

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

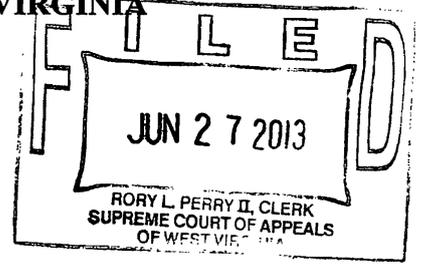
JOHN N. KENNEY

Petitioner,

v.

NO. 13-0427

Appeal from a final order of the
Circuit Court of Monongalia County
(Civil Action No. 11-C-102)



SAMUEL C. LISTON,

Respondent.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. The trial court erred by allowing the jury to award duplicative damages for “[c]ompensation for a permanent injury” and future pain and suffering.
- II. The trial court erred by allowing the jury to award duplicative damages for “[c]ompensation for a permanent injury” (which was not specified to be limited to the future effects of the permanency) and past loss of enjoyment of life.
- III. The trial court committed error by allowing the jury to hear Respondent’s counsel’s theory of *Shamblin*-type excess coverage available to Petitioner to pay the jury’s verdict.
- IV. The trial court erred by instructing the jury on the possibility of *Shamblin*-type excess insurance coverage because the same was a comment on the evidence in violation of Rule 51 of the West Virginia Rules of Civil Procedure and gave undue influence to the possibility of such excess insurance coverage.
- V. The trial court erred by denying Petitioner’s *Motion in Limine to Exclude Evidence, Testimony and Argument Relating to Past Medical Expenses Not Actually Paid by the Plaintiff.*
 - A. Barring Respondent from recovering write-off amounts not paid or incurred by himself or by his insurance company on his behalf or, in the alternative, allowing Petitioner to introduce evidence of billing reductions to rebut the reasonableness of Respondent’s claimed damages, does not violate the collateral source rule.
 - B. The trial court erred by allowing Respondent to recover the amounts of medical bills that were written-off because no individual or entity will ever be responsible for the payment of such amounts.
 - C. Even if the trial court did not err by allowing Respondent to recover the amount of his medical bills that were written-off, the trial court erred by not allowing Petitioner to introduce evidence of the discounted amounts as evidence of the true reasonable value of Respondent’s medical expenses.

STATEMENT OF THE CASE

This case arises out of a motor vehicle accident which occurred in Monongalia County, West Virginia, on April 6, 2010. *Joint Appendix at 000002 (hereinafter "J.A. at ___")*. As a result of the accident, Petitioner, John N. Kenney ("Petitioner"), was charged with first offense driving under the influence ("DUI"). *Id.* Petitioner later pled no contest to first offense DUI. *J.A. at 679*. Respondent, Samuel C. Liston ("Respondent") sustained injuries in the accident and sought medical treatment therefor. *J.A. at 000045*. Respondent's health insurance carrier (Blue Cross/Blue Shield) paid a substantial portion of Respondent's medical bills. *J.A. at 000045 – 000046*. Additionally, many of Respondent's medical expenses were written-off or downwardly adjusted. *Id.* Neither Respondent nor Respondent's health insurance carrier were responsible for the payment of the amounts which were written-off. *Id.*

Prior to trial, Petitioner filed a motion *in limine* regarding the amount of the write-offs contained within Respondent's medical bills. *J.A. at 000006 – 000015*. Petitioner argued that since the amounts were neither paid nor incurred by Respondent or Respondent's health insurance carrier, Respondent should not be able to introduce evidence of the same at trial. *J.A. at 000008 – 000010*. In the alternative, Petitioner argued that the amounts of the write-offs should be admissible as evidence of the reasonable value of Respondent's medical expenses. *J.A. at 000011 – 000013*. The trial court denied this motion *in limine* and ruled that Respondent could recover the amount of the write-offs and further ruled that Petitioner could not introduce evidence of the amount of the write-offs to prove the reasonable value of Respondent's medical expenses. *J.A. at 000073 – 000079*.

Also prior to trial, Respondent submitted a proposed verdict form which contained separate line items for permanent injury and loss of enjoyment of life. *J.A. at 000042 – 000044.* Petitioner objected to the proposed verdict form, arguing that Respondent could not recover for both permanency and loss of enjoyment of life; thus, lines for both awards should not be included on the jury verdict form. *J.A. at 000062 – 000065.* Therefore, Petitioner proposed that the line item for permanency be stricken from the Petitioner’s verdict form. *J.A. at 000063.*

Trial began on September 18, 2012. *J.A. at 000080.* The case was tried in a bifurcated manner, with the jury first determining compensatory damages and subsequently determining punitive damages. *J.A. at 000080 – 000084.* The issue regarding the line item for permanency was addressed by the trial court on September 20, 2012, during the third day of trial. *J.A. at 568 – 569.* The trial court determined that “Compensation for a permanent injury” should remain on the verdict form and “Compensation for future loss of enjoyment of life” should be removed from the verdict form. *Id.* Petitioner objected and argued that the proper line item should be “Compensation for future loss of enjoyment of life” and that there should be no line item for “Compensation for a permanent injury.” *J.A. at 000062 – 000066; 568-569.* The trial court overruled Petitioner’s objections. *J.A. at 569.* Therefore, the verdict form which was eventually submitted to the jury contained, *inter alia*, line items for “Compensation for a permanent injury”, “Compensation for future pain and suffering”, and “Compensation for past loss of enjoyment of life.” *J.A. at 000081 – 000082.*

The jury returned a verdict on the first phase of the bifurcated trial on September 21, 2012. *Id.* The jury awarded compensatory damages totaling \$325,272.92. *Id.* This amount represented \$74,061.00 for past medical expenses, \$19,520.00 for future medical expenses,

\$5,000.00 for past pain and suffering, \$16,000.00 for future pain and suffering, \$18,000.00 for past emotional distress and mental anguish, \$0.00 for future emotional distress and mental anguish, \$12,000.00 for past loss of enjoyment of life, \$170,300.00 for “[c]ompensation for a permanent injury”, \$10,391.92 for past lost wages, and \$0.00 for future lost wages. *Id.*

At this point, the trial court revealed to the jury that their service was not yet complete and explained to the jury that the second phase of the trial would begin. *J.A. at 665 – 666.* Respondent’s counsel called Petitioner as an adverse witness during the punitive phase of the trial. *J.A. at 673.* During Respondent’s counsel’s cross- examination of Petitioner, Respondent introduced evidence and testimony regarding the financial position of Petitioner. *J.A. at 675 – 677; 687 - 688.* During this line of questioning, Respondent’s counsel elicited testimony from Petitioner regarding the fact that Petitioner had insurance coverage. *J.A. at 688.* Petitioner’s counsel then elicited testimony from Petitioner regarding the fact that the coverage limit of his insurance policy is \$100,000.00. *J.A. at 695 -696.* On re-cross examination, Respondent’s counsel then attempted to question Petitioner regarding Respondent’s contention that Petitioner may have unlimited insurance coverage due to the circumstances of this case.¹ *J.A. at 703.* Petitioner’s counsel objected. *J.A. at 703 - 706.*

¹By way of background, Respondent’s counsel contends that pursuant to *Shamblin v. Nationwide Mut. Ins. Co.*, 175, W. Va. 337, 332 S.E.2d 639 (1985), Petitioner’s automobile liability insurer is responsible for any excess verdict in this case. *J.A. at 704.* The undersigned counsel do not represent Petitioner with respect to his insurance coverage. Petitioner has retained personal counsel to represent him with respect to his insurance coverage. *J.A. at 704.* Subsequent to trial, Respondent’s counsel amended the Complaint to seek declaratory judgment regarding whether Petitioner’s automobile liability insurer is liable for the entirety of the jury verdict pursuant to the tenets of *Shamblin*. *J.A. at 000138.* The coverage issue is still being litigated at the trial court level and, to date, no determination has been made as to whether Petitioner’s automobile liability insurer will

