

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

OCT 3 2011

DOCKET NO. 11-0960

BONNIE TOOTHMAN  
and  
GARY TOOTHMAN,

Plaintiffs below, Petitioners

V.)

Appeal from a final order  
of the Circuit Court of Marion  
County (08-C-204)

KARI LYNN JONES,

Defendants below, Respondent

Petitioner's Brief

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## ASSIGNMENTS OF ERROR

- 1 - The jury verdict was inadequate as a matter of law because the jury awarded less than the proven medical expenses.
- 2 - The Circuit Court incorrectly denied the Plaintiffs' motion to reveal the presence of insurance coverage for the Defendant, which resulted in prejudice to the Plaintiffs.
- 3 - The Circuit Court incorrectly utilized yet another antiquated role, requiring that future pain and suffering be proved to "reasonable medical certainty."

## STATEMENT OF THE CASE

This is an action for personal injuries from a motor vehicle accident filed in the Circuit Court of Marion County.

A jury trial was held on 11 & 12 January 2011 before Hon. David R Janes, Judge. The jury returned a verdict in favor of the plaintiffs in the amount of \$5372. The plaintiffs filed a motion for new trial under RCP 59. Following hearing on the motion, the Circuit Court denied the same, but ordered an additur of \$2000 for pain and suffering, over the objection of the plaintiffs.

The facts of this case are largely unremarkable. Bonnie Toothman is a 63 year-old lady. (AR.21) At the time of the incident subject of this action, she and her husband, Gary Toothman, operated two businesses in Marion County, a used car lot and a storage locker facility. (AR.24-25)

On 7 June 2006, Bonnie Toothman was driving to a regular appointment with her family physician, Dr. Peter Ang. She was alone in her vehicle. The defendant, Kari Lynn

~~Jones, was driving the vehicle immediately behind Ms. Toothman. Ms. Toothman~~

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stopped for a Department of Highways flagger at a road construction site on Locust Avenue in Fairmont. Ms. Jones was distracted by her child in her car and she rear-ended Ms. Toothman. Jack Frost, a Fairmont police officer conferred with Ms. Toothman, who determined that an ambulance was not necessary. Ms. Toothman's car could be driven and after giving her information to the officer, she proceeded to her scheduled doctors appointment. (AR.38-39)

Prior to trial, the defendant stipulated liability.

Soon after the accident, an adjuster from State Farm Insurance, representing Ms. Jones, got in contact with Ms. Toothman. The adjuster made arrangements to pay Ms. Toothman's medical bills, without any admission of liability. This is important for two reasons.

At trial, Ms. Jones testified on direct as follows:

Q - And what did you do after the police took your statement?

A - I left.

Q - You just drove home?

A - Yes.

Q - Did you think that Mrs. Toothman was okay after this?

A - Yeah. I mean she didn't appear to be hurt. And I didn't hear anything else until I got papers served.

Q - Until you got sued?

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A - Yes.

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Q - That's the first time you heard that she had been injured?

A - Yes.

(AR.104)

The Court excused the jury for a break and convened a bench conference at

Plaintiff's request:

MR. CURRY: The subject of discussion is insurance, Your Honor. The reason is the suggestion that Ms. Jones didn't hear anything until she got papers served on her, while factually true, is grossly misleading because her insurance company, State Farm, continued to deal with Ms. Toothman continually through that process, and the fact that they didn't let their insured in on it is not our problem, and it leaves the impression that we're hard-hearted gold-seekers. Moreover, Your Honor, this is yet again one of those situations where we have a very nice individual who made a mistake, that's the reason she had insurance, and not being permitted to introduce the fact that she has insurance, we have offered to settle within policy limits, leaves the jury with a false impression that something bad will happen to her with the verdict.

Now with respect to the second half of my argument, I know that is dead against decades of the jurisprudence of West Virginia, and while I would admire the Court's courage if you were to permit me to tel the jury about insurance for that reason, my mother could probable get that verdict revered by the Supreme Court unless they really take a different tact [sic - "tack?"]. However, this idea that she did not hear anything is intolerable and I would ask to be permitted to ask of her and to return Mrs. Toothman to the stand to confirm that indeed Mrs. Toothman was dealing with when we use the euphemism that we have to in those circumstances, her representatives, during that period of time. I know frankly if we did that at the bench while the jury was there, they could

overhear and that would not be proper. (AR.106)

Counsel for Defendant replied:

