
**IN THE
SUPREME COURT OF VIRGINIA**

RECORD NO. 022761

JOSEPH D. MORRISSEY, Appellant

v.

GARY WYCOFF, Appellee

BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF VIRGINIA

JOSEPH D. MORRISSEY,

Petitioner

v.

Record No. 022761

GARY WYCOFF,

Respondent.

BRIEF IN OPPOSITION

Comes now Gary Wycoff (Wycoff), respondent herein and plaintiff in the court below and prays that the petition of Joseph D. Morrissey (Morrissey) be denied and that respondent be awarded his costs.

Statement of the Nature of the Case and of The Material Proceedings in the Lower Court

Wycoff filed this lawsuit seeking compensatory and punitive damages after Morrissey savagely beat Wycoff and then attempted to fabricate an alternative account and cover-up his actions. Record at 000046-000052. The trial court granted Morrissey s motion to bifurcate the issue of punitive damages, but the issues were tried together after Morrissey withdrew the request. Record at 000101-103. Morrissey represented that he would offer no defense in mitigation of punitive damages. Record at 000101. Further, at Morrissey s request, his criminal conviction was not introduced in evidence. *Id.* (Order 7/16/2002 ¶ 2). A more comprehensive jury instruction on punitive damages addressing issues Morrissey is now asserting was objected to by Morrissey and the court accepted Morrissey s more limited instruction on punitive damages and instructed the jury accordingly. Record at 000126; Instruction No. 26; Transcript at 499-500; see Record at 000082-83. On July 18, 2002, after a three day jury trial, the jury rendered a verdict in favor of Wycoff in the amount of \$40,000 in compensatory damages and \$1,000,000 in

punitive damages.

In a post-trial motion, Morrissey challenged only the issue of the quantum of punitive damages. The trial court denied the defendant's motion, and reduced the amount of the award of punitive damages to \$350,000.00 in accordance with § 8.01-38.1 of the Code of Virginia, and on August 27, 2002, entered judgment for \$40,000 in compensatory damages and \$350,000 in punitive damages.

STATEMENT OF THE FACTS

Morrissey cites an erroneously limited standard for review, claiming it proper to present facts based on testimony only on witnesses called by Wycoff. Petition at 4. According to established law, the Court must view the evidence in the light most favorable to the Plaintiff, the prevailing party at trial. *Poliquin v. Daniels* 254 Va. 51, 53, 486 S.E.2d 530, 532 (1997). Additionally, on review absent clear evidence to contrary in record, appellate court assumes trial court correctly applied law to facts. *See Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102, 105 (1995) *Asphalt Roads & Materials Co., Inc. v. Com., Dept. of Transp.*, 257 Va. 452, 459, 512 S.E.2d 804, 808 (1999).

On July 3, 1999, Morrissey, an attorney and former Commonwealth Attorney, Tr. 412-413 stated to Wycoff, I m going to kill you. I m going to beat your head in, Tr at 178. Accordingly, Morrissey attacked Wycoff, beating Wycoff's face and head with his fists, wearing a heavy ring. Tr. 61,178,184. Although Wycoff informed Morrissey, I do not want to fight you, Tr. 179, Morrissey continued to attack Wycoff. When Wycoff attempted to stop the onslaught of blows to his face by hugging Morrissey, Tr. 52-53, Morrissey knocked him down to

the ground, continued to savagely beat Wycoff in the face. Tr. at 184, 185. When Wycoff attempted to crawl away from Morrissey, by turning over from his back to his hands and knees, Morrissey continued to beat Wycoff in the face and head with his fists, Tr. 53, 476, and grabbed Wycoff's head by the hair and smashed his head into the corner of a brick wall. Tr. 185-186, 259.

Morrissey inflicted such fear and pain that Wycoff believed Morrissey was going to kill him. Tr. 186.

Wycoff did not strike, kick, punch or slap Morrissey. Tr. 220, 253, 254. At no time did Wycoff fight with Morrissey. Tr. 254. Wycoff made no aggressive moves towards Morrissey. Tr. 60. Wycoff pleaded with Morrissey, I don't understand why you're doing this to me, Joe. I'm your friend. I'm trying to help you. I am only telling you the truth. Tr. 56. The two defensive moves by Wycoff included an attempt to stop early fist blows by Morrissey by pushing Morrissey's hands back and a bear hug used in an attempt to avoid further blows to the face. Tr. 52-53, 247-250.

