

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543

JAMES D. MacDONALD and DEBBIE MacDONALD,
Plaintiff Below, Appellants,

vs.

CITY HOSPITAL, INC., and SAYEED AHMED, M.D.,
Defendants Below, Appellees

NOV 17 2010

The Honorable Gray Silver, III, Judge
Circuit Court of Berkeley County
Civil Action No. 07-C-150

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SUPREME COURT OF
WEST VIRGINIA

REPLY BRIEF OF
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I. INTRODUCTION

This is the reply brief of the appellee, Dr. Sayeed Ahmed, M.D., in support of his cross-appeal of an order of the Circuit Court of Berkeley County, awarding appellants, James D. MacDonald and Debbie MacDonald, \$500,000 for noneconomic damages, even though there was no evidence at trial that Mr. MacDonald met the statutory requirements for an award of noneconomic damages in excess of \$250,000.

II. STATEMENT OF FACTS

In many ways, this case is a perfect example of why caps on noneconomic damages are needed in medical malpractice cases. Liability was hotly contested and the verdict could have gone either way. Moreover, plaintiffs' damages, both economic and noneconomic, were not great. Indeed, plaintiffs' facial challenges to the constitutionality of the cap nearly ignore completely the actual facts of the case.¹ Yet, defendants find themselves subject to a verdict of noneconomic damages in the amount of \$500,000.

Because plaintiffs' noneconomic damages were relatively modest, not much of the trial was devoted to the issue. For example, during closing argument, plaintiffs' counsel spent only four of forty-one pages of argument on the issue of noneconomic damages. Tr., Nov. 24, 2008, at 199-202, 252. And, much of that argument concerned Mr. MacDonald's medical history; how much medical expert witnesses earn; Mr. MacDonald's alleged inability to dance as he had in the past; and what Mr. MacDonald is still able to do, including substitute teaching, working at a grocery store, and working out at the gym. *Id.*

¹ Indeed, plaintiffs devoted less than one page of their fifty-page initial brief to the facts, Appellants' Brief at 5; devoted less than three pages of their forty-three page reply brief to the facts, Appellants' Reply Brief at 41-43; and there are no record references in either brief for the factual representations that are made, even though the trial transcript has been filed.

Of course, from Dr. Ahmed's perspective, there is a good reason plaintiffs did not spend much time discussing noneconomic damages at trial or in their briefing to this Court and refrain from making any references to the trial transcript, i.e., plaintiffs' evidence of noneconomic damages was relatively weak.

1. Mr. MacDonald's Activities Were Limited by Various Illnesses Prior to His Treatment by Defendants.

Prior to the alleged malpractice in this case, Mr. MacDonald suffered from a number of disorders that limited his life activities in ways for which defendants are not responsible.

For example, Mr. MacDonald was diagnosed with diabetes in childhood. I Tr., Nov. 18, 2008, at 23, II Tr., Nov. 19, 2008, at 8. Mr. MacDonald testified that, from the age of eight, his activities were limited by his dependence upon insulin. II Tr., Nov. 19, 2008, at 8-9. Eventually, his diabetes caused end organ damage, resulting in a 1988 kidney transplant. *Id.* at 24; II Tr., Nov. 19, 2008, at 15. Specifically, Mr. MacDonald has only one functioning kidney. *Id.* at 17.

In both 2003 and 2004, he sought treatment at City Hospital for pneumonia, apparently related to his kidney transplant. *Id.* at 15. In addition to his history of diabetes, high cholesterol, kidney transplant, and pneumonia, Mr. MacDonald had also suffered a series of strokes prior to his 2004 hospitalization, which Mr. MacDonald admitted further impaired his life activities. *Id.* at 19-21. Because of these various conditions, Mr. MacDonald was taking a number of medications prior to his treatment in October 2004. *Id.* at 17-18, 27-28.

2. After His Treatment by Defendants and a Short Period of Rehabilitation, Mr. MacDonald Was Able to Engage in Almost All of the Same Activities as Prior to the Treatment.

After the alleged malpractice in this case, Mr. MacDonald was able to continue engaging in almost all of the activities in which he engaged prior to that time.

