORK0053). Griffith's report on plaintiff's future medical bills estimated plaintiff's future bills at \$426,245.00, which constituted the bulk of plaintiff's compensatory damages.

⁸ The only conviction shown on the 2007 MVR was the September 24, 2005 speeding ticket which Denny was convicted of on October 25, 2005. The June 2007 violation (convicted in July 2007) did not appear on Denny's MVR until the 2008 MVR was obtained, after the subject accident in March of 2008 (See ORK0198). Similarly, the September 2005 violation (October 2005 conviction) did not appear on Denny's 2005 MVR (see ORK0195), as it first appeared on the 2006 MVR (see ORK0196).

The matter was tried before Judge Zakaib in the Circuit Court of Kanawha County in a five (5) day trial beginning on May 16, 2011, and concluding on May 20, 2011. At trial, over defendants' objections, the Court permitted plaintiff to offer evidence in support of a punitive damage claim, including Denny's driving record⁹ and Griffith's testimony that Orkin had a net worth of \$2,960,000,000.00.¹⁰ This evidence and testimony would have been patently inadmissible had the lower court properly excluded plaintiff's punitive damage claim.

The improper submission of this evidence, in addition to inflammatory arguments by plaintiff's counsel, was extremely prejudicial to defendants and tainted the entire damage award. In particular, the improper testimony that Orkin had a net worth of approximately THREE BILLION DOLLARS inevitably tainted the jury's assessment of compensatory damages.

Moreover, plaintiff failed to introduce any evidence at trial of the standard of care in the industry in regard to driver certification policies. Thus, even assuming that Orkin violated its Driver Policy, plaintiff nevertheless failed to show that the alleged conduct fell below the standard of care in the industry in order to establish simple negligence. Plaintiff therefore failed to establish a foundation for her punitive damages claim.

On May 20, 2011, the jury returned a verdict awarding plaintiff \$924,781.23 in compensatory damages and \$500,000.00 in punitive damages (see Verdict Form at ORK0159.) The jury assessed the following compensatory damages which were not supported by the evidence:

⁹ See Trial Transcript at ORK0734 - ORK0750; ORK0785 - ORK0830.

¹⁰ See Griffith's Trial Testimony at ORK0844 - ORK0845.

Future Medical Bills	\$426,245.00
Past Mental Anguish	100,000.00
Future Mental Anguish	25,000.00
Past Loss of Enjoyment of Life	100,000.00
Future Loss of Enjoyment of Life	25,000.00

The expert testimony offered by plaintiff was speculative and insufficient to establish plaintiff's future medical expenses with a reasonable degree of medical certainty. Similarly, plaintiff presented absolutely no evidence of past or future mental anguish, nor any evidence of past and future loss of enjoyment of life. In fact, plaintiff testified that she went on a 770-mile cross-country motorcycle trip after the subject accident (see Trial Transcript at ORK0592 - ORK0593).

The Judgment Order on the Jury Verdict was entered on June 6, 2011. On or about June 10, 2011, defendants' filed their "*Motion to Vacate the Punitive Damages Award and for an Order Granting a New Trial on Compensatory Damages Only; Notwithstanding the Foregoing, Defendants Request a Remittitur of Compensatory Damages*" ("Defendants' Motion") (See Defendants' Motion at ORK0163 - ORK0202.) The lower court denied Defendants' Motion by Order entered on August 26, 2011 (see August 26, 2011, Order at ORK0254 - ORK0264.¹¹)

Defendants seek relief from the August 26, 2011, Order, and request this Court to vacate the punitive damage award and further to grant a new trial only on compensatory damages. In the alternative, defendants request a remittitur of both the punitive and compensatory damage awards.

¹¹ The Order entered by the lower court was the proposed order provided by plaintiff. (See Plaintiff's Proposed Order at ORK0232 - ORK0243)

III. SUMMARY OF ARGUMENT

1. Defendants' first assignment of error is that the lower court erred in submitting the punitive damage claim to the jury because plaintiff's complaint failed to assert a claim for punitive damages or assert any allegations that would give rise to a punitive damage claim. Plaintiff never amended her complaint to make a punitive damage claim or include allegations that would give rise to a punitive damages claim. As such, plaintiff has failed to properly plead punitive damages and thus the issue of punitive damages was erroneously submitted to the jury.

2. Defendants' second assignment of error is that the punitive damage award is erroneous because plaintiff did not submit evidence to establish that Orkin's failure to terminate or put Mr. Denny on probation amounted to simple negligence, much less constituted malicious, willful or reckless conduct. First, the evidence at trial clearly showed that Orkin did not fail to adhere to its own self-imposed guidelines and drivers' policy. Second, even if Orkin had failed to adhere to its own driver policy, under West Virginia law, Orkin's self-imposed policies cannot establish a standard of care to create liability. The standard of care for liability purposes---as opposed to applying internal policies and procedures--- is determined by the industry as a whole. Without offering evidence of the standard of care, plaintiff therefore failed to establish a foundation of negligence in order to seek punitive damages.

3. Defendants' third assignment of error is that the punitive damage award is erroneous as a matter of law because the evidence is insufficient to establish that Orkin's conduct rose to the level required to assess punitive damages under *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895). The Court accordingly committed reversible error by giving plaintiff's Instruction Nos. 12, 13 and 16. The facts in this action do not even remotely approach the

threshold of conduct required to permit a claim for punitive damages against defendants under *Mayer*. Here, the traffic incidents on Denny's driving record at Orkin were merely minor traffic citations and fender benders. The record is absolutely devoid of any evidence to support a punitive damage claim.

4. Defendants' fourth assignment of error is that the punitive damage award is erroneous because it was based entirely on a fallacy due to the completely incorrect assertion by plaintiff's counsel that Orkin failed to enforce its Driver Policy. This argument formed the entire basis for plaintiff's punitive damages claim. However, the undisputed evidence establishes that Orkin did not fail to enforce its Driver Policy. Denny never accumulated nine (9) penalty points under Orkin's policy and was never subject to termination prior to the subject accident. Further, because Denny's most recent speeding ticket in June of 2007 did not appear on the 2007 MVR, Orkin had no knowledge of this incident prior to the subject accident in March of 2008. Thus, Orkin could not have assessed these penalty points to Denny which would have obligated Denny to take a defensive driving class.

