

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 14-1332**

**WHEELING PARK COMMISSION,**

**Petitioner,**

**Appeal from a final Order of the  
Circuit Court of Ohio County  
CASE NO. 09-C-274**

**V.**

**JOSEPH DATTOLI and KERRY DATTOLI  
His Wife,**

**Respondents.**

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**APPEAL BRIEF**

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**I. TABLE OF CONTENTS**

1. Table of Contents	Page 2
2. Table of Authorities	Page 2
3. Assignments of Error	Page 3
4. Statement of the Case	Page 3
5. Summary of Argument	Page 7
6. Statement Regarding Oral Argument	Page 8
7. Argument	Page 8
8. Conclusion	Page 17
9. Certificate of Service	Page 19

**II. TABLE OF AUTHORITIES**

<b>Case</b>	<b>Page</b>
<i>Washington v. B. &amp; O. R.R.</i> , 17 W. Va. 190 (1880).	8
<i>Hinkle v. Martin</i> , 163 W. Va. 482 (1979).	8, 11
<i>Williamson &amp; Co. v. Nigh</i> , 58 W. Va. 629, 53 S.E. 124 (1906).	8
<i>Dye v. Corbin</i> , 59 W. Va. 266, 53 S.E. 147 (1906).	8
<i>White v. Moore</i> , 134 W. Va. 806, 62 S.E. 2d 122 (1950).	8
<i>Roberts v. Gale</i> , 149 W. Va. 166, 139 S.E. 2d 272 (1964).	8
<i>Pinfold v. Hendricks</i> , 155 W. Va. 489, 184 S.E. 2d 731 (1971).	8
<i>Thompson v. Hope Gas, Inc.</i> 2013 W. Va. LEXIS 124, 5 (2013).	9, 11
<i>Mabe v. Huntington Coca-Cola Bottling Co.</i> , 145 W. Va. 712, 720 (1960)	10
<i>Fleming v. Hartrick</i> , 100 W. Va. 714 (1926)	10
<i>Richards v. Monongahela Power Co.</i> , 2011 W. Va. LEXIS 473 (2011).	11

<i>Freshwater v. Booth</i> , 160 W. Va. 156 (1977).	7, 13, 14, 15, 16
<i>Martin v. Charleston Area Medical Ctr.</i> , 181 W. Va. 308, 312 (1989).	14
<i>Linville v. Moss</i> , 189 W. Va. 570 (1993).	14
<i>Raines v. Thomas</i> , 175 W. Va. 11 (1985).	14
<i>King v. Bittinger</i> , 160 W. Va. 129, 137 (1976)	16
<i>Foster v. City of Keyser</i> , 202 W.Va. 1, 22, 501 S.E.2d 165, 187 (1997)	17
85 A.L.R.2d 9, 26	16
West Virginia Code §29-12A-13(c)	17

**ASSIGNMENTS OF ERROR**

- I. The trial court erred in denying Petitioner’s Motion for Directed Verdict.
- II. The trial court erred in granting Respondents’ Motion for a New Trial on damages only.

**STATEMENT OF THE CASE**

On September 1, 2007, Respondent, Joseph Dattoli, was at Wheeling Park for a family reunion. Specifically, he was near the boathouse, where there are split rail fences between the boathouse and the adjacent parking lot. This was on Labor Day weekend, and the park was hosting an event, known as “Fort Henry Days.” There were various amusement attractions for children setup in this parking lot as part of the event (ball pit, blow up house, etc.). Mr. Dattoli was in the general vicinity of this parking lot, when he chose to either sit or lean on a split rail

fence. At this point, the top rail of the split rail fence could not hold Mr. Dattoli's weight<sup>1</sup>, and it broke. He then fell backwards and suffered a torn rotator cuff. He underwent surgery for this injury and ultimately made a full recovery.<sup>2</sup>

Respondents filed a negligence claim against the Wheeling Park Commission in connection with this accident. At trial, Respondents generally argued two theories of negligence. First they claimed that the fence was negligently maintained and this negligent maintenance caused the fence to break. Second they claimed that the park was negligent in not providing sufficient seating in the area, and for this reason Mr. Dattoli was required to sit and/or lean on the subject fence causing it to break.

