IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JAMES W. HIGGINBOTHAM,

Respondent / Plaintiff below,

-v- CASE NO. 101499

(Appeal from Mason County Circuit Court Civil Action No. 05-C-12N below)

NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation;
NORFOLK SOUTHERN CORPORATION, a Virginia corporation;
CHARLES PAXTON, individually;
JAMES D. FARLEY, individually;

Petitioners / Defendants below.

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PETITION FOR APPEAL

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OF WEST VIRGINIA

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52 Am. Jur. 2d. *Malicious Prosecution* §23 (1970)

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I. KIND OF PROCEEDING AND NATURE OF THE RULINGS IN THE CIRCUIT COURT OF MASON COUNTY

Norfolk Southern Railway Company ("NS"), Norfolk Southern Corporation, and NS Special Agents (NS police officers) Charles Paxton and James D. Farley (all collectively referred to as "Petitioners") appeal the Mason County Circuit Court verdict and award of damages in a malicious prosecution cause of action filed by James W. Higginbotham ("Respondent" or "Higginbotham"). The rulings appealed are described below.

On September 8, 2006, Petitioners filed their motion for complete summary judgment, which the trial court denied by letter to counsel on June 25, 2007. Trial of Respondent's malicious prosecution claim began August 28, 2007, and, at the close of Respondent's evidence, Petitioners moved for complete judgment as a matter of law under *W.Va.R.Civ.P. 50(a)*. (Trial Transcript ("Tr."), p. 818 *et seq.*) *At the same time*, Respondent also moved for judgment as a matter of law on the issue of whether Petitioners had procured his prosecution, one element in his required proof. (Tr., p. 812.) The trial court denied Petitioners' motion, but *granted* Respondent's motion and held as a matter of law that the Petitioners had procured the prosecution (Tr., p. 865.), notwithstanding the fact Petitioners had not concluded their defense and there was uncontradicted testimony from the assistant prosecutor that he had total, independent responsibility for the prosecution. (Tr., pp. 405-06.)

At the close of trial, Petitioners again moved for judgment as a matter of law. (Tr., p. 956 *et seq.*) The trial court again denied the motion, instructed the jury as a matter of law that Petitioners had procured Respondent's prosecution, and permitted the jury to consider probable cause and malice and award compensatory and punitive damages over objection. (Tr., p. 960.)

On September 6, 2007, the jury returned a verdict for Respondent and awarded him $20,000 in special damages for "out of pocket damages, attorneys fees," $100,000 for general

damages of embarrassment, humiliation, damage to reputation, annoyance, inconvenience, and emotional distress, and $300,000 in punitive damages. The court below entered its Judgment Order on December 4, 2007, awarding $420,000 plus certain interest to Respondent.

Petitioners thereafter filed timely post-trial motions, again moving for judgment as a matter of law or, alternatively for a new trial, and also for a *Garnes* review of the punitive damage award, as well as the overturn of the punitive damage award or remitter. After a hearing on April 30, 2008, the trial court entered its final order denying the post-trial motions on March 24, 2010. Petitioners now accordingly appeal to this Court.

II. STATEMENT OF FACTS

This malicious prosecution case concerns the unauthorized removal of rail managed and operated by NS and the role that Respondent Higginbotham played therein. The victim of this theft, NS, reported it to the local prosecutor, including facts uncovered about Higginbotham's role in the rail removal. Because of Higginbotham's role, a Kanawha County prosecutor sought and obtained grand jury indictments against Higginbotham (and two other associates) for grand larceny. A different assistant prosecutor ultimately agreed to the indictments' dismissal over a year later, and Higginbotham was never tried. With the indictments dismissed, Higginbotham filed this malicious prosecution action against NS and the NS employees who had initially investigated the theft.

Higginbotham was a career railroad track maintenance worker. He worked on the same railroad tracks in Kanawha County for many years. Although the tracks remained the same, the names of his employer changed over the years. He worked for Penn Central until it became Conrail, Conrail until its Kanawha County and other central West Virginia lines came under NS management, and NS until he retired. One of the lines of railroad he worked on at least during

part of his career was the Blue Creek line in remote Kanawha County. (Tr., pp. 331, 661-62.) Over time, this line stopped being actively used. The tracks, however, remained in their bed and on the NS track charts for possible future use.[1]

While employed by the railroads, Higginbotham developed his own side business. He and a friend formed a company called RJW Construction, with the purpose of buying and selling scrap, railroad metal, and, in particular, railroad tracks. Through the years, he and his company did business with two particular rail "scrappers," David Clark and Charles Chandler. Higginbotham had bought rail from Chandler many times. (Tr., pp. 599-605.)

The theft that ultimately gave rise to the pending action occurred in the spring of 2000. Chandler told Higginbotham to advise Clark (who now lived in Florida) that he was selling 105 pound rail from Blue Creek. (Tr., p. 692.) (This was the same rail that Higginbotham had worked on in the 1970s for Conrail. He and the other central West Virginia Conrail employees became NS employees, and Conrail track in the region was transferred to NS management only the year prior -1999.) Notwithstanding the fact that Higginbotham knew the company which NS acquired (Conrail) had owned and maintained the Blue Creek tracks, Higginbotham agreed to act as the "broker" or "go-between" for Chandler and Clark's Blue Creek rail purchase and sale, advising Clark how to get to Blue Creek, and offering to meet him there. Higginbotham even rented a backhoe for Chandler to use to rip out the rail. (Tr., p. 681.) Through Higginbotham's work in coordinating the transaction, Clark paid Chandler $10,000 for 105 pound Blue Creek rail. (Tr., p. 621-23; 673.) Clark also paid the equivalent of $6,500 to Higginbotham for him to inspect the rail on Clark's behalf. (Tr., p. 673-74.)

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[1] Pursuant to an Operating Agreement, NS was solely responsible for all maintenance and operation of former Conrail rail, including the Blue Creek tracks, and had the responsibility to stop any unauthorized removal. The tracks were technically held in the name of "Pennsylvania Lines LLC," which was owned by Conrail in which Norfolk Southern Corporation owns a 58% equity controlling interest. (Tr., pp. 760-65; Def.'s Trial Ex. 3.)

In addition to coordinating Chandler's sale of Blue Creek rail to Clark, Higginbotham, through his company, also paid Chandler $10,000 for some127 pound Blue Creek rail. Higginbotham even sent an RJW company truck to pick up the rail at Blue Creek and bring it to Mason County. (Tr., p. 678.) Thus, Higginbotham, along with Chandler and Clark, was directly involved in the active removal and "sale" of Blue Creek rail.

Some time after Higginbotham had helped Chandler start the removal process of the 105 pound Blue Creek rail and had acquired some of the 127 pound Blue Creek rail for his company (RJW), Higginbotham mentioned to NS Track Supervisor Mark Lonsinger (a supervisor, friend and former co-worker), that he had heard *CSX* was selling rail at Blue Creek. (Tr., p. 283.) This statement was not truthful, as Higginbotham knew that Chandler, and not CSX, was "selling" the rail after taking it up with a backhoe that Higginbotham provided. When Lonsinger asked Higginbotham why he thought it was *CSX* rail, Higginbotham made no reply. (Tr., p. 330.) He also did not tell Lonsinger that he had already bought some of the Blue Creek rail from Chandler, or that he had facilitated a deal for Chandler to sell Clark some of the Blue Creek rail. (Tr., p. 331.) When Lonsinger began asking questions, Higginbotham gave no answers. NS later concluded that Higginbotham was likely trying to create the false pretense that he, a track worker on this territory for 30 years, was ignorant of which railroad controlled the track.

In any event, Lonsinger informed the NS Division Engineer (Phillip Merilli) that he had a report that *CSX* was selling Blue Creek rail. (Tr., p. 291.) As Blue Creek line was an NS operated line listed on NS track charts, Merilli sent Lonsinger and an assistant to Blue Creek to investigate. (Tr., pp. 291, 324.) Once there, they found Higginbotham's friend Chandler using the backhoe to remove rail from its rail bed. Chandler showed them a paper that was supposedly a CSX permit for the rail removal. (Tr., pp. 291-93.) Unbeknownst to Lonsinger at the time, the

paper was a fraud, prepared by CSX Roadmaster Tom Crawford in return for a several thousand dollar bribe from Chandler. Chandler had told Crawford he needed something to "legitimize" the removal of the Blue Creek rail in case people started asking questions. (Tr., p. 497-98.)

When Merilli learned that NS rail was actually being taken, he sent NS Police Department Special Agent[2] Paxton to Blue Creek with Lonsinger, as it was Paxton's job to investigate theft of railroad property. Chandler was gone, but they found rail taken out of its bed, carried off and stacked along with piles of rail joint bars, spikes, tie plates and other materials. (Tr., pp. 304-05.) Paxton telephoned the number printed on the backhoe at the scene and discovered Higginbotham had rented it for RJW Construction. (Tr., p. 236, 306) Lonsinger advised Paxton that Higginbotham worked for NS as a welder. (Tr., p. 306.) (Paxton did not know Higginbotham and had no recollection of ever meeting him previously.) (Tr., pp. 230-31.)

When informed that rail was being removed at Blue Creek with a Higginbotham-provided backhoe, Merilli followed company practice for dealing with employees suspected of major misconduct and had Lonsinger take Higginbotham out of service pending further investigation into the matter. Lonsinger, accompanied by Paxton, did so (Tr., p. 304-05), and during the course of their meeting, Higginbotham confessed that he had not only rented the backhoe for Chandler to use to take out the rail, but that he had also paid Chandler $10,000 for some of the 127 pound rail Chandler had taken up at Blue Creek and then hauled it to Mason County in Higginbotham's NS-provided vehicle. (Tr., pp. 336.) Part of being "taken out of service" required Higginbotham to surrender this vehicle. There, Lonsinger found more documents tying Higginbotham directly to the unauthorized removal of the rail, including: (1) a purchase contract with Clark referencing Blue Creek rail and stating that *"Bill Higginbotham*

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[2] Under West Virginia *Code* § 61-3-41, railroad special police officers such as Respondents Paxton and Farley, are commissioned by the Governor and have the authority of deputy sheriffs.

agrees to sell"; (2) a handwritten backhoe rental contract between Higginbotham's company and Chandler; and (3) a copy of a $10,000 check from Clark to Chandler referencing "R.J.W. [Higginbotham's company] Job #XTO 2655PC, noting Blue Creek and "Total order is for 1 mile of 105 rail, bars, plates." (Tr., p. 343-47; Pl. Ex. 12.)

