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NO. 19-0010

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MAY 30 2019

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CHRISTOPHER MCKENZIE,

Plaintiff,

v.

Civil Action No. 16-C-160

DONALD L. SEVIER and
CASSANDRA SEVIER,

Defendants.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE PATRICK N. WILSON, JUDGE

BRIEF OF THE APPELLEES, DONALD L. SEVIER AND CASSANDRA SEVIER

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

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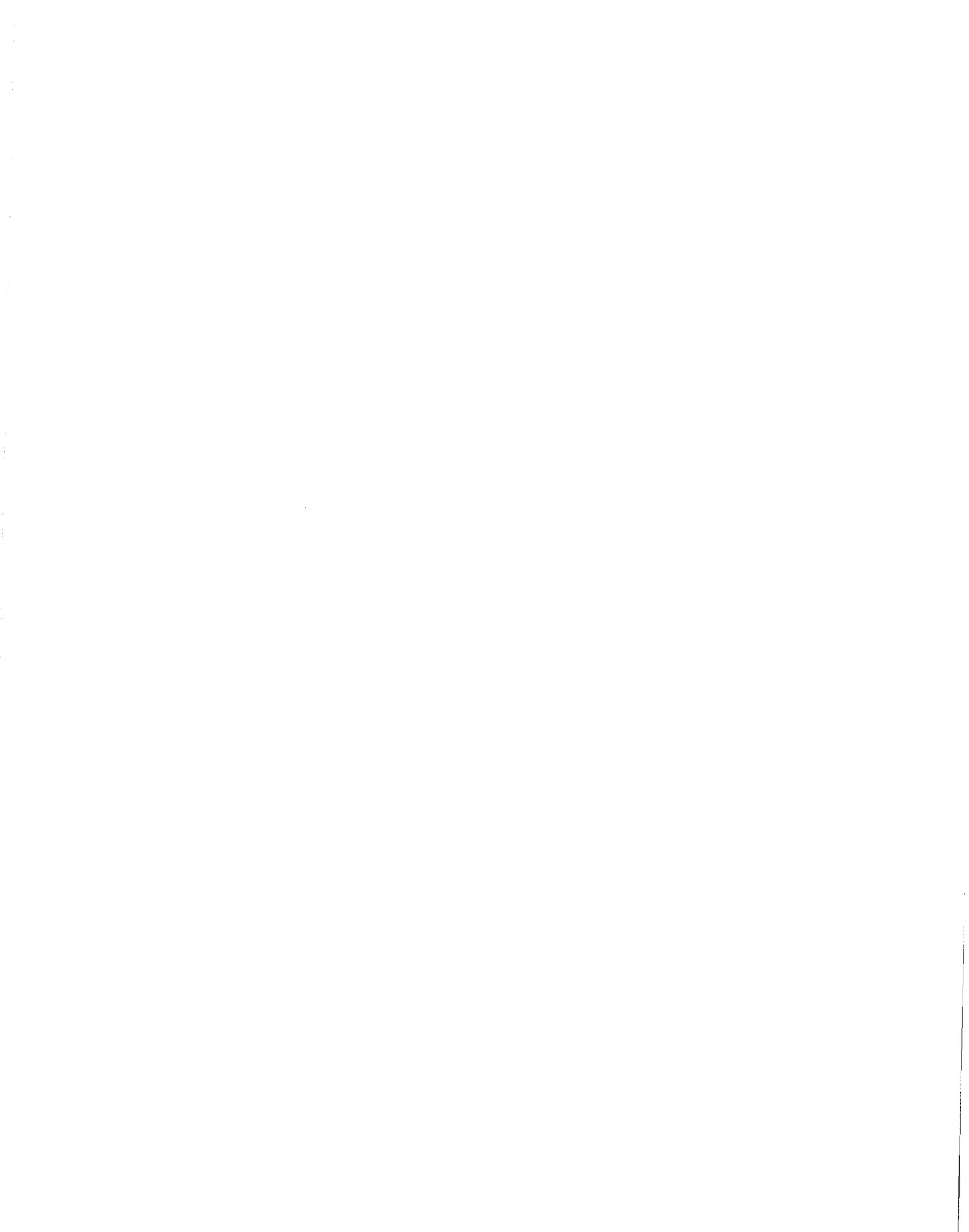


TABLE OF CITATIONS

Federal Cases

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NO. 19-0010

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CHRISTOPHER MCKENZIE,
Plaintiff,

v. Civil Action No. 16-C-160

DONALD L. SEVIER and
CASSANDRA SEVIER,
Defendants.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE PATRICK N. WILSON, JUDGE

BRIEF OF THE APPELLEES, DONALD L. SEVIER AND CASSANDRA SEVIER

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**I. Statement of the Kind of Proceeding
and Nature of the Ruling Below**

On August 22, August 23, and August 24, 2018, the dispute between these parties was tried to a jury. The jury determined that the appellant, Christopher McKenzie, was not injured or damaged as a proximate result of any conduct by the appellee, Donald L. Sevier. Petitioner Appendix at Volume 3 page 001074. In



rendering this verdict the jury answered several special interrogatories on the verdict form adopted from the verdict form proposed by the plaintiff. Appellee Appendix at page 01056.

The trial which began on August 22, 2018 was the culmination of this civil action that commenced with the filing of the complaint on July 6, 2016. Petitioner's Appendix Volume 1 page 22. The complaint originally, included the appellant's spouse, Anna McKenzie, as a plaintiff alleging injuries and damages resulting from the alleged wrongful conduct of the appellees. Petitioner's Appendix Volume 1 at page 22.

