

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 REPLY BRIEF

Tiffany R. Durst, Esquire, West Virginia State Bar No. 7441
Nathaniel D. Griffith, Esquire, West Virginia State Bar No. 11362
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, West Virginia 26508
Telephone: (304) 225-2200
Facsimile: (304) 225-2214
tdurst@pffwv.com
ngriffith@pffwv.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ARGUMENT

I. Contrary to Respondent’s assertions, the trial court committed prejudicial error by allowing duplicate damages to be awarded for “compensation for a permanent injury” and future pain and suffering......1

 A. The line item on the jury verdict form for “compensation for a permanent injury” was not the equivalent of a line item for future loss of enjoyment of life.....1

 B. The jury instructions did not cure the duplication of damages on the verdict form.....3

 C. Petitioner’s objections regarding the inclusion of a line item on the verdict form for “compensation for permanent injury” were properly preserved.....5

II. The trial court committed prejudicial error by allowing duplicate damages to be awarded for “compensation for a permanent injury” and past loss of enjoyment of life......6

 A. By the plain language of the verdict form, duplicative damages for “compensation for a permanent injury” and past loss of enjoyment of life were awarded in violation of *Flannery v. United States*6

 B. Petitioner’s objection regarding the duplication of damages between past loss of enjoyment of life and “compensation for a permanent injury” was properly preserved.....7

III. Petitioner’s counsel did not “open the door” to speculative evidence regarding potential *Shamblin*-type excess insurance coverage......8

IV. Contrary to Respondent’s assertion, the trial court committed reversible error by *sua sponte* instructing the jury on the possibility of excess insurance coverage 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......11

V. The trial court erred in denying Petitioner’s *Motion in Limine to Exclude Evidence, Testimony, and Argument Relating to Past Medical Expenses Not Actually Paid by the Plaintiff.*.....13

A.	The “gratuitous service doctrine” is not applicable in the context of write-offs to medical expenses.....	13
B.	Contrary to the assertions of Respondent and the <i>Amicus Curiae</i>, the amount that a medical provider accepts in full satisfaction of the gross amount billed is relevant to the reasonable value of medical services.....	14
C.	The jury could be apprised of the written-off amounts without referencing the existence of a collateral source and the same would not be overly complicated.....	17
D.	Write-offs or billing reductions are not exclusively given to patients with health insurance and are also available to uninsured patients.....	18
E.	Prohibiting plaintiffs from recovering written-off amounts would not result in separate classes of recovery for insured versus uninsured persons as all plaintiffs would only be permitted to recover the reasonable value of their claimed medical expenses.....	19
CONCLUSION.....		20
CERTIFICATE OF SERVICE		

TABLE OF AUTHORITIES

W. Va. Cases:

<i>Bice v. Wheeling Elec. Co.</i> , 62 W. Va. 685, 59 S.E. 626 (1907).....	12
<i>Cain v. Kanawha Traction & Elec. Co.</i> , 85 W. Va. 434, 102 S.E. 119 (1920).....	12
<i>Carrico v. West Va. Cent. P. Ry.</i> , 39 W. Va. 86, 19 S.E. 571 (1894).....	12
<i>Carson v. Phoenix Ins. Co.</i> , 41 W. Va. 136, 23 S.E. 552 (1895).....	11
<i>Cook v. Cook</i> , 216 W. Va. 353, 607 S.E.2d 459 (2004).....	1
<i>Darling v. Browning</i> , 120 W. Va. 666, 200 S.E. 737 (1938).....	12
<i>Delong v. Kermit Lumber & Pressure Treating Co.</i> , 175 W. Va. 243, 332 S.E.2d 256(1985).....	2
<i>Ex parte Doyle</i> , 62 W. Va. 280, 57 S.E. 824 (1907).....	11
<i>Flannery v. United States</i> , 171 W. Va. 27, 297 S.E.2d 433 (1982).....	1, 2, 6
<i>Fleming v. Railroad Co.</i> , 51 W. Va. 54, 41 S.E. 168 (1902).....	12
<i>Garnes v. Fleming Landfill</i> , 186 W. Va. 656, 413 S.E.2d 897 (1991).....	8, 10
<i>Jones v. Sanger</i> , 204 W. Va. 333, 512 S.E.2d 590 (1998).....	15
<i>Jordan v. Bero</i> , 158 W. Va. 28, 210 S.E.2d 619 (1974).....	1
<i>Kretzer v. Moses Pontiac Sales, Inc.</i> , 157 W. Va. 600, 201 S.E.2d 275 (1973).....	13
<i>McDougal v. McCammon</i> , 193 W. Va. 229, 455 S.E.2d 788 (1995).....	14
<i>Shaver v. Consolidated Coal Co.</i> , 108 W. Va. 365, 151 S.E. 326 (1929).....	3, 6
<i>Smith v. Abbott</i> , 106 W. Va. 119, 145 S.E. 596 (1928).....	12
<i>State ex rel. Trent v. Sims</i> , 138 W. Va. 244, 77 S.E.2d 122 (1953).....	11
<i>State v. Dodds</i> , 54 W. Va. 289, 46 S.E. 228 (1903).....	12