In accordance with the relevant collective bargaining agreement between Higginbotham's union and NS, after NS had taken Higginbotham out of service it was required to conduct a formal investigatory hearing where witnesses (including Higginbotham) gave statements and the confiscated documents were reviewed. After the August 2000 hearing, the hearing officer terminated Higginbotham for "conduct unbecoming a railroad employee." (Tr., pp. 791-95.) Although an arbitration panel (a neutral Public Law Board created pursuant to the Railway Labor Act) reinstated his employment a year later, it affirmed that Higginbotham was guilty of conduct unbecoming a railroad employee and awarded ***no backpay***. (Tr., pp. 800-01, 943.)

Prior to the company hearing, the NS police had concluded that the rail theft was complicated, as it involved four individuals – Chandler, Clark, Higginbotham, and Crawford. Paxton's co-worker, NS Special Agent Farley, testified that their supervisor told Paxton not to serve any warrants he had obtained in the matter but to instead report the theft to the Kanawha County prosecutor for handling. (Tr., pp. 569.) In July 2000, the NS officers met with assistant prosecutor Robert Schulenberg and turned the matter over to him. (Tr., p. 410.) Although Paxton had previously obtained arrest warrants for Chandler and Higginbotham from a local magistrate, they were never served but were, instead, just placed in the file. (Tr., p. 261.)

Assistant prosecutor Schulenberg testified that he took responsibility for the case, reviewed the officers' reports and directed them to gather some additional, specific evidence. He issued subpoenas for money orders utilized in connection with payments between Chandler and

Clark and bank account records. Schulenberg, expressly testified that: (a) he took control of the investigation; (b) he made the decision to seek indictments against Higginbotham, Chandler and Clark; (c) he made that decision independently, based upon his review of the police record, statements and materials he subpoenaed and upon his 16 years of experience as a prosecutor; and (d) he believed, as a prosecuting attorney, that there was a good faith, reasonable basis that the crimes had been committed and that these those three individuals were the persons to be charged or otherwise he would not have taken it to the grand jury. (Tr., pp. 405-06.)

Paxton retired from NS effective December 31, 2000. (Tr., p. 202.) He only met a couple of times with the prosecutor. He never testified before the grand jury that indicted Higginbotham and had no further involvement of any kind with the investigation. (Tr., p. 205.) After Paxton's retirement in December 2000, NS Special Agent Farley, who also did not know Higginbotham, became the NS officer assigned to monitor the Blue Creek rail theft matter and the NS contact person for the prosecutor. During the two years that the prosecutor had the case before going to the grand jury, the NS police office averaged about one status call per month (approximately twenty-nine total calls) with the prosecutor. (Tr., pp. 520, 665.) Each call and attempted contact was logged into the NS Police file in accordance with standard practice.

The NS police provided Schulenberg with any assistance he requested, such as their investigatory documents, including written statements taken from Chandler, Crawford and Lonsinger, the NS police report, and the documentary evidence found in Higginbotham's company vehicle. (Tr., pp. 53, 584-88; Plaintiff's Trial Exhibits ("Pl. Ex.") 23, 9, 10 12.) Paxton had made an error in the police report, indicating that Higginbotham, instead of Chandler, had had a conversation with CSX roadmaster Crawford about the Blue Creek rail. However, Crawford's sworn statement, which was included in the materials provided to the prosecutor,

plainly stated that Crawford's dealings were with Chandler, not Higginbotham. (Tr., pp. 417-20; 531; 584-88; 673-74; Pl. Ex. 10.)

Assistant prosecutor Schulenberg testified without reservation that he alone decided when and if to take the criminal investigation to a Kanawha County grand jury, which he elected to do in June 2002. Schulenberg made very clear it was his decision to seek indictments against Higginbotham, Chandler and Clark, and make CSX roadmaster Crawford a "cooperating witness" with immunity. (Tr., pp. 406, 408, 412-20, 426-27, 431, 448.)

Schulenberg subpoenaed Farley to testify before the Kanawha County grand jury. (Tr., p. 409.) Farley recounted the facts from the police report to the grand jury as he remembered them, but there were a couple of errors in his testimony. For example, Farley testified that there was a check from Clark to Higginbotham for $10,000. Actually, the $10,000 check was from Clark to Chandler. The *actual* amount Clark paid Higginbotham was $6,500 for Higginbotham's services for Clark in assisting Clark with his purchase of Blue Creek rail from Chandler. (Tr., pp. 673-74.) Farley also testified that the Chandler-Clark-Higginbotham rail removal scheme had resulted in both 105 and 107 pound rail being taken from Blue Creek, when actually the rail in question was *105* pound rail and the 127 pound rail that Higginbotham had purchased from Chandler for RJW Construction. Farley believed he was answering the prosecutor's questions truthfully (Tr., p. 545.), and there was no evidence that Farley's mistakes were in any way intentional. Although Farley may have confused a couple of facts, he provided the grand jury with *favorable testimony to Higginbotham* by telling the grand jury *twice* that Higginbotham had, in fact, returned the 127 pound rail that he had removed from Blue Creek (Tr., p. 592.).

The Kanawha County grand jury indicted Chandler, Clark and Higginbotham for grand larceny of Blue Creek rail. (Tr., p. 405; Pl. Ex. 1.) Higginbotham's indictment was published in

a *Kanawha County* newspaper, but Higginbotham only knew that because a relative saw it. (Tr., p. 753.) Higginbotham was never arrested or incarcerated and had just one court appearance to post a $500 bond (which was later refunded to him). (Tr., pp. 645, 685.) The indictments against all three individuals were dismissed over a year later with the acquiescence of a *different* assistant prosecutor, and Higginbotham (but not Chandler and Clark) then sued the Petitioners for malicious prosecution. (Pl. Ex. 2.)

III. ASSIGNMENTS OF ERROR

1. The Trial Court committed clear error by denying Petitioners summary judgment or judgment as a matter of law, as Petitioners did not procure Respondent's prosecution, there was probable cause for Respondent's prosecution, and the prosecution was not malicious.

2. The Trial Court committed clear error by denying Petitioners summary judgment or judgment as a matter of law, as Petitioners were entitled to the absolute defense of advice of counsel.

3. The Trial Court committed clear error by denying Petitioners immunity in the performance of official duties.

4. The Trial Court committed clear error in allowing the award of compensatory damages to stand, as it had no basis in fact.

5. The Trial Court committed clear error in upholding the punitive damage award.

IV. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

A. The Trial Court committed clear error by denying Petitioners summary judgment or judgment as a matter of law, as Petitioners did not procure Respondent's prosecution, there was probable cause for prosecution, and it was not malicious.

Standard of Review

Petitioners bring their Petition, submitting that the trial court erred by failing to grant them summary judgment, or judgment as a matter of law, either at the conclusion of trial or after Petitioners' post-trial motions to the same. Accordingly, the standard of review for failure to

grant judgment as a matter of law is one of legal error: "We apply a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law." *Gillingham v. Stephenson*, 209 W. Va. 741, 745, 551 S.E.2d. 663, 667 (2001). "Where the issue on appeal from the circuit court is clearly a question of law . . . , we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E. 2d 415 (1995).

The Petitioners did not procure the Respondent's prosecution.

A cause of action for malicious prosecution requires the plaintiff to prove by a preponderance of the evidence that the prosecution was terminated in plaintiff's favor, and that the defendant procured the prosecution without probable cause and with malice. *Morton v. C & O Railway*, 184 W.Va. 64, 399 S.E.2d 464, 467 (1990). The first element was not at issue as the indictments against Higginbotham were dismissed. The other three elements of proof – procurement, probable cause and malice – remained as issues for trial. Higginbotham was required to prove all three of these elements. *Id.*

At the conclusion of only the *plaintiff's* case in chief, however, the lower court granted Higginbotham's motion for judgment that *Petitioners* had procured his prosecution as *a matter of law*, and denied Petitioners' motion for judgment that they did not procure Higginbotham's prosecution. (Tr., pp. 864-65.) The trial court ruled without even waiting until Petitioners had put on their defense and, more importantly, ruled in the face of the Kanawha County Assistant Prosecutor Schulenberg's testimony taking full responsibility for the indictments. Schulenberg testified he determined: what evidence to subpoena in the investigation; whether there was sufficient probable cause to take the case to a grand jury for indictments; when to go before the grand jury; who to subpoena to testify before the grand jury; and what charges on which to seek grand jury indictments. (Tr., pp.381, 406, 408, 412-20, 426-27, 431, 448.) It was clear that the

party who caused the wheels of the Kanawha County judiciary to actually act against Higginbotham and the others was the prosecutor exercising his independent judgment and not the NS police officers who simply turned over their investigatory material to the prosecutor.

The facts of this case and applicable case law make clear that, as a matter of law, the Petitioners did not procure Higginbotham's prosecution. Given Schulenberg's testimony, the trial court should never have instructed the jury that the Petitioners procured his prosecution.

1. Procurement requires more than reporting suspected criminal activity to a local prosecutor for his independent assessment and judgment.

In reaching its decision that the Petitioners procured the Respondent's prosecution as a matter of law, the trial court cited *Vinal v. Core*, 18 W.Va. 1 (1881). (Tr., pp. 864-65.) In that case, the Court said procurement was to be given its normal or usual meaning and made no real attempt to define procurement beyond that opaque definition. The facts of *Vinal* are significant in helping to understand how the *Vinal* defendant procured the plaintiff's prosecution. In *Vinal,* the plaintiff was actually arrested and brought before a justice of the peace pursuant to the defendant having sworn out a warrant. The justice of the peace heard testimony and ultimately dismissed the warrant. In the case at bar, however, Higginbotham was never arrested as a result of any arrest warrant. Instead, a grand jury indicted him, pursuant to the actions of the assistant prosecutor who supplied the grand jury with the evidence he developed, including subpoenaing testimony from officer Farley. *Vinal* does not support a finding as a matter of law that the Petitioners procured Higginbotham's prosecution as the court below erroneously ruled.