At the time of trial, Mr. MacDonald was 68-years-old and living in Tennessee. II Tr., Nov. 19, 2008, at 6-7. Mr. MacDonald received his degree in education at Shepherd College in 1970 and worked in the Berkeley County school system from 1971 through 2003. *Id.* at 11.

Mr. MacDonald is married, has two children, and testified that he and his wife enjoyed country and western dancing as their leisure activity, *id.* at 13-14, but he admitted that after his first hospitalization for pneumonia, which is not the subject of this litigation, he decided to retire from teaching, *id.* at 21-22. Thus, even before the treatment which is the subject of this litigation, Mr. MacDonald's other medical conditions had adversely affected his life activities to the point of precipitating his retirement.²

When Mr. MacDonald again became ill in 2004, he was unable to take himself to the hospital and waited until his wife returned from out of town. *Id.* at 24. Because of Mr. MacDonald's condition upon his arrival and the necessity of placing him on a respirator, he testified that he can remember practically nothing between October 29, 2004, when he was admitted at City Hospital, and November 10, 2004, twelve days later, after he had been transferred to a hospital in Winchester, Virginia. *Id.* at 26.

Some time after Mr. MacDonald had been transferred to the Winchester hospital, he remembers having difficulty straightening his leg while in bed, but because he was still being provided oxygen, he was unable to speak to hospital personnel about his difficulties. *Id.* at 31. Eventually, hospital personnel learned of his difficulties, however, and he was provided a therapist, while in the hospital, to assist with strengthening his legs to the point where he was initially able to stand next to the bed. *Id.* at 32. Prior to his departure from the Winchester

² Mr. MacDonald testified that after he retired following his 2003 hospitalization for pneumonia, his substitute teaching duties were limited to two or three times per week. *Id.* at 23.

hospital, Mr. MacDonald was able to walk short distances in his room, including to the bathroom on his own. *Id.* at 32-33.

Naturally, having been confined to a bed for several weeks, Mr. MacDonald was in a weakened condition.³ So, upon his discharge, it was recommended that Mr. MacDonald undergo a brief period of physical therapy. Initially, he spent one weekend at Blue Ridge in Charles Town and three weeks at War Memorial in Berkeley Springs. *Id.* at 34-35.

Following his discharge from War Memorial on December 31, 2004, Mr. MacDonald testified that he used a walker for “a week or ten days” thereafter, but at that point, was able to walk around on his own. *Id.* at 36. Mr. MacDonald also testified that he received about another eight weeks of physical therapy at City Hospital beginning in January 2005, concentrating on building strength in both his arms and legs. *Id.* at 37. After that brief period of physical therapy, Mr. MacDonald received no further treatment, but resumed his life activities with relatively few additional limitations that he did not have prior to October 2004 treatment.

3. Appellants’ Brief Contains No Reference to the Record to Support the Claim that Mr. MacDonald is “Permanently Disabled” or Suffered the “Loss of a Limb” Because the Evidence is to the Contrary.

Appellants’ briefs contain no references to the record to support their claims that Mr. MacDonald is “permanently disabled” or has suffered the “loss of a limb” because there was no such evidence and, indeed, the evidence was clearly to the contrary.

³ Indeed, plaintiffs’ own expert testified that Mr. MacDonald’s condition was a product of both rhabdomyolysis, which plaintiffs contended was a product of defendants’ malpractice, and “critical care neuropathy,” which was a product of the long-term treatment of Mr. MacDonald’s weakened condition: “A critical care neuropathy is a separate condition than rhabdomyolysis. It’s a condition where when people are acutely ill and are required to be on a ventilator longer than seven days like Mr. MacDonald. In addition to rhabdomyolysis, you can get . . . your nerves can be diffusely abnormal. In other words, you can have a numbness, some problems especially in the perineal nerves involving the lower legs.” I Tr., Nov. 19, 2008, at 65.

In their response to Dr. Ahmed's cross-appeal, the sum total of appellants' discussion of the evidence of Mr. MacDonald's limitations (without a single reference to the record) is as follows: "Mr. MacDonald testified extensively about his inability to dance, to keep his balance, to walk around without assistance, to carry things, and to perform countless other day-to-day activities." Appellants' Reply Brief at 41. That is it -- a single sentence with not a single reference to the trial transcript. Indeed, the actual testimony at trial was to the contrary.

