

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1332

WHEELING PARK COMMISSION,

Petitioner,

V.

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

Respondents.

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

REPLY BRIEF

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I. TABLE OF CONTENTS

1. Table of Contents	Page 2
2. Table of Authorities	Page 2
3. Statement Regarding Oral Argument	Page 3
4. Argument	Page 3
5. Conclusion	Page 17
6. Certificate of Service	Page 18

II. TABLE OF AUTHORITIES

Case	Page
<i>Williamson & Co. v. Nigh</i> , 58 W. Va. 629, 53 S.E. 124 (1906).	9
<i>Freshwater v. Booth</i> , 160 W. Va. 156 (1977).	9, 10, 11, 12, 17
<i>Martin v. Charleston Area Medical Ctr.</i> , 181 W. Va. 308, 312 (1989).	10, 11
<i>Linville v. Moss</i> , 189 W. Va. 570 (1993).	10, 11
<i>Raines v. Thomas</i> , 175 W. Va. 11 (1985).	10, 11
<i>Payne v. Gundy</i> , 196 W. Va. 97 (1995).	11
<i>Foster v. City of Keyser</i> , 202 W. Va. 1, 22, 501 S.E.2d 165, 187 (1997)	13, 17
<i>Keeny v. Liston</i> , 2014 W. Va. LEXIS 633 (2014)	16, 17
<i>McConnell v. Wal-Mart Stores, Inc.</i> , 2014 U.S. Dist. LEXIS 14280, *10, (D. Nev. Feb. 5, 2014)	16
West Virginia Code §29-12A-13(c)	13
West Virginia Code Section 29-12A-1 <i>et. Seq.</i>	3, 14, 15
West Virginia Code Section 29-12A-4	3, 4

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes Rule 19 oral argument is appropriate because this case involves assignments of error in the application of settled law. Petitioner does not believe the case is appropriate for memorandum decision.

ARGUMENT

I. THE ISSUE OF LIABILITY SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY, AND THE JURY IMPROPERLY DECIDED THE ISSUE OF LIABILITY.

a. Section 29-12A-4 does not describe any duty and is totally irrelevant to the issues before this Court.

In his Appeal Brief, Petitioner argues that Respondents failed to produce sufficient evidence of duty and/or breach with regard to their negligence claims. In their Response, Respondents attempt to refute this argument in a variety of ways. However, Respondents notably failed to do the one thing that would successfully overcome petitioner's argument – describe any evidence of duty or breach that was introduced at trial.

Respondents first seem to argue that they were not required to provide evidence of a duty. Specifically, they seem to argue that the applicable duty is described in West Virginia Code Section 29-12A-4(c)(2)-(4). However, in making this argument, Respondents have clearly misinterpreted these statutes. Article 29-12A is titled the Governmental Tort Claims and Insurance Reform Act and is specifically intended “to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.” W. Va. §29-12A-1. Generally speaking any argument that this statute reduces Respondents' evidentiary burden seems illogical.

Section 29-12A-4(c)(2)-(4) specially describe what types of negligence claims are viable

against political subdivisions. For the most part, these statutes have no bearing or relevance to the issues before this Court. There was no Motion to Dismiss or even any discussion in the case below regarding these statutes or whether the Petitioner, as a political subdivision, was subject to a negligence claim. Petitioner, being aware of these statutes and being aware that a “negligent maintenance” type claim was viable, merely defended the claim.

However, Respondents are attempting to pass these statutes off as something they are not. These statutes provide guidance as to the types of claims that can be brought against political subdivisions, but they do not provide any guidance with regard to the duties or standards that govern the property maintenance of political subdivisions. They simply allow for negligence claims to be asserted. These statutes have no bearing on the elements of negligence or the evidentiary requirements associated therewith. Simply stated, a negligence claim against a political sub-division is governed by the same laws of negligence as claims filed against non-political subdivisions, and neither Sub-Sections 29-12A-4(c)(2)-(4) nor any other statute has any effect on the elements of negligence and the necessary evidence to establish said elements. Overall, Respondent were required to produce evidence of a duty and a breach of said duty. They failed to do so, and these statutes have no redeeming qualities with regard to this failure.

b. Not only did Respondents not provide expert testimony, but they also did not provide any evidence at all in regard to the applicable duty.