To adopt the trial court's reasoning would mean that if one goes to a prosecuting attorney to report a suspected crime, or if a railroad even has its railroad police investigate a suspected crime and report the same to the local prosecutor, those actions establish as a matter of law that a procurement occurred. Clearly, the trial court's radical interpretation of *Vinal* creates a foregone

conclusion of procurement in any malicious prosecution case. Also, by so ruling just after the completion of Higginbotham's case in chief but before the Petitioners' case in chief was completed, the court foreclosed the defense of the procurement issue by Petitioners.

This plain error, at a minimum, warrants reversal and remand for a new trial. Moreover, West Virginia caselaw on malicious prosecution underscores what *true* procurement is and why the Petitioners were entitled to outright judgment in their favor as a matter of law.

Truman v. Fidelity & Casualty, 146 W.Va. 757, 123 S.E.2d 59 (1961) is a case that most closely parallels the facts in the case at bar. In *Truman* this Court specifically noted the absence of any procurement of the prosecution by the defendant. In *Truman,* the defendant investigated suspected insurance fraud by the plaintiff. After having taken statements and gathering other evidence, the defendant submitted its investigatory materials to the local prosecutor, leaving the evidence with him. The defendant's representative testified that it was left entirely to the prosecutor to determine whether a criminal prosecution should be instituted.

Just like the situation in the case at bar with respect to prosecutor Schulenberg and the Respondent, in *Truman* the prosecutor elected to present the matter to the grand jury, and the plaintiff was indicted. *Id.* at 67-68. As in the case at bar, thereafter the plaintiff obtained a criminal defense attorney and posted bond. As in the case at bar, sometime later, the criminal prosecution was dismissed with the assent of the prosecuting attorney. *Id.* at 68. In the malicious prosecution civil trial, the jury found in favor of the plaintiff and awarded damages.

In *Truman,* this Court made certain findings with regard to the lack of procurement by the defendant which have specific relevance to the case at bar:

> In the instant case, there is nothing to indicate that any steps toward prosecution whatsoever were actually taken by the defendant's agents or employees after the evidence in their hands was left with the prosecuting attorney at Fayetteville in July, 1959. The proceedings before the grand jury were conducted by the

> prosecuting attorney or his assistant and the testimony on which the indictment was made was given by Trooper Legursky as a law enforcement officer. . . . There was no evidence upon which the jury could reasonably and properly have determined that the defendant was prosecuting the plaintiff ..... *Id.* at 72-73.

In the case at bar, prosecutor Schulenburg conducted the proceedings before the grand jury and subpoenaed Farley to testify as a law enforcement officer. (Tr., p. 409.) There was no evidence before the jury to indicate that any NS special agent or other representative had taken steps toward Higginbotham's prosecution **after** the matter had been left with prosecutor Schulenberg in the early fall of 2000. His prosecution was **not** caused or procured by the Petitioners, as this Court's analysis in *Truman* makes clear.

This Court continues to require direct prosecution by the defendant in order to constitute a legal "procurement." In *Morton v. C&O Railway Co.,* 184 W.Va. 64, 399 S.E.2d 464 (1990), the C&O railroad police officer went to a magistrate and obtained an arrest warrant *under which the plaintiff was arrested and charged.* Clearly the special agent there caused the prosecution, as he arrested the plaintiff. This did not occur in the case at bar.

In *Pote v. Jarrell,* 186 W.Va. 369, 412 S.E.2d 770 (1991), the defendant went to a magistrate to inquire about a warrant for plaintiff's arrest. The magistrate said it was a civil matter and did not issue a warrant. The defendant then went to the prosecuting attorney and had him draft language to be included in a complaint to be filed for issuance of a warrant. The defendant then doggedly went back to the magistrate and obtained a warrant charging plaintiff with a felony, directly causing the plaintiff's arrest and prosecution. *Id.* at 773-74. This Court concluded that there was sufficient evidence *for the jury* to have found that the defendant procured the prosecution. *Id.* at 775. Even with the facts of *Pote* showing clear, direct and purposeful intent to personally have the plaintiff prosecuted by going directly to the magistrate and swearing out a complaint *on which* the plaintiff was arrested and prosecuted, this Court

deemed procurement a ***question of fact*** for the jury. In the case at bar, the lower court denied Petitioners this and found procurement against them as a matter of law *even before they completed their case in defense* and when the clear evidence was that Respondent's indictment, arraignment and prosecution were the direct result and determination of the prosecutor's independent judgment. (Tr., p. 406, 426-27.)

Finally, in *Rhodes v. Smithers*, 939 F.Supp. 1256, 1281 (S.D.W.Va. 1995), the federal court dismissed a malicious prosecution case by summary judgment. There, the law enforcement officers went to a local prosecutor with their investigation into criminal activities. The prosecutor considered the evidence and took the case to the grand jury on two occasions, each time using one of the officers as the testifying witness. The grand juries handed down indictments against the plaintiff. Id. at 1262, 1263.

Likewise, the NS railroad police officers in the case at bar turned over their investigation into the Blue Creek rail removal to the Kanawha County prosecutor to handle as he saw fit, as the officers and the assistant prosecutor verified in undisputed testimony. Like the state police defendants in *Rhodes*, Special Agent Farley was called upon to testify before a grand jury. As a matter of law, the Petitioners in the case at bar were entitled to judgment on the case as they clearly did not procure Higginbotham's prosecution. The actions of the prosecutor in independently seeking and obtaining a grand jury indictment procured the prosecution.

2. Petitioners had no control over Higginbotham's prosecution and never knowingly provided false information.

When there is no control of the prosecution by the civil defendants, there is no procurement of the prosecution by the civil defendants. *See*, e.g., *Brice v. Nkaru*, 220 F.3d 233, 239 (4th Cir. 2000), *citing* 52 Am. Jur. 2d. *Malicious Prosecution* §23(1970). Because West Virginia jurisprudence on malicious prosecution has focused more on the issue of probable cause

than that of procurement, case law from other states can help to clarify the procurement requirement, especially regarding the impact of providing inaccurate information mistakenly.

a. Case law from other states.

The Texas Supreme Court defines procurement as follows:

> A person does **not** procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including the law enforcement official or the grand jury, unless the person provides information which he knows is false. *King v. Graham*, 126 S.W.3d 75, 78 (Tex. 2003): (Emphasis added).

Ohio underscores the "control" element in this manner:

> [I]f an informer merely provides a statement of his belief of criminal activity and leaves the decision to prosecute entirely to the uncontrolled discretion of the prosecutor, or if the prosecutor conducts an independent investigation or prosecutes for an offense other than the one charged by the informer, the informer is not regarded as having instituted the criminal proceedings. *Robbins v. Fry,* 72 Ohio App.3d 360, 594 N.E. 2d 700, 702 (1991), *citing Archer v. Cachat,* 165 Ohio St. 286, 135 N.E.2d 404 (1956). (Emphasis added.)

Thus, the only way that judgment as a matter of law would have been possible in *Respondent's* favor on the issue of procurement would have been if the NS police officers admitted to or were proved to have given the prosecutor *material,* false information about Respondent and Schulenberg had then testified that the material, false information was the determining factor in his decision to prosecute Respondent. There was no such evidence.

Westar Mortgage Corporation v. Jackson, 133 N.M.114, 61 P.3d 823 (2002) aptly illustrates the crucial control element that must be exerted by the civil defendant on the official authorities before the official's decision to prosecute will be imputed to the civil defendant. The New Mexico Supreme Court, in holding specifically that the plaintiff had failed to establish procurement of the prosecution, highlighted the impact of prosecutorial independence in establishing a lack of procurement on the part of the civil defendant:

> If the officer or prosecutor makes his [or her] own decision to prosecute, it is he [or she], not the complaining witness, who is regarded as instituting the action. The independent exercise of prosecutorial discretion establishes that Weststar did not initiate the prosecution. See *Restatement (2nd) of Torts* §653 comment g. *Id.* at 831.

The New Mexico Supreme Court expressly rejected a conclusion that an individual who persuades, requests, directs or even pressures prosecuting authorities to proceed with a prosecution is somehow initiating the prosecution such that he should be liable for it. Instead, the Court recognized that "[C]itizens must have '<u>wide latitude</u> in reporting facts to authorities <u>so as not to discourage the exposure of crime</u>.' [citation omitted] Efficient law enforcement requires that a private person who aids the police by giving honest, even if mistaken, information about crime, should be given effective protection from civil liability." *Id.* (Emphasis added.)