For example, at the time of trial, Mr. MacDonald testified that he could paint his house; operate a vacuum; prepare meals; carry laundry down stairs; exercise, including walking on a treadmill and using exercise equipment such as a leg lift machine; operate a motor vehicle; and attend his son's wedding during a Caribbean cruise. II Tr., Nov. 19, 2008, at 39-42, 44, 45, 62, 108. Also, after his October 2004 hospitalization, Mr. MacDonald returned to substitute teaching for two years⁴ and even worked as a bagger at a local grocery store. *Id.* at 45. Mr. MacDonald also testified that he was eventually able to walk without the assistance of a cane.⁵ *Id.* at 44.

Other than the foregoing, Mr. MacDonald testified to suffering no actual pain; rather, he initially suffered some ambulatory difficulties that required a brief period of rehabilitation and, to a considerable degree, had subsided prior to trial.

⁴ Moreover, Mr. MacDonald testified that he would have continued substitute teaching after his move to Tennessee except for the fact, "They only pay 50 bucks a day. I told them, You're kidding me. So I never really pursued that after I put my application in." *Id.* at 45-46. Of course, someone who is "permanently disabled" and has suffered the "loss" of his limbs does not even apply for a substitute teaching position. Obviously, appellants' present arguments in support of their opposition to Dr. Ahmed's cross-appeal have no support in the record, which explains why they do not cite it.

⁵ Indeed, although he had a cane with him at trial, his wife testified that he did not use a cane when he visited his mother because he allegedly did not want her to see him using a cane. *Id.* at 112.

Respectfully, someone who can engage in those activities, including returning to work for two years as a substitute teacher, is not “permanently disabled” nor has he or she suffered “loss of a limb,” as argued by appellants in their reply brief. Appellants’ Reply Brief at 41-42.

Certainly, Mr. MacDonald testified that he no longer goes dancing, II Tr., Nov. 19, 2008, at 40, but he was a teacher, not a professional dancer, and someone who is able to walk, unassisted, on a treadmill for ten minutes at a time, *id.* at 41, and perform leg lifts with both legs using weights, *id.* at 41, has not suffered the “loss” of his legs and is not “permanently disabled.”

4. The Trial Court Did Not Find Any Evidence that Mr. MacDonald is “Permanently Disabled” or Suffered the “Loss of the Use” of His Legs, But Only that He Suffered the “Partial” Loss of Use, Which is an Incorrect Interpretation of the Statute.

With respect to plaintiffs’ noneconomic damages, the trial court made several remarks prior to the verdict indicating the relative lack of evidence of noneconomic damages, including but not limited to the absence of any dollar amount for any alleged loss of services by Mr. MacDonald, Tr., Nov. 24, 2008, at 130, and the absence of evidence that Mr. MacDonald suffered a “permanent physical and functional injury that permanently prevents him from being able to independently care for himself and perform life-sustaining activities,” *id.* at 131.⁶

Again, issues of liability in the case were hotly contested and, even after the jury had deliberated for three and a half hours, Tr., Nov. 25, 2008, at 12, 14, it requested a definition of proximate cause, *id.* at 15. Eventually, after deliberating another ninety minutes, *id.* at 18, the jury returned a verdict allocating thirty percent of the fault to City Hospital; allocating seventy

⁶ Moreover, in its order applying the cap on noneconomic damages, the trial court observed that while, in its judgment, a noneconomic damages award of \$250,000 might be inadequate, an award of \$500,000 is not inadequate. Order, May 14, 2009, at 23 (“the Court believes that while this (\$500,000) is a reasonable limitation, a lesser cap (\$250,000) in this situation might not be.”).

percent of the fault to Dr. Ahmed; and awarding Mr. MacDonald and Ms. MacDonald \$1 million and \$500,000 in noneconomic damages respectively, *id.* at 21.⁷

Even though plaintiffs knew that their ability to receive noneconomic damages in excess of \$250,000 would turn on whether Mr. MacDonald suffered a “permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system” or “permanent physical or mental functional injury that permanently prevents the injured person from being

⁷ Based upon the evidence at trial, there is little logical explanation for an award of \$1.5 million in noneconomic damages, but there may be a clue in the closing argument of plaintiffs’ counsel:

This man is younger than me. He’s sixty years old. There’s life in front of him. The question is how much is all that worth to somebody?

