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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0200

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ROOF SERVICE OF BRIDGEPORT, INC.,
Defendant Below, Petitioner,

v.

ROBERT JOSEPH TRENT and CHARLOTTE TRENT, his wife,
Plaintiffs Below, Respondents.

Honorable Christopher McCarthy, Judge
Circuit Court of Harrison County
Civil Action No. 16-C-333-3

BRIEF OF THE PETITIONER

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to award judgment to an employer arising from an accident which occurred after an employee had returned to a jobsite in the employee's personal vehicle for purposes of retrieving scrap metal for sale the proceeds of which the employee would retain after he had earlier returned his employer's vehicle to his employer's place of business at the end of the workday.

2. The Circuit Court erred by failing to exclude evidence alleging that a plaintiff's physical limitations were caused by an accident when the plaintiff's treating physician testified that those physical limitations were not caused by the accident.

3. The Circuit Court erred by failing to (a) include on the verdict form in a respondeat superior case the employer's independent contractor defense where evidence was admitted in support of that defense and (b) include on the verdict form in a negligence case whether an injured plaintiff's negligence contributed to his injuries where evidence was submitted in support of the defense of comparative contributory negligence.

4. The Circuit Court erred by failing to set aside a jury verdict attributing no negligence to a plaintiff who admitted at trial that he did not look both ways before crossing a street immediately before stepping into the street and being struck by a vehicle.

5. The Circuit Court erred by failing to set aside the jury's verdict of $250,000 for the plaintiff's past general damages and $250,000 for his future general damages, and by failing to set aside the jury's verdict to the plaintiff's spouse of $250,000 for loss of consortium, where such awards were redundant, excessive, and against the clear weight of the evidence, warranting a new trial or remittitur.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Plaintiffs, Robert and Charlotte Trent ["Mr. Trent," "Ms. Trent," or "Plaintiffs"] filed suit against the Defendants, Bruce Wilfong ["Mr. Wilfong"][1], Roof Service of Bridgeport, Inc. ["Roof Service" or "Petitioner"], and John K. Cole ["Mr. Cole" or "Owner"][2] on September 9, 2016, arising from an automobile accident on June 9, 2015, in which a vehicle operated by Mr. Wilfong collided with Mr. Trent outside Mr. Trent's home.[3]

Concerning Roof Service and its Owner, the complaint alleged that they "were negligent, reckless, and careless in hiring the Defendant, Bruce A. Wilfong, and permitting him to drive on or near the Plaintiff's residence."[4]

At the close of discovery, Roof Service moved for summary judgment, noting that the evidence was undisputed that Mr. Wilfong was not acting within the course and scope of his employment at the time of the accident because at the end of his workday on the Plaintiffs' residence, he had returned his company vehicle back to the company, retrieved his personal vehicle, had traveled back to the Plaintiffs' residence for purposes of retrieving scrap to sell the proceeds of which he would retain, and was involved in a collision with Mr. Trent.[5] Alternatively, Roof Service argued that Mr. Wilfong was an independent contractor for purposes of the salvaging

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[1] The claims against Mr. Wilfong were settled prior to trial. App. at 352.

[2] The claims against Mr. Cole were voluntarily dismissed prior to trial. App. at 349.

[3] App. at 9.

[4] App. at 10.

[5] App. at 52-61.

of scrap and, accordingly, it was not responsible for any of Mr. Wilfong's acts or omissions conducted as an independent contractor.[6]

In opposition to Roof Service's summary judgment motion, the Plaintiffs argued, "[W]hether Mr. Wilfong was picking up scrap aluminum for his purpose was irrelevant. These defendants had a contractual obligation to remove the scrap . . . ."[7] In other words, the Plaintiffs maintained, even if Mr. Wilfong had returned the company truck to Roof Service and returned to the worksite in his own vehicle and his retrieval of the scrap provided no financial benefit to Roof Service but was for Mr. Wilfong's exclusive financial benefit, Roof Service was nevertheless responsible for a collision between Mr. Wilfong's personal vehicle and Mr. Trent because someone had to remove the scrap.

Similarly, in their response to the summary judgment motion on the independent contractor issue, although the Plaintiffs conceded that the four factors are (1) selection and engagement of the servant; (2) payment of compensation; (3) power of dismissal; and (4) power of control, and that there was no evidence that Roof Service either paid Mr. Wilfong to retrieve the aluminum scrap or had directed him to do so, they argued because Roof Service had the power to pay Mr. Wilfong or direct him not to retrieve the aluminum scrap, his status could not be one of independent contractor.[8]

Eventually, on September 10, 2018, one week before trial, the Circuit Court entered a two-page order denying Roof Service's motion for summary judgment.[9] The order contains but a single

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[6] App. at 61-62.

[7] App. at 123.

[8] App. at 123-124.