<i>State v. Garner</i> , 97 W. Va. 222, 124 S.E. 681 (1924).....	3, 6
<i>State v. Moubray</i> , 139 W. Va. 535, 81 S.E.2d 117 (1954).....	11
<i>State v. Taylor</i> , 215 W. Va. 74, 593 S.E.2d 645 (2004).....	16
<i>Wilt v. Buracker</i> , 191 W. Va. 39, 443 S.E.2d 196 (1993).....	2
<i>Wheeler v. Murphy</i> , 192 W. Va. 325, 452 S.E.2d 416 (1994).....	9, 10
Out of Jurisdiction Cases:	
<i>Colomar v. Mercy Hosp., Inc.</i> , 242 F.R.D. 671 (S.D. Fla. 2007).....	18
<i>Hollis v. Michaels</i> , Civil Action No. 1:09CV154 (N.D. W. Va.).....	16, 19
<i>Howell v. Hamilton Meats & Provisions</i> , 52 Cal. 4th 541, 257 P.3d 1130 (2011).....	13, 18, 19
<i>Maldonado v. Oschner Clinic Found.</i> , 493 F.3d 521 (5th Cir. 2007).....	19
<i>Martinez v. Milburn Enters.</i> , 290 Kan. 572, 233 P.3d 205 (2010).....	15
<i>Nassau Anesthesia Assoc. P.C. v. Chin</i> , 924 N.Y.S.2d 252 (2011).....	15
<i>Robinson v. Bates</i> , 112 Ohio St. 3d 17, 857 N.E.2d 1195 (2006).....	16
<i>Scott v. Garfield</i> , 454 Mass. 790, 912 N.E.2d 1000 (2009) (Cordy and Botsford, JJ. concurring).....	15
<i>Sharp Coronado Hosp. v. Bonta</i> , 2004 Cal. Unpub. LEXIS 7788 (Cal. App. 3d Dist. 2004).....	19
<i>Temple Univ. Hosp., Inc. v. Healthcare Mgt. Alternatives, Inc.</i> , 832 A.2d 501 (Pa. Super Ct. 2003).....	15

W. Va. Statutes and Rules:

Rule 46 West Virginia Rules of Civil Procedure.....5, 6

Rule 51 West Virginia Rules of Civil Procedure.....11, 12

Rule 103(a)(1) West Virginia Rules of Evidence.....5

Rule 401 West Virginia Rules of Evidence.....14, 15

W. Va. Code § 57-5-4j.....14

Secondary Sources:

Charleston Area Medical Center’s Charity and Uninsured Policy (available at <http://www.camc.org/charityanduninsuredpolicy>).....18

Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* (4th Ed. 2000).....8, 14, 16

ARGUMENT

I. Contrary to Respondent's assertions, the trial court committed prejudicial error by allowing duplicate damages to be awarded for "compensation for a permanent injury" and future pain and suffering.

A. The line item on the jury verdict form for "compensation for a permanent injury" was not the equivalent of a line item for future loss of enjoyment of life.

Essentially, Respondent's argument is that "compensation for a permanent injury" is the same as "compensation for the permanent effect of the injury on the capability of the plaintiff to function as a whole man." *Respondent's Brief* at 11. In other words, Respondent argues that the line item for "compensation for a permanent injury" was the equivalent of a line item for future loss of enjoyment of life. *Respondent's Brief* at 10-11.

However, this argument ignores long-standing precedent that requires permanency to be proven in order for a plaintiff to recover any category of future damages (not simply future loss of enjoyment of life). "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). "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." Syl. Pt. 9, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 619 (1974). "Once a permanent injury has been established then [...] future damages can be considered." *Flannery*, 171 W. Va. at 30, 297 S.E.2d at 436. "The test governing future damages as set forth in syllabus points seven and nine of *Jordan v. Bero* [...] requires that either the negligently inflicted injury or its direct consequences be proven by a reasonable certainty to have a lasting, permanent future effect." Syl. Pt. 5, *Cook v. Cook*, 216 W. Va. 353, 607 S.E.2d 459 (2004).

“[D]amages for the loss of enjoyment of life are a valid element of recovery when a plaintiff has suffered a permanent injury.” *Wilt v. Buracker*, 191 W. Va. 39, 43, 443 S.E.2d 196, 200 (1993).

Clearly then, a plaintiff is required to prove that an injury or its consequences are permanent in nature before any type of future damages can be awarded. Thus, “compensation for a permanent injury” is not interchangeable with “future loss of enjoyment of life” as Respondent seems to contend. Rather, the phrase “permanent injury” is an umbrella category which must be proven before any subcategory of future damages can be claimed (*e.g.* future pain and suffering, future loss of enjoyment of life, future impairment of earning capacity, and future medical expenses).

Additionally this Court has stated: “Future pain and suffering may be inferred from the permanent nature of the injury, but the permanency or future effect of the injury must be proven with reasonable certainty.” *Delong v. Kermit Lumber & Pressure Treating Co.*, 175 W. Va. 243, 245, 332 S.E.2d 256, 258 (1985). If “compensation for a permanent injury” is synonymous with “loss of enjoyment of life” as Respondent contends, then why would future pain and suffering be permitted to be inferred from the permanent nature of the injury? This principle invalidates Respondent’s hypothesis that “compensation for a permanent injury” is synonymous with “loss of enjoyment of life.”