Now, I’m going to tell you, I brought in these figures of what these doctors are making to do this kind of thing. Why? For comparison. We’ve been here in trial since last Monday. People started testifying on Tuesday. Tuesday, Wednesday, Thursday and Friday, four days they testified. You have your notes and you see what the healthcare profession – the healthcare provision charged to come in here and testify, you’re going to see it’s over \$50,000 and they all appear to be healthy.

Let’s put some things in perspective here. What is the value of the rest of his life to him? Think about that. Think about what things cost. . . .

What is the value, if we’re paying doctors \$50,000 on both sides to come in here and testify about this case to find excuses instead of accepting responsibility for not doing the thing that should have been done, what’s the value to the common person?

Tr., Nov. 24, 2008, at 200-201.

In other words, plaintiffs’ counsel argued to the jury that it should take \$50,000, which was his calculation of the costs of the experts, and multiply it by some figure, perhaps twenty for Mr. MacDonald and ten for Ms. MacDonald, because of “the value of the rest of his life” and defendants offering “excuses instead of accepting responsibility,” and punish defendants by awarding Mr. MacDonald \$1 million for noneconomic damages and Ms. MacDonald \$500,000 in noneconomic damages. Obviously, what experts charge to testify, Mr. MacDonald’s life expectancy, or defendants’ non-admission of liability had nothing to do with plaintiffs’ noneconomic damages, but it is precisely these types of arguments designed to inflame jurors into awarding excessive noneconomic damages that warranted the legislative branch’s decision to place a cap on those damages in medical professional liability cases.

able to independently care for himself or herself and perform life sustaining activities,” W. VA. CODE § 55-7B-8(b), they offered no expert witness who testified that either was the case.

Nevertheless, the trial court speculated that the jury may have believed that Mr. MacDonald was “very feeble” and that his “quality of life has been greatly diminished by the rhabdomyolysis.” Order, May 14, 2009, at 13. So, even though the trial court correctly rejected plaintiffs’ argument that Mr. MacDonald’s injuries prevented him “from being able to independently care for himself” and “perform life sustaining activities,” as he was able to resume teaching, work in a grocery store, go on cruises, prepare meals, perform household chores, regularly work out at a gym, drive his car, walk without assistance, and otherwise take care of himself, it incorrectly determined that his muscular weakness in his lower extremities constituted a “partial loss of use of a limb or a partial use of a bodily organ system,” even though the statute does not include the term “partial,” but requires “loss of use of a limb or loss of a bodily organ system,” and reduced the noneconomic damages to \$500,000. *Id.* at 13-14.

Ultimately, on August 20, 2009, the trial court denied defendants’ Rule 50 and Rule 59 motions from its judgment order of May 14, 2009, and defendants have cross-appealed that judgment order.⁸

⁸ In their reply brief, plaintiffs argue that defendants failed to preserve the cap issue by not requesting a special interrogatory, Appellants’ Reply Brief at 40, but a special interrogatory issue was initially presented, then withdrawn by plaintiffs. Specifically, plaintiffs offered a complicated verdict form that incorrectly and inaccurately split the two sections of the statute into four component parts asking the jury the following questions:

8. Do you find that Plaintiff James MacDonald suffered a permanent and substantial physical deformity? . . .
9. Do you find that Plaintiff James MacDonald suffered loss or use of a limb? . . .
10. Do you find that Plaintiff James MacDonald suffered loss of a bodily organ? . . .

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

Plaintiffs suggest that a deferential standard of review because it was the jury that returned a verdict in excess of what defendants assert is the proper \$250,000 cap on noneconomic damages, Appellants' Reply Brief at 32-33, but Dr. Ahmed is not appealing the verdict,⁹ but the trial court's post-verdict application of the statutory cap.