That's kind of an interesting novel approach to a valid question. First of all, when you ask a client or a defendant in this particular case like Mrs. Jones, Ms. Jones, did you hear anything else, the question really is a bulb the information was exchanged, these folks had an opportunity to exchange phone numbers and find out if there was any thing in follow-up. It's not uncommon for a plaintiff to call a defendant or a defendant call a plaintiff and ask did you ever hear anything whether they were injured later on, and the point of the question is for a rational reasonable purpose, did anybody from their side ever tell you personally that she was actually injured, because at the scene of the accident, the police officer said she wasn't. Mrs. Desmond never told anybody he was injured and the probative and relativeness of the question is the fact that she was not told anything after that until she got suit papers. There is another component of this. It's not Ms. Jones all that they waited two years to file the lawsuit. Besides that, I did not say when the lawsuit was filed. They don't know. I've never made an issue of it. I didn't say you mean they waited two years to tell you. I just simply said, when was the first time you found out there was an issue, when I got suit papers. That could have been two days later, it would have been two years or thereunder later. (AR.107-108)

The Circuit Court did not believe that the jury would draw a majority of conclusions and overruled the motion.

Also, Ms. Toothman testified to her medical treatment. She saw Dr. Ang periodically. She refused to take "high-test" pain medications due to concern about the side effects and addiction potential. (AR.46) She testified to three courses of physical therapy over four years, and the biggest part of the medical bills were for physical therapy. There was a two year gap in physical therapy, during which time she did not

receive any. However, she did not do so because State Farm quit paying those bills.\_\_\_\_\_

Obviously, under current law, she could not tell the jury that.

The trial was conducted in a completely polite and collegial manner. The plaintiffs promised, and kept that promise, that the only thing bad they would say about the defendant was that on this occasion she drove negligently. The parties all acted and were treated very respectfully. In that respectful treatment, however, facts were elicited through counsel for the defendant which created an incomplete or even inaccurate impression to the jury, given that there was insurance coverage that could not be mentioned. The defendant is a young lady who had a small child and who was, at the time of trial, not employed outside the home. (AR.102) Of course, that did not affect her in the real world because the plaintiffs had offered to settle within policy limits.

As a counterpoint, the plaintiffs were painted with some indicia of positive economic status. On cross-examination, Ms. Toothman talked about her ability to take a trip to the beach house the plaintiffs own in South Carolina. (AR.63-64) That the home was a gift from the plaintiffs' physician-son likely was of no effect. Counsel for the put defendant pointed out that Ms. Toothman was able to fulfill a promise to a grandchild to take him on a "Disney" cruise ship after the child's father died. (AR.63)

The plaintiffs presented medical bills totaling \$5972. The defendant accepted that they were actually incurred in a reasonable amount of disputed their necessity.

Ms. Toothman's primary treating physician, Dr. Peter Ang (a family physician and gerontologist intelligence) deemed all of the expenses necessary and caused by injuries

from this motor vehicle accident. Dr. Ang testified that he offered Ms. Toothman prescriptions for pain medication, but that she had refused those for fear of potential side effects, addiction and sedation. (AR.121) Dr. Ang diagnosed Ms. Toothman with “cervical strain, at that time maybe whiplash, along with neck pain.” (AR.124) Dr. Ang further testified that physical therapy was recommended by him after evaluating Ms. Toothman. (AR.122-123)

Dr. Ang went into the issue of future pain:

Q - Do you have an opinion to a reasonable degree of medical certainty whether Mrs. Toothman will continue to experience pain into the future as a result of this automobile accident of June of 2006?

A - Again, you know, from her history she's not complained prior to surgery and she's consistently intermittently complained over the last four years, so I would say probably will continue is my opinion.

Q - Can you state that to a reasonable degree of medical certainty? That's a term of art within the law.

A - Yes. Yes, I think it would be.

Q - Can you state to a reasonable degree of medical certainty whether she will have any limitations of her ability to perform activities into the future as a result of this automobile accident of June of 2006?

A - She has said that it sometimes has interfered with certain, you know, bookkeeping jobs, desk jobs, that it gives her more pain and discomfort and some stiffness of her neck, so I would say during those episodes that she would have more pain that she would probably have some limitations of activities.

Q - But thereto [sic - "there, too"] we must deal with this legal term of art. Do you have an opinion to a reasonable degree of medical certainty if she would experience those limitations as a result of this automobile accident?

A - Yes.

Q - What is that opinion?

A - That I think it's medically reasonable to say that 16 she would have limitations of actions in the future as a result of what happened.