Respondents next focus their argument on assertions that, given the nature of their negligence claim, they were not required to produce expert testimony. First this argument is not supported by the prior precedent of this Court. Specifically this Court has clearly required expert testimony with regard to matters beyond the competency of a lay person. *Thompson v. Hope Gas, Inc.* 2013 W. Va. LEXIS 124, 5 (2013). In their Response Brief, Respondents claim that

jurors “understand that a fence rail should not break into several tiny pieces when a minimal amount of pressure is applied.” *See*: Response Brief at pg. 15. This statement not only confuses the intent and purpose of the need for an expert but also misinterprets the general elements of negligence claim. The pertinent question is not whether the fence rail should or should not have broken. The question is “why did it break?” Did it break because it wasn’t maintained? Was it installed improperly? Did it have a design defect? Did it break as a result of some action or inaction of the Wheeling Park Commission? Did it break as a result of some other forces? Without knowing anything about the design of fences or the maintenance that they require, the jury simply cannot answer these questions. Simply stated, the jury cannot determine that the fence broke because it wasn’t maintained properly, when they have no information as to how reasonable parks maintain fences. Thus, it is clear that an expert was necessary in order to provide testimony to this effect.

Interestingly, in their Brief, Respondents make no mention of their second theory of liability, which was based on allegations that the Petitioner negligently failed to provide sufficient seating. *See*: Decision and Order, Appx. 809-8101. Perhaps Respondents did not mention this theory because it obviously requires expert testimony. Generally speaking, it is clear that jurors do not have knowledge or understanding of the applicable industry standard governing required seating for a carnival or similar type event. By failing to mention this theory of negligence, Respondents seemingly acknowledge its need for expert testimony. However, despite its detriment to Respondent’s arguments, this theory of negligence cannot be disregarded. Respondents clearly presented testimony regarding the lack of seating in the area, and their counsel clearly argued this theory of negligence to the jury. *Id.* However, the verdict form merely asked the jury if they believed Petitioner was negligent and did not ask them to determine

whether petitioner was negligent with regard to the maintenance of the fence or negligent with regard to the amount of seating provided. *See*: Verdict Form, Appx. 758. Thus, it is unclear as to which theory of negligence the jury had in mind when issuing its verdict. Because there does not seem to be a dispute that expert testimony is necessary with regard to a claim involving inadequate seating and because it is very possible that the jury found Petitioner liable with regard to this claim, it is clear that Respondents failed to provide adequate evidence to support the verdict, and the Court therefore made a reversible error by denying Petitioner's Motion for a Directed Verdict.

Additionally, in their Brief, Respondents asserted arguments on the expert testimony issue, but completely disregarded the larger and more crucial evidentiary shortcomings of their case. Specifically Respondents failed to acknowledge that, regardless of the need for expert testimony, they were still required to provide some evidence as to the nature of petitioner's duty. Instead of describing any evidence of a duty and a breach, Respondent's Brief follows very much the same theme as their case in chief at trial. It focuses on two facts exclusively. First it focuses on the fact that the subject fence broke. Second it focus on the fact that Mr. Datolli was injured. Respondents' reiteration of this evidence is puzzling because, these facts were not disputed at trial.

The fence breaking and Mr. Datolli being subsequently injured have very little to do with the larger and more pertinent question of "why did the fence break?" This is the question that Respondents were required to answer. In order to answer this question, they were required to provide some evidence, any evidence at all, as to what the petitioner should have done differently with regard to the maintenance of the fence. They failed to do this. They did not introduce any physical evidence that informed the jury about proper fence maintenance. They

called several witnesses, but not one witness said anything to the effect of “the park should have done x.” Even in its Order granting a Motion for a New Trial, the Circuit Court stated “there was no evidence that defendant had any notice that the fence was flawed or needed any repair.” *See*: Order and Opinion, Appx. 810. How could the jury find that Petitioner acted unreasonably in any way, when there was no evidence as to what would have been reasonable in the first place?.