It is also worth pointing out again that this Court has never stated that “permanent injury” is synonymous with “loss of enjoyment of life.” Contrariwise, the Court has actually held that “[t]he loss of enjoyment of life is encompassed within and is an element of the permanency of the plaintiff’s injury.” *Flannery*, 171 W. Va. at 30, 297 S.E.2d at 436 (emphasis added). Similarly, in *Wilt*, the Court held that “the loss of enjoyment of life resulting from a permanent injury is part of the general measure of damages flowing from the permanent injury[.]” *Wilt, supra* at Syl. Pt. 4.

Both *Flannery* and *Wilt* support the conclusion that “loss of enjoyment of life” is a subset of the general umbrella of “permanent injury.”¹

As a result, Respondent’s argument that the line item for “compensation for a permanent injury” was the equivalent of a line item for future loss of enjoyment of life must fail. Rather, a line item for “permanent injury” necessarily entails all subcategories thereof – including future pain and suffering. Thus, Respondent received a duplicate recovery for “compensation for a permanent injury” and future pain and suffering.

B. The jury instructions did not cure the duplication of damages on the verdict form.

Respondent also argues that the jury instructions (*J.A. at 578-605*) cured any defects in the verdict form (*J.A. at 000081-000082*). *Respondent’s Brief at 11-12*. With regard to conflicting statements among jury instructions, this Court has held that an incorrect jury instruction cannot be cured by a correct instruction. “Generally, a complete positive instruction incorrectly stating the law governing a material point is not cured by another inconsistent instruction properly presenting the applicable law.” *Shaver v. Consolidated Coal Co.*, 108 W. Va. 365, 384, 151 S.E. 326, 333 (1929). “A bad instruction is not cured by a good one given to the jury, and with which it is in conflict.” Syl. Pt. 2, *State v. Garner*, 97 W. Va. 222, 124 S.E. 681 (1924). “The reason for this salutary rule is that the court cannot tell which of the instructions the jury regarded, whether the good or the bad one, to the prejudice of the party affected thereby.” *Id.* at 226, 682.

¹In fact, the trial court recognized that damages for loss of enjoyment of life are a “subset” of damages for permanent injury at trial:

The Court: See, I see that [loss of enjoyment of life] as a subset of permanent injury. Because if you have a permanent injury, then you are going to have some – a lot of other permanent things, one of which is the loss of enjoyment of life.

The same principle should apply to a conflict between jury instructions and a verdict form. It is impossible to tell whether the jury utilized the incorrect categorization of damages listed on the verdict form or the statement regarding damages in the jury instructions which Respondent contends was correct. Therefore, the defects in the verdict form were not cured by the jury instructions.

Additionally, even if the defects in the verdict form could have been cured by jury instructions, it is clear that the jury instructions in this particular case provided no such cure. Respondent cites to two (2) portions of the jury instructions which he contends resolved any problems with the line items on the verdict form. The first portion of the instructions upon which Respondent relies reads:

The Plaintiff seeks to recover future damages from the Defendant in this case. Future damages are those sums awarded to an injured party for:

1. Residual or future effects of an injury which have reduced the capability of an individual to function as a whole person.
2. Future medical expenses.
3. Future pain and suffering.
- And 4. Future lost wages.

J.A. at 597. The second portion of the jury instructions upon which Respondent relies reads:

There is a claim that Samuel Liston's injuries are permanent. Therefore, when you are considering future damages you are only to consider future damages that you find are reasonably certain to occur to Samuel Liston. The extent or seriousness of a permanent injury is measured by determining how the injury has deprived Samuel Liston of his customary activities has reduced his capacity to function as a whole person.

J.A. at 600-601.

J.A. at 569.

However, the jury was also instructed that in assessing Respondent's damages, they should consider "[a]ny loss of enjoyment of life such as the inability to indulge in and perform normal everyday activities and hobbies pursued prior to the incident [...] which you find, to a reasonable certainty, will continue into the future." *J.A. at 595*. Therefore, the jury instructions actually exacerbated the problems with the verdict form since the jury was instructed that they could award duplicative damages for permanency and future loss of enjoyment of life.

C. Petitioner's objections regarding the inclusion of a line item on the verdict form for "compensation for permanent injury" were properly preserved.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [...] [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]" *W. Va. R. Evid. 103(a)(1) (emphasis added)*. "[I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefore[.]" *W. Va. R. Civ. P. 46 (emphasis added)*.

In this case, Petitioner objected to the inclusion of the line item for "compensation for a permanent injury" on the verdict form and stated that "the proposed line item for permanency should be stricken from [Respondent's] proposed jury verdict form." *J.A. at 000062 - 000063*. Although this specific objection was made in the context of the inclusion of line items for "compensation for a permanent injury" and loss of enjoyment of life, by objecting and stating that "the proposed line item for permanency should be stricken from Plaintiff's proposed jury verdict form" clearly Petitioner was asserting that a line item for permanency was not a proper line item for

the jury to consider. This objection was sufficient to make known to the trial court the action which the Petitioner desired the trial court to take in accordance with *W. Va. R. Civ. P. 46*.