Another illustration of what procurement means is found in *Lukecart v. Swift & Co.*, 256 Iowa 1268, 130 N.W.2d 716 (1964), a case similar to the case at bar where the plaintiff was prosecuted pursuant to an indictment, not an arrest warrant, and the county attorney assumed <u>full responsibility</u> for presenting the case to the grand jury. The Iowa Supreme Court held no reasonable mind could conclude that defendants procured the prosecution and pointedly noted:

> The growing reluctance of people to help, interfere, or even "call the cops" or testify when crimes are being or have been committed is shocking. . . . . <u>It is certainly not the province of the courts to create a legal climate where it is unhealthy or financially dangerous to call on peace officers for help or give information or testimony to officials and official agencies.</u>
>
> The importance of protecting individuals from the harassment of improper charges and the procurement thereof is well recognized but we cannot go so far as to say that whenever a prosecution fails those who called for an investigation or gave testimony are liable for malicious prosecution. *Id.* at 723. (Emphasis added)

Finally, the Texas Supreme Court emphasized that without evidence that the complaining parties (NS special agents in the case at bar) *knowingly* provided false, material information that caused the prosecution to occur, a civil plaintiff cannot possibly establish procurement:

> [P]roof that a complainant has knowingly furnished false information is necessary for liability when the decision to prosecute is within another's discretion. But such proof is not sufficient. ....[T]here must be proof that the prosecutor acted based on the false information and that but for such false information the decision would not have been made. *King v. Graham, supra,* 126 S.W.3d at 78.

b. NS' mistaken information

There were a few errors in the information provided to the prosecutor by the NS officers. For example, the NS police report given to the prosecutor erroneously indicated that Higginbotham, rather than co-indictee Chandler, had a conversation with CSX roadmaster Crawford, who created the fake rail removal permit. During his grand jury testimony, Farley testified at one point to a $10,000 check from Clark to Higginbotham, when actually the $10,000 check was from Clark to Chandler (although that check did specifically reference Higginbotham and a contract between Clark and RJW Construction with the notation that "Mr. Bill Higginbotham agrees to sell"). (See Pl. Ex. 12.) Farley also testified that the Chandler-Clark-Higginbotham rail removal scheme had resulted in both 105 and 107 pound rail being taken from Blue Creek (due to a typographical error in the police report listing 107 pound rail), when the rail in question was actually the 105 pound rail taken up with Higginbotham's provided backhoe and the 127 pound rail that Higginbotham had "purchased" from Chandler for RJW Construction.

These inaccuracies are mere human error and to hold, as a matter of law, that these constitute procurement of a prosecution is to insist victims of crimes be perfect in their reporting. The NS report given to the prosecutor contained an actual copy of Crawford's sworn statement which showed that Crawford's conversations were with Chandler, not Higginbotham. Also, while Farley was incorrect that Higginbotham had been paid $10,000 by Clark, the report showed that Clark did pay Higginbotham $6,500 for his efforts in facilitating Clark's purchase of Blue Creek rail from Chandler. Farley believed he was answering the prosecutor's questions

truthfully (Tr., p. 545.), and there was no evidence that Farley's mistakes were in any way intentional. Although Farley may have confused certain facts, he provided the grand jury with *favorable testimony to Higginbotham* by telling the grand jury *twice* that Higginbotham had, in fact, returned the 127 pound rail that he had removed from Blue Creek (Tr., p. 592.). To the extent there were some inaccuracies, they were immaterial. The NS police officers testified that they never knowingly provided any false or inaccurate information (Tr., pp. 545, 673-74), and Respondent could not refute this testimony.

In the case at bar, the trial court's decision to grant judgment *to Higginbotham* on the issue of procurement under this evidence helps create a legal climate where it is inherently dangerous for anyone to give information or testimony to local prosecutors and grand juries. The trial court ignored the unrefuted testimony of the prosecutor that he had exercised independent judgment in deciding to prosecute, and, to the extent there was *any* question about the prosecutor's veracity, substituted itself for the fact-finding role of the jury.

Irrespective of what the stolen rail removed weighed or who had a conversation, several uncontested facts remained before the prosecutor which amply supported the prosecutor's decision to have Higginbotham indicted along with Chandler and Clark:

(1) Higginbotham paid Chandler $10,000, received a load of 127 pound Blue Creek rail, and used his company's trucks to haul off the rail to Mason County.

(2) He brokered a Blue Creek rail purchase and sale between Clark and Chandler and was paid $6,500 by Clark to inspect the Blue Creek rail for Clark.

(3) He rented the backhoe for Chandler to use to take out the Blue Creek rail.

(4) He told Lonsinger that he had heard *CSX* was selling Blue Creek rail when he had already provided the backhoe for Chandler to lift up and sell Blue Creek rail and did not answer Lonsinger when questioned how he knew CSX owned the rail. He did not tell Lonsinger that he was involved in the rail transaction, and never told Lonsinger that he had "purchased" 127 pound Blue Creek rail from Chandler.

(5) Found in Higginbotham's truck were a purchase contract with Clark stating that "Bill Higginbotham agrees to sell" and referencing Blue Creek rail; a backhoe rental agreement between Higginbotham's company and Chandler that was in Higginbotham's handwriting; and a $10,000 check from Clark to Chandler referencing "R.J.W. (Higginbotham's private company) Job #XTO 2655PC, noting Blue Creek and "Total order is for 1 mile of 105 rail, bars, plates."

This evidence tied Higginbotham directly into the scheme to take up the Blue Creek rail, remove it, and use it for personal gain at the expense of its rightful owners. All of this was in the prosecutor's possession and was not contested. The prosecutor was clear that it was his decision to initiate the prosecution against Higginbotham, Clark and Chandler. (Tr., pp. 431, 438.)

Accordingly, this Court should reverse the judgment in favor of the Respondent and award judgment to the Petitioners. To uphold the lower court's ruling on procurement would negate the procurement component of a malicious prosecution cause of action by holding that simply providing information of suspected criminal activity to the local prosecutor for his independent determination of any further action constitutes a "procurement of prosecution."

Probable cause existed for Higginbotham's prosecution.

Petitioners are also entitled to judgment as a matter of law for the reason that probable cause existed for Higginbotham's prosecution Probable cause is defined as:

> Such a state of facts and circumstances known to the prosecutor personally or by information from others as would *in the judgment of the court* lead a man of ordinary caution, acting conscientiously, in the light of such facts and circumstances, to believe that the person charged is guilty. *Syl. Pt. 2, Radochio v. Katzen, supra.* (Emphasis added.)

The question of the existence of probable cause "depends on the defendant's honest belief of guilt." *Morton v. C & O Railway, supra.* "The legal presumption is that every prosecution for crime is founded upon probable cause and is instituted for the purpose of justice." *Id., quoting McNair v. Erwin,* 84 W.Va. 250, 99 S.E. 454 (1919). In a civil lawsuit for malicious prosecution, the issue of probable cause is a question of law for the court to be viewed

from the standpoint of those defending the malicious prosecution lawsuit and not from the plaintiff's standpoint. *Truman v. Fidelity & Casualty*, *supra,* 123 S.E.2d at 65, 70-71. Further, a prosecutor is not required, before beginning a criminal prosecution, to verify each item of information or to investigate the crime, or to exhaust all sources of information; it is sufficient if he acts as a reasonably prudent person would have to ascertain the truth. *Id.* at 69.

Initially and importantly, the analysis begins with the legal presumption that every prosecution for crime is "founded upon probable cause and is instituted for the purpose of justice." *Morton v. C & O Railway, supra* at 467. Probable cause does not require evidence sufficient to establish a prima facie case at trial or guilt beyond a reasonable doubt. *United States v. Strickland*, 144 F.3rd 412, 416 (6th Cir. 1998). Further, and critically in the case at bar, a grand jury indictment is evidence of probable cause. *Restatement (2nd) of Torts* §664(2); *Tritchler v. West Virginia Newspaper Publishing Company*, 156 W.Va. 335, 193 S.E.2d 146 (1972). Here, a grand jury considered evidence against Higginbotham and indicted him.

Finally, the mere fact that criminal charges against a criminal defendant are dismissed is not evidence of a lack of probable cause for the institution of the initial criminal proceedings. *Catzen v. Belcher*, 64 W.Va. 314, 61 S.E. 930 (1908). (Nor does a dismissal of criminal charges constitute evidence of malice. *Lenhart v. Keystone Coal & Coke Company*, 85 W.Va. 520, 102 S.E. 215 (1920).) Against this legal backdrop, the Petitioners moved the lower court to grant it summary judgment, and later judgment as a matter of law on the issue of probable cause at the close of both the plaintiff's and defendants' evidence and in post-trial motion thereafter. The lower court erroneously denied these motions.

The facts in the case at bar showed more than enough probable cause for Higginbotham's prosecution, and the Petitioners should have been awarded either summary judgment or

judgment as a matter of law. The evidence established that valuable rail at Blue Creek, for which Norfolk Southern Railway Company was directly responsible under an unrefuted Operating Agreement, was taken up, "sold," and carried away without permission. Higginbotham plainly admitted to this with respect to the 127 pound rail. (Tr., p. 336.) The Blue Creek rail was NS rail, directly under the control and management of Norfolk Southern Railway Company through an Operating Agreement, listed on NS operating track maps and charts, and was ultimately owned by NS by virtue of NS holding a controlling 58% equity interest in Conrail with the sole right to operate, manage, and maintain the former Conrail rail within the State of West Virginia. (See, e.g., Tr., pp. 760-65.) Both Farley and Paxton testified that they understood the Blue Creek rail to be NS rail, although not necessarily knowing or understanding the legal intricacies by which NS maintained the rail. (Tr., pp. 237-38; 514.)

Additionally, there was ample evidence that would lead any reasonable person to conclude that Higginbotham was involved in the larceny of rail:

First, both at the time of the 2000 investigation and in trial testimony, Higginbotham made critical admissions material to his involvement in the unauthorized rail removal. (Tr., pp. 660-81.) He admitted that he, through his company, had rented the backhoe so that Chandler could remove rail at Blue Creek; admitted that he had received $6,500 from a Florida buyer just to go to Blue Creek and have the rail inspected for possible sale; admitted that he, through his personal company, had, for $10,000, bought, removed, and stored in Mason County 127 pound rail which had been removed from the Blue Creek area (demonstrating that the rail had value in excess of $1,000, as required for grand larceny --W.Va. *Code 61-3-13(a)*); admitted that he had long-time dealings with the scrappers who were taking up the rail and buying the rail and acted as their go-between; and admitted that he had even previously performed maintenance work on

the Blue Creek rail as a railroad employee. (Tr., pp. 660-81.) These oral admissions, which Higginbotham confirmed at trial, are no less valuable than signed confessions of his direct role in the illegal removal of rail. Under those facts alone, probable cause existed. *Truman, supra* at 72. An admission of the plaintiff's guilt of the offense for which the prosecution was commenced establishes, as a matter of law, that the plaintiff failed to establish a lack of probable cause. *Id.*

Second, the NS police officers had obtained and turned over to the prosecutor the *Mirandized*, signed statement of scrapper Charles Chandler, who stated, among other things, such crucial indicia supportive of probable cause for *Higginbotham's* direct involvement in grand larceny as the following:

1. Higginbotham told Chandler that he knew the Blue Creek rail had been owned by Conrail.
2. Chandler received a call from Higginbotham telling him that Clark in Florida wanted to buy 105 pound rail.
3. Chandler received a call from Higginbotham telling him to "hurry up and get up here" or else Higginbotham would have to give Clark his money back.
4. Chandler loaded two or three tractor-trailer loads of 127 pound rail "onto Bill's [Higginbotham's] tractor-trailer" at Blue Creek.
5. Higginbotham wired him $10,000 at Chandler's bank in Florida.
6. Higginbotham, through his private company, rented a backhoe for Chandler specifically to use in taking up the Blue Creek rail. (See Pl. Trial Exhibit 9.)