Overall, given the nature of their negligence claims, there is no question that Respondents were required to provide expert testimony with regard to the reasonable and proper maintenance of a split rail fence as well as the proper industry standard in regard to the amount of seating that should be provided at carnivals and/or other events. By failing to provide any expert testimony with regard to these issues, Respondents failed to present sufficient evidence, and their claims should have been dismissed by directed verdict. Moreover, Respondents were, at the very least, required to present some evidence or testimony, via lay witness or otherwise, as to the proper maintenance of a fence and/or the correct number of seats that were required. By not presenting any evidence to this effect, Respondents did not present sufficient evidence to support their negligence claims, and Petitioner’s Motion for Directed Verdict should have been granted.

c. Respondents’ argument regarding Petitioners failure to provide evidence is nonsensical, in that Respondents had the burden to establish negligence.

Throughout their Brief, Respondents also appear to argue that the Petitioner did not provide sufficient evidence, and then they, somehow, parlay this argument into justifying their own failure to provide evidence. Although it is somewhat confusing on its face, it is clear that any argument to this effect must fail for multiple reasons.

First this argument must fail because it is based on misinterpretations of the evidence, which was presented at trial. Respondents state that “the petitioner was unable to produce a single

document or testimony relating to the installation, repair or maintenance of the fence during its lifetime.” *See*: Response Brief at pg. 19. However, at trial, a Dailey Occurrence Report from the date of the subject fall was entered into evidence. Furthermore, John Hargleroad, Petitioner’s Director of Operations, provided testimony regarding this document. *See*: Trial Transcript, Appx. 1135-1137. Specifically, Mr. Hargleroad explained that park employees would inspect the park on a daily basis to “monitor the area and make sure things are in good repair.” *Id.* at 1136. Moreover, Mr. Hargleroad indicated that the Dailey Occurrence Report from the date of the fall indicated that the subject fence had been inspected that day. *Id.* at 1175-77. Thus, it is clear that Respondent’s insinuation that the park had no record of any maintenance of the subject fence is misleading, and in fact there was evidence that a park employee had inspected this fence on the same day as the subject fall. Therefore, it is clear that any argument that the park failed to provide evidence of maintenance should be disregarded on its face.

Respondents also attempt to somehow convert Mr. Hargleroad in to an expert, and then seem to indicate that Mr. Hargleroad offered an opinion as to the maintenance of the subject fence. Specifically, Respondents rely on Mr. Hargleroad’s testimony “that he understood wood has a life expectancy.” *See*: Response at pg. 18 citing Appx. At 1161. Again, this is a misleading argument. Respondents fail to refer to the statements immediately preceding this testimony, when Mr. Hargleroad stated, “I don’t have real knowledge of split rail fences.” Appx. 1161. Again, later in his testimony, he stated, “I don’t know anything about fences.” *Id.* at 1181. Thus, it is clear that Mr. Hargleroad did not, in any way, testify regarding a duty or standard regarding the maintenance of split rail fences.

More importantly than Respondents’ factual inaccuracies, is the general irrelevancy of Respondents’ entire argument. Generally speaking, Petitioner’s failure to provide evidence in

this case is immaterial because Petitioner had no burden of proof to overcome. Petitioner was not required to establish that it did, in fact, maintain the fence properly, or that it did, in fact, provide sufficient seating. The burden of proof with regard to these claims fell squarely upon Respondents. *Hinkle v. Martin*, 163 W. Va. 482, 483 (1979) citing, *Williamson & Co. v. Nigh*, 58 W. Va. 629, 53 S.E. 124 (1906). Thus, the evidence or lack thereof, which Petitioner provided has no effect on the minimum amount of evidence that Respondents were required to provide. Further, Respondents called one representative of the Wheeling Park Commission. This individual did not have any specific information regarding the installation, maintenance, or repair of the parks fences, but clearly indicated that other employees would have said information. Appx. 1126. Respondents then elected to call no other employees and rested their case. This situation certainly cannot be characterized as the Petitioner failing to provide evidence, but rather quite clearly is a situation in which, despite having the opportunity, Respondents failed to present adequate evidence regarding the maintenance of the subject fence. As a result of this failure, Respondents' claims should have been dismissed.

II. IF A NEW TRIAL IS NECESSARY, SAID TRIAL SHOULD BE ON THE ISSUES OF LIABILITY AS WELL AS DAMAGES.

a. This is clearly a "Type 2" case pursuant to the *Freshwater v. Booth* analysis.

