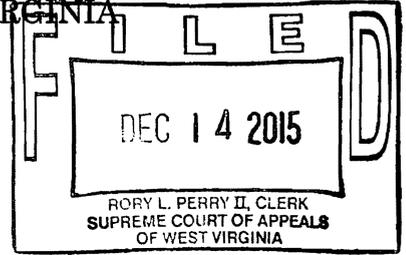


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0825



ASHLEY GUNNO,

Petitioner,

v.

KEVIN McNAIR,

Respondent.

PETITIONER'S BRIEF

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INTRODUCTION

In this case, Defense Counsel conceded at trial that Plaintiff was injured and was entitled to some damages as a proximate result of the Defendant's conduct: "Ms. Gunno-Comer is seeking damages, *some of which she deserves*, from Mr. McNair, and some of which, the evidence will show, shouldn't be charged to Mr. McNair. . . . *We think that you can give her compensation for this. The evidence will show you that something happened to her in the accident.*"¹ The evidence of at least some injury proximately caused by the Defendant was not in dispute. Because the Jury failed to award at least some damages to the plaintiff, the verdict was against the clear weight of the evidence and the Circuit Court erred in refusing to grant a new trial.

¹ JA:160, 167 (emphasis added).

ASSIGNMENT OF ERROR

Whether the Circuit Court erred in denying Plaintiff's Motion for New Trial following a jury finding that Plaintiff was injured as the proximate result of Defendant's admitted negligence but awarding no damages when even the Defendant conceded that Plaintiff was entitled to some award of damages.

STATEMENT OF THE CASE

This case arises out of an automobile accident that occurred on September 13, 2011.² On June 25, 2012, Plaintiff/Petitioner Ashley D. Gunno filed suit in the Circuit Court of Kanawha County alleging that she was injured by the negligence of Defendant/Respondent.³ Following discovery, Defendant admitted liability for the accident.⁴ A three-day trial on damages was set and commenced in the Circuit Court of Kanawha County on May 6, 2014.⁵ Following the presentation of evidence, the jury unanimously concluded that “the Plaintiff Ashley D. Gunno was injured as a proximate result of the accident of September 13, 2011.”⁶ Notwithstanding this finding, the jury awarded \$0.00 in damages. Judgment was entered on the verdict on May 29, 2014.⁷ On June 9, 2014, the Plaintiff timely filed a motion for a new trial.⁸ Following a hearing on December 9, 2014, Circuit Judge Webster denied the post-trial motion by order entered July 28, 2015.⁹ This appeal followed.

² JA:2 at ¶6.

³ JA:3.

⁴ JA:819.

⁵ JA:12.

⁶ JA:762.

⁷ *Id.*

⁸ JA:767.

⁹ JA:818.

Testimony from Plaintiff and Her Husband

The testimony at trial provided undisputed evidence that Plaintiff Gunno suffered a painful injury as a result of the accident. Much of that evidence came from Ashley Gunno herself.

On September 13, 2011, Ashley Gunno was driving to work from her home in Alum Creek to CAMC Memorial in Kanawha City.¹⁰ As she approached the intersection of Route 119 and Oakwood Road, Ms. Gunno was traveling between 45 and 50 miles per hour. As she proceeded through the intersection with the traffic light green, she observed a van turn in front of her towards Oakwood Road.¹¹ She testified that she tried to apply her brakes, but had no time to avoid the collision.¹²

Ms. Gunno testified that impact shattered glass and she was forced to shut her eyes because she was terrified that the glass would end up in them. Ms. Gunno next recalled being jerked everywhere in her car and fearing that she was going to roll over. The impact was so fierce it caused Ms. Gunno to spin around and make contact with a 3rd vehicle sitting at the Oakwood stop light.¹³ Following the accident, Ms. Gunno was hysterically crying from the pain and fear of being in a serious traffic accident.¹⁴

¹⁰ JA:183.

¹¹ JA:184.

¹² *Id.*

¹³ JA:184-185.

¹⁴ JA:185.

As a result of the collision, the vehicles both sustained extremely heavy damage. (see photos) Trial Exhibits 1 and 2) The vehicle driven by the Defendant McNair was totaled in the accident due to the heavy physical damage. All of the contents of Ms. Gunno's console spilled out into the vehicle. Her work bag was spilled into the floorboard. The rearview mirror in her vehicle broke loose, and her head hit the left side (drivers) window during the collision. Due to the significance of the impact, the contents of her vehicle were scattered in the car.¹⁵

Following the collision, 911 was notified and paramedics responded. Ms. Gunno received medical attention at the scene of the accident. While being evaluated in her driver's seat, Ms. Gunno testified that she advised the paramedic that her seatbelt caused her work badge to be pressed into her chest so hard it was causing her "horrible chest pain."¹⁶ Due to the paramedics' and firefighters' fear that her air bag was going to deploy, they extracted Ms. Gunno from the front seat of the vehicle. At that time, she experienced excruciating neck pain, and the paramedics applied a C-collar in an effort to prevent further injury.¹⁷

Ms. Gunno was transported via EMS to Charleston Area Medical Center – General Division. In the emergency room, Ms. Gunno testified that the doctors performed a full physical evaluation and a battery of tests. She underwent x-rays, a

¹⁵ JA:187-188.