Although Morrissey claimed that Wycoff kicked him, he claimed at various times the kick to be to his right thigh, to his testicle, not to his testicle, to his groin, and not to his groin. Tr. 465, 468, 469, 470.

Although Morrissey produced photographs allegedly depicting scrapes, cuts and bruises he claimed Wycoff caused to him, Wycoff did not cause him any such injuries. See Photos; Tr. 220, 253, 254. Daphne Justin Anliker, the MCV ER Triage Nurse observed Morrissey shortly after he beat Wycoff and observed no cuts or bruises on Morrissey. Tr. 4, 5. Malcolm Wells, who observed Morrissey beating Wycoff, also observed that Morrissey did not have any cuts or

abrasions to his forehead or any nick to his ear. Tr. 60-61.

Not even Morrissey's elderly neighbor Ms. Cogbill supported Morrissey's claim that he received injuries from Wycoff depicted in the photographs, exclaiming, "Well he sure didn't look like that when I saw him that day." Tr. 345.

Once Morrissey became aware that his actions were witnessed, Morrissey attempted to perpetrate an elaborate cover up. He began by viciously spraying Wycoff down with a garden hose without regard for his open wounds, Tr. 58-59, 260, attempting to control the scene and the witnesses. Tr. 189, 191.

Although Wycoff wanted medical attention from St. Mary's hospital, Morrissey insisted on another course and drove him to MCV. Tr. 194, 458. He attempted to confuse or coerce Wycoff into adopting a fictional account, suggesting that Wycoff had been drinking and simply fallen. Tr. 196, 197, 216. At the hospital, Morrissey told the triage nurse that Wycoff had fallen. Tr. 470.

Morrissey's attempt to kill Wycoff failed, but he left Wycoff with severe injuries. Tr. 178. Wycoff was terrified and severely injured with wounds to his forehead, a fractured nose, gashes, cuts, and brain injuries Tr. 6, 121. Waller, M.D. video deposition. At the hospital, Wycoff's heart rate was exceptionally high and his respiratory rate was high. Tr. 6. It was only after the nurse took Wycoff from Morrissey's presence that Wycoff was able to tell the nurse that Morrissey inflicted the injuries upon him. Tr. 9. Years later, when Dr. Cifu examined Wycoff, he was still suffering back and neck symptoms related to the July 3, 1999 incident. Tr. 119.

Morrissey's malice towards Wycoff burned with murderous intent fueled by arrogance and pride. Morrissey had wanted Wycoff to do some work for him to be started immediately. Tr.

167. However, Wycoff informed Morrissey that he was committed to completing work he had undertaken for an attorney, that Morrissey felt was his subordinate, and he became incensed. Tr. 166-7. On July 3, 1999, when Morrissey discovered Wycoff at yet another job site for another subordinate after Wycoff had told him that he was too busy to work for Morrissey, Morrissey rushed at Wycoff screaming Liar, liar. Tr. 173-4; 476. Yet, fearing that somebody might be watching, Morrissey, stopped and went into the house. Determining that no witnesses were present, Morrissey then attacked Wycoff with the intent to kill him. Tr. 178.

Morrissey's attempt to cover up his actions continued through the trial, attempting to convince the jury that Wycoff had instigated a fight and that they had engaged in mutual combat. Tr. 454, 464. None of the injuries depicted in the photographs Morrissey claimed depicted his injuries allegedly caused by Wycoff existed until well after the incident. He didn't have them at the scene. Tr. 60-61. He didn't have them at the hospital. Tr. 482. He didn't have them when he visited Joanna Wycoff later that day. Tr. 525. See Tr. 345.

Morrissey showed no remorse. Morrissey is a person of substantial means. He testified that he owned properties, including a river property on the market for \$990,000.00, Tr. 485, Exhibit 21, a Sika Lane property, had interests in a building on Midlothian Turnpike, Tr. 486, and had sold his law building, Tr. 489. Morrissey volunteered no financial information to indicate that he was not a person of substantial means.

Although an instruction with greater detail addressing the very issues argued by Morrissey before this Court was offered by Wycoff¹, Morrissey objected to the instruction.

¹ Mr. Roberts: Judge, I have proffered this. If they have objected and it's on the record, then it can be pulled, but I put it in there because I believe that the due process issues actually entitle them to that, and I didn't want a punitive damage award thrown out....Tr. 500.