Upon review of the facts and evidence in this case in combination with this Court's analysis in *Freshwater v. Booth*, there is no question that this is a "Type 2" case, and in the event a new trial is appropriate, said trial should be on both liability and damages. *See generally: Freshwater v. Booth*, 160 W. Va. 156 (1977). 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." *Id.* 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, this Court has quite clearly delineated and defined a "Type 2" case.

With regard to the case at bar, Respondents were awarded medical expenses but no pain and suffering, so the damages appear to be inadequate. Secondly, there is no question that liability was contested and there was evidence to sustain a jury verdict in favor of either party. This is soundly established by the Circuit Court's own Order. The Order first states, "the record of the evidence presented in this case establishes that liability and damages were both seriously contested." See: Order at Appx. 809. The Order goes on to state, "the jury could have decided the question of liability either way." *Id.* Finally, the award was in excess of \$50,000, so it is clear that this was not a defendant's verdict perversely expressed. Overall, this is an undeniable example of a "Type 2" case, and it is clear that, pursuant to the *Freshwater* analysis, any new trial must be held in regard to both liability and damages.

Despite effortlessness of this analysis, Respondents have attempted to argue that this is a "Type 4" case. However, the case is quite clearly not a "Type 4" 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."

Freshwater v. Booth, 160 W. Va. 156 (1977). Generally speaking, it is clear that the issue of liability was not “conclusively proven.” In fact, liability was not proven at all given that respondents provided no evidence of duty or breach: two of the four essential elements of a negligence claim. *See*: Discussion above. However even assuming arguendo that liability was proven, it is clear, from the Circuit Judge’s Order Granting a New Trial, that it was not so conclusive as to allow this Court to infer the confusion was with regard to damages. Again, the Circuit Judge, himself, believed that the Jury could have decided liability either way. *See*: Order at Appx. 809. Thus, it is apparent that this case is not a “Type 4” but is clearly a “Type 2” case. Therefore, it is clear that, pursuant to the precedent of *Freshwater*, any new trial must be on both liability and damages.

b. The Court abused its discretion when granting a new trial on damages only.

In their Brief, the Respondents describe the proper standard of review as an abuse of discretion with regard to rulings on a motion for a new trial. *See*: Response at pg. 22 citing *Payne v. Gundy*, 196 W. Va. 97 (1995). Although this is a relatively high standard to overcome, said standard is clearly met in this case. This Court has provided clear precedent when addressing how cases should be classified and how motions for new trials should be handled by circuit courts. *Freshwater v. Booth*, 160 W. Va. 156 (1977). *Martin v. Charleston Area Medical Ctr.*, 181 W. Va. 308, 312 (1989); *Lirville v. Moss*, 189 W. Va. 570 (1993); *Raines v. Thomas*, 175 W. Va. 11 (1985). More specifically, this Court has defined a “Type 2” case as a case in which:

(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.

Id.

In its Order, the Circuit Court correctly identified *Freshwater* as the governing precedent in this case. The Circuit Court then addressed the proper elements. The Circuit Court addressed the first prong of this standard by holding that, “it is the Courts opinion that the jury’s failure to neither award any damages for past pain and suffering and/or past mental or emotional pain was an inadequate damage award...” See: Order, Appx. 812. Also as is described above, the Court overtly stated, “the record of the evidence presented in this case establishes that liability and damages were both seriously contested.” and “the jury could have decided the question of liability either way.” *Id.* at 809. Therefore, in its Order, the Circuit Court clearly described what this Court has previously designated as a “Type 2” case. However, the Circuit Court did not classify this case as a “Type 2” case pursuant to the controlling precedent cited above. Furthermore, the Circuit Court’s explanation for not classifying this case as a “Type 2” case is somewhat confusing. Specifically, the Circuit Court, in its order states, “it is not a Type 2 case because, as stated, the total award of damages was not clearly inadequate as an award of damages suffered by the plaintiff.” *Id.* at 813. It must first be pointed out that, if the damages were not inadequate, then neither a *Freshwater* analysis nor a new trial would be appropriate. Moreover, this statement contradicts the final ruling, in which the Circuit Court opines that the damages were, in fact, inadequate.