The jury was then excused while the trial court determined whether such information was admissible. *J.A. at 707*. Outside of the presence of the jury, the trial court ultimately ruled that Respondent's counsel could ask one (1) question regarding the contention that Petitioner essentially has unlimited insurance coverage. *J.A. at 707 – 708*. Petitioner's counsel then inquired of the trial court as to whether she would be permitted to question Petitioner regarding the fact that his automobile liability insurer had informed him that its position was that he has only \$100,000.00 in coverage for the matter. *J.A. at 709*. However, the trial court ruled that Petitioner's counsel could not ask any such question of Petitioner. *Id.*

The trial court also *sua sponte* determined that the jury should also be instructed on the issue. *J.A. at 707 – 708*. Petitioner's counsel ultimately objected to the instruction, arguing that the same was an impermissible comment on the evidence in violation of Rule 51 of the West Virginia Rules of Civil Procedure. *J.A. at 746*. The instruction which was ultimately read to the jury stated as follows:

In considering the amount of punitive damages to award in this case, if any, you may consider some or all of the following:

[...]

4. The wealth of [Petitioner] as demonstrated by his assets at the time of the automobile collision.

The Court instructs you that because of certain legal actions that have been taken in this case there may or may not be additional coverage to pay whatever your verdict may be.

J.A. at 000113. No other evidence which the jury heard during trial regarding Petitioner's wealth (or lack thereof) was presented to the jury by way of a similar jury instruction. *J.A. at 000111 – 000114*.

be responsible for any portion of the excess verdict in this case.

The jury ultimately rendered a punitive damage verdict in the amount of \$300,000.00. *J.A. at 000083.*

Subsequently, Petitioner timely filed a *Motion for Post-Trial Relief* in which he requested remittitur, a new trial, or a new trial on the issue of punitive damages. *J.A. at 000085 – 000114.* The trial court denied Petitioner’s motion by Order entered February 26, 2013. *J.A. at 000130 – 000134.*

SUMMARY OF ARGUMENT

Petitioner presents this brief respectfully requesting that the February 2, 2012 and February 26, 2013 Orders of the Circuit Court of Monongalia County be reversed and a new trial granted due to numerous reversible errors committed prior to and during trial. Damages for a “permanent injury” are duplicative of damages for future pain and suffering. The phrase “permanent injury” is an umbrella term which encompasses all types of future damages (including future pain and suffering). In this case, the trial court committed reversible error by allowing separate line items to be placed on the verdict form for “[c]ompensation for a permanent injury” and future pain and suffering.

Along the same lines, in direct contravention of *Flannery v. United States*, the trial court permitted the jury to award “separate amounts for both the permanency of Plaintiff’s injury and the loss of enjoyment of life.” The line item on the verdict form for “[c]ompensation for a permanent injury” was not limited to compensation for the future effects of the permanent injury. Additionally, the trial court permitted the jury to award a separate amount for past loss of enjoyment of life. Therefore, pursuant to *Flannery v. United States*, the trial court committed reversible error by

permitting the jury to award duplicative damages for “[c]ompensation for a permanent injury” and past loss of enjoyment of life.

Respondent’s counsel contends that because a demand was made to settle this matter within Petitioner’s policy limits prior to suit being filed, the case falls within the tenets of *Shamblin v. Nationwide Mutual Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985). Yet, no judicial determination regarding the possibility of excess coverage had been made at the time of trial.² The trial court erred by permitting Respondent’s counsel to cross-examine Petitioner regarding the speculative possibility that there may be “unlimited” insurance coverage available to Petitioner. Additionally, the trial court’s error in this respect was compounded by the trial court’s refusal to allow Petitioner’s counsel to elicit testimony from Petitioner regarding the fact that Petitioner had been informed by his insurance carrier that there was only \$100,000.00 in insurance coverage available to him.

Further, the trial court committed reversible error by instructing the jury that “because of certain legal actions that have been taken in this case there may or may not be additional coverage to pay whatever your verdict may be.” This instruction amounted to a comment on the evidence in violation of Rule 51 of the West Virginia Rules of Civil Procedure because the jury was not instructed on any other evidence they heard regarding Petitioner’s financial status. In other words, Petitioner’s allegedly unlimited insurance coverage was singled out and emphasized to the jury by way of an instruction to the exclusion of all other evidence elicited regarding Petitioner’s financial status.

²In fact, no such determination has been made to date.

Moreover, the trial court erred with regard to its pre-trial ruling regarding the admissibility of the amount of write-offs in Respondent's medical bills. Such write-offs are merely illusory charges which were never paid (or even incurred) by Respondent, his health insurer, or any other entity. The amount of the write-offs within Respondent's medical bills were not "payments" that are subject to the collateral source rule. Therefore, the trial court committed reversible error by finding that the write-off amounts were subject to the collateral source rule and were recoverable by Respondent.

Last, even if the trial court did not err by allowing Respondent to recover damages for the write-off amounts, the trial court erred by prohibiting Petitioner from introducing the write-off amounts as evidence of the true reasonable value of Respondent's medical expenses. It is axiomatic that the proper measure of damages for medical expenses is the reasonable value of the medical expenses – not necessarily the total amount paid or billed. Thus, the trial court committed reversible error by finding that the write-off amounts were not admissible as evidence of the reasonable value of Respondent's medical expenses.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this case because some of the issues have not been authoritatively decided by this Court and the decisional process would be aided by oral argument. Petitioner further asserts that Rule 20 argument is appropriate in this case because an issue of first impression is involved and conflicting decisions exist among the lower tribunals.

ARGUMENT

"Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear

that the trial court has acted under some misapprehension of the law or the evidence.” Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976). While the trial court’s decision denying Petitioner’s motion for a new trial in this case is governed by an abuse of discretion standard, to the extent that said decision hinges on the trial court’s interpretation of the law, it is subject to *de novo* review by this Court. *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). “An appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial.” Syl. Pt. 2, *Lively v. Rufus*, 207 W. Va. 436, 533 S.E.2d 662 (2000).

In this case, the trial court committed prejudicial error in its application of the law in several respects, which are set forth below. Consequently, Petitioner should be granted a new trial.

I. The trial court erred by allowing the jury to award duplicative damages for “[c]ompensation for a permanent injury” and future pain and suffering.

“The 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[.]” *Flannery v. United States*, 171 W. Va. 27, 29, 297 S.E.2d 433, 435 (1982) (emphasis added). “Once a permanent injury has been established then the following elements of future damages can be considered”:

- (1) Residuals or future effects of an injury which have reduced the capability of an individual to function as a whole man;
- (2) future pain and suffering;
- (3) loss or impairment of earning capacity; and
- (4) future medical expenses.

Id. at 30, 436 (quoting Syl. Pt. 10, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974)).

In other words, a plaintiff must prove permanency before he or she can recover any future damages. The permanency of the plaintiff’s injury is then measured by the jury assessing sub-categories of future general damages flowing from the permanent injury, such as future loss of

enjoyment of life, future pain and suffering, future loss or impairment of earning capacity, and future medical expenses.³ See *Flannery*, 171 W. Va. at 30, 297 S.E.2d at 436.

In this case, Petitioner objected to the inclusion of “[c]ompensation for a permanent injury” on the verdict form, arguing that the same is not an appropriate line item of damages. *J.A. at 000062 – 000063; 568 - 569*. The trial court overruled Petitioner’s objection.⁴ *J.A. at 569*. In denying Petitioner’s *Motion for Post-Trial Relief* on this issue, the trial court relied on the following passage from *Flannery*:

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.