[9] App. at 589-590.

legal citation - to a case involving the legal principle that for purposes of a summary judgment motion the evidence must be considered in a light most favorable to the non-moving party.[10]

The order identified five "material issues of fact": (1) "the contract between the parties in regard to the removal of debris;" (2) "whether or not there was compensation received by Defendant Bruce Wilfong for the removal of the debris in question;" (3) "whether or not Bruce Wilfong actually ceased employment with Defendant Roof Service . . . on the date of the accident;" (4) "that the removal of the debris in question was a matter of custom and practice and part of the Trent roofing job;" and (5) "upon whose authority (permission) did Defendant Bruce Wilfong return to the Trent residence to remove debris."[11]

The order is silent on both (1) where in the evidentiary record was there any support for the conclusion that these were genuinely contested issues and (2) how any of them bore any relevance to the questions of whether Mr. Wilfong was within the course and scope of his employment at the time he struck Mr. Trent with his personal vehicle on the street while leaving with the scrap aluminum and whether he was acting at that time as an independent contractor rather than as an employee of Roof Service.

In addition to the absence of evidence meeting this Court's threshold for respondeat superior liability, Roof Service filed several pre-trial motions in the wake of the denial of its motion for summary judgment.

First, Roof Service moved in limine to preclude Mr. Trent from presenting any evidence or argument concerning the permanency of his injuries where none of his medical providers and

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[10] App. at 589.

[11] App. at 590.

none of his medical records indicate, to a reasonable degree of medical certainty, that he suffers from any permanent injuries.[12] Second, Roof Service tendered a verdict form that included an interrogatory on its independent contractor defense.[13] Finally, Roof Service tendered a verdict form that included an interrogatory regarding whether Mr. Trent's negligence contributed to the accident.[14]

B. TRIAL

The trial of this case commenced on September 17, 2018,[15] a week after the Circuit Court entered its summary judgment order.

It began with Plaintiffs' counsel essentially telling the jury in opening statement that unless the Plaintiffs got something from Roof Service, they would not have a full recovery:

> Now, you got to remember, Mr. Cole is out of this case, he's a representative of the corporation. Wilfong is gone. The only person you've got to deal with here today, is a corporation. That's it.
>
> The reason why you have a corporation is that it insulates Mr. Cole from liability. It doesn't cost him anything, there's nothing you can do about Mr. Cole. We can't take money from Mr. Cole. Okay.
>
> We can take money from the corporation, and these people deserve to be compensated for their injuries.[16]

The first witness at trial was the officer who investigated the accident.[17] Based on the statements of Mr. Trent and Mr. Wilfong on the date of the accident, the officer testified that it

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[12] App. at 160-161.

[13] App. at 150.

[14] App. at 151.

[15] App. at 614.

[16] App. at 620.

[17] App. at 639.

appeared to have occurred when Mr. Wilfong was backing up his truck to load scrap metal when he struck Mr. Trent.[18]

Prior to the collision, Mr. Trent reported to the officer that he had observed Mr. Wilfong's truck as it passed Mr. Trent's location,[19] but the officer's testimony offers no insight as to why Mr. Trent did not observe Mr. Wilfong's truck as it was backing.

The officer confirmed that a pedestrian, like Mr. Trent, has a duty to look both ways before crossing a street; that if Mr. Trent had looked both ways, he should have seen Mr. Wilfong's truck; and that there was nothing based on the officer's observations that would have prevented Mr. Trent from seeing Mr. Wilfong's truck if Mr. Trent had looked both ways before proceeding to cross the street when he was struck.[20]

The Plaintiffs also called the Owner of Roof Service as a witness.[21] The Owner explained that his company had put new roofs on the Plaintiffs' residence on two occasions.[22] He explained that the roofing job was fixed price of $10,900 with any additional charges the result of additional work, such as on their gutters.[23] The services to be rendered included "removing old roofing, clean up, and haul away."[24] The Owner explained that he billed the Plaintiffs once the job was completed even after the accident because the accident "had nothing to do with" the job.[25]

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[18] App. at 645.

[19] App. at 647.

[20] App. at 653-656.

[21] App. at 676.

[22] App. at 678.

[23] App. at 678, 681.

[24] App. at 679.

[25] App. at 681.

With respect to Roof Service's alternative argument that Mr. Wilfong would have been acting as an independent contractor relative to his separate salvaging and sale of debris, the Owner explained, "[H]e asked me back 20 years ago, if he could have the scrap metal that was only these roofs. . . . And I told him he could have it, but he had to do it on his own time, and he had to use his vehicle."[26] In other words, the salvaging and sale of debris by Mr. Wilfong would be on his own time, at his own expense, and at his own risk. As the Owner explained, "He has five kids and I tried to help him."[27] He also testified that he received nothing from Mr. Wilfong's salvage activities, but that it was purely for Mr. Wilfong's benefit.[28]

When asked whose decision it was for Mr. Wilfong to return to the Trent residence on his own time and in his own vehicle to salvage scrap metal, the Owner testified, "He made that decision."[29] The Owner also testified that whether Mr. Wilfong removed the debris, or the debris was otherwise removed during the workday, Roof Service had an obligation to remove it and the amount it received for the roofing job was the same.[30]

As the Owner explained, "it was either going to the dump, or if he wanted it, he could have it. . . . If he thought he could make some money at it, fine with me,"[31] and if salvaging scrap was part of Mr. Wilfong's employment duties, the Owner asked, "[W]hy would he leave the job, take the company truck home, and get his own vehicle and clean this up, because that was part of the

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[26] App. at 682-683.

[27] App. at 683.

[28] App. at 706-707. When asked, "Does Mr. Wilfong ever get paid then for pick up the scrap metal?" the Owner testified, "Never. Never. He makes his money from when he resells the scrap." App. at 712.

