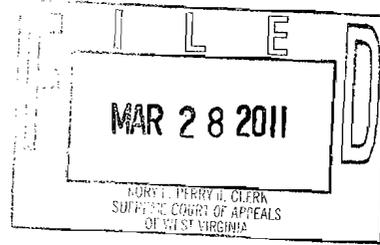


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 101499



NORFOLK SOUTHERN RAILWAY  
COMPANY, A Virginia Corporation,  
NORFOLK SOUTHERN CORPORATION,  
A Virginia Corporation; Charles Paxton,  
an individual, and JAMES D. FARLEY, an  
individual,

Petitioners/Defendants below.

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

JAMES W. HIGGINBOTHAM,

Respondent, Plaintiff below,

BRIEF OF RESPONDENT  
JAMES W. HIGGINBOTHAM  
IN RESPONSE TO PETITION FOR APPEAL

Marvin W. Masters, Esquire  
WV Bar No. 2359  
The Masters Law Firm, lc  
181 Summers Street  
Charleston, WV 25301  
(304) 342-3106

David L. White, Esquire  
WV Bar No. 4006  
Suite 314, The People's Building  
179 Summers Street  
Charleston, WV 25301  
(304) 437-0754

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## I. STATEMENT OF THE CASE.

Although the Petitioners (hereinafter, collectively, "the Railroad") apparently now seek to imply that the Respondent (hereinafter, "Mr. Higginbotham"), failed to communicate a "firm" settlement demand below, that was simply not the case. See, e.g., Petition, p 48: "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." The fact of the matter is that Mr. Higginbotham made firm offers of settlement, to no avail.

In response to a "firm" settlement demand, the Railroad offered Mr. Higginbotham \$17,000.00 to settle his case at mediation. Mr. Higginbotham reduced his demand, but the Railroad did not move.

Although Mr. Higginbotham thought his case had more value, after an impromptu "settlement conference" with Circuit Judge Nibert in his chambers on the eve of trial, and on the Judge's recommendation, a firm, bottom-line demand of \$125,000.00 was authorized by Mr. Higginbotham and communicated to the Railroad by the Judge himself.

The Railroad offered \$35,000.00. Mr. Higginbotham held firm.

After the first week of trial, the Railroad offered Mr. Higginbotham \$90,000.00 to settle his case. Again, Mr. Higginbotham held firm at \$125,000.00.

Accordingly, the Railroad had a "firm" offer of \$125,000.00 to settle the case from the first day of trial until the moment just before the verdict.

To suggest otherwise is simply inaccurate and incorrect. This is not a defendant who did not have the means to handle a settlement in line with Mr. Higginbotham's reasonable demand. In 2006, the corporations that wrongfully caused Mr. Higginbotham to be indicted for three felony offenses with a potential 3-30 year prison term pocketed a tidy 2.5 billion (yes, that's "billion" with a "b") profit. {Tr. p 783}.

Furthermore, in keeping with their tactics throughout the entire course of this litigation, the Railroad continues to insist upon putting their own "spin" upon the facts of this case, ignoring the damning evidence the jury found to be reprehensible and upon which it rendered a fair and just verdict for Mr. Higginbotham. The spin the Railroad employs here would put a Mariano Rivera cutter to shame.

It is axiomatic that at this stage of the proceedings, the facts must be viewed in a light most favorable to Mr. Higginbotham, and every reasonable and legitimate inference fairly arising from the evidence must be afforded to the party who obtained a jury verdict, and the facts which the jury might properly find under the evidence must be assumed as true. That is not the approach taken by the Railroad, however. Even in this Court, the Railroad continues to argue the facts as if the verdict had never occurred and as if the court and jury below had not flatly rejected their view of pertinent events. Reading the Railroad's recitation of the operative facts, if taken as true, the only appropriate course would be a voluntary dismissal of the claim and a letter of apology from Mr. Higginbotham.

For example, even after the criminal charges it caused to be brought against Mr. Higginbotham were unceremoniously dismissed outright (how often does that



happen?) by the Circuit Court of Kanawha County, West Virginia, and even after the trial court below rebuffed their efforts for a summary finding that Mr. Higginbotham had nonetheless engaged in criminal conduct, and even after the trial jury in Mason County which heard this case obviously rejected the idea, the Railroad continues, even before this Court, to vigorously press their claim that Mr. Higginbotham is somehow guilty of a crime. Their Petition cannot be read any other way. The Railroad still won't quit. Thus, all of their legal arguments are premised upon a fatally flawed factual basis. If the facts were as the Railroad urges here, and as it argued vigorously below, there could be no verdict. If this Honorable Court were to accept the erroneous version of the events posited by the Railroad in its Petition - a version rejected by the trial court and jury below - the Railroad would be entitled to relief - no questions asked.

However, the law does not permit that course. Instead, the facts must be viewed in a light most favorable to the verdict, affording deference to the court and jury below. At bottom, the Railroad's arguments and assignments of error before this Court are thus too fact-intensive to be persuasive. The Railroad does not complain of instructional error. Nor does it assert with any seriousness any claim it was denied a fair trial. Indeed, the Court below even kept from the jury the Kanawha County Circuit Court's Order dismissing the criminal charges against Mr. Higginbotham. That order contained a finding, inter alia, that the rail alleged to have been stolen had been abandoned as a matter of law since it had been in disuse for decades. (Nearby residents had cars on blocks on the rail with geranium's growing from under the hoods...OK, maybe not quite, but almost). The Railroad argued that it would be prejudiced if that Order was

seen by the jury (because the findings in it made it obvious that the prosecution could not have been commenced in good faith), and the court below ruled for the Railroad and refused to allow it in evidence. That was a serious blow to Mr. Higginbotham at trial, but it is believed the court's thinking was that the jury would be tempted to resolve the ultimate issue on that Order alone, and is, thus, understandable.

However, it is difficult to imagine that in fifty pages of brief the Railroad could not see fit to even acknowledge that the jury accepted Mr. Higginbotham's argument that he was prosecuted criminally because the Railroad tried and failed to fire him administratively, because he was a former "Conrail" employee, and, because he'd been a vocal union leader. They somehow left out Railroad Division Engineer Merilli's "smoking gun" comment to "go for the gold." {Tr. p 319}. What the Railroad boss meant was, "put Mr. Higginbotham in jail and it won't matter that we couldn't get him fired the way the contract required. We'll get through the back door what we couldn't get through the front door."

The Railroad asserted in the administrative proceedings surrounding Mr. Higginbotham's termination that it owned the rail; its police officer testified under oath to the grand jury that it owned the rail, told the Kanawha County Assistant Prosecuting Attorney it owned the rail, and it asserted in the court below in this case for years that it owned the rail. Eventually, after a careful examination of the evidence, Judge Nibert ruled once and for all that the rail did not belong to the defendants below or any of them. (Hence, the somewhat convoluted argument here that NW owns 58% of a holding company which owns a company which owns the rail - or something like that).