J. A. at 000131 (boldface added by trial court). Based on this passage, the trial court reasoned that Respondent “was entitled to recovery for ‘future pain and suffering’ and for the ‘permanent effect of the injury itself.’” *J.A. at 000131*. Yet, the trial court failed to recognize that the “permanent effect of the injury itself on the capability of an individual to function as a whole man” is the same as “loss of enjoyment of life.” *Flannery*, 171 W. Va. at 31, 297 S.E.2d at 437 (stating that the “definition of a permanent injury which includes ‘those future effects of an injury which have reduced the capability of an individual to function as a whole man’ is the appropriate area for considering the

³ “The loss of enjoyment of life resulting from a permanent injury is part of the general measure of damages flowing from the permanent injury.” Syl. Pt. 4, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993) (emphasis added). The other “part[s]” of the general measure of damages flowing from a permanent injury would be future pain and suffering, future loss or impairment of earning capacity, and future medical expenses. *Flannery*, 171 W. Va. 30, 297 S.E.2d at 436.

⁴ The trial court’s ruling that future pain and suffering is not duplicative of damages for a permanent injury is a question of law which is subject to *de novo* review by this Court. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on appeal from the circuit court is clearly a question of law [...] we apply a *de novo* standard of review.”).

element of loss of enjoyment of life”). Therefore, the above-quoted passage from *Flannery* – on which the trial court relied – essentially states that a plaintiff can recover for future pain and suffering and future loss of enjoyment of life. Nowhere in *Flannery* did the Court state that a plaintiff could recover for “compensation for a permanent injury” and future pain and suffering.

As a result of the trial court’s ruling, the jury was permitted to award \$16,000.00 for future pain and suffering and \$170,300.00 for “[c]ompensation for a permanent injury”. *J.A. at 000100*. If permanency had been included on the verdict form and all other future general damages omitted from the verdict form, there may not have been error. However, the jury was permitted to award damages for the umbrella category of “permanency” as well as a subcategory thereof - future pain and suffering. *J.A. at 00099 - 000100*. This would be the equivalent of a jury awarding a line item of damages for the umbrella category of “pecuniary” damages and also awarding a line item of damages for the subcategories of medical expenses or lost wages. *See Id.* at 29, 435 (stating that “pecuniary” damages include medical expenses, lost wages, and lost earning capacity).

The jury’s award of duplicative damages for “[c]ompensation for a permanent injury” and future pain and suffering was prejudicial error.

It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.

Syl. Pt. 7, *Harless v. First Nat’l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982); *see also McDavid v. U.S.*, 213 W. Va. 592, 601, 584 S.E.2d 226, 235 (2003) (noting that it is “axiomatic” that only one recovery is permitted for each loss); *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997) (reversing trial court’s upholding of jury verdict where duplicative damages were

awarded for intentional infliction of emotional distress and punitive damages). Therefore, this Court should reverse the trial court's ruling which denied Petitioner a new trial.

II. The trial court erred by allowing the jury to award duplicative damages for “[c]ompensation for a permanent injury” (which was not specified to be limited to the future effects of the permanency) and past loss of enjoyment of life.

As explained above, loss of enjoyment of life is one (1) measure of the general damages flowing from a permanent injury. *Wilt* at Syl. Pt. 4. This Court has unequivocally held that an award of damages for both permanency and loss of enjoyment of life amounts to an impermissible duplication of damages:

In the present case, the trial judge did not award separate amounts for both the permanency of the plaintiff's injuries and the loss of enjoyment of life. If this had been done, there would have been an impermissible duplication of damages.

Flannery, 171 W. Va. at 32, 297 S.E.2d at 438. The *Flannery* court did not limit this admonition to an award of permanency and future loss of enjoyment of life. *Id.*

Prior to trial, Respondent submitted a proposed verdict form which contained separate line items for permanent injury and loss of enjoyment of life. *J.A. at 000042 – 000043*. Petitioner objected to the proposed verdict form, arguing that Respondent could not recover for both permanency and loss of enjoyment of life; thus, lines for both awards should not be included on the jury verdict form.⁵ *J.A. at 000062 – 000063*. Therefore, Petitioner proposed that the line item for permanency be stricken from the verdict form. *J.A. at 000063*.

⁵ Specifically, Petitioner “object[ed] to [Respondent's] proposed verdict form which lists ‘Compensation for a

In direct contravention of *Flannery*, the trial court ruled that permanency could remain on the verdict form as a line item of damages.⁶ *J.A. at 568 – 569* Therefore, the jury was permitted to award “separate amounts for both the permanency of Plaintiff’s injury and the loss of enjoyment of life.” The jury ultimately awarded \$12,000.00 for past loss of enjoyment of life and also awarded \$170,300.00 for “[c]ompensation for a permanent injury.” *J.A. at 000081 – 000082*.

In denying Petitioner’s *Motion for Post-Trial Relief* on this issue, the trial court reasoned that “[a]ny award for ‘permanency’ is for future damages and would not be duplicative of an award for past damages [for loss of enjoyment of life].” *J.A. at 131*. The trial court’s reasoning might have been sound if the verdict form had limited the line item for “[c]ompensation for a permanent injury” to the future effects of such a permanent injury. However, it did not. The trial court’s reasoning seems to assume that “permanency” or “permanent injury” necessarily entails only future damages. However, this is an incorrect assumption. If a plaintiff sustains a permanent injury on the date of an accident and trial does not occur until years later, the plaintiff suffered from the past effects from a permanent injury from the date of the accident until the date of trial. Likewise, the hypothetical plaintiff would suffer from the future effects of a permanent injury from the date of the trial going forward.⁷

permanent injury’ as a line item because Plaintiff cannot recover for both permanency and loss of enjoyment of life.” *J.A. at 000062*.

⁶The trial court’s ruling that past loss of enjoyment of life is not duplicative of damages for a permanent injury is a question of law which is subject to *de novo* review by this Court. *Chrystal R.M. v. Charlie A.L., supra*, at Syl. Pt. 1.

⁷The same hypothetical could easily be applied to the specific facts of this case. The accident occurred on April 6, 2010. *J.A. at 000001*. Trial took place from September 18, 2012 to September 21, 2012. *J.A. at 000080 - 000084*. Therefore, assuming Respondent suffered from a permanent injury on the date of the accident, Respondent suffered from the past effects of a permanent injury from April 6, 2010 until the jury’s verdict was rendered on September 21, 2012. As a result, the jury’s award for “[c]ompensation for a

In this case, the jury's award of \$170,300.00 for "[c]ompensation for a permanent injury" encompassed the past effects of the permanent injury as well as the future effects thereof. According to *Flannery*, this amount was duplicative of the \$12,000.00 the jury awarded for past loss of enjoyment of life. Therefore, this Court should reverse the trial court's decision denying a new trial due to the impermissible duplication of damages. See *Harless, supra*; *McDavid, supra*; *Tudor, supra*.

III. The trial court committed error by allowing the jury to hear Respondent's counsel's theory of Shamblin-type excess coverage available to Petitioner to pay the jury's verdict.

In this case, Respondent's counsel contends that because a demand was made to settle this matter within Petitioner's policy limits prior to suit being filed, the case falls within the tenets of *Shamblin v. Nationwide Mutual Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985).