Third, at the time of the 2000 investigation, NS officials found in Higginbotham's company vehicle, a purchase order for 105 pound Blue Creek rail stating that "ATTN: Mr. Bill Higginbotham agrees to sell" and also referencing a contract number XTO 2655, the same number found on a copy of a check from Crossties of Ocala, Inc. to scrapper Chandler for $10,000, referencing "Dep. On R.J.W. Job # XTO 2655 PC." (Tr., p. 670-72; Pl. Ex. 12.) This information was also provided to the prosecutor. (Tr., pp. 417-20, 396.) Although CSX roadmaster Crawford testified that he created a forged rail removal permit in May 2000 for scrapper Chandler (Tr., p. 497-98) and Higginbotham claimed to have relied on a CSX rail

removal permit shown him by Chandler (Tr., pp. 676-77), the documentary evidence found in Higginbotham's company truck in 2000 and confirmed in his trial testimony was that he had already "purchased" 127 pound Blue Creek rail from Chandler in April 2000 (a month before the CSX roadmaster had even forged the permit). (See Tr., p. 605.) The NS police officers gave the truck documents as well as the Crawford's written statement to the prosecutor. (Tr., pp. 417-20.)

Fourth, the Court had before it the uncontradicted testimony of prosecutor Schulenberg, who testified that he made the independent determination that probable cause existed and the independent decision to seek grand jury criminal indictments against Higginbotham, Chandler and Clark for grand larceny. (See Tr., pp. 405-06, 431.) Schulenberg confirmed that he believed there was indeed probable cause for the indictments (Tr., p. 381.)

Finally, the grand jury indictments against Higginbotham (as well as Chandler and Clark) constituted prima facie evidence themselves of the existence of probable cause. "The indictment of the accused by a grand jury is evidence that the person who initiated proceedings had probable cause for initiating them." *Restatement (2nd) of Torts* §664(2). See also *Bielfeld v. Haines*, 2005 U.S. Dist. Lexis 8176 (W.D. Ky. 2005), holding that in general an indictment by a grand jury creates a presumption of probable cause, against which a plaintiff must show that the officer either deliberately lied to the grand jury or showed reckless disregard for the truth.

Based upon this evidence and the fact that the Kanawha County grand jury did issue indictments against Higginbotham and his business associates, Petitioners should have received either summary judgment or judgment as a matter of law that there was probable cause for Higginbotham's prosecution. The grand jury heard the testimony of Officer Farley as elicited by the prosecutor's questions concerning the facts that Higginbotham rented a backhoe for the scrapper taking up the Blue Creek rail, purchased rail from the scrapper himself and hauled it off

to Mason County, and acted as a go-between for the scrapper and a would-be purchaser. (Tr., p. Pl. Ex. 7.) Officer Farley testified that the rail in question was NS rail to his belief. (Tr., p. 514.)

In addition, Higginbotham admitted to his direct role in the removal of Blue Creek rail that did not belong to him. He admitted that he secured the backhoe for lifting up the rail; purchased, received and carried off rail having a value of at least the $10,000 that he gave the scrapper; and knew that the rail did not belong to him and had belonged to NS's rail predecessor, Conrail. (See, e.g., Tr., pp. 331-33; 621-23; 673-81.)

The evidence established probable cause ***as a matter of law***, and the trial court plainly erred in failing to so rule. It was Higginbotham's burden to prove lack of probable cause, and he did not meet his burden. There were admissions from Higginbotham that he: rented the back hoe for the scrapper wrongfully taking up Blue Creek rail; was paid thousands of dollars by the purchaser of the rail to facilitate the deal; bought Blue Creek rail from Chandler (the scrapper) and had it hauled to Mason County; and, importantly, knew that the Blue Creek rail had belonged to Conrail which had been acquired by NS. Chandler gave a sworn statement that Higginbotham: called him looking to broker a deal on the Blue Creek rail for another scrapper; told him he knew the rail had been owned by Conrail; and pressured him to hurry up and load the rail or Higginbotham would have to give back money to the Florida purchaser. Uncontested documents showed that Higginbotham was so intimately involved in the Blue Creek rail removal that one contract even indicted that *he* (i.e., Higginbotham) was selling the rail. The prosecutor who received, subpoenaed and reviewed evidence about the theft concluded and confirmed that probable cause existed for an indictment against Higginbotham and the two scrapers involved in the rail deal, and the grand jury, upon the prosecutor's presentation of evidence, returned indictments. All of these factors underscore the existence of probable cause.

To uphold the judgment against Petitioners on this issue would effectively equate a dismissed prosecution with lack of probable cause, completely disregarding the fact that a grand jury considered evidence provided to it by an independent prosecutor before issuing indictments. Accordingly, this Court must reverse the denial of the post-trial motion on probable cause and enter judgment in favor of the Petitioners. Alternatively, the jury's verdict finding a lack of probable cause was against the clear weight of the evidence, and a new trial is warranted.

There was no malice on the part of the Petitioners.

The required element of "malice" in malicious prosecution cases has a specific definition:

> "By 'legal malice,' as applied in actions for malicious prosecution, is meant any sinister or improper motive other than a desire to punish the party alleged to have committed the offense." *Syl. Pt. 2, McNair v. Erwin, supra.* (Emphasis added.)

In civil malicious prosecution cases, the issue of malice is generally a question of law for the court, and not a question of fact for the jury. *Morton, supra* at 467.

This Court has further clarified that, in order to meet his burden of demonstrating malice with regard to a criminal prosecution, a plaintiff must show evidence of such factors as "ill will and enmity." See *Truman, supra* at 72. Without such evidence of "ill will" and "enmity," a trial court should find no malice as a matter of law:

> "The trial court should have held as a matter of law that the evidence failed to disclose proof of malice sufficient to render that issue one for jury determination. There was no evidence of ill will, enmity, unfriendliness toward the plaintiff on the part of any agent or employee of the defendant. Indeed, the evidence scarcely discloses that any of the defendants' agents or employees was personally acquainted with the plaintiff at the time the prosecution was instituted. The defendant being a corporation, malice on its part would necessarily have to exist on the part of its agents or to emanate from their acts or conduct." *Id.* (Emphasis added.)

Note that this Court in *Truman* admonished that the "trial court should have held as a matter of law" that there was no malice. In the case at bar, the lower court abandoned its duty to

rule on the issue as a matter of law and, instead, allowed the jury to make that decision for it. Higginbotham, however, simply did not show any possible form of malice by the Petitioners.

First, neither NS officer even knew Higginbotham (See Tr., p. 230-31.) Paxton did not recall ever meeting Higginbotham prior to the police investigation (although Higginbotham claimed he had previously met Paxton), and Farley testified that he never met Higginbotham until sometime after this lawsuit was filed. (See Tr., pp. 230-31; 665.) Higginbotham continually admitted that he knew of nothing either officer would have had against him. (Tr., p. 666.) Clearly, there was no meaningful relationship with Higginbotham that would have called into question some personal motive for the officers' referral of the investigation to a prosecutor.

Contrast the situation at bar (investigation but, instead of an arrest, referral to the prosecutor's office for any further action) with a situation where railroad police arrested the suspected rail thief, handcuffed him (so tightly, according to the suspect, that his wrists became numb), escorted him from his place of work, placed him in a company vehicle, and took him to the local court where he was then jailed. Even in that situation, a court granted CSX and its police officers summary judgment on the claim of malicious prosecution. *See Nerswick v. CSX Transportation, Inc.*, 2010 U.S. Dist. LEXIS 14911 (U.S. District Court – S.D. Ohio, Feb. 19, 2010). Yet, under the facts in the case at bar, the court below refused to find a lack of malice.

Second, the NS officers did not arrest Higginbotham, although they testified they could have done so. Instead, they took their investigation to the prosecutor and turned the matter over to him. (Tr., pp. 251-62.) If there had been malice toward Higginbotham, the officers could have easily served an arrest warrant on him and caused him to face prosecution immediately. Instead, they turned over the entire matter to the local prosecutor and left it solely in his hands.

Third, the NS officers never singled out Higginbotham in the course of their investigation, but simply reported his involvement along with the involvement of the scrapper, the prospective purchaser, and the CSX representative involved in the scheme. All of this was placed in the prosecutor's hands for *his* determination as to the proper response.

Fourth, the NS officers provided the prosecutor with *favorable and mitigating* evidence about Higginbotham. Officer Farley twice told the grand jury that Higginbotham had returned the 127 pound rail after he had been caught. (Tr., p. 592.) If malice were in the equation, the officers would not have provided the prosecutor with a police report where the reporting officer specifically noted that Clark (the prospective rail purchaser) had said Higginbotham was honest but that Chandler was the "one to watch out for." (See Pl. Ex. 23.) Clearly the NS officers lacked malice. The officers testified at trial that they never intentionally gave false or incorrect information to either the prosecutor or the grand jury (Tr., pp. 595, 852), and there was no evidence to rebut this testimony. Despite Respondent's attempt to connect Division Engineer Merilli to his prosecution, the uncontradicted testimony was that Merilli had no contact with the prosecutor or the grand jury. (See Tr., pp. 928-40; 944-45.)