5. Defendants' fifth assignment of error is that the lower court erred in denying defendants' motion for a new trial on compensatory damages because the evidence and argument related to punitive damages of Orkin's net worth, Denny's driving record, and inflammatory arguments by plaintiff's counsel were inadmissible, erroneous, and tainted the compensatory damage award. The most damaging and unfairly prejudicial evidence erroneously submitted to the jury is Griffith's testimony that Orkin had net worth of \$2,960,000,000.00. This testimony would have been patently inadmissible if not for the punitive damage claim, and inevitably tainted the compensatory damage award such that a new trial is warranted.

6. Defendants' sixth assignment of error is that the lower court erred in denying defendants' motion for a new trial on compensatory damages because the jury's compensatory damage award was not supported by the evidence. The jury awarded plaintiff \$426,245.00 in future medical expenses. However, the expert testimony offered by plaintiff was speculative and insufficient to establish plaintiff's future medical expenses with a reasonably degree of medical certainty. Likewise, the jury awarded plaintiff \$125,000.00 for past (\$100,000) and future (\$25,000) mental anguish and another \$125,000 for past (\$100,000) and future (\$25,000) loss of enjoyment of life. However, plaintiff presented absolutely no evidence of past or future mental anguish, nor any evidence of past and future loss of enjoyment of life.

7. Defendants' seventh assignment of error is that the portion of Jury Instruction No. 3 which provided that the jury is "obligated to assess the total amount of damages" is misleading, confusing, contrary to the law and unfairly prejudicial to defendants. The jury is not "obligated" to assess any damages against the defendant. The jury may assess damages if the plaintiff proves, by the preponderance of the evidence, that she is entitled to damages. This jury instruction is contrary to the law and misleads the jury as to their duty to assess damages, and constitutes reversible error.

8. Defendants' eighth assignment of error is that the lower court committed reversible error by allowing, over defendants' objections, Griffith's testimony regarding future medical bills and Orkin's net worth. Griffith's testimony in this regard should have been excluded due to unfair surprise. Defendants did not receive Griffith's expert report on plaintiff's future medical bills until May 6, 2011, subsequent to the pretrial. Further, defendants did not receive Griffith's expert report regarding Orkin's alleged net worth until May 12, 2011, two

business days before the trial. Plaintiff's late disclosure of this information was in violation of the scheduling order, constituted unfair surprise and should have been excluded.

9. Defendants' ninth assignment of error is the lower court's refusal to grant defendants a remittitur of compensatory damages. As stated above, the jury, which was tainted by the punitive damage evidence, grossly inflated their compensatory damage award as well. First, there was no evidence of mental anguish and no evidence of loss of enjoyment of life. The defendants therefore request a complete remittitur of those awards (\$250,000). Second, plaintiff's evidence on future medical bills was speculative and failed to meet the reasonable degree of certainty standard under West Virginia law. The defendants therefore request a remittitur of the future medical damage award by \$328,245. Accordingly, defendants request a total remittitur in the amount of \$578,245.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary due to the significant legal and factual issues in this case. There was absolutely no evidence of conduct warranting punitive damages and the issue should not have gone to the jury. To compound the error, plaintiff's expert was then permitted to testify that Orkin had a net worth of nearly \$3,000,000,000.00. As a direct result, \$500,000.00 in punitive damages was awarded by the jury despite the fact that plaintiff had failed to prove that Orkin's conduct even amounted to simple negligence. Moreover, the testimony on Orkin's net worth tainted the entire compensatory damages award.

Importantly, this matter concerns significant public policy issues. The punitive damage award was based solely on the incorrect allegations that Orkin failed to enforce its company adopted safety policy. Plaintiff had no evidence regarding the standard of care in the

industry. The only evidence at trial of a similar policy showed that Orkin's Driver Policy was more stringent than the West Virginia Department of Motor Vehicles' ("DMV") policy. Thus, unless reversed, this case will undoubtedly serve as a deterrent for companies to set internal safety policies that go above and beyond the statutory requirements. Simply stated, companies should not be subjected to additional liability by seeking to establish safety policies of a higher standard than otherwise required by law.

Accordingly, this appeal is appropriate for Rule 20 argument.

V. ARGUMENT

- 1. The lower court erred in submitting the punitive damage claim to the jury because plaintiff's complaint failed to assert a claim for punitive damages or assert any allegations that would give rise to a punitive damage claim.**

The punitive damage award must be vacated because plaintiff's complaint fails to assert a claim for punitive damages, and further fails to assert any allegations of willful, reckless or malicious conduct that would give rise to a punitive damage claim (see Complaint at ORK0001-ORK0005). "The complaint must set forth enough information to outline the elements of a claim to permit inference to be drawn that these elements exist." *Fass v. Newsco Well Service, LTD*, 350 S.E.2d 562, 564 (W. Va. 1986). Though the West Virginia Rules of Civil Procedure may permit for a complaint to be amended to conform to the evidence, plaintiff never amended her complaint.

Clearly, plaintiff's complaint sets forth no information to outline a claim for punitive damages, nor are there any conclusory allegations that could be construed as such. Plaintiff never amended her complaint, and, as such, plaintiff failed to properly plead punitive

damages. The issue of punitive damages was therefore erroneously submitted to the jury, and must be vacated by this Court.

2. **The punitive damage award is erroneous and has absolutely no evidentiary basis because plaintiff did not submit evidence of the standard of care to establish that Orkin's failure to terminate or put Mr. Denny on probation amounted to simple negligence, much less constituted malicious, willful or reckless conduct.**

Plaintiff's punitive damage claim against Orkin was grounded on Orkin's alleged failure to follow its own company guidelines in its Driver Policy. Plaintiff's punitive damage claim was not based upon malice, but rather on extreme negligence or recklessness (See Plaintiff's Response to Defendants' Motion for New Trial ORK208 - ORK211). As a matter of law, before plaintiff can successfully establish a punitive damage claim against Orkin on the grounds of extreme negligence or recklessness, plaintiff must first establish that Orkin is guilty of simple negligence.¹² In other words, plaintiff must establish a foundation of simple negligence in order to proceed to the more egregious level of extreme negligence or recklessness for punitive damages.

In order to prove simple negligence, plaintiff must establish the appropriate standard of care. However, plaintiff completely bypassed this burden of proof and jumped directly into the punitive damage arena. Absolutely no evidence was presented of the industry standard for driver certification policies, similar driver safety policies, guidelines or government regulations.