Morrissey rejected the instruction below and thereby waived the issues presented therein:

In determining whether to award punitive damages and the amount of the punitive damages you may consider the damages sustained and the amount of the compensatory award and the measurement of punishment required, the relationship between the amount of the compensatory and punitive damages, and the ability of the defendant to pay.

You may award punitive damages in the amount in your deliberate consideration you believe is appropriate to punish the defendant for acting in reckless or callous disregard of, or indifference to, the rights of others. You may also award punitive damages to deter both the defendant and others from acting similarly.

Jury Instruction No. 26 became the law of this case, when submitted by agreement of Morrissey. Record at 000129; Tr. 499 - 500; Record at 000127. That instruction provided:

If you find that the plaintiff is entitled to be compensated for his damages and if you further believe by the greater weight of the evidence that the defendant acted with actual malice toward the plaintiff or acted under circumstances amounting to a wilful and wanton disregard of the plaintiff's rights, then you may also award punitive damages to the plaintiff to punish the defendant for his actions and to serve as an example to prevent others from acting in a similar way.

If you award punitive damages, you must state separately on your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

The jury was properly instructed that their verdict must not be based in any way upon sympathy or bias. Instruction No. 24; Record at 000127.

Morrissey presented no evidence to the jury that he had been convicted by a jury in the Richmond Circuit Court of simple assault under Virginia Code Ann § 18.2-57, a Class 1 Misdemeanor, or that he had been fined \$2,500, but received no jail time. See Plaintiff's Exhibits 1-22, Defendant's Exhibits 1-14 and Transcript. Record No. 000153-155. In fact, Morrissey represented to the Court that he would offer no defense in mitigation of punitive damages, and moved to preclude the parties or witnesses from mentioning the criminal

proceedings against him together with his conviction. Record at 000101 (Order 7/16/02 ¶ 2)

The conscience of the court that heard the testimony and observed the trial proceedings was not shocked.

The punitive award is warranted in this case.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. The Punitive Damages Awarded In The Verdict Is Appropriate, The Product Of Fair and Impartial Deliberation By The Jury And Was Not Improperly Influenced By Bias And Prejudice.

In considering the Morrissey s Petition for Appeal, the court must take into account several principals, first, that Wycoff, the prevailing party is the favored party on review and second the sanctity of the jury s verdict. The trial court, as well as the appellate court, is required to consider the evidence in the light most favorable to the party that received the jury verdict, in this case the plaintiff. *Poulston v. Rock*, 251 Va. 254, 261, 467 S.E.2d 479, 483 (1996) *citing Caldwell v. Seaboard Sys. R.R.*, 238 Va. 148, 155, 380 S.E.2d 910, 914 (1989). If there is evidence, when viewed in that light, to sustain the jury verdict, then remitting the verdict is error. *Edmiston v. Kupsenel*, 205 Va. 198, 202-03, 135 S.E.2d 770, 780 (1964).

In response to a similar claim that the punitive award was excessive, the court in *Hamilton Development Co. v. Broad Roack Club, Inc.*, 248 Va. 40, 45, 445 S.E.2d 140, 144 (1994), stated,

Ordinarily, a damage award fixed by a jury after a properly conducted trial and approved by the trial judge is held to be inviolate against disturbance by the appellate court. *The Gazette, Inc. v. Harris*, 229 Va. 1, 48, 325 S.E.2d 713, 744, *cert. denied sub nom. Fleming v. Moore*, 472 U.S. 1032, 87 L. Ed. 2d 643, 105 S. Ct. 3513 (1985). **There is no rigid standard for measuring punitive damages; the amount of such an award is largely a matter within the discretion of the**

fact finder. *Philip Morris Inc. v. Emerson*, 235 Va. 380, 414, 368 S.E.2d 268, 287 (1988).

Hamilton Development Co. v. Broad Roack Club, Inc., 248 Va. at 45, 445 S.E.2d at 144.

(emphasis added).

The court went on to discuss the standard of appellate review which is instructive for the issues presented by the defendant's first two alternative motions.