However, on July 19, 2018, the appellant, and former plaintiff, Anna McKenzie, filed a motion to dismiss all of the claims asserted by the plaintiff, Anna McKenzie, without prejudice, pursuant to Rule 41(a)(2) of the West Virginia Rules of Civil Procedure. Appellees Appendix at page 00877. The appellees responded to the motion to dismiss the claims of the plaintiff, Anna McKenzie, on July 30, 2018, objecting to any dismissal without prejudice and seeking the recovery of attorney's fees and costs for the dismissal immediately prior to trial, as well as seeking an instruction to the jury regarding the dismissal pursuant to the decision in Groves v. Compton, 167 W.Va. 873, 280 S.E.2d 708 (1981). Appellees Appendix at page 00922. The trial court refused the request of the appellees for attorney fees and costs as well as any instruction to the jury on the last second dismissal with no explanation.



Much of the litigation in this case involved claims by the appellant complaining of insufficient discovery responses; spoliation of evidence; motions seeking sanctions; and, the attempt to disqualify counsel for the appellees. Appellees Appendix at pages 00167, 00118, 00081 and 00177. Little of the litigation activities in this matter conformed to the scope and purpose of the West Virginia Rules of Civil Procedure as articulated in Rule 1 which seeks to secure the just, speedy and inexpensive determination of every action.

The appellant, although quick to cast disparagement upon appellees and their counsel, failed to properly execute service of process upon the appellee, Donald L. Sevier, with the original Summons and Complaint. Appellees Appendix at page 00048. Based upon improper service, the appellant wrongfully obtained the entry of default against the appellee, Donald L. Sevier, on September 13, 2016. Appellees Appendix at page 00001.

The appellee, Donald L. Sevier, filed a Notice of Special Appearance for the purpose of contesting personal jurisdiction on November 23, 2016. Appellees Appendix at page 00002. The default was set aside over the objections of the appellant. Appellees Appendix at 00048

Following the default being vacated, the appellee, Donald L. Sevier, filed an answer and counterclaim against the appellant, Christopher McKenzie, on May 17, 2017. Petitioner's Appendix

Volume 1 at page 41. The appellant, Christopher McKenzie, filed an answer to the counterclaim of the appellee, Donald L. Sevier, on May 30, 2017. Petitioner's Appendix Volume 1 at page 55.

The appellee, Cassandra Sevier, filed her answer and counterclaim on October 12, 2016. Petitioner's Appendix Volume 1 at page 39. The appellant, Christopher McKenzie, filed his answer to the counterclaim of appellee, Cassandra Sevier, on October 27, 2016. Petitioner's Appendix Volume 1 at page 51.

The counterclaim of the appellee, Cassandra Sevier, involved conduct by the appellant, Christopher McKenzie, which included multiple occasions of insults directed to the appellees as well as their nine (9) year old daughter who has Down syndrome. The counterclaim of the appellee, Cassandra Sevier, were based upon the West Virginia insulting words statute contained in West Virginia Code §55-7-2. Petitioner's Appendix Volume 1 at page 36.

The counterclaim of the appellee, Donald L. Sevier, asserted that the appellant, Christopher McKenzie, while intoxicated and impaired committed a battery upon the appellee, Donald L. Sevier, by spitting on him. Petitioner's Appendix Volume 1 at page 46. The appellant, Christopher McKenzie, had a blood alcohol content of 0.196 upon arriving at the hospital following the subject incident. Petitioner's Appendix Volume 1 at pages 382-385.



Along with the Summons and Complaint the appellant served the plaintiff's first set of discovery to the appellee, Cassandra Sevier. The appellee, Cassandra Sevier, responded to this discovery on or about October 24, 2016. Appellees Appendix at page 00034.

On February 2, 2017, the appellant filed a motion to compel discovery seeking privilege logs with respect to attorney-client and work product privilege assertions as well as assertions related to the communications between the appellees as husband and wife. Appellees Appendix at page 00035. Although, these were continued complaints by the appellant throughout the litigation over the absence of privilege logs, all attorney-client communication occurred after the July 7, 2015 incident.

The appellee, Cassandra Sevier, responded to this motion to compel on February 17, 2017. Appellees Appendix at page 00039. The Court ordered supplementation of some of the discovery responses of the appellee, Cassandra Sevier. Petitioner's Appendix Volume 1 at page 63.

On September 26, 2017, the appellant filed a motion for sanctions against the appellee, Cassandra Sevier, as well as a motion for sanctions against appellee, Donald L. Sevier, both motions related to alleged insufficient responses to discovery. The appellant also filed a motion for adverse inference jury instruction on spoliation of evidence. Appellees Appendix at pages 00118 and 00081.

On September 25, 2017 the appellant filed a notice for an Adverse Jury Instruction on Spoilation of Evidence claiming that the appellees failed to preserve the clothing they were wearing at the time of the incident precluding any effort to test the DNA of the clothing for evidence of the appellant's spit. Appellees Appendix at page 00081. The appellees filed a response on November 16, 2017. Appellees Appendix at page 00143.

Pursuant to the pretrial order the parties participated in mediation on November 15, 2017 with the appellees proposing a settlement that was more favorable than the verdict of the jury. Appellees Appendix at page 00167 and 00842. The appellant then filed a motion seeking the costs of the mediation.

The trial court denied this motion but did not sanction the appellant for the meritless filing. Appellees Appendix at page 00842. The motion seeking costs of the mediation was one of several motions unrelated to the July 7, 2015 incident but only directed to how the litigation progressed.