A company's guidelines are not determinative of the standard of care in order to establish simple negligence, much less the extremely high threshold necessary to recover

¹² The punitive damage claim was completely separate and apart from Count I of the Complaint regarding Denny's negligent driving related to the subject accident, for which liability was admitted.

punitive damages. This Court has addressed the similar issue in the context of medical malpractice cases:

The jury cannot consider whether a medical malpractice defendant has acted negligently until it has determined the standard against which the defendant's conduct is to be measured. There is a difference between the evidence the jury considers in determining the standard and the standard itself. Only a deviation from the standard itself constitutes evidence of negligence. Consequently, the jury ... could not have found that the hospital's violation of its protocols constituted evidence of negligence unless it first found that the protocols were not merely evidence of the applicable standard, but were synonymous with it.

Reynolds v. City Hospital, Inc., 529 S.E.2d 341 (W. Va. 2000), quoting *Bell v. Maricopa Med. Ctr.*, 755 P.2d 1180 (Ct. App. 1988) (Emphasis added.) The fundamental and well-established principle underlying this doctrine is simply that a company should not be penalized for violating its own policies if its policies exceed the general standard of care in the industry.

Notably, in *Reynolds*, punitive damages were not at issue. Rather, the issue centered around the standard of care for the purposes of determining simple negligence. That, however, is exactly the reason why the punitive damage award in the present case is so outrageous. The plaintiff in *Reynolds* claimed the hospital was negligent due to its failure to follow its own self-implemented guidelines. However, this Court held that the hospital's self-implemented guidelines were not conclusively the standard of care, because the hospital's guidelines may have exceeded the standard of care in the industry. Simply because the hospital failed to adhere to its own policies did not de facto establish negligence. Rather, this Court held that the plaintiff needed to present evidence of the general standard of care in the industry as a whole, which the plaintiff failed to do.

This doctrine has been more fully explained by the United States Court of Appeal for the Third Circuit:

[I]f a health care facility, in striving to provide optimum care, promulgates guidelines for its own operations which exceed the prevailing standard, it is possible that care rendered at that facility by an individual practitioner on a given occasion may deviate from and fall below the facility's own standard yet exceed the recognized standard of care of the medical profession at the time. A facility's efforts to provide the best care possible should not result in liability because the care provided a patient falls below the facility's usual degree of care, if the care provided nonetheless exceeds the standard of care required of the medical profession at the time. Such a result would unfairly penalize health care providers who strive for excellence in the delivery of health care and benefit those who choose to set their own standard of care no higher than that found as a norm in the same or similar localities at the time.

Titchnell v. United States, 681 F.2d 165 (3rd Cir. 1982).

Importantly, this principle is not limited to medical malpractice cases. See *Briggs v. Washington Metropolitan Area Transit Authority*, 481 F.3d 839, 848 (D.C. Cir. 2007) (“a company’s internal policies - standing alone - cannot demonstrate the applicable standard of care.”); *WMATA v. Young*, 731 A.2d 389, 398 (D.C. 1999) (“company rules are not ‘conclusive’ or ‘wholly definitive’” on the applicable standard of care.); *Clark v. District of Columbia*, 708 A.2d 632, 636-637 (D.C. 1997) (“In essence, plaintiff’s case here is based upon the proposition that the District deviated from its own Plan. That is simply not enough.”); *Varner v. District of Columbia*, 891 A.2d 260, 272 (D.C. 2006) (“Aspirational practices do not establish the standard of care which the plaintiff must prove in support of an allegation of negligence...to hold otherwise would create the perverse incentive ... to write their manuals in such a manner as to impose minimal duties...in order to limit civil liability.”); *FFE Transp. Services, Inc. v. Fulgham*, 154 S.W.3d 84, 92 (Tex. 2004) (“FFE’s self-imposed policy with regard to inspection of its

trailers, taken alone, does not establish the standard of care that a reasonably prudent operator would follow.”)

In this instant case, plaintiff failed to present any expert testimony or any evidence whatsoever of the industry standard for driver certification polices or similar safety policies in the trucking industry. The jury had no reference as to whether or not Orkin’s Driver Policy was equal to, exceeded or was below the generally accepted industry standard. Plaintiff incorrectly relied solely on Orkin’s Driver Policy and presumed that it automatically established the standard of care.

Notably, the only evidence introduced regarding a similar point system was the system followed by the West Virginia Department of Motor Vehicles (“DMV”), which sets a lower disqualification standard than Orkin’s Driver Policy.¹³ Under the DMV’s point policy, Denny had accumulated even fewer penalty points, and his driver’s license was never subject to suspension by the DMV. At the time of the subject accident, Denny had - at most - merely three (3) penalty points from the DMV on his license resulting from the June 26, 2007, speeding ticket for traveling a paltry 1-4 mph over the speed limit. All other penalty points were already removed from his record because they occurred more than two (2) years prior.

Moreover, this issue concerns significant public policy issues. If a violation of a company’s self-adopted guidelines subjects the company to potential punitive damages, then

¹³ The Orkin point system is drastically more strict and demanding than the point system employed by the DMV. For example, as opposed to Orkin’s nine (9) point threshold, an individual’s license is not subject to suspension by the DMV until twelve (12) points are accumulated. (See excerpt of Chapter VII, Driver Responsibilities, of the DMV’s Handbook, at ORK0199 - ORK0201.) Further, points are only kept on the record at the DMV for a two (2) year period, compared to the three (3) year period in Orkin’s policy. *Id.* Additionally, under Orkin’s policy, any speeding ticket constitutes a four (4) point penalty. (See ORK0190) However, a speeding ticket when travelling less than 76 mph is only a three (3) point penalty from the DMV. (See ORK0201.) Moreover, unlike Orkin’s policy, accidents under the DMV point system do not accumulate any points unless certain citations are issued in conjunction with the accident.

why should the company impose guidelines above the bare bones minimum? Why strive for safer and more stringent policies when it may subject the company to even more liability? This is precisely why the standard of care is determined on an industry wide basis and not by a single company's self-imposed policies and procedures. Companies should be rewarded and not be penalized by seeking to set the bar higher than the industry standard. As articulated in *Clark v. District of Columbia*, 708 A.2d 632, 636 (D.C. App. 1997):

Because the Suicide Prevention Plan is only an unpublished internal agency procedure and not a statute or regulation, it cannot embody the standard of care under a negligence *per se* theory. [Citations omitted.] To hold otherwise would create the perverse incentive for the District to write its internal operating procedures in such a manner as to impose minimal duties upon itself in order to limit civil liability rather than imposing safety requirements upon its personnel that may far exceed those followed by comparable institutions.

Clark at 636.