¹⁶ JA:190.

¹⁷ JA:190-191.

CT scan, and was given medication to help with the pain she was experiencing.¹⁸ Ms. Gunno testified that in the emergency room, she was hurting all over, but her neck was by far the worst pain. She testified when the doctor moved her legs, she experienced both back pain and neck pain so intense she was unable to describe it and put it in words.¹⁹

Following her discharge, Ms. Gunno returned home. Over the next few days, Ms. Gunno testified she was “so sore...she felt like she had been beat from head to toe.” She was not able to sleep.²⁰ The first night following the accident, she awoke in the middle of the night and had radiating pain that went down the backs of both of her arms. She described it as a “burning” like a “thousand bees stinging her up and down the backs of her arms” and it was shooting out of her pinkies.²¹

She testified that she slept in a recliner for the little bit of time she was able to sleep. She summed up the pain and testified that she “couldn’t move”, was “miserable”, anything she did including getting up to go to the bathroom caused pain.²²

¹⁸ JA:191.

¹⁹ JA:191-192.

²⁰ JA:192.

²¹ JA:192-193.

²² JA:193.

Prior to the September 2011 accident, Ashley Gunno had not been in any other accidents; indeed, she testified she was in great health - with no prior neck or back injuries.²³ Ms. Gunno had graduated high school from Capital High and obtained an Associate Degree in Nursing from West Virginia State University in 2008. She then obtained a Bachelors of Science and Nursing in 2010, and at the time of trial was pursuing a Masters Degree of Science and Nursing to be a family nurse practitioner.²⁴ Following the accident, Ms. Gunno did not immediately return to work. She testified that she “could barely walk, let alone have to be responsible for caring for and being in charge of someone’s life.”²⁵

Following her emergency room discharge, Ms. Gunno first treated with Dr. Matthew Walker, an orthopedic specialist at Neurological Associates in Charleston. At the time of her presentation to Dr. Walker, Ms. Gunno testified she was unable to move her neck without agonizing pain. She had intermittent burning, radiating pain down both arms, and back pain.²⁶ Ms. Gunno testified that Dr. Walker advised her not to return to work for one (1) month as a result of her pain and injuries.²⁷

²³ JA:181-182.

²⁴ JA:173.

²⁵ JA:193.

²⁶ JA:194.

²⁷ *Id.*

While treating with Neurological Associates in Charleston, Ms. Gunno testified that she received physical therapy from therapist Leslie Johnson. Ms. Johnson performed manipulations on Ms. Gunno's neck, heat therapy, electrical stimulation, weight lifting, stretching, etc.²⁸

Ms. Gunno was provided a TENS unit (a device used to send electrical pulses to relieve pain) to use at home. Ms. Gunno testified that she continued to occasionally use the TENS unit to relieve pain at the time of trial.²⁹ The TENS unit, however, only provided Ms. Gunno temporary relief.³⁰

From a surgical standpoint, Ms. Gunno was advised there was nothing that could be done and she was discharged from Neurological Associates.³¹

Due to the pain she was still experiencing and her inability to return to a physically demanding job, Physical Therapist Johnson advised Ms. Gunno to seek out a chiropractor and resume treatments.³² Ms. Gunno testified that she sought chiropractic care on the recommendation of Physical Therapist Johnson.³³

²⁸ JA:195.

²⁹ JA:196.

³⁰ *Id.*

³¹ JA:196-197.

³² JA:197.

³³ *Id.*

Following her discharge, Ms. Gunno presented to Dr. Jay McClanahan, a Chiropractor with the Dr. J Chiropractic and Wellness Center located in Nitro, West Virginia. Ms. Gunno testified that she presented with symptoms of neck pain that would radiate down into her arms.³⁴

She described the neck pain to the jury as “burning, aching, throbbing, pain.”³⁵ She also described back pain, but her neck pain was so intense that was the initial focus of treatment.³⁶ Ms. Gunno testified the pain was “constant” for the first few months and that normal household activities like running a vacuum would make it worse and would cause radiating pain. Ms. Gunno testified that when she presented to Dr. McClanahan she had not slept through the night and as of the time of trial would still wake up in pain and would have to reposition herself.³⁷

At the time Ms. Gunno initiated treatment with Dr. McClanahan, he ordered her to remain off work for three to four weeks and indicated he would reevaluate her physical condition at that point. Ms. Gunno testified that Dr. McClanahan agreed that due to the physically demanding nature of her job, she could not perform it.³⁸

³⁴ JA:198.

³⁵ *Id.*

³⁶ *Id.*

³⁷ JA:199.

³⁸ JA:200.