On December 1, 2017 the appellant filed a motion to disqualify counsel for the appellees. Appellees Appendix at page 00177. The appellees responded to this motion on January 15, 2018. Appellees Appendix at page 00223.

The motion to disqualify was ultimately denied on August 13, 2018. Appellees Appendix at page 01011. However, once again the trial court refused any award of attorney fees and costs based upon another meritless motion. Appellees Appendix at page 01011.



The appellees responded to discovery or supplemented responses to discovery thirteen (13) times in this action. Appellees Appendix at pages 00034; 0039; 00057; 00108; 00150; 00206; 00231; 00247; 00295; 00321; 00343; 00375; 00408; 00740; 00767; and, 00927.

II. Assignments of Error

I. The appellant waived any claim that the jury verdict was inconsistent as the appellant raised no timely objection.

II. The August 24, 2018 jury verdict was not inadequate or inconsistent as the appellant failed to prove that any conduct of the appellee, Donald L. Sevier, was the proximate cause of any injury to the appellant, therefore, the trial court correctly denied the motion for new trial.

III. The trial court abused its discretion in not awarding costs to the appellees pursuant to West Virginia Code §59-2-8 and Rule 54(d) of the West Virginia Rules of Civil Procedure as the appellees were the prevailing party at trial.

IV. The trial court abused its discretion in awarding sanctions against the appellees based upon the conduct of discovery.

III. Statement of Facts

1. On July 7, 2015 the appellant, Christopher McKenzie, who had been drinking some form of alcoholic beverages throughout the evening became involved in a verbal argument with the appellee, Cassandra Sevier, in the street between their respective homes. Petitioner's Appendix Volume 1 at page 279 and page 298.



2. In an effort to end the verbal dispute, the appellee, Donald Sevier, approached the appellee, Cassandra Sevier, from behind to compel her to disengage. Petitioner's Appendix Volume 1 at page 279.

3. As the appellee, Donald Sevier, began to move the appellee, Cassandra Sevier, away from the appellant, Christopher McKenzie, Mr. McKenzie lunged toward Mr. Sevier and spit at him. Petitioner's Appendix Volume 1 at page 279.

4. As a reflex the appellee, Donald Sevier, struck Mr. McKenzie in the left side of his face with a closed fist. Petitioner's Appendix Volume 1 at page 280.

5. The appellant, Christopher McKenzie, with a determined blood alcohol content of 0.196, determined some time later at the hospital emergency room, stumbled backward striking his heels on the edge of his driveway causing him to fall and hit the back of his head. Petitioner's Appendix Volume 1 at page 279, page 282 and page 298.

6. The street between the homes owned by the appellant, Christopher McKenzie, and the appellees had been milled in preparation for paving. This caused the street level to be lower than the lip of the McKenzie driveway. Petitioner's Appendix at Volume 1 page 355.

7. Immediately following this incident the appellee, Cassandra Sevier, provided assistance to Mr. McKenzie and the appellee, Donald Sevier, called for the police and an ambulance. Petitioner's Appendix Volume 1 at page 199.

8. Prior to the July 7, 2015 incident the appellant and appellees had an acrimonious relationship causing law enforcement to be called to their street several times. Petitioner's Appendix Volume 1 at page 353.

9. The appellantsuffered from anxiety; adult attention deficit disorder; chronic pain; muscle pain and aches; hypertrophy of his prostate; sleep apnea; depressive disorder; diabetes; fibromyalgia; as well as, alcoholism, prior to July 7, 2015 resulting in Mr. McKenzie being disabled from working before this incident. Petitioner's Appendix Volume 2 at pages 457-460 and pages 474-480.

10. Prior to July 8, 2015 the acrimonious relationship between the appellant and Mr. and Mrs. Sevier, included the appellant making rude, crude and vulgar references regarding the appellee, Cassandra Sevier, and the Seviers' nine (9) year old daughter, who has Down syndrome. Petitioner's Appendix Volume 1 at page 329.

11. These comments would generally occur when Mr. McKenzie was intoxicated and were directed to Mrs. Sevier, Mr. Sevier as well as guests at their home. Petitioner's Appendix Volume 1 at page 236.



12. This conduct by the appellant had been occurring for multiple years. Petitioner's Appendix Volume 1 at page 246.

IV. Summary of Argument

The failure by the appellant to object to the verdict of the jury prior to the discharge of the jury waived any claim that the verdict was inconsistent. However, even if the appellant had objected based upon the special interrogatories contained on the verdict form, the verdict of the jury is not inconsistent.

There is substantial evidence to support the verdict of the jury especially as all evidence must be considered most favorable to the appellees; all conflicts in the evidence resolved in favor of the appellees; all facts which the evidence tends to prove must be assumed in favor of the appellees; and, the appellees must be given the benefit of all favorable inferences which may be drawn from the facts proved. Accordingly, the jury was within its authority to determine that the appellant was not entitled to compensatory damages a result of any conduct of the appellee, Donald L. Sevier.

The appellant, who was disabled at the time of the July 7, 2015 incident had many preexisting medical problems including, but not limited to, chronic alcoholism. Further, the appellant had a blood alcohol content in excess of 0.196 at the time of the incident.



The trial court abused its discretion in refusing to award taxable costs to the appellees pursuant to West Virginia Code §59-2-8 and Rule 54(d) of the West Virginia Rules of Civil Procedure as the appellees are the prevailing party. Further, the trial court abused its discretion in requiring the appellees to pay all costs of the jury trial. The appellant in his complaint, as well as, in his answer to the counterclaims demanded a jury, therefore, that demand could not be waived or withdrawn without the consent of the appellees which was not requested nor given.