[29] App. at 687.

[30] App. at 688-689.

[31] App. at 689, 690.

agreement. . . . He didn't use the company truck."[32] The Owner testified that all of Roof Service employees "drive their own vehicles to work" and "once they get to our place, then they use company vehicles."[33]

More significantly, the Owner testified that on the date of the accident, Mr. Wilfong returned the company vehicle at the end of the workday, retrieved his own personal vehicle, and then returned to the Trent residence for his independent salvage work **even though the distance between the company and the Trent residence is only a "block"** taking "**three or four minutes**.[34]

Obviously, if Mr. Wilfong understood that he was working for Roof Service during his salvage operations at worksites, neither he nor any other reasonable human being would get in his company vehicle, drive it one block, park the company vehicle, get in his personal vehicle, and then drive back in his personal vehicle one block to complete work for his employer.

The Plaintiffs also called Mr. Wilfong as a witness at trial.[35] Like the Owner, Mr. Wilfong testified that the accident occurred after he had returned to the Plaintiffs' residence on his own time and in his own vehicle to salvage scrap metal.[36] He testified that, "I pulled up on the driveway,

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[32] App. at 692. The Owner also noted that during an earlier roofing job, they had followed the same procedure, and the Plaintiffs never complained about it. App. at 693-694. The Owner testified that he visited Mr. Trent on several occasions in the hospital after the accident; that Mr. Trent "is a nice man;" that the Trents allowed the Owner's daughter to place political signs in their yard after the accident; and that when they met after the accident at a Dollar General on which Roof Services was performing a job, they "shook hands." App. at 696.

[33] App. at 707-708.

[34] App. at 710-711.

[35] App. at 820.

[36] App. at 822-823.

squared the truck up, backed down the street, approximately 30 feet, and I heard Mr. Trent yell."[37] At the time of the accident, Mr. Wilfong estimated that he was backing his truck at two to three miles per hour.[38] Mr. Wilfong testified that he found Mr. Trent in the street with his head against the sidewalk, and that he called 911.[39]

Mr. Wilfong explained that his vision of Mr. Trent may have been impaired by a camper placed on the back of his pickup truck.[40] He also testified that he knew that Mr. Trent must have crossed the street behind him after he had moved forward positioning his vehicle to back up because "he wasn't there when I went up the street."[41] Mr. Wilfong testified that on the date of the accident, Mr. Trent came out of his house several times because Mr. Trent was anxiously waiting on a UPS or FedEx truck to arrive with medicine for his wife who was in the hospital.[42] This, in part, may explain why Mr. Trent's focus was down the street from where Mr. Wilfong was backing and Mr. Trent's failure to check in Mr. Wilfong's direction before stepping into the street.

With respect to his salvage work, Mr. Wilfong also testified that it was not part of his job duties, nor was it a bonus for work performed for Roof Service.[43] Instead, as Mr. Wilfong testified, "He was just going to throw it away, I was going to make some extra money, that's all."[44] Mr.

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[37] App. at 823.

[38] App. at 856.

[39] App. at 828.

[40] App. at 825.

[41] App. at 835.

[42] App. at 851-852.

[43] App. at 848.

[44] App. at 848.

Wilfong confirmed the Owner's testimony that he always retained all of the funds from his independent salvage operations that he spent "on my kids or pay [b]ills with it."[45] When asked if "Roof Service [has] anything to do with . . . you picking up the scrap and turning it in for money," Mr. Wilfong responded, "No. Nothing," and that all of his salvage work was done "On my time. . . . I was off the clock. I was on my own time."[46]

Ms. Trent was then called as a witness at trial.[47] She explained that on the day of the accident, she was in a local hospital recovering from knee replacement surgery.[48] After the accident, Mr. Trent, who was eighty-one years old at the time,[49] was brought to the same hospital.[50] She testified about her husband's discomfort after the accident, his subsequent loss of weight, and his inability to perform some of the yard and house work.[51] She testified that before the accident, both she and her husband would go to the local mall and walk, but after the accident, he is less ambulatory.[52]

She conceded that her husband had heart problems before the accident, including open heart surgery in 2011, but that he was still able thereafter to lead a normal life.[53] She also admitted that **before the accident**, her husband had substantial problems with arthritis throughout his body,

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[45] App. at 858.

[46] App. at 859.

[47] App. at 865.

[48] App. at 868.

[49] App. at 893.

[50] App. at 868.

[51] App. at 870-871. She conceded, however, that he was still able to do dishes, laundry, and other household tasks. App. at 874.

[52] App. at 871-872. Although she testified that her husband occasionally used a cane outside the house that, "he doesn't use the cane constantly in the house." App. at 886.