Moreover, at trial, Petitioner's counsel "object[ed] to leaving in 'compensation for a permanent injury'" and the trial court understood that Petitioner's counsel "would rather have 'compensation for future loss of enjoyment of life.'" *J.A. at 568*. Had "compensation for future loss of enjoyment of life" be included on the verdict form (as the trial court recognized that Petitioner was requesting), the duplication of damages between "compensation for a permanent injury" and future pain and suffering would not have become an issue.

II. The trial court committed prejudicial error by allowing duplicate damages to be awarded for "compensation for a permanent injury" and past loss of enjoyment of life.

A. By the plain language of the verdict form, duplicative damages for "compensation for a permanent injury" and past loss of enjoyment of life were awarded in violation of *Flannery v. United States*.

In this case, the jury was permitted to award damages for both permanency and loss of enjoyment of life. *J.A. at 000081-000082*. The *Flannery* court could not have been more clear that this results in an impermissible duplication of damages. *See Flannery*, 171 W. Va. at 32, 297 S.E.2d at 438 ("[T]he 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.") Yet, Respondent again asserts that the jury instructions were sufficient to instruct the jury that "damages for permanent injury are for the future effect of the injury[.]" *Respondent's Brief at 14*. Initially, as noted above, a defective verdict form cannot be cured by an allegedly accurate jury instruction. *Shaver*, 108 W. Va. at 384, 151 S.E. at 333; *Garner*, *supra*, at Syl. Pt. 2.

Moreover, in this case, the jury instructions do not exclusively state that damages for “compensation for a permanent injury” are limited to the future effect of such an injury as suggested by Respondent. In fact, the jury instructions actually frame the damages for permanent injury in the past tense:

The extent or seriousness of a permanent injury is measured by determining how the injury has deprived [Respondent] of his customary activities and has reduced his capacity to function as a whole person.

J.A. at 600-601 (emphasis added). Accordingly, Respondent cannot rely upon the jury instructions to cure the defects present in the verdict form. Therefore, the jury awarded duplicate damages for loss of enjoyment of life and permanency in direct contravention of *Flannery* which warrants a new trial.

B. Petitioner’s objection regarding the duplication of damages between past loss of enjoyment of life and “compensation for a permanent injury” was properly preserved.

Prior to trial, Petitioner filed *Objections to Plaintiff’s Proposed Verdict Form*. *J.A. at 000062 – 000066.* The first heading of said pleading reads: “Defendant objects to Plaintiff’s proposed verdict form which lists ‘Compensation for a permanent injury’ as a line item because Plaintiff cannot recover for both permanency and loss of enjoyment of life.” *J.A. at 000062.* Additionally, after setting forth the law on the topic, the same pleading stated:

Therefore, it is settled law that Plaintiff cannot recover for both permanency and loss of enjoyment of life; thus, lines for both awards should not be included on the jury verdict form. Consequently, the proposed line item for permanency should be stricken from Plaintiff’s proposed jury verdict form.

J.A. at 000063.

Respondent seems to assert that Petitioner was required to object again “prior to the trial court administering the charge or delivering the verdict form to the jury[.]” *Respondent’s Brief at 14*. “[I]t is not necessary in West Virginia to incur odium by repeating and renewing objections to the same or similar evidence that is being introduced.” Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 1-7(B)(7)(c) (4th Ed 2000). “A party does not waive an objection once made and overruled by the failure to renew the objection each time the same or similar evidence is introduced.” *Id.* Thus, Petitioner was not required to re-object at trial after filing a written objection to the same prior to trial and Petitioner’s objection to this error was preserved.

III. Petitioner’s counsel did not “open the door” to speculative evidence regarding potential Shamblin-type excess insurance coverage.

In order for this issue to be properly analyzed, it is important again to stress the order of events which led to the introduction of testimony regarding the speculative potential of excess *Shamblin*-type coverage. Each step in the chain of events leading to the erroneous admission of such evidence is set forth below.

It is true that Petitioner’s counsel mentioned the financial position of Petitioner during the opening statement of the punitive damage phase of the trial. *J.A. at 670-671*. The financial position of the defendant is a relevant and proper factor for the jury to consider in awarding punitive damages. Syl. Pt. 3, *Garnes v. Fleming Landfill*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Therefore, because evidence of Petitioner’s financial position was relevant and proper, the same did not “open the door” to otherwise inadmissible evidence.

Next, Respondent’s counsel called Petitioner as an adverse witness. *J.A. at 673*. Respondent’s counsel cross-examined Petitioner regarding his financial position and the fact that he

had insurance coverage for the accident at issue. *J.A. at 675-677; 677-688*. With respect to insurance coverage specifically, Respondent's counsel asked Petitioner: "You also, in fact, have insurance, don't you?" *J.A. at 688*. Petitioner responded to the foregoing question as follows: "I do." *J.A. at 688*. Petitioner concedes that this line of questioning was appropriate as Respondent was permitted to rebut evidence of Petitioner's financial position by introducing evidence of the existence of liability insurance available to Petitioner. *Wheeler v. Murphy*, 192 W. Va. 325, 333, 452 S.E.2d 416, 424 (1994) (rebuttal evidence consisting of "the existence and policy limits" of a defendant's liability insurance policy is admissible).