Fifth, if the Petitioners had malice toward Higginbotham, why would the Railway have employed two of Higginbotham's sons *after* its officers had discovered the father's involvement in the unauthorized removal of the Blue Creek rail? (Tr., p. 698.) Employing two more family members after the event hardly illustrates malice toward Higginbotham.

Finally, although Higginbotham tried to create the illusion that the Division Engineer (Merilli), who had Higginbotham taken out of service over the rail incident, was biased against former Conrail employees (*see, e.g.,* Tr., pp. 464-65; 651), the evidence showed that Merilli was a former Conrail employee himself and had gone beyond what a supervisor normally does for an

employee by helping Higginbotham pass the required rules test at the time of Higginbotham's reinstatement to service. (Tr., p. 941-45.)

In short, the clear evidence at trial was that the Petitioners had no malice toward the Respondent. Instead, the clear evidence was that the NS police officers were only doing their jobs and turned over their investigation to a prosecutor to independently assess and handle rather than arrest Higginbotham outright. They had no possible reason to want to see him prosecuted other than their belief that he and others were engaged in criminal wrongdoing. A desire to see someone punished for offenses committed is not malice as that term is defined in actions for malicious prosecution. *McNair, supra.* There must be a "sinister" or "improper" motive fueling the prosecution. There was simply no such evidence placed before the jury. As this Court noted in *Truman, supra,* where the evidence discloses no ill will, enmity or unfriendliness toward the plaintiff on the part of the corporate agents, and the evidence further discloses that the agents did not even know the plaintiff, a trial court should hold as a matter of law that there was no malice.

Accordingly, with such strong evidence of lack of *any* malice toward Higginbotham on the part of the Petitioners, the question of malice was one for the lower court and not for the jury. The Petitioners were entitled to judgment as a matter of law. The lower court wrongly denied Petitioners judgment at the conclusion of the plaintiff's case in chief, the conclusion of trial, and after the filing of post-trial motions. This Court should reverse the judgment.

B. The Trial Court committed clear error by denying Petitioners summary judgment or judgment as a matter of law, as Petitioners were entitled to the absolute defense of advice of counsel.

Petitioners were entitled to the absolute defense of advice of counsel.

Under West Virginia law, advice of counsel is an absolute defense for an action for malicious prosecution. *Hunter v. Beckley Newspapers*, 129 W.Va. 302, 40 S.E.2 332 (1946).

The defense of advice of counsel is available where the evidence discloses that the attorney consulted, in the case at bar the Kanawha County Prosecuting Attorney, had the benefit of all *pertinent* information and believed it sufficient to support the prosecution. Note that the legal requirement is not that he be informed of every possible fact and circumstance, or that an unknowing error in the information provided him renders the defense inapplicable.

Special Agents Paxton and Farley, instead of procuring Higginbotham's and others' prosecution through the execution of an arrest warrant, consulted with prosecutor Schulenberg. Schulenberg testified he interviewed the NS police officers, subpoenaed records, reviewed written witness statements, and interviewed the CSX representative who created the fake rail removal permit. In addition, the prosecutor had the benefit of the police reports on the investigation. He affirmed that, in his judgment, there was a good faith basis to take the matter to a Kanawha County grand jury for indictment on grand larceny. It was his sole decision to seek the indictments. (See Tr., pp. 405-09, 431.)

The advice of counsel defense warranted judgment as a matter of law. At a minimum, the trial court should have permitted an interrogatory to submit the defense for jury consideration. Thus, alternatively Defendants would be entitled to a new trial under Rule 59.

C. The Trial Court committed clear error by denying Petitioners immunity in the performance of official duties.

Petitioners were entitled to the defense of qualified immunity.

Special Agents Farley and Paxton (and the NS corporate Petitioners, as the two officers were acting as agents for the NS Petitioners) have qualified immunity in performance of their official law enforcement duties. As established by the United States Supreme Court in *Harlowe v. Fitzgerald*, 457 U.S. 800, 815 (1982), police officers are entitled to a qualified, good faith immunity when performing their official duties. The evidence at trial clearly established without

question that everything the NS officers did in the undertaking of the NS police investigation into the theft of the Blue Creek rail and the reporting of the same to the prosecutor was done in the course of and as part of NS police officers' duties as employees of Norfolk Southern.

Farley and Paxton testified they undertook the company's investigation into the theft of NS rail in the Blue Creek area in Kanawha County. They interviewed witnesses and took signed statements from witnesses. They compiled NS police department reports on the investigation and supplemented those reports periodically. They also met with the Kanawha County Prosecutor and provided him with copies of the reports, statements, and related documentation. (See Tr., pp. 531, 584-88; Pl. Exs. 9, 10, 12, 23.) There is no question but that the Petitioners' actions were undertaken in their law enforcement capacity.

In the trial below, there was absolutely no evidence that Paxton or Farley deliberately or knowingly lied or showed reckless disregard for the truth. There were a few technical errors, both in the written police report and in the grand jury testimony, regarding transposed names and the "107 pound rail" error that began with a typographical error in a police report entry. (Tr., pp. 531, 850.) There was no evidence that these errors were intentional in any way.

Here, the clear testimony was that Paxton had only a short time in the investigation and limited contact with the prosecutor's office. He made a couple of typos in the police report, listing 107 for 105, and listing Respondent for Chandler on one occasion, which were then unintentionally repeated by Farley in his grand jury testimony. (Tr., p. 531.)

There was also an erroneous reference in one of Paxton's entries in the police report to Higginbotham having had a conversation with CSX Roadmaster Crawford when Crawford's conversations concerning Blue Creek rail were with Chandler. Higginbotham was nevertheless intimately involved in Chandler's unauthorized removal of the Blue Creek rail, including

providing the backhoe for tearing out the tracks and being paid by Clark as the rail "purchaser" for acting as his broker in West Virginia since Clark was in Florida. In any event, prosecutor Schulenberg had been provided a copy of Crawford's written statement which clearly identified *Chandler* as the one having a conversation with Crawford. (See Tr., pp. 531; 584-88; Pl. Ex. 10.) To the extent Higginbotham contends Paxton's name error was somehow damaging, the fact remains that the prosecutor had a copy of the actual statement which listed the correct name, and had ample evidence of Higginbotham's intimate role in the rail removal scheme.

Finally, although Farley testified before the grand jury that there was a check from Clark to Higginbotham for $10,000, he was confused. The $10,000 check was from Clark to Chandler, but the check did specifically make reference to Higginbotham and a contract between Clark and RJW Construction with the specific notation that "Mr. Bill Higginbotham agrees to sell." (See Pl. Ex. 12.) While Farley may have indicated that Clark paid Higginbotham $10,000, the actual amount Clark paid Higginbotham was $6,500 for Higginbotham's services in assisting Clark with his purchase of Blue Creek rail from Chandler. (Tr., pp. 673-74.) Although Farley may have confused the dollar amount, the fact remained that Higginbotham did receive several thousand dollars from Clark. Additionally, Farley even provided the grand jury with *favorable testimony to Higginbotham* by telling the grand jury *twice* that Higginbotham had returned the 127 pound rail that he had removed from Blue Creek (Tr., p. 592.).

The technical errors in the police report and grand jury testimony were just that and nothing more. If the test for official immunity requires a "perfect" police report and error-free recollection of events as the trial court apparently believed in denying Petitioners' post-trial motions, then law enforcement officers in this state should consider their immunity to civil suit illusory. Under the trial record, Petitioners were entitled to the defense of qualified immunity.

D. The Trial Court committed clear error in allowing the award of compensatory damages to stand, as it had no basis in fact.

The compensatory damages award had no basis in fact.

Notwithstanding the Petitioners' post-trial motions, the lower court failed to grant either a new trial or an appropriate *remittitur* of the damages awarded. The jury award was against the clear weight of the evidence, and it is excessive to the point it indicates the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case.

First, the jury awarded $20,000 in "out of pocket expenses, attorney fees," which award had no basis at all in the evidence before the jury. Higginbotham testified that he posted a $500 cash bond which was refunded to him after the charges were dismissed. (Tr., p. 645.) He never even testified if he had to pay a criminal defense lawyer. Somehow, however, the jury derived an award of $20,000 from the evidence and, despite Petitioners' motion, the court let it stand.

Second, the jury awarded $100,000 for emotional distress, anguish, humiliation, embarrassment, and damage to reputation. The evidence, however, was that Higginbotham had no emotional distress or mental anguish which required any type of treatment, he was never arrested or incarcerated, and the only "publication" of his indictment in evidence was his testimony that his brother saw it in a *Kanawha* County newspaper (rather than the Pt. Pleasant newspaper). (Tr., p. 753.) Instead of real publication of his criminal indictment, what the jury heard was Higginbotham's self-serving testimony that his reputation had been damaged. (Tr., pp. 640-41.) He presented no evidence of being shunned, either personally or otherwise, and no evidence of any possible adverse financial impact his indictment had on him personally. Clearly, the $100,000 number had no basis in evidence and was based upon jury passion and prejudice.

This lack of any real evidence to support the damages awarded warranted a new trial or *remittitur*. When one views the jury's $120,000 special and compensatory damages awards in

light of the lack of evidence of any *real* special damages, no tangible evidence of any damage to his reputation, and no professional help for any alleged emotional distress/mental anguish, the award is "monstrous, enormous, [and] at first blush beyond all measure, unreasonable, outrageous and manifestly shows jury passion, partiality, prejudice or corruption." *See Addair v. Majestic Petroleum, Inc.*, 160 W.Va. 105, 232 S.E.2d 821, syl. pt. (1977).

E. The Trial Court committed clear error in upholding the punitive damage award.

Higginbotham was not entitled to an award of punitive damages.