[53] App. at 878.

had degenerative joint disease, had a fusion of his right ankle, had one leg substantially shorter following surgery, had a surgical repair of his arthritic wrist, had plates and screws placed in his right arm after it had been broken, had arthritic hips for which he had been treated with physical therapy, and had a severe arthritic condition of his right shoulder.[54]

Indeed, she admitted that years before the accident, "he'd walk so far and he felt like he had a lump of concrete in the calf of his leg. And he'd have to stop and wait for a few minutes before he could resume walking."[55]

After the accident, she testified that her husband was issued a handicap parking sticker, but that difficulty in securing convenient parking spaces had limited their ability to attend church and football games after the accident.[56]

Ms. Trent indicated that because of problems with his elbow and shoulder, her husband was unable to sketch, work crossword puzzles, or engage in similar activities in the same manner as before the accident,[57] though she admitted that "he had a horrible right shoulder with arthritis before the accident"[58] and when presented with examples of his post-accident signature, including one in 2018, they were "exceptional."[59]

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[54] App. at 942-943, 953, 955.

[55] App. at 952-953.

[56] App. at 875-878.

[57] App. at 878-881.

[58] And, Mr. Trent's treating physician testified that he could not determine whether any of Mr. Trent's post-accident limitation of motion was attributable to the accident or existed prior to the accident. App. at 463 ("I don't know.").

[59] App. at 881, 960. Ms. Trent tried to explain how her husband's handwriting began to improve dramatically shortly after the accident through 2018, by stating, "But have him sign today and see what it looks like." App. at 960.

Also, on cross-examination, she admitted that his physical therapy records reflected that her husband was able to walk at the mall and that he reported that he was ready to be discharged from physical therapy just a few months after the accident because, as indicated in his medical records, "he could walk 500 to 1,000 yards."[60] She also admitted that in another record a year after the accident, it was reported her husband was "able to walk 501 to 1,000 yards without symptoms" and he had reported that he was able to walk for "one hour."[61]

Other than the foregoing, Ms. Trent offered no traditional substantive testimony in support of a claim for loss of spousal consortium.

Mr. Trent was then called as a witness at trial.[62] He confirmed that on the date of the accident he was awaiting the delivery of medicine for his wife.[63] He stated that he crossed the street to put away his neighbors' garbage can because they were out-of-town and then returned to the sidewalk where he was looking in the opposite direction of Mr. Wilfong's vehicle for a FedEx truck[64] when he was struck by Mr. Wilfong's vehicle.[65] He stated that prior to being struck, he did see Mr. Wilfong's truck go past him on the street, but he did not see Mr. Wilfong as he was backing

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[60] App. at 944-945. Ms. Trent tried to explain away Mr. Trent's medical records by claiming his doctors "mess up" his medical records and that she did not "trust" the physical therapy records. App. at 945-946.

[61] App. at 950-951.

[62] App. at 963.

[63] App. at 965-966.

[64] App. at 990 ("I was looking in the other direction . . . I was expecting him [the FedEx truck] momentarily."); App. at 1025 ("I was looking to my right."); App. at 1027 ("I was concentrating on the right.").

[65] App. at 966.

up immediately before the collision.[66] He testified that because of the collision, he suffered a broken thumb, a fractured pelvis, and an injured elbow.[67]

He testified that after the accident his range of motion in one arm was limited but admitted that before the accident he was unable to mow the yard and that pre-accident arthritis contributed to his limitation of motion.[68] Indeed, Mr. Trent reported that he had been treated with physical therapy for neck and shoulder pain well before the accident.[69] He also admitted that **prior to the accident**, his shoulder was very arthritic;[70] that his treating physical indicated that he was a candidate for shoulder replacement surgery;[71] that he had previously broken the same arm;[72] that he suffered a condition called Scaphoid Lunate Advance Collapse in his wrist that required that it be rebuilt and a plate installed;[73] that he had open heart surgery followed by three months of rehabilitation;[74] that he suffered from pre-accident impairment as a result of an arthritic hip and had been told that at some point he would need hip replacement surgery;[75] and that he continues to treat for pre-accident cardiac issues.[76] He admitted that before the accident that he had reported

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[66] App. at 1024.

[67] App. at 968-969.

[68] App. at 972-973.

[69] App. at 973.

[70] App. at 986.

[71] App. at 987.

[72] App. at 987.

[73] App. at 1058.

[74] App. at 988.

[75] App. at 1044-1046.

[76] App. at 988. John Angotti, M.D., who had treated Mr. Trent for more than twenty years, testified at trial that an incident of atrial fibrillation experienced by Mr. Trent while hospitalized to treat injuries suffered in the accident were unrelated to the accident, but that Mr. Trent's COPD, hypertension, coronary artery disease, chronic kidney disease, aortic stenosis, diabetes, rheumatoid arthritis, osteoarthritis, and other pre-accident medical conditions contributed to the atrial fibrillation episode. App. at 1003-1012, 1014.

that due to his arthritis issues all of his activities were difficult to perform, including an inability to walk long distances, to walk outdoors, to climb stairs, to push, to pull, to lift, and to carry.[77] He also admitted that because of his arthritis issues, he may have taken pain medication before the accident, but that eventually after the accident, he discontinued using any pain medication.[78]

He confirmed that, following the accident, he never used a wheelchair, but would occasionally use a cane.[79] Like his wife, Mr. Trent dismissed his physical therapy records noting his substantial progress within months of the accident as allegedly inaccurate,[80] but he did confirm that he was able to return to walking in a local mall for exercise.[81] He also conceded that, in his deposition, he reported that the pain in his pelvic area eventually subsided[82] and that he reported to his medical providers that within three months of the accident, he had no difficulty in performing his usual work or household activities.[83] Mr. Trent attempted to explain his handwritten report of

