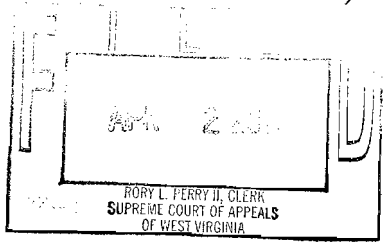
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.

PETITIONERS' REPLY BRIEF

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STATUTES

W.Va. *Code § 61-3-13(a)*

MISCELLANEOUS SOURCES:

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INTRODUCTION AND STANDARD OF REVIEW

Respondent James W. Higginbotham ("Respondent") has presented a smokescreen of "facts" in an attempt to distract this Court from the *established* facts of this case. For example, Respondent has accused the Petitioners of "spin" (Respondent's Brief, p. 3), complained that the Petitioners have presented assignments of error that are "too fact-intensive" (Respondent's Brief, p. 4), and posited an alleged "smoking gun" from a never defined comment ("go for the gold") attributed to a division engineer who had no role in determining whether Respondent was prosecuted or not. (Respondent's Brief, p. 6; Trial Transcript "Tr." pp. 851, 939.)

Contrary to Respondent's attempt to malign the facts as set forth in the Petition for Appeal, the hard facts of this case made very clear both at the conclusion of discovery and at trial that the Respondent did not have a valid cause of action against the Petitioners for malicious prosecution. Accordingly, Petitioners have appealed to this Court on the basis that (1) the trial court erred by failing to grant them a Rule 56 summary judgment, and (2) the trial court erred by failing to grant them a Rule 50 judgment as a matter of law, either at the conclusion of trial or after Petitioners' post-trial motions to the same, as the facts of this case set forth in the record made clear that the Respondent had failed to satisfy the requirements for malicious prosecution.

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). Petitioners are asking this Court to review the denial of the motions for judgment as a matter of law and to conclude, based upon a review of the evidence as is required when considering a motion for judgment as a matter of law, that the motions should have been granted.

As the Petitioners have thoroughly addressed each point of their appeal in their "Petition for Appeal" which, for purposes of this matter, is serving as the Petitioner's Brief, this Reply Brief will focus primarily upon points raised by Respondent in his Response for purposes of rebutting the same.

I. THE ALLEGED COMMENT "GO FOR THE GOLD" WAS NEVER DEFINED AT TRIAL AND CONTRIBUTES NOTHING TO THIS CASE.

Two non-issues made recurrent appearances in Respondent's Brief and therefore merit particular rebuttal. The first non-issue is the alleged comment "go for the gold" to which Respondent appears to hinge his argument on this one phrase and even chastises Petitioners for not raising and addressing the comment in their actual Brief. In all of the over one thousand pages of transcript, this comment is apparently only discussed in testimony twice. Initially, Officer Paxton was asked if NS Division Engineer Merilli told him to "go for the gold" with respect to Respondent. Paxton denied that he ever heard Merilli tell him that, and said that, to his knowledge, the only time he had heard the phrase "go for the gold" was with respect to NS's attempts each year to win the gold Hareman [Harriman] award, a prestigious safety award. (Tr., pp 272-74.) He denied that the phrase had anything to do with prosecuting Higginbotham, as Respondent attempted to allege at trial.

The other occasion where this phrase arose at trial was when Respondent questioned NS Track Supervisor Lonsinger. Lonsinger testified that when he was with Officer Paxton and Paxton was speaking by telephone with Merilli, Paxton said that Merilli said to "go for the gold."[1] (Tr., p. 319.) Lonsinger never testified as to what he understood the phrase to mean; instead, Respondent imposed his own interpretation of the phrase, completely without basis.

[1] The testimony occurred over objection of double hearsay. Its admission was clear error. (Tr., p. 319.)

Based upon these two references in the trial testimony to the phrase "go for the gold," Respondent has attempted to buttress his entire argument. In Respondent's opinion, based solely upon conjecture, the phrase meant that Paxton was to see that Respondent was wrongly prosecuted for the unauthorized removal of the Blue Creek rail. If that was the purpose of the phrase, which Respondent admits was only revealed by Paxton and nowhere is there any indication that the phrase was communicated to Officer Farley, the phrase seems especially unlikely to hold Respondent's proffered meaning in light of the facts that: (1) Although Officer Paxton did obtain arrest warrants at the initiation of the investigation for both Respondent and the scrapper, Paxton never executed the warrants and never arrested anyone (Tr., p. 261); (2) Officer Paxton retired on December 31, 2000, over a year and one-half before the Kanawha County Prosecuting Attorney decided to bring the rail removal before a grand jury (Tr., p. 202); and (3) Officer Paxton never testified before the 2002 Kanawha County grand jury that indicted Respondent and two others for the rail removal (Tr., p. 205). In short, Respondent's much vaunted phrase – "go for the gold" – is nothing but a red herring.

