

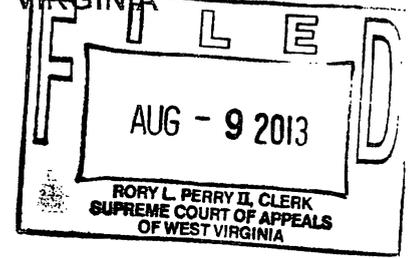
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN N. KENNEY

Petitioner,

v.

NO. 13-0427



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

SAMUEL C. LISTON,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 6, 2010, the Petitioner/Defendant, John N. Kenney, after consuming almost a 12-pack of beer and two (2) large gin and tonics, drove his car and crashed into the rear end of a vehicle stopped at a stoplight in which the Respondent/Plaintiff, Samuel C. Liston ("Mr. Liston"), was a passenger. *Joint Appendix at at 678 - 679 (hereinafter "J.A. at ____")*. The Petitioner did not even brake before he crashed into the Liston vehicle. *Id.* The force of the collision totaled the Petitioner's vehicle, and was so great that it broke the seat that Mr. Liston was sitting in. The Petitioner's blood alcohol was measured at .328, or over four (4) times the legal limit, an hour after he crashed into the Liston vehicle. *J.A. 702; 719- 720.*

As a result of the collision, Mr. Liston suffered serious and permanent injuries, including a herniated disk at the C6-7, which required fusion surgery and the placement of a metal plate in his spine. Thereafter, because of the extreme pain that Mr. Liston continued to be in on a daily basis, he was required to undergo an ablation procedure which entailed having large needles inserted into Mr. Liston's spine and placed on the nerve which was causing the pain, then heating the needles to burn through the nerve. Mr. Liston was conscious throughout the procedure, as the procedure cannot be done with any anesthetics. Mr. Liston incurred medical bills in excess of \$78,000. A majority of these bills, less co-pays, deductibles, and med pay coverage were paid by Mr. Liston's health care insurance carrier, Blue Cross/Blue Shield.

On January 13, 2012, a pre-trial hearing was held to address a motion in limine filed by the Petitioner to prohibit Mr. Liston from introducing evidence of his medical expenses which did not contain and/or reflect reductions obtained as a result of Mr. Liston having

health care coverage with Blue Cross/Blue Shield. As reflected in the trial court's order entered on February 2, 2012, the Petitioner's motion was denied. In making its decision, the trial court considered the collateral source rule and the well established rule that a plaintiff, who has been injured by the tortious conduct of a defendant, is entitled to recover the reasonable value of the medical service not just the amount of the actual payment. *J. A. at 000073 - 000079.*

Pursuant to the request of the Petitioner, the case was tried in a bifurcated manner, with the jury first determining compensatory damages and subsequently determining punitive damages. *J. A. 000080 - 000084.* Long before the trial began, the parties submitted proposed jury instructions and verdict forms. The trial began on September 18, 2012.¹ *Id.*

After the close of evidence on September 20, 2012, the trial court took a recess to allow the jury to go for lunch and for the court and the parties to work on jury instructions and the verdict form. *J. A. 565 - 569.* Prior to the trial court finalizing the charge to the jury, the trial court inquired as to any objections to the charge. The Petitioner only raised two (2) objections. *J. A. 568.* The Petitioner objected to the verdict form containing a line for "compensation for a permanent injury" and requested instead, to have the line reflect "compensation for future loss of enjoyment of life." *Id.*² Considering this objection, the trial

¹ The trial was originally scheduled to begin in January 2012. However, Mr. Liston had to undergo an ablation procedure to deal with the continuous pain in his neck under the care of a new physician, and the case was continued until September 2012, so that the Petitioner would have an opportunity to depose Mr. Liston's new physician prior to trial.

² On or about January 5, 2012, the Petitioner filed "Defendant John Kenney's Objections to Plaintiffs Proposed Verdict Form." *J.A. 000062 - 000065.* In said pleading, the Respondent set forth an objection to the verdict form containing a line for both

court concluded that “compensation for future loss of enjoyment of life” is encompassed within and is an element of permanent injury. Consequently, the line item for “compensation for future enjoyment of life” was removed from the verdict form. *J. A.* 566 - 569. The Petitioner accepted this modification made to the verdict form.