In *Emerson*, we adopted the standard of appellate review for punitive damages that we previously had adopted in *Modaber v. Kelley*, 232 Va. 60, 348 S.E.2d 233 (1986), for compensatory damages. 235 Va. at 414, 368 S.E.2d at 287. In *Modaber*, we said that the appellate court must declare a verdict excessive and rule that the trial court had abused its discretion in refusing to set it aside "whenever the size of the award shocks the conscience of the Court and creates the impression that the jury was biased in favor of the plaintiff or prejudiced against the defendant or has misconceived or misunderstood the facts or the law, or if the award is so out of proportion to the plaintiff's [damages] as to suggest that it is not the product of a fair and impartial decision." 232 Va. at 69, 348 S.E.2d at 238.

Hamilton Development Co. v. Broad Roack Club, Inc., 248 Va. at 46, 445 S.E.2d at 144.

In considering the defendant's motion, the court must take special heed of the principle, applicable to any claim that a jury award is excessive, 'that the verdict of the jury will not be set aside unless it is so grossly excessive (or inadequate) as to indicate that the jury in rendering it were actuated by prejudice, passion or corruption, or that they have been misled by some mistaken view of the merits of the case.' " *WJLA-TV v. Levin*², 264 Va. 140, 163 (June 7, 2002) quoting *News Leader Co. v. Kocen*, 173 Va. 95, 103, 3 S.E.2d 385, 389 (1939) (quoting *Kroger Grocery Co. v. Rosenbaum*, 171 Va. 158, 164, 198 S.E. 461, 463 (1938)). The trial court is

²WJLA-TV dealt with defendant's claim that \$2 million in a defamation count bore no reasonable relationship to the actual loss suffered by defendant nevertheless the principals for reviewing the verdict are instructive. The court affirmed the award.

accorded a large measure of discretion regarding whether a verdict should be affirmed, set aside, or reduced because it saw and heard the witnesses. *Id. citing Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 300, 362 S.E.2d 32,45 (1987).

"The inadequacy or excessiveness of each verdict must be determined on the facts of the case...." *Williams Paving Co. v. Kreidl*, 200 Va. 196, 204, 104 S.E.2d 758, 764 (1958). The facts of the present case, when considered in the light most favorable to the plaintiff, demonstrate that the verdict was not excessive.

The purpose of punitive damages is to punish the wrongdoer and warn others. *Smith v. Litten*, 256 Va. 573, 578, 507 S.E.2d 77, 80 (1998). Punitive damages are awarded primarily for the protection of the public, as a punishment to defendant, and as a warning and example to deter him and others from committing like offenses. Courts have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993). If "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity." *Id.*, at 457.

"[N]onviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem v. Helm*, 463 U.S. 277, 292-293, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983). "The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 387 (1994). And finally, a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance. See *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948).

And finally, "[J]uries are presumed to follow their instructions." *Green v. Young* 571 S.E.2d 135, 139 (2002) citing *Zafiro v. United States*, 506 U.S. 534, 540, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) (quoting *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)); see also *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), ("assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision").

A. The size of the award should not shock the conscience of the Court nor does the size of the award create the impression that the jury was biased in favor of the plaintiff or prejudiced against the defendant.

The trial judge heard and saw the witnesses. The size of the award did not shock the conscience of the trial court, because it was warranted under the facts of this case. This is a damage award fixed by a jury after a properly conducted trial and approved by the trial judge and should be held to be inviolate against disturbance by this appellate court. *Hamilton Development Co. v. Broad Roack Club, Inc.*, 248 Va. at 45, 445 S.E.2d at 144.

Morrissey in his petition fails to base his petition upon the evidence viewed in the light most favorable to the prevailing party. This is not a case of a fistfight, (Petition at 6), not a case with no weapons involved, (*Id.*), not a case where both men inflicted injuries upon the other, (*Id.*), not a fight, (Petition at 8), not a case where both men participated, (*Id.*), not a case where there was no evidence of any extraordinary behavior by Morrissey..., (*Id.*), and is not as case where [Morrissey] did not brutalize the plaintiff. (*Id.*)

Viewed in the light most favorable to the plaintiff, Joseph D. Morrissey, a person with a violent past, threatened to kill Wycoff and then attempted to do so, beating him mercilessly and

causing severe injuries.

Willfully and in utter disregard of the rights Wycoff, Morrissey did not stop there. Morrissey concocted and maintained that he acted in self-defense after being kicked by Wycoff and further that Wycoff's injuries were from a fall rather than from the beating at Morrissey's hands. In furtherance of his willful, conscious disregard of the rights of Wycoff, Morrissey fabricated evidence of injuries to himself wounds not present when he beat Wycoff, not present while Wells was at the scene, not present when at MCV, and not present when Morrissey was seen by Wycoff's mother as he searched for Wycoff's sister, hoping to enlist others to prevent the truth from being told.