II. THE OWNERSHIP OF THE RAIL IS CLEAR.

The second non-issue, also a red herring, which the Respondent bandies about is the ownership of the Blue Creek rail at issue in this case. According to the Respondent, Petitioner NS did not even own the rail that Respondent was involved in removing, so NS could not possibly have claimed rail theft. He even secured, over objection, a trial court instruction that NS did not own the rail. When one does not have much with which to pursue his course of action, one grasps at straws. Respondent is grasping at straws with his rail ownership argument.

As this Court is well aware, corporate ownership is oftentimes complicated and complex. Petitioner NS, like many nationally based corporations, routinely holds, possesses, and, yes,

owns assets in many different ways that are quite different from the way an average person may, for example, own a car or a home. Corporations frequently own assets that are titled in the names of other corporate entities, and Petitioners explained at trial that, pursuant to an Operating Agreement, NS was solely responsible for all maintenance and operation of former Conrail rail, including the Blue Creek rail, and had the responsibility to stop any unauthorized removal. The Blue Creek rail was 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.). Respondent even grudging conceded the 58% controlling interest in his Brief (See Respondent's Brief, p. 5), but nevertheless argued relentlessly that Petitioner NS still did not "own" the rail and therefore there could have been no theft of the rail as against NS. The argument is specious and, quite frankly, likely insulting to the Court's intelligence.

Regardless of the technical ownership of the rail in question, however, Prosecutor Schulenberg made clear in his trial testimony that *who* owned the rail was an irrelevant inquiry in determining if a theft had occurred, as the real issue was those involved in taking the rail did not own it. (*See, e.g.,* Tr., 372.) So, even if NS was not the "titled owner" of the rail, the fact remains that neither Respondent, Clark nor Chandler – the three involved in the removal of the rail over which NS ultimately had a controlling interest – were the owners of the rail. Grand larceny was still at issue.

III. PROCUREMENT OF PROSECUTION REQUIRES MORE THAN WHAT PETITIONERS DID.

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 satisfied as the indictments against Respondent were dismissed. The other three elements of proof – procurement, probable cause and malice – remained as issues for trial. Respondent was required to prove all three of these elements. *Id.* However, at the conclusion of his case in chief, the trial court ruled as a matter of law that Petitioners had procured his prosecution and would not allow the jury to consider this critical element of proof required for a malicious prosecution cause of action. Respondent argues that the trial court properly withheld this issue from the jury, and that the evidence was clear that Petitioners had procured Respondent's prosecution. Respondent (and the trial court) relied upon the circuitous definition of procurement – essentially, procure means to procure – set forth in *Vinal v. Core*, 18 W.Va. 1 (1881).

As Petitioners noted in their Petition, the plaintiff in *Vinal* was actually arrested and brought before a justice of the peace pursuant to the defendant having sworn out a warrant. This did not happen in the case at bar. (Tr., p. 261.) Respondent was never arrested and never brought before a magistrate based upon any warrant sworn out against him. Respondent was never even arrested at all. The Kanawha County prosecutor was the one who, having assumed the investigation into the rail removal as early as the summer of 2000, took two years to decide whether or not he wanted to seek indictments on the matter. He was the one who assumed responsibility for the investigation as well as responsibility for the decision to seek indictments against Respondent and two others. He was the one who made the decisions and testified, under oath, that at no time did he ever feel any pressure from the Petitioners to seek indictments. The prosecutor procured the indictment; Petitioners did not.

Respondent asserts that if this Court were to agree that Petitioners did not procure the Respondent's prosecution, then there would never be a civil cause of action for malicious

prosecution in this state. Respondent essentially argues that legal procurement for a malicious cause of action is a given consequence anytime an individual, whether a law enforcement officer or not, refers a concern of possible criminal activity to a local prosecutor who then takes control of the investigation and determines what, if any, prosecution occurs.