At trial, Respondent, Kerry Dattoli, testified first. Generally speaking, Mrs. Dattoli testified regarding her husband, Joseph Dattoli's torn rotator cuff, and how it affected Mr. Dattoli as well as his family. Mrs. Dattoli did not witness the subject fall, and she did not testify regarding the maintenance of the fence or the seating in and around the parking lot. *See*: Trial Transcript at Appx. 955-988.

Respondents next called Rachel Higgins, who is their ex-daughter-in-law. Ms. Higgins was married to Respondents' son at the time of the subject accident, and she witnessed Mr. Dattoli's fall. Generally, Ms. Higgins testified that she saw Mr. Dattoli lean on the fence and then fall backwards after the fence broke. She also provided testimony as to her recollection of how Mr. Dattoli's injury affected him. *See*: Trial Transcript at Appx. 988-1088. However, she did not provide any testimony regarding the condition of the fence or the maintenance of the fence. She also did not provide any testimony regarding the seating in the area.

Respondents next called their son, Brandon Dattoli. Like the witnesses before him, Brandon Dattoli testified regarding the effect which the fall had on his father. *See*: Trial

1 Mr. Dattoli's medical records indicate that he weighed in excess of 240 pounds at the time of this accident.  
2 At trial Mr. Dattoli claimed that he was still suffering from pain, but this testimony was soundly refuted by his medical records and his own surgeon's testimony. Further, the Jury ultimately awarded him no damages for future pain and suffering.

Transcript at Appx 1088-1027. He also provided some testimony regarding the existence and location of some seating in the general vicinity of the fall. *See*: Trial Transcript at Appx 1025-1026. However, he did not provide any insight into any industry standard regarding seating, and he also did not provide any lay opinion regarding the sufficiency of the seating. Likewise, he did not provide any testimony at all regarding the condition or maintenance of the fence.

Respondents next played the video trial deposition of Joseph Dattoli's treating surgeon, Dr. Patrick Demeo. Dr. Demeo provided testimony regarding Mr. Dattoli's injury and subsequent treatment but as can be imagined, did not testify regarding the subject split rail fence or the seating provided at the park. *See generally*: Demeo Deposition Transcript at Appx 911-949.

Next, Respondent, Joseph Dattoli, took the stand. Mr. Dattoli provided extensive testimony regarding his physical injuries and other alleged damages. However, even Mr. Dattoli, himself, did not provide any opinion regarding the maintenance of the fence. In fact, he clearly testified that prior to the accident, he looked at the fence and it "looked solid." *See*: Trial Transcript at Appx 1044. Mr. Dattoli went on to testify that immediately before the fall the fence looked strong, well maintained and had no signs of neglect. *See*: Trial Transcript at Appx. 1091-1092. At no point, did he indicate that he believed the fence was not maintained properly. Moreover, Mr. Dattoli acknowledged that there were several seating options available to him in the vicinity of the fall. *See*: Trial Transcript at Appx. 1084-1089. He also acknowledged that he could have utilized any of these seating options, but he made the choice to use a split rail fence instead. Likewise, Mr. Dattoli did not indicate that believed the seating was insufficient in the area.

Finally, Respondents called John Hargleroad, who was the Director of Operations of the Wheeling Park Commission at all times relevant to the case. Mr. provided a litany of testimony regarding the park and split rail fences in general, but he did not provide any testimony regarding

the standard of care for maintaining fences nor did he provide any testimony regarding the and standard governing seating in a park setting. *See:* Trial Transcript at Appx. 1125-234.

Overall, respondents provided a plethora of testimony regarding their alleged damages. Likewise they produced testimony confirming that the subject fence broke and Mr. Dattoli was thereafter injured: two issues that were not in dispute. However, the Respondents quite conspicuously did not provide any evidence with regard to the maintenance of the subject split rail fence. Likewise, the Respondents did not provide any evidence with regard to any standard or custom governing the seating issue. Based upon this total lack of evidence with regard to the indispensable elements of duty and breach of duty, Petitioner moved for a Directed Verdict at the close of Respondent's case. *See:* Trial Transcript at Appx. 1200-1201. However, the Circuit Court denied this Motion. *See:* Trial Transcript at Appx. 1201. The denial of this Motion is one of Petitioner's assignments of error.

After this Motion for Directed Verdict was denied, the case was submitted to the Jury. During their deliberation, the Jury asked the court if Mr. Dattoli's medical bills were paid by medical insurance. The Jury also asked the court if Mr. Dattoli's wages were paid by disability insurance. The fact that these questions were being asked, seemed to indicate that the Jury was making improper considerations when deciding liability. However, the Court properly instructed the Jury that these issues were not to be taken into consideration and no information could be provided.