At no time did Morrissey accept responsibility for his conduct nor did he evince any remorse. Instead Morrissey was poised before the jury as an individual with a propensity for violence, likely to repeat his conduct going so far as to ask the jury to give him the green light to do so.

The defendant chose not to introduce any evidence in mitigation of the punitive damages. Evidence that Morrissey was convicted by a jury in the Richmond Circuit Court of simple assault under Virginia Code Ann § 18.2-57, a Class I Misdemeanor, and fined only \$2,500.00 is not evidence in this case. (Petition at 9-10). If the Court were to take judicial notice, then the Court would also note that the penalty for Malicious Wounding under Virginia Code Ann § 18.2-51 is five years to twenty, Virginia Code Ann §18.2-10(c), which is a criminal sanction for comparable conduct. The penalty for comparable conduct of attempted murder is similarly significant.

Under the facts of the case, a higher punitive award would be appropriate. That being the case, one cannot say that the size of the award should shock the conscience of the Court or that

the size of the award creates the impression that the jury was biased in favor of the plaintiff or prejudiced against the defendant.

B. The size of the award is not grossly excessive as to indicate that the jury in rendering it were actuated by prejudice, passion or corruption, or that they have been misled by some mistaken view of the merits of the case.

When considering the evidence in the light most favorable to the plaintiff, it is evident that the jury was deliberate and showed considerable restraint rather than being actuated by prejudice, passion or corruption. There is not even a suggestion by the defendant that the jury was misled by some mistaken view of the merits of the case.

Illogically, Morrissey praises the jury for its determination of compensatory damages, but suggests that the same jury that was not influenced by passion or prejudice in its deliberations over compensatory damages became so when evaluating punitive damages. The presumption that the jury reasonably, conscientiously, and impartially applying the standards that govern the decision, *Strickland*, 466 U.S. at 695, applies all the more in the case where even the defendant praises the deliberate action of the jury in awarding compensatory damages. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 959 (4th Cir.1996) (In *Evans*, the Fourth Circuit applied this same actor inference in an employment case when the plaintiff is hired and fired by the same individual and the termination of employment occurs within a relatively short time span following the hiring, "a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."

C. The punitive award is not so out of proportion to the plaintiff's damages as to suggest that it is not the product of a fair and impartial decision.

Viewed in the light most favorable to the plaintiff, Wycoff suffered severe physical injuries and trauma. Morrissey told Wycoff that he was going to kill him, and then attempted to do so. There is no rigid standard for measuring punitive damages; the amount of such an award is largely a matter within the discretion of the fact finder. Courts have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993). If "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity." *Id.*, at 457.

Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine. It is appropriate, therefore, to reiterate Court's rejection of a categorical approach sought by Morrissey.

Morrissey lines up numerous cases and without regard to the facts and simply applies a multiplier to the award of compensatory damages. See *Hamilton*, 10:1 ratio (Brief at 7); *Pouston v. Rock*, 251 Va. 254 (1996), 2.5:1; *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128 (1992) 1:4 reasonable; *Philip Morris Inc. v. Emerson*, 235 Va. 380 (1988) 6:1 reasonable, etc.

Morrissey ignores the accepted view that some wrongs are more blameworthy than

others. Thus, the United States Supreme Court stated that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem v. Helm*, 463 U.S. 277, 292-293, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983). "The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 387 (1994).

By contrast to Hamilton, where that defendant had trespassed on a fraction of an acre trespass on a .176-acre parcel, the court under the facts of that case held a \$200,000 punitive award was reasonable. Few rational people would contend that trespass on a .176-acre parcel holds a candle to the savage beating of the present case. It is the nature of Wycoff's injuries in relation to the size of the punitive award that is most important not simply a sterile comparison of multipliers. If the punitive award were less it would be cause for concern. Morrissey's conduct evinced indifference to or reckless disregard for the health and safety of others. A recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance. See *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948).

The punitive award is not so out of proportion to the plaintiff's damages as to suggest that it is not the product of a fair and impartial decision.