In the instant case, plaintiff was permitted by the trial court to completely bypass and ignore this burden of proof, and was nonetheless awarded \$500,000 in punitive damages. Ultimately, plaintiff's punitive damage claim serves only to deter companies from implementing safety policies that go above and beyond the bare minimum. Accordingly, the punitive damage award must be vacated.

- 3. Plaintiff's punitive damage award is erroneous as a matter of law because the evidence is insufficient to establish that Orkin's conduct rose to the level required to assess punitive damages under *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895). The Court accordingly committed reversible error by giving plaintiff's Instruction Nos. 12, 13 and 16.**

Recently, in *Perrine v. E.I. Dupont De Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010), this Court issued a lengthy opinion addressing the review of a jury's punitive damage award. As set forth in *Perrine*:

When this Court, or a trial court, reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895), and its progeny. If a punitive damage award was justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992).

Perrine at Syl. Pt. 6.

(a) Review of punitive damage award under *Mayer*.

Pursuant to *Perrine*, this Court must first evaluate whether defendants' conduct entitled plaintiff to punitive damages under *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895), as follows:

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

Mayer at Syl. Pt. 4.

The facts in this action do not remotely approach the threshold of conduct required to permit a claim for punitive damages against defendants under *Mayer*. This Court has long recognized that a wrongful act done without malice constitutes no basis for punitive damages, and that in order to secure punitive damages, the defendants must be shown to have engaged in a willful, wanton, reckless or malicious act. *Concerned Love One and Lot Owners v. Pence*, 383 S.E.2d 831 (W. Va. 1989); *Bennett v. 3-C Coal Company*, 379 S.E.2d 388 (W. Va. 1989); *Tri-State Asphalt Product, Inc. v. McDonough Company*, 391 S.E.2d 907 (W. Va. 1990); *Rains v. Faulkner*, 48 S.E.2d 393 (W. Va. 1947). Even if the evidence amounts to negligence,

this alone is never enough to justify punitive damages. *Bennett v. 3-C Coal Company*, 379 S.E.2d 388, 394 (W. Va. 1989) [Emphasis added].

In determining whether or not an award of punitive damages is proper, it is not so much the particular act the defendants are accused of committing so much as the defendant's motives and conduct in committing it, which is to be considered as the basis of the award. See William L. Prosser, *The Law of Torts*, at 11 (4th Ed. 1971) (Emphasis added). The substantive law of West Virginia is clear that the jury may be asked to assess exemplary, punitive or vindictive damages only in actions where malice, oppression or wanton, willful, or reckless conduct affecting the rights of others appears. Syl. Pt. 1 *Wells v. Smith*, 297 S.E.2d 872 (W. Va. 1982); *Painter v. Rains Lincoln Mercury, Inc.*, 323 S.E.2d 596 (W. Va. 1984); *Muzelak v. King Chevrolet, Inc.*, 368 S.E.2d 710 (W. Va. 1988). Malice is an essential and controlling factor for the recovery of punitive damages and evil intent can neither be presumed nor inferred from evidence of mistake or accident. See *Michies Jurisprudence* § 66, *Damages* (1991 Supp.). Plaintiffs failed to show any malice on the part of Orkin so as to justify a punitive damage award.

The incidents identified in Denny's driving record are merely minor traffic citations and fender benders. (See Table, *supra*.) At no time was Denny cited for a major violation, i.e., a DUI or reckless driving, that would give any indication to Orkin that Denny was reckless or an unsafe driver as alleged by plaintiff. Since 2000, Denny was involved in only two at-fault accidents and had two speeding tickets, only one of which Orkin had knowledge. ¹⁴ *Id.*

Moreover, even under Orkin's more stringent policy, it is undisputed that Denny was never subject to termination or reassignment to a non-driving position. There is simply no

¹⁴ See Table, *supra*. Further, as explained previously, Orkin did not have knowledge of the most recent speeding ticket on June 20, 2007, prior to the subject accident.

evidence to conclude that Orkin's failure to terminate or put Denny on probation was malicious, willful, or reckless in order to give rise to punitive damages. Denny was never subject to termination and at worst, failing to put Denny on probation was mere simple negligence. However, as discussed previously, plaintiff failed to prove even simple negligence because plaintiff failed to introduce any evidence as to the appropriate standard of care.

The punitive damage award has absolutely no evidentiary basis and utterly fails to meet the standard set forth in *Mayer*. Accordingly, the Circuit Court committed reversible error when it gave Plaintiff's Instruction Nos. 12, 13, and 16¹⁵ regarding punitive damages. These instructions never should have been submitted to the jury and the jury's punitive damage award must be vacated in its entirety by this Court.

(b) Review of punitive damage award for excessiveness

As set forth above, defendants vigorously contest that the punitive damage was justified under *Mayer*. However, if this Court determines otherwise, as set forth in *Perrine*, this Court must then examine whether the amount of the award is excessive under the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).¹⁶ The factors are discussed below.

¹⁵ These comprised plaintiff's punitive damage instructions (see ORK0141 - ORK0144; ORK0147). Further, giving Instruction No. 13 added insult to injury because there was no evidence whatsoever that Orkin ever "concealed or covered up its actions" or "profited from its wrongful conduct" as described in the instruction (see ORK0143 - ORK0144).

¹⁶ As provided in Syl. Pt. 7 of *Perrine*:

7. 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

(1) Aggravating circumstances

i. The reprehensibility of defendant's conduct

Essentially, plaintiff's punitive damage award is based on Orkin not placing Denny on probation after his June 26, 2007, speeding ticket for going 1-4 miles per hour over the speed limit. Orkin, however, was not even aware of this incident at the time of the subject accident because it did not appear on the 2007 MVR.¹⁷ Even if Orkin had been aware, Denny would not have been subject to termination or reassignment because he had not reached the nine (9) point threshold, nor was Denny ever cited for a major offense. Clearly, Orkin's conduct in this regard is far from "reprehensible."

ii. Whether defendant profited from the wrongful conduct.

Defendants in no way profited from their actions and plaintiff offered no evidence to the contrary.

iii. The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed.

Punitive damages were not appropriate in this instance as no clear wrong was committed. Plaintiff's complaint failed to even assert a claim for punitive damages. The facts of this case simply did not permit for a punitive damages claim such that it would have been a

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.

¹⁷ See pp. 6-7, *supra*. See also Section 4 of brief, *infra*.

consideration throughout settlement negotiations. Accordingly, punitive damages should not have been a factor to encourage a fair and reasonable settlement in this case.

iv. The cost of litigation to the plaintiff.

The cost of litigation to plaintiff was minimal as this was not a complex matter.

(2) Mitigating circumstances

i. 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.