Second, the Petitioner objected to the verdict form containing the line item “[c]ompensation for future lost wages” arguing that there was not sufficient evidence offered by the Respondent to make a claim for future lost wages. Considering this objection, the trial court found that sufficient evidence was presented and, consequently, allowed the verdict form to contain a line for future lost wages. *J.A.* 570-572.

The jury returned a verdict on the first phase of the bifurcated trial on September 21, 2012, and awarded compensatory damages to Mr. Liston totaling \$325,272.92. *J.A.* 000081-000082. After returning the award of compensatory damages to Mr. Liston, the jury was advised that a second phase of the trial would begin, wherein the jury would consider whether punitive damages should be awarded in the case. *J.A.* at 665-666.

During opening statement of the punitive portion of the trial, Petitioner’s counsel raised the issue of the financial status of Petitioner. Specifically, Petitioner’s counsel advised the jury that the Petitioner will testify that:

. . . he has no financial means at this point to pay a punitive damage verdict. He was working at the time of this accident, but he’ll tell you since has been laid off. He was working for a company that sold equipment to mines and has been laid off since May and is currently receiving unemployment benefits in the amount of 800-and-some dollars a week. At the time that he was

“permanent injury” and “loss of enjoyment of life” and an objection to “annoyance and inconvenience”. As noted above, the objection regarding loss of enjoyment of life was granted and the verdict form was changed. Additionally, “annoyance and inconvenience” was removed from the verdict form.

working, he made 30-some thousand dollars a year. He has –as part of his unemployment, has an obligation to apply for jobs. He has no job prospects at this point.

He's 35 years old. Living with his parents. Doesn't own property. He owns a car, which I believe is a 2002 car that is paid off. He has nothing else of financial value to pay.

J.A. at 671.

Mr. Liston called the Petitioner to testify. Based upon Petitioner's assertion that he lacked financial assets to pay a punitive damage award, Mr. Liston's counsel questioned the Petitioner about his financial assets. During said questioning, Mr. Liston's counsel simply inquired if the Petitioner had insurance, as permitted under *Garnes v. Fleming*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and *Wheeler v. Murphy*, 192 W.Va. 325, 452 S.E.2d 416 (1994). Specifically, Mr. Liston's counsel asked: "You also, in fact, have insurance, don't you?" *J.A. 688*. The Petitioner responded, "I do." *Id.* Respondent's counsel made no further inquiry regarding insurance.

Despite knowing that issues pertaining to *Shamblin-type excess coverage* existed in the case (see *J.A. 703 - 706*), Petitioner's counsel chose to illicit testimony from the Petitioner (i.e., her client) regarding the amount of insurance. The questions and responses were as follows:

Q. Mr. Edwards also asked you about insurance. And you did have insurance at the time of the accident, correct?

A. I did.

Q. What – do you know what your policy limits are?

A. I believe they were \$100,000 at the time, yes.

J.A. at 695 - 696

In light of the testimony illicitly by Petitioner's counsel and the issue regarding *Shamblin*-type excess coverage, on redirect examination, Mr. Liston's counsel attempted to clarify the Petitioner's understanding of the amount of insurance coverage that he had by asking the following question:

Q. Okay. With regards to your insurance coverage, there was, in fact, a question about actually how much coverage you have; isn't there?

J.A. 703.

Petitioner's counsel objected to this question, and counsel approached the bench. *Id.* Petitioner's counsel argued that the foregoing question was improper because the issue of the *Shamblin*-type excess coverage had not yet been determined. Mr. Liston's counsel responded that the question was proper because counsel for the Petitioner "opened-the-door" and that it was prejudicial to Mr. Liston to mislead the jury as to the possible assets available to the Petitioner to satisfy any judgment. *J.A. 703- 706.* After initially hearing from counsel at the bench, the trial court decided to take a recess. *J.A. 706 - 707.*

After considering the issue further, the trial court found that, at a minimum, counsel for the Petitioner "opened-the-door" on the issue of how much coverage was available. The court reasoned that the issue of the Petitioner's insurance coverage being limited to \$100,000 was now out there and that it would be unfair to let the jury believe that those were the only assets available. Nonetheless, the trial court limited Mr. Liston's counsel to one question on the issue and also required Mr. Liston's counsel to use the term "may" as it relates to the possibility of insurance coverage over \$100,000. *J.A. at 707- 710.* After issuing the ruling, the trial court reconvened the jury. Thereafter, Mr. Liston's counsel

continued redirect examination.