The Circuit Court abused its discretion in awarding sanctions against the appellees based upon the discovery process in light of the conduct of the appellant including, but not limited to, seeking a default judgment without any legal basis; filing multiple motions for sanctions regarding a privilege log which the appellees already stated did not exist; as well as the trial court permitting the appellant to call unidentified witnesses and present documents not previously disclosed until immediately prior to trial.

V. Statement Regarding Oral Argument

With respect to the appeal of the appellant regarding the denial of the motion for new trial, pursuant to Rule 19(a), the appellees, Donald L. Sevier and Cassandra Sevier, believe that a memorandum opinion affirming the Circuit Court of Marion County, West Virginia is warranted in this action. The appellant raises no new issues that have not been addressed in various decisions of

this Court including, but not limited to, Evans v. Bluefield Hospital Company, LLC, 2018 WL 6016028 (W.Va. Sup.Ct. 2018); Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999).

With respect to the appeal of the appellees regarding the \$4,000.00 sanction against the appellees and the refusal to award the appellees costs in accordance with West Virginia Code §59-2-11, the appellees believe, pursuant to Rule 19(a), that a memorandum opinion reversing the trial court is warranted. To the extent that this Court determines that a memorandum opinion is not appropriate, the appellee believes oral argument would be beneficial.

VI. Points and Authorities

Federal Cases

224 West Flagger Holdings Inc. v. Terra Nova Insurance Company, Ltd., 2004 WL 5595581 (S.D. Fla. 2004)

State Cases

Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996)

Burdette v. Campbell, 126 W.Va. 591, 30 S.E.2d 713 (1944)

Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 113 (1996)

Carper v. Watson, 226 W.Va. 50, 697 S.E.2d 86 (2010)

Combs v. Hahn, 205 W.Va. 102, 516 S.E.2d 506 (1999)

Evans v. Bluefield Hospital Company, LLC, 2018 WL 6016028 (W.Va. Sup.Ct. 2018)

Foster v. Sakhai, 210 W.Va. 716, 559 S.E.2d 53 (2001)

Goldstein v. Peacemaker Properties, LLC, 825 S.E.2d 337 (W.Va. 2019)

Groves v. Compton, 167 W.Va. 873, 280 S.E.2d 708 (1981)



Jackson v. Putnam County Board of Education, 121 W.Va. 170, 653 S.E.2d 632 (2007)

Mack v. Southern Farm Bureau Casualty Insurance Company, 447 S.2d 32 (La. Ct.App. 1984)

Modular Building Consultants of West Virginia, Inc. v. Poerio, Inc., 235 W.Va. 747, 774 S.E.2d 555 (2015)

Nagy v. Oakley, 172 W.Va. 569, 309 S.E.2d 68 (1983)

Neely v. Belk, Inc., 222 W.Va. 560, 668 S.E.2d 189 (2008)

Nelson v. West Virginia Public Employees Insurance Board, 171 W.Va. 445, 300 S.E.2d 86 (1983)

Pauley v. Gilbert, 206 W.Va. 114, 522 S.E.2d 208 (1999)

Perdomo v. Stevens, 197 W.Va. 552, 476 S.E.2d 223 (1996)

Prager v. City of Wheeling, 91 W.Va. 597, 114 S.E. 155 (1992)

Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983)

Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 SE2d 246 (1986)

Smith v. Gebhardt, 240 W.Va. 426, 813 S.E.2d 79 (2018)

Spencer v. McClure, 217 W.Va. 442, 618 S.E.2d 451 (2005)

State v. Vance, 207 W.Va. 640, 535 S.E.2d 484 (2000)

State ex rel. Meadows v. Stephens, 207 W.Va. 341, 532 S.E.2d 59 (1997)

State Farm Mutual Insurance Company v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992)

Strahin v. Clevenger, 126 W.Va. 175, 603 S.E.2d 197 (2004)

Tagupa v. Vipdesk, 135 Hawaii 468, 353 P.3d 1010 (2015)

Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999)

Truman v. F&M Bank, 180 W.Va. 133, 375 S.E.2d 765 (1988)

Tyree v. Bell, 2018 WL 6015840 (W.Va. Sup.Ct. 2018)

Statutes and Regulations

West Virginia Code §55-7-2

West Virginia Code §59-2-8

West Virginia Code §59-2-11

Rules of Appellate Procedure

West Virginia Rules of Appellate Procedure Rule 19(a)

Rules of Civil Procedure

West Virginia Rules of Civil Procedure Rule 38(a)

West Virginia Rules of Civil Procedure Rule 38(d)

West Virginia Rules of Civil Procedure Rule 41(a)(2)

West Virginia Rules of Civil Procedure Rule 54(d)

VII. Discussion

A. Standard of Review

The appellees, Donald L. Sevier and Cassandra Sevier, assert that the standard of review with respect to the denial of the motion for new trial is abuse of discretion with review of the underlying findings of fact by the Circuit Court under the clearly erroneous standard. State v. Vance, 207 W.Va. 640, 535 S.E.2d 484 (2000); Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999). Any conclusions of law are reviewed de novo. Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 113 (1996).