A two-step process governs the post-trial review of a punitive damages award under West Virginia law. There must first be a determination that the conduct of an actor toward another person entitles that person to a punitive damages award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, syl. pt. 4 (1895): "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 . . . the jury may assess exemplary, punitive or vindictive damages; these terms being synonymous." Second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). *Vandevender v. Sheetz*, 200 W.Va. 591, 490 S.E.2d 678, 688 (1997). In *Garnes, supra,* this Court held that in order for a punitive damages award to withstand judicial scrutiny, there must be (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate post verdict review of the award by the trial court using well established principles; and (3) a meaningful and adequate appellate review. In the case at bar, there was no reasonable constraint on jury discretion, and there was no meaningful and adequate post verdict review of the award. Although the trial court did hold oral argument in April 2008 on the post-trial motion regarding the punitive damage it was not until July 2009 that the court

sent a letter advising that it was denying the post-trial motions and directing Higginbotham's counsel to prepare an order doing so incorporating plaintiff's counsel's arguments. Thus, Petitioners had no real meaningful review and pray this Court to provide the same.

Under *Garnes* and its progeny, therefore, this Court should review the punitive damages award against the following factors:

1. Whether there is a reasonable relationship between the punitive damages and the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred

2. The reprehensibility of the defendant's conduct (which factor has been described by the United States Supreme Court as the "most important indicium of the reasonableness of a punitive damages award" – see *BMW v. Gore, supra* at 575.)

3. Whether the defendant profited from wrongful conduct

4. Whether there is a reasonable relationship between punitive damages and compensatory damages

5. The financial position of the defendant

6. The costs of the litigation

7. Whether criminal sanctions were imposed on defendant for its conduct

8. Whether there are any other civil actions against the defendant based upon the same type of conduct

9. The appropriateness of punitive damages to encourage fair and reasonable Settlements. *See Boyd v. Gaffoli,* 216 W.Va. 552, 608 S.E.2d 169, 180-81 (2004).

Before reviewing the <u>amount</u> of the award, however, this Court should first review the <u>propriety</u> of an award of punitive damages. Here, the punitive damage award lacks a sufficient legal and evidentiary basis. "The addition of anything to the actual damages by way of punishment is only permissible when the actual damages are not sufficient for the purpose, and then only to the extent that is necessary to make the total amount of the verdict sufficient

therefore." *Goodman v. Klein,* 87 W.Va. 292, 104 S.E. 726, 730 (1920). Here, the Respondent presented no testimony of any actual damages, had no physical injury, and further testified that he had no counseling, therapy, or professional visits. (See, e.g., Tr., p. 686.) Nevertheless, the jury awarded Respondent $20,000 for actual damages, $100,000 in emotional distress, anguish, and embarrassment, and $300,000 in punitive damages, all of which the trial court let stand.

It is important to recall certain facts established at trial. As summarized earlier in this Petition with citations to the record, Higginbotham was never arrested by any NS police officers. He was never incarcerated or tried. There was no evidence that any of the Petitioners attempted to resist the prosecuting attorney's decision to an agreed dismissal of the criminal charges against Higginbotham and his co-indictees. The NS police officers did not even know Higginbotham. They testified that they had no ill will toward him, no malice, and that everything they did in connection with their report, the consultation with prosecutor Schulenberg, and Farley's testimony before the grand jury was done without any intention of misrepresenting information or withholding information. While the officers admitted to making a few technical mistakes in a couple of name transpositions, confusing rail weights and how much money Higginbotham was paid, Higginbotham did not present any evidence that either NS special agent had any sinister or improper motive toward him at all, nor that they had any intent or reason to lie about him. In fact, the testimony showed that Officer Paxton included in his police reports favorable comments about Higginbotham made by an interviewee, and Officer Farley reminded the grand jury twice that Higginbotham had returned the 127 pound Blue Creek rail that he had received from a rail scrapper and taken to his property.

Accordingly, there was no legally sufficient evidence at trial to entitle Higginbotham to *any* award of punitive damages under syllabus point 4 of *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E.

58 (1895). Assuming *arguendo,* that the jury verdict on liability was proper (and for the reasons set forth previously it was not), Petitioners submit that the actual damages awarded Higginbotham more than adequately compensated him and contained sufficient punishment in light of the fact that he presented no evidence of tangible, monetary damage. The jury nevertheless awarded $20,000 for out of pocket damages plus $100,000 in general damages for emotional distress, annoyance, etc. There was clearly no need for any additional punitive damages as the $100,000 compensatory damages were punitive in nature given that Respondent was never arrested, incarcerated, or tried, did not produce any witness to say that his reputation had been damaged, and never saw the first health care provider regarding any alleged emotional distress. As a matter of law, the $300,000 punitive damage award was groundless.

In addition to being groundless, the $300,000 punitive damage award was clearly duplicative of the jury's $100,000 emotional distress/annoyance/humiliation award. "[I]in cases where damages for emotional distress are sought, 'a claim for emotional distress without any physical trauma may permit a jury to have a rather open-hand in the assessment of damages.'" *Mace v. CAMC,* 188 W.Va. 57, 422 S.E.2d 624, 634 (1992).

This Court has cautioned against awarding punitive damages in addition to compensatory damages where there was no physical trauma or treated emotional distress. In cases involving an intentional emotional distress claim without physical injury or trauma, this Court has expressly held that any damages awarded for emotional distress necessarily encompasses punitive damages, and an additional award for punitive damages would constitute an impermissible double recovery. See, e.g., *Tudor v. CAMC,* 203 W.Va. 111, 506 S.E.2d 554, 574 (1997); Syl. Pt. 8, *Dzinglski v. Weirton Steel Corp.,* 191 W.Va. 278, 445 S.E.2d 219 (1994); *Vandevender v. Sheetz, Inc., supra* at 694, and *Sheetz, Inc. v. Bowles Rice,* 209 W.Va. 318, 547 S.E.2d 256 272

fn. 14, 274-75 (2001). While the Respondent's suit was one of malicious prosecution as opposed to intentional infliction of emotional distress, this Court has found that a cause of action for malicious prosecution is subsumed within a cause of action for intentional infliction of emotional distress, with the cause of action for malicious prosecution being the lesser cause of action. *See Hines v. Hills Dept. Store,* 193 W.Va. 91, 454 S.E.2d 385, 391 (1994).

This Court has also held an award of punitive damages to be duplicative of emotional distress damages in a cause of action for intentional infliction of emotional distress where there was no physical injury. *Mace, supra.* Malicious prosecution is a lesser cause of action than one for intentional infliction of emotional distress. *Hines, supra.* Therefore, logically, if one cannot obtain both punitive damages and emotional distress damages in the more severe cause of action where there is no physical injury, one surely cannot receive both punitive damages and emotional distress damages in the lesser cause of action where there is no physical injury.

Accordingly, because the jury awarded emotional distress damages without evidence of physical injury, punitive damages were inappropriate and duplicative. Petitioners objected to the punitive damage instruction and specifically raised duplication. (Tr., pp. 963-64.)

The punitive damage award did not satisfy Garnes.

Notwithstanding the fact that there was no basis for consideration of punitive damages and that such an award as permitted by the lower court duplicated the award for emotional distress, etc., the *Garnes* factors set forth above and required by this Court to be considered in a *de novo* review of a punitive damage award mandate overturning the $300,000 punitive award.

1. Petitioners' conduct was hardly so reprehensible as to support the punitive damage award. (Garnes Factor 2)

The United States Supreme Court has held the most important indicium of the appropriateness of a punitive damages award is the degree of reprehensibility of the tortfeasor's

conduct, *BMW v. Gore*, 517 U.S. 559, 575 (1996), which is the second listed factor in the *Garnes* listing compiled by the West Virginia Supreme Court. The reprehensibility of a tortfeasor's actions are determined by consideration of the following factors: how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him; *Garnes, supra,* syl. pt. 3; whether the harm caused was physical as opposed to economic; whether the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; whether the target of the conduct had financial vulnerability; whether the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Boyd v. Gaffoli, supra* at 182 (citing *BMW v. Gore, supra* at 575-577).

Furthermore, according to the United States Supreme Court, the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award, and the absence of all of them renders any award suspect. The Supreme Court further instructs that a court should presume a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is *so reprehensible* as to warrant the imposition of further sanctions in addition to compensatory damages awarded to achieve punishment or deterrence. *Id.*

In the present case, the facts simply do not support a $300,000 punitive damage award when the Respondent was already awarded $100,000 compensatory damages and $20,000 actual damages when Respondent presented no evidence of tangible monetary damage. Petitioners'

actions consisted of an investigation by NS police into the unauthorized removal of rail at Blue Creek, the reporting of those finding to the Kanawha County Prosecutor's office one month after the police department's first involvement in the investigation (June 16, 2000 to July 18, 2000), and approximately one telephone call per month to the prosecutor to check the status of the matter for internal NS Police Department recordkeeping. The NS police officers had the authority under West Virginia Code 61-3-41 to investigate criminal activity. There is no disputing the fact that the rail at Blue Creek was being removed by scrapper Charles Chandler without authorization from NS, which was directly responsible for the rail.

The NS officers' actions in investigating the rail removal and reporting their findings to a local prosecutor were not likely to harm to Higginbotham or anyone else who had a *legitimate* reason to be removing, or assisting in the removal of, Blue Creek rail. Likewise, the NS police officers' actions in investigating and reporting to the local prosecutor were not concealed. Just like any West Virginia deputy sheriff could do, the officers took their investigation and reports to the local prosecutor so that ***he*** could determine whether the situation warranted further action.

There is no evidence of any wrongdoing at all on the part of the NS police officers that, in turn, could be imputed to the NS corporate defendants. Higginbotham was not "set up." There was no evidence that the NS police intentionally provided any incorrect information to the prosecutor or grand jury, nor any evidence of any past wrongdoing on the part of the officers or the corporate defendants with regard to any similar situations involving the investigation of apparent thefts of property and the reporting of the same to local prosecutors.