After that, Petitioner's counsel elicited testimony from Petitioner regarding the fact that the coverage limit of his insurance policy was \$100,000.00. *J.A. at 695-696*. This line of questioning was also proper because *Wheeler* allows for the admission of the amount of insurance coverage when the same becomes an issue:

[W]here defense counsel offered evidence of [the defendant's] meager finances, the plaintiff's rebuttal evidence disclosing the existence and policy limits of [the defendant's] liability insurance is not barred by either Rules 401-403 or Rule 411, *WVRE* [1994].

Having ruled that evidence of the defendant's liability insurance and the amount of coverage is not excluded under Rule 411, [...]

We find that the circuit court's refusal to allow plaintiff's counsel to introduce evidence of [the defendant's] liability insurance and policy limits to rebut the defense evidence of [the defendant's] meager income, was an abuse of discretion.

Wheeler, 192 W. Va. at 333-334, 452 S.E.2d at 424-425 (emphasis added). Thus, evidence of Petitioner's insurance policy limits was also properly admissible. Because evidence of Petitioner's policy limits was relevant and proper, the same did not "open the door" to otherwise inadmissible evidence.

Respondent's counsel then attempted to cross-exam Petitioner regarding counsel's assertion that the Petitioner may have essentially unlimited insurance coverage due to the circumstances of the case. *J.A. at 703*. After the trial court overruled Petitioner's counsel's objection regarding the same, Respondent's counsel then was permitted by the trial court to ask the following question:

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.

As set forth above, all testimony elicited by Petitioner's counsel prior to this inquiry was proper and admissible under *Garnes* and *Wheeler, supra*. Thus, Petitioner's counsel did not "open the door" to otherwise inadmissible evidence of the speculative possibility of excess insurance coverage by eliciting proper and admissible testimony. Furthermore, assuming *arguendo* that Petitioner's counsel did "open the door" to evidence of the possibility of excess insurance coverage, then by the same logic Respondent's counsel "opened the door" to testimony regarding Petitioner's insurance carrier's position that Petitioner only has \$100,000.00 in available insurance coverage. The trial court prohibited Petitioner's counsel from eliciting such testimony:

Mrs. Durst: Your Honor, do I then have the opportunity to question my client as well, that he's at least been advised by his insurance company that their position is that he only has \$100,000.

The Court: No, because that's – they've advised him incorrectly if they've advised him that, Tiffany.

J.A. at 709.

When the trial court permitted Respondent's counsel to inquire as to the availability of excess insurance coverage, Petitioner's counsel should have been permitted to introduce evidence that his insurance carrier has taken the position that there is no excess insurance coverage and his coverage limits are \$100,000.00. Since Petitioner's counsel was prohibited from pursuing this line of questioning, the jury was permitted to only hear "one side of the story", so to speak, and was left with the false impression that it was a forgone conclusion that additional insurance coverage was available to Petitioner.² Consequently, the trial court committed prejudicial error by allowing the jury to hear Respondent's counsel's unproven theory of excess insurance coverage.

IV. Contrary to Respondent's assertion, the trial court committed reversible error by sua sponte instructing the jury on the possibility of excess insurance coverage 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.

The trial court instructed the jury as follows: "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*. Respondent's only defense of this instruction is that it "was accurate, as it was based directly on the testimony of the Petitioner." *Respondent's Brief at 17*. However, Respondent's argument ignores the well-founded rule that it is prejudicial error to single out and give undue emphasis to one (1) piece of evidence to the exclusion of other evidence within jury instructions. *State v. Moubray*, 139 W. Va. 535, 544, 81 S.E.2d 117, 123 (1954); Syl. Pt.

²Respondent also relies on the fact that the word "may" was used in his question. *Respondent's Brief at 16; J.A. at 711*. Presumably, Respondent contends that the word "may" conveys a discretionary or permissive meaning. However, this Court has recognized that the word "may" is ambiguous and can at times connote a mandatory meaning. *State ex rel. Trent v. Sims*, 138 W. Va. 244, 273, 77 S.E.2d 122, 140 (1953) ("The word 'may' should be read as 'must' when the intention so requires[.]"); *Ex parte Doyle*, 62 W. Va. 280, 281, 57 S.E. 824, 825 (1907) ("The little word 'may,' when used in statutes has given rise to much discussion. Sometimes it is permissive, sometimes mandatory, as dependent on intent[.]"); *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136, 139, 23 S.E. 552, 553 (1895) ("It is only where it is necessary to give effect to the clear policy and intention of the legislature that the word 'may' can be construed in a mandatory sense[.]") (emphasis added).