At trial, Respondent sought to recover punitive damages. Respondent put forth evidence of Petitioner's financial position. *J.A. at 675 – 677; 687 - 688*. Respondent's counsel also elicited testimony from Petitioner regarding the fact that he has insurance coverage for the accident. *J.A. at 688*. On direct examination, Petitioner's counsel elicited testimony from Petitioner regarding the fact that the coverage limit of his insurance policy is \$100,000.00. *J.A. at 695 - 696*. On re-cross examination, Respondent's counsel then attempted to question Petitioner regarding counsel's contention that Petitioner may have essentially unlimited insurance coverage due to the circumstances of the case. *J.A. at 703*. Petitioner's counsel promptly objected to this inquiry. *J.A. at 703 – 706*. The jury was excused while the trial court determined whether such information was admissible. *J.A. at 706*.

permanent injury" included the past effects of the permanent injury as well as the future effects thereof.

The trial court ultimately ruled that Respondent's counsel could ask a question regarding counsel's contention that Petitioner essentially has unlimited insurance coverage. *J.A. at 707 - 708*. The trial court further ruled that Petitioner's counsel was prohibited from eliciting testimony from Petitioner regarding the fact that his insurance carrier had informed him that its position is that he only has \$100,000.00 in coverage for the accident in question. *J.A. at 709*. In accordance with the trial court's ruling, Respondent's counsel asked the following question of Petitioner:

- Q. Okay. You understand that because of some actions that have been taken in this – in I guess the course of this case, that you may have additional coverage to cover whatever the verdict may be; isn't that correct?
- A. That is correct.

J.A. at 711.

Petitioner concedes that Respondent was permitted to rebut evidence of Petitioner's financial position by putting forth evidence of the existence and policy limits of liability insurance available to Petitioner. "A defendant's net worth is relevant to the issue of punitive damages, and [...] where defense counsel offer[s] evidence of [a defendant's] meager finances, the plaintiff's rebuttal evidence disclosing the existence and policy limits of [the defendant's] liability insurance is not barred[.]" *Wheeler v. Murphy*, 192 W. Va. 325, 333, 452 S.E.2d 416, 424 (1994) (emphasis added). However, the trial court erroneously permitted Respondent to put forth evidence beyond the simple existence and policy limits of Petitioner's liability insurance. Namely, the trial court allowed the jury to be informed of the suppositional assertion that there may be unlimited insurance coverage available to Petitioner.

This Court has previously disapproved of argument or instructions regarding what particular party or entity will be responsible for the payment of a jury verdict when such arguments or instructions are based on mere speculation. In *Lacy v. CSX Transportation*, this Court held that argument or instructions regarding the operation of the doctrine of joint and several liability - where the purpose thereof is to communicate to the jury the potential post-judgment effect of their assignment of fault - are inadmissible. Syl. Pt. 4, 205 W. Va. 630, 520 S.E.2d 418 (1999). In so holding, the Court reasoned as follows:

Any conclusion about how joint and several liability will ultimately affect a particular defendant is largely speculative. As the Superior Court of Pennsylvania pointed out in holding that it was proper for a trial court to refuse a jury instruction on joint and several liability, "neither the court nor the jury can say with assurance how much of the verdict rendered, if any, any one tortfeasor will in fact pay." [...]

When a jury that has been instructed under *Adkins* considers the doctrine of comparative negligence in the context of apportioning fault, it is not required to speculate about the consequences of its verdict. Rather, the jury can easily comprehend what effect its findings will have on the litigants, without any need to consider evidence beyond that relevant to determination of the cause of action. The same cannot be said of the jury's consideration of joint and several liability, where in most cases the ultimate financial impact of a jury verdict on individual defendants cannot be fully appreciated by anyone until long after judgment is rendered.

This Court has consistently rejected permitting counsel to base arguments before the jury upon mere speculation. [...] Similarly, a court's instructions should not prompt the jury to speculate as to facts that are not in evidence. Cf. Syl. pt. 1, *Oates v. Continental Ins. Co.*, 137 W. Va. 501, 72 S.E.2d 886 (1952) ("A jury will not be permitted to base its findings of fact upon conjecture or speculation."). [...]

[A]ny consideration of the potential post-judgment effects of joint and several liability is likely to degenerate into conjecture about whether a particular defendant will ultimately bear a greater portion of the plaintiff's loss than is attributable to its fault. Counsel for CSX speculated that plaintiffs would be unwilling to collect any judgment against Caco Sullivan, and would instead resort to forcing CSX to pay the entire judgment. While such an outcome is perhaps a plausible inference given the unique familial relationship of these parties, there was nothing in evidence that otherwise directly supported such a contention. [...]

To inform the jury about the potential effects of joint and several liability without otherwise misleading it, trial courts could conceivably be required to instruct and/or permit evidence on such complex and often proscribed subjects as contribution, indemnity, bankruptcy, the effect of statutory and common-law immunities, the extent of defendants' financial resources, and the existence of insurance coverage—just to name a few.

Id. at 641-642, 429-430 (emphasis added). This Court in *Lacy* found that the trial court abused its discretion by allowing the jury to hear about the effects of joint and several liability and awarded a new trial. *Id.* at 650, 438.

In the case *sub judice*, as in *Lacy*, any conclusion about whether Petitioner's insurance carrier will ultimately be responsible for the payment of an excess verdict is purely speculative. Likewise, as in *Lacy*, the responsibility for payment of a verdict in excess of Petitioner's policy limits "cannot be fully appreciated by anyone until long after judgment is rendered."

In the same vein, in order to properly inform the jury as to whether Petitioner's liability insurer will ultimately be responsible for the payment of an excess verdict without misleading it, the trial court would have been required to instruct the jury on "complex and often proscribed subjects." According to *Shamblin*, the following standards govern whether an insurer is liable to its insured for personal liability in excess of policy limits:

[T]he proper test to be applied is whether the reasonable prudent insurer would have refused to settle within policy limits under the facts and circumstances, bearing in mind always its duty of good faith and fair dealing with the insured. Further, in determining whether the efforts of the insurer to reach settlement and secure a release for its insured as to personal liability are reasonable, the trial court should consider whether there was appropriate investigation and evaluation of the claim based upon objective and cogent evidence; whether the insurer had a reasonable basis to conclude that there was a genuine and substantial issue as to liability of its insured; and whether there was a potential for substantial recovery of an excess verdict against its insured. Not one of these factors may be considered to the exclusion of the others.

Shamblin at Syl. Pt. 4. Pursuant to the reasoning of *Lacy*, in order to properly inform the jury, the trial court would have been required to instruct the jury on the *Shamblin* factors. However, in violation of the reasoning of *Lacy*, the trial court allowed the jury to speculate regarding the possibility of excess *Shamblin*-type insurance coverage, in the absence of instruction on these factors.

At the time of trial, there had been no judicial determination that Petitioner's insurance carrier would be obligated to indemnify Petitioner for personal liability in excess of policy limits. In fact, there has still been no such judicial determination. Therefore, as in *Lacy*, the jury was permitted to speculate about the financial consequences of their verdict (in the absence of evidence regarding the same). Moreover, the trial court's error was further compounded by not allowing Petitioner's counsel to elicit testimony from Petitioner regarding the fact that he had been informed by his insurance carrier that its position is that he only has \$100,000.00 in coverage available for this matter.

The trial court's erroneous decision to allow the jury to hear that Petitioner may have unlimited insurance coverage available to him prejudiced Petitioner in this matter. As in *Lacy*, *supra*, the jury was permitted to base their punitive damage verdict on speculation; therefore, a new trial is warranted.

IV. **The trial court erred by instructing the jury on the possibility of *Shamblin*-type excess insurance coverage because the same amounted to a comment on the evidence in violation of Rule 51 of the West Virginia Rules of Civil Procedure and gave undue influence to the possibility of such excess insurance coverage.**

In addition to permitting the jury to hear Respondent's theory of *Shamblin*-type excess insurance coverage, the trial court also *sua sponte* determined that the jury should be instructed on

possible existence of unlimited insurance coverage. *J.A. at 707 - 708*. The instruction which was ultimately read to the jury stated:

In considering the amount of punitive damages to award in this case, if any, you may consider some or all of the following:

[...]