Other factors that figure into this Court's assessment of the reprehensibility question equally weigh in the Petitioners' favor. Higginbotham was not physically harmed. The Petitioners were hardly indifferent to or recklessly disregarding of the health and safety of others,

as, rather than arresting Higginbotham and the other scrappers involved in the taking up Blue Creek rail, the NS police officers turned over the entire investigation to the Kanawha County Prosecuting attorney for his counsel, independent review, and determination as to the proper action to take. There is no way that Higginbotham can legitimately contend that the Petitioners did not attempt to safeguard his civil liberties. The independent prosecutor unequivocally testified that he took full responsibility for the investigation and ultimate decisions regarding the presentation of the case to a grand jury. (Tr., pp. 405-06.) As Paxton testified, he knew that, had he merely arrested Higginbotham from the onset, he would have cost Higginbotham money in terms of bonding, etc. Instead, the NS agents took the matter to a prosecutor to let ***him*** determine if there was a case for prosecution. (Tr., pp. 261-62; 569.)

Finally, the prosecutor confirmed that he never felt pressured by NS officers to prosecute Higginbotham (Tr., p.p. 375-376), and any harm Higginbotham experienced as a result of the prosecutor's decision to seek grand jury indictments was not the result of any intentional malice, trickery, or deceit on the part of the NS police officers. While there were a couple of errors contained in the NS police report which were then repeated before the grand jury (such as the "107 pound" rail instead of 105 pound rail and reference to Higginbotham instead of Chandler in connection with a conversation with suspect Thomas Crawford), the evidence was clear that these were mere the result of simple human error, not intentional lies or deceits. No reasonable person could possibly conclude otherwise.

Under the Supreme Court's mandate that the principal indicium of an award of punitive damages is the reprehensibility of the defendant's actions, the award of punitive damages in the case at bar clearly fails. There was nothing reprehensible about the fact that the NS police officers attempted to do their job as law enforcement officers in order to stop the unauthorized

removal of rail in their charge and to report their investigation to a local prosecutor for further handling. In fact, these officers should be commended for investigating and reporting suspected criminal activity to local prosecutors rather than just using their police powers to arrest people at will for suspicious behavior. In recognition of this principle, this Court has mandated a legal presumption that every prosecution for crime is founded upon probable cause and is instituted for the purpose of justice. *Morton v. C & O Railway*, 184 W.Va. 64, 399 S.E.2d 464, 467 (1990). It is incomprehensible that the pursuit of justice is somehow evidence of reprehensibility.

2. *There was no reasonable relationship between punitive and compensatory damages. (Garnes Factors 1 and 4)*

The U.S. Supreme Court also emphasizes the ratio of punitive damages to the actual harm inflicted on plaintiff. *BMW v. Gore, supra,* 517 U.S. at 580 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459 (1993). In accordance therewith, this Court provided in *Garnes, supra,* that to pass constitutional muster, a punitive damages award must bear a reasonable relationship to the harm on which it is based, and further provides that where the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. *Id., syl. pt. 3.*

Moreover, in syllabus point 15 of *TXO, supra,* this Court held that the outer limit of the ratio of punitive damages to compensatory damages is roughly 5 to 1 in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large. The U. S. Supreme Court has further recognized that "[F]ew awards exceeding a single digit ratio, between punitive and compensatory damages, to a significant degree, will satisfy due process....." *State Farm v. Campbell,* 538 U.S. 408, 425 (2003).

In the case at bar, there is initially no evidence that the Petitioners acted with extreme negligence or wanton disregard. Punitive damages should not even be a consideration in this case. The ratio of punitive damages to compensatory damages awarded in this case illustrates the lack of a reasonable relationship between the two. Higginbotham did not testify at trial as to any tangible monetary damages (although in pre-trial deposition he testified to $5,000 in criminal defense fees). Clearly, the harm which forms the basis of the punitive award in this case can only be characterized as "slight."

For some unknown and inexplicable reason, however, the jury actually awarded Higginbotham $20,000 in actual damages sustained. Even using the jury's actual damage award of $20,000 for comparison with the $300,000 punitive damage award gives a ratio of ***15 to 1***, still skewed from the *TXO* guidelines where there is no evidence of evil or malevolent intent to harm, and still a double-digit ratio where there was no evidence of any actual intent to cause harm.

Additionally, there was no legal basis for the jury's award of $100,000.00 for annoyance, emotional distress, damage to reputation, etc. Higginbotham introduced no evidence of any real damages he suffered. He did not have any physical injury or treatment for any alleged emotional distress or mental anguish. He offered no evidence of any financial damage to reputation or loss of his good name. No witness testified that he thought less of the Respondent because of his indictment or its dismissal. Because there is no actual basis for this award, it should not be used as a credible predicate multiplier in the Court's review of the excessiveness of the award.

As noted above, the punitive award is wholly duplicative of the $100,000 awarded for humiliation, annoyance, and damage to reputation arising from Respondent's prosecution. In *Campbell, supra,* the U.S. Supreme Court struck down a large punitive award on the very same grounds that it overlapped with the compensatory award for non-economic damages, noting that

compensatory damages awarded for non-physical injury already contain a punitive element. *Id.* at 426, citing *Restatement (Second) of Torts § 908*, Comment c, p. 466 (1977): "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specific amount frequently includes elements of both." The compensatory damages awarded Higginbotham clearly had a punitive element. The actual damage award bore no reasonable relationship with any harm Respondent suffered.

3. *Norfolk Southern Corporation's financial picture should not have been in evidence. (Garnes Factor 5)*

The trial court erred by permitting Higginbotham to introduce an SEC report listing the 2006 gross earnings for Norfolk Southern Corporation during cross-examination of Phillip Merilli, a Chief Engineer for NS. Merilli testified that he had only seen such reports because he is a stockholder and that he had no experience with such documents as an NS engineer. He pointed out that he is not an accountant. (Tr., pp. 786-87.) Yet, the lower Court allowed the document into evidence. (Tr., p. 787.) This ambush, clearly designed to pump up a potential punitive damage award, gave the jury an opportunity to use the large number of gross earning for *one* defendant to fashion a punitive damage award against *all* of the defendants jointly.

The U.S. Supreme Court has indicated, however, that great wealth alone, cannot sustain a punitive award. *See Campbell, supra* at 427-428. Further, while *Garnes, supra,* has indicated that the financial position of the defendant may be relevant, nothing in *Garnes* authorizes the introduction into evidence of corporate documentation that was never disclosed during discovery, nor referenced in any evidentiary listings, nor sponsored by a witness even familiar with the document in question. Additionally, the individual Petitioners (Paxton and Farley) were unquestionably prejudiced by this improper introduction of the SEC document which only

bore in some respect on the financial position of one of the corporate defendants. In short, the trial court should have excluded the SEC document.

4. *Petitioners did not profit from Higginbotham's prosecution. (Garnes Factor 3)*

Petitioners did not profit from any conduct alleged by Higginbotham to be wrongful that would justify an award of punitive damages to remove such profit. They clearly did not profit from taking their investigation to the prosecutor who then decided to seek indictments. Although Higginbotham did return the 127 pound rail to Norfolk Southern Railway Company that he had received from the scrapper at Blue Creek, the company was entitled to the rail anyway. In any event, there was absolutely no evidence of any profiting by the NS Petitioners needing removal by a punitive damage award of $300,000.

5. *No miscellaneous factors support an award of $300,000 in punitive damages. (Garnes Factors 6-9)*

The remaining, miscellaneous factors cited in *Garnes* for courts to consider in evaluating the propriety of punitive damage awards do not support the jury's punitive award of $300,000. First, Higginbotham's costs of litigating this case could not have been high. There were no experts, and no costly expert witness depositions were taken. Second, the Petitioners did nothing that has warranted or resulted in any criminal sanctions against them. Third, there was never any evidence of any other cases of malicious prosecution brought against any of the Petitioners.

Finally, this is not a case where punitive damages are needed to encourage fair and reasonable settlements. As Petitioners represented to the trial court in their post-trial motions, they made fair offers of settlement to Higginbotham prior to and during trial, and they invited Higginbotham to make a *firm* settlement demand to them on many occasions. Each of the *Garnes* factors underscores that the punitive damage award was excessive and unreasonable.

F. Upholding the lower court's judgment in this case will result in a serious undermining of West Virginia' law enforcement.

Finally, there are serious policy implications in play with respect to the lower court's denial of the Petitioners' motion for judgment as a matter of law and for relief from the award of punitive damages. The lower court let stand a judgment of $420,000 jointly against the Petitioners because an individual plaintiff, who was never arrested, incarcerated or treated for any emotional distress, had his indictment dismissed with the assent of an assistant prosecuting attorney who was not the assistant prosecuting attorney who obtained the indictment. The lower court let stand a judgment of $20,000 for expenses, when the Respondent had not put any expenses into evidence. The lower court let stand a judgment of $100,000 for embarrassment, emotional distress, humiliation and mental suffering, when the Respondent admitted that he had not sought any treatment and no one testified that they had thought less of him because of the indictment. And finally, the lower court let stand $300,000 in punitive damages, when the evidence showed that the NS police officers, who did not even known the Respondent, did not arrest him but instead turned over their investigation to the local prosecutor.

If left uncorrected by this Court, the actions of the trial court have ominous repercussions for West Virginia law enforcement. When an officer, trying to do his job, with no evidence of ill will to the accused, is left to face a $420,000 verdict, a serious chilling effect occurs on the willingness to report suspected crimes to local prosecutors. Any citizen will be reluctant to approach a prosecutor with suspected criminal activity if to do so generates potential liability for thousands of dollars when the prosecutor thereafter obtains a grand jury indictment against the suspect. Criminal defendants whose prosecutions fail for some reason will have absolutely no reason to refrain from filing malicious prosecution claims with impunity.

In short, upholding this unfounded verdict against Petitioners would effectively remove the "brakes" on malicious prosecution civil actions and provide those indicted *by a grand jury no less,* who later, for whatever reason, see their indictments dismissed, with a guaranteed jury trial on malicious prosecution claims against *anyone* providing information to a prosecutor of suspected criminal activity. This cannot be the goal of West Virginia jurisprudence.

V. CONCLUSION

For all the reasons set forth herein, Petitioners pray that this Court grant its Petition for Appeal, reverse the lower court judgment, and enter judgment in favor of Petitioners.

Respectfully submitted,

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