During said redirect examination, the Petitioner was questioned and testified regarding the amount of insurance as follows:

Q. Mr. Kenney, before we broke we were discussing the issue regarding your amount of insurance coverage. You understand that; is that correct?

A. I do.

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. 711. Mr. Liston's counsel did not ask any other questions regarding insurance.

At the close of evidence on the punitive damages case, the parties and the trial court addressed the jury instructions. *J.A. 732 - 747.* With respect to insurance coverage, the court gave the following cautionary instruction:

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

J.A. 750 (emphasis added).

After considering the evidence offered regarding punitive damages, the jury rendered a punitive damage verdict in the amount of \$300,000. *J.A. at 000083.*

SUMMARY OF ARGUMENT

Any and all relief requested in the *Petition for Appeal and the Petitioner's Brief* should be denied. The Petitioner's assertion that there was a duplication of damages arising from the jury's awards for the line items labeled "future pain and suffering" and "compensation for a permanent injury" is clearly without merit, as West Virginia law permits

a plaintiff, who has suffered a permanent injury, to receive an award for both future pain and suffering and for the permanent effect of the injury itself on the capability of the individual to function as a whole man. The record clearly demonstrates that “compensation for a permanent injury” as used on the verdict form meant compensation for the “permanent effect of the injury itself on the capability of an individual to function as a whole man” and that the trial court, the parties, and the jury understood this. Any possible concern regarding the duplication of such damages was taken care of by the jury instructions. The Petitioner’s arguments in this regard are clearly without merit when the verdict form is considered in light of the jury instructions. Moreover, the purported duplication of damages assignment of error regarding future pain and suffering should not even be considered on appeal because Petitioner’s counsel did not object to future pain and suffering being included on the verdict form.

With respect to the Petitioner’s assertion that damages for “past loss of enjoyment of life” are included in the “permanent injury” award, such assertion is also without merit because damages for a permanent injury pertain to the future effect of said injury not the past effects. Again, the Petitioner did not object to “past loss of enjoyment of life” being included on the verdict form, and consequently, this issue should also be deemed waived.

The Petitioner’s assignments of error regarding *Shamblin*-type excess coverage should also be rejected because the Petitioner opened the door for any purported error on this issue. In the punitive damage portion of the case, the Petitioner placed his financial condition at issue. Furthermore, Petitioner’s counsel illicit testimony from the Petitioner as to the amount of insurance coverage available to him, despite knowing that there was an issue regarding *Shamblin*-type excess coverage in the case. This testimony opened

the door to the inquiry regarding the Petitioner's understanding regarding the amount of insurance coverage that he had in this case. It is simply improper for the Petitioner to seek relief for any purported error that was caused by him. Further, the jury instruction given by the Court on this issue was not a comment on the evidence in violation of Rule 51 of the West Virginia Rules of Civil Procedure. The instruction did not single out or advise the jury that the Petitioner had unlimited insurance coverage.

Finally, the trial court properly ruled that Mr. Liston was able to present the value of his medical expenses through the medical bills without reducing the medical expenses for any reductions obtained as a result of a collateral source paid for by Mr. Liston. Moreover, the Petitioner waived this argument by failing to vouch the record as to the specific amount that he claimed the medical bills should have been reduced by.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not believe Oral Argument is necessary on Petitioner's Appeal in accordance with Rule 18(a)(3) of the W.Va. Rules of Appellate Procedure.