11. Do you find that Plaintiff James MacDonald suffered a permanent, physical, functional injury that permanently prevents him from being able to independently care for himself and perform life sustaining activities?

Plaintiffs' Proposed Jury Verdict Form at 3. Initially, the trial indicated it was going to give this instruction: "These, you know, seem to be questions of fact of the cap questions for a jury. I think, if you give them to the jury, we should give them now and not try to stagger it." Tr., Nov. 24, 2008, at 131. Eventually, however, it was plaintiffs who withdrew these questions, resulting in the trial court deferring the issues until post-trial: "Counsel, before we get on this charge that Mr. Burke and Ms. Honaker have been kind enough to shepherd for us, one clarification on the caps. . . . I believe Plaintiffs have withdrawn them from the verdict form." Id. at 142 (emphasis supplied). Thus, it was plaintiffs who withdrew the cap issue from the verdict form and defendants invited no error and never waived their right to contest which cap applied. Indeed, the issue was part of defendants' post-trial motions. This is not a case, like *Gerver v. Benavides*, 207 W. Va. 228, 530 S.E.2d 701 (1999), where a party waits until a verdict is returned and then attempts to parse out damages between economic and noneconomic when the jury could have easily performed that function with a special interrogatory. Rather, in this case, it was plaintiffs who withdrew the issue from the jury and application of the statutory cap was left by plaintiffs for the trial court upon post-trial motions, which is consistent with the practice elsewhere. See, e.g., *Depaoli v. Vacation Sales Associates, L.L.C.*, 489 F.3d 615, 618 (4th Cir. 2007)("Vacation Sales filed post-trial motions for application of the statutory cap on damages provided by 42 U.S.C. § 1981a(b)(3)"); *Cox v. Shelby State Community College*, 194 Fed. Appx. 267, 271 (6th Cir. 2006)("In a subsequent series of orders and after a post-trial hearing, the district court remitted the jury's award of compensatory damages to \$300,000 because of a statutory cap on such damages for an employer the size of Shelby State."); *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1167-68 (10th Cir. 2003)("In a post trial order, the district court held the jury's award of \$300,000 in back pay to be against the weight of the evidence and remitted the amount to \$56,252.25, remitted the liquidated damages under the ADEA to the same amount, and applied the \$300,000 cap on punitive and compensatory damages imposed by the Civil Rights Act of 1991").

⁹ Not only did plaintiffs withdraw their special interrogatory from the verdict form, the jury received no instructions regarding any statutory or other limitation on the amount of noneconomic damages it could award. Tr., Nov. 24, 2008, at 170-171. Thus, nothing can be

Where an issue on appeal involves the interpretation or application of a statute, a *de novo* standard of review applies. See Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (“Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.”); Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)(“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”).

Thus, because the trial court’s decision to apply the \$500,000 cap rather than the \$250,000 cap involves interpretation of the statutory language, the appropriate standard of review is *de novo*.¹⁰

gleaned from the jury’s verdict regarding whether plaintiffs satisfied the statutory criteria for an award in excess of \$250,000. Rather, both parties agreed that the trial court would decide the issue, based upon the evidence, upon post-trial motions.