Overall, it is clear that the Circuit Court misapplied the *Freshwater* analysis, and in doing so abused its discretion. This case is clearly a “Type 2” case, and any Order granting a new trial, should have done so with regard to both liability and damages.

III. THE PETITIONER IS ENTITLED TO A SET-OFF IN THE ENTIRE AMOUNT OF INSURANCE BENEFIT THAT RESPONDENTS RECEIVED PURSUANT TO WEST VIRGINIA CODE §29-12A-13(C).

a. Respondents' arguments regarding ERISA are premature and not properly preserved.

In its Appeal Brief, Petitioner preserved any argument regarding the "set-off" issue, which is currently still pending before the Circuit Court. Respondents agreed that this issue was premature for consideration, but still responded to this preservation, with multiple arguments. Respondents first assert that the entire "set-off" requirement delineated by West Virginia Code §29-12a-13(c) is preempted by ERISA. This argument must fail.

As has been stated by both parties, this "set-off" issue has not yet been decided by the Circuit Court. However, both parties have briefed the issue in the case below. Specifically, Respondents filed a Motion for Partial Summary Judgment with regard to the Issue, and then subsequently filed a Post-Trial Motion for Set-Off. Appx 275, and Appx 761. Likewise, Respondents filed responses to both of these pleadings. Appx. 351 and Appx.786. However, at no point in either of Respondents' Briefs, did they assert that this "set-off" was not available pursuant to federal preemption or a contradiction with ERISA. Thus, because this argument has not been presented at the Trial Court level, it has clearly been waived and is not appropriate for consideration at this point.

b. Petitioner's "set-off" should not be limited to only those amounts paid by Respondents' insurance carriers.

In the case below there was no dispute that political subdivisions, such as the Wheeling Park Commission, are entitled to a set-off in regard to first party medical benefits provided to a plaintiff. *Foster v. City of Keyser*, 202 W.Va. 1, 22, 501 S.E.2d 165, 187 (1997). *See also*: W.Va. Code §29-12A-13(c). In this case, the Respondent was awarded past medical expenses, and he

has admitted that the majority of these expenses have been covered by his first-party medical insurance carrier.

With this in mind, there was no dispute regarding the entitlement to a "set-off," but rather there seemed to be a dispute regarding the amount of this "set-off." At trial, Respondent was awarded \$36,894.47 in past medical expenses. Of this amount, Respondent's medical insurance company covered \$27,282.85. Neither party disputed this figure. At his deposition, Mr. Datolli stated:

9 Q. My calculations indicate that
10 approximately \$27,000 worth of your medical bills
11 have been paid. Does that sound about right?
12 A. Yes.

See: Mr. Datolli's Deposition Transcript, Appx. 588. Because there was no dispute regarding the entitlement to a "set-off" and there was no dispute regarding the amount of expenses which were covered, Petitioner maintains that it is entitled to a "set-off" in the amount of \$27,282.85.

However, Respondents have argued that Petitioner is not entitled to a "set-off" in the amount of bills which were covered, but instead is only entitled to a "set-off" in the amount that Respondents' medical insurance company actually paid. Appx. 351. More specifically, Respondents argued that plaintiff's insurance company only "actually paid" \$9,637.85, so the set-off should be limited to this amount. *Id.*

This proposal should be rejected. First, a ruling to this effect would be wholly contradictory to the clearly stated purpose of West Virginia Code Section 29-12A-1 *et seq.* The "set-off" requirement at issue is prescribed by Section 29-12A-13, which is a portion of Article 29-12A, more commonly known as the "The Governmental Tort Claims and Insurance Reform Act." When enacting this article, the legislature clearly stated that the purpose of the Act was, "to

limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.” W.Va. Code §29-12A-1. With this in mind, the Court should carefully consider the effective outcome of limiting the “set-off” to only the amounts paid for medical bills. This ruling certainly would not serve in the interest of limiting liability of political subdivisions, but, in fact, would do the exact opposite. Moreover, restricting this “set-off” certainly would not reduce insurance costs to political subdivision. Contrarily, it would result in increased liability and in turn, create higher insurance costs for political subdivisions. Hence, the proposed “amounts actually paid” calculation will, without question, contradict the clearly stated purpose of the Governmental Tort Claims and Insurance Reform Act.