Despite the lack of supporting evidence, the Jury returned a verdict finding Petitioner liable. *See:* Verdict Form at Appx. 758. The Jury awarded Respondent \$36,894.47 in past medical bills. *Id.* This dollar amount was stipulated to prior to trial. The Jury also awarded Responded \$19,000 in past lost wages, which was considerably less than the \$30,685.55, which Respondent claimed. *Id.* The Jury awarded Respondent's \$0 for all other forms of damages including but not limited to past pain and suffering. *Id.* It is interesting to note that the only

damages that were awarded were the same types of damages for which the jury previously inquired about the availability of insurance coverage. This correlations provides a strong indication that by awarding these damages and only these damages, the Jury was attempting to “create” insurance coverage for Mr. Dattoli out of sympathy.

Thereafter, Respondents filed a Motion for a New Trial arguing that the Jury’s award was insufficient due the Jury’s failure to award past pain and suffering. *See:* Motion at Appx. 777. Petitioner responded and argued that a new trial was not necessary, but if it was, it should be on both liability and damages. *See:* Response at Appx. 801. The Court granted Respondent’s Motion and ordered a new trial on damages alone. *See:* Order at Appx. 809. This ruling is the basis for Petitioner’s second assignment of error.

#### SUMMARY OF ARGUMENT

Petitioner’s first assignment of error is asserted in connection with the Circuit Court’s denial of its Motion for Directed Verdict. There is no question that a plaintiff is required to introduce *prima facie* evidence of a legal duty and of a breach of said duty before a negligence claim can be submitted to a jury. In this case, Respondents did not introduce any evidence as to what Petitioner’s duty was and also did not introduce evidence that this duty was breached. Without this evidence, it is clear that this case should not have been submitted to the Jury, but rather should have been dismissed by a directed verdict. Thus, the Circuit Courts denial of Petitioner’s Motion for Directed Verdict was reversible error.

Also, after the Trial, the Respondents moved for a new trial based upon a claim that the damages awarded were insufficient. The Circuit Court granted this Motion and ordered that a new trial take place solely on the issue of damages. However, in making this ruling, the Circuit Court misapplied the legal standard delineated in *Freshwater v. Booth*. Namely, pursuant to *Freshwater*, there is no questions that this case is a “Type 2” case, and thus, if a new trial is necessary, said trial should be on all issues rather than damages only.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes oral argument will be beneficial and is therefore necessary.

### ARGUMENT

- I. **The issue of liability should not have been submitted to the jury and the jury improperly decided the issue of liability.**

The only claims that have been asserted in this case are claims of negligence. The elements of negligence are clear and well established. Specifically this Court has stated:

Negligence is the doing of something, which under the circumstances a reasonable person would not do, or the omission to do something in discharge of a legal duty, which under the circumstances a reasonable person would do, and which act of commission or omission as a natural consequence directly following produces damage to another. Negligence can be based on omission, only when there is a legal obligation on the party to do the omitted acts. If such legal obligation exists, negligence may arise either from the non-performance or mal-performance of the duty imposed by law.

*Washington v. B. & O. R.R.*, 17 W. Va. 190, 197 (1880). What this means, in general terms, is that a plaintiff must prove that a defendant failed to take some action that a reasonable person would have taken or that a defendant took an action that a reasonable person would not have taken. Generally speaking, these elements are called "duty" and "breach of duty." Furthermore, there is no questions that plaintiffs are required to present *prima facie* evidence of duty and breach of duty at trial, in order to have the issue of liability submitted to the jury. *Hinkle v. Martin*, 163 W. Va. 482, 483 (1979) citing *Williamson & Co. v. Nigh*, 58 W. Va. 629, 53 S.E. 124 (1906); *Dye v. Corbin*, 59 W. Va. 266, 53 S.E. 147 (1906); *White v. Moore*, 134 W. Va. 806, 62 S.E. 2d 122 (1950); *Roberts v. Gale*, 149 W. Va. 166, 139 S.E. 2d 272 (1964); *Pinfold v. Hendricks*, 155 W. Va. 489, 184 S.E. 2d 731 (1971). With this in mind, when reviewing the Circuit Court's decision, this Court must carefully analyze all evidence, or lack thereof, which Respondents provided in regard to duty and breach of duty.