¹⁰ Plaintiffs also suggest that a “clearly erroneous” standard applies, Appellants’ Reply Brief at 39, but whether the evidence satisfies a statutory definition is not a finding of fact, but a conclusion of law. See Syl. pt. 5, *Jackson v. State Auto Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004)(“As a general rule, an expert witness may not give his or her opinion on the interpretation of the law as set forth in W. VA. CODE, 33-11-4(9)(a)-(o) (2002), which defines unfair claim settlement practices; the legal meaning of terms within that code section; or whether a party committed an unfair claim settlement practice as defined in that code section. Rather, it is the role of the trial judge to instruct the jury on the law.”). Finally, in addition to suggesting that either a “manifest weight of the evidence” or “clearly erroneous” standard may apply, plaintiffs also make reference, citing no authority, to an “abuse of discretion” standard. Appellants’ Reply Brief at 43 (“At a bar minimum, the trial court did not abuse its discretion in applying W. VA. CODE § 55-7B-8(b).”). Of course, as noted, review of either a trial court or an agency’s interpretation and/or application of a statute involve a *de novo* standard, not an abuse of discretion standard. See, e.g., Syl. pt. 2, *Hensley v. West Virginia Dept. of Health & Human Resources*, 203 W. Va. 456, 508 S.E.2d 616 (1998)(“In reviewing a circuit court’s award of prejudgment interest, we usually apply an abuse of discretion standard. When, however, a circuit court’s award of prejudgment interest hinges, in part, on an interpretation of our decisional or statutory law, we review *de novo* that portion of the analysis.”). Here, where the issue on appeal is whether a “partial” loss of use of a limb is sufficient hinges in an interpretation of the statute and, thus, triggers *de novo* review. See, e.g., *Fogg v. Ashcroft*, 254 F.3d 103, 107 (D.C. Cir. 2001)(“The dispute in this case centers on the terms ‘in an action,’ as used in subsection (a)(1) and ‘each complaining party,’ as used in subsection (b). The district court interpreted these

B. THE TRIAL COURT ERRED BY NOT APPLYING THE \$250,000 CAP ON NONECONOMIC DAMAGES.

As previously noted, the trial court applied the \$500,000 cap, rather than the \$250,000 cap, because it speculated that the jury may have believed that Mr. MacDonald was “very feeble;” that his “quality of life has been greatly diminished by the rhabdomyolysis,” Order, May 14, 2009, at 13; and that, muscular weakness in his lower extremities constituted a “partial loss of use of a limb or a partial use of a bodily organ system,” even though the statute does not include the term “partial,” but requires “loss of use of a limb or loss of a bodily organ system,” *id.* at 13-14. Dr. Ahmed submits that this was erroneous and should be reversed.

One of the legislative findings in the Medical Professional Liability Act is “our system of litigation is an essential component of this state’s interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence, and any limitation placed on this system must be balanced with and considerate of the need to fairly compensate patients who have been injured as a result of negligent and incompetent acts by health care providers.” W. VA. CODE § 55-7B-1. Under our system of justice, those who suffer more injury deserve more monetary compensation and, conversely, those who suffer less injury deserve less monetary compensation.

Thus, the legislative branch has enacted a two-tiered system for noneconomic loss. First, litigants are entitled to a minimum cap of \$250,000 in all except extraordinary cases:

[T]he maximum amount recoverable as compensatory damages for noneconomic loss shall not exceed two hundred fifty thousand dollars per occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case

provisions to impose a \$300,000 compensatory damage cap on the § 1981a recovery for Fogg’s entire Title VII lawsuit. . . . As the issue is purely legal, we review *de novo*.”); *Pavon v. Swift Transp. Co., Inc.*, 192 F.3d 902, 910 (9th Cir. 1999)(“The court’s application of the damages cap under 42 U.S.C. § 1981a is a question of law subject to *de novo* review.”).

of wrongful death, regardless of the number of distributees, except as provided in subsection (b) of this section.

W. VA. CODE § 55-7B-8(a). Second, if certain criteria are satisfied, litigants are entitled to an higher cap:

The plaintiff may recover compensatory damages for noneconomic loss in excess of the limitation described in subsection (a) of this section, but not in excess of five hundred thousand dollars for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, where the damages for noneconomic losses suffered by the plaintiff were for: (1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.

W. VA. CODE § 55-7B-8(b) (emphasis supplied).

1. The Trial Court Improperly Re-Wrote the Statute by Adding the Term “Partial” and Appellants’ Failure to Appeal or Cross-Appeal on the Issue of Whether Mr. MacDonald is Unable to “Independently Care for Himself . . . and Perform Life Sustaining Activities,” Prevent Them from Now Asserting that Provision of the Statute.