4. The wealth of [Petitioner] as demonstrated by his assets at the time of the automobile collision.

The Court instructs you that because of certain legal actions that have been taken in this case there may or may not be additional coverage to pay whatever your verdict may be.

J.A. at 000113. Petitioner's counsel timely objected to the above instruction. *J.A. at 746*. As noted above, this instruction was erroneous due to the fact that any contentions regarding the possibility of excess insurance coverage were purely conjectural since no judicial determination has been made regarding the same.

Further, this instruction violated Rule 51 of the West Virginia Rules of Civil Procedure. Rule 51 states, in pertinent part: "[T]he instructions given by the court [...] shall not comment upon the evidence[.]" The Rules of Civil Procedure provide no exception to the prohibition of comments on the evidence by the trial court's jury instructions. Indeed, the prohibition on comments upon the evidence within Rule 51 is an implicit recognition that

[t]he influence of the court over its juries is so apparent and so well recognized that [...] the judiciary should studiously and jealously refrain from impressing, in any manner, on the jury its view of fact, or the weight or credibility it would give to testimony.

Averill v. Hart & O'Farrell, 101 W. Va. 411, 421-422, 132 S.E. 870, 874 (1926).

The foregoing instruction was improper because it singled out and gave undue emphasis to one (1) piece of evidence regarding Petitioner’s financial condition. “An instruction which singles out, and gives undue prominence to certain facts, ignoring other facts, proved, and of equal importance in a proper determination of the case, is improper.” Syl. Pt. 3, *State v. Dodds*, 54 W. Va. 289, 46 S.E. 228 (1903). “An instruction which singles out and calls to the attention of the jury an indecisive fact or circumstance to the exclusion of other important facts and circumstances shown by the evidence [...] is erroneous and misleading in that it gives undue prominence to such indecisive point.” *State v. Moubray*, 139 W. Va. 535, 544, 81 S.E.2d 117, 123 (1954). “A frequent error in instructing juries lies in the habit of singling out particular facts of the case and instructing the jury with reference to them, while ignoring other essential facts as to which the jury ought to be instructed; or singling out particular features of the evidence and dwelling upon them with emphasis, and ignoring other features; thus leading the jury to attach undue importance to the facts thus singled out and dwelt upon.” *Fleming v. Railroad Co.*, 51 W. Va. 54, 59, 41 S.E. 168, 170 (1902).

“An erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudiced by such instruction.” Syl. Pt. 1, *Bills v. Life Style Homes*, 189 W. Va. 193, 429 S.E.2d 80 (1993). In this case, the instruction at issue singled out one (1) piece of evidence regarding Petitioner’s financial status and incorporated the same into an instruction. *J.A. at 000113*. The instruction did not mention the other testimony which the jury had heard regarding the fact that Petitioner was unemployed, the fact that Petitioner’s only asset was his automobile, the fact that Petitioner was residing with his parents, and the fact that Petitioner’s only current income was his unemployment benefits. *J.A. at 693 - 698*. By singling out the contention that there “may or may not be additional coverage to pay what [the] verdict may be”,

Petitioner was prejudiced as the possibility of unlimited insurance coverage was emphasized more than other pieces of evidence which the jury heard regarding Petitioner's financial status. In effect, the trial court impressed upon the jury the weight that it would give to that particular piece of evidence over contrary evidence regarding Petitioner's wealth (*e.g.* Petitioner's assets, income, etc.).

Thus, a new trial is warranted due to this erroneous instruction.

V. **The trial court erred by denying Petitioner's Motion in Limine to Exclude Evidence, Testimony and Argument Relating to Past Medical Expenses Not Actually Paid by the Plaintiff.**

Certain amounts of Respondent's medical bills were written-off by his medical providers. *J.A. at 000045 - 000046.* The total amount of medical expenses claimed by Respondent did not reflect these adjustments. In the context of medical billing, this is a common practice and the medical provider does not seek recovery for the amounts which were voluntarily written-off from the patient or any other entity.⁸

This issue was presented to the trial court by way of Petitioner's *Motion in Limine to Exclude Evidence Testimony and Argument Relating to Past Medical Expenses Not Actually Paid by the Plaintiff.* *J.A. at 000006 - 000015.* After said motion was fully briefed and argued, the trial court denied the motion *in limine.* *J.A. at 000073 - 000079.* The trial court's ruling allowed Respondent to recover the written-off amount of his medical expenses, even though the written-off amounts are mere phantom expenses which were never paid (or even incurred) by Respondent or Respondent's health insurer. *Id.* Furthermore, the trial court's ruling prohibited Petitioner from introducing evidence of the written-off amounts as evidence of the reasonable value of the medical expenses. *Id.*

⁸"A 'write-off' is the difference between the original amount of a medical bill and the amount accepted by the

Generally, “[t]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. Pt. 1, *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010). However, to the extent that an evidentiary ruling is based on either a legal precept or an interpretation of a statute, this Court applies a *de novo* review. *McGlinchey v. Frye*, 2011 W. Va. LEXIS 516, *10 - *11 (Nov. 10, 2011) (memorandum decision) (citing *Meadows v. Meadows*, 196 W. Va. 56, 59, 468 S.E.2d 309, 312 (1996)). In this case, the trial court’s ruling on the recoverability and admissibility of the written-off amounts hinged on the interpretation of the collateral source rule. *J.A. at 000073 - 000079*. Thus, a *de novo* standard of review applies to the trial court’s decision.

- A. Barring Respondent from recovering write-off amounts not paid or incurred by himself or by his insurance company on his behalf or, in the alternative, allowing Petitioner to introduce evidence of billing reductions to rebut the reasonableness of the value Respondent’s claimed medical expenses, does not violate the collateral source rule.**

This Court has never addressed whether or not written-off amounts - which are never paid or incurred by any person or entity – are subject to the “collateral source” rule. However, because the collateral source rule applies only to “payments” made, the same should not be applicable to written-off amounts. Further, not applying the collateral source rule to the written-off amounts would not thwart the rationale behind the collateral source rule.

“The collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party.” Syl. Pt. 7, *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981) (emphasis added). “The collateral source rule also ordinarily prohibits inquiry as to whether the

medical provider as the bill’s full payment.” *Robinson v. Bates*, 112 Ohio St. 3d 17, 20, 857 N.E.2d 1195,

plaintiff has received payments from collateral sources.” *Id.* at Syl. Pt. 8, in part (emphasis added). “[T]he collateral source rule excludes payments from other sources to plaintiffs from being used to reduce damage awards imposed upon culpable defendants.” *Illosky v. Michelin Tire Corp.*, 172 W. Va. 435, 446, 307 S.E.2d 603, 615 (1983) (emphasis added).

In this case, the write-offs within Respondent’s medical bills were not “payments” that are subject to the collateral source rule. Neither Respondent nor his health insurance company paid the write-off amounts. Likewise, the write-off amounts were not even incurred by Respondent or his health insurer. “[N]o natural obligation to pay the healthcare provider arises when the provider agrees to contractually adjust medical charges[.]” *Suhor v. Lagasse*, 2000 La. App. LEXIS 2495, 770 So. 2d 422 (2000). Rather, said amounts are simply phantom expenses which are never paid or incurred by any individual or entity. *Robinson v. Bates*, 112 Ohio St. 3d 17, 23, 857 N.E.2d 1195, 1200 (2006) (“Because no one pays the write-off, it cannot possibly constitute a *payment* of any benefit from a collateral source.”) (italics in original); *Katsick v. U-Haul Co. of W. Mich.*, 740 N.Y.S.2d 167, 292 A.D.2d 797 (N.Y. App. Div. 2002) (stating that a “write off [...] is not an item of damages for which [a] plaintiff may recover because plaintiff has incurred no liability therefor”); *Moorhead v. Crozer Chester Medical Center*, 564 Pa. 156, 765 A.2d 786 (2001) (stating that written-off amounts are “illusory” charges which are “not paid by any collateral source”).