ARGUMENT

- I. **The jury's awards for the line items labeled "[c]ompensation for a permanent injury" and "[f]uture pain and suffering" were clearly proper under West Virginia law and were not duplicative damages.**

The Petitioner's assertion that there was a duplication of damages arising from the jury's awards for the line items identified on the verdict form as "compensation for a permanent injury" and "future pain and suffering" is without merit. The jury correctly applied West Virginia law which permits a plaintiff, who has suffered a permanent injury,

to receive an award for both future pain and suffering and for the permanent effect of the injury itself on the capability of the individual to function as a whole person. The record clearly demonstrates that “compensation for a permanent injury” as used on the verdict form meant the “permanent effect of the injury itself on the capability of an individual to function as a whole man” as set forth in *Flannery v. United States of America*, 171, W.Va. 297 S.E.2d 433 (W. Va. 1982), and that the trial court, the parties, and the jury understood this.

- A. West Virginia law entitles a plaintiff who has been permanently injured to recover damages for both future pain and suffering and for the permanent effect of the injury itself on the capability of the plaintiff to function as a whole person.**

West Virginia’s seminal case regarding future damages is *Flannery v. United States of America*, 171 W. Va. 27, 297 S.E.2d 433 (W. Va. 1982). In *Flannery*, the West Virginia Supreme Court of Appeals explained its holding in *Jordan v. Bero*, 210 S.E.2d 618 (W. Va. 1974) and discussed what damages are proper for a permanent injury. The Court in *Flannery* held:

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

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

Flannery at 171 W. Va. 30, and 297 S.E. 2d 436.

The above cited law makes it clear that once a permanent injury has been established future damages can be considered by a jury including, but not limited to: future medical expenses; future lost wages; future pain and suffering; and the permanent effect of the injury itself on the capability of an individual to function as a whole man. Consequently, each of these are separate recoverable elements of future damages that should be reflected as a separate line items of damages on a verdict form in a permanent injury case.

Despite the above cited law, the Petitioner claims that the trial court erred by permitting the verdict form to contain a line for "compensation for a permanent injury" rather than a line for compensation for "future loss of enjoyment of life", and that this somehow caused Mr. Liston to receive a double recovery. In making this claim, the Petitioner disregards the record in this case, including, but not limited to: the pre-trial proceedings; the proceedings during trial when the verdict form was addressed by the parties and the court; and the charge to the jury. When these matters are considered, it is clear that the Petitioner's claim is without merit and was waived.

With respect to the pre-trial proceedings, the Petitioner filed a written pre-trial objection to Mr. Liston's proposed verdict form. ³ *J.A. At 000062 -65*. In the written objection, the Petitioner objected to the verdict form containing a line for "compensation for a permanent injury" and a line for "loss of enjoyment of life." At the close of the evidence on the compensatory damages portion of the trial, the trial court addressed the Petitioner's objection. *J.A. at 568 - 569*. After hearing from the parties and consulting

³ The written objection cited hereto was filed on or about January 5, 2012, prior to the original trial date.

Flannery, the trial court determined that “compensation for permanent injury” should remain on the verdict form and that “compensation for future loss of enjoyment of life” should be removed. *Id.* Contrary to the Petitioner’s assertion, the trial court’s use of “compensation for a permanent injury” on the verdict form obviously meant compensation for the permanent effect of the injury itself on the capability of the plaintiff to function as a whole man as set forth in *Flannery*. Further, by making this correction to the verdict form, the trial court addressed any concern regarding duplication of damages.

B. When the verdict form is read in conjunction with the jury instructions, it is clear that there was no duplication of damages in this case.

It is well established when reviewing issues concerning a verdict form that the verdict form should be read along with the charge to the jury. *Perrine v. E. I. Du Pont de Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010). In the present case, the Petitioner essentially argues that the verdict form, by having separate line items for future pain and suffering and permanent injury, somehow resulted in a duplication of damages. This argument is dispatched quickly when reference is made to the charge to the jury.

During the charge to the jury, the trial court clearly and accurately instructed the jury as to law pertaining to permanent injury and future damages. *J.A. at 596 - 602.* With regard to future damages, the trial court instructed the jury:

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.

With respect to the Respondent's claim of permanent injury, the trial court instructed the jury as follows:

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 and has reduced his capacity to function as a whole person.

J.A. at 600 -601.