Here is what the Petitioners did that apparently constitutes a procurement *as a matter of law* in the opinion of both the Respondent and the trial court. First, the Petitioners, after being informed that rail that did not belong to Respondent, Chandler and Clark, was nevertheless being removed from rail beds that were clearly shown to be part of the NS track system had the temerity to turn over their file to the local prosecuting attorney's office and took all further direction from the prosecutor (as opposed to vice versa).

Second, as the rail that had been ripped from its track bed without authorization and removed in part from the scene was unequivocally NS maintained rail (regardless of the Respondent's misleading argument on rail "ownership") and was unequivocally listed as included within the NS track chart system, Officer Farley periodically checked on the status of the matter pending before the prosecutor. (Respondent recites in his brief that Officer Farley checked on the matter twenty nine times in the two year period that this matter remained pending in the prosecutor's office. That equates to one call approximately every 3 ½ weeks to check the status of a matter that remained an open file on the NS Police Department's books, standard procedure with an open file. The prosecutor was clear that he never felt pressured by NS officers to prosecute Respondent or the others involved in the rail removal. (Tr., pp. 375-76.))

Those are essentially the actions which Respondent contends constituted the "procurement" of his prosecution – turning over the matter completely to the prosecutor's office and periodically checking on the status of the matter in order to know whether to close the

department file on the matter or not. Petitioners submit that those actions, *as a matter of law,* do not constitute procurement.

To adopt the trial court's reasoning that these actions, *as a matter of law,* constitute procurement 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, such actions would establish as a matter of law that a procurement occurred. What can only be characterized as a radical interpretation of *Vinal* by the trial court creates a foregone conclusion of procurement in any malicious prosecution case. The factor of "procurement" might as well be eliminated from the factors required for malicious prosecution as procurement would become a mandated conclusion as a matter of law. This clear error by the trial court, at a minimum, warrants reversal and remand for a new trial.

In the Petition for Appeal, Petitioners explored in great detail the case law addressing malicious prosecution procurement both in West Virginia jurisprudence and elsewhere. The cases are clear that, in order to procure a prosecution, there must be actions specifically taken on the part of those so charged that directly and intentionally result in the prosecution (such as arresting and taking the criminal defendant before a magistrate,). One particular case cited in the Petition for Appeal warrants repetition here.

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. Petitioners have cited this case to the trial court in its motion for summary judgment as well as in trial and post-trial motions for judgment on the case. 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. Here, Petitioners Paxton and Farley investigated the suspected rail theft by the Respondent.

After having taken statements and gathering other evidence, the *Truman* defendant submitted its investigatory materials to the local prosecutor, leaving the evidence with him. Here, after having taken statements and gathering other evidence, Paxton and Farley submitted their investigatory materials to the local prosecutor, leaving the evidence with him. The *Truman* defendant's representative testified that it was left entirely to the prosecutor to determine whether a criminal prosecution should be instituted. Here, Paxton, Farley and prosecutor Schulenberg all testified that it was left entirely to Schulenberg to determine whether to prosecute the matter at all.

Like the situation in the case at bar, in *Truman* the prosecutor elected to present the matter to the grand jury, and the plaintiff was indicted. *Id.* at 67-68. Also in the case at bar, thereafter the plaintiff obtained a criminal defense attorney and posted bond. Again, 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 reviewing the judgment below, 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, <u>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</u> 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. (Emphasis added.)

In the case at bar, the prosecutor 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 trial court or 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 the prosecutor in the early fall of 2000. Petitioners did not cause or procure his prosecution, as this Court's analysis in *Truman* makes clear. No reasonable jury could have found otherwise, and the trial court should have granted judgment to Petitioners notwithstanding the verdict.

The trial court was simply and plainly wrong in its mid-trial ruling that, as a matter of law, Petitioners had procured the Respondent's prosecution. Instead, the trial court should have granted Petitioner's Rule 50 motion that, as a matter of law, Respondent had failed to prove that Petitioners procured his prosecution. At the bare minimum, the trial court should have deferred this issue to the jury to have decided upon proper legal instruction.

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."

IV. PROBABLE CAUSE EXISTED.

Respondent seems to make the mistake of equating probable cause with guilt. (Respondent's Brief, p. 23.) Even more importantly, however, Respondent ignores the facts that Petitioner chronicled in detail in its Petition (Petition for Appeal, pp. 24-28) which plainly showed that probable cause did exist for Respondent's prosecution. Respondent claims that "there is not one whit of evidence, which would support the claim that Mr. Higginbotham was guilty of a crime." Of course, Petitioners are not charged with proving anyone guilty of a crime. (*See, e.g., United States v. Strickland*, 144 F.3rd 412, 416 (6th Cir. 1998).) 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.)