It should also be noted that such write-offs or discounts are not necessarily only given to patients with insurance. “An uninsured plaintiff may herself [or himself] pay her [or his] medical expenses at a negotiated price, *e.g.*, a steep cash discount upon her threat of bankruptcy.” *Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572, 608, 233 P.3d 205, 227 (2010). Also, “many hospitals

now have means-tested discounts off their chargemasters for uninsured patients, which bring the prices charged to the uninsured closer to those paid by commercial insurers or even below.”⁹ *Howell v. Hamilton Meats & Provisions*, 52 Cal. 4th 541, 561, 257 P.3d 1130, 1142 (2011). “[M]any hospitals and physicians offer steep discounts for cash-paying patients regardless of income” where the patient does not use health insurance. Chad Terhune, *Many Hospitals, Doctors Offer Cash Discount for Medical Bills*, Los Angeles Times, May 27, 2012 (available at <http://articles.latimes.com/2012/may/27/business/la-fi-medical-prices-20120527>). Stated differently, the existence of a write-off or discount is not predicated on the existence of a health insurance contract. Contrariwise, such write-offs or discounts are equally available to a patient who may not have any insurance.

Consequently, the collateral source rule is simply inapplicable in the context of write-offs. As a result, the trial court erred in ruling that the collateral source rule allowed Respondent to recover the write-off amounts. To the extent that recovery of the write-off amounts was not an error, the trial court erred by prohibiting Petitioner from introducing the amounts of the write-offs as evidence of the reasonable value of Respondent’s claimed medical expenses.

B. The trial court erred by allowing Respondent to recover the amounts of medical bills that were written-off because no individual or entity will ever be responsible for the payment of such amounts.

The amount of medical damages a plaintiff can recover should be limited to the amounts actually paid by a plaintiff and/or any amounts paid on a plaintiff’s behalf which are found to be caused by a defendant’s tortious conduct. As explained above, this Court has never specifically addressed whether a plaintiff can recover an amount which was written-off as a medical expense at

⁹ A “chargemaster” is “a uniform schedule of charges represented by the hospital as its gross billed charge

trial. However, several circuit courts throughout the State, as well as one federal district court, have ruled that a plaintiff cannot recover write-offs as damages at trial.

The Circuit Court of Raleigh County addressed the issue at bar in an *Order Regarding Defendant's Motion in Limine* dated April 6, 2012 in the context of Medicare in *Jeffries v. Levin*, Civil Action No. 10-C-11-K. In *Jeffries*, Plaintiff was a Medicare beneficiary and, as a result, some of her medical expenses were written-off or adjusted by her healthcare providers. *Id.* at 2. The Circuit Court noted that other jurisdictions were divided on whether a plaintiff could recover written-off amounts and further noted that this Court has not addressed the issue. *Id.* at 3. The Court reasoned that “any expenses written off [by] Medicare or Medicaid were not incurred by the plaintiff in the case at hand.” *Id.* at 8. Therefore, the Court granted the defendant’s motion *in limine* and held that the plaintiff could not introduce evidence of the amounts which were written-off. *Id.* at 8.

The Circuit Court of Harrison County addressed a similar issue in an October 25, 1999 *Order Granting Defendant's Motion in Limine* entered in the matter of *Amorese, et al v. The Board of Education of Barbour County*, Civil Action No. 98C-341-2. In that case, the plaintiff incurred approximately \$141,000.00 in medical expenses but Medicaid paid only \$45,000.00 in full satisfaction of the medical expenses. *Id.* at 2. The Circuit Court noted that the plaintiffs would have no liability for the approximately \$96,000.00 in medical expenses which were written-off. *Id.* at 2. Therefore, the Circuit Court held that “evidence of medical expenses in excess of the amount compensated by Medicaid” would not be admissible and that the Plaintiff was “not permitted to recover damages for which they are not personally liable.” *Id.* at 3.

for a given service or item, regardless of payer type.” *Howell, supra* at footnote 7.

In *Ladanza v. Wheeling Hospital, et al*, Civil Action No. 05-C-206, the Circuit Court of Ohio County addressed the issue in the context of Medicare in a January 28, 2007 *Order Regarding Plaintiffs' Motion for Summary Judgment and Defendants' Pretrial Motions*. In that case, the defendants argued “that the amount written off by Medicare is not a payment from a collateral source within the meaning of the collateral source rule, and does not constitute an item of damages for which the Plaintiff may recover because no payment has been made on behalf of the Plaintiff and because the Plaintiff has incurred no liability for these amounts.” *Id.* at 4. The Circuit Court reasoned that “the amounts written off by Medicare do not constitute payments made on behalf of the Plaintiff and do not constitute damages suffered or incurred by the Plaintiff.” *Id.* at 4. As a result, the Circuit Court held that the written-off or adjusted amounts could not be introduced into evidence. *Id.* at 4.

The United States District Court for the Southern District of West Virginia addressed the same issue in the context of Medicaid in *Arroyo v. Ford Motor Company*, Civil Action No. 2:99-0122, Dkt. No. 119 (Nov. 15, 2000). The defendant moved to exclude evidence of medical expenses written-off by health care providers. *Id.* at 1. The District Court noted that the plaintiffs “are not responsible for payment of the ‘written off’ amounts.” *Id.* at 3. The District Court reasoned, in part, that “inasmuch further as they will bear no financial responsibility for the written off amounts, these amounts are not collateral sources of recovery pursuant to West Virginia law, and the plaintiffs are not permitted to recover these amounts as special damages.” *Id.* at 6. The District Court further held that “[s]ubject to the appropriate limiting instructions, the jury may be apprised of the full, original charge” for the medical expenses to the extent the jury may find that information helpful in considering non-economic damages. *Id.* at 6-7.

Although the aforementioned cases have been in the context of Medicare or Medicaid, in ruling that written-off amounts were not recoverable, the courts based their holdings at least in part on the fact that the written-off amounts were never incurred by either the plaintiff or by the Medicare/Medicaid system. The medical expenses in this case were not covered by Medicare or Medicaid. Nonetheless, the same reasoning holds true when a medical provider agrees to write-off a portion of a bill for a patient who has private insurance or a patient who has no insurance. Those portions of the medical expenses which were written-off or discounted are simply fictional charges which were never paid or incurred by either the Respondent or by his health insurer. Because the amounts were neither paid nor incurred, the written-off amounts are not subject to the collateral source rule.

Additionally, several courts across the country have refused to allow a plaintiff to claim as damages amounts beyond what his or her own health insurer has paid and for which the plaintiff is not being held personally liable. In *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541, 257 P.3d 1130 (2011), the Supreme Court of California addressed this issue. The court ultimately held that “an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial.” *Id.* at 566, 1145. In so holding, the court reasoned that the collateral source rule was not implicated because “the negotiated rate differential – the discount medical providers offer the insurer – is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule.” *Id.*

Also, the Supreme Court of Pennsylvania, in *Moorhead v. Crozer Chester Med. Ctr.*, 564 Pa. 156, 765 A.2d 786 (2001), *abrogated on other grounds by Northbrook Life Ins. Co. v.*

Commonwealth, 597 Pa. 18, 949 A.2d 333 (2008), addressed this issue in a case where the parties stipulated to these facts: the patient/appellant was covered by Medicare and “Blue Cross 65,” a supplemental coverage which she personally purchases; the “fair and reasonable” value of the medical services rendered to her totaled \$108,668.31; the Medicare allowance for those services was approximately \$12,000.00; of that Medicare allowance 80% was paid by Medicare and 20% was paid by Blue Cross; pursuant to their agreement as a voluntary participant in the Medicare program, the medical provider/appellee accepted the Medicare allowance -- \$12,167.40 – as payment in full for those medical services rendered; therefore, the balance, \$96,500.91, was non-recoverable either from the patient or any other source. Appellant contended that she was entitled to claim as medical special damages the full \$108,668.31. Appellee argued that the recovery should be limited to \$12,167.40.