The first general theory of negligence, which the Respondents asserted, dealt with the maintenance of the subject fence. Specifically, they seemed to claim that the Wheeling Park Commission was negligent in its maintenance of this fence, and said negligence caused Respondent's injuries. Thus, in order to have this claim submitted to the Jury, Respondents were required to provide at least *prima facie* evidence that there was a duty to maintain this fence in a certain way. This would be the "duty" requirement. Respondents were then required to provide evidence that the Wheeling Park Commission failed to maintain this fence in a manner in which a reasonable park commission would have. This would be the "breach of duty" requirement.

Upon reviewing the evidence that was presented, it becomes abundantly clear that Respondents did not provide any evidence, whatsoever, of either duty or breach of duty. First, this Court has clearly stated, "where a matter is beyond the competency of a layperson, then an expert must be employed." *Thompson v. Hope Gas, Inc.* 2013 W. Va. LEXIS 124, 5 (2013). In regard to the "duty" element, Respondents were required to provide evidence regarding the steps that a reasonable park would take to maintain a split rail fence. An opinion in this regard would certainly require some knowledge as to how parks operate generally and more specifically how parks typically maintain split rail fences. Additionally, an opinion in this regard would likely require at least some familiarity with split rail fences and their required maintenance in a park setting. It is relatively clear that a typical lay person does not have knowledge regarding the operations of parks and has no knowledge as to how "reasonable parks" maintain split rail fences. Because, lay people do not have this knowledge, it is clear that in order to provide *prima facie* evidence of the duty which Petitioner owed, Appellees were required to elicit testimony from an expert on park operations and/or fence maintenance. Respondents did not offer any expert testimony in this case.<sup>3</sup> Thus, because this testimony was necessary to establish the duty,

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<sup>3</sup> Respondents disclosed an expert in this regard but chose not to call the expert at trial. See: Plaintiff's Expert Disclosure at Appx. 204.

which was owed and because Respondents did not provide this testimony, it is clear Respondents failed to provide *prima facie* evidence of a duty, and the claim involving negligent maintenance of the subject fence, therefore, should not have been submitted to the Jury, but rather, Petitioner's Motion for Directed Verdict should have been granted.

However, the lack of expert testimony is not the only shortcoming in regard to the evidence presented at trial. In fact, even if it were assumed for argument's sake that expert testimony was not absolutely necessary, it is clear that Respondent's still failed to present sufficient evidence with regard to the elements of duty and breach. There is no dispute that, even if the expert testimony requirement is ignored, Respondents were required to introduce at least some evidence of what Petitioner's duty was and some evidence that Petitioner breached this duty.

Overall, neither Respondents nor any of their witnesses gave any opinions about what the park should have done differently with regard to the subject fence. Moreover, not one witness opined regarding how the Petitioner's maintenance of the subject fence was improper or insufficient. Not one witness gave any opinion as to some alternative maintenance that should have been done. Instead, Respondents and their family members merely testified that the fence broke and that Mr. Dattoli was injured. Not one person discussed the maintenance of the fence at all. This total lack of evidence was acknowledged in the Circuit Court's Order, which states, "there was no evidence that the defendant had any notice that the fence was flawed or needed any repair..." See: Order at Appx. 810. The issues of duty and breach were simply ignored.

In summary, Respondents asserted a claim that Petitioner negligently maintained the subject split rail fence. There is no dispute that this claim requires *prima facie* evidence of each element of negligence. *Mabe v. Huntington Coca-Cola Bottling Co.*, 145 W. Va. 712, 720 (1960) citing *Fleming v. Hartrick*, 100 W. Va. 714 (1926). However, not only did Respondents not present the necessary expert testimony regarding the duty to maintain a fence, but they also did

not produce any evidence at all regarding petitioner's duty or petitioner's alleged breach of said duty. Without said evidence, it is clear that this claim should not have been submitted to the jury and Petitioner's Motion for Directed Verdict should have been granted. *Hinkle v. Martin*, 163 W. Va. 482 (1979); *Richards v. Monongahela Power Co.*, 2011 W. Va. LEXIS 473 (2011).

Respondent's second theory of negligence involved allegations that Petitioner did not provide adequate seating in the area surrounding the site of the subject accident. At the time of the subject fall, there were carnival type attractions (bounce house, rock climbing wall, etc.) in the area. There was clear evidence presented at trial that there were benches in the area of these attractions. However, despite these benches, respondent argued that he was required to sit/lean and the subject fence because there was insufficient seating in the area. Thus he alleged that the Petitioner was negligent in failing to provide more seating.