Ms. Gunno initially treated with Dr. McClanahan from October 2011 until the spring of 2012.³⁹ Ms. Gunno testified during her treatment with Dr. McClanahan (around December 2011) she resumed working in partial shifts in four hour increments.⁴⁰ She was on restricted duty and was not allowed to lift or pull up on any patients.⁴¹ Following approximately thirty (30) treatments with Dr. McClanahan, Ms. Gunno testified that she returned to work full time – 12 to 15 hour shifts.⁴²

She described the return to full duty as “horrible” but testified she had very good co-workers that would help her in the care and treatment of her patients. While her co-workers assisted, Ms. Gunno testified she was still required to perform CPR on patients and her quality of CPR diminished following the accident due to her pain, inability to maintain pressure on patients, and lack of stamina.⁴³

Following her return to full time work, Ms. Gunno testified that she maintained her home therapy program and the use of her TENS unit. She testified

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² JA:201-202.

⁴³ JA:202.

the pain gradually returned and was so intense she could not take it anymore.⁴⁴ At that point, she presented to a Health Plus for an evaluation.⁴⁵

Ms. Gunno next presented to the Holzer Clinic and was evaluated and treated by Dr. Marietta Babayev.⁴⁶ Ms. Gunno presented with continuing neck and back pain that continued following her increased duties at work. She described “constant lower back, aching, nagging, throbbing pain” that would send radiating pain around her pelvis and down her right leg, pain that she had never experienced before the accident.⁴⁷

Dr. Babayev treated Ms. Gunno with trigger point injections. Initially Ms. Gunno testified she was treated with nine (9) injections around her shoulder blade and up into the base of her skull that she described as “awful.”⁴⁸ She described receiving immediate relief following the injections, but the pain would eventually return.⁴⁹

Following treatment with Dr. Babayev, Ms. Gunno testified she returned to treatment with Dr. McClanahan to help her with pain relief and to increase her range

⁴⁴ JA:203.

⁴⁵ *Id.*

⁴⁶ JA:203-204.

⁴⁷ JA:204-205.

⁴⁸ JA:205.

⁴⁹ JA:205-206.

of motion. She testified that treatment with Dr. McClanahan “helped tremendously.” Ms. Gunno’s second round of treatment with Dr. McClanahan consisted of 10-15 treatments that she ultimately stopped due to the cost of treatment.⁵⁰

At the time of Trial in May 2014, Ms. Gunno testified that she continued to have flare-ups of pain her neck and back.⁵¹ She described the neck pain as rare, but that it depended on her level of activities.⁵² She described the flare-ups as burning pain that would radiate down into her arms sometimes making it painful to move.⁵³

Ms. Gunno further testified as she sat on the witness stand, she had lower back pain that did not exist prior to the accident.⁵⁴

She described the pain as “excruciating” that would cause her pain at work and would keep her from doing a lot of activities that she previously enjoyed.⁵⁵ Some of the other activities she described as painful were “carrying school books”, “standing up for long periods of time”, “squatting” to get clothes out of the dryer among other things.⁵⁶

⁵⁰ JA:207.

⁵¹ JA:208.

⁵² *Id.*

⁵³ JA:208.

⁵⁴ JA:209.

⁵⁵ *Id.*

⁵⁶ JA:209-210.

Ms. Gunno also described the three months she missed work as “awful.”⁵⁷ She testified that she enjoyed being “productive” and did not like sitting at home missing work.⁵⁸

In January 2014, Ms. Gunno’s son Richard was born. Ms. Gunno described to the jury pain she experienced carrying him around, carrying his car seat, playing with him in the floor and picking him up two to three times every night.⁵⁹ She described feeling “sad” as a first time mom because of the pain she experienced trying to do simple things with her son.⁶⁰

Ms. Gunno’s testimony was confirmed by the testimony of her husband, Rick Comer. Mr. Comer was at home on September 13, 2011 getting ready for work when he learned of the accident.⁶¹ He then drove to the scene and observed a “massive wreck that I thought for sure someone was dead in.”⁶²

Mr. Comer then proceeded to hospital. He described the scene at the hospital as very scary seeing Ms. Gunno in that type of an environment with a neck brace on, pushed up around her face.⁶³

⁵⁷ JA:213.

⁵⁸ *Id.*

⁵⁹ JA:213-214.

⁶⁰ JA:214.

⁶¹ JA:376.

⁶² JA:378.

⁶³ JA:381.

Mr. Comer confirmed much of Ms. Gunno's testimony. He testified that she was very sore and that she lived in a recliner for the first three days following the accident. Mr. Comer testified that he helped her to the bathroom and up and down in the chair.⁶⁴ Mr. Comer testified that Ms. Gunno required medication to sleep following the accident.⁶⁵

Over the next three (3) months Mr. Comer confirmed that, while Ms. Gunno was getting some mobility back, but she was constantly sore and pretty much had to stay in the house.⁶⁶

When she went back to work on a limited schedule, it was hard on her. The job calls for a lot of physical fitness to move patients around and it would cause her pain.⁶⁷ At one point Ms. Gunno called Mr. Comer and told him she was quitting her job due to the accident. She had a patient that she couldn't help and she had to scream for co-workers to help her.⁶⁸

Mr. Comer confirmed that at the time of trial, Ms. Gunno was still having flare-ups. Her back hurt quite a bit and the pain was pretty constant.⁶⁹

⁶⁴ JA:382.