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He also testified that Mr. Trent had, over time, refused recommended testing and treatment, including a colonoscopy, referral to a kidney specialist, and nocturnal oxygen. App. at 1008-1009. Dr. Angotti also confirmed that what was reported in the physical therapy records regarding Mr. Trent's recovery was consistent with what he had observed: "as he was coming to my office on follow-up visits during his recovery, he had less and less problems during recovery with complaints of pain and issues. . . . I was unaware of anything that was interfering with his lifestyle at that point." App. at 1013-1014. Indeed, when asked, "So after the accident, he wasn't complaining to you about problems with walking and that sort of thing?" his treating physician responded, "No, sir." App. at 1014. During the trial, the Trents' counsel attempted to deal with this adverse testimony by attacking Dr. Angotti for refusing to talk to counsel about the case, App. at 1015-1016, to which the trial judge said, "We're not going down this road," App. at 1016.

[77] App. at 1045-1047.

[78] App. at 1049.

[79] App. at 975.

[80] App. at 977.

[81] App. at 977-982.

[82] App. at 1051. As his physician explained, Mr. Trent's pelvic injury was treated "non-operatively." App. at 460.

[83] App. at 1059-1060.

substantial recovery within three months of the accident by testifying, "if I did this again, it might change."[84]

With respect to the issue of respondent superior, the Plaintiffs' counsel presented this argument in closing:

> As far as his being in the scope of employment, you know, it walks like a duck, it quacks like a duck, it is a duck, is all I'm telling you.
>
> I don't know what else to tell you. I mean, the guy has been there for 38 years. It wasn't like just another employee, it's the foreman supervisor.
>
> He can do anything as agent of that company he wants to do . . . I'm telling you, they contracted with the Trents to remove all this debris and what have you.
>
> That's part of the contract. Paid for by the Trents. He was an employee acting within the scope of his employment.[85]

In other words, the Plaintiffs argued to the jury that because removing debris was necessary as part of installation of a new roof, Roof Service is liable even though its employee, pursuant to a long-standing agreement, had returned the company truck to the company; had retrieved his own truck to return to the worksite; and, at a time and in a manner in which Roof Service exercised absolutely no control, would have retrieved salvageable scrap from which he would derive the sole economic benefit, Mr. Wilfong was acting within the course and scope of his employment.

Concerning the fact that Mr. Trent's treating physicians and medical records contradicted Mr. Trent's testimony that his post-accident limitations were attributable to the accident rather than to multiple pre-accident medical issues, many of which had either required surgery or would

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[84] App. at 1061. This testimony should also be taken in the context of testimony by his treating physician that "we told him that he can continue full normal activity and come back only if he thought he was having problems." App. at 464.

[85] App. at 1213-1214.

require surgery, the Plaintiffs' attorney told the jury that it should ignore the testimony of Mr. Trent's treating physical, the contents of his medical records, and reach its own conclusion from the medical records **as interpreted by Plaintiff's counsel essentially serving as their medical expert**:

> Now, I put in the records here, Dr. Angotti's. And, I'll get to that in a little bit. Had a little trouble with him. . . .
>
> My client hardly went to see him, maybe once a year, once every six months. . . .
>
> [I]f you have any problem about this, the pelvic problem, he's [defense counsel] going to say, well, **Dr. France said**, oh, **it's healed and what have you**.
>
> **You look at this imaging here**. **I submit to you** as of June, **it still hasn't healed from the imaging** - that there's still healing.
>
> You know, appearing incompletely healed. Now, **I think that's because of age**, but it doesn't matter.
>
> **But I couldn't get Dr. Angotti with that**, **because he is mad at me** because I had a lawsuit, that I really was a small potato involved in.[86]

In other words, Plaintiffs' counsel argued to the jury that it should reject the sworn testimony of Mr. Trent's treating physicians and medical records, some of which were in Mr. Trent's own handwriting, and accept the interpretation of those records of counsel, which is why Roof Service filed a motion in limine that was unfortunately denied.

With respect to Ms. Trent's consortium claim, of which almost no testimony was offered, her counsel told the jury, "As far as loss of consortium, I've never figured that one out. . . . He

[86] App. at 1216-1219. (Emphasis supplied) As Plaintiffs' counsel explained to the jury during closing argument, he had previously sued Dr. Angotti on behalf of another client. App. at 1219-1220.

wasn't there for her, when she had her knee, other health problems because of what he's gone through. He doesn't help around the house very much . . . ."[87]

At the end of their deliberations, the jury on a verdict form to which Roof Service objected found that Mr. Wilfong was acting within the scope of his employment; that Mr. Wilfong was at fault in the accident; that 100 percent of the fault was apportioned to Mr. Wilfong [without asking if Mr. Trent was also at fault in the accident]; and awarded stipulated medical expenses of $181,000; $250,000 for Mr. Trent's past general damages; $250,000 for Mr. Trent's future general damages; and $250,000 for Ms. Trent's loss of consortium, for a total verdict of $931,000.[88]

C. POST-TRIAL PROCEEDINGS

Roof Service timely filed a post-trial motion arguing that the Circuit Court erred in (1) failing to grant judgment as a matter of law to Roof Service where the subject driver in his personal vehicle after the conclusion of his workday was not within the course and scope of his employment at the time of the accident; (2) failing to exclude evidence alleging that Mr. Trent's physical limitations were caused by an accident when his treating physicians testified that those physical limitations were not caused by the accident; (3) failing to include on the verdict form Roof Services' independent contractor defense; (4) failing to set aside a jury verdict attributing no comparative contributory negligence to Mr. Trent who admitted at trial that he did not look both ways before crossing a street immediately before stepping into the street; and (5) failing to set aside the jury's verdict of $250,000 for Mr. Trent's past general damages and $250,000 for future

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[87] App. at 1226.