The standard of review with respect to the decision by the trial court to not award costs to the appellees as the prevailing parties pursuant to West Virginia Code §59-2-8, the standard of review is whether the trial court abused its discretion. Burdette



v. Campbell, 126 W.Va. 591, 30 S.E.2d 713 (1944). However, the reason must contain specific predicate findings for a decision under Rule 54(d) of the West Virginia Rules of Civil Procedure when the costs are assessed against the prevailing party. Perdomo v. Stevens, 197 W.Va. 552, 476 S.E.2d 223 (1996).

With respect to the imposition of sanctions, the standard of review is also abuse of discretion. Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996). However, the trial court must explain its reasons on the record if it decides a sanction is appropriate. Smith v. Gebhardt, 240 W.Va. 426, 813 S.E.2d 79 (2018).

B. The Appellant is Not Entitled to a New Trial as the Appellant Failed to Object to the Verdict Form Prior to the Discharge of the Jury.

This case was submitted to the jury at approximately 3:30 p.m. on August 24, 2018. Petitioner's Appendix Volume 3 at page 1074. At approximately 4:19 p.m., the jury presented a question to the Court which stated as follows:

(1) Definition of Battery:

-Does it mean that an individual crosses the street intentionally to hit & harm another person.

-Does it mean that once in the situation, he reacts and hits another person.

Petitioner's Appendix Volume 3 at page 777.

The trial court responded to the question with the consent of the parties and the jury was instructed that "the law regarding this matter is contained in the Court's instructions that were read



3. If you answered YES to Question 1 do you find by a preponderance of the evidence that Donald Sevier and Cassandra Sevier together committed Civil Conspiracy?

ANSWER: YES _____ NO X

4. If you answered YES to Question 3 indicate what amount of compensatory damages, if any, that Christopher McKenzie is entitled to in compensatory damages as a result of the Civil Conspiracy excluding any damages awarded in Question 2, if any: **N/A**

Compensatory Damages \$ _____

5. If you answered YES to either Question 1 OR Question 3 AND awarded Christopher McKenzie Compensatory Damages in either Question 2 OR Question 4, do you find by clear and convincing evidence that Donald Sevier acted with actual malice toward Christopher McKenzie?

ANSWER: YES _____ NO X

6. Do you find by clear and convincing evidence that Donald Sevier acted with conscious, reckless and outrageous indifference to the health, safety and welfare of others?

ANSWER: YES _____ NO X

7. If you answered YES to Question 5 OR 6 indicate what amount, if any, that Christopher McKenzie is entitled to, in punitive damages: **N/A**

ANSWER: YES _____ NO _____



8. If you answered YES to either Question 1 OR Question 3 AND awarded Christopher McKenzie Compensatory Damages in either Question 2 OR Question 4, do you find by clear and convincing evidence that Cassandra Sevier acted with actual malice toward Christopher McKenzie? **N/A**

ANSWER: YES _____ NO _____

9. Do you find by clear and convincing evidence that Cassandra Sevier acted with conscious, reckless and outrageous indifference to the health, safety and welfare of others?

ANSWER: YES _____ NO **X** _____

10. If you answered YES to Question 8 OR 9 indicate what amount, if any, that Christopher McKenzie is entitled to, in punitive damages: **N/A**

Punitive Damages \$ _____

11. Do you find by a preponderance of the evidence that Christopher McKenzie committed Battery against Donald Sevier?

ANSWER: YES _____ NO **X** _____

12. If you answered YES to Question 11 indicate the amount of compensatory damages, if any, that Donald Sevier is entitled to in compensatory damages as a result of the Battery: **N/A**

Compensatory Damages \$ _____

13. Do you find by a preponderance of the evidence that Christopher McKenzie used insulting words in harm of Donald Sevier:

ANSWER: YES _____ NO X

14. If you answered YES to Question 13 indicate what amount of compensatory damages, if any, that Donald Sevier is entitled to in compensatory damages as a result of the use of insulting Words:

N/A

Compensatory Damages \$ _____

15. Do you find by a preponderance of the evidence that Christopher McKenzie used insulting words in harm of Cassandra Sevier:

ANSWER: YES X NO _____

16. If you answered YES to Question 15 indicate what amount of compensatory damages, if any, that Cassandra Sevier is entitled to in compensatory damages as a result of the use of Insulting Words:

Compensatory Damages \$ -0-

17. If you answered YES to either Question 11, Question 13 or Question 15 AND awarded Donald Sevier and/or Cassandra Sevier Compensatory Damages in Question 12, Question 14, or Question 16 do you find by clear and convincing evidence that Christopher McKenzie acted with actual malice toward Donald Sevier?

ANSWER: YES _____ NO X



18. Do you find by clear and convincing evidence that Christopher McKenzie acted with conscious, reckless and outrageous indifference to the health, safety and welfare of others?

ANSWER: YES _____ NO X

(NOT CONSCIOUS)

19. If you answered YES to Question 17 OR 18 indicate what amount, if any, that Donald Sevier is entitled to, in punitive damages: **N/A**

Punitive Damages \$ _____

8/24/18
Date

/s/James Keith Foster
Foreperson

Petitioner's Appendix Volume 3 at page 1080.

Question 1 contained on the verdict form was provided by the appellant. Appellees Appendix at page 01056. The verdict form as completed by the jury was not objected to by the appellant nor did the appellant seek to have the jury polled. Petitioner's Appendix Volume 2 at page 772.

Any claims regarding the inconsistency of a verdict are waived if there is no objection to any defect or irregularity made prior to the dismissal of the jury. Combs v. Hahn, 205 W.Va. 102, 516 S.E.2d 506 (1999). To determine if a jury verdict is inconsistent, such inconsistency must appear after excluding every reasonable conclusion that would authorize the verdict. Prager v. City of Wheeling, 91 W.Va. 597, 114 S.E. 155 (1992).