After reviewing the above referenced instructions, it is clear that the jury was properly advised as to what future damages could be awarded and what the jury was to consider when awarding any judgment for a permanent injury. In other words, when considering whether to award compensation for a permanent injury, the jury was to consider how the injury deprived Mr. Liston of his customary activities and whether the injury reduced his capacity to function as a whole person. There is nothing to suggest in the instructions that compensation for a permanent injury, as used on the verdict form, included compensation for future pain and suffering. In fact, the jury verdict illustrated that the jury understood the law and individually considered each of the four (4) categories of future damages. Importantly, the jury did not award "compensation for future emotional distress and mental anguish" or "future lost wages."

C. Regardless, the Petitioner failed to object to the line item "[f]uture pain and suffering" being included on the verdict form and, consequently, is precluded from raising this issue on appeal.

West Virginia law is clear that where a party fails to object to a verdict form at the time of trial, those objections are waived. If a litigant fails to object to a jury instruction or the court's charge, that litigant has waived the right to assert such objection for the first

time in a post-trial motion or on appeal. *W. Va. R. Civ. P. 51*; see also *Pinnacle Mining Co. of N. W. Va. v. Duncan Aircraft Sales of Fl.*, 182 W. Va. 307, 309, 387 S.E.2d 542, 544 (1989)(recognizing that objections to jury instructions cannot be raised for the first time in a post-trial motion to set aside the verdict). “A party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the matter to which he objects and the grounds of his objection.” *Tracy v. Cottrell*, 206 W. Va. 363, 376, 524 S.E.2d 879, 892 (1999), quoting *Roberts v. Powell*, 157 W. Va. 199, 207 S.E.2d 123 (1973). Put another way, “[a] litigant may not silently acquiesce to an alleged error. . . and then raise that error as a reason for reversal on appeal.” See *Page v. Columbia Natural Res. Inc.*, 198, W. Va. 378, 389, 480 S.E.2d 817 (1996). Therefore, this Court should refuse to consider instructional error. . . unless an objection was made at trial.” See *Tracy*, 206 W. Va. at 376.

In the present case, the Petitioner never objected to the verdict form containing a line item for compensation for “future pain and suffering” when objecting to the line item “compensation for a permanent injury” and is prohibited from making such objection now. Thus, in accordance with established precedent, this Court should refuse to consider this issue.

II. The jury did not duplicate damages in its awards for permanent injury and past loss of enjoyment of life.

As established above, it is clear from the jury instructions, verdict form and the jury’s verdict, that the jury’s award of compensation for permanent injury was for the **future** effect of Mr. Liston’s permanent injuries, proven to a reasonable degree of certainty, and did not include compensation for his “past” loss of enjoyment of loss damages which only needed

to be proven by a preponderance of the evidence and were separately awarded by the jury on the verdict form. Contrary to the Petitioner's apparent contention to the contrary, the jury was properly instructed as to the law that damages for past loss of enjoyment of life are for "past" damages incurred from the date of the accident up to the present time and that damages for permanent injury are for the future effect of the injury on the plaintiff's capacity to function as a whole person, proven to a reasonable degree of certainty. (See *Jury Instructions, J.A. 578 - 605*).

Moreover, the Petitioner waived all objections to the jury's award for "past loss of enjoyment of life" by failing to object to said line item being on the verdict form prior to the trial court administering the charge or delivering the verdict form to the jury, and, consequently, should be precluded from raising this issue on appeal. As set forth above, this Court should not entertain an assignment of error where the party has failed to make a timely objection at trial.⁴ In the present case, the Petitioner never objected to the verdict form containing an award for "past loss of enjoyment of life." Therefore, the Petitioner should be prohibited from raising this new issue on appeal.

III. After Petitioner's counsel "opened-the-door", the trial court properly allowed Respondent's counsel to ask one question regarding the possibility of Shamblin-type excess coverage.

The Petitioner is also wrong in asserting that the trial court committed error by allowing Respondent's counsel to ask a single question of the Petitioner as to the Petitioner's understanding regarding the amount of liability insurance coverage that he had.

⁴One of the reasons for this established rule is obviously to provide the trial court with an opportunity to correct any error, rather than to allow (and encourage) a litigant to await the outcome of the jury's verdict and then make an issue of the matter on appeal if the verdict does not go his way.

