

13-0427

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

SAMUEL C. LISTON,

Plaintiff,

v.

CIVIL ACTION NO. 11-C-102
HONORABLE SUSAN B. TUCKER

JOHN N. KENNEY, and STATE FARM
MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Defendants.

**ORDER DENYING DEFENDANT JOHN N. KENNEY'S
MOTION FOR POST-TRIAL RELIEF**

On January 16, 2013, came the parties, by and through there respective counsel, upon Defendant John N. Kenney's Motion for Post-Trial Relief. The Court after considering the brief filed on behalf of Mr. Kenney, as well as the response brief filed by counsel for the Plaintiff, Samuel C. Liston, and hearing the argument of counsel, **DENIES** Defendant John N. Kenney's Motion for a Post-Trial Relief. The reasons for the Court's denial of said Motion are set forth on the record, as well as set forth below:

- i. **The jury's award for "compensation for a permanent injury" and "future pain and suffering" was not an impermissible duplication of damages.**

Plaintiff's proposed verdict form did contain line items for "Compensation for future loss of enjoyment of life" as well as "Compensation for permanent injury." Defendant ("John Kenney") timely objected to having both line items on the verdict form and the court, after

hearing the arguments of counsel, granted the Defendant's objection. In fact, when making its ruling the court specifically stated that future loss of enjoyment of life is the main element for compensation for permanent injury.

This court's ruling was in line with *Flannery v. United States of America*, 297 S.E.2d 433 (W. Va. 1982). The Court in *Flannery* held:

What *Jordan* makes clear is that once a **permanent injury** has been established that in addition to future pecuniary expenses or liquidated damages and losses such as medical, hospital and kindred expenses and loss of future wages and earning capacity, the plaintiff is entitled to additional damages for **future pain and suffering** and for the **permanent effect of the injury** itself on "the capability of an individual to function as a whole man." 210 S.E.2d at 634. (emphasis added)

We believe that the loss of enjoyment of life is encompassed within and is an element of the permanency of the plaintiff's injury. To state the matter in slightly different manner, the degree of permanent injury is measured by ascertaining how the injury has deprived the plaintiff of his customary activities as a whole person. The loss of customary activities constitutes the loss of enjoyment of life.

The Plaintiff, Samuel Liston was entitled to recovery for "future pain and suffering" and for the "permanent effect of the injury itself." There was not a duplicative award and therefore the defendant's Motion for remittitur or reduction of the jury's award is denied.

II. The jury's award for permanency was not duplicative of the jury's award for past loss of enjoyment of life.

Any award for "permanency" is for future damages and would not be duplicative of an award for past damages. The W. Va. Supreme Court of Appeals in *Flannery* stated "[t]he term "permanent injury" is used as a threshold condition that must ordinarily be shown in

order to recover any future damages surrounding a personal injury as we said in Syllabus Point 9 of Jordan v. Bero, W.Va. 210 S.E.2d 618 (1974): "The permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages."

Therefore, the jury's award in the present case for past loss of enjoyment of life is not duplicative and Defendant's Motion to set aside that award is Denied.

III. Defendant John Kenney is not entitled to a new trial on the punitive damage award as there was no error in the questioning of the him, and even if error could be found, it was invited error.

The Defendant seeks a new trial because the court allowed plaintiff to ask a single question of the defendant as to defendant's understanding regarding the amount of liability insurance coverage. Defendant brings forth this motion even though it was defendant himself who introduced his wealth, or the alleged lack thereof, into evidence which was the only reason that insurance coverage could be brought before the jury. Thereafter, the plaintiff only brought forth the fact that the defendant had insurance coverage, and didn't inquire as to the amount, as both parties were well aware that the amount of coverage the defendant may have in this matter was under debate. Nevertheless, defense counsel then specifically asked the defendant the amount of his insurance coverage. Defense counsel then objected, when on re-cross, plaintiff's counsel asked if it was the defendant's understanding that additional coverage may be available.

The court in allowing the plaintiff to ask one question as to whether or not it was the

defendant's understanding that there may be additional coverage to pay a verdict was not error. The defendant himself brought forth his wealth, or lack thereof, which allowed the plaintiff to inquire as to insurance coverage under *Games v. Fleming*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

Thereafter, as stated above, defense counsel asked the defendant as to the amount of the policy, when she, and the defendant knew the amount of coverage was in question. If the amount of coverage wasn't in question, then the defendant could have easily answered the question on re-cross in the negative, instead of affirming that it was his understanding that he may have additional coverage beyond the stated policy limit.