As wrongful death was obviously not an issue, appellants had two options at trial for triggering the \$500,000 limit on noneconomic damages: (1) present evidence that Mr. MacDonald suffered a “permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system” or (2) present evidence that Mr. MacDonald suffered a “permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.” They did neither and even the trial court concluded that they did not do the latter.¹¹

¹¹ The appellants did not and they have not cross-assigned the trial court’s failure to conclude that Mr. MacDonald suffered “permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.” Consequently, they have waived whether the evidence satisfied the third statutory exception to the \$250,000 cap on noneconomic damages,

Obviously, Mr. MacDonald did not suffer and has never contended that he suffered any “physical deformity” as his physical appearance is no different now that it was prior to treatment.

Also, Mr. MacDonald did not suffer and has never contended that he suffered any “loss of a bodily organ system” as his legs are not an “organ.”

Rather, Mr. MacDonald’s argument is and has been that he suffered a “loss of use of a limb,” i.e., his legs, but even the trial court did not conclude that Mr. MacDonald suffered such loss as a person who loses his legs cannot, without a prosthetic device, walk on a treadmill, perform leg lifts on a weight machine, and engage in the other activities involving the use of legs which Mr. MacDonald admitted at trial he can do.

Instead, the trial court departed from the statute by finding that evidence of a “partial loss of use of a limb or a partial use of a bodily organ system” satisfied the statute. Order, May 14, 2009, at 14 (emphasis supplied).

As courts are not permitted to rewrite statutes,¹² however, but must apply the language as written,¹³ the trial court clearly erred.

see *State v. Lively*, 226 W. Va. 81, 86 n.2, 697 S.E.2d 117, 122 n.2 (2010)(“To the extent that the Defendant failed to raise the issue in his Petition for Appeal as an assignment of error, the argument regarding this issue is deemed waived and will not be considered by the Court in this appeal. See *Koerner v. West Virginia Dep’t of Military Affairs & Pub. Safety*, 217 W. Va. 231, 617 S.E.2d 778 (2005) (refusing to consider an argument in appellant’s brief that was not assigned as error in petition for appeal.”); *State v. Rash*, 226 W. Va. 35, 41, 697 S.E.2d 71, 77 (2010)(“To the extent that the Appellant failed to raise the third, fifth, and sixth assignments of error (delay in the pre-indictment allegations, irrelevancy of E.C.H.’s testimony regarding effects of sexual abuse, and confrontation clause violation due to E.C.H.’s treatment records not being produced) in his Petition for Appeal, these argument are deemed waived, and will not be considered in this appeal.”)(citations omitted).

¹² *Helton v. Reed*, 219 W. Va. 557, 563, 638 S.E.2d 160, 166 (2006)(Benjamin, J., concurring)(“A statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten to achieve some other resort; and while it may be unfortunate to this taxpayer that the Legislature did not foresee the situation now before us, this Court should not rewrite the statute so as to provide the relief sought by respondent.”); *McVey v. Pritt*, 218 W. Va. 537, 540-41, 625 S.E.2d 299, 302-03 (2005)(“This court ‘cannot rewrite [a] statute so as to

As noted Mr. Ahmed’s cross-appeal, when the legislature intends to allow “partial loss” to satisfy the criteria for recovery, it uses the term “partial loss.” See W. VA. CODE § 23-4-6(f) (“For the partial loss of vision in one or both eyes, the percentages of disability shall be determined by the commission, using as a basis the total loss of one eye. . . . For the partial loss of hearing in one or both ears, the percentage of disability shall be determined by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, using as a basis the total loss of hearing in both ears.”).¹⁴

Conversely, when the legislature intends to require “complete loss” to satisfy the criteria for recovery, it uses the term “loss.” See W. VA. CODE § 23-4-6(f) (“The loss of a great toe shall be considered a ten percent disability. . . . The loss of a foot shall be considered a thirty-five percent disability.”).

provide relief . . . nor can we interpret the statute in a manner inconsistent with the plain meaning of the words.’ *VanKirk v. Young*, 180 W. Va. 18, 20, 375 S.E.2d 196, 198 (1988).”.

¹³ Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968) (“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.”); Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) (“A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.”).