The Petitioner makes this claim even though it was the Petitioner who introduced his wealth, or the alleged lack thereof, during the punitive damages phase of the trial, *which was the only reason that insurance coverage was brought before the jury*. In response, Mr. Liston's counsel only brought forth the fact that the Petitioner had insurance coverage and did not inquire as to the amount of such coverage, as both parties were well aware that the amount of coverage the Petitioner may have in this matter was under debate. Nevertheless, Petitioner's counsel asked the Petitioner the amount of his insurance coverage. After the Petitioner "opened-the-door" on the issue of the amount of insurance coverage, Mr. Liston's counsel wanted to ask if this truly was the Petitioner's understanding. However, Petitioner's counsel objected.

The trial court then correctly determined that Petitioner's counsel had opened-the-door to further inquiry as to the amount of insurance coverage that may be available to the Petitioner, and limited Mr. Liston's counsel to one (1) question regarding the possibility of additional coverage. The one question was whether or not it was the Petitioner's understanding that there may be additional coverage to pay a verdict. This was clearly not error.

First, it was the Petitioner who brought forth his wealth, or alleged lack thereof, which allowed Mr. Liston's counsel to inquire as to insurance coverage under the Court's holdings in *Garnes v. Fleming*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and *Wheeler v. Murphy*, 192 W.Va. 325, 452 S.E.2d 416 (1994). As stated above, Petitioner's counsel then asked the Petitioner the amount of the policy, when she, and the Petitioner knew the amount of coverage was in question. If the amount of coverage was not in question, then Petitioner could have easily answered the question on re-direct in the negative. Instead,

the Petitioner affirmed that it was his understanding that he **may** have additional coverage beyond the stated policy limit.

The Petitioner wishes to have his cake and eat it too. However, the one question asked by Mr. Liston's counsel was clearly not error. Neither was the simple cautionary instruction given in the charge. Under the circumstances created by the Petitioner, both were proper and necessary to avoid misleading the jury.

Moreover, even assuming *arguendo* that it could have otherwise been error (had Petitioner not opened-the-door as the trial court correctly determined), it was invited error:

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

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

Petitioner's counsel attempts to argue that the jury was permitted to hear false evidence regarding the extent of insurance coverage available to the Defendant. Such argument is simply not true. To the contrary, it was Petitioner's counsel who attempted to mislead the jury. As a consequence, the jury was properly allowed to hear that the Petitioner **may or may not** have additional coverage, which was testified to by the Petitioner himself.

IV. The instruction regarding the possibility of *Shamblin*-type excess coverage did not violate Rule 51 of the West Virginia Rules of Procedure. It was fair and clearly advised the jury that insurance coverage may or may not be available to pay whatever verdict was rendered, and was appropriate under the circumstances.

The jury instruction given by the trial court which simply stated that there “may or may not be” insurance coverage to pay a verdict was a proper instruction under the circumstances.

‘The formulation of jury instructions is within the broad discretion of the a circuit court, and a circuit court’s giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties. Syl. pt. 6, *Tennant v. Marion Halth Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).’

Syllabus Point 3, *Keese v. General Refuse Service, Inc.*, 216 W.Va. 199, 604 S.E.2d 449 (2004).

This Court has also held:

‘A trial court’s instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court’s discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.’ Syl. pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syllabus Point 14, *Keese v. General Refuse Service, Inc.*, 216 W.Va. 199, 604 S.E.2d 449 (2004).

In the present case, the trial court’s instruction was accurate, as it was based directly on the testimony of the Petitioner. Moreover, the instruction was fair to both parties, as the jury, as determiner of the facts, ultimately had to consider all the evidence

it had heard in making its determination as to the award of punitive damages.