For his part, Assistant Kanawha County Prosecuting Attorney Schulenberg testified that had he known there was confusion on the issue of ownership of the rail, he would not have presented the case for indictment. {Tr. p 398}.

The jury, obviously, resolved the factual issues in favor of Mr. Higginbotham and against the Railroad. Defendants' duty relative to its post-trial motions and in its Petition here, therefore, was to recognize that the law requires that it refrain from attempting to support its arguments with allegations of error based upon inferences arrived at by speculation, conjecture and the facts as they wish they had been.

The Railroad received a full and fair opportunity to present their evidence to the jury and skillfully took full advantage of it, as the record reflects. Their claims of legal error rest, at bottom, upon a fallacious recitation of the facts they hoped would be proved, but which the jury rejected.

## II. ACTS

Despite defendants' continued claims to the contrary, the facts adduced at trial overwhelmingly support the jury's verdict.

James W. "Bill" Higginbotham, 65, and his wife of 38 years, Shirley, live on Arbuckle Creek Road in Leon, Mason County, West Virginia. {Tr. pp 597-98; 733-34}. They are the proud parents of four children and nine grandchildren who all still likewise live in Mason County. He is a front-line veteran of the conflict in Vietnam. {Tr. p 655}.

When Mr. Higginbotham became a Norfolk Southern Corporation employee as a welder in 1998 when that company merged with Conrail, the corporate defendants here

acquired an employee who had done railroad work with a spotless record since 1964. {Tr. p 648-49}. As the railroads he worked for "merged," his employer over the years changed. However, even his Norfolk Southern supervisors in this matter admit that Mr. Higginbotham was an excellent employee, truthful, trustworthy, hardworking and reliable. {Tr. 193; 233-34; 283; 779-80}. Indeed, Mr. Higginbotham worked two jobs, sharing ownership in a construction company where he worked nights and weekends to try to take care of his family when his regular railroad work permitted. At the time of trial, he and Richard Howard had run the "RJW Construction" business together for 27 years. {Tr. p 711}. Primarily, the company installed and maintained train track for private plants, coal facilities and the like from the plant location to the main railroad lines. These efforts necessitated the purchase of rail and other equipment used by the railroads themselves. {Tr. p 714}.

Bill Higginbotham's record of excellence, and his good reputation in his community, remained in tact until the Spring of the year 2002, when his world came crashing down around him. His brother called - he'd just read in the state's largest newspaper, The Charleston Gazette, that Bill Higginbotham had been indicted by a Kanawha County Grand Jury and charged with three felony counts of Grand Larceny. {Tr. p 738-39}. Mr. Higginbotham and his wife drove to Charleston and paid Tom Smith \$5,000. {Tr. pp 643-44}. Then, he was arraigned, photographed and fingerprinted like a common criminal, posted bond and his case was set for trial.

Mr. Higginbotham had told his immediate supervisor, Mark Longsinger, that he was purchasing rail from CSX at Blue Creek, West Virginia. {Tr. p 283}. Longsinger

investigated, advised his boss, who advised the Railroad police to put a stop to the rail removal in that area. Longsinger has admitted that he did not know who owned the rail in that area, and thought CSX might have been selling rail owned by his employer. {Tr. p 285}.

From there, the basic facts are undisputed. As it turns out, local scrapper (one who buys and sells scrap rail) Charles Chandler had done business with Mr. Higginbotham for years. {Tr. P 594}. Chandler had likewise done business with a man at CSX Railroad, Thomas Crawford, for years. {Tr. pp 499; 677-78}. However, Mr. Higginbotham did not know Crawford nor had he ever done business with him. {Tr. P598}. He did not do business with Crawford on this occasion. David Clark, of Florida, operated a scrap rail business and had done business with Chandler and Mr. Higginbotham, but not with CSX's Crawford. {Tr. pp 492-93}. Thus, the only person of moment with whom CSX's Crawford knew or did business with was Mr. Chandler, the scrapper. {Tr. pp 475; 478}.

Scrapper Chandler told Mr. Higginbotham and Clark that he had rail for sale from the Blue Creek area. He showed Mr. Higginbotham a piece of paper with CSX letterhead - as he had done on many other occasions over the years - showing he was authorized to remove the rail for sale. {Tr. p 606}. Neither Clark nor Mr. Higginbotham knew anything about Mr. Crawford and his activities at CSX, or that he was involved in the matter. {Tr. p 598}.

It eventually came to light that Chandler had paid Crawford cash under the table for the document with CSX letterhead which purported to authorize the removal of the

rail, but which was really bogus. Neither Mr. Higginbotham nor Mr. Clark knew that and there is not one shred of evidence to the contrary. In later statements and testimony, neither Mr. Chandler nor Mr. Crawford implicated either Mr. Higginbotham nor Mr. Clark in their scheme. Both Mr. Higginbotham and Mr. Clark were innocent dupes.

Despite the fact that there was no evidence implicating Mr. Higginbotham whatsoever, the Railroad police undertook to have Mr. Higginbotham and Mr. Clark indicted with Mr. Chandler, who deserved to be. They gave CSX document falsifier Crawford a free pass! {Tr. pp 566-67; 395; 398}

The railroad police didn't bother to tell Assistant Kanawha County Prosecuting Attorney Rob Schulenberg, who handled the matter, that Mr. Higginbotham had been fired based on the very same transaction but reinstated to his job by the Public Law Board after he'd appealed. {Tr. pp 399-400}. They didn't give Mr. Schulenberg a copy of the transcript of the hearing, which led to that decision, which found that he had not "knowingly" stolen anything, nor did they give him the decision itself. Instead, the "police report" they gave to Schulenberg contained a false statement, which created a link between CSX wrongdoer Crawford and Mr. Higginbotham, when in fact no such link ever existed. {Tr. Pp 390; 531}. They now contend it was simply a "mistake." Oddly, Railroad Police Officer Paxton testified at trial that neither he nor Officer Farley, the only two individuals who placed entries into the "report" had made the false entry connecting Mr. Higginbotham to Mr. Crawford at CSX. {Tr. p 270}. Mr. Higginbotham later sued Chandler in Florida for his money back - money he had paid Chandler for

some of the rail which he had, upon request, delivered to the Railroad - and obtained a judgment against him.

