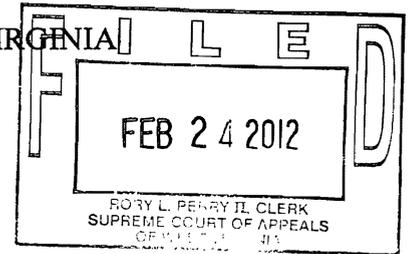


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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' REPLY BRIEF

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I. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners incorporate by reference their request for Rule 20 oral argument set forth in *Petitioners' Brief* due to the significant legal, factual and public policy issues presented in this appeal.

II. ARGUMENT

Petitioners respectfully submit the foregoing reply to supplement their original brief and to respond to notable misstatements of fact and law in Plaintiff's Response.

1. **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. (Petitioner's Second Assignment of Error)**

- A. *Plaintiff's punitive damage award was based upon an independent claim asserted directly against Orkin for the alleged failure to enforce its driver safety policies, to which Orkin adamantly denied fault and liability.*

Plaintiff fails to recognize the clear and unambiguous distinction between (1) the negligence claim asserted in the complaint regarding James Denny's ("Denny") driving at the time of the March 17, 2008, accident; and (2) the claim asserted directly against Orkin, LLC ("Orkin"), upon which the punitive damage award was based, for Orkin's alleged failure to enforce its internal safety policies.¹

The negligence claim set forth in the complaint arises solely out of Denny's driving at the time of the accident on March 17, 2008. At the time of the accident, Denny, an Orkin employee, was acting within his scope of employment with Orkin. As such, the basis of plaintiff's negligence claim in the complaint - as against Orkin - is vicarious liability pursuant to the doctrine

¹ The two Orkin Driver Safety Policies at issue were the Driver Certification Policy and the GPS Policy. These policies are separate and distinct policies, each enforced independently of the other.

of respondeat superior. Defendants admitted fault only with respect to Denny's driving *at the time of the accident on March 17, 2008*.

Conversely, the punitive damage award was not based upon vicarious liability under the doctrine of respondeat superior. The claim upon which the punitive damage award was based was asserted directly against Orkin for the alleged failure to enforce its internal driver safety policies. Clearly, Denny, merely an Orkin driver, had no responsibility or liability with respect to the *enforcement* Orkin's internal driver safety policies. The enforcement of Orkin's internal driver safety policies is the responsibility of Orkin's risk management department. Denny could not be liable for Orkin's alleged failure to enforce its internal driver policies as against himself or any other Orkin driver, and thus respondeat superior is inapplicable for this claim. Plaintiff's attempt in her responsive brief to argue that the punitive damage award was somehow based upon respondeat superior is erroneous, nonsensical and disingenuous.²

While Orkin admitted Denny was at fault the time of the accident, Orkin vehemently denied that it failed to enforce its internal driver safety policies throughout Denny's employment with Orkin. Plaintiff's responsive brief inexplicably attempts to lump these two separate and distinct claims together. Plaintiff's assertion that Orkin, by admitting Denny's fault for the March 17, 2008 accident, likewise admitted that Denny was an unsafe driver throughout his entire eighteen

² Plaintiff's attempt to assert that respondeat superior is applicable to the punitive damage award is blatantly disingenuous. When plaintiff's counsel was questioning Denny on direct examination regarding Denny's driving history and Orkin's enforcement of its internal policies as against Denny, plaintiff's counsel stated "And Mr. Denny, I'm not trying to pick on you, I'm not. Our issue is not with you." (See ORK0739.) Plaintiff's counsel then questioned Denny as follows:

Based on what we've just gone through, would you agree with me it's apparent your managers were not enforcing the safety rules, at least as listed in their own handbook?...You're working every day. It's up to them. They're the ones that have to enforce the handbook, not you; right?

(See ORK0746.)

(18) year Orkin employment, and that Orkin failed to enforce its safety policies with respect to Denny over that eighteen (18) year period, is simply illogical.

Plaintiff thus had two separate and independent claims each involving a different set of facts. Specifically, the negligence claim in the complaint involved only the facts surrounding the subject accident on March 17, 2008. However, the facts of the March 17, 2008 accident have no application or relationship to the facts upon which the punitive damage award was based. The punitive damage award related to Orkin's monitoring of Denny's driving record over his eighteen (18) year employment *prior to the accident*. Thus, the facts upon which the punitive damage claim was based encompassed everything ***but*** the facts on the day of the accident.

