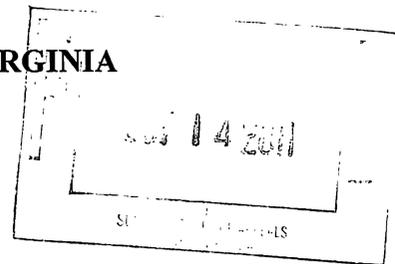


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0960



**BONNIE TOOTHMAN and
GARY TOOTHMAN,**

Petitioners,

v.

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

KARI LYNN JONES,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Section of Brief	Page Number
Table of Authorities.....	ii
Statement of the Case.....	1
Summary of Argument.....	4
Statement Regarding Oral Argument and Decision.....	5
Argument.....	6
1. The jury award was not inadequate as a matter of law.....	6
2. Excluding evidence of Respondent’s insurance coverage was proper.....	8
3. Requiring that future pain and suffering be proven to a “reasonable medical certainty” was proper.....	10
Conclusion.....	11

TABLE OF AUTHORITIES

Case Name	Page Number
<i>Alkire v. First National Bank of Parsons</i> , 197 W.Va. 122 (1996).....	8
<i>Bailey v. De Boyd</i> , 135 W.Va. 730 (1951).....	11
<i>Carrico v. West Virginia Cent. and P. Ry. Co.</i> , 39 W.Va. 86 (1894).....	11
<i>Combs v. Hahn</i> , 205 W.Va. 102, 105 (1999).....	7-8
<i>Dumpy v. Norfolk and W. Ry. Co.</i> , 82 W.Va. 123 (1918).....	11
<i>Fullmer v. Swift Energy Co., Inc.</i> , 185 W.Va. 45 (1991).....	6
<i>Hovermale v. Berkley Springs Moose Lodge No. 1483</i> , 165 W.Va. 689 (1980).....	11
<i>Moorefield v. Lewis</i> , 96 W.Va. 112 (1924).....	9
<i>Parsons v. Norfolk, and Western Ry. Co.</i> , 185 W.Va. 718 (1991).....	8
<i>Peck v. Bez</i> , 129 W.Va. 247 (1946).....	11
<i>Toler v. Hager</i> , 205 W.Va. 468 (1999).....	8
<i>Wade v. Chengappa</i> , 207 W.Va. 319 (1999).....	6-7
<i>Walker v. Robertson</i> , 141 W.Va. 563 (1956).....	11
<i>Wilson v. Fleming et al</i> , 89 W.Va. 553 (1921).....	11

STATEMENT OF THE CASE

Petitioners, Bonnie Toothman and Gary Toothman, filed Civil Action No. 08-C-204 on June 3, 2008, stemming from injuries Mrs. Toothman sustained during a car accident with the Respondent, Kari Lynn Jones. The Respondent admitted liability. Prior to trial on damages, the court granted Respondent's motion *in limine* barring the introduction of Respondent's liability insurance as evidence at trial.

On January 12, 2011, at the conclusion of the two-day trial, the jury awarded the Petitioners a total of \$5,372.35. As reflected in the verdict form, the award was only for past medical bills, which Petitioner asserts was insufficient as a matter of law because the award was about \$600 less than they asserted at trial. Contrary to Petitioners' assertion that Respondent stipulated to the higher medical bills, there was no such stipulation made, but only that Respondent did not contest that Petitioner had those medical bills. It was up to the jury to determine if all of the physical therapy bills were related to the accident. There was no agreement on the precise amount awarded. As indicated by the following discussions with the court, Petitioners' counsel did not raise any concerns with this part of the jury verdict after it was read:

THE CLERK: [. . .] Past medical expenses, \$5,372.35. Past and future pain and suffering, zero. Past and future loss of enjoyment of life, annoyance, and/or mental anguish, zero. Total, \$5,372.35.

[. . .]

THE COURT: [. . .] Any objection to the form of the verdict not previously expressed, Mr. Curry?

MR. CURRY: No, Your Honor.