An examination of the verdict form indicates that there is no inconsistency based upon the special interrogatories and the conflicting testimony and evidence presented to the jury. Modular Building Consultants of West Virginia, Inc. v. Poerio, Inc., 235 W.Va. 747, 774 S.E.2d 555 (2015). The appellant did not submit nor request that a special interrogatory be included in the verdict form that asked the jury to identify whether any wrongful conduct of the appellee, Donald L. Sevier, was the proximate cause of injury and damage to the appellant.

In Tyree v. Bell, 2018 WL 6015840 (W.Va. Sup.Ct. 2018), this Court discussed the verdict form utilized and stated as follows:

The verdict form posed the following question:

“Do you find by a preponderance of evidence, more likely than not, that the plaintiff, Pamela Bell, was injured as a result of Connor Tyree’s actions?”

The jury in Tyree was asked on the verdict form if Ms. Bell was injured as a result of the actions of Mr. Tyree, to which the jury said no.

In this action, the appellant did not request the inclusion on the verdict form of a question regarding whether any actions of the appellee, Donald L. Sevier, **caused** injuries to the appellant. Petitioner’s Appendix Volume 3 at page 1074. There was substantial conflicting evidence including the admitted blood alcohol content of the appellant of 0.196; the appellant’s claim of no recollection of the incident; the appellant’s preexisting medical conditions

including, but not limited to, alcoholism; as well as, the falls and other mishaps appellant suffered following the subject incident as a consequence of his refusal to accept treatment and/or assistive devices. Petitioner's Appendix Volume 2 at pages 480-484.

The jury further heard testimony that Mr. McKenzie had no facial injuries consistent with being hit by Mr. Sevier and that Mr. McKenzie backed up and hit his heels on the curb of his own driveway causing him to fall. All of this happening while Mr. McKenzie had a blood alcohol content of at least 0.196. Petitioner's Appendix Volume 1 at page 382.

C. The Appellant Failed to Establish that His Injuries Were the Proximate Result of Any Conduct of the Appellee, Donald L. Sevier.

A new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. State ex rel. Meadows v. Stephens, 207 W.Va. 341, 532 S.E.2d 59 (1997). When a case such as this action involves conflicting testimony and circumstances which have been fairly tried, under proper instructions, the verdict of the jury must not be set aside unless that verdict is plainly contrary to the evidence or without sufficient evidence to support it. Neely v. Belk, Inc., 222 W.Va. 560, 668 S.E.2d 189 (2008).

The verdict of the jury was neither inconsistent nor inadequate where the appellant failed to request a special interrogatory to the jury inquiring if the conduct of the appellee,



Donald L. Sevier, was the proximate cause of any injuries suffered by the appellant. Strahin v. Clevenger, 126 W.Va. 175, 603 S.E.2d 197 (2004); Jackson v. Putnam County Board of Education, 121 W.Va. 170, 653 S.E.2d 632 (2007); Spencer v. McClure, 217 W.Va. 442, 618 S.E.2d 451 (2005).

Further, in Foster v. Sakhai, 210 W.Va. 716, 559 S.E.2d 53 (2001), this Court held that:

In determining whether there is sufficient evidence to support a jury verdict the Court should:

- (1) Consider the evidence most favorable to the prevailing party;
- (2) Assume all conflicts in the evidence were resolved by the jury in favor of the prevailing party;
- (3) Assume as proved all facts which the prevailing parties evidence tends to prove; and
- (4) Give the prevailing party the benefit of all favorable inferences which may be drawn from the facts proved.

Applying these factors there can be no question that the trial court was correct in denying the motion for a new trial.

This Court has also held that:

When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the evidence or without sufficient evidence to support it.

Neely v. Belk, Inc., 222 W.Va. 560, 668 S.E.2d 189 (2008). The trial of this case contained no uncontroverted elements of damage. Petitioner's Appendix at Volume 2 at page 456-480. In fact, the only medical witness presented by the appellant was unable to establish the reasonableness of any medical expenses either past or future. Petitioner's Appendix Volume 2 at page 485 and page 496. This medical witness also testified regarding the substantial amount of opioid medication the appellant was receiving from different physicians. Petitioner's Appendix Volume 2 at page 494. Petitioners Appendix Volume 2 at page 485.

The medical witness further confirmed that the appellant did not have any bones broken in his face and that all of the injuries he suffered on July 7, 2015 were to the back of his head. Petitioner's Appendix Volume 2 at page 486. Accordingly, the impact made by Mr. Sevier's right hand did not cause any of the injuries for which the appellant complained.

The injuries complained of by the appellant were the proximate cause of the appellant's extreme intoxication with a blood alcohol content of in excess of 0.196 and catching his heels on the lip of his own driveway causing him to fall and strike the back of his head. The jury's verdict is consistent with this evidence and in accordance with the instructions of the Court. Petitioner's Appendix Volume 3 at page 1055.



D. The Appellees are Entitled to Recover the Taxable Costs from the Appellant Pursuant to West Virginia Code §59-2-8 and Rule 54(d) of the West Virginia Rules of Civil Procedure.

West Virginia Code §59-2-8 provides that:

the party for whom final judgment is given in any action, ..., whether he be plaintiff or defendant, shall recover his costs against the opposite party...

In an action at law pursuant to West Virginia Code §59-2-8 the costs shall be awarded to the prevailing party. Nagy v. Oakley, 172 W.Va. 569, 309 S.E.2d 68 (1983); Carper v. Watson, 226 W.Va. 50, 697 S.E.2d 86 (2010).