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, supra,* 123 S.E.2d at 65, 70-71.

The trial court simply failed to bear the responsibility placed by law upon it. With the issue of probable cause, the trial court had before it a question of law to be viewed from the standpoint of NS, Paxton and Farley – those defending the malicious prosecution lawsuit – and not from Respondent's perspective. This is so for the very obvious and logical reason that malicious prosecution cases are disfavored as a matter of law, since the legal presumption in West Virginia is 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.

The Petitioners moved the trial 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 trial court committed clear legal error by denying these motions.

The facts in the case at bar showed more than enough evidence for a personal of ordinary caution to believe that Respondent had committed grand larceny by taking and carrying away property that did not belong to him. These facts bear repeating again.

First, both at the time of the 2000 investigation and in trial testimony, Respondent 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.)

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 *Respondent's* direct involvement in grand larceny as the following:

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

Fourth, the trial 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 Respondent, Chandler and Clark for grand larceny. (See Tr., pp. 381, 405-06, 431.)

Finally, the grand jury indictments against Respondent (as well as Chandler and Clark) constituted prima facie evidence themselves of the existence of probable cause. *Restatement (2nd) of Torts* §664(2).

Thus, the plain evidence before the court below, which it ignored, was that Respondent was intricately involved in a scheme involving the sale and removal of rail that clearly did not belong to either the scrapper, Respondent who aided the scrapper and removed some of the rail himself, and the would-be buyer of the wrongfully removed rail. Regardless of the smokescreen arguments by Respondent that Petitioner NS did not own the rail (when NS clearly held a controlling interest in the limited liability company that owned the rail), the undisputed fact remained that Respondent did not own the Blue Creek rail and had absolutely no valid right to remove or broker the sale of the same. His actions in renting the backhoe for the rail's removal, receiving thousands of dollars for brokering a sale of the rail, issuing contracts and purchase orders for the sale of the rail, and removing and transporting some of the rail to his own property constituted clear evidence that there was, indeed, probable cause, as a matter of law, *reasonably* to suspect that Respondent (and Chandler and Clark) were guilty of larceny.

It is incomprehensible that, on the question of probable cause alone, the trial court refused to grant Petitioners either summary judgment or judgment as a matter of law at the conclusion of either the plaintiff's case or the trial altogether. Respondent's protests that *the jury* "did not buy" Petitioners' evidence ignore the fact that the question was one of law for the court.

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. Alternatively, the jury's verdict was against the clear weight of the evidence, and a new trial is warranted.

V. MALICE WAS ABSENT.

The required element of "malice" in malicious prosecution cases means any sinister or improper motive other than a desire to secure justice against the party alleged to have committed the offense. *Syl. Pt. 2, McNair v. Erwin, supra.* In civil malicious prosecution cases, the issue of malice is generally a question of law for the court and not a jury question. *Morton, supra* at 467.

Again, the trial court, both with respect to Petitioners' Motion for Summary Judgment as well as the motions for judgment as a matter of law, committed clear error in light of the evidence. This Court has held 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. *Id.*

First, neither NS officer even knew the Respondent. (See Tr., p. 230-31.) Respondent also admitted that he knew of nothing either officer would have had against him. (Tr., p. 666.) Second, the NS officers did not arrest Respondent, although they testified they could have done so. Instead, they took their investigation to the prosecutor and turned the matter completely over to him. (Tr., pp. 251-62.) Third, the NS officers never singled out Respondent in the course of their investigation, but reported his involvement along with that of Charles Chandler, David Clark and Thomas Crawford to the prosecutor for *his* determination as to further action.

Additionally, the NS officers provided the prosecutor with *favorable and mitigating* evidence about Respondent, when Officer Farley confirmed to the grand jury that Respondent had returned the 127 pound rail. (Tr., p. 592.)