This court does not believe that the question asked of the defendant, or the simple instruction given in the charge was in error. However, if it is determined to be in error, it was invited by the defendant.

“Invited error” is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous [ruling] and then later seeking to profit from that error. The idea of invited error is ... to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the [proceedings] use the error to set aside its immediate and adverse consequences.

State v. Crabtree, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996). Accord *In re Tiffany Marie S.*, 196 W.Va. 223, 233, 470 S.E.2d 177, 187 (1996) (“[W]e regularly turn a deaf ear to error that was invited by the complaining party.” (citation omitted)); *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 599, 396 S.E.2d 766, 780 (1990)

Defense counsel argues that the jury was permitted to hear false evidence regarding the extent of insurance coverage available to the Defendant. That is simply not true. The jury was allowed to hear that the defendant may have additional coverage, which was the

testimony of the defendant.

WHEREFORE, for the reasons stated above, Defendant's Motion is Denied. Defendant's exception to the Order is noted. The court directs the Clerk of the Court to provide a copy of this Order to all counsel of record.

ENTER: February 26, 2013
Susan B. Tucker
HON. SUSAN B. TUCKER

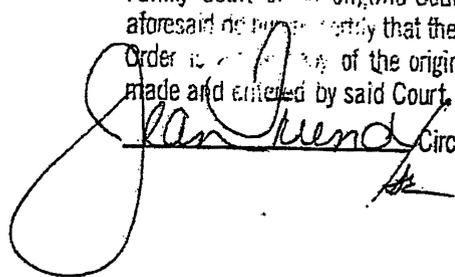
Submitted By:



J. Bryan Edwards (WV State Bar #6886)
CRANSTON & EDWARDS, PLLC
1200 Dorsey Ave., Suite II
Morgantown, West Virginia 26501
304-296-3500
Counsel for the Plaintiff

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true and correct copy of the original Order made and entered by said Court.



Jean Friend, Circuit Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

SAMUEL C. LISTON,

Plaintiff,

v.

CIVIL ACTION NO. 11-C-102
HONORABLE SUSAN B. TUCKER

JOHN N. KENNEY,

Defendant.

JUDGMENT ORDER

On September 18, 2012, came the Plaintiff, Samuel C. Liston, in person and by his counsel, J. Bryan Edwards, and also came the Defendant, John N. Kenny, in person and by his attorney, Tiffany R. Durst.

Thereupon came a jury, to-wit: Christine Daft, David Friend, Kevin Hart, Eric Jordan, James Rhoades, and George Lies, six good and lawful jurors, selected according to law to well and truly try the issues between the Plaintiff, Samuel C. Liston and the Defendant, John N. Kenney, and true verdict render according to the evidence so help you God.

The jury then heard opening statements on behalf of the Plaintiff and the Defendant and part of the testimony on behalf of the Plaintiff before adjourning for the day.

The jury returned into Court on September 19, 2012 and heard additional testimony on behalf of the Plaintiff, before adjourning for the day.

The jury returned into Court on September 20, 2012, and heard additional testimony on behalf of the Plaintiff. Then the Plaintiff rested his case in chief for compensatory damages. The Defendant rested his case on compensatory damages without calling any

witness. The jury then heard the instructions of the Court and closing arguments on behalf of the Plaintiff and the Defendant before retiring to their chambers to consider a verdict. The jury adjourned for the day without returning a verdict.

The jury returned into Court on September 21, 2012, and retired to their chambers to continue with their deliberations. After some time, the jury returned the following verdict:

1. *The parties have stipulated that the negligence of the Defendant, John N. Kenney, caused the accident that occurred on April 6, 2010.*

2. *Do you the jury find, by a preponderance of the evidence, that the negligence of the Defendant, John N. Kenney, was a direct and proximate cause of the damages suffered by the Plaintiff in the accident that occurred on April 6, 2010?*

 X YES NO

If your answer to Question Number 2 is "NO," then skip the remaining questions and have the foreperson sign the jury verdict form. Return it to the bailiff and advise him that you have completed your deliberations. If your answer to Question Number 2 is "YES," then you are to continue on and answer the following questions.