(Appendix, p. 240)

With regard to the lack of any verdict for past pain and suffering, there was a discussion with the court regarding the proper manner to address this issue. Respondent's counsel requested that the jury be sent back to deliberate this element of damages, but Petitioners' counsel objected, and so the jury was dismissed. The court indicated that if the parties could not come to an agreement, that an additur would be applied, which was eventually ordered, in the amount of \$2,000 for past pain and suffering.

Thereafter, on February 9, 2011, the Petitioners filed a Motion for a New Trial. In their motion, the Petitioners argued on grounds which sought to defy legal precedent set by W.Va. case law and eschew the W.Va. Rules of Evidence. Petitioners asserted that the jury verdict was inadequate as a matter of law, that the Circuit Court incorrectly excluded evidence of insurance coverage for the Respondent, and incorrectly required that future pain and suffering be proven to a reasonable medical certainty.

With regard to the presence of insurance coverage for the Respondent, Petitioners asserted that a new trial was necessary in order to correct the prejudicial effect of certain questions raised during the direct examination of Respondent, Kari Lynn Jones, at trial. Petitioners' motion for a new trial centered on the following line of questioning by the Respondent's counsel:

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?

A: Yes.

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

A: Yes.

(Appendix, p. 94)

While the witness was still on the stand, Petitioners' counsel expressed his concerns during a bench conference as follows:

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, [. . .] that's the reason she had 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 tell the jury about insurance for that reason, my mother could probably get that verdict reversed by the Supreme Court unless they really take a different tact. (Appendix, pp. 95-96)

In response, the Court denied Mr. Curry's request based upon the well-known rule prohibiting a discussion of a defendant's liability coverage at trial:

THE COURT: Okay. You can have a seat. Mr. Curry's request/motion is overruled. [. . .] The fact that Ms. Toothman was in contact with the insurance company, that's not – Ms. Jones doesn't know that, she didn't participate in that process. [. . .] In any event, the motion is denied, and certainly, **as Mr. Curry aptly noted, the fact that she's got liability coverage is strictly prohibited by the current case law in West Virginia.** And this may be an appropriate case for Mr. Curry to seek to have that changed, but it won't be by me. (Appendix, p. 98)(emphasis added)

Of interest, Mr. Curry made no effort to cross-exam on any aspect of this line of questioning.

The Petitioners also argued in their motion for a new trial that the Circuit Court's requirement that future pain and suffering be proven to a "reasonable medical certainty" is an antiquated and an impossible standard. In support of this argument, Petitioners rely primarily on the testimony of Dr. P. Kent Thrush, the Respondent's IME physician. The focal point of the Petitioners' argument is the following interchange, taken out of context, from Mr. Curry's cross examination of Dr. Thrush:

Q. Now 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? (Appendix, p. 194)

During direct examination, however, Dr. Thrush had testified as follows concerning the Petitioners' need for future medical treatment:

A. **But I would say with a reasonable degree of medical certainty** or a reasonable degree of medical probability this treatment in 2010 would not be related to the accident of '06. (Appendix, p. 164)(emphasis added)

A. [. . .] Again, it goes back to my experience has been that most people pretty much get back to where they were in three to six months after a neck sprain like this, whiplash injury like this. Now a few patients have continued subjective complaints longer than that and they say they're not quite back to where they were before. And we don't know the reason for that completely. I guess she would fall in that category if she says that she was still having trouble. But likewise, she could be having symptoms just from her degenerative disc disease. So I think in my experience treatment beyond that first 6 to 12 months in physical therapy is not warranted for a sprain. (Appendix, pp. 165-166)

Ultimately, the Circuit Court denied the Petitioners' Motion for a New trial, finding that none of their arguments represented a valid basis for granting a new trial. In the same order, the Court granted a \$2,000 additur for pain and suffering to supplement the jury award. The Petitioners now wish to reverse the Circuit Court's order and ask this Court to grant a new trial.

SUMMARY OF ARGUMENT

On appeal, the Petitioners seek to overturn the Circuit Court of Marion County's proper decision to deny the Petitioners', and former Plaintiffs', Motion for a New Trial, based upon three assignments of error which seek to eschew the W.Va. Rules of Evidence and overturn decades of legal precedent established by W.Va. case law.