Other facts demonstrated the lack of malice. For example, despite Respondent's attempt to connect Division Engineer Merilli and the infamous, hearsay-ridden "go for the gold" comment to Respondent's prosecution, Merilli testified without contradiction that he had neither directed the NS police department's efforts nor contacted the prosecutor or the grand jury. (See Tr., pp. 928-40; 944-45.) There is hardly malice on the part of the Petitioners when NS has employed two of Respondent's sons *after* its officers had discovered the father's involvement in the unauthorized removal of the Blue Creek rail. (Tr., p. 698.) Finally, although Respondent tried to suggest that the Division Engineer (Merilli), who had Respondent taken out of service over the rail removal, was biased against former Conrail employees (*see, e.g.,* Tr., pp. 464-65), the evidence showed that Merilli, a former Conrail employee himself, had helped Respondent pass the required rules test at the time of his reinstatement to service. (Tr., p. 941-45.)

In short, the clear evidence at trial was that the Petitioners had no malice toward the Respondent. 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.

VI. THE TRIAL COURT SHOULD HAVE APPLIED THE DEFENSES OF ADVICE OF COUNSEL AND QUALIFIED IMMUNITY.

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. Prosecutor

Schulenberg 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 should have applied.

In addition, both Petitioners Farley and Paxton testified that they were railroad police officers of longstanding for Petitioner NS and licensed in West Virginia.[2] 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' official law enforcement duties as special agents of Norfolk Southern.

While there were some technical errors in the police report and grand jury testimony (which Petitioners outlined in their Petition for Appeal), those errors were just that and nothing more. If the test for official immunity requires a "perfect" police report and "error-free" recollection of events as Respondent promotes and the trial court apparently believed in denying Petitioners' post-trial motions, then law enforcement officers in this state should consider their legal immunity to civil suit to be nothing more than a false promise. Under the trial record, Petitioners were entitled to qualified immunity.

VII. THE AWARD OF PUNITIVE DAMAGES UNDER THE FACTS OF THIS CASE WAS DUPLICATIVE AND UNJUSTIFIED

A two-step process governs the post-trial review of a punitive damages award under West Virginia law. First, there must be a determination that the conduct of an actor toward another

[2] Respondent attempts to "make hay" from the fact that Paxton's commission document was not allowed at trial, while conveniently ignoring that Paxton testified without contradiction that he was a duly West Virginia-commissioned NS police officer and had been so employed for several years. (Tr., pp. 842-44.)

person entitles that person to a punitive damages award. See *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, syl. pt. 4 (1895). 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).

Before reviewing the amount of the award, however, this Court should first review the propriety of an award of punitive damages. Here, the punitive damage award lacks a sufficient legal and evidentiary basis, and, importantly, was duplicative of the amount awarded Respondent as compensatory damages.

The jury in the trial below made a three part monetary award. It awarded $20,000 in actual damages (although at most the jury had before it only $5,000 in actual damages; the rest was whole-cloth invention, apparently). It also awarded Respondent $100,000 in compensatory damages for annoyance and inconvenience, emotional distress and mental anguish, humiliation and embarrassment, and damage to reputation. This award was made without any evidence of actual "injury." The jury also awarded $300,000 in punitive damages.

It is a well-established, general principle that an award of damages for emotional distress without any physical trauma necessarily already encompasses an award of punitive damages. This Court has strongly cautioned against allowing an award of 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, for example, this Court has expressly held that any damages awarded for emotional distress *necessarily encompasses* punitive damages, and a separate 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); *Mace v. CAMC*, 188 W.Va. 57, 422 S.E.2d 624, 634 (1992). 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). Respondent's cause of action for malicious prosecution is substantively analogous to a cause of action for intentional infliction of emotional distress. In both of these tort causes of action, the plaintiff is seeking monetary damages to compensate him for an experience which he claims should not have been inflicted upon him and which caused him emotional distress. In a malicious prosecution case, the plaintiff is claiming that he was unjustly prosecuted for a crime, and that, as a result of having had to endure that experience, once the criminal charge was ultimately dismissed he should be compensated for the distress he underwent. In an intentional infliction of emotional distress case, the plaintiff is claiming that he was unjustly subjected to an intolerable experience and that, as a result, he should be compensated for the distress he underwent. In neither cause of action is there a requirement that the plaintiff prove actual "injury," either physical or emotional, as the presumed injury lies from having had to experience the wrongful prosecution/infliction.

This Court has 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 inferior to but analogous intentional to

the infliction of emotional distress. See *Hines, supra*. Therefore, logically, if one cannot obtain both punitive damages and emotional distress damages in the more severe cause of action (intentional infliction of emotional distress) where there is no physical injury, one surely cannot receive both punitive damages and emotional distress damages in the lesser cause of action (malicious prosecution) where there is no physical injury.