Q - Do you have an opinion to a reasonable degree of medical certainty if she will require medical treatment into the future as a result of these injuries?

\* \* \*

Q - Do you have an opinion to a reasonable degree of medical certainty if she will require future medical treatment as a result of this automobile accident?

A. I would say intermittently some physical therapy to give her some pain relief.

(AR.125-126)

The defendant presented an expert witness who had examined Ms. Toothman, Dr. P. Kent Thrush, an orthopedic surgeon in Fairmont, much of whose practice is now doing independent medical evaluations.

Dr. Thrush testified that everyone of Ms. Toothman's has degenerative changes in the spine. (AR.158) He reviewed an x-ray and found nothing "that could be objectively related to the accident." (AR.163) He testified that neck sprains or whiplash injuries tend to resolve over time, and get better "because the body has the ability to heal that type of

injury.” (AR.166) Dr. Thrush testified that after the first series of physical therapy, it was his opinion that further physical therapy was not related to the accident.

Interestingly, Dr. Thrush referred to the terms “reasonable medical probability” and “reasonable medical certainty” being used interchangeably some. (AR.174)

When questioned on cross-examination, Dr. Thrush explained further his opinions about neck sprains healing:

Q - Okay. Now, some people then don't get better from a cervical strain/sprain?

A - In my experience it's most people, the majority, vast majority, most people get back to where they were in about 3 to 6 months with a mild/medium sprain.

Q - How do you know who doesn't?

A - They tell you.

Q - Is there any other way to know who doesn't?

A - No.

Q - You don't have a meter or an x-ray or any kind of scan?

A - No. They just say, my neck doesn't deal as good as it did before the accident. It's now been six months, eight months, twelve months. It still bothers me some. And we would put that person in that category, okay, it's been over six months, she still has some symptoms, she didn't seem to get back to where she was before according to her report. And then you say, okay, what we you do about it. My answer is you don't do anything about it. (AR.189)

There is, of course, an issue of whether Ms. Toothman should be charged with the knowledge of Dr. Thrush's opinion that the physical therapy was not necessary.

Q - Should Mrs. Toothman have known that therapy was not a good idea?

A - No. She's not a doctor and doesn't have that kind of experience and - - -

Q - So at least from her standpoint it was a reasonable thing to do?

A - I guess she was in this case doing what the doctor told her to do.

Dr. Thrush also addressed the issue of future pain, and did so candidly and realistically:

Q - [D]o you have an opinion to a reasonable degree of medical certainty if she will continue to experience neck pain in the future?

A - I pause because that's a difficult question, *in fact impossible question to answer*. There's no way that anybody can know that. . . . How much is it going to bother her? Don't know. *Nobody can predict*.

\* \* \*

Q - Now [to] repeat another discussion you and I have had on a number of occasions, the idea of asking a doctor to say what is going to happen as a matter of certainty in the future is really an absurdity, isn't it?

A - All you can give is your best guess, so, you know, over the years we develop opinions and judgments about things. You know, should this patient have her neck operated on in the future? I think it's unlikely, but, again, *you can't predict the future*. (AR.203-204) (Emphasis added)

The jury returned a verdict of \$5392. There is no \$600 medical bill item and so no readily available objective way to determine why the jury picked that particular verdict \$600 less than the medicals. The Circuit Court denied the motion for new trial but made a

\$2000 added to order for pain and suffering.

The plaintiffs seek a reversal of the Circuit Court order and a new trial.

#### SUMMARY OF ARGUMENT:

##### INADEQUATE VERDICT:

Once the jury returned with its clearly inadequate verdict, the plaintiffs had already been denied their right to a trial by an unexplained bias to jury. The Circuit Court could not be sure that with an arbitrary addition.

##### MENTIONING INSURANCE:

The long-standing rule against mentioning the existence of liability insurance predates the mandatory insurance statutes. The reason for the rule against mentioning insurance is now so weakened that it should be re-examined and rejected and juries should be given accurate information about the existence of insurance and the nature of its risk-spreading function.

##### THE "REASONABLE MEDICAL CERTAINTY" STANDARD:

The existing standard for medical testimony regarding future occurrences requires expert testimony to a "reasonable medical certainty." "Reasonable certainty" is an oxymoron. "Reasonable" denotes some room for error or adjustment. "Certainty" denotes an absolute. Future prediction of anything save immutable physical laws is impossible,

and thus any affirmative answer must be inaccurate and require at least a compromise of judgment by the professional and any negative answer may deprive a worthy plaintiff of just compensation for the future effects of an injury sustained through the negligence of another. Retaining the “reasonable medical certainty” standard perpetuates not just a legal fiction but a falsehood.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The first assignment of error, inadequate verdict, is based on well-settled principles and oral argument under Rev. R.A.P. 18 should not be necessary. If the Court determines that oral argument is necessary on this ground, the case would be appropriate for a Rule 19 argument and disposition by memorandum decision.