Furthermore, the Court should consider the potential benefit to be gained in exchange for a blatant contradiction of statutory purpose. Respondents have asked the court to limit this “set-off,” so that Mr. Datolli can collect past medical expenses which were previous “adjusted” by his medical insurance carrier. In essence, he is seeking compensation for medical expenses, which he at no point was required to pay. He is asking that he be given a double recovery, in essence a win fall, at the expense of the Wheeling Parks Commission. This is not justifiable on its face, and clearly flies in the face of the legislative intent of the Governmental Tort Claims and Insurance Reform Act. Hence, Respondents’ “amounts actually paid” calculation should be disregarded, and Petitioner should be given a “set-off” in the full amount of medical expenses, which were covered by plaintiff’s medical insurance carrier.

There was no dispute in this case that a total of \$27,282.85 of Respondent’s past medical expenses were covered by his medical insurance. There was also no dispute that of this \$27,282.85, Respondent’s medical insurer paid a total of \$9,637.85 and the remainder was

“adjusted” or “written down.” Respondents have previously argued that Petitioner is not entitled to a “set-off” of \$27,282.85 because Respondents’ medical insurance carrier did not “actually pay” this amount. Instead Respondents argue that the “set-off” should be the \$9,637.85, which the medical insurer “actually paid.”

However, Respondents’ argument in this regard is wholly inconsistent with this Court’s recent decision in *Keeny v. Liston*, 2014 W. Va. LEXIS 633 (2014). In the *Keeny* case, the defendant argued that “a discount, reduction or write-off of a bill by a creditor is not a payment...” and these amounts therefore were not subject to the collateral source rule. The Supreme Court referred to this argument as a “*tenuous distinction*” and went on to hold:

"A creditor's forgiveness of debt — that is what a write-down in the present context amounts to — is often considered equivalent to payment in other contexts, e.g., income tax, credit bids at foreclosure, etc. In other words, a creditor's partial forgiveness of a tort victim's medical bills via a write-down is properly considered a third-party 'payment' ..."

Keeny, 2014 W. Va. LEXIS 633, 27 (2014) quoting *McCConnell v. Wal-Mart Stores, Inc.*, 2014 U.S. Dist. LEXIS 14280, *10, 2014 WL 464799 *4 (D. Nev. Feb. 5, 2014). Thus, this Court denied defendant’s argument that insurance “write downs” or “adjustments” were not considered “amounts paid.”

With this ruling in mind, Respondents’ argument in this case seems inconsistent at best. How can insurance “write downs” be considered the equivalent of payments in the collateral source context but not the equivalent of payments in the political subdivision “set-off” context? Likewise, how can insurance “write-downs” be treated as payments for evidentiary purposes at trial, but be classified as the exact opposite after the trial is over? There is simply no logical explanation for such a paradoxical definition. Overall, this Court has clearly held that insurance

“write downs” or “adjustments” are the equivalent of actual payments and should be treated the same as actual payments. Thus, the “set-off” in this case should clearly include the amounts “actually paid” as well as any amounts which were “written down” by Respondent’s medical insurer.

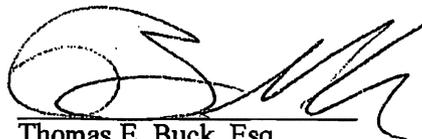
CONCLUSION

Respondents asserted a negligence claim in this case, but failed to introduce any evidence of duty or breach of duty. Respondents have attempted to avoid reversal by asserting multiple arguments, but none of which can overcome the general lack of evidence, which was presented. Overall, Petitioner moved for a Directed Verdict based upon Respondent’s lack of evidence, and the denial of this Motion was an error. This Order should therefore 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, because the Circuit Court failed to categorize this case as a “Type 2” case, the Circuit abused its discretion and its Order granting a new trial on damages only should be overturned.

Finally, the issue regarding Petitioner’s “set-off” of insurance benefits is premature. However, should this Court wish to consider said issue, it is clear that Petitioner is entitled to the a “set-off” in the full amount of the benefits in accordance with this Court’s previous rulings in *Foster v. City of Keyser* and *Keeny v. Liston*.

Signed:



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2015, true and accurate copies of the foregoing **REPLY BRIEF** were hand delivered to counsel for all other parties to this Appeal as follows:

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