Like the negligent maintenance claim, this claim also requires proof of duty, breach, causation and damages. Specifically with regard to duty, Respondents were required to provide *prima facie* evidence regarding the amount of seating that a reasonable park would have provided under the circumstances. Even more so than the maintenance issue described above, this issue requires expert testimony. Lay people do not know whether there is an industry standard in regard to the amount of seating that should be provided at carnivals and/or other events. Even assuming that there is some industry standard governing seating, which to this day remains unknown, it is clear that lay people do not generally have knowledge about what this industry standard is. Lay people do not know how the proper volume of seating is calculated. Is it dependent upon the number of people attending an event? Is it dependent upon the size or square footage of the event area? Is it dependent upon the anticipated durations of the event? Is there even a requirement for seating? Clearly this issue requires expert testimony. *Thompson v. Hope Gas, Inc.* 2013 W. Va. LEXIS 124, 5 (2013). Likewise lay people do not have knowledge regarding the appropriate placement of seating or if there is even a protocol or standard that

covers this issue. Thus, in order to provide *prima facie* evidence that Petitioner owed a duty and breached this duty, Respondents were required to provide evidence as to the industry standard or generally accepted practice governing seating at carnivals or similar events, and because this is not common knowledge, Respondents were required to produce expert testimony in this regard. However, Respondents failed to provide any such evidence.

Moreover, Respondents did not even provide a lay opinion about how much seating should have been provided or where said seating should have been provided. Instead they merely made bald assertion that the seating was insufficient. This type of claim without any supporting evidence is not enough. There is no question that the existence of a legal duty as well as the sufficiency of evidence establishing said duty are legal issues that are to be decided by the trial court. In this case, Respondents failed to establish that a duty existed let alone establish that a duty was breached. Thus, it is clear that Petitioner's Motion for Directed Verdict should have been granted.

**II. If a new trial is necessary, said trial should be on the issues of liability as well as damages.**

As has been stated, the issues of both liability and damages were tried to the jury in this case. After hearing all the evidence and deliberating, the jury found Petitioner liable and returned a verdict for past medical expenses in the amount of \$36,894.47. Evidence of this figure was presented and the amount was not contested. The jury also returned a verdict for past lost wages in the amount of \$19,000. This figure was drastically reduced from the \$30,685.55, which Respondent requested at trial. The jury did not award any other form of damages including but not limited to past pain and suffering. After the trial, Respondents filed a Motion for a New Trial, based on the argument that the verdict was inadequate as a result of the jury's failure to award damages in the form of past pain and suffering. The Circuit Court granted this Motion and

ordered that the case be retried on the issue of damages only.

In making this ruling, the Circuit Court correctly relied on the precedent of *Freshwater v. Booth*, but did not apply this precedent of this case correctly. 160 W. Va. 156 (1977). In *Freshwater*, this Court delineated four separate and distinct situations in which a new trial was appropriate as a result of inadequate damages awards and also described whether liability and/or damages should be retried in each of these situations. *Freshwater v. Booth*, 160 W. Va. 156 (1977). The first situation is referred to as a "Type 1" case, and this involved a case in which a plaintiff was entitled to a directed verdict in regard to liability. *Id.* The case at bar clearly does not fit within this category, so no further explanation is needed in this regard. A "Type 3" case involves a case in which "the plaintiff's evidence of liability is so questionable and the damage award so nominal, an appellate court may reasonably infer that even though the jury were sympathetic toward the plaintiff, they could award him only a nominal sum as an act of mercy." *Id.* "A type 3 case or defendant's verdict perversely expressed is identified by the nominal award of damages which permits an appellate court reasonably to infer that the error was made on liability..." *Id.* In the case at bar, the plaintiff's evidence of liability was questionable, to say the least. However, the Jury did award plaintiff in excess of \$50,000 and this cannot be considered "nominal." Thus, the case at bar clearly is not a Type 3 case. A "Type 4" case involves "a case in which, while the plaintiff would not be entitled to a directed verdict on the matter of liability, the issue of liability has been so conclusively proven that an appellate court may infer that the jury's confusion was with regard to the measure of damages and not to liability." *Id.* As is described above, plaintiffs in this case did not produce any evidence, let alone sufficient evidence, to support a finding of liability. With this in mind, it certainly cannot be found that liability was "conclusively proven." The questionability of Respondent's liability evidence is clearly demonstrated in the Circuit Court's Order, which states, "the facts demonstrate that the jury could have decided the question of liability either way." *See*: Order at Appx. 810. Thus, this case

is not at Type 4 case.