⁶⁵ JA:383.

⁶⁶ JA:383.

⁶⁷ JA:384.

⁶⁸ *Id.*

⁶⁹ JA:385.

Mr. Comer testified that when Ms. Gunno has flare-ups, she's not very happy as the pain was aggravating to her. Using a heating pad and having to lay down and sleep a certain way also bothered her.⁷⁰ She occasionally had nights she could not sleep.⁷¹ She experienced crying spells.⁷² Mr. Comer confirmed that Ms. Gunno's symptoms presented when she tried to become more active.⁷³

After the accident, Ms. Gunno and her husband, Mr. Comer, rarely participate in the hobbies they had prior to the accident such as camping, riding their side-by-side, bowling, etc.⁷⁴ Mr. Comer confirmed that Ms. Gunno did not have pain or any problems participating in an active life prior to the accident.⁷⁵

Expert Testimony

The evidence of Ms. Gunno's injuries was not limited to lay witnesses. The jury heard evidence from Dr. Jay McClanahan. Dr. McClanahan testified that he treated Ms. Gunno for the accident over two courses of treatment: first from

⁷⁰ JA:385-386.

⁷¹ JA:386.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ JA:387-388.

⁷⁵ JA:377.

10/31/2011 – 3/2/2012 and secondly from 1/6/2012 – 4/4/2013.⁷⁶ Initial complaints: neck pain; radiating pain in arms; some low back pain.⁷⁷

His examination Ms. Gunno showed decreased range of motion and muscle spasms at C5, C6, L3, L4, L5.⁷⁸ Dr. McClanahan testified that he could feel spasms in both her cervical & lumbar spine.⁷⁹ Based on this diagnosis her condition necessitated approximately 30 treatments in her first course of treatment.⁸⁰ Dr. McClanahan testified that upon completion of first course of treatment in March of 2012 she had regained some of her decreased range of motion and her level of pain was generally down, but still there. She was still having spasms: her March 2, 2012 physical evaluation showed spasms at multiple levels in both her lumbar and cervical spine.⁸¹

Dr. McClanahan testified that Ms. Gunno was not fully recovered upon discharge from the first course of treatment on March 20, 2012.⁸² At that time she

⁷⁶ JA:297.

⁷⁷ JA:299.

⁷⁸ JA:306.

⁷⁹ JA:307.

⁸⁰ JA:308.

⁸¹ JA:310.

⁸² JA:315.

still had moderate pain; flare ups; pain upon standing; difficulty sleeping due to pain⁸³ along with sleep disturbance of two hours per night daily.⁸⁴

Dr. McClanahan testified that Ms. Gunno returned for further treatment on November 6, 2012, presenting with the same complaints as the last time of pain in her back and neck.⁸⁵ On November 15, 2012 he noted pain on “standing and sitting.”⁸⁶ Dr. McClanahan opined that this was not normal as a patient should be able to sit, stand and bend without pain even if it is moderate pain.⁸⁷

Dr. McClanahan testified that in his physical exam of Ms. Gunno on February 7, 2013 he diagnosed “trigger points” which are objective indicators of pain and injury that, in Ms. Gunno’s case are “very painful.”⁸⁸

He testified that while Ms. Gunno’s cervical spine largely got better, her lumbar spine continued to cause problems.⁸⁹ Upon discharge from the second course of treatment Dr. McClanahan physically felt spasms in Ms. Gunno’s lumbar spine.⁹⁰

⁸³ JA:465-466.

⁸⁴ JA:466-467.

⁸⁵ JA:468.

⁸⁶ JA:470.

⁸⁷ JA:471.

⁸⁸ JA:472-473.

⁸⁹ JA:474.

⁹⁰ JA:475-476.

He noted for the jury that at that time she also was still having pain in the low back that affected her ADLs.⁹¹

Based on his hands on treatment of Ms. Gunno, Dr. McClanahan offered opinions that Ms. Gunno suffered a permanent injury from the accident; that she will not regain 100% recovery; that she continues to experience pain; and that there is nothing further she can do to prevent flare-ups other than alter life.⁹²

Dr. McClanahan was not the only expert to testify. The jury also heard from Dr. Bruce Guberman. Dr. Guberman *was hired by defense counsel* to perform an “independent” medical evaluation of Ms. Gunno. Dr. Guberman physically evaluated Ms. Gunno on one occasion.⁹³ Dr. Guberman also sat through and heard all the testimony at trial.

By the time of trial, Dr. Guberman testified he had reviewed over 700 pages of Ms. Gunno’s medical records going back five years prior to the motor vehicle accident in formulating his opinions on the case.⁹⁴ Dr. Guberman admitted he found no evidence of pre-existing lumbar back pain or pre-existing cervical/neck pain.⁹⁵

⁹¹ JA:478.