¹⁴ W. VA. CODE § 30-4A-2(a) (“‘Deep conscious sedation/general anesthesia’ includes partial loss of protective reflexes and the patient retains the ability to independently and continuously maintain an airway.”)(emphasis supplied); W. VA. CODE § 33-17-9 (“All insurers providing fire insurance on real property in West Virginia shall be liable, in case of total loss by fire or otherwise, as stated in the policy, for the whole amount of insurance stated in the policy, upon such real property; and in case of partial loss by fire or otherwise, as aforesaid, of the real property insured, the liability shall be for the total amount of the partial loss, not to exceed the whole amount of insurance upon the real property as stated in the policy. This section does not apply where such insurance has been procured from two or more insurers covering the same interest in such real property.”)(emphasis supplied).

In this case, however, the trial judge interpreted “loss of a great toe” as “partial loss of a great toe” and “loss of a foot” as “partial loss of a foot.” Obviously, this interpretation is untenable.

In *Holstein v. State Compensation Director*, 150 W. Va. 315, 145 S.E.2d 455 (1965), for example, this Court held that severance of a portion of a claimant’s index finger was not a loss of that finger for purposes of a six percent permanent partial disability award.¹⁵

Likewise, in this case, evidence of a reduction of function in Mr. MacDonald’s legs was insufficient where the statute requires “loss of use of a limb” and where he still can quite substantially use his legs.

Nowhere appellants’ reply brief do they make any effort to address these issues. Thus, this case should be remanded with directions to reduce the plaintiffs’ noneconomic damages award to \$250,000.

¹⁵ See also *Haines v. Workmen’s Compensation Comm’r*, 151 W. Va. 152, 150 S.E.2d 883 (1966)(policy of Workmen’s Compensation Commission that uncorrected visual loss of 20/200 constituted industrial blindness and entitled employee who sustained injury resulting in partial loss of vision in one eye to full award of 33% for total and irrevocable loss of sight of one eye was in conflict with statute which provides for 33% disability for irrevocable loss of sight of one eye and could not stand); *Bates v. Inter-Ocean Cas. Co.*, 126 W. Va. 620, 29 S.E.2d 469, 470 (1944)(“The policy in question specifically covers loss by accident of certain parts of the body, and disability resulting from accident. There seems to be no general coverage under its provisions relating to loss of a member of the body. The coverage is entirely specific and only the provision applying to the loss of a foot covers the loss of a leg. There is no additional coverage for the entire or partial loss of a leg or an arm.”); *Fuhrman-Peretz v. Ferragamo*, 2006 WL 2587981 at *4 (S.D.N.Y.)(“[T]o qualify as a serious injury within the meaning of the statute, ‘permanent loss of use’ must be total.” *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 299 (2001). A partial loss of use of a body organ, member, function or system does not meet the statutory definition. *Id.*)(emphasis supplied); *Martel v. M.M. Mades Co.*, 121 N.H. 231, 232-33, 427 A.2d 522, 522-23 (1981) (partial loss of use of a hand and wrist could not be the basis for a finding of loss of an arm or loss of use of an arm under the relevant statute).

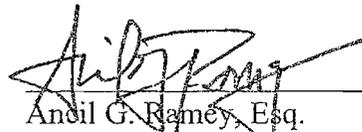
V. CONCLUSION

The trial court simply got it wrong when it found that a “partial” loss of use of a limb, in this case, some residual weakness in Mr. MacDonald’s legs that does not prevent him from teaching, working in a grocery store, going on cruises, preparing meals, performing household chores, regularly working out at a gym (including walking on a treadmill and performing leg lifts on a weight machine), driving his car, walking without assistance, and otherwise take caring of himself. Rather, where the statute plainly requires “loss of use of a limb,” a “partial” loss is legally insufficient and the trial court erred, as a matter of law, in failing to apply the \$250,000 cap.

WHEREFORE, the appellee, Dr. Sayeed Ahmed, M.D., respectfully requests that this Court reverse the Circuit Court of Berkeley County upon his cross-appeal and remand the case with directions to reduce plaintiffs’ noneconomic damages award to \$250,000.

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that on November 17, 2010, I served a copy of the foregoing "REPLY BRIEF OF APPELLEE DR. SAYEED AHMED, M.D." upon counsel of record by depositing a true copy of the same in the United States mail, postage prepaid, addressed as follows:

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