3. *Please state what amount of damages you award the Plaintiff as compensation for the following:*

- | | |
|--------------------------------------------------------------------------|----------------------|
| 1. <i>Compensation for past medical expenses:</i> | \$ <u>74,061.00</u> |
| 2. <i>Compensation for future medical expenses:</i> | \$ <u>19,520.00</u> |
| 3. <i>Compensation for past pain and suffering:</i> | \$ <u>5,000.00</u> |
| 4. <i>Compensation for future pain and suffering:</i> | \$ <u>16,000.00</u> |
| 5. <i>Compensation for past emotional distress and mental anguish:</i> | \$ <u>18,000.00</u> |
| 6. <i>Compensation for future emotional distress and mental anguish:</i> | \$ <u> 0.00</u> |
| 7. <i>Compensation for past loss of enjoyment of life:</i> | \$ <u>12,000.00</u> |

8. Compensation for a permanent injury:	\$ <u>170,300.00</u>
9. Compensation for past loss wages:	\$ <u>10,391.92</u>
10. Compensation for future loss wages:	\$ <u>0.00</u>
Total Damages	\$ <u>325,272.92</u>

You have now completed your deliberations. Have the foreperson sign the jury verdict form, return it to the bailiff and advise him that you have completed your deliberations.

September 21, 2013
Date

/s/ George Lies
Foreperson

The Court then asked whether counsel for either party desired to poll the jury, to which all counsel responded in the negative.

Thereupon, the Court informed the jury that the facts of the case had required that the case be bifurcated on the issue of punitive damages. The jury then heard opening statements on behalf of the Plaintiff and the Defendant and then all the testimony on behalf of the Plaintiff on the issue of punitive damages. The Plaintiff rested his case on punitive damages and the Defendant did not call any witnesses and rested his case as well.

The jury then heard the instructions of the Court and closing arguments on behalf of the Plaintiff and the Defendant before retiring to their chambers to consider a verdict. After some time, the jury returned the following verdict:

1. Do you the jury find, by a preponderance of the evidence that John N. Kenney, on April 6, 2010, engaged in grossly negligent or reckless conduct which caused the motor vehicle accident?

X YES NO

If your answer to Question Number 1 is "NO," then skip the remaining questions and have the foreperson sign the jury verdict form. Return it to the bailiff and advise him that you have completed your deliberations. If your answer to Question Number 1 is "YES," then you are to continue on and answer the following question.

If your answer to Question No. 1 is "YES," then please assign a dollar amount representing the amount of money you determine necessary to punish John N. Kenney for his conduct: \$300,000.00

You have now completed your deliberations. Have the foreperson sign the jury verdict form, return it to the bailiff and advise him that you have completed your deliberations.

Dated: September 21, 2012

*George Lies /s/
JURY FOREPERSON*

The Court then asked whether counsel for either party desired to poll the jury, to which all counsel responded in the negative.

Thereupon, the Court proceeded to render judgment on the jury's verdict, and it is, accordingly, **ORDERED** and **ADJUDGED** that the Plaintiff, Samuel C. Liston, recover of and from the Defendant, John N. Kenny, the sum of \$625,272.92, with prejudgment interest in the amount of \$14,545.00 on the economic damages awarded by the jury calculated at the amount of seven percent (7%) per annum for those items of damage specified as past hospital and medical expenses and past loss of income, as determined by the jury, from and including April 6, 2010, through and including September 21, 2012. The total prejudgment interest for all of those separate items of economic damage totals \$14,545.00 for a total judgment award of \$639,817.92.

It is further **ORDERED** and **ADJUDGED** that the Plaintiff, Samuel C. Liston, recover of and from the Defendant, John N. Kenney, per diem post-judgment interest at the rate

of seven percent (7%) per annum on the total judgment award of \$639,817.92 from and including September 21, 2012, until paid. This amounts to a post-judgment per diem interest factor of \$122.70.

It is further **ORDERED** and **ADJUDGED** that the Defendant, John N. Kenney, is to pay all the costs of this action as taxed by the Clerk of the Court.

The Clerk is directed to send copies of this Order to all counsel of record.

ENTER: October 09, 2012

Susan B. Tucker
Susan B. Tucker, Chief Judge

Prepared By:



J. Bryan Edwards, Esquire (WV Bar #6886)
CRANSTON & EDWARDS, PLLC
1200 Dorsey Avenue, Suite II
Morgantown, WV 26501
Counsel for Defendants

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State of West Virginia do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

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Jean Friend
Circuit Clerk