V. **The trial court properly denied the Petitioner's motion in limine regarding the value of medical expenses to be presented to the jury at trial.**

The trial court, in following this Court's long line of rulings, properly denied the Petitioner's Motion in Limine which sought to prohibit the Mr. Liston from presenting to the jury the amount of his medical bills that were billed, instead of the amount that was paid by his health insurer. Other than arguing that the amount paid by Mr. Liston's health insurer was less than the actual amount of the bills, the Petitioner offered no other evidence as to the reasonableness of Mr. Liston's medical bills. The trial court, in denying the Petitioner's Motion in Limine, properly found that payments made by Mr. Liston's health insurance provider was a "collateral source" and therefore should not be brought before the jury.

A. **The "collateral source rule" bars a wrongdoer from receiving the benefit of any reductions to an injured person's medical expenses when such reductions were obtained as a result of a collateral source paid for by the injured person.**

"The collateral source rule normally operates to preclude the offsetting of payments made by health and accident 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)." Syllabus Point 7, *Keese v. General Refuse Service, Inc.*, 216 W.Va. 199, 604 S.E.2d 449 (2004). "The collateral source rule also ordinarily prohibits inquiry as to whether the plaintiff has received payments from collateral sources. This is based upon the theory that the jury may well reduce the damages based on the amounts that the plaintiff has been shown to receive from collateral sources.' Syl. pt. 8, *Ratlief v. Yokum*,

167 W.Va. 779, 280 S.E.2d 584 (1981)." Syllabus Point 8, *Keese v. General Refuse Service, Inc.*, 216 W.Va. 199, 604 S.E.2d 449 (2004).

B. Any reductions to an injured person's medical expenses that were obtained as a result of a collateral source paid for by the injured person should not be considered by a jury because the injured person has paid monies to obtain the reductions.

Our law has long held that "[a]n injured person is entitled to recover damages for reasonable and necessary nursing care rendered to [her], whether such services are rendered gratuitously or paid for by another." *Kretzer v. Moses Pontiac Sales, Inc.*, Syl. Pt. 5, 157 W.Va. 600 (1974)(emphasis added). The doctrine of gratuitously rendered care encompasses any medical services rendered to a plaintiff whether or not actually paid. *Id.* at 610. See, also, Long v. City of Weirton, 158 W.Va. 741, 787 (1975) (holding award of damages for doctor's bill is not predicated on actual payment, but on evidence that such services were necessarily rendered and reasonable in value of such services). A plaintiff's evidence of medical services rendered, whether gratuitously rendered or not, is admissible evidence for the jury in arriving at the plaintiff's damages. Identical to any other "collateral source," the rationale underlying the gratuitous services rule is that the wrongdoer cannot be permitted to minimize a plaintiff's damages by the fortuitous fact that the injured party happened to have a third-party source of payment for his damages independent of the wrongdoer, or was provided the services gratuitously. *Moses*, at 610.

Therefore, a defendant should also not be permitted to raise the issue that some of the plaintiff's medical services were paid at a reduced rate. The only relevant inquiry is whether the value of such medical services is "reasonable," and, even if disputed, actual payment by a health care insurance carrier is irrelevant to that inquiry. *Long*, at 787.

Actual payment (or nonpayment) of the plaintiff's medical expenses resulting from his own independent arrangements does not serve the inquiry of whether the value of those service is reasonable. Id. Such evidence would be totally irrelevant. That would impermissibly permit a defendant to minimize a plaintiff's damages and profit from his wrongdoing solely because the plaintiff's medical providers agreed to accept a reduced rate on his behalf.

It, therefore, follows that any evidence that even if some of a plaintiff's medical costs were gratuitously or contractually reduced or discounted by virtue of the plaintiff's health insurance coverage, is clearly irrelevant and must be excluded under Rules of Evidence Rule 401 and 402. The fact that some of a plaintiff's medical expenses may have been paid at a reduced rate, does not make it "more probable or less probable" that such damages are or are not presented at a "reasonable value." WVRE 401. To the contrary, any attack by a defendant on the reasonableness of such damages must be based on admissible evidence of the fair value of the services.⁵ Any challenge of the "reasonable value" need only go that far.