The conduct of Orkin at issue was not requiring Denny to take a defensive driving class after receiving a speeding ticket for going 1-4 miles per hour over the speed limit. Yet, Orkin was not even aware of the prior incident at the time of the subject accident. A \$500,000 punitive damage award has no reasonable relationship to Orkin's conduct.

ii. Additional relevant evidence

Plaintiff's punitive damage claim is based solely on allegations that Orkin failed to adhere to its company driver policy, which is far more stringent than the DMV penalty point system. Orkin is therefore being punished by implementing a driver safety policy that goes above and beyond the minimum requirements. Upholding plaintiff's punitive damage award would be a deterrent for companies to implement internal policies that strive for a higher standard. Further, defendants incorporate by reference the arguments set forth in Section 4, *infra*.

4. The punitive damage award is erroneous because it was based entirely on a fallacy due to the misrepresentation of the evidence by plaintiff's counsel that Orkin failed to enforce its Driver Policy.

Inexplicably, plaintiff's entire punitive damage award is based on a fallacy due to the misrepresentation of the evidence by plaintiff's counsel. Plaintiff's counsel repeatedly and erroneously argued to the jury that Denny should have previously been terminated or put on probation by Orkin under Orkin's self-implemented Driver Policy.¹⁸ Plaintiff's counsel incorrectly asserted that Orkin failed to enforce its own policy, and thus Orkin should be liable for punitive damages. This argument formed the entire basis for plaintiff's punitive damages claim.

However, the undisputed evidence establishes precisely the opposite - Orkin never violated its Driver Certification Policy. As explained in detail above, prior to the subject accident, Denny never accumulated nine (9) penalty points over a three (3) year period, and was never subject to termination or reassignment to a non-driver position.¹⁹ This is an undisputed fact.

Admittedly, while under that same policy, an employee would be placed on "probation" with the accumulation of eight (8) points, there was absolutely no evidence that Orkin knew that Denny had accumulated eight (8) points at the time of the accident in question. Importantly, when on "probation," the employee does not lose driver certification (see ORK0190). The only corrective action required would be that the employee take a defensive driving test online or receive safe driving instruction.

¹⁸ See footnotes 2, 3, 4 and 5, *supra* at pp. 4-5. See also Section 5, *infra* at pp. 29-30, further discussing plaintiff's counsel erroneous representations regarding Orkin's GPS policy

¹⁹ See detailed explanation of Orkin's Driver Policy and the penalty points accumulated by Denny under the policy on pp. 4-7, *supra*.

As explained previously, under Orkin's Driver Policy, Orkin processes Motor Vehicle Reports ("MVR") on an annual basis for all driving employees to determine how many points, if any, have accumulated over the previous year (see ORK0189). At trial, the deposition of Mike Gibney ("Gibney"), the claims director for Orkin's risk management department, was read to the jury. Gibney testified that Orkin had no knowledge of Denny's most recent June 2007 speeding ticket (for going 1-4 mph over the speed limit) because it did not appear on the 2007 annual MVR (see Trial Transcript at ORK0810 - ORK0811). Gibney's testimony is confirmed by the 2007 MVR, which identifies Denny's only violation as the speeding ticket occurring on September 24, 2005 (see ORK0197). The June 2007 speeding ticket was not known by Orkin until the 2008 MVR was obtained after the subject accident in March of 2008 (see ORK0198).

Orkin therefore could not have assessed these four (4) penalty points to Denny prior to the subject accident in March of 2008. As such, at the time of the subject accident in March of 2008, as far as Orkin was aware, Denny had only four (4) penalty points on his Orkin driving record from the speeding ticket in September of 2005. Therefore, Orkin did not violate or fail to enforce its Driver Policy, and plaintiff's punitive damage claim is founded upon a complete fallacy. Thus, plaintiff's punitive damage award must be vacated.

- 5. The lower court erred in denying defendants' motion for a new trial on compensatory damages because the evidence and argument related to punitive damages of Orkin's net worth, Denny's driving record, and inflammatory arguments by plaintiff's counsel were inadmissible, erroneous, and tainted the compensatory damage award.**

Due to the error of allowing plaintiff's punitive damage claim to go to the jury, plaintiff was permitted to introduce evidence and argument by counsel relating to the punitive damage claim. The admission of this evidence and argument by plaintiff's counsel unfairly

prejudiced defendants, poisoned the jury's perception of the defendants and ultimately tainted the jury's compensatory damages award. Specifically, the following evidence and argument should never have been presented to the jury: (1) testimony of plaintiff's expert, Roger A. Griffith, that Orkin has a net worth of \$2,960,000,000.00; (2) testimony and evidence regarding Denny's driving record; and (3) inflammatory arguments by plaintiff's counsel which misrepresented the evidence.

The most damaging and unfairly prejudicial evidence erroneously submitted to the jury as a result of the punitive damage claim is Griffith's erroneous testimony that Orkin had net worth of \$2,960,000,000.00. This astronomical figure - which was calculated by plaintiff's expert, no less - would have been blatantly inadmissible if not for the punitive damage claim. Moreover, Griffith's net worth calculation should have been prohibited because it was erroneous. Specifically, Griffith calculated the net worth of Rollins, Inc., Orkin's parent corporation, not Orkin. In any case, once the jury heard the erroneous testimony of Orkin's alleged exorbitant financial worth, the jury's assessment of compensatory damages was inevitably tainted.

Though West Virginia has not specifically addressed this issue, other jurisdictions have held that "where the issue of punitive damages is erroneously submitted to the jury, together with the defendant's financial condition, an award of compensatory damages is tainted and cannot stand." *Kark-TV v. Simon*, 656 S.W.2d 702, 705 (Ark. 1983). The Pennsylvania Superior Court in *Baker v. Pennsylvania National Mutual Casualty Ins. Co.*, 536 A.2d 1357 (Pa. Super. Ct. 1988), elaborated on this precise issue:

When the trial court refused to dismiss the insured's claim for punitive damages pre-trial and thereafter allowed evidence at trial of the insurance company's net worth, the amount of its reserves,

and the procedures which it followed in settling claims, the trial court committed serious error.