Railroad Police Officer Farley testified falsely to the Kanawha County Grand Jury concerning the matter. He told them, falsely, that Mr. Higginbotham had received \$10,000.00 from Mr. Clark for rail from the Blue Creek "theft." That was not true, a fact he eventually had to admit at trial. {Tr. pp 528-30; 545}. He also testified to the grand jury that Mr. Higginbotham had returned some of the rail to the Railroad, and though counsel now claims that somehow should be construed to exonerate Mr. Higginbotham, on the contrary, it made him look guilty. He "returned" the rail to its "lawful owner." Officer Farley did not tell Prosecutor Schulenberg or the Grand Jury that Mr. Higginbotham worked for the Railroad. {Tr. pp 385; 546}. He didn't tell the grand jury that the Railroad's effort to fire Mr. Higginbotham for the events about which he was testifying had failed and that Mr. Higginbotham had been reinstated to his job after having been found by the Public Law Board not to have knowingly stolen the rail. {Tr. pp 384-85; 548}. The Railroad, indeed, told Mr. Schulenberg that Mr. Higginbotham was involved with Mr. Crawford, the CSX man who produced the false document authorizing rail removal. {Tr. p 390}. That was not true. At trial, Railroad police officer Farley had to admit that he knew of no legitimate evidence connecting Mr. Higginbotham and Mr. Crawford at CSX. {Tr. p 532}. He further admitted that there was no evidence whatsoever to contradict the idea that Mr. Higginbotham was himself duped. {Tr. p 533}.

Based on Mr. Farley's testimony to the Grand Jury, poor Mr. Clark was indicted and charged for a transaction in which he was not even remotely involved at all - a fact the Railroad has now been forced to admit. {Tr. pp 563; 608}.

Eventually, The Honorable Paul Zakaib, Judge of the Circuit Court of Kanawha County, West Virginia, dismissed the charges against Mr. Higginbotham and his two co-defendants, finding, inter alia, that the rail alleged to have been stolen had been "abandoned" as a matter of law. The railroad admitted at trial that the area had not been in use for at least 25 years. {Tr. pp 248-49}. The indictment, which was Mr. Higginbotham's very first encounter with the criminal justice system, was returned on June 3, 2002, and the dismissal order entered on January 16, 2004, so Mr. Higginbotham spent about a year and a half of his life with the felony charges and potential 3-30 jail time hanging over his head. {Tr. pp 645-46}. Interestingly, the circuit court in Mr. Higginbotham's case thus did not have to examine the evidence pertinent to the elements of the grand larceny charges - elements which it is now clear could not be proved. The Railroad here did not "own" the rail as alleged, it had not been "removed" or "carried away" - at least with respect to two counts of the indictment, and the evidence of value presented to the grand jury was the value of "new" rail. Thus with the new value, the "theft" appeared to be far larger than it actually was. Farley gave the grand jury "new" values for the rail, which had not been used in at least 25 years nor maintained since 1975. Those facts are undisputed.

Although the events which formed the basis of the indictment, occurred in the Spring of 2000 and he had been indicted two years later in 2002, by that time Mr.

Higginbotham had already dealt with the issue in the employment context and it had cost him a full year off from work with the Railroad. Higginbotham's internal hearing with his union representative, Mike Flowers, was held on August 17, 2000, at which time he, Merilli, Mark Longsinger (his immediate supervisor) and Police Officer Paxton testified concerning the removal of rail from the Hightop Branch in the Blue Creek area of Kanawha County, West Virginia. Flowers called the proceedings a "kangaroo court." {Tr. p 191}. Higginbotham's dismissal was sustained after a highly contentious, ten-hour, hearing. {Tr. p 599}. Essentially Merilli "prosecuted" the case for the Railroad, and he had appointed his immediate subordinate as the "independent" hearing examiner. {Tr. pp 792-93}. Mr. Higginbotham appealed, pursuant to the labor contract, to the Public Law Board.

After reviewing the record, the Public Law Board determined that Higginbotham should not have been terminated from his employment. By Order Entered on May 30, 2001, the Public Law Board, after reviewing the entire record concerning the matter, explicitly found, inter alia, that "[T]he evidence in the record failed to establish that Claimant {Higginbotham} knowingly stole from the Carrier {NS}." The Board Ordered Higginbotham's reinstatement, but did not award him back pay. "Our review of the record leads us to conclude that although Carrier did not establish by substantial evidence that Claimant knowingly stole Carrier's property, Carrier did prove by substantial evidence that Claimant knew or should have known that the rail in question belonged to Carrier or to CSX and knew or should have known that the scrap dealer lacked proper authorization for its removal. Accordingly, we find that Carrier proved

Claimant guilty of conduct unbecoming an employee." Thus, Higginbotham was reinstated to his position in June, 2001 and went back to work as a welder for the Norfolk Southern Corporation, but did not receive back pay.

Again, it must be noted that Norfolk Southern Corporation claimed "ownership" of the property and rail in question, when, as has now been established, it was not the "owner" thereof. Judge Nibert ruled pre-trial that in fact, based upon the testimony of Railroad personnel themselves, Norfolk Southern and The N&W Railway did not own the rail in question at the time of the events in question. The Railroad's corporate representative at trial testified that, as he sat on the stand, he still did not know who owned the rail! {Tr. p 781}. However, the claim that the Railroad owned it went unchallenged in the employment arena. The rail was not owned by CSX either. Accordingly it is likely that had the Board known all the true facts, it would not have found Mr. Higginbotham guilty of anything. Further, although Mr. Higginbotham obviously believes the evidence with respect to the finding that he knew or should have known that Chandler did not have proper authorization to remove the rail is in error, the important fact to the claims asserted here is the finding that he did not knowingly steal rail. That finding was, obviously, communicated to the Railroad, which accepted it, did not appeal it, and complied with it by reinstating Mr. Higginbotham to his employment position. {Tr. p 801}.

Mr. Higginbotham was a member of the Brotherhood of Maintenance of Way and had served as the local president, secretary and other high offices in his union, often representing others against whom the Railroad sought to impose discipline. {Tr.

p193}. According to union representative Flowers, Mr. Higginbotham, after he was returned to work, just wanted to fly under the radar, giving up his union positions, because he was so close to retirement and he did not want to lose his pension. {Tr. p 193}.

When the merger which brought Mr. Higginbotham into the employ of the Railroad occurred in 1998, he and other then-Conrail employees were still subject to a union contract which was different and more lucrative than the contract the then-current Norfolk Southern employees were working under. Better pay, better pension, better benefits all around. {Tr. pp 187-88}. Thus, Mr. Higginbotham, and others who testified, believe that one of the Railroad's motivations to discharge him was his status as "Conrail" because he and other former Conrail employees cost the company more money. Union rep Flowers testified that "Conrail" employees were treated differently, and not in a good way. {Tr. pp 194-96}. A co-employee, Dave Whittington, testified that when Mr. Higginbotham won his case before the law board and was returned to work, there was obvious "friction" between he and the Railroad bosses. He, too, testified the conrail employees were treated differently. {Tr. 466}.