⁹² JA:479-480.

⁹³ JA:564-565.

⁹⁴ JA:557.

⁹⁵ *Id.*

During Dr. Guberman's one evaluation of Ms. Gunno on May 29, 2013, he testified that Ms. Gunno was still experiencing persistent cervical and lumbar strains from the accident.⁹⁶ At the time of trial (967 days post-accident), Dr. Guberman admitted that Ms. Gunno still had persistent neck and back strains and symptomology in those areas that he related to the accident to a reasonable degree of medical probability.⁹⁷

Dr. Guberman's testimony and opinion was that Ms. Gunno's neck injury was solely attributable to the motor vehicle accident.⁹⁸ Dr. Guberman further testified to a reasonable degree of medical probability that the multiple neck trigger point injections were related to the accident.⁹⁹

Dr. Guberman told the jury that soft tissue injuries such as the ones experienced by Ms. Gunno are real and cause pain.¹⁰⁰ Dr. Guberman testified that he found no evidence of degenerative issues in Ms. Gunno's neck.¹⁰¹ Indeed, Dr. Guberman told the jury that Ms. Gunno's neck injury was solely related to accident.¹⁰² Dr. Guberman admitted that soft tissue injuries such as Ms. Gunno's can

⁹⁶ JA:567-568.

⁹⁷ JA:572.

⁹⁸ JA:559.

⁹⁹ *Id.*

¹⁰⁰ JA:562.

¹⁰¹ JA:572.

¹⁰² JA:573.

last the rest of her life.¹⁰³ He also testified that her decreased range of motion and muscle spasms were both objective indicators of her injuries.¹⁰⁴

Dr. Guberman had observed the trial testimony of Dr. McClanahan.¹⁰⁵ Dr. Guberman testified Dr. McClanahan's two rounds of treatments with Ms. Gunno were reasonable and necessary to treat her injuries.¹⁰⁶ Dr. Guberman further admitted that Dr. McClanahan helped Ms. Gunno get better.¹⁰⁷

Dr. Guberman further testified that Ms. Gunno suffered a decrease in her overall quality of life as a result of the accident and the injuries she sustained.¹⁰⁸ Indeed, Dr. Guberman, *the Defendant's IME doctor*, admitted to the jury that:

- the flare-ups that Ms. Gunno testified to at trial that she continued to experience required Ms. Gunno to change the way she lives her life;¹⁰⁹
- Ms. Gunno's hobbies, activities, and work duties would cause her pain following accident;¹¹⁰ and

¹⁰³ JA:574.

¹⁰⁴ JA:582.

¹⁰⁵ JA:588.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ JA:588-589.

¹⁰⁹ JA:589.

¹¹⁰ *Id.*

- Ms. Gunno may never get back to where she was prior to the accident.¹¹¹

As noted above, the jury agreed with the undisputed evidence that Ms. Gunno was injured as a proximate result of the accident. However, notwithstanding this substantial testimony of Ms. Gunno's injuries, the jury refused to award her any compensation whatsoever for past and/or future physical and mental pain and suffering and reduced ability to enjoy life. This verdict was contrary to the clear weight of the testimony (much of which was unopposed) establishing serious compensable injuries.

The Defendant and the Circuit Court placed great emphasis on the fact that Plaintiff chose not to seek recovery for her economic losses for her lost wages and medical bills. This decision may have led to the jury's confusion. However, the record established at trial (as even Defense Counsel admitted) established entitlement to at least some damages. The law does not require proof of economic loss as a prerequisite to the recovery of non-economic damages.

A new trial is clearly warranted in this case.

¹¹¹ JA:592.

SUMMARY OF ARGUMENT

In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. On appeal of a damage issue that has been tried by a jury, the allegation of inadequate damages should be viewed by considering the evidence most strongly in favor of the defendant. However, even under this restrictive standard, a new trial is the appropriate resolution where a jury verdict is inadequate because it does not include elements of damage which are specifically proved with undisputed evidence including a substantial amount as compensation for injuries and the consequent pain and suffering.

In this case the clear weight of the evidence presented at trial is that Plaintiff Gunno was injured in and experienced pain and suffering following the September 13, 2011, motor vehicle accident. This was established in uncontroverted evidence from Plaintiff, Plaintiff's husband, Dr. Jay McClanahan, one of Plaintiff's treating medical providers, and Dr. Bruce Guberman, the defense medical expert. In addition to testimony from the above-referenced witnesses, defense counsel admitted in his opening statement and closing argument that Plaintiff Gunno was entitled to compensation for her injuries. Despite the admissions and testimony, the jury awarded no money for the pain and suffering experienced by Plaintiff Gunno

following the accident where she had no liability. This is a prime example of a civil miscarriage of justice justifying a new trial.

* * * *

In denying the motion for a new trial, the Circuit Court relied heavily on the fact that the Plaintiff opted not to put the amount of the medical bills or her lost wages into evidence. In using this argument to distinguish the cases noted above requiring a new trial the Circuit Court improperly conflated lack of evidence as to the pecuniary value of the medical expenses into an illusory dispute over whether the necessity of the treatment and lost work time were undisputed.