Analyzing the concepts of remedies, damages and collateral source, the *Moorhead* court determined that the \$96,500.91 amount that was paid neither by a third-party insurance carrier nor by the patient/appellant represented an “illusory charge” to which the collateral source rule did not apply. *Id.*, 765 A.2d at 791. The court, therefore, concluded that

[a]warding Appellant the additional amount of \$96,500.91 would provide her a windfall and would violate fundamental tenets of just compensation. It is a basic principle of tort law that ‘damages are to be compensatory to the full extent of the injury sustained, but the award should be limited to compensation and compensation alone.’ Appellant never has, and never will, incur the \$96,500.91 sum from the Appellee as an expense. We discern no principled basis upon which to justify awarding that additional amount.

Id., 765 A.2d at 790 (internal citations omitted).

Such an evaluation of a plaintiff’s true damages is in accordance with the Restatement (Second) of Torts method of calculating the value of damages:

When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him.

Restatement (Second) of Torts § 911, cmt. h (1979). Accordingly, to the extent that Respondent paid less than the amount charged by his medical providers, Respondent can recover no more than the amount paid.¹⁰

Allowing a plaintiff to recover only amounts paid by the plaintiff or by a plaintiff's insurer (and not conjured "total" amounts billed) is also congruent with the stated purpose of compensatory damages. "[T]he aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant's injurious conduct." *Kessel v. Leavitt*, 204 W. Va. 95, 187, 511 S.E.2d 720, 812 (1998). Restoring Respondent to the financial position he would enjoy in the absence of Petitioner's tortious conduct would limit Respondent's recovery of medical expenses to what either he or his insurance provider has actually paid in full satisfaction of his medical expenses.

Likewise, permitting only the recovery of medical expenses actually paid would not thwart the public policy behind the collateral source doctrine. The collateral source rule reflects "the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor." *Restatement (Second) of Torts* § 920A. However, to allow the collateral source rule to be wielded to assist a plaintiff in recovering phantasmal damages (*i.e.* write-

¹⁰ It must be noted that a "write off" is not a "gift" which is subject to the gratuitous service doctrine. Medical providers who agree to accept discounted payments do so for commercial reasons and not as a gift intended to the patient or their insurer. *Howell v. Hamilton Meats & Provisions*, 52 Cal. 4th 541, 558, 257 P.3d 1130, 1139-40 (2011). "The rationale for [the gratuitous service doctrine] – an incentive to charitable aid – has, as just explained, no application to commercially negotiated price agreements like those between medical providers and health insurers." *Id.* at 559, 1140.

offs) which have never been paid or incurred by any person or entity would actually befall a windfall upon the plaintiff.

Thus, Respondent should only have been permitted to recover medical expenses which were paid or incurred by Respondent or on Respondent's behalf. By allowing Respondent to recover damages for fictional write-off charges, Petitioner was unfairly prejudiced. Consequently, a new trial is warranted.

- C. **Even if the trial court did not err by allowing Respondent to recover the amount of his medical bills that were written-off, the trial court erred by not allowing Petitioner to introduce evidence of the discounted amounts as evidence of the true reasonable value of Plaintiff's medical expenses.**

The "proper measure of damages" for medical services "is not simply the expenses or liability incurred [...] but rather the reasonable value of medical services made necessary because of the injury proximately resulting from the defendant's negligence." *Jordan v. Bero*, 158 W. Va. 28, 57, 210 S.E.2d 618, 637 (1974) (emphasis added). Therefore, the "reasonable value" of the medical services is not necessarily the total amounts billed.¹¹ *Id.*

W. Va. Code § 57-5-4j states that "[p]roof that medical, hospital and doctor bills were paid or incurred because of any illness, disease or injury shall be *prima facie* evidence that such bills so paid or incurred were necessary and reasonable." (Emphasis added.) The language of this statute actually suggests that the total billed amount is not *prima facie* evidence of the reasonable value thereof. Rather, the statute refers to "bills so paid or incurred". As explained above, a write-off is never paid or incurred by any individual or entity. Therefore, W. Va. Code § 57-5-4j would make

¹¹ See also *Long v. The City of Weirton*, 158 W. Va. 741, 787, 214 S.E.2d 832, 861 (1975) (award of medical expenses is "predicated on proof of the reasonable value of such expenses necessarily incurred [...] and not upon the actual expenses paid"); *Kretzer v. Moses Pontiac Sales*, 157 W. Va. 600, 610, 201 S.E.2d 275, 281 (1973) ("The general rule is that a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonable required by the injury. This

only the amounts “paid or incurred” *prima facie* evidence of the reasonable value of such expenses. As a result, the amounts adjusted as a write-off would be directly relevant under W. Va. Code § 57-5-4j.

Regardless, even if the statute applies to the gross amount billed, the statute only creates a *prima facie* presumption of reasonableness. Because the gross amount billed is only *prima facie* evidence of the “reasonable” value under the statute, defendants are entitled to introduce evidence to rebut the *prima facie* presumption raised by this statute with the amount actually accepted in full satisfaction of the gross amount billed.

The “total” amount stated on a medical invoice does not actually reflect the amount of compensation recovered by the provider for its services. Moreover, the “total” amount stated on a medical bill does not necessarily even reflect the “reasonable” value of the services.

The complexities of health care pricing structures make it difficult to determine whether the amount paid, the amount billed or an amount in between represents the reasonable value of medical services. One authority reports that hospitals historically billed insured and uninsured patients similarly. With the advent of managed care, some insurers began demanding deep discounts, and hospitals shifted costs to less influential patients. This authority reports that insurers generally pay about forty cents per dollar of billed charges and that hospitals accept such amounts in full satisfaction of the billed charges.

As more medical providers are paid under fixed payment arrangements, another authority reports, hospital structures have become less correlated to hospital operations and actual payments. Currently, the relationship between charges and costs is tenuous at best. In fact, hospital executives reportedly admit that most charges have no relation to anything, and certainly not to cost.

Stanley v. Walker, 906 N.E.2d 852, 857 (Ind. 2009) (internal quotations marks and citations omitted).

is a recovery for their value and not for the expenditures actually made or obligations incurred.”).

In general, medical providers “feel financial pressure to set their ‘full charges’ [...] as high as possible, because the higher the ‘full charge’ the greater the reimbursement amount the hospital receives since reimbursement rates are often set as a percentage of the hospital’s ‘full charge.’” George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 199 (2005-06). The “full charges” are generally “at least double and may be up to eight times what the hospital would accept as payment in full for the same services[.]” *Id.* at 104. Therefore, the gross amount billed by a medical provider is not dispositive evidence of the reasonable value of services rendered.

In a different context, this Court has suggested that both the original medical bill and the amount actually paid could be relevant to assess the reasonableness of medical expenses. The case of *In re: E.B.* dealt with the West Virginia Department of Health and Human Resources’ (“DHHR”) right to reimbursement from a Medicaid recipient from a settlement and/or judgment recovered from a liable third-party. 729 S.E.2d 270, 2012 W. Va. LEXIS 314 (2012). For reasons not pertinent to the case at bar, this Court found that the substantive law of the state of Ohio would have applied to the underlying case since the injury occurred in Ohio. *Id.* at 301, *101-*102.