... Because the trial court erroneously refused summarily to disallow the claim for punitive damages, as it should have done, the jury was permitted to hear evidence that the appellant company **had a net worth of more than ninety-two million dollars in 1982 and that its net income during the same year had exceeded fifteen million dollars.**

This evidence, although relevant in a proper claim for punitive damages, is not relevant to and, indeed, is highly prejudicial and improper in a claim for compensatory damages. See: *Feld v. Merriam*, 506 Pa. 383, 396, 485 A.2d 742, 748 (1984); *Trimble v. Merloe*, 413 Pa. 408, 410, 197 A.2d 457, 458 (1964). **The reason for the rule is readily apparent. Evidence of a defendant's considerable wealth tends to prejudice the jury against the defendant who, it is presumed, can afford to compensate the plaintiff for his or her alleged losses. Thus, a jury will be inclined to award compensatory damages based not upon the evidence and the law, but upon the defendant's ability to pay. Because of the prejudicial impact associated therewith, the improper receipt of this evidence requires that a compensatory damage award be set aside and a new trial awarded.** See: *Feld v. Merriam*, *supra*. See also: *Arye v. Dickstein*, 337 Pa. 471, 474, 12 A.2d 19, 20 (1940) (even where evidence concerning defendant's wealth is properly received in a valid action for punitive damages, its admission "should be most carefully safeguarded by the judge, so that injustice shall not be done to the defendant"); *Hoffman v. Memorial Osteopathic Hospital*, 342 Pa.Super. 375, 385-386, 492 A.2d 1382, 1388 (1985) (same).

Baker at 1361-1362. [Emphasis added.]

Here, the jury was erroneously led to believe that Orkin had a net worth of approximately THREE BILLION DOLLARS, dwarfing the ninety-two million dollar net worth figure found to be prejudicial and grounds for a new trial in *Baker*. Any jury, upon hearing such an enormous figure, would fully believe that any damages assessed against the defendant corporation are financially insignificant by comparison and harmless. As such, the jury will likely, at a minimum, resolve all doubts in favor of the injured plaintiff. The erroneous

submission of Orkin's alleged net worth cannot be written off as harmless. Frankly, it is simply impossible for any human being to ignore a \$3,000,000,000.00 net worth figure when assessing liability and damages, whether compensatory or punitive. Accordingly, because plaintiff's punitive damages claim was erroneously submitted to the jury, the erroneous evidence of Orkin's alleged net worth was highly prejudicial and ultimately tainted the compensatory damage award, and thus defendants are entitled to a new trial.

Further, the evidence and argument of counsel regarding Denny's driving record was unfairly prejudicial because it was misrepresented by plaintiff's counsel. Not only did plaintiff's counsel incorrectly argue - and apparently convince the jury - that Denny should have been terminated pursuant to Orkin's Driver Policy, plaintiff's counsel also misrepresented Orkin's GPS "Rules of the Road" policy.²⁰ This policy was separate from, and in addition to, the Driver Certification Policy (see Trial Transcript at ORK0796 - ORK0802).

Specifically, all of Orkin's company vehicles were equipped with a GPS satellite system that monitors the vehicle during operation, including the speed at which the vehicle was traveling. Under the policy, Orkin drivers were automatically assessed a warning if the GPS system detected their vehicle traveling over 70 mph at any given time (see Trial Transcript at ORK0796 - ORK0802). If the driver was assessed three (3) warnings within a twelve (12) month period, they were subject to termination. *Id.* Any warning was cleared from their driving record twelve (12) months after it was issued. *Id.*

Denny was assessed a warning in 2000 and two warnings in 2002 (see Trial Transcript at ORK0815 - ORK0818). These warnings were due solely to Orkin's GPS satellite

²⁰ See footnotes 2, 3, 4 and 5, *supra* at pp. 4-5.

detecting a speed over 70 mph, and none resulted in speeding tickets issued by the police or any governmental authority. These warnings are completely unrelated to the penalty points described above from the incidents listed in the table, *supra*. Denny never had three (3) warnings within a twelve (12) month period, was never subject to termination under the GPS policy, and had not exceeded 70 mph while driving a company vehicle for six (6) years prior to the subject accident. Moreover, there is no allegation that Denny was traveling over 70 mph at the time of the subject accident or that excessive speed was otherwise a causative factor in the accident.

In admitting these into evidence, plaintiff's counsel repeatedly referred to these warnings as "speeding violations" and misled the jury into the belief that these resulted in speeding tickets issued by the police or a state trooper (see Trial Transcript at ORK0731 - ORK0749). Plaintiff's counsel further misled the jury by arguing that these warnings were related to Orkin's Driver Policy and resulted in penalty points, which, of course, they did not. *Id.*²¹ As such, the jury was misled and confused by plaintiff's counsel as to Denny's driving record and the enforcement of Orkin's driving policies in general.²²

This line of questioning had no relationship to plaintiff's negligence claim for which defendants had already admitted liability. Rather, this line of questioning went solely to plaintiff's erroneous punitive damage claim. Thus, this evidence and testimony should have been deemed inadmissible had the court properly granted defendants' Motion *In Limine* to Exclude Plaintiff's Alleged Punitive Damage Claim (ORK0082 - ORK0105) and/or Defendants'

²¹ During his examination of Denny, plaintiff's counsel confusingly went back and forth between the Orkin's GPS Policy and the incidents which accumulated penalty points under Orkin's Driver Policy. (See ORK0731 - ORK0740). Further, defendants' objected to this entire line of questioning. (See ORK0729).

²² See footnotes 2, 3, 4 and 5, *supra* at pp. 4-5.

Motion *In Limine* to Exclude Evidence or Testimony Related to James Denny's Driving Record (ORK0106 - ORK0108).

More egregiously, in his closing, once he had the green light with respect to punitives, plaintiff's counsel made several outlandish statements that Orkin "doesn't care about safety" and that "they went out and hired two people to avoid liability." (See Trial Transcript at ORK1136) Plaintiff's counsel argued "they will do anything to avoid being held responsible. That's why they hired those two witnesses. If you let them off, they get a pass, nothing changes" (*Id.* at ORK1136 - ORK1137) Moreover, plaintiff's counsel then stated:

... Now if you make \$100,000 a year, you know, there's a certain amount of money that's going to make you feel like ouch, I better not do that again. When you've got a 2.9 billion company -- [objection] ... That's the question. It's got to be big enough that this company representative goes back to Atlanta or goes out in that hallway and makes a phone call and says, "We need to get so and so, let's have a board meeting. We've got to make some changes guy."

(*Id.* at ORK1137 - ORK1138)

There was nothing in the record which supported any of these remarks and the verdict should be reversed on this basis alone. See *Jones v. Setser*, S.E.2d 623 (W.Va. 2009). As a result, when considered together, the erroneous submission of punitive damages, Orkin's erroneous net worth of \$3,000,000.00, the misrepresentation and inflammatory arguments by plaintiff's counsel regarding both Denny's driving record and Orkin's enforcement of its driving policies, the entire damages award was tainted. Accordingly, the punitive damage award must be vacated, and defendants are entitled to a new trial on compensatory damages.