In any event, by June 2001, at the very least, the Railroad had the full picture of what had occurred, knew that it had not established that Mr. Higginbotham had knowingly taken stolen rail because the Public law Board had told the Railroad so, and Mr. Higginbotham was back to work. Mr. Higginbotham's wallet was \$10,000.00 lighter, he'd missed in excess a year of work, salary and wages, and had suffered the embarrassment and humiliation among his peers of having been terminated from his

employment. That just wasn't enough for the Railroad, however. It proceeded to procure its bogus indictment against Mr. Higginbotham.

Clearly, the scenario painted by the false report and sworn grand jury testimony by the Railroad's police officers made it appear to the prosecutor and the grand jury that Mr. Higginbotham was right in the thick of the wrongdoing. The problem for the Railroad was and remains that they have no true evidence whatsoever to support that conclusion. The Railroad's own track supervisor, Mark Longsinger, Mr. Higginbotham's boss, unequivocally testified that as far as he knows, Mr. Higginbotham committed no crime. {Tr. p 357}.

The jury did not buy the Railroad's attempt to implicate Mr. Higginbotham in a crime. If it had, we would not be here.

At some point, claims of "innocent mistakes" and "typos" and "technical errors" ring a hollow tone when they pile up and pile up and all the "mistakes" are designed to falsely implicate an innocent man in criminal wrongdoing. A fair reading of the record here will demonstrate that no reasonable person could have believed there was any basis whatsoever for charging Mr. Higginbotham with a crime.

The defendants had a motive to get Mr. Higginbotham indicted and convicted to take him off their payroll. Their efforts to fire him had been rebuffed by the labor board and they set about to go through the back door to take his job when the front door had been slammed in their faces. They decided to "go for the gold" and try to put Mr. Higginbotham in jail for crimes they knew or should have known he hadn't committed. The jury saw through their sham and slammed the back door in their faces too.

The "go for the gold" evidence at trial mysteriously did not make it into the Petition for Appeal.

At trial, Mr. Higginbotham's immediate supervisor, Mr. Longsinger, testified that Police Officer Paxton was surprised when he was directed to pursue the criminal charge against Mr. Higginbotham since Mr. Higginbotham had been reinstated to his job by the Public Law Board. He related that they were initially instructed to stop the removal of the rail and that had been accomplished. Then, Mr. Higginbotham's firing had been overturned. However, then Mr. Paxton received a message from Mr. Merilli to "go for the gold," meaning to prosecute Mr. Higginbotham. {Tr. pp 318-320}. Both Paxton and Merilli, of course, denied those facts. Longsinger, however, was involved in the "investigation" and thus in a position to know what occurred, and was Railroad management himself at the time of the events at issue.

Despite the overwhelming evidence at trial that Mr. Higginbotham was utterly innocent, the Railroad persisted before the jury - even as they do in this court - in advancing its claim that he was guilty of the criminal charges they had caused to be brought against him. It is no wonder the jury found malice.

The facts recited hereinabove are but a few of those proved at the trial of this case. They are sufficient, however, to support the jury's verdict. The jury no doubt concluded that Merilli did not like losing as he did when Mr. Higginbotham had been reinstated and thus there was a motive to prosecute Mr. Higginbotham other than simply to see a guilty person punished for his crime.

The testimony of the police officers at trial would be humorous if it were not so sad. Their efforts to implicate Mr. Higginbotham in wrongdoing failed miserably.

### III. SUMMARY OF ARGUMENT

The defendants' now assign as error a variety of claims which all lack merit. First, they contend that they did not procure Mr. Higginbotham's prosecution. Second, they argue that, as a matter of law, there was in fact probable cause for Mr. Higginbotham's prosecution. Third, they claim Plaintiff did not "demonstrate malice." Fourth, they continue to assert that they are entitled to rely on the "absolute defense" of advice of counsel. Fifth, they argue that they are immune from suit based upon the doctrine of qualified immunity and finally, they claim that the damage awards were not supported by the evidence. In well-reasoned rulings placed upon the record, the Court below ruled against the defendants on all these assertions.

Mr. Higginbotham argues that if the Railroad's argument on the issue of "procurement" were to be accepted, it would be the end of the viability of a cause of action for malicious prosecution in this jurisdiction. The Railroad confuses the "procurement" of a criminal charge, as that term of art is used in connection with a civil cause of action for malicious prosecution, with the mechanics of securing an indictment. Simply because, in West Virginia, only a duly elected or appointed prosecuting attorney is authorized to appear before a grand jury to obtain an indictment for a felony, it does not necessarily follow that he or she "procured" the criminal charge.

Plaintiff will address the defendants' claims in seriatim.

#### IV. ARGUMENT

##### A. PROCUREMENT

The Railroad claims that the court erred in finding as a matter of law that the defendants procured the prosecution.

Essentially, if the defendants' position on this issue were to be adopted, any definitive ruling would effectively eliminate a cause of action for malicious prosecution from West Virginia jurisprudence. In the State of West Virginia, absent presentation of a case to the grand jury by a prosecutor, an indictment cannot be obtained. Although defendants do not ever bother to elucidate the precise nature of their position as to what exactly "procurement" in this jurisdiction should legally be, they simply claim that what they did was not it. The Court here applied the law of this state in ruling that "procurement" means "procurement."

The essential element of "procurement" in a malicious prosecution action found its origins in the seminal case of Vinal v. Core, 18 W.Va. 1 (1885). In examining the issue of what is meant by "procurement" in this context, the Court opined: "The second thing necessary to prove in such a case as the one before us is, 'that the prosecution was instigated and procured by the co-operation of the defendants.' By instigated and procured is meant instigation and procurement in the ordinary meaning of this language. It would not be necessary to show, that the defendants themselves either jointly or severally applied to the justice to issue the warrant. If they instigated and procured it to be done by another, they would be bound jointly, as much as if they had made a joint application to the justice to issue the warrant. Thus in Scott & Boyd v.

Shelor, 28 Gratt. 891, the complaint was made by one Smith, and all his information was based on a letter written to him by one of the defendants, Scott; and Boyd, the other defendant, is only shown to have co-operated with him in procuring the prosecution of the plaintiff by his having told witnesses, that he, Boyd, would not have set the prosecution on foot, if the plaintiff had not abused the family of his father-in-law, Scott. The jury found a verdict against the defendants jointly, and the Court of Appeals refused to set it aside, saying they found no fault with the verdict," 18 W.Va. 1 at 25. The Vinal analysis has withstood the test of time, and it has been cited repeatedly as still good authority in malicious prosecution actions. Applying the "plain meaning" analysis invoked by the Vinal Court can only lead to the conclusion that the Railroad here "procured" Mr. Higginbotham's

To have permitted the Railroad to assert and argue at trial that they did not "instigate and procure" Mr. Higginbotham's prosecution would have been permitting them to assert and argue a position contrary to law. The fact of the matter is that they instigated and procured Mr. Higginbotham's prosecution - plain and simple. In view of the undisputed facts of the case, it really should not lie in their mouths to now try to claim that they did not do so.