[88] App. at 1413-1415.

general damages, and by failing to set aside the jury's verdict to Ms. Trent $250,000 for loss of consortium, where such awards were redundant, excessive, and against the clear weight of the evidence, or to order a remittitur of those damages.[89]

On February 15, 2019, the Circuit Court entered an order denying Roof Service's post-trial motion[90] and it is from that order that Roof Service prosecutes its timely appeal.

III. SUMMARY OF ARGUMENT

First, this Court should remand for entry of judgment for the employer arising from an accident which occurred after its employee had returned to a jobsite in the employee's personal vehicle for purposes of retrieving scrap metal for sale by the employee the proceeds of which the employee would retain after he had earlier returned his employer's vehicle to his employer's place of business at the end of his workday.

Second, in the alternative, this Court should set aside the verdict and remand for a new trial where the Circuit Court (1) permitted testimony that a plaintiff's physical limitations were caused by an accident when the plaintiff's treating physician testified that those physical limitations were not caused by the accident; (2) failed to include on the verdict form in a respondeat superior case the employer's independent contractor defense where evidence was admitted in support of that defense; (3) failed to include on the verdict form in a negligence case whether an injured plaintiff's negligence contributed to his injuries where evidence was submitted in support of the defense of comparative contributory negligence; and (4) failed to set aside a jury verdict attributing no

[89] App. at 2093-2129.

[90] App. at 2176-2192.

comparative contributory negligence to a plaintiff who admitted at trial that he did not look both ways before crossing a street immediately before stepping into the street.

Finally, in the alternative, this Court should order a remittitur of damages on remand where the Circuit Court (1) failed to set aside the jury's verdict of $250,000 for the plaintiff's past general damages and $250,000 for his future general damages and (2) failed to set aside the jury's verdict to the plaintiff's spouse of $250,000 for loss of consortium, where such awards were redundant, excessive, and against the clear weight of the evidence.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner respectfully submits that because this appeal involves issues of first impression and of fundamental public importance as a $900,000 verdict has been returned against an employer when both the employer and employee agree that the subject accident occurred on the employee's time and involved the employee's personal vehicle after the employee's workday had ended, oral argument under R. App. P. 20 is warranted.

V. ARGUMENT

A. STANDARD OF REVIEW.

Concerning the denial of Roof Service's motion for summary judgment, the standard of review is *de novo*.[91] Likewise, relative to the denial of a R. Civ. P. 59(e) motion, the same *de novo* and abuse of discretion review applies as applicable to the underlying issues.[92] Here, Roof Service

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[91] Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)("A circuit court's entry of summary judgment is reviewed *de novo*.").

[92] Syl. pt. 1, *Wickland v. American Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998)("The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.").

respectfully submits that the Circuit Court erred as a matter of law by denying its summary judgment motion, by denying its motion for judgment at the close of plaintiffs' case-in-chief, by denying its motion for judgment at the close of trial, and by denying its post-trial motion.

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence are subject to review under an abuse of discretion standard."[93] Again, the Plaintiffs and their counsel were erroneously permitted due to the Circuit Court's in limine ruling to contradict the testimony of Mr. Trent's treating physicians and the medical evidence and to offer their own contrary evidence of causation and permanency, warranting the award of a new trial.

Similarly, although "Generally, this Court will apply an abuse of discretion standard when reviewing a trial court's decision regarding a verdict form,"[94] "the criterion for determining whether the discretion is abused is whether the verdict form, together with any instruction relating to it, allows the jury to render a verdict on the issues framed consistent with the law, with the evidence, and with the jury's own convictions."[95] Here, although the verdict form asked the jury whether Mr. Wilfong's negligence contributed to the accident, it omitted the question of whether Mr. Trent's negligence contributed to the accident despite substantial evidence justifying that question, and also omitted the question of whether Mr. Wilfong's status at the time of the accident was as an independent contractor, despite substantial evidence justifying that question, warranting the award of a new trial.

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[93] Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).

[94] Syl. pt. 4, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010).

[95] *Williams v. Charleston Area Med. Ctr., Inc.*, 215 W. Va. 15, 19, 592 S.E.2d 794, 798 (2003)(citations omitted).

Concerning the failure to set aside a verdict that allocated no fault to Mr. Trent and to remit damages that were clearly unsupported by the evidence, the standard of review is one of abuse of discretion,[96] which is well supported in the record.

Accordingly, Roof Service respectfully requests entry of an order setting aside the judgment and remanding the case for entry of judgment for the Petitioner or, in the alternative, entry of an order setting aside the judgment and remanding for a new trial or for entry of a judgment with a remittitur of damages.