Furthermore, the cases relied on by the Defendant and the Circuit Court involved disputed factual records unlike the record presented at trial here. Where like here, evidence of injury and causation is uncontroverted, the evidence, even viewed most strongly in favor of the defendant, requires a finding that the jury award of zero damages is inadequate.

Finally, the fact that the jury did not have before it the amount of the medical bills or the lost wages is completely irrelevant. There is no question on this record that the medical treatment itself is in the record and undisputed as to necessity and causation. That fact that dollar amounts were not attached to the treatment does not permit the jury to awarding no damages for the noneconomic losses.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument. Pursuant to Revised Rule of Appellate Procedure 20, Petitioner believes that this case involves a matter of first impression over the standard to be applied for granting a new trial when a jury fails to award noneconomic damages to a plaintiff, who having clearly received medical treatment for injuries proximately caused by a defendant chooses to not seek recovery for the costs of that treatment. Resolution of this question is important as more and more plaintiffs are choosing to try cases in this manner.

Alternatively, this case is appropriate for a Rule 19 argument under Rule 19(a)(1), Rule 19(a)(2), and/or Rule 19(a)(3). Under either circumstance, a memorandum decision is not appropriate as this case does not present such a limited circumstance where reversal of the circuit court can be accomplished via a memorandum decision as the factual record is substantial. *See Rule 21(d)*.

ARGUMENT

I. An order denying a new trial is subject to review for abuse of discretion.

The law regarding the standard of review applicable to an order granting or denying a motion for a new trial is clear:

“As a general proposition, we review a circuit court's rulings on a motion for a new trial under an abuse of discretion standard. *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994) ... Thus, in reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.”¹¹²

II. The circuit court abused its discretion in refusing to grant Plaintiff a new trial when the undisputed evidence established proximate causation and substantial damages.

The standard for granting a motion for a new trial based on inadequate damages is also well established:

In syllabus point three of *Walker*, we held as follows:

In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.

In syllabus point two of *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 461 S.E.2d 149 (1995), we explained:

¹¹² *Williams v. Charleston Area Med. Ctr.*, 215 W.Va. 15, 18, 592 S.E.2d 794, 797 (2003) (quoting *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995)); see also *Big Lots Stores, Inc. v. Arbogast*, 228 W. Va. 616, 619, 723 S.E.2d 846, 849 (2012) (quoting *Williams*).

“In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.’ Syl. pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984),” Syl. Pt. 6, *McClung v. Marion County Comm’n*, 178 W.Va. 444, 360 S.E.2d 221 (1987).¹¹³

On appeal of a damage issue that has been tried by a jury, the allegation of inadequate damages should be viewed by considering the evidence most strongly in favor of the defendant.¹¹⁴

Thus, even under this restrictive standard, a new trial is the appropriate resolution where a jury verdict is inadequate:

In a civil action for recovery of damages for personal injuries in which the jury returns a verdict for the plaintiff which is manifestly inadequate in amount and which, in that respect, is not supported by the evidence, a new trial may be granted to the plaintiff on the issue of damages on the ground of the inadequacy of the amount of the verdict.¹¹⁵

A verdict’s adequacy is tested by as follows:

“ ‘Where a verdict does not include elements of damage which are specifically proved in uncontroverted amounts and a substantial amount as compensation for injuries and the consequent pain and suffering, the verdict is inadequate and will be set aside. *Hall v. Groves*, 151 W.Va. 449, 153 S.E.2d 165 (1967).’ *King v. Bittinger*, 160 W.Va. 129, 231 S.E.2d

¹¹³ *Marsch v. Am. Elec. Power Co.*, 207 W. Va. 174, 181, 530 S.E.2d 173, 180 (1999).

¹¹⁴ *Lenox v. McCauley*, 188 W.Va. 203, 209, 423 S.E.2d 606, 612 (1992), we reiterated that where a damage issue has been tried by a jury, the allegation of inadequate damages should be weighed on appeal by *Id.* at 209, 423 S.E.2d at 612.

¹¹⁵ *Syl. pt 3, Biddle v. Haddix*, 154 W.Va. 748, 179 S.E.2d 215 (1971).

239, 243 (1976).” Syllabus Point 1, *Kaiser v. Hensley*, 173 W.Va. 548, 318 S.E.2d 598 (1983).¹¹⁶

The clear weight of the evidence presented at trial is that Plaintiff Gunno was injured in and experienced pain and suffering following the September 13, 2011, motor vehicle accident. The failure of the jury to award any damages after finding proximate cause clearly meets this standard.