The Railroad - remarkably - asserts that it was not them who "instigated and procured" Mr. Higginbotham's prosecution, but instead the Assistant Prosecuting Attorney of Kanawha County, Robert Schulenberg, "instigated and procured" the prosecution as a matter of law. That claim is simply specious. Failing that, the Railroad asserts that the issue was one of fact for the jury. Thus, the Railroad is asserting that (1)

the issue is one of law for the court; but, (2) if they lose it as a question of law, then it is a question of fact (!). The law should not be bastardized in such a fashion.

The defendants "investigated" the alleged crimes, appeared before a judicial officer and obtained warrants for his arrest, prepared a report containing false information concerning Mr. Higginbotham's involvement in the alleged crimes, gave that report to the Assistant Prosecuting Attorney knowing he would rely upon it, called his office over and over and over {29 times} to find out when the case would be presented, met with the prosecutor, reviewed the indictment before it was presented, appeared before and gave false testimony to the grand jury which rendered an indictment against Mr. Higginbotham, and now contend they had nothing to do with it! No other police agency, entity or person was involved in instigating or procuring the prosecution of Mr. Higginbotham other than the defendants. The prosecuting attorney merely did his job as required by the law in this state. Absent his presentation of the case to the grand jury, no indictment could ever be obtained in this or any other case. Mr. Schulenberg testified in the matter at bar that no indictment would have been sought had the Railroad police not brought the matter to him. {Tr. p 391).

The Railroad's attempts to distinguish the West Virginia cases on the issue reveal the frivolity of their argument. Citing *Radochio v. Katzen*, 92 W.Va. 340, 114 S.E.2d 746 (1922), for the proposition that "there must be a direct correlation between the actions of the person alleged to have procured the prosecution and the prosecution itself" the Railroad then asserts there was no such connection here. Are they kidding us? No

reasonable person could view the facts of this case and conclude that the Railroad did not instigate and procure the prosecution of Mr. Higginbotham - there are no facts to the contrary. That is why the Court below ruled, as it did, that the Railroad instigated and procured the prosecution.

Other West Virginia decisions, Sudnick v. Kohn, 81 W.Va. 492, 94 S.E. 962 (1918), McNair v. Erwin, 84 W.Va. 250, 99 S.E.454 (1919), Hunter v. Beckley Newspapers, 129 W.Va. 302, 40 S.E.2d 332 (1946), and Thomas v. Beckley Music & Electric Co., 246 W.Va. 764, 123 S.E.2d 73 (1961), likewise lend the Railroad no solace. None of those decisions change the basic Vinal proposition that "instigation and procurement" means "instigation and procurement" in the ordinary sense of the words. Applying that law to the facts of this case the Court correctly ruled that the Railroad "instigated and procured" Mr. Higginbotham's prosecution. It is apparent that the Railroad does not like the law, but it is the law nonetheless. As stated hereinabove, to adopt the Railroad's position would be to obliterate the cause of action for malicious prosecution from the state's jurisprudence since only a prosecutor can obtain an indictment in this state. Surely even these litigants cannot envision a scenario where a prosecutor would assert that his will was overborne by a complainant and that he did not exercise his independent judgment to obtain an indictment. Interestingly, the Railroad recognizes that in Thomas, supra., "The Supreme Court noted that the criminal prosecution was 'admittedly set in motion by defendants'. Id. at 79. Thus, procurement was not at issue in this case." Can the Railroad here actually claim that Mr. Higginbotham's prosecution was not "set in motion" by their activities and sworn testimony?

Similarly, the Railroad's reliance upon Truman v. Fidelity and Casualty, 146 W.Va. 757, 123 S.E.2d 59 (1961) is misplaced because it is obviously factually distinguishable. Here, the Railroad agent did testify (falsely) to the grand jury, which indicted Mr. Higginbotham. Other cases, i.e., U 184 W.Va. 64, 399 S.E.2d 464 (1990) and Pote v. Jarrell, 186 W.Va. 369, 412 S.E.2d 770 (1991), undercut the Railroad's position here on a number of issues. The Pote trial court apparently permitted the "procurement" issue to go to the jury, but there is no indication that resolution as a matter of law was requested at trial. While the Railroad complains loud and long that the court should not have ruled on the issue as a matter of law, they have not identified "facts" - other than the involvement of Assistant Prosecutor Schulenberg - which could have been in dispute on the issue. Schulenberg's conduct, as a matter of law, does not take the Railroad off the hook.

Further, as the cases make clear, it is not an "either - or" proposition. More than one person or entity can "procure" a prosecution. Here, perhaps the railroad and Schulenberg both procured the prosecution. As such, to permit the Railroad to argue, as it wanted to do, that the jury had to choose between it and Mr. Schulenberg, on the issue of procurement, would have been error.

The Railroad's reliance on cases from other jurisdictions is similarly misplaced. None of them change the law in West Virginia.

Thus, despite the Railroad's efforts to complicate the issue, it is really a very simple one. The Court below did not err.

## B. PROBABLE CAUSE

The Railroad got it's money's worth in argument to the jury in this case that there was in fact probable cause to charge Mr. Higginbotham. Their problem is that there is not one whit of evidence, which would support the claim that Mr. Higginbotham was guilty of a crime.

At trial, each and every witness for the Railroad, and Assistant Prosecutor Schulenburg, were asked to identify any evidence whatsoever which could lead one to believe that Mr. Higginbotham engaged in criminal conduct. Not one shred of evidence was identified. It is abundantly clear that the issues of "probable cause" and "malice" are quintessentially ones for the jury in view of the disputed facts in this record. This Court has explained: In Harper v. Harper, 49 W.Va. 661, 39 S. E. 661, it was held that 'the discharge by a justice of the plaintiff, who has been arrested and brought before him for examination, or the refusal of a grand jury to indict him, is prima facie evidence of want of probable cause'. And in Fetty v. Huntington Loan Co., 70 W.Va. 688, 74 S. E. 956, it is stated: 'Plaintiff's discharge by the justice is prima facie evidence of the want of probable cause, but may be rebutted by proof.' Vinal v. Core, supra, (Syl. pt. 16); Harper v. Harper, 49 W.Va. 661, 39 S. E. 661.

Malice is also a necessary element of the action, which plaintiff must establish. But being a matter of motive and, therefore, difficult to prove by direct evidence, it may be inferred from want of probable cause. Vinal v. Core, supra, (Syl. pt. 10). Malice is a comprehensive, technical term. It is not confined to personal hatred or ill-will, but comprehends any unlawful motive or purpose; as, for instance, procuring the arrest of a

party on a criminal warrant, for the purpose of forcing him to pay a debt, and not for the purpose of punishing him for the crime charged. 26 Cyc. 50."