6. **The lower court erred in denying defendants' motion for a new trial on compensatory damages because the jury's compensatory damage award was not supported by the evidence.**

(a) Future Medical Bills

Subsequent to the pre-trial conference and approximately one week before the trial of this matter, plaintiff disclosed Griffith's expert report summarizing plaintiff's alleged future medical bills. Once reduced to present value, Griffith's report asserted that plaintiff had expected medical bills with a present value of up to \$426,245.00²³ (See Griffith's Report at ORK0052.) Over ninety-six (96%) percent of the future medical bills were attributed to battery replacements in the spinal cord stimulator implant. The minor remaining future bills were attributed to a back brace and physical therapy.

Griffith testified that plaintiff, currently 46 years old, would need five (5) battery replacement procedures, the last to take place when plaintiff was 80 years old (see Trial Transcript at ORK0835 - ORK0836). Plaintiff previously had the initial device implanted by Dr. Caraway, the treating physician. The remaining projected procedures are less intensive as each procedure is only to replace the battery of the device every seven (7) years (see Trial Transcript at ORK0896 - ORK0897). Mr. Griffith calculated the future costs based on five future procedures, even though no doctor had said she would need more than four. Also, no doctor testified to the need for a back brace or physical therapy after each procedure, costs of which Mr. Griffith calculated at over \$30,000.

Dr. Caraway testified that the current cost of replacing the spinal cord stimulator battery was \$60,000.00 (see Trial Transcript at ORK0435). When asked to itemize the costs on cross-examination, Dr. Caraway stated that the replacement device cost \$18,000.00, the surgeon

²³ Before being reduced to present value, Griffith asserted the total future medical bills were \$830,028.00.

fee was \$3,500.00, and the operating room cost was \$10,000.00 for a one hour operation²⁴ (*Id.* at ORK0461 - ORK0467). These total itemized costs amounted to \$31,500.00 - not \$60,000.00 as otherwise alleged. When Dr. Caraway was asked what other expenses were included in order to reach the \$60,000.00 figure, he was unable to provide any explanation (*Id.* at ORK0466 - ORK0467).

Griffith then calculated the future costs of the battery replacement procedures using the discredited \$60,000.00 estimation provided by Dr. Caraway which he himself could not explain or support. In order to determine the future medical costs of future battery replacement procedures to take place every seven (7) years, Griffith applied an inflation rate of approximately 5%, per year (see Trial Transcript at ORK0835 - ORK0836) Thus, before reducing the figure to present value, Griffith estimated the cost of the procedure in 2017 at \$80,046.00; in 2024 at \$108,545.00; in 2031 at \$147,191.00; in 2038 at \$199,596.00; and in 2045 at an astronomical \$270,660.00 (when plaintiff would be 80 years old) (see Griffith's Expert Report at ORK0054; see also Trial Transcript at ORK0851).

Shockingly, on cross-examination, Griffith testified that he had no knowledge of whether the costs for the battery replacement procedure had, in fact, gone up or not over the last four or five years; but Griffith applied the 5% inflation rate anyway (see Trial Transcript at ORK0851 - ORK0855). Conversely, Dr. Whiting, the only testifying expert with knowledge of the costs of the procedures over the past few years, specifically testified that the cost of the procedure is actually decreasing due to advances in technology (*Id.* at ORK0897 - ORK0898).

²⁴ Defendants dispute Dr. Caraway's estimates, as defendants' expert Dr. Whiting testified that the replacement device was \$16,000.00, the surgeon fee was \$3,500.00, and the operating room cost would be less than half of one hour (less than \$5,000). Thus, Dr. Whiting estimated the current cost of the replacement procedure current at \$24,500.00.

Notably, Dr. Whiting testified that the battery replacement procedure takes merely ten (10) minutes, not an hour as Dr. Caraway suggested. *Id.* As such, the exorbitant and arbitrary inflation rate applied by Griffith - which increased plaintiff's future medical costs by more than 250% - is not supported by the evidence.

“To support a relevant instruction on the recovery of future medical expenses, the plaintiff must offer proof to a degree of reasonable certainty which will indicate costs within an approximate range, as well as the necessity and reasonableness of such prospective medical charges.” *Jordan v. Bero*, 210 S.E.2d 618, 637 (W. Va. 1974). Here, Dr. Caraway could only account for \$31,500.00 of the \$60,000.00 in costs to perform the procedure. Griffith, who testified that he had not researched the cost trend of the procedure in the past five years, arbitrarily applied an outrageous 5% annual inflation rate on top of the unsupported \$60,000.00 figure for a procedure which continues to be performed quicker and cheaper than in years past due to advances in technology. Accordingly, the jury's assessment of \$426,245.00 is not supported by the evidence and the defendants are entitled to a new trial, based on this award.

(b) Past and Future Mental Anguish

The plaintiff presented absolutely zero evidence of any past or future mental anguish. Regardless, the jury awarded a total of \$125,000.00 for mental anguish. There is simply no evidence which supports such an award, and defendants are entitled to a new trial.

(c) Past and Future Loss of Enjoyment of Life

Likewise, the plaintiff presented absolutely zero evidence of any past or future lost of enjoyment of life. Plaintiff did testify that she would be unable to ride her motorcycle. However, plaintiff also testified that she went on a 770-mile cross-country motorcycle trip after

the subject accident! As such, plaintiff presented no evidence which supports the jury's \$125,000.00 award for past and future loss of enjoyment of life and defendant is entitled to a new trial.

7. **The lower court erred in denying defendants' motion for a new trial on compensatory damages because Jury Instruction No. 3 which stated that the jury was "obligated to assess the total amount of damages" was misleading, contrary to the law and constitutes reversible error.**

In Jury Instruction No. 3, the Court instructed the jury as follows:

You are instructed that in assessing the amount of damages in this case, you are not permitted to speculate as to whether or not any losses which occurred to Cindy Mosier were paid by some collateral source, such as health insurance, automobile insurance, or by some other entity or agency.

You are obligated to assess the total amount of damages without any consideration or speculation as to whether or not these have been paid from some other source.

(See Plaintiff's Jury Instruction No. 3 at ORK0134) [Emphasis added.]