D. The size of the award is appropriate and not so large as to be destructive.

Evidence of a party's net worth is admissible because it is material to this purpose and is relevant to a determination of the size of the award and whether it is so large as to be destructive. *Id.*; *The Gazette, Inc. v. Harris*, 229 Va. 1, 50-51, 325 S.E.2d 713, 746-47, cert. denied sub nom. *Fleming v. Moore*, 472 U.S. 1032, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985). While evidence of net

worth is relevant, the appropriate amount of a punitive damage award can be established by other evidence, and the lack of evidence of the wrongdoer's net worth does not of itself defeat the punitive damage award. *Flippo v. CSC Associates III, L.L.C.*, 262 Va. 48, 58, 547 S.E.2d 216, 222 (2001).

Defendant claims that viewing the evidence in the light most favorable to Morrissey showed an individual with an equity position of \$530,000.00. Petition at 12. Defendant did not put into evidence his net worth. Viewed in the light most favorable to the plaintiff, Morrissey's net worth is significant. One can not fault plaintiff with failing to put into evidence information that he does not have. Nothing precluded Morrissey from testifying as to his net worth. The financial information regarding Morrissey indicated that Morrissey, a single man without any dependents, has significant financial means, including multiple properties, the ability to travel between continents, a successful career as prosecutor and an attorney with subordinates and partners.

There is no evidence that the punitive award is so large as to be destructive in this case.

E. The size of the award serves the purpose of punitive damages--Punitive damages are awarded primarily for the protection of the public, as a punishment to defendant, and as a warning and example to deter him and others from committing like offenses.

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981). Exemplary damages imposed on a defendant should reflect "the enormity of his offense." *Day v. Woodworth*, 54 U.S. 363, 13 HOW 363, 371, 14 L. Ed. 181 (1852).

Based upon the testimony and demeanor of Morrissey in the present case, one wonders whether the size of this punitive award is large enough to serve as an adequate warning and example to deter Morrissey from committing like offenses. Anything less would fail to serve the purpose of punitive damages. Morrissey demonstrated no remorse.

That Morrissey should be punished is irrefutable. Without the award, the public would not be protected. In a day and time where victims are blamed, as Morrissey attempted to do in this case, a clear warning and example to deter Morrissey and others from committing like offenses is imperative. The men and women of the Henrico community faithfully fulfilled their role as fact finder and determined the amount of the punitive award in a deliberate fair and impartial fashion, a matter largely within their discretion.

II. **Morrissey waived consideration of the relationship between the amount of the compensatory and punitive damages and the ability of the defendant to pay by objecting to the proffered jury instruction directing the jury to consider those issues and agreeing on Instruction No. 26, by failing to introduce any evidence of Morrissey's net worth and by representing to the court that it would offer no defense in mitigation of punitive damages.**

When a party proffers or agrees to an instruction which is contrary to a position previously argued during trial, the agreed instruction becomes the law of the case, and the party is deemed to have waived its previous objection. *WJLA-TV v. Levin* 264 Va. 140, 159, 564 S.E.2d 383, 394 (Va., 2002) citing, *T.L. Garden & Associates v. First Savings Bank of Virginia*, 262 Va. 28, 31, 546 S.E.2d 705, 706 (2001).

Morrissey complains in his petition for appeal that the jury failed to adequately consider the relationship between the amount of the compensatory and punitive damages and the ability of the defendant to pay, after objecting to the very jury instruction that would have directed them to do so. By objecting to the instruction and agreeing upon the punitive instruction given, Morrissey has waived these issues.

Notwithstanding and without waiving the waiver argument, the verdict offends neither principle.

Morrissey represented to the court below that he would offer no defense in mitigation of punitive damages, and he should not be permitted to do so here.

CONCLUSION

Under the facts of this case, the punitive damages awarded are proper. The trial judge heard and saw the witnesses. The size of the award did not shock the conscience of the trial court, because it was warranted under the facts of this case. Morrissey, told Wycoff that he was going to kill him, and attempted to kill him. This is a damage award fixed by a jury after a properly conducted trial and approved by the trial judge and should be held to be inviolate against disturbance. Wherefore, respondent Wycoff prays that the petition for appeal be denied and that Wycoff be awarded his costs.

Garien Wycoff

By: _____

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CERTIFICATE

I hereby certify that a true copy of the foregoing was served via U.S. Mail, this 17th day of December, 2002 to:

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