We have also held that proof of want of probable cause `devolves on the plaintiff', Porter v. Mack & Boren, 50 W.Va. 581, 40 S. E. 459, Point 12, Syllabus; that `Good faith on the part of the prosecutor is an essential element of probable cause', Dunlap v. The Chesapeake & Ohio Railway Co., 107 W.Va. 186, 148 S. E. 105, 65 A.L.R. 221; and that a corporation is liable for `malicious prosecution by its agent', Meadows v. Corinne Coal & Land Co., 115 W.Va. 522, 177 S. E. 281. Thomas v. Beckley Electric Co., 146 W.Va. 764, 123 S.E.2d 73 (1961).

Mr. Higginbotham contends "malice" also means retaliation for "losing" your case when you fire somebody and then you have to put them back to work a year later. It means, "if we can't get him that way, we'll get him another." We'll "go for the gold."

In Wilmer v. Rosen, 102 W.Va. 8, 135 S.E. 225 (1926), defendant Rosen procured a criminal prosecution for his employee, Wilmer, and accused him of stealing money. Wilmer's evidence showed that he was authorized to withhold some of the profits he made doing business because he had a one third interest in the profits by agreement with defendant Rosen and had been told by the defendant to use the money, keep a record of it, and square up at an appropriate time. The defendant disputed those facts. The jury found against the defendant. Under those circumstances, the Court correctly noted that the issue of probable cause was for the jury.

Defendant insists that in this case the existence of probable cause was a question for the court, citing Bailey v. Gollehon, 76 W.Va. 322, where it was held that: `If, in an

action for malicious prosecution, sufficient facts to constitute probable cause for institution of the criminal proceedings are clearly established by admissions or uncontradicted evidence or both, it is the province of the court to deny right of recovery by direction of a verdict for the defendant or the setting aside of a verdict for the plaintiff.' 'On the other hand probable cause is a mixed question of law and fact. What are the existing facts, on which probable cause or its absence is based, is a question of fact to be decided by the jury.' Vinal v. Core, 18 W.Va. 1; Fetty v. Huntington Loan Co., 70 W.Va. 688, 693; Goodman v. Klein, 87 W.Va. 292. The jury had a right to believe that plaintiff acted in good faith in taking money which he honestly considered his own. The question of his intent was for their determination.

Wilmer v. Rosen, 102 W.Va. 8 at 12-13, 135 S.E. 225 (1926). {Emphasis That proposition guided the court below and should be deemed persuasive by this Honorable Court.

Despite all their high-sounding arguments about "presumptions" and the like, one fact escaped the Railroad's analysis: the indictment was summarily dismissed by the Circuit Court of Kanawha County, West Virginia. That fact alone would undercut the argument now posited, at least with respect to a ruling as a matter of law. Certainly, taken together with all of the other facts in the case - the false report, the false sworn grand jury testimony, the ownership issue, questions about the value of the rail involved and the like - clearly the Court was correct to submit the issue to the jury.

The jury correctly found there was no probable cause and the court below did not err in not finding and absence thereof as a matter of law.

### C. MALICE

Likewise, the Railroad's argument that Mr. Higginbotham failed to prove malice falls of its own weight. The jury found malice. The evidence supports that finding.

Mr. Higginbotham contended at trial, and the jury found, that the Railroad tried to fire him, was unable to do so lawfully because of his union protections, and then set about to prosecute him criminally to obtain through the back door what it could not do through the front door. That contention, apparently accepted by the jury, is sufficient to support a finding of malice. The Railroad "went for the gold" - the evidence showed - but the jury decided to take some of their gold. Again, the Railroad "simply forgot" to tell the prosecuting attorney that they had fired Mr. Higginbotham and that he had been judicially cleared of "knowingly stealing rail" - the very rail in question - and reinstated.

Now, the Railroad asserts that "They (defendants' agents) had no possible reason to want to see the Plaintiff prosecuted other than their belief that he and others were engaged in criminal wrongdoing." That was their argument at trial and it was rejected by the jury. The Railroad still refuses to acknowledge that the "sinister" or "improper" motive the jury attributed to them was to rid their payroll of one William J. Higginbotham. The evidence before the jury was clearly sufficient - more than sufficient - to permit that finding and to support the denial of a ruling on the issue as a matter of law.

#### D. ADVICE OF COUNSEL

The Railroad continues to ignore the exception to the "advice of counsel" defense upon which they continue to attempt to rely for "false information." They admitted at trial that false information - directly connecting Mr. Higginbotham to admitted wrongdoer CSX Roadmaster Crawford - was given to the prosecutor. They admitted at trial that they told the prosecutor that the rail was owned by N&W Railroad. The Court below ruled that N&W did not own the rail. The Railroad does not now seriously contest that ruling. Thus they gave "false information" to the prosecutor and the "advice of counsel" defense remains unavailable to them. Similarly, the Railroad did not bother to tell the prosecutor that Mr. Higginbotham had been fired, judicially cleared of knowingly stealing the very rail in question, and reinstated to his job. It did not make full disclosure of the facts. Their failure to tell the prosecutor and grand jury about the employment firing and reinstatement provides strong evidence that it was the true motivation for the prosecution.

Admittedly, there can be little question that, as a broad, general proposition, the law is as defendants state. This Court has said: A further bar to any recovery in this action is the fact that, in our opinion, the defendant, Lantz, made a full and complete disclosure of the facts and circumstances on which the warrant aforesaid was issued to a reputable attorney and, in making the complaint on which the said warrant was issued, followed his advice.

It has always been the law, so far as we know, that a person in instigating a civil suit or a criminal prosecution is protected against actions for malicious prosecution in

cases where he has submitted, in good faith, the matters upon which he acts to a reputable attorney, and made a full disclosure to such attorney of all matters in connection with the proposed prosecution.

Wright v. Lance, 133 W.Va. 786 at 794, 58 S.E.2d 123 (1950). See also, Hunter v. Beckley Newspapers, 129 W.Va. 302, 40 S.E.2d 332 (1946). {The issue, as stated by the Hunter Court, is whether a "{F}air and accurate disclosure to counsel of the facts on which the advice is sought..." is made}.

Since the Railroad did not make a "full and fair disclosure" of all of the facts to the prosecutor, and indeed provided him false information regarding Mr. Higginbotham's involvement in the alleged offenses for which he was indicted, this defense is unavailable.

See also, Wilmer v. Rosen, 102 W.Va. 8, 135 S.E.225 (1926).

The jury was properly instructed on this issue (Defendants' Instruction No 22) and it found against the Railroad. The evidence supports that finding.

#### E. QUALIFIED IMMUNITY

The Railroad's own instruction on this issue was given to the jury and the jury rejected the Railroad's claim. They now complain that the court should have "permitted the jury to specifically answer an interrogatory" on the issue.