Accordingly, because plaintiff's direct claim against Orkin for allegedly failing to enforce its internal safety policies was an independent claim, plaintiff must first establish a foundation of negligence before recovering punitive damages on the grounds of extreme negligence or recklessness.³

B. Plaintiff did not establish the appropriate standard of care with regard to her independent and direct claim against Orkin for Orkin's alleged failure to enforce its internal safety policies.

First, as set forth previously, the undisputed facts establish that Orkin did not fail to enforce its internal policies. Second, even if Orkin had failed to enforce to its internal policies, Orkin's internal policies cannot establish a standard of care to establish negligence, much less provide a basis for punitive damages.

³ Plaintiff does not assert that the punitive damage claim was based on malice.

Plaintiff conceded in her responsive brief that “[p]laintiff did not present any evidence of the industry standard or similar safety policies in the trucking industry...” (See Plaintiff’s Responsive Brief, at p. 19.) Plaintiff further conceded that the only similar driver penalty point system introduced at trial was the system enforced upon all West Virginia drivers by the West Virginia Department of Motor Vehicles (the “DMV”). *Id.* It is undisputed that the DMV’s point system is far more lenient than Orkin’s policies, and further that Denny was never subject to probation or suspension under the DMV’s point system.

In fact, a driver is not subject to suspension by the DMV until they have accumulated twelve (12) penalty points. (See ORK0200.) Under the DMV’s point system, Denny had, at most, merely three (3) penalty points on his license at the time of the March 17, 2008 accident. Clearly, under the penalty point system implemented by a state agency - and the only comparable point system admitted as evidence at trial - Denny was far from an “unsafe” or “aggressive” driver as alleged by plaintiff.

A company’s internal guidelines are not determinative of the standard of care in an industry. Here, plaintiff failed to establish the appropriate standard or care, concerning herself only with Orkin’s stringent internal policies. As such, plaintiff’s assertion that Orkin breached a standard of care owed to plaintiff by failing to terminate Denny or put him on probation has no factual or legal basis. It is axiomatic that plaintiff must first establish simple negligence in order to recover punitive damages on the basis of extreme negligence or reckless. Accordingly, plaintiff’s punitive damage award is erroneous, and must be reversed.

2. **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. (Petitioner's Third Assignment of Error)**

A. *Plaintiff's Response incorrectly states the standard of review for punitive damages and fails to identify any specific conduct that warrants punitive damages under Mayer v. Frobe, 22 S.E.58 (W. Va. 1895).*

Plaintiff's Response erroneously asserts that "[o]nly the jury can determine what facts they deem necessary to warrant punitive damages that constitute gross negligence, willful, wanton, recklessness or maliciousness..." (See Plaintiff's Response at p. 22.) This is directly contrary to the review of punitive damage awards pursuant to *Perrine v. E.I. Dupont De Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010). As stated under *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.

Perrine at Syl. Pt. 6. Under *Perrine*, the Court independently reviews a punitive damage award to determine if it is supported by the evidence. Thus, the Court, acting as the gatekeeper, ultimately decides if a punitive damage award is justified.

Plaintiff attempts to justify the punitive damage award by relentlessly labeling Denny as an "aggressive", "unsafe" and "reckless"⁴ driver that was a "safety risk" to the public. Plaintiff asserts that Orkin "ignored" this by failing to remove Denny from his non-driving position, and thus Orkin's conduct was "reprehensible." Plaintiff boldly uses these buzzwords throughout her response, yet plaintiff fails to provide actual facts to justify the buzzwords.

⁴ Plaintiff's Brief uses the term "aggressive" an estimated twenty (22) times, "reckless" an estimated sixteen (16) times, and "unsafe" an estimated five (5) times.