As noted above, in addition to testimony from the Plaintiff regarding her injuries and extensive medical treatment(s), testimony was also offered from Richard Comer (Plaintiff’s husband), Dr. Jay McClanahan (one of Plaintiff’s treating medical providers), and Dr. Bruce Guberman (the defense medical expert). In addition to testimony from the above-referenced witnesses, defense counsel admitted in his opening statement and closing argument that Plaintiff Gunno was entitled to compensation for her injuries. Despite the admissions and testimony, the jury awarded no money for the pain and suffering experienced by Plaintiff Gunno following the accident where she had no liability. This is a prime example of a civil miscarriage of justice justifying a new trial.

Thus, in *Payne v. Gundy*, the plaintiff sued the defendant for assault and battery.¹¹⁷ The circuit court found liability and the jury awarded punitive damages, but no compensatory damages. The plaintiff moved for a new trial pursuant to Rule

¹¹⁶*Marsch*, 207 W. Va. At 180, 530 S.E.2d at 179 (quoting *syl. pt 2; Maynard v. Napier*, 180 W.Va. 591, 378 S.E.2d 456 (1989)).

¹¹⁷196 W. Va. 82, 468 S.E.2d 335 (1996).

59 relating to the adequacy of the verdict. The court denied plaintiff's motion and an appeal followed. On appeal this Court overturned the lower court's decision noting this Court has "consistently held that where there is uncontroverted evidence of damages and liability is proven, a verdict not reflecting them is inadequate."¹¹⁸

Similarly, in "a jury verdict awarding no damages cannot stand where the preponderance of the evidence, or, as in this case, the uncontradicted evidence, shows injury of a substantial nature. A verdict of the jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case."¹¹⁹

In the Gunno case, it is uncontroverted that Plaintiff Gunno did not have any fault in the September 13, 2011 accident. It is uncontroverted that Plaintiff Gunno was injured in the accident. It is uncontroverted that Plaintiff Gunno received medical treatment for her injuries following the accident. It is uncontroverted that Plaintiff Gunno sustained pain and suffering following the accident proximately caused by the accident. Last, it is uncontroverted by counsel for the defendant that Ashley Gunno is entitled to compensation for her past pain and suffering. Despite the uncontroverted evidence and admissions of defense counsel, the jury awarded no

¹¹⁸*Id.* (citing *Raines v. Thomas*, 175 W. Va. 11, 14, 330 S.E.2d 334, 336 (1985). See also syl. pt. 2, *Godfrey v. Godfrey*, 193 W. Va. 407, 456 S.E.2d 488 (1995); syl. pt. 1, *Bennett v. Angus*, 192 W. Va. 1, 449 S.E.2d 62 (1994); syl. pt. 1, *Linville v. Moss*, 189 W. Va. 570, 433 S.E.2d 281 (1993); syl. pt. 2, *Fullmer v. Swift Energy Co. Inc.*, 185 W. Va. 45, 404 S.E.2d 534 (1991)).

¹¹⁹ *Keiffer v. Queen*, 155 W.Va. 868, 189 S.E.2d 842 (1972) (citing syl. pt. 3, *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393 (1947)).

money. Accordingly, the jury's verdict not reflecting the uncontroverted evidence is inadequate and clearly shows they were misled by a mistaken view of the case.

For the reasons stated above, the decision of the Circuit Court denying the motion for a new trial was an abuse of discretion and should be reversed. This Court should award a new trial on the issue of harms and losses sustained in the September 13, 2011, accident, including, but not limited to, past and/or future physical and mental pain and suffering, and reduced ability to enjoy life.

III. Plaintiff's decision not to seek recovery of lost wages or medical bills does not change the analysis.

In denying the motion for a new trial, the Circuit Court relied heavily on the fact that the Plaintiff opted not to put the amount of the medial bills or her lost wages into evidence. In using this argument to distinguish the cases noted above requiring a new trial the Circuit Court improperly conflated lack of evidence as to the pecuniary value of the medical expenses into an illusory dispute over whether the necessity of the treatment and lost work time were undisputed.

First, it is important to review the cases relied upon by the Circuit Court. None require the denial of the motion for a new trial. First, as this Court made clear in Syllabus Point 2 of *Richmond v. Campbell*, that while "pain and suffering is an indefinite and unliquidated item of damages," a new trial on the ground of inadequacy is still proper when "the verdict is so small that it clearly indicates that the jury was influenced by improper motives."¹²⁰ Unlike the jury in this case, in *Richmond*, the

¹²⁰148 W. Va. 595, 595, 136 S.E.2d 877, 878 (1964).

jury awarded \$5,000.00 in 1960's dollars. Indeed, the Court noted that verdict compared favorably with similar verdicts upheld.¹²¹ The opinion in *Sargent v. Malcomb*, which echoes many of the same principles as *Richmond*, involved an excessive verdict not an allegedly inadequate one.¹²² Indeed, the Court noted that “it requires a stronger case in an appellate court to reverse a judgment awarding a new trial than a judgment denying a new trial.”¹²³

Finally, the Circuit Court's decision improperly relied on cases, where unlike this one, there were disputed facts regarding causation and damages. For example, in *Toler v. Hager*, “[t]he disputed question . . . was not, as the circuit court supposed, the amount of damages the appellee should be awarded. Rather, the issue was whether the appellee was injured at all as a result of the accident.”¹²⁴ The Court noted the disparity among the testimony including the lack of objective evidence of injury and the expert testimony in conflict with the plaintiff's claims.¹²⁵ Similarly, in *Big Lots Stores, Inc. v. Arbogast*, the Court concluded that the evidence supported the jury verdict awarding no damages for past or future pain and suffering or past or future loss of enjoyment of life in customer's action against store to recover for injuries

¹²¹148 W. Va. at 601, 136 S.E.2d at 881.