The portion of the instruction that the jury is "obligated to assess the total amount of damages" is misleading, confusing, contrary to the law and unfairly prejudicial to defendants. The jury is not "obligated" to assess any damages against the defendant. The jury may assess damages if the plaintiff proves, by the preponderance of the evidence, that she is entitled to damages. This jury instruction is contrary to the law and misleads the jury as to their duty to assess damages, and constitutes reversible error.

8. The lower court erred in denying defendants' motion for a new trial on compensatory damages because Griffith's testimony regarding future medical bills and Orkin's net worth should have been excluded due to unfair surprise.

Pursuant to the Circuit Court's May 27, 2010, Scheduling Order, the deadline for disclosure of expert witnesses was December 30, 2010, and the discovery deadline was February 23, 2011 (see Scheduling Order at ORK0059-ORK0060). A pre-trial conference in this matter was held on May 2, 2011, and the trial held on May 16, 2011. Defendants did not receive Mr. Griffith's expert report on plaintiff's future medical bills until May 6, 2011, subsequent to the pre-trial. Further, defendants did not receive Mr. Griffith's expert report regarding Orkin's alleged net worth until May 12, 2011, two (2) business days before the trial.²⁵

"Expert testimony may be excluded to avoid unfair surprise." *Stewart v. Peffer*, 985 F.2d 553, at *4 (4th Cir. 1993). Griffith's report on plaintiff's future medical bills estimated plaintiff's future bills at \$426,245.00, which constituted the bulk of plaintiff's compensatory damages. Griffith's expert report regarding net worth erroneously approximated Orkin's net worth at three billion dollars. Plaintiff's failure to disclose this information until after the pre-trial conference constitutes unfair surprise and Griffith's testimony on this issue should have been excluded. Such an untimely disclosure unfairly prejudiced defendants' ability to adequately prepare for rebuttal and cross-examination of Griffith's testimony, and the failure to exclude Griffith's testimony on these issues constitutes reversible error.

In *Stewart*, under similar facts, the Fourth Circuit held that that the trial court abused its discretion in permitting plaintiff's expert to testify at trial. Similar to the present case, plaintiff's counsel in *Stewart* failed to disclose their expert's supplemental report on plaintiff's

²⁵ The defendants' objected to Griffith's testimony on these issues due to the untimely disclosure, but the lower court nonetheless overruled (See Trial Transcript at ORK0844.)

future medical bills until the eve of the trial. In remanding the case to the trial court for a new trial on damages, the Court stated as follows:

Effective cross-examination of an expert witness requires advance preparation. The lawyer, even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.²⁶

... Therefore, we hold that the trial court abused its discretion in allowing [plaintiff's expert] to testify that [plaintiff] would require trigger point injections, large joint injections, blood work, special pillows and Zostrix cream, and in allowing the jury to consider this evidence in arriving at its verdict.

Stewart at *4.

Analogous to *Stewart*, plaintiff's counsel in the instant matter failed to timely disclose Mr. Griffith's expert reports until after the pretrial conference and within mere days of trial. One of the reports related to plaintiff's future medical bills which comprised the bulk of plaintiff's compensatory damages. This significantly increased plaintiff's potential compensatory damages by \$426,245.00, all of which was subsequently awarded to the plaintiff by the jury. The other report erroneously asserted that Orkin's net worth was approximately \$3,000,000,000.00, and was not received by defendants' counsel until the Thursday before trial. This erroneous net worth calculation was severely prejudicial to defendants and ultimately tainted the entire trial.

The untimely disclosures unfairly prejudiced defendant's ability to prepare for and rebut this brand new testimony. Due to the unfair surprise of this testimony, defendants

²⁶ Quoting the advisory committee on the 1970 amendments to Rule 26(b)(4) of the Federal Rules of Civil Procedure.

deserve a new trial on compensatory damages so that they may adequately prepare to cross-examine and rebut Dr. Griffith's testimony.

9. The lower court erred in refusing defendants' request for a remittitur of compensatory damages of \$578,245.

This Court is permitted to either grant a new trial or order a remittitur of compensatory damages when the damages awarded are either excessive or not supported by the evidence. *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791 (W. Va. 1986). As stated above, the jury, which was tainted by the punitive damage evidence, grossly inflated their compensatory damage award as well. There was no evidence of mental anguish. Yet the jury awarded \$125,000 for that item of damages. The undisputed evidence at trial was that Ms. Mosier did ride her motorcycle after the accident like she did before - in fact, riding 770 miles five weeks after the accident. Accordingly, there was no evidence of loss of enjoyment of life. Yet the jury awarded \$125,000 for this item of damages. The Defendants request a complete remittitur of those awards (\$250,000).

Similarly, the uncontradicted evidence from Dr. Caraway and Dr. Whiting was that no more than \$24,500 of the costs of the battery replacement procedure could be accounted for and that the costs of the procedure have been going down, not up over the last five years. Consequently, Mr. Griffith's inflation assumptions were completely wrong and the future costs should not have been inflated 250%.

Therefore, the best evidence is that the future medical bills would be the sum of four of the procedures at \$24,500 each, or \$98,000 - not \$426,245. And this total has not even been reduced to present value. The defendants request a remittitur of the future medical damage award by \$328,245.

Thus, defendants request a total remittitur of punitive damages of \$500,000, and compensatory damages in the amount of \$578,245.00 (\$250,000 plus \$328,245).

VI. CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court vacate the punitive damage award in its entirety and grant a new trial only on compensatory damages. In the alternative, defendants request that this Court grant a remittitur of punitive damages of \$500,000 and compensatory damages of \$578,245.

JAMES DENNY and
ORKIN, LLC,

By Counsel,



Charles M. Love, III (WVSB #2254)
David A. Mohler (WVSB #2589)
BOWLES RICE McDAVID GRAFF & LOVE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
304-347-1100



Thomas V. Flaherty (WVSB #1213)
FLAHERTY SENSABAUGH BONASSO PLLC
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338-3843
304-345-0200

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1330

CINDY MOSIER,

Respondent,

v.

Appeal from a final order of the
Circuit Court of Kanawha County (10-C-383)

JAMES DENNY and
ORKIN, LLC, a
Delaware Corporation,

Petitioners.

CERTIFICATE OF SERVICE

I, David A. Mohler, do hereby certify that on the **23rd day of December, 2011**, I did serve a copy of the foregoing *Petitioners' Brief* via hand delivery upon the following:

Robert B. Warner, Esquire
Warner Law Offices, PLLC
227 Capitol Street
Post Office Box 3327
Charleston, West Virginia 25333
Counsel for Plaintiff


David A. Mohler (WVSB #2589)