Accordingly, because the jury awarded emotional distress damages without evidence of physical injury, a separate award of punitive damages was inappropriate and duplicative. Petitioners objected to the punitive damage instruction and specifically raised duplication. (Tr., pp. 963-64.) The trial court committed clear error by permitting the separate award of punitive damages to stand.

In addition, the punitive damage award does not satisfy *Garnes*. Petitioners have outlined and analyzed the *Garnes* factors in great detail in their Petition Brief. In conducting the required review, the trial court below ignored several key factors;

- The "reprehensibility" factor is not satisfied under the facts when the Petitioners did not arrest the Respondent, did not - by the prosecutor's own testimony – pressure him to seek an indictment of the Respondent, did not -- again by the prosecutor's own testimony – encourage the prosecutor to extend certain suspects immunity but not others, did not encourage the prosecutor concerning whether to indict, or who to indict, or what charges to bring, and did not object or contest a later prosecutor's decision to permit the charges against the Respondent and his co-indictee to be dismissed. Additionally, the mistakes in the police report on the rail weights and whether Respondent had a conversation with a CSX Roadmaster, and the grand jury testimony confusing both the rail weights and a $10,000 check with a $6,500 payment, were

never shown to be anything but mere human error and of no material consequence. (See, e.g., Petition for Appeal, pp. 21-22; Tr., pp. 545; 673-74.)

- The damages awarded for actual harm -- $20,000, although the Respondent only put $5,000 in actual damages into evidence – bore no reasonable relationship to the $300,000 awarded in punitive damages.

- The 2006 gross earnings report for the parent corporation , admitted over objection, clearly unfairly prejudiced not only Petitioner Norfolk Southern Railway Company, but also the two individual Petitioners, Paxton and Farley, who were tagged in the punitive damage award.

- There was no evidence of any kind that the Petitioners possibly "profited" from any conduct alleged by the Respondent to be wrongful.

- Petitioners made fair offers of settlement and attempted to engage the Respondent in fair settlement talks.[3]

- There were never any criminal sanctions against the Petitioners, nor any evidence that they had ever been involved in other malicious prosecution actions.

- Finally, by Respondent's own admission, his costs of litigating this case have been low (ca. $20,000).

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[3] Respondent shockingly listed to this Court in its opening paragraphs of its Response Brief *dollar amounts* of private settlement negotiations in this case. Petitioners move that those representations be stricken from Respondent's Brief. Nowhere previously in this litigation or appeal had settlement dollar amounts been made part of the record, and Respondent's highly unorthodox disclosure has the appearance, whether intended or not, of attempting to prejudice the appeal process before this Court and obfuscate the legitimate issues on appeal. Decisions by this Court addressing the *Garnes* factors never routinely indicate settlement *dollar amounts*, but instead, when this factor is addressed at all, indicate whether the defendant below engaged in settlement *offers* or not. *See, e.g., Vandevender v. Sheetz, supra.* Respondent was not even accurate in his representation, as there was not a "firm number" from Respondent during trial and the stated timing of Petitioners' last offer is erroneous. In any event, Petitioners submit that, having extended settlement offers to the Respondent, they handled the settlement negotiations fairly and responsibly under the facts of this case.

Accordingly, under the uncontested facts of this case the $300,000 awarded and permitted to stand as punitive damages was both (1) an impermissible duplicative punitive damage award in light of the separate award for annoyance, humiliation, distress, etc. and (2) a constitutionally excessive award violative of *Garnes*. Notwithstanding the fact that Petitioners were entitled to the judgment as a matter of law, a punitive damage award was unwarranted.

VIII. CONCLUSION

For all the reasons set forth herein, and those more fully expounded in the Petition for Appeal previously filed, Petitioners pray that this Court reverse the lower court judgment against them and enter judgment in favor of Petitioners. Alternatively, Petitioners pray that this Court reverse the lower court judgment and remand this case for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing "Petitioner's Reply Brief" upon the following persons by depositing true copies thereof to their last known addresses in the regular manner, United States mail, postage pre-paid from Huntington, West Virginia, on the **12th day of April, 2011**:

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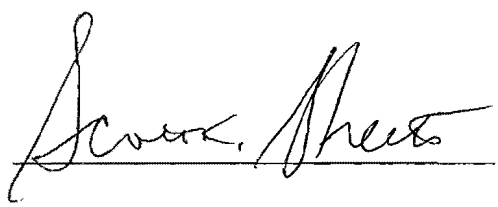

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