The second and third assignments of error challenge long-standing principles of law for the reasons stated herein. If the Court determines that it is appropriate to open these issue for full analysis, then a full argument and a full decision would be appropriate. Otherwise, argument would not be necessary and a memorandum decision would be appropriate.

#### ARGUMENT

**1 - The jury verdict was inadequate as a matter of law because the jury awarded less than the proven medical expenses.**

"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.”

*Godfrey v. Godfrey*, 193 W.Va. 407456 S.E.2d 488(1995)

The wrinkle in the instant case is not that the jury could not have deemed all of the physical therapy necessary. Given Dr. Thrush’s opinion, they could. There is no way to tell if that’s what they depended on, since the \$600 difference between the medical damages and the verdict is not explained by any number in the evidence.

But what is nowhere in the evidence is any hint that Ms. Toothman’s treating physician, Dr. Ang, didn’t refer her for physical therapy or that he didn’t believe that it was connected to the accident. Further, there is no hint in the evidence that Ms. Toothman should have or even would have been justified in ignoring Dr. Ang’s opinion.

The reasonable analysis is one of foreseeability. Some bizarre, expensive therapy may very well not be the foreseeable consequence of a negligently induced injury. Physical therapy is somewhat pricey, but it’s generally accepted in the medical community. It is reasonable for a patient to listen to his or her own physician’s recommendation for treatment, including physical therapy. A result such as that which befell Ms. Toothman sends a terrible message to persons unfortunate enough to be injured. Do not merely be reasonably conservative in your care, so the lesson goes, be fearful that someone will second-guess your own doctor years later and you’ll get stuck with the bill you incurred was because someone negligently ran into to you.

“An award of additur is appropriate under West Virginia law only where the facts

of the case demonstrate that the jury has made an error in its award of damages and the failure to correct the amount awarded would result in a reduction of the jury's intended award.” *Bressler v. Mull's Grocery Mart*, 194 W.Va. 618, 461 S.E.2d 124 (W.Va., 1995) the reverse situation appears here. The jury and tended to make any inadequate award. This unlawful penury is unexplained and cannot be repaired with an additur.

**2 - The Court incorrectly denied the Plaintiffs’ motion to reveal the presence of insurance coverage for the Defendant, which are resulted in prejudice to the Plaintiffs.**

WVRE 411 provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

In the real world, adherence to this hoary rule of concealing insurance coverage worked a prejudice to Ms. Toothman every bit as pernicious as that ever caused by a jury willy-nilly spending the money of a corporate insurance giant. She was denied consideration of her just damages.

The intended message that she was insensitive to the defendant who is, in fact, a nice individual was very clear. He never contacted her until suit was filed. The fact that defendant that she was dealing with defendant’s representatives could not be revealed.

Ms. Jones status as a stay-at-home mom was balanced against the much older Ms. Toothman who could afford a beach home and a cruise with her grandchild. To what end? No one can say with a straight face that this was not to engender financial sympathy for the defendant. In some cases, that may not even be a bad thing. Courts are not mechanical things, they are arbiters of human disputes and, frequently, human tragedy and human hash is. Passion. But by omitting the truth, we mislead juries. Ms. Toothman had a long gap in treatment. She must not have been hurting, or at least that was the reasonable conclusion for the jury because they didn't know that state farm and paid medical bills and then cut off those payments.

It might be said that we omit relevant truths for juries all the time. Example can be found certainly in the criminal realm. If we have someone on trial for burglary and has three prior burglary convictions, the state cannot introduce those convictions demonstrate that the defendant committed this burglary. But we know that past conduct is the best predictor of future conduct and so in the real world, those past convictions are relevant. They are too prejudicial. And then in many cases, we skirt around that rule with WVRE 404(b) and place absolute trust that a jury will following technical limiting instruction.

The truth concealed from the jury and used in case is that the primary duty of the defendant was to attend the trial, sit quietly, and testified briefly. It was probably uncomfortable for her to be there. Beyond that, nothing bad was or is going to happen to her.