B. THE CIRCUIT COURT ERRED BY FAILING TO AWARD JUDGMENT AS A MATTER OF LAW IN FAVOR OF AN EMPLOYER IN WHERE THE DRIVER IN AN ACCIDENT WITH A PEDESTRIAN PREVIOUSLY ENDED HIS WORK DAY, RETURNED HIS EMPLOYER'S VEHICLE TO HIS EMPLOYER, PICKED UP HIS PERSONAL VEHICLE, AND RETURNED TO THE JOBSITE FOR THE PURPOSE OF ENGAGING IN A PERSONAL EFFORT TO RETRIEVE AND SELL SCRAP METAL, THE PROCEEDS OF WHICH WOULD BE RETAINED SOLELY BY THE DRIVER, COMPLETELY OUTSIDE THE SUPERVISION OR CONTROL OF HIS EMPLOYER.

The doctrine of respondeat superior is a longstanding principal in Anglo-American law, which "imposes liability on an employer for the acts of its employees within the scope of employment, not because the employer is at fault, but merely as a matter of public policy."[97]

This Court has described the doctrine of respondeat superior as follows:

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[96] Syl. pt. 1, *Burke-Parsons-Bowlby Corp. v. Rice*, 230 W. Va. 105, 736 S.E.2d 338 (2012)("This Court reviews the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review."); Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976)("Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence."); *Coleman v. Sopher*, 201 W. Va. 588, 605, 499 S.E.2d 592, 609 (1997)("Remittitur typically arises in connection with a motion for a new trial, as it did in this case. Consequently, we will consider these issues together and apply the standard for reviewing a trial court's ruling on a motion for a new trial to our consideration.").

[97] *Dunn v. Rockwell*, 225 W. Va. 43, 62, 689 S.E.2d 255, 274 (2009) (citations omitted); *Zirkle v. Winkler*, 214 W. Va. 19, 21, 585 S.E.2d 19, 21 (2003).

> An agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship. Of course, if he is acting within the scope of his employment, then his principal or employer may also be held liable.[98]

The burden of establishing the vicarious liability of an employer for the acts of its employee occurring within the course and scope of the employment lies with the party asserting its existence.[99]

"There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative."[100]

Here, Roof Service did not select or engage Mr. Wilfong for purposes of salvaging scrap metal from the Plaintiffs' property to be sold exclusively for his financial benefit; did not pay Mr. Wilfong compensation for anything done after he returned the company vehicle at the end of his workday; did not have the power to dismiss Mr. Wilfong for an accident in Mr. Wilfong's vehicle on his personal time engaged in his personal activities; and did not control Mr. Wilfong relative to his operation of his personal vehicle or personal activities.

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[98] Syl. pt. 3, *Musgrove v. Hickory Inn, Inc.*, 168 W. Va. 65, 281 S.E.2d 499 (1981) (cited in *Dunn*, 225 W. Va. at 62, 689 S.E.2d at 274); see also *Griffith v. George Transfer & Rigging, Inc.*, 157 W. Va. 316, 201 S.E.2d 281 (1973) ("[t]he universally recognized rule is that an employer is liable to a third person for any injury to his person or property which results proximately from tortious conduct of an employee acting within the scope of his employment").

[99] See *Zirkle v. Winkler*, 214 W. Va. 19, 22, 585 S.E.2d 19, 22 (2003) ("it is always incumbent upon the one who asserts vicarious [respondeat superior] liability to make a prima facie showing of the existence of the relation of . . . employer and employee").

[100] Syl. pt. 5, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990).

The Circuit Court's error in failing to grant Roof Service as a matter of law based upon the undisputed evidence is best demonstrated by this Court's decision in *Falls v. Union Drilling Inc.*, 223 W. Va. 686, 72 S.E.2d 204 (2008).

In *Falls*, this Court described the circumstances of the accident as follows:

> Daniel Falls was fatally injured in a single vehicle accident that occurred while he and his supervisor, Donald Roach, were traveling home to Spelter, Harrison County, West Virginia, from a Union Drilling worksite located in Marshall County, West Virginia. On the previous work day, Donald Roach had worked at least one extra shift in addition to the five, regularly-scheduled eight-hour shifts he was scheduled to work that week. Roach drove home to Harrison County after his shifts ended, giving Daniel Falls a ride. During that drive, Roach lost control of the vehicle and Daniel Falls was fatally injured.[101]

In other words, as in the instant case, the motor vehicle accident happened after the conclusion of the workday as the supervisor and his subordinate were traveling from the worksite to their homes.

The employee's widow filed a wrongful death suit alleging that her husband's employer was liable under the doctrine of respondeat superior, but the employer filed a motion to dismiss, arguing that her suit was barred by the exclusive remedy provision of the workers' compensation statute.[102] After the trial court granted the employer's motion to dismiss, the widow appealed and this Court affirmed holding that because the widow's claims were predicated upon her husband and his supervisor being within the course and scope of employment, her claims were barred by workers' compensation immunity:

> As we recognized in *Brown*, "**[u]nder normal circumstances**, an employee's use of a public highway going to or coming from work is not considered to be in the course of employment. The reasoning underlying this rule is that the employee is being exposed to a risk identical to that of the general public; **the risk is not imposed by the employer**." *Brown*, 212 W. Va. at 126, 569 S.E.2d at

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[101] *Falls*, supra at 70, 672 S.E.2d at 206.