The Railroad did not submit a proper verdict form in this case and thus waived any such error.

In any event, the Railroad does not bother to explain why, when the issue was given to the jury in a proper instruction, a special interrogatory would have changed anything. The jury is presumed to have rejected the claim by its verdict.

At bottom, the issue raised is premised upon an assumption of "good faith" by the officers involved. The jury, by its verdict for punitive damages, has indicated that the Railroad acted with malice, without probable cause, and not in good faith.

#### F. DAMAGES

It is apparent from the arguments posited that the defendants have no real substantive complaint about the compensatory damages awarded, cite no authority for the propositions asserted, and Mr. Higginbotham respectfully avers that the compensatory damage award is entirely appropriate under the facts and circumstances of the case. Of course, the jury gave him back the \$5,000.00 he'd paid Tom Smith to defend him in the criminal case. {Tr. 643-44}. Quite reasonably, they also gave Mr. Higginbotham a little gas money for his travels to and from Charleston, a little something for food and other out-of pocket expenses anyone in his position would have incurred dealing with a criminal charge in a distant county. The jury heard ample evidence of anguish, distress, humiliation and embarrassment to support the award. Mrs. Higginbotham testified that while he was under indictment, she would awake at 3 a.m. to find Mr. Higginbotham sitting in a chair in the living room, unable to sleep because he was worried and depressed and afraid. {Tr. p 742}. Further, apparently, the Railroad failed to take cognizance of the testimony reflecting that Plaintiff was labeled a "thief" in the workplace, made fun of and ridiculed. {Tr. p 638-641}. On one occasion,

when Mr. Higginbotham was working at a particular plant, before he could enter to work, the plant ran a background check on him. What should appear? The three felony charges of grand larceny against William T. "Bill" Higginbotham. Was that embarrassing? Of course it was. {Tr. pp 640-41}. As would anyone, Mr. Higginbotham wonders how many people saw the newspaper reporting that he had been charged with three felonies. As often occurs, it was never in the newspaper that the charges were dismissed. He can only be left to wonder what those he encounters on a daily basis are thinking about him, whether they know he was charged as a felon, or if they think he is indeed a thief. How much did he worry - a man of his age - that he lose the pension he'd worked virtually all his life to build, something that was assured if he was convicted of a crime. How can one put a small price tag on that?

The verdict rendered for compensatory damages here is a small price to pay. There is no basis to set aside or reduce the compensatory award. The Railroad also claims that Mr. Higginbotham was not entitled to an award of punitive damages. The Court below made careful findings on the issues relevant to the inquiry and the award was entirely appropriate under the circumstances.

Regardless of the manner in which the Railroad now wants to play with the numbers, the fact remains that the award - three times the compensatory damage award - was fully justified and is not improper.

At the outset, Mr. Higginbotham does not quibble with the recitation of the law set forth by the Railroad with respect to post-judgment judicial review of the punitive damage award. He further agrees that the verdict and award must be evaluated in

terms of the factors outlined in Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). The court below did just that.

The Railroad first claims that an award of punitive damages in this case was unwarranted at all. Mr. Higginbotham obviously disputes this idea. The Court heard the evidence, permitted the issue to go to the jury, and the jury determined, under proper (defense) instructions (*about which the Railroad obviously cannot and does not complain*), that an award of punitive damages was appropriate. All of the arguments the Railroad now advances were contained in their instructions to the jury and the jury rejected those arguments. To support their position that no punitive damage award should have been made, the Railroad apparently persist in their attempts to convince the court that their conduct was all "an innocent mistake," a "typo," a "technical error" and in "good faith." The jury rejected those claims and the Court should as well. The Railroad still, even at this juncture, refuses to acknowledge that they gave material false information to the prosecuting attorney of Kanawha County West Virginia, failed to disclose to him material facts, and gave false sworn testimony to the Kanawha County Grand Jury which indicted Plaintiff James W. Higginbotham. Furthermore, they were unable to discharge Mr. Higginbotham from his employment in a lawful way, so chose to "go for the gold" and attempted to get his job by getting him convicted as a criminal. Then, they came into court and lied about it. Given their continued denials, even in the face of overwhelming evidence at trial, the Court might be tempted to order an additur to this punitive damage verdict rather than cut it.

Even though, at this stage of these proceedings, the facts must be viewed in a light most favorable to the verdict, the Railroad still refuses to afford the Plaintiff and the Court below that rudimentary consideration. Instead, they insist on persisting in minimizing their conduct - conduct the jury found reprehensible and appropriate for punishment. Even now, the Railroad refuses to admit anything or to even acknowledge Mr. Higginbotham's trial theories, which the jury found to be persuasive.

The jury was entitled to find, and apparently did so find, that the Railroad, having failed in their effort to fire Plaintiff Higginbotham in the legal manner required of them, undertook to obtain his indictment and prosecution for crimes they had no evidence he committed, to remove him from the payroll once and for all. They prepared a report of "investigation" which contained materially false information concerning the nature and extent of Mr. Higginbotham's involvement in the theft of rail, gave that report to the Assistant Prosecuting Attorney of Kanawha County, West Virginia, withheld other pertinent information - including that they had fired Mr. Higginbotham and that he had been reinstated upon a finding that he did not knowingly steal the rail - and gave false sworn testimony to a grand jury which then indicted Mr. Higginbotham and exposed him to up to thirty (30) years in jail. The charges against him were publicized, he was publicly ridiculed and embarrassed, and forever branded a "thief" in the eyes of those who saw the charges but didn't know of their summary dismissal by a Circuit Judge. He faced uncertain times for over a year while he was out of work and wondering if he would ever be cleared of charges for which there was no basis whatsoever. The jury found there was no probable cause for the prosecution and

that the Railroad acted with malice. The evidence supports those findings. The Railroad continues to assert "evidence" they claim shows an absence of malice and the presence of probable cause. They had a full and fair opportunity to, and did, present those claims to the jury. The jury rejected them.

The Railroad's claim that somehow the punitive damage award is barred because the compensatory award included damages for emotional distress is misplaced. *Cf. Hines v Hills Dept. Store*, 193 W.Va. 91, 454 S.E.2d 385 (1994). No cause of action for intentional infliction of emotional distress was asserted or tried in the matter before the Court.

In that regard, however, it is simply noteworthy that the compensatory damage verdict here was comprised of a number of components - not just damages for "emotional distress." The award in the matter at bar also included damages for "annoyance and inconvenience, humiliation and embarrassment" and damages for the harm caused to Mr. Higginbotham's reputation.

The Railroad below never requested that the court separate those items and elements of damages on the verdict form, and since they do not now complain about the form of the verdict itself, they apparently recognize that any claim of error in that regard has been waived.