As will be discussed below, the Petitioners' supposed "inadequate jury award" was cured by the trial judge via a post trial additur - a valid remedy recognized and supported by W.Va. case law. Additionally, the Petitioners' remaining assignments of error – concerning the trial judge's exclusion of evidence revealing the Respondent's insurance coverage, and the trial judge's adherence to the rule requiring future pain and suffering to be proven by a "reasonable medical certainty" – were in fact proper, and were in accordance with the W.Va. Rules of Evidence and W.Va. case law addressing the continuing relevance of such rules. For these reasons, the Petitioners' appeal should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rev. R.A.P. 18(a)(4), oral argument is unnecessary in this case because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

1. The jury award was not inadequate as a matter of law.

The jury award of \$5,392 was not inadequate as a matter of law. When inadequate damages are asserted as the basis for a new trial, a miscarriage of justice will only exist if “it is a sum so low that under the facts of the case, reasonable men cannot differ about its inadequacy.” Syl. Pt. 2, *Fullmer v. Swift Energy Co., Inc.*, 185 W.Va. 45 (1991). The Petitioners’ argument that the jury award was inadequate as a matter of law is based upon two theories: 1) that the jury’s award of special damages without an award for general damages exhibited an inadequate jury award; and 2) the jury did not award them the full amount of their alleged past medical bills - a difference of about \$600. Neither argument presents a proper basis for finding that the jury award was inadequate.

Petitioners asserted at trial that their past medical damages were \$5,972, and tried to obtain a stipulation on this point, which was refused by Respondent. The jury concluded that about \$600 worth of past treatment - perhaps some of her overlapping treatments with her doctor for unrelated conditions, or physical therapy treatments after over a year gap in treatments - were just not related. At any rate, the amount of difference is not significant, nor should the jury have to explain every aspect of its decision.

Moreover, the fact that no general damages were awarded to the Petitioners does not make the verdict “inadequate as a matter of a law” as the Petitioners contend. On the contrary, the W.Va. Supreme Court has held that a verdict containing no award for general damages is *not* inadequate as a matter of law. In *Wade v. Chengappa*, 207 W.Va. 319 (1999), the jury awarded the plaintiff her past medical expenses, and an amount for pain and suffering, but provided no award for other general damages listed on the verdict form (including Mental Anguish and Loss of Enjoyment of

Life). As in this case, the jury foreman in *Wade* entered "\$0" in the blanks accompanying these damages, and the plaintiff moved for a new trial, asserting that the verdict was inadequate as a matter of law. The court held that the zeroes on the verdict form, which were "boldly set forth in the handwriting of the jury foreperson," exemplified that the jury *did* deliberate as to these damages and chose to award nothing. *Id* at 324. Therefore the verdict could not be held inadequate on that basis.

Likewise, in this case, the fact that the jury awarded the Petitioners a specified amount of special damages but entered zeroes on the verdict form for the listed general damages is not a basis on which a new trial should be granted. Furthermore, "[i]n an appeal from an allegedly inadequate damage award, the evidence concerning damages is to be viewed most strongly in favor of the defendant." *Combs v. Hahn*, 205 W.Va. 102, 105 (1999) Here, the jury's deliberation as to the general damages yields the conclusion that no miscarriage of justice occurred, and the damage award granted to the Petitioners is not a sum so low that reasonable men could not differ about its inadequacy.

To the extent that the award may be considered inadequate, any deficiency in the verdict itself was cured by the Court's post-trial additur. After the verdict had been read, but before the jury had been excused, both parties were given the verdict form to review. Counsel for the Respondent expressed concern as to the lack of an award for general damages, and suggested that the jury deliberate further, but Petitioners' counsel objected. Thereafter, the judge excused the jury and decided that the verdict could be corrected via an additur.