The facts are that Denny was an Orkin driver for eighteen (18) years. Prior to the March 17, 2008 accident involving the plaintiff, *Denny had never caused a single personal injury in eighteen (18) years as an Orkin driver.* In that time, Denny had been involved in only two (2) very minor accidents in which he was at fault. Specifically, Denny sideswiped a vehicle while going up a hill on July 5, 2000,⁵ and Denny backed into a vehicle while in the parking lot of Contemporary Galleries furniture store on July 3, 2003.⁶ Denny also had a speeding ticket on September 24, 2005, for going 1-15 miles per hour over the speed limit, and a speeding ticket on June 20, 2007, for going 1-4 miles per hour over the speed limit.⁷ (See ORK0102 - ORK0104.) On only three (3) occasions was Denny warned by Orkin for going over 70 miles per hour as detected by Orkin's GPS satellite system (once in 2000, and twice in 2002). (See ORK0815 - ORK0818.)⁸ This is the entirety of Denny's driving record throughout his eighteen (18) year employment with Orkin.

Thus, plaintiff's labeling of Denny as an "aggressive", "unsafe" and "reckless" driver is utterly baseless. Over Denny's eighteen (18) year employment with Orkin, Denny never once caused a single personal injury prior to the accident with plaintiff. To label Denny as a "safety risk" to the public based on his Orkin driving record prior to the March 17, 2008 accident is factually erroneous. As such, plaintiff's assertion that Orkin's failure to remove Denny from the road constitutes "reprehensible conduct" is absurd. Accordingly, the punitive damage award cannot be justified under the facts of this case and must be reversed.

⁵ See ORK0099.

⁶ See ORK0100.

⁷ This last speeding ticket was unknown to Orkin prior to the March 17, 2008 accident.

⁸ Again, the GPS policy was separate and apart from the penalty point system under the Driver Certification Policy. Plaintiff's Brief continues to erroneously assert that Denny should have been terminated under the GPS policy for exceeding 70 mph on three (3) occasions. (See Plaintiff's Brief at p. 4.) This is completely false as a driver could only be terminated under the GPS policy for accumulating three (3) warnings within a twelve (12) month period. Denny never accumulated three (3) warnings within a twelve (12) month period.

3. **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. (Plaintiff's Eighth Assignment of Error)⁹**

A. Orkin objected to Roger A. Griffith's testimony regarding Orkin's net worth and plaintiff's future medical costs.

Plaintiff asserts in her responsive brief that Orkin did not object to Roger A. Griffith's ("Griffith") testimony regarding Orkin's net worth nor his testimony regarding plaintiff's future medical costs. (See Plaintiff's Response at pp. 30, 37) First, on May 12, 2011, defendants filed *Defendants' Motion In Limine to Exclude Plaintiff's Alleged Punitive Damage Claim*. (See ORK0082 - ORK0105.) Therein, defendants requested the trial court to exclude any testimony or evidence related to punitive damages. Griffith's testimony regarding Orkin's net worth related only to the punitive damages claim.

The motion *in limine* was addressed the first day of the trial on May 16, 2011.¹⁰ (See ORK0268 - ORK0305.) The Court denied the motion and permitted plaintiff to put on evidence of punitive damages, at which time counsel for defendant specifically stated his objection, which was noted by the Court. (See ORK0303-0304.) Further, defendants' counsel again objected when Griffith testified at trial. Defendants' counsel objected to Griffith's testimony on both future medical costs and Orkin's net worth due to the untimely disclosure of this information. (See ORK0834, ORK0844.)

Notably, Plaintiff's Response further asserts that each of these reports were timely provided to defendants. This is unequivocally false. A pre-trial conference in this matter was held

⁹ Defendants' objection to Griffith's testimony regarding net worth is likewise applicable to defendants' Fifth Assignment of Error, in that evidence and argument regarding punitive damages should have been excluded, and ultimately tainted the compensatory damage award.

¹⁰ Plaintiff asserts that the "Circuit Court carefully considered the evidence before submitting the issue of punitive damages to the jury." (Plaintiff's Response at p. 12.) However, punitive damage issue was only briefly addressed by the Court on the morning of the first day of trial. (See ORK0268 - ORK0303.)

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. (See ORK0053). Likewise, defendants only received Mr. Griffith's expert report regarding Orkin's alleged net worth on or about May 10, 2011, just a few days prior to the trial. (See ORK0058.)

III. CONCLUSION

For the foregoing reasons, in addition to the grounds set forth in Petitioners' Brief, petitioners 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.

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CERTIFICATE OF SERVICE

I, David A. Mohler, do hereby certify that on the **24th day of February, 2012**, I did serve a copy of the foregoing *Petitioners' Reply Brief* via hand delivery upon the following:

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