Contrarily, the case at bar does seem to be a text book Type 2 case. Specifically, in *Freshwater*, this Court described a Type 2 case as a case “where liability is strongly contested and the award of damages is clearly inadequate if liability were proven.” Moreover, when describing this type of case, this Court has, on multiple occasions, held:

In a tort action for property damage and personal injuries the appellate court will set aside the jury verdict and award a new trial on all issues where: (1) the jury verdict is clearly inadequate when the evidence on damages is viewed most strongly in favor of defendant; (2) liability is contested and there is evidence to sustain a jury verdict in favor of either plaintiff or defendant; and (3) the jury award, while inadequate, is not so nominal under the evidence as to permit the court to infer that it was a defendant's verdict perversely expressed.

*Martin v. Charleston Area Medical Ctr.*, 181 W. Va. 308, 312 (1989) citing *Freshwater v. Booth*, 160 W. Va. 156 (1977); *Linville v. Moss*, 189 W. Va. 570 (1993); *Raines v. Thomas*, 175 W. Va. 11 (1985).

Thus, after considering this Court's well established precedent in combination with the facts of this case, it is clear that this is a Type 2 case, and if there is to be a new trial, it should be on both liability and damages. With regard to the first prong of the above described standard, there is no dispute among the parties that the verdict was inadequate. There was proof that Mr. Dattoli suffered a torn rotator cuff and subsequently underwent surgery. The lack of an award of pain and suffering renders the award inadequate. Thus, this prong is met. With regard to the second prong, there is no question that liability was contested. The evidence demonstrates this, and further the Circuit Court confirmed this in its Order by stating, “the record of the evidence presented in this case establishes that liability and damages were both seriously contested.” *See*: Order at Appx. 809. Also, there is no question that a verdict could have been entered in favor of either party. Again, this is confirmed by the Circuit Court's Order, which clearly indicates, “the jury could have decided the question of liability either way.” *Id.* Thus, there is no question that

the second prong of this test is met. Finally, in regard to the third prong, Respondents were awarded over \$50,000, so there is no dispute that the award granted was not “nominal.” Hence, it is clear that the case at bar fits squarely within the definition of a Type 2 case, and this Courts well established precedent therefore requires that any new trial to be on all issues.

Further, it should be noted that the Circuit Court’s interpretation of the *Freshwater* analysis may be inaccurate. Specifically, the Circuit Court’s summary determination that this case was not a Type 2 case must be reviewed. The analysis of this issue consists of a single sentence stating, “it is not a type 2 case because, as stated, the total award of damages was not clearly inadequate as an award for the damages suffered by plaintiff.” This finding is puzzling, mainly because the inadequacy of the award is the basis of Respondent’s Motion for a New Trial. If the award was not inadequate, there would be no reason to apply the *Freshwater* analysis to begin with. More importantly, if the award was not inadequate, then it seems that an order denying the Motion for a New Trial would have been the appropriate measure. However, discussion of this outcome is merely a speculative exercise, because there is no dispute that, if liability was established, the award given was inadequate. Thus, the Circuit Court’s failure to recognize this case as a Type 2 case was a mistake. Overall, the Circuit Court clearly misinterpreted the definition of a Type 2 case, and thus erred in its application of the *Freshwater* analysis. Therefore, the Order requiring this case to be retried on the issue of damages alone was improper and should be overturned.

Additionally, even if the longstanding precedent and the Circuit Court’s misinterpretation of the same is disregarded, it is clear that any new trial should be on all issues. The facts and circumstances surrounding this case demonstrate that the jury was confused, and at least some, if not all of this confusion, surrounded the issue of liability. The Jury was instructed about the elements of a negligence claim. *See*: Jury Charge at Appx. 738. Further, they were instructed that Respondent was required to prove each of these elements by a preponderance of the evidence. *Id.*