Mandatory insurance in any event is the "elephant in the room" of any motor

vehicle accident trial. If we assume that “ignorance of the law is no excuse,” then at least all of the jurors who operate a motor vehicle are aware specifically that one must have automobile insurance in order to operate a motor vehicle. West Virginia Code §17D-2A-1, *et seq.* This antiquated rule, however, prevents us were from reminding a jury of the fact we are all charged with knowing anyway. The history of this rule is instructive. Before automobile insurance was required, the first financial responsibility statute was passed in 1935, although at that time it was limited to showing the one be able to satisfy a verdict after it was rendered. [See *Nulter v. State Rd. Comm'n Of West Va.*, 119 W.Va. 312 (W.Va., 1937) and former West Virginia Code §17-20-1 *et seq.*] By the 1970s, this had morphed into a requirement of automobile insurance as an incident of being permitted to drive, such that the vehicle owner or operator could be sanctioned for violation in the absence of any accident. [See *Miller v. Lambert*, 195 W.Va. 63, 464 S.E.2d 582 (W.Va., 1995)].

The rule regarding concealment of insurance predates any rule that required insurance and is a very old one [See *Moorefield v. Lewis*, 96 W.Va. 112 (W.Va., 1924): “The jury in such case should not be apprised of the fact that the defendant by indemnity insurance is protected against damages.”] It was in this milieu that the rule protecting insurance companies was born, but time has rendered the rule not only obsolete but also oppressive as we have demonstrated. It is time for that rule to be abolished.

We trust juries to follow their instructions. We can instruct our juries that insurance is not “free money,” but is a pool of money collected from all drivers based

upon the respective risks which spreads the risk among the driving population. We can instruct juries that prevailing plaintiffs are entitled to their just damages. No less, no more.

**3 - The Court incorrectly utilized yet another antiquated role, requiring that future pain and suffering be proved to “reasonable medical certainty.”**

Future medical damages must be proved to a “reasonable medical certainty.”

*Hoovermale v. Berkeley Springs Moose Lodge No. 1483*, 165, W.Va. 689, 271 S.E.2d 335 (1980), *Pygman v. Helton*, 148 W.Va. 281, 134 S.E.2d 717 (1964).

If we assume for a moment that it is possible to prove anything medical to a reasonable certainty, whatever that is, the role that future events the proven to a reasonable certainty and that causation be proven to a reasonable probability as a logical disconnect. The first and it would seem that the more important question to one in a position of a defendant is not what exact number do I have to pay? It is the threshold question, did something I did wrong harm someone? If the answer to the latter question is only “probably,” and that defendant is stuck paying bills that he or she may not have created, that is cold comfort to think that they will be paying for future events.

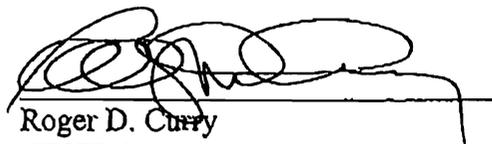
That particular discussion is largely academic. In reality, future medical damages cannot be proved to a “reasonable certainty.” The defendant’s highly qualified expert witness scoffed at the idea. We know that some injuries will continue to cause problems in some injuries will require various levels of future medical care. What we cannot know to a certainty is who is going to ask. Exactly what in the future. It cannot be done.

Whenever an expert witness intones an opinion to a "reasonable medical certainty," perhaps she or he understands the necessity of that mantra to wish her a reasonable compensation for plaintiff. If so, however, his or her professional judgment has been tainted with necessary nonsense. And when we have a professional conversant in the English language will not cut corners to drive a particular result, we will end up with a plaintiff who may be manifestly likely to experience negative of backs of injury into the future and incur some level of monetary expense and yet not be permitted to recover the proverbial red cent.

Justice Holmes may have said that "The life is of the law has not been logic, it has been experience," but by perpetuating logical nonsense, we hardly foster respect for the law.

#### CONCLUSION

The Circuit Court's trial order and order denying a new trial should be reversed, and this matter should be remanded for a new trial.



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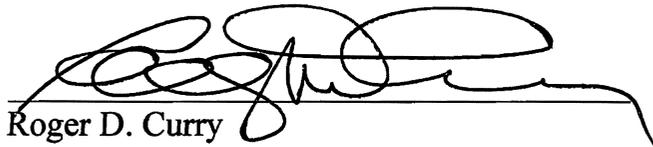
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CERTIFICATE OF SERVICE

I hereby certify that on 30 September 2011, true and accurate copies of the foregoing Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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