¹²²150 W. Va. 393, 395, 146 S.E.2d 561, 563 (1966).

¹²³*Id.* (citing *Graham v. Wriston*, 146 W.Va. 484, pt. 3 syl., 120 S.E.2d 713).

¹²⁴205 W. Va. 468, 475, 519 S.E.2d 166, 173 (1999)

¹²⁵*Id.*

when customer's testimony of considerable and unabated swelling was not supported by medical evidence, evidence regarding severity of incident was conflicting, jury heard evidence suggesting that customer's pain was not easily distinguished from her preexisting nerve injury, jury was informed that customer may have sustained injury to her knee independent of the subject incident.¹²⁶

Reliance on *Marsch, supra*, is also improper. Unlike the evidence here, the evidence in *Marsch* was also conflicting:

Ohio Power emphasizes the conflicting evidence presented at trial and the necessity for jury resolution of the evidence. Ohio Power introduced evidence tending to discount the existence of pain and suffering and indicating that the shoulder pain was due to a preexisting shoulder injury and the subsequent shoulder injury which occurred at home. Ohio Power also asserts that, viewing the evidence most strongly in favor of the defendant, Mr. Marsch was merely "banged up" as a result of this incident. He testified at trial that he felt "okay" and "didn't feel too banged up" following his fall. He was checked and released at a local emergency room and returned to work the following day. He did not miss any work due to shoulder pain until after his subsequent shoulder injury incurred at home approximately six weeks later.¹²⁷

Notably, the Court in *Marsch* explicitly distinguished a case like the instant one where the evidence of injury was uncontroverted:

Conversely, in *Hagley v. Short*, 190 W.Va. 672, 441 S.E.2d 393 (1994), the question of damages in a personal injury action had been submitted to a jury. Although the evidence was uncontroverted that the plaintiff lost wages and incurred medical expenses as a result of the incident, the jury awarded the plaintiff no damages. The plaintiff's motion for a new trial was denied by the circuit court. This Court reversed and remanded the case for a new trial upon the sole issue of damages. We stated that "[e]ven when the evidence is viewed most

¹²⁶228 W. Va. 616, 723 S.E.2d 846 (2012).

¹²⁷207 W. Va. at 182, 530 S.E.2d at 181.

strongly in favor of the defendant, the jury award of zero damages is still inadequate.” 190 W.Va. at 673, 441 S.E.2d at 394.¹²⁸

The facts in this case fall within the latter category. As the existence of damages were uncontroverted, the evidence, even viewed most strongly in favor of the defendant, requires a finding that the jury award of zero damages is inadequate.

Finally, the fact that the jury did not have before it the amount of the medical bills or the lost wages is completely irrelevant. There is no question on this record that the medical treatment itself is in the record and undisputed as to necessity and causation. That fact that dollar amounts were not attached to the treatment does not permit the jury to awarding no damages for the noneconomic losses. The same is true with respect to lost wages. It is true that Plaintiff's counsel made a tactical decision not to introduce the amount of the economic losses, a decision that is becoming more popular in cases like this one where the injury is severe relative to the available treatment.¹²⁹ When, however, as is the case here, the evidence of the treatment and the need for the treatment is in the record and not disputed as necessary, the jury was not free to completely disregard the evidence of noneconomic damages and award nothing in damages to this seriously injured plaintiff.

Perhaps if the jury had awarded a small sum for the claimed noneconomic damages, Plaintiff's entitlement to a new trial would be more suspect, and the tactical

¹²⁸*Id.*, at 181, 530 S.E.2d at 180.

¹²⁹ See D. Ball, *David Ball on Damages: The Essential Update: A Plaintiff's Attorney's Guide* at p. 49 (recommending that medical expenses not be sought in cases where injury is severe compared to medical expenses incurred).

decision more relevant. Again, here there was substantial undisputed evidence of injury conceded by the Defendant's counsel and his expert along with an explicit finding that the Plaintiff was injured as a proximate result of the accident. Under these circumstances, the jury was simply not free to award no damages whatsoever and a new trial is required.

CONCLUSION

The jury's zero dollar verdict was against the clear weight of the undisputed evidence. The Circuit Court erred in failing to grant a new trial. This Court should reverse the denial of the motion for a new trial and remand this action for a new trial on damages.

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0825

ASHLEY GUNNO,

Petitioner,

v.

KEVIN McNAIR,

Respondent.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing has been served upon the following known counsel of record, this day by USPS to the following address:

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