The Ohio Department of Job and Family Services (“ODJFS”) argued that the “the paid Medicaid rate, rather than the billed rate, should be used as evidence of the reasonable value of the medical services rendered to E.B. and which will be rendered to him in the future[.]” *Id.* at 303, *110. In support of this proposition, the ODJFS cited *Robinson v. Bates*, 112 Ohio St. 3d 17, 857 N.E.2d 1195 (2006). *Id.* at footnote 39. This Court recognized that *Robinson* holds that “[b]oth an original medical bill rendered and the amount accepted as full payment are admissible to prove the

reasonableness and necessity of charges rendered for medical and hospital care.” *Id.* (citing *Robinson*, at Syl. Pt. 1). This Court went on to state:

While we disagree with the circuit court and find that the holding in *Bates* (finding that both the original medical bill and the amount actually paid are admissible to prove the reasonableness of medical expenses) could be at least instructive in this particular case in the context of assessing future medical expense damages, the fact still remains that no expert testimony was presented by the DHHR adequately establishing the paid Medicaid rates applicable to the future medical expenses[.]

Id. at 303-304, *112-*113.

Petitioner recognizes that the Court in *In re: E.B.* addressed the amounts recoverable through subrogation in a case where Ohio substantive law would apply – not a tort action applying West Virginia law. However, the Court did not find that applying such a principle would be contrary to the public policy of this State. *See Howe v. Howe*, 218 W. Va. 638, 646-647, 625 S.E.2d 716, 724-725 (2005) (citing *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W. Va. 329, 424 S.E.2d 256 (1992)) (stating that a court can refuse to apply foreign law on public policy grounds where the law is contrary to pure morals or abstract justice or the enforcement would be of evil example and harmful to its own people). Thus, in essence the Court did implicitly recognize that the amount acceptable as full payment of a medical bill can be relevant as to the reasonable value of the services rendered.

Although this Court has never directly addressed whether the amounts accepted in full satisfaction of a medical bill are admissible as to the reasonable value medical expenses rendered, numerous other jurisdictions have. For example, in *Robinson v. Bates, supra*, in a personal injury action the plaintiff proffered medical expenses totaling \$1,919.00. 112 Ohio St. 3d at 18, 857 N.E.2d at 1196. The plaintiff’s insurance company had negotiated the amount of \$1,350.43 as payment in full for the medical expenses. *Id.* The trial court refused to admit the original bills and

limited the plaintiff's proof of damages to the amount actually paid for the medical treatment. *Id.* at 19, 1196. The Court of Appeals for Hamilton County found that the trial court erred in refusing to admit the medical bills because the plaintiff was entitled to seek recovery of the entire amount of the medical bills, rather than simply the amount paid by her insurer. *Id.*

On appeal, the Supreme Court of Ohio noted that properly submitted medical bills are rebuttable evidence of reasonableness and once medical bills are admitted, a defendant can then present evidence to challenge their reasonableness.¹² *Id.* at 20, 1198. The Supreme Court of Ohio went on to reason that “[t]he collateral-source rule does not apply to write-offs of expenses that are never paid.” *Id.* at 22, 1200. However, in seeking to “avoid the creation of separate categories of plaintiffs based on individual insurance coverage” the Court in *Robinson* declined to adopt a categorical rule, holding as follows:

Because different insurance arrangements exist, the fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment. Due to the realities of today's insurance and reimbursement system, in any given case, that determination is not necessarily the amount of the original bill or the amount paid. Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence. Both the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care.

The jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between.

Id. at 23, 1200. As a result, the *Robinson* Court ultimately held that “both the original bill and the amount accepted are evidence relevant to the reasonable value of medical expenses.” *Id.* at 23, 1201.

¹² This principle is similar to W. Va. Code § 57-5-4j (discussed *supra*).

Likewise, in *Stanley v. Walker*, the plaintiff introduced redacted medical bills totaling \$11,570, showing the amounts medical service providers originally billed him. 906 N.E.2d 852, 854, 2009 Ind. LEXIS 471, *2 (2009). The bills showed the amounts originally billed but not the amounts totaling \$4,750 that were discounted as write-offs. *Id.* The defendant desired to introduce evidence of the discounted amounts of the medical bills. *Id.* at 854, *3. The trial court ultimately rejected the defendant's request. *Id.* The Supreme Court of Indiana held that the defendant should have been entitled to introduce evidence of the discounted amounts of the medical bills to rebut the reasonableness of charges introduced by the plaintiff.¹³ *Id.* at 858, *14-15. The court further held that, so as to not violate the collateral source rule, the discounted charges for medical services should be introduced without referencing insurance. *Id.*

In addition to Ohio and Indiana, Kansas allows evidence of discounted charges to be admitted to allow the jury to assess the reasonable value of a plaintiff's claimed medical expenses. *Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572, 233 P.3d 205 (2010) (jury is entitled to consider both the charges assessed by the medical provider as well as the amount actually accepted to determine the reasonable value of the medical care that the insured received).

However, one need not gaze beyond the borders of West Virginia for guidance on this issue. In *Hollis v. Michaels*, the United States Northern District of West Virginia addressed the same question. *Hollis v. Michaels*, Civil Action No. 1:09CV154, *Order Granting Def.'s Mot. in Limine*, Dkt. No. 52 (N.D. W. Va. February 28, 2011). In *Hollis*, the District Court ruled that a plaintiff

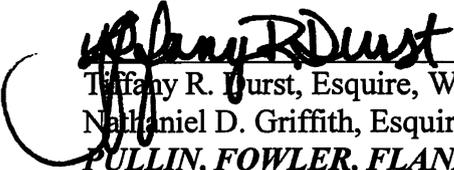
¹³ It should be noted that Indiana has a Rule of Evidence which is strikingly similar to W. Va. Code § 57-5-4j. Rule 413 of the Indiana Rules of Evidence states that “[s]tatements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence [and] shall constitute prima facie evidence that the charges are reasonable.”

cannot introduce evidence of medical expenses unless additional evidence is admitted of the amounts that were written-off. *Id.* at 3. The District Court reasoned that if evidence of the write-offs were not admitted, the jury would be misled “on the issue of reasonable value [of the medical expenses] inasmuch as the initially billed amount constitutes only the ‘sticker price’ of these services, while the figures actually paid are more relevant to determining their reasonable value.” *Id.* at 4. The District Court went on to state that if the plaintiff perceived a disadvantage in the introduction of the write-offs, the plaintiff “may simply use the reduced amounts during his case-in-chief, thereby eliminating the potential that the jury would improperly reduce the overall award with the knowledge that [the plaintiff] received insurance benefits for his injuries.” *Id.* at 4.

The trial court’s erroneous ruling prohibiting Petitioner from introducing evidence of the amount accepted in full satisfaction of Respondent’s medical bills prevented Petitioner from introducing relevant, probative evidence of the reasonable value of Respondent’s medical expenses. Therefore, a new trial is warranted.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Honorable Court vacate the judgment in this matter in its entirety and grant a new trial. In the alternative, Petitioner requests a new trial solely on the issue of punitive damages.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN N. KENNEY

Petitioner,

v.

NO. 13-0427

**Appeal from a final order of the
Circuit Court of Monongalia County
(Civil Action No. 11-C-102)**

SAMUEL C. LISTON,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioner, does hereby certify on this 26th day of June, 2013, that a true copy of the foregoing "**PETITIONER'S BRIEF**" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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