3, *State v. Dodds*, 54 W. Va. 289, 46 S.E. 228 (1903); *Fleming v. Railroad Co.*, 51 W. Va. 54, 59, 41 S.E. 168, 170 (1902).³ This well-established precedent states that a trial court is prohibited from singling out certain instructions within its charge to the jury. Therefore, the accuracy (or inaccuracy) of the instruction at issue is not necessarily the only troubling aspect.

Surely, Respondent would take issue with this style of instruction if the evidence which was singled out was unfavorable to his case, such as: instructing the jury that Respondent received no medical treatment at the scene of the accident (*J.A. at 535*); instructing the jury that Respondent worked a full day after the accident (*J.A. at 537*); instructing the jury that one of Respondent's medical records stated that he had neck pain prior to the accident (*J.A. at 541-542*); or instructing the jury that Respondent had arthritis at multiple levels of his cervical spine (*J.A. at 545*).

When framed in this manner, it is easy to see why singling out a piece of evidence and placing it into a jury instruction would be improper. Doing so gives the impression that the evidence which is singled out is more significant in some respect than other evidence which was not included within the jury instructions.

Therefore, the trial court committed reversible error by *sua sponte* instructing the jury on the possibility of excess insurance coverage in violation of Rule 51 of the West Virginia Rules of Civil Procedure and giving undue influence to the possibility of such excess insurance coverage.

³See also *Darling v. Browning*, 120 W. Va. 666, 200 S.E. 737 (1938) (“The court correctly refused this instruction because it laid undue emphasis on an isolated element and would have tended to mislead the jury.”); *Smith v. Abbott*, 106 W. Va. 119, 122-123, 145 S.E. 596, 597 (1928); Syl. Pt. 3, *Cain v. Kanawha Traction & Elec. Co.*, 85 W. Va. 434, 102 S.E. 119 (1920) (“An instruction calling to the jury’s attention a particular, uncontrolling fact or circumstance, and thereby giving it undue prominence, is properly refused.”); Syl. Pt. 6, *Bice v. Wheeling Elec. Co.*, 62 W. Va. 685, 59 S.E. 626 (1907); *Carrico v. West Va. Cent. P. Ry.*, 39 W. Va. 86, 104, 19 S.E. 571, 577 (1894) (“[A]n instruction must not assume facts as proven, or assume that the weight of the evidence is in favor of certain facts, thus taking those questions from the jury, or improperly influencing it.”).

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

A. **The “gratuitous service doctrine” is not applicable in the context of write-offs to medical expenses.**

Both Respondent and the *Amicus Curiae* rely upon the gratuitous service doctrine. *Respondent’s Brief at 19, Amicus Curiae Brief at 4.* In *Kretzer*, this Court addressed whether a plaintiff could recover the value of nursing services gratuitously rendered by the plaintiff’s daughter. *Kretzer v. Moses Pontiac Sales*, 157 W. Va. 600, 609-610, 201 S.E.2d 275, 281 (1973). The Court ultimately held that “[a]n injured person is entitled to recover damages for reasonable and necessary nursing care rendered to [him], whether such services are rendered gratuitously or paid for by another.” Syl. Pt. 5, *Kretzer v. Moses Pontiac Sales, Inc.*, 157 W. Va. 600, 201 S.E.2d 275 (1973) (emphasis added). However, the write-offs made in this case are neither “gratuitous” nor “paid for by another.”

“Medical providers that agree to accept discounted payments by managed care organizations or other health insurers as full payment for a patient’s care do so not as a gift to the patient or insurer, but for commercial reasons and as a result of negotiations.” *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.

The “gratuitous service doctrine” is simply inapplicable in the case of write-offs, because such reductions were not made as a charitable gift to Respondent. The situation at bar is not

one where a relative of Respondent provided nursing care to Respondent gratuitously. Rather, the reductions were merely illusory charges. Moreover, the reductions were not “paid for by another” as contemplated by *Kretzer, supra*. Neither Respondent nor any other entity ever paid or incurred the amounts at issue. Therefore, *Kretzer* and the gratuitous services doctrine do not address the issue *sub judice*.

B. Contrary to the assertions of Respondent and the *Amicus Curiae*, the amount that a medical provider accepts in full satisfaction of the gross amount billed is relevant to the reasonable value of medical services.

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *W. Va. R. Evid. 401*. Expanding on the issue of relevant evidence, this Court has stated:

Under Rule 401, evidence having *any* probative value whatsoever can satisfy the relevancy definition. Obviously, this is a liberal standard favoring a broad policy of admissibility. For example, the offered evidence does not have to make the existence of a fact to be proved more probable than not or provide a sufficient basis for sending the issue to the jury.

McDougal v. McCammon, 193 W. Va. 229, 236, 455 S.E.2d 788, 795 (1995) (italics in original).

“This liberal formulation of the test makes manifest that the relevancy threshold is low and that the standard is neither onerous nor stringent in application.” *Cleckley* at § 4-1(c).