The Railroad essentially urges this court to "uncompensate" Mr. Higginbotham for the permanent scar on his reputation left by false allegations that he was a felon and a thief. Unlike the cases cited by the Railroad, this is not a wrongful discharge employment case and thus this court's oft-stated concern about the nature of the

damages recoverable and the evidentiary basis therefore in actions of that genre is absent here.

Defendants cite no genuine authority which supports their contention and thus it should be rejected for a variety of reasons. Certainly, the punitive damages awarded here would not be duplicitous for the damages afforded Mr. Higginbotham to compensate him for the permanent impairment of his good reputation for being law-abiding, honest and a man of integrity. Since the defendants did not ask that the jury specify the sums awarded for each element of compensatory damages, this claim was waived.

#### *FACTORS*

The Railroad asserts that its conduct was not sufficiently reprehensible to support the punitive damage award.

One of the ten commandments states: "Thou shalt not bear false witness against thy neighbor." Exodus 20:16.

The jury determined in this case that defendants' conduct was violative of that biblical prohibition. What could be more reprehensible, in the ordinary sense, than breaching one of God's ten commandments?

The **BMW v. Gore**, 517 U.S. 559 (1996), considerations argued by the Railroad all offer little support for their claim that the punitive damage award was improper. It is

noteworthy that the Railroad cannot really claim the award was excessive with a straight face, in view of all of the circumstances.

The Railroad pursued their deceitful endeavor over a four or five year period, leaving Plaintiff Higginbotham without a job or health insurance for a full year for him and his family. They knew their actions were causing harm and would likely cause harm - Mr. Higginbotham went to bed every single night for a substantial period of time with three felony charges against him, wondering if he would be required to do thirty years in jail. He was financially vulnerable - out of work for over a year. The evidence at trial clearly indicated that the defendants had engaged in retaliatory conduct against union leaders and members who dared fight for their employment rights on other occasions. To this day, the defendants have shown no remorse whatsoever. Thus the Gore analysis weighs heavily in favor of sustaining the punitive damage award. Further, the defendants' conduct in this litigation was likewise questionable in some respects. The defendants claimed ad nauseum that the N&W Railway "owned" the purloined rail when in fact it did not. That fact only became apparent when they were pressed on the issue and finally had to admit the true ownership. Even after the Court ruled, defendants still persisted in trying to claim otherwise. A similar tact was taken by the defendants with respect to their officers' compliance with W.Va. Code 61-3-41. Despite their insistence throughout the litigation and trial that the appropriate paperwork had in fact been filed with the Kanawha

County Clerk, when push came to shove at trial the defendants were unable to produce sufficient evidence of same.

The Railroad here even attempt to pervert the "ratio" issue to their favor with misleading arguments creating "ratios" of "60" to one and "15" to one when defendants surely know for a fact that the ratio is merely three to one, perfectly acceptable under any standard by any court. By their bastardized logic, no punitive damage award would ever be appropriate. Given their findings, the wealth of the defendants, the nature of the testimony by the defendants' witnesses and the circumstances of the case, the Court would be well justified in finding that the jury showed admirable restraint. As stated hereinabove, the verdict is but a miniscule of a percentage of the defendants' net worth.

Despite its claims that it did not "profit" from the wrongdoing, it is clear that the defendant did not pay Mr. Higginbotham his salary and benefits for a year and expected to profit even more should it have been successful in its endeavor to rid him from their payroll once and for all. Further, defendants' took possession of ten thousand dollars (\$10,000.00) worth of rail it apparently did not and does not own and have never given it back to Mr. Higginbotham.

This is not a case where the defendants acted "with extreme negligence or wanton disregard" but with no actual intention to cause harm. It is established, by the jury's verdict, that the defendants here acted *with malice*. Thus, defendants' claim that a

5 to 1 ratio would be an "outer limit" (even though it was not exceeded in this matter) is a meritless argument.

Accordingly, this Court should find that the verdict is not constitutionally infirm.

While the Railroad complains that the court should not have admitted the SEC report, the court will recall that an adequate evidentiary basis for admission was laid and the Court did not err in permitting its limited use. Any error in that regard would be considered harmless. The Railroad attempts to "minimize" the \$5,000.00 in damages proven by the Plaintiff in this matter. While that sum may be pocket change to the defendants and their counsel, most ordinary people cannot afford to make a five thousand dollar outlay for a lawyer without it hurting them. Further, defendants claim that Plaintiff's costs "of litigating this case were low" without knowing whereof they speak. The costs at this juncture exceed twenty thousand dollars (\$20,000.00) and continue to mount. The defendants litigated this case vigorously and denied denied denied key facts before being forced to admit them. In sum, the punitive damage award in this case was warranted, was not excessive and was not constitutionally inappropriate. The defendants made full use of their due process and in fact obtained a full and fair trial. Under all of the facts and circumstances in this case, the verdict should be sustained.

V. CONCLUSION

The Railroad got a fair trial. The jury found against them and made a modest damage award against one of the world's largest corporations. The Railroad could have settled the case reasonably but refused to pay the last \$35,000.00 required to do it. The jury was properly instructed. The defendant raises no substantive instructional error. The jury's verdict should not be disturbed.

A handwritten signature in black ink, appearing to read "D. White", written over a horizontal line.

David L. White, Esquire  
West Virginia Bar No. 4006  
Suite 314, The Peoples Building  
179 Summers Street  
Charleston, WV 25301  
(304) 437-0754

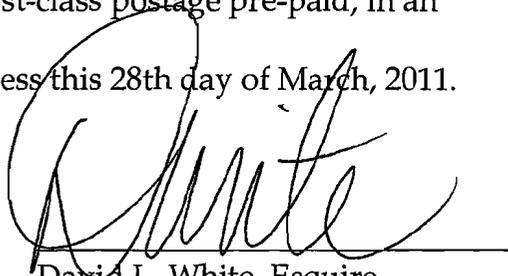
Respectfully submitted,

JAMES W. HIGGINBOTHAM,  
By Counsel:

Marvin W. Masters, Esquire  
WV Bar No. 2359  
The Masters Law Firm, loc  
181 Summers Street  
Charleston, WV 25301  
(304) 342-3106  
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CERTIFICATE OF SERVICE

I, David L. White, Esquire, counsel for the Respondent/ Appellee, Plaintiff below, do hereby certify that I served a true copy of the foregoing "Brief of Respondent James W. Higginbotham In Response To Petition For Appeal" upon Scott Sheets, Esquire, counsel for the Petitioner/ Appellant , Defendants below, by depositing same in the United States mail, first-class postage pre-paid, in an envelope addressed to him at his stated address this 28th day of March, 2011.

A handwritten signature in black ink, appearing to read "D. White", written over a horizontal line.

David L. White, Esquire  
Suite 314, The Peoples Bldg.  
179 Summers Street  
Charleston, WV 25301  
(304) 437-0754