In addition to West Virginia Code §59-2-8, Rule 54(d) of the West Virginia Rules of Civil Procedure provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs". In this action, the trial court required that the parties each bear their own costs with the exception of the appellees being required to pay all costs associated with the jury despite the appellees prevailing in this trial. Petitioner's Appendix Volume 3 of page 1084.

In Perdomo v. Stevens, 197 W.Va. 552, 476 S.E.2d 223 (1996), this Court held that when the assessment of costs is directed contrary to the procedural rule the record must contain specific predicate findings for the decision to assess costs against the prevailing party. The judgment order contains no predicate findings other than the appellees exercised their right to have



this case decided by a jury pursuant to Article III, Section 13 of The Constitution of West Virginia.

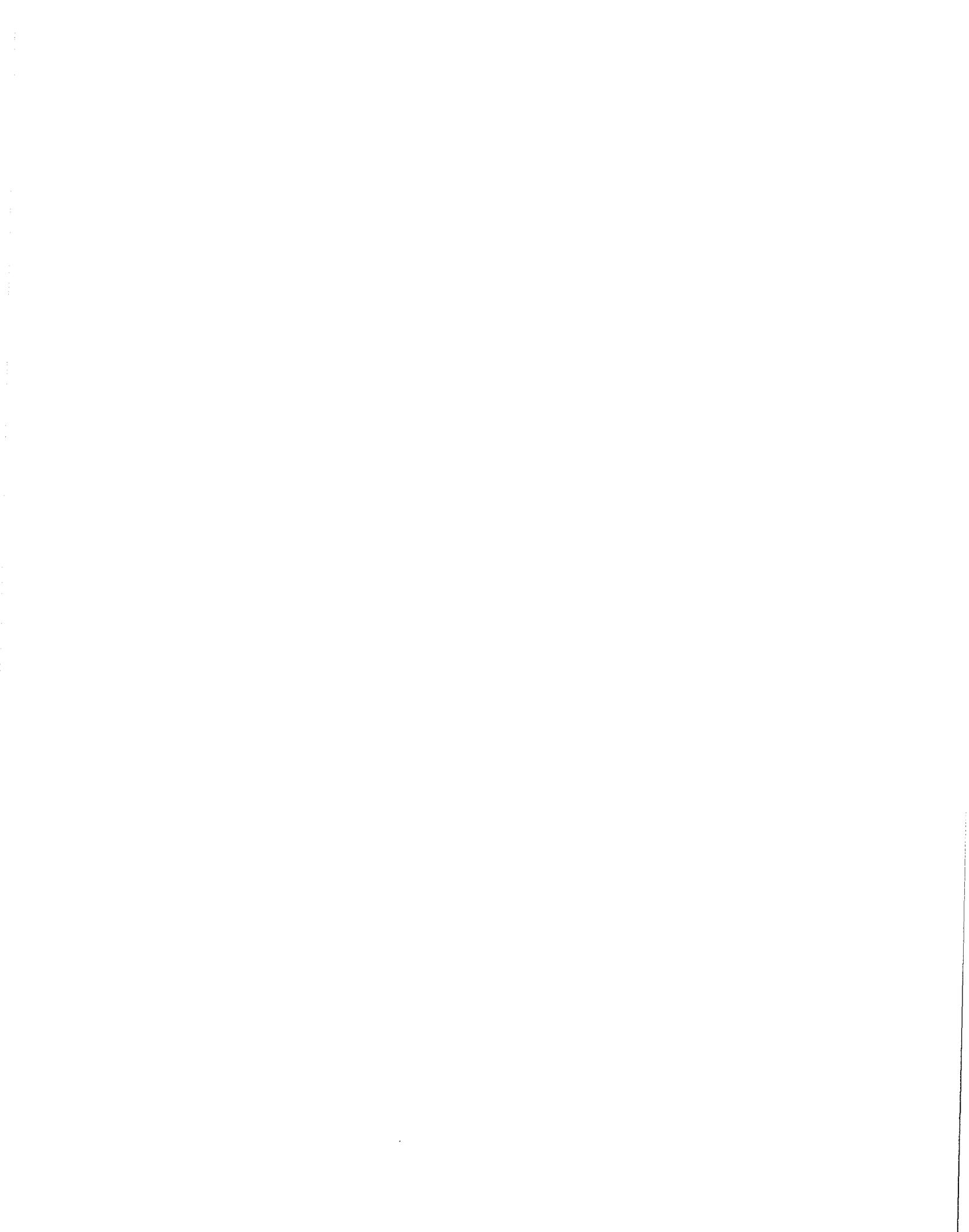
The recovery of costs to the prevailing party is a creature of statute since the recovery of cost and common law were unknown. Burdette v. Campbell, 126 W.Va. 591, 30 S.E.2d 713 (1944). In Pauley v. Gilbert, 206 W.Va. 114, 522 S.E.2d 208 (1999), this Court held that the prevailing party was entitled to recover the cost of litigation pursuant to West Virginia Code §59-2-8.

In reaching the conclusion articulated in Pauley this Court held that:

Because the term "shall" is generally afforded a mandatory connotation, see Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86, and because it is indisputable that the jury's verdict in Ms. Pauley's favor renders her the prevailing party, we find that Ms. Pauley is unquestionably entitled to recover her costs in accordance with West Virginia Code §59-2-8.