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.” The statute does not limit what type of evidence can be introduced to rebut the presumed reasonable value of medical expenses. “When no specific rule exists [to govern the admissibility of evidence], admissibility must be determined by reference to

the general provisions governing the admission of relevant evidence.” See *Jones v. Sanger*, 204 W. Va. 333, 339, 512 S.E.2d 590, 596 (1998). For reasons previously stated, the collateral source rule does not prohibit the admission of the written-off amounts of the medical expenses as evidence of reasonable value. See *Petitioner’s Brief at 21-36*. Thus, the admission of such evidence is governed by the liberal standard of relevancy under Rule 401.

The admission of the written-off amounts is proper under Rule 401 because evidence of the written-off amounts make it more probable that the gross amounts billed were not “reasonable.” As a matter of common sense, a medical provider would not accept a reduced amount in full satisfaction of a bill if that amount were not reasonable. “Evidence of the amount accepted in satisfaction of the bill for medical services provided to an injured plaintiff is of relevance, *i.e.*, some value, in determining the reasonable value of those services.” *Martinez v. Milburn Enters.*, 290 Kan. 572, 611, 233 P.3d 205, 229 (2010). “[T]he price that a medical provider is prepared to accept for the medical services rendered is highly relevant to that determination [of the reasonable value of the services].” *Scott v. Garfield*, 454 Mass. 790, 912 N.E.2d 1000 (2009) (Cordy and Botsford, JJ. concurring). “[T]he amounts ‘actually received’ by medical providers from insurers are a far better indicator of the reasonable value of a provider’s services than the ‘full published charge’ unilaterally set by the provider.” *Nassau Anesthesia Assoc. P.C. v. Chin*, 924 N.Y.S.2d 252, 254 (2011).⁴

The amount of the written-off amounts is not required to be dispositive evidence of the reasonable value of the medical expenses in order to be admissible under Rule 401. It is only

⁴“Reasonable value is the value paid by the relevant community of payors. Since hospitals and related providers rarely receive payments based upon their published rates, those rates cannot be deemed determinative in assessing the value of the services. Rather, reasonable value is what someone normally receives for a given service in the ordinary course of its business from the community it serves.” *Temple Univ. Hosp, Inc. v. Healthcare Mgt. Alternatives, Inc.*, 832 A.2d 501, 510 (Pa. Super. Ct. 2003).

necessary that the amount actually accepted in full satisfaction meets the low standard of relevancy. *See W. Va. R. Evid. 401*. The proper course of action in such a situation would be to allow the jury to be apprised of both amounts (*i.e.* the gross amount billed and the reduced amount accepted in full satisfaction thereof).⁵ The jury can then decide whether the true reasonable value of the medical care is “the amount originally billed, the amount the medical provider accepted as payment, or some amount in between.” *Robinson v. Bates*, 112 Ohio St. 3d 17, 23, 857 N.E.2d 1195, 1200 (2006). Additionally, if the plaintiff perceived a disadvantage in the introduction of both amounts, 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[.]” *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).

Additionally, evidence that a medical provider accepted a reduced payment in full satisfaction of a bill is not substantially more prejudicial than probative under *W. Va. R. Evid. 403*. “Rule 403 is not to be employed liberally.” *Cleckley, Handbook on West Virginia Evidence*, § 4-3(A)(1) (2000). “Under Rule 403 unfair prejudice does not mean damage to a [party’s] case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” *State v. Taylor*, 215 W. Va. 74, 78, 593 S.E.2d 645, 649 (2004) (internal quotation marks omitted).

Respondent’s Brief asserts that the reduced amounts of the medical expenses are more prejudicial than probative so as to warrant their exclusion under Rule 403. *See Respondent’s Brief at 20*. However, other than stating that evidence of such reductions could result in the jury awarding

⁵As explained in the subsequent section, this could be accomplished without referencing the existence of a

less than the sticker price of the medical expenses, Respondent offers no other rationale for this argument. Yet, if the sticker price is not the “reasonable value” of the medical services, then there is no unfair prejudice and Rule 403 does not operate to exclude the evidence at issue.

C. The jury could be apprised of the written-off amounts without referencing the existence of a collateral source and the same would not be overly complicated.

The *Amicus Curiae* argue that “[p]roceedings [w]ould be made infinitely more complicated by the introduction of collateral payments, premiums, adjustment schedules, contracts between health insurance carriers and providers and other evidence relevant to the adjustment.” *Amicus Brief at 6*. Additionally, the arguments propounded by the *Amicus Curiae* and Respondent suggest that allowing the jury to be informed of the written-off amounts would result in the jury being informed of the existence of a collateral source. *Amicus Curiae Brief at 16-18; Respondent’s Brief at 18*.

However, both of these arguments fail. The jury could simply be instructed as follows: “In this case, plaintiff’s medical providers originally billed a total of X dollars for their services. However, plaintiff’s medical providers accepted Y dollars in full satisfaction of the original amount billed.” Alternatively, a representative of the medical provider could be called to testify as to the gross amounts billed versus the reduced amounts accepted in full satisfaction thereof. The jury would then be at liberty to decide whether the reasonable value of the claimed medical services was the gross amount originally billed, the reduced amount accepted in full satisfaction of the gross amount, or some amount in between.

collateral source.