In general, courts addressing this issue have held that a party contesting a verdict must object to the verdict when it is returned, prior to the jury's discharge. *Combs v. Hahn*, 205 W.Va. 102, 105 (1999). The rationale is to give the trial court the opportunity to correct any infirmity in the verdict

while correction is still possible. *Id* at 105-106. In most circumstances, when a party raises a valid concern with the award, the jury is sent back to deliberate further. *See, Toler v. Hager*, 205 W.Va. 468 (1999); *Parsons v. Norfolk, and Western Ry. Co.*, 185 W.Va. 718 (1991) However, Petitioners' counsel chose not to exercise this option and declined Respondent's counsel's request to do so. Thereafter, in the face of Petitioners' counsel's refusal to adopt the most common remedy, the Court dismissed the jury and indicated it could address this issue on post trial motions.

It has been established in W. Va. case law that an additur is a valid and favorable substitution for a new trial. *See, Syl. Pt. 1, Alkire v. First National Bank of Parsons*, 197 W.Va. 122 (1996)(holding that plaintiffs' motion for judgment notwithstanding the verdict was mooted by the trial court's additur.) Likewise, in this case, the trial court's additur for general damages rendered moot any basis for a new trial due to the jury's failure to award general damages.

2. Excluding evidence of Respondent's insurance coverage was proper

In what is perhaps the Petitioners' most unwarranted basis for an appeal, the Petitioners assert that excluding evidence of the Respondent's insurance coverage at trial was an error. Prior to trial, the Respondent's Comprehensive Motions in Limine were granted. In relevant part, these motions *in limine* barred the Petitioners from introducing evidence or making reference to any liability insurance coverage of the Respondent. The mere questioning of Ms. Jones' knowledge of whether Mrs. Toothman was injured, and her response that she didn't know it until she was served a copy of the complaint is a fair question and answer. Mrs. Toothman did not complain about any injury at the scene of the accident, but went straight to her medical doctor's appointment - which is where she was headed when the accident occurred. Ms. Jones was not asked how long a period it was between the accident and the complaint, and no further discussion was made regarding the matter.

Petitioners' counsel could have inquired about Ms. Jones' knowledge of Mrs. Toothman's medical treatments, and whether she disputed any of them, but that was not done. There was no unfair prejudice in Ms. Jones' remarks, and they certainly do not necessitate the dismantling of sound law.

The prohibition on the introduction of insurance at trial is well-established. In *Moorefield v. Lewis*, 96 W.Va. 112 (1924), the court held that “[t]he jury in such case should not be apprised of the fact that the defendant by indemnity insurance is protected against damages.” The reasoning for the rule is that such evidence would improperly influence the jury to find for the plaintiff without regard to the defendant's actual liability, simply because the insurance company would and could cover it. Despite the Petitioners' argument that this rule is “antiquated,” there is good reason why the rule has remained unchanged for more than 75 years.

Petitioners seem to be fixated on the usual speed bumps in every trial, like the kind of witness each person will make and the legitimate introduction of the individual. It is an age-old issue that both sides of the aisle have to address. In this case, Ms. Jones testified that she was a homemaker and cared for her two young children. Petitioners interpret this to mean that she's unemployed, and you should feel sorry for her and not award a substantial verdict. What Petitioners fail to recognize is that the jury instructions cover this very issue, and the jury is instructed not to allow sympathy to rule over their decisions. Petitioners' remedy is to give an instruction that Ms. Jones is insured by State Farm Insurance Company. Similarly, Petitioners take issue with the fact that Mrs. Toothman voluntarily blurted out that her son bought her a beach house, and that they spend time there vacationing, in addition to the Disney cruise they attended as well. As stated before, these are typical problems to overcome in every case, and are not a sound basis to change existing laws about insurance coverage

3. Requiring that future pain and suffering be proven to a “reasonable medical certainty” was proper.

In their third assignment of error, the Petitioners argue that the trial court improperly utilized “yet another antiquated rule” which required that future pain and suffering be proven to a “reasonable medical certainty.” The Petitioners again attempt to characterize a well established rule as “antiquated” simply because its enforcement did not yield their intended result. The Petitioners base their argument around Dr. Thrush’s rhetorical commentary on the “impossibility” of predicting the future. The Petitioners fail to mention that during direct examination, Dr. Thrush *did* express his opinion to a reasonable medical certainty. Regarding the necessity for future medical treatments, and the potential for future pain and suffering, Dr. Thrush testified:

A. But I would say with a *reasonable degree of medical certainty* [. . .] this treatment in 2010 would not be related to the accident of ‘06. (Appendix, p. 164)(emphasis added)

A. [. . .] Again, it goes back to my experience has been that most people pretty much get back to where they were in three to six months after a neck sprain like this, [. . .] So I think in my experience treatment beyond that first 6 to 12 months in physical therapy is not warranted for a sprain. (Appendix, pp. 165-166)

Ultimately, Petitioners offered no evidence to dispute Dr. Thrush’s testimony and show that future medical treatments were necessary to a reasonable degree of medical certainty.

The court’s requirement that future pain and suffering be proven to a medical certainty does not impose an impossible standard by which the Petitioners can never recover for future damages. Rather, in an effort to protect defendants from unjustly bearing the burden for future costs which may never materialize, the court merely establishes a heightened standard for proving future damages:

Because these are future events, we have required the medical expert to give his opinion on these questions to a reasonable degree of medical certainty. [. . .] Though it is necessary to establish future pain and suffering and reasonable and necessary expense of medical and nursing services to be incurred in the future by medical testimony that there is **reasonable certainty** that such pain and suffering **will** result and such expenses **will** be incurred, [. . .] there is no such requirement with respect to the admissibility of sufficiency of medical testimony concerning the proximate cause of an injury.

Hovermale v. Berkley Springs Moose Lodge No. 1483, 165 W.Va. 689, 696-697 (1980)(emphasis added). The requirement to prove future pain and suffering to a medical certainty is a rule that has been consistently upheld and utilized throughout history in W.Va. courts. *See, Carrico v. West Virginia Cent. and P.Ry. Co.*, 39 W.Va. 86 (1894); *Dumpy v. Norfolk and W. Ry. Co.*, 82 W.Va. 123 (1918); *Wilson v. Fleming et al*, 89 W.Va. 553 (1921); *Peck v. Bez*, 129 W.Va. 247 (1946); *Bailey v. De Boyd*, 135 W.Va. 730 (1951); and *Walker v. Robertson*, 141 W.Va. 563 (1956) Thus, no miscarriage of justice resulted from the Circuit Court properly requiring that future pain and suffering be proven to a reasonable medical certainty. The Petitioners' failure to meet their evidentiary burden at trial does not equate to a valid basis for an appeal.

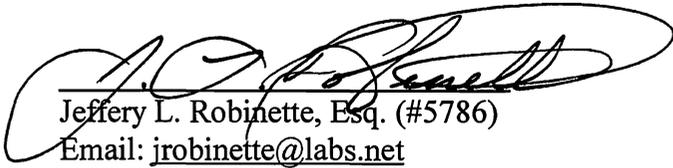
CONCLUSION

The Petitioners' assignments of error in this case do not merit a new trial. Any existing deficiencies in the jury award were remedied when the trial judge entered a post-trial additur of \$2,000 for pain and suffering. W.Va. case law supports additur as a valid and favorable remedy under comparable circumstances. Additionally, the trial court's exclusion of evidence of Respondent's insurance coverage is supported by decades of W.Va. case law and is still a valid rule of evidence in this state. Finally, requiring future pain and suffering to be proven to a "reasonable medical certainty" does not create an impossible standard, but rather an evidentiary check to ensure

a fair and accurate remedy for plaintiffs that does not require defendants to unjustly compensate plaintiffs costs that may never materialize. For the reasons set forth herein, the Respondent, Kari Lynn Jones, requests that the Petitioners' appeal be denied.

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KARI LYNN JONES,

Respondent.

CERTIFICATE OF SERVICE

I, Jeffery L. Robinette, counsel for the Respondent, do hereby certify that the foregoing *Respondent's Brief*, was served upon the following by mailing a true and accurate copy thereof by first class, United States mail, postage prepaid, to the following address, this 12th day of October, 2011.

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