Likewise, any evidence that a plaintiff's medical services have been rendered at a reduced cost is clearly more prejudicial than probative also demanding exclusion. WVRE 403. Informing the jury that a plaintiff did not actually pay for certain medical services can only result in a reduction of any award below the "reasonable value" of such services. That result would be prejudicial and improper; however, there is no other rational to admit such evidence. The jury has no reason to know that such services were provided

⁵ The "reasonable value" of such medical services is presumed under W.Va. Code § 57-5-4j unless competent, admissible evidence is otherwise presented, which did not occur in this case.

at a reduced rate except for the sole and improper purpose of inferring that a plaintiff should not fully recover these damages because he has not actually paid for them. Exclusion of this evidence is the very rationale underlying both the "collateral source rule" -- a wrongdoer has no right to receive benefit by not having to compensate an injured person for those medical care and other services that the injured victim was able to obtain gratuitously, or have paid from a collateral source benefit, independent of the wrongdoer. *Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers*, §4-9(C)(4th Ed.2000).

C. Any reduction to an injured person's medical expenses that was obtained as a result of a collateral source paid for by the injured person is irrelevant as to the reasonable value of medical expenses.

It is axiomatic that a party who becomes obligated to pay damages because of a wrong done may not benefit by payments or medical services rendered to the injured party from collateral sources." See Grove by and through Grove v. Myers, 181 W. Va. 342, 350, 382 S.E.2d 536, 544 (1989). This rule, known as the collateral source rule, applies to instances where the payments at issue were made by a health insurance or automobile insurance company. See *Jones v. Laird Foundation*, 156 W. Va. 479, 482, 195 S.E.2d 821, 824 (1973) Simply put, the collateral source rule is premised on the long-standing judicial theory that "it is better for injured plaintiffs to receive the benefit of collateral sources in addition to actual damages than for defendants to be able to limit their liability for damages merely by the fortuitous presence of these sources." See *Illosky v. Michelin Tire Corp.*, 172 W. Va. 435, 447, 307 S.E.2d 603, 615 (1983).

Accordingly, "[t]he general rule is that a plaintiff who has been injured by the tortuous conduct of the defendant is entitled to recover the reasonable value of medical

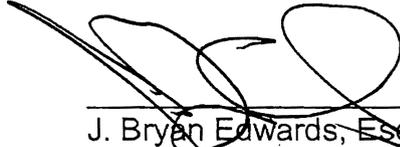
and nursing services reasonably required by the injury. This is a recovery for their value and not for the expenditures actually made or obligations incurred." See *Kretzer v. Moses Pontiac Sales*, 157 W. Va. 600, 610, 201 S.E.2d 275, 285 (1974) (internal citations omitted); *Long v. City of Weirton*, 158 W.Va. 741, 787 (1975)(holding award of damages for doctor's bill is not predicated on actual payment, but on evidence that such services were necessarily rendered and reasonable in value of such services). Thus, under this general rule, a plaintiff may recover for any reasonably incurred medical costs, as well as any medical costs which are likely to be reasonably incurred in the future as a result of a defendant's tortious conduct, regardless of how those medical costs were paid, if at all. See *Id.*; see also *Jordan v. Bero*, 158 W. Va. 28, 57,210 S.E.2d 618,637 (1974).

Therefore, under this rule, Mr. Liston was entitled to recover for all medical expenses previously incurred by him as well as all medical expenses which are reasonably expected to be incurred by him in the future regardless of whether Blue Cross/Blue Shield has, or will, negotiate to pay a reduced sum to the providers of that medical care. Petitioner's arguments to the contrary are in violation of West Virginia law and the policy decisions underlying the collateral source rule.

CONCLUSION

For the foregoing reasons, and all others that may appear to the Court, the Respondent/Plaintiff, Samuel C. Liston, respectfully requests that the Court deny the Petition for Appeal.

Respectfully Submitted,
Respondent, By Counsel



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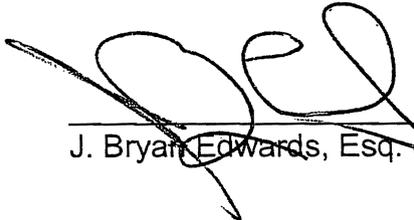
CERTIFICATE OF SERVICE

RESPONDENT'S RESPONSE TO PETITIONER'S PETITION TO APPEAL was served on August 8, 2013, via U.S. Mail, postage pre-paid on the following:

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