Under this paradigm (a simple two sentence instruction), no reference would need to be made to any collateral source. Likewise, the trial would not be needlessly complicated by the introduction of adjustment schedules, contracts, and other unnecessary information. Moreover, if the plaintiff felt disadvantaged by such an instruction, the plaintiff could simply use the reduced amounts, thereby nullifying the need for such an instruction. *See Hollis, supra.*

Thus, notwithstanding assertions to the contrary, the jury could be informed of the reduced amounts without reference to any collateral source. Additionally, informing the jury of the reduced amounts would not needlessly complicate the trial.

D. Write-offs or billing reductions are not exclusively given to patients with health insurance and are also available to uninsured patients.

Both Respondent and the *Amicus Curiae* attempt to argue that but for Respondent's health insurance, it would have been impossible for Respondent to have received write-offs or billing reductions. *Respondent's Brief at 19; Amicus Curiae Brief at 18.* Yet, this is a mistaken premise as write-offs and billing reductions are routinely provided to uninsured patients by medical providers.

For example, Charleston Area Medical Center provides a twenty-percent (20%) discount to any patient without third-party coverage, which "is greater than any discount given to a non-governmental HMO or insurance company." *See Charleston Area Medical Center's Charity and Uninsured Policy (available at <http://www.camc.org/charityanduninsuredpolicy>).* As other courts have recognized, it is a common practice for hospitals or other medical providers to offer write-offs or billing reductions to uninsured patients. "It is undisputed that Mercy [Hospital] offers discounts and/or write-offs to at least some of its uninsured patients." *Colomar v. Mercy Hosp., Inc.*, 242 F.R.D. 671, 675 (S.D. Fla. 2007). "Oschner [Clinic Foundation] offered numerous discounts to

uninsured patients” including “‘prompt pay’ discounts, charity care considerations, discounts provided during the collection process, service discounts for dissatisfied patients, and discounts pertaining to particular treatments.” *Maldonado v. Oschner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007). “Sharp [Coronado Hospital] discounts by 20 percent, and in some cases 25 percent, the cost of room and board charged [to] uninsured self-paying patients who pay the cost before the end of the month in which the charge is incurred.” *Sharp Coronado Hosp. v. Bonta*, 2004 Cal. Unpub. LEXIS 7788 (Cal. App. 3d Dist. 2004).⁶

E. Prohibiting plaintiffs from recovering written-off amounts would not result in separate classes of recovery for insured versus uninsured persons as all plaintiffs would only be permitted to recover the reasonable value of their claimed medical expenses.

Contrary to the argument of the *Amicus Curiae*, allowing evidence of write-offs to be introduced would not create separate classes of recovery “based solely on the fortuity of whether identically situated victims have private health insurance, Medicaid, Medicare, or no coverage whatsoever.” *See Amicus Curiae Brief at 6*. This argument falls short because allowing a recovery of the reasonable value of medical services for all plaintiffs does not result in separate classes of recovery. *See generally Howell v. Hamilton Meats & Provisions*, 52 Cal. 4th 541, n. 6, 257 P.3d 1130 (2011).

If anything, allowing evidence of billing reductions would in fact unify the current classes of recovery. Whether a plaintiff has private insurance, Medicaid, Medicare, or no insurance coverage, the plaintiff may only recover the reasonable value of their claimed medical expenses.

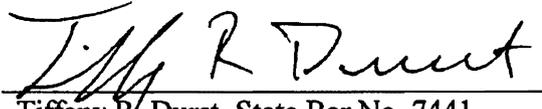
⁶Further support for the fact that billing reductions or write-offs are available to uninsured patients is set forth in *Petitioner’s Brief* at pages 23-24.

Therefore, allowing evidence of billing reductions would not create separate classes of recovery as all plaintiffs would be entitled to recover the reasonable value of their medical expenses.

CONCLUSION

For all the foregoing reasons and all the reasons set forth in *Petitioner's Brief*, 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.

**Petitioner, John N. Kenney,
By Counsel:**



Tiffany R. Durst, State Bar No. 7441

Nathaniel D. Griffith, State Bar No. 11362

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC

2414 Cranberry Square

Morgantown, West Virginia 26508

Telephone: (304) 225-2200

Facsimile: (304) 225-2214

**BY NATHANIEL D. GRIFFITH
W/ PERMISSION**

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 28th day of August, 2013, that a true copy of the foregoing "*PETITIONER'S REPLY BRIEF*" was served upon opposing counsel via facsimile and by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

J. Bryan Edwards, Esq.
Cranston & Edwards, PLLC
Dorsey Avenue Professional Building
1200 Dorsey Avenue, Suite II
Morgantown, WV 26501

Sean Sawyer, Esq.
Higinbotham & Higinbotham, PLLC.
132 Adams Street, Suite 100
Fairmont, WV 26554

E. Kay Fuller, Esq.
Martin & Seibert
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25402

Chad Lovejoy, Esq.
Duffield, Lovejoy, Stemple & Boggs
522 9th Street
P.O Box 608
Huntington, WV 25711



Nathaniel D. Griffith, State Bar No. 11362

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC

2414 Cranberry Square
Morgantown, West Virginia 26508
Telephone: (304) 225-2200
Facsimile: (304) 225-2214