Accordingly, the circuit court erred in ordering that each party be responsible for their own costs with the exception that the appellees must pay all costs of the jury.

By shifting the full cost of the jury trial to the appellees the trial court impermissibly infringed upon the constitutional right to a jury trial afforded to the appellees. The right of jury trial is guaranteed by Article 3, Section 13 of The Constitution of West Virginia.



This constitutional provision provides as follows:

In suits at common law, where the value and controversy exceeds \$20.00 exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved...

It is without question at the inception of this litigation the appellant and the defendants all requested a trial by jury. Petitioner's Appendix Volume 1 at pages 21, 28, 39, 47 and 60.

Once all parties demanded a jury trial Rule 38(d) of the West Virginia Rules of Civil Procedure provides that this demand for jury trial may not be waived or withdrawn without the consent of all parties. Rule 38(a) of the West Virginia Rules of Civil Procedure provides that the right of jury trial is declared by the constitution and/or statutes of the State of West Virginia and shall be preserved to the parties inviolate.

There is no provision of the constitution, statutes or common law of West Virginia that permits the prevailing party to be punished through the payment of the cost of impaneling the jury under any circumstances. See, Mack v. Southern Farm Bureau Casualty Insurance Company, 447 S.2d 32 (La. Ct.App. 1984) (jury costs cannot be assessed against prevailing party on sole ground that party requested jury trial). As provided herein, West Virginia Code §59-2-8 provides that the prevailing party shall not recover costs.



In Nagy v. Oakley, 172 W.Va. 569, 309 S.E.2d 68 (1983), the West Virginia Supreme Court of Appeals held, pursuant to West Virginia Code §59-2-11 that costs are always awarded to the substantially prevailing party in civil litigation. There is no question that the appellees were the substantially prevailing parties, particularly against the plaintiff, Anna McKenzie, who voluntarily withdrew her claim immediately prior to trial, therefore, that portion of the judgment order which requires the defendants to pay the cost of the jury must be reversed.

E. The Trial Court Abused its Discretion in Awarding Sanctions Against the Appellees Based Upon the Conduct of Discovery.

The trial court erred in awarding sanctions in the form of attorney fees based upon alleged inadequate discovery and refusing to alter/amend such orders prejudging the appellees. Appellees Appendix at pages 00262 and 00431; Petitioner's Appendix Volume 3 at pages 1075-1084 and page 1129.

The trial court ignored the decisions of the Court regarding the scope of discovery in this action such as Truman v. F&M Bank, 180 W.Va. 133, 375 S.E.2d 765 (1988) and State Farm Mutual Insurance Company v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992). Further, the trial court did not consider the factors outlined in Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983) before ordering the imposition of sanctions.



The trial court abused its discretion by permitting wrongful litigation conduct on the part of appellant while sanctioning the appellees based upon allegations of discovery misconduct. The appellant wrongfully obtained a default against the appellee, Donald L. Sevier, through the use of an unauthorized method of service. Appellees Appendix at page 00048.

The appellant filed a Motion to Disqualify Counsel for the appellees where no legal grounds existed. Appellees Appendix at page 01011. The Circuit Court permitted the dismissal without prejudice of the plaintiff, Anna McKenzie, on the eve of trial; over the objection of the appellees; and, with no discussion or consideration of the request by the appellees for the award of fees and cost pursuant to Rule 41 (a)(2) of the West Virginia Rules of Civil Procedure. Groves v. Compton, 167 W.Va. 873, 280 S.E.2d 708 (1981); Tagupa v. Vipdesk, 135 Hawaii 468, 353 P.3d 1010 (2015); 224 West Flagger Holdings Inc. v. Terra Nova Insurance Company, Ltd., 2004 WL 5595581 (S.D. Fla. 2004).

A further example is the continued request by the appellant for privilege logs related to the communication between the appellees as the oral communication between the appellees as husband and wife. Appellees Appendix at page 00441 and Petitioner's Appendix Volume 1 at page 72. The appellees repeatedly stated in multiple supplemental discovery responses that no documents existed to prepare a privilege log but the appellant continued to file motions for sanctions.

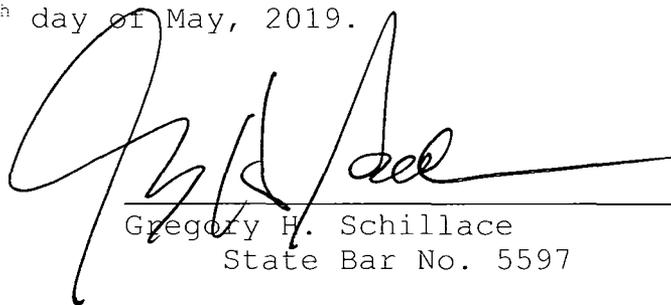


The notice of the appellees to present to appellant from supplementary discovery immediately prior to trial was denied by the trial court with undisclosed witnesses being permitted to testify. Appellees Appendix at page 01003. Petitioner's Appendix Volume 2 at page 140. The trial court abused its discretion as discovery activity were not equally rejected by the Circuit County Court. Goldstein v. Peacemaker Properties, LLC, 825 S.E.2d 337 (W.Va. 2019); Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986).

VIII. Conclusion

Based upon the foregoing, the appellee, Donald L. Sevier and Cassandra Sevier, respectfully request that the decision of the Circuit Court of Marion County, West Virginia, in its Order of be affirmed and that the Circuit Court Orders of January 9, 2018, April 10, 2018, September 27, 2018 (in part); and December 20, 2018 be reversed.

Dated this 30th day of May, 2019.



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