Despite these instructions and despite the complete lack of evidence with regard to two of the four elements (duty and breach), the jury, somehow, found Petitioner liable.<sup>4</sup> Had the jury understood the evidentiary requirements as well as the elements of the claims, it is clear that they could not have found Petitioner liable. Thus, the finding of liability, in and of itself, is a strong indicator that the Jury was confused with regard to liability. Further, this Court has stated “the degree of moral fault which a jury imputes to the tortfeasor is almost inevitably reflected in the liberality or parsimony of the pain and suffering award. *Freshwater v. Booth*, 160 W. Va. 156, 161. (1977). With this in mind, the Jury’s decision to award nothing for pain and suffering in this case is telling as to their true opinions with regard to fault even withstanding their unexplainable finding of liability. Also, during its deliberation, the jury asked the court about the existence of medical insurance and/or disability insurance. These questions combined with the Jury’s decision to award absolutely no intangible damages, provide a strong indication that the jury’s verdict was improperly influenced by sympathy for the respondents. Thus, these questions provide even more insight into the jury’s confusion with regard to liability.

Overall, this case fits squarely within the Type 2 classification, and for that reason alone, it is clear that any new trial should be on all issues. Moreover, the general facts and circumstances surrounding this case provide a strong inference that the Jury was confused with regard to the issue of liability. Finally, this Court has held:

It has frequently been stated, furthermore, that the power to limit the new trial to the issue of damages must be exercised with caution, and it has been held that any doubt as to the propriety of such limitation must be resolved against it.

*King v. Bittinger*, 160 W. Va. 129, 137 (1976) quoting, 85 A.L.R.2d 9, 26. Thus, given the clear precedent and the nature of the evidence in this case, the more prudent and cautious course of action would be for any new trial to be on all issues rather than damages alone. Therefore, it is

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<sup>4</sup> Motions for Directed Verdict are designed to avoid this confusion and avoid unexplainable verdicts like the verdict in this case.

clear, that the Circuit Court's Order should be reversed, and if, in fact, a new trial is necessary said trial must be on all issues.

**III. Because it is a political subdivision, Petitioner is entitled to a set-off of all insurance benefits received by Respondent.**

The Petitioner, the Wheeling Park Commission, is a political subdivision and as such is afforded protections of West Virginia Code §29-12A-13(c). Thus, Petitioner is entitled to "an offset of any recovery by injured plaintiff from a political subdivision in the amount of first-party insurance proceeds received by the plaintiff as compensation for their injuries or damages." *Foster v. City of Keyser*, 202 W.Va. 1, 22, 501 S.E.2d 165, 187 (1997). Clear evidence that the Respondent's medical bills have been paid and/or written off has been produced. Clear evidence that the Respondent's past wage loss claim has in part been paid has been produced. These benefits were received as a result of first-party insurance. Accordingly, Petitioner was entitled to Summary Judgment with respect to these damages or alternatively was entitled to a setoff post-verdict.

Petitioner filed a Motion for Partial Summary Judgment with respect to damages sought by plaintiff which were covered by first-party insurance including medical bills and wage loss. This Summary Judgment Motion was denied. Petitioner also filed a post-trial Motion for setoff. This Motion has not been ruled upon. Because the Circuit Court has ordered a new trial, Petitioner realizes this issue may not be ripe for an appeal. However, Petitioner does not wish to waive argument on this issue. Furthermore, should this Court believe this issue is ripe, Petitioner will happily supplement its Brief accordingly.

**CONCLUSION**

Overall, Respondents asserted a negligence claim in this case, but failed to introduce any evidence of duty or breach of duty. There can be no argument that at least some evidence of duty and breach of duty was necessary in order for this case to be submitted to the Jury. Petitioner

moved for a Directed Verdict based upon Respondent's lack of evidence, but the Circuit Court denied this Motion. This denial was an error, and should be overturned.

Moreover, there is no questions that pursuant to *Freshwater v. Booth*, this case fits squarely into the Type 2 category and any new trial must therefore be on all issues. Additionally, the facts and circumstances surrounding this trial clearly indicate that the jury was confused with regard to the issue of liability, and any new trial should therefore be on all issues. However, the Circuit Court ordered a new trial on the issue of damages only. This order was made in error, and should therefore be overturned.

Signed:



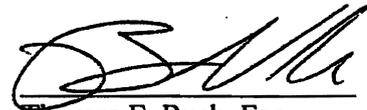
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>m</sup> day of April, 2015, true and accurate copies of the foregoing **APPEAL BRIEF** were hand delivered to counsel for all other parties to this Appeal as follows:

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