[102] Id. at 71, 672 S.E.2d at 207.

202.(Emphasis added). We further held in the Syllabus of *Buckland v. State Compensation Comm'r*, 115 W. Va. 323, 175 S.E. 785 (1934) that:

> An injury, resulting in death, received by an employee while traveling upon a public highway in the same manner and for like purposes as the general public travels such highway, and not in performance of his duties for his employer, is not an injury received in the course of employment within the meaning of the Workmen's Compensation Act and is, therefore, not compensable.

We observe here, however, that Appellant, in order to attempt to maintain a respondeat superior claim, does not plead that this accident occurred under normal circumstances. Rather, Appellant herself asserts special circumstances in order to attempt to make such a claim. We have recognized that various nuances of the "going and coming" rule may serve to alter its application where additional evidence exists linking the employer to the accident. One such exception to the rule is that if employees are required, as a condition of their employment, to routinely journey from place to place, then injuries incurred by those employees while traveling are compensable. We have held that "Workmen's Compensation law generally recognizes that an employee is entitled to compensation for an injury received while traveling on behalf of the employer's business." Syl. Pt. 1, *Calloway v. State Workmen's Compensation Comm'r*, 165 W. Va. 432, 268 S.E.2d 132 (1980). However, when an employee engages in a "major deviation from the business purpose", compensation can be denied. Id. at Syl. Pt. 3.

Another exception to the "going and coming" rule that we have recognized is the "special errand" exception. In *Harris v. State Workmen's Compensation Comm'r*, 158 W. Va. 66, 70-71, 208 S.E.2d 291, 293-94 (1974), we held:

> "When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, **the journey may be brought within the course of employment by** the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, **is itself sufficiently substantial to be viewed as an integral part of the service itself**."

Id. (citing 1 LARSON WORKMEN'S COMPENSATION LAW § 16.10 (1972)).12 (Emphasis added). In accord, *Courtless v. Jolliffe*, 203 W. Va. 258, 263, 507 S.E.2d 136, 141 (1998). Such a "special errand" may require the use of a highway to perform an employee's duties for the employer. For example, in Syllabus Point 1 of *Canoy v. State Compensation Comm'r*, 113 W. Va. 914, 170 S.E. 184 (1933), we stated:

> Injury or death of an employee of a subscriber to the Compensation Fund occurring upon a public highway and not on the premises of the employer, gives right to participate in the fund, when "the place of injury was brought within the scope of employment by an express or implied requirement of the contract of employment, of its use by the servant in going to and returning from work."

Id. (Emphasis added). The special errand exception to the "going and coming rule" is still applied by a majority of jurisdictions. See Arthur Larson and Lex K. Larson, 1 LARSON'S WORKER'S COMPENSATION LAW § 14.05 (2008).

In evaluating the rather unique nature of the set of claimed circumstances before us, and taking the allegations set forth in the complaint as true, we cannot avoid the fundamental conflict in Appellant's argument. In the case sub judice, Appellant's claims, as set forth in her complaint, intertwine the concepts of our traditional "going and coming rule" in the respondeat superior context, with those of employer workplace negligence, by alleging that Falls' injuries were the direct and proximate result of the workplace negligence of Union Drilling since Union "negligently and recklessly" required Falls, Roach, and other employees to "consistently work excessive hours without adequate rest or sleep."

Here, Appellant has pled "special circumstances" in the "going and coming rule" context by asserting in her complaint a direct connection between the workplace practices of Union Drilling and the injuries sustained by Mr. Falls. See *Brown*, 212 W. Va. at 125, 569 S.E.2d at 201. Appellant's complaint must be read to maintain that Falls' injuries were directly work-related.[103]

In other words, because the widow's suit was predicated upon the theory that "special circumstances" existed to take the fatal trip outside the "going and coming" rule, the supervisor and her husband would have been within the course and scope of their employment, thereby barring her wrongful death suit under the workers' compensation immunity statute.

In instant case, of course, there are no "special circumstances" alleged to bring what was not a "**risk imposed by the employer**" such as working its employees excessive hours or commanding Mr. Wilfong to perform a "special errand" on its behalf to bring the automobile

[103] *Falls*, supra at 75-76, 672 S.E.2d at 211-212 (emphasis supplied).

accident within his course and scope of employment, plainly warranting award of judgment as a matter of law to Roof Service.

This Court's recent decision in *Pratt v. Freedom Bancshares, Inc.*, 2018 WL 6016075 (W. Va.)(memorandum), further illuminates this point.

In *Pratt*, the plaintiff sustained significant injuries because of a head-on collision, the fault for which lied with John Hott, then Chair of the Board of Directors of Freedom Bancshares, Inc.[104] Mr. Hott was driving from his home to a regularly-scheduled meeting of the Board of Directors of Freedom Bancshares, Inc., when the vehicle he was driving crossed the center line and struck the vehicle operated by Mr. Pratt.[105] Mr. Pratt settled his claims with Mr. Hott and proceeded against Freedom Bancshares and others, alleging that Freedom was vicariously liable for the misconduct of Mr. Hott because, when the accident occurred, he was driving to a regularly-scheduled board meeting.[106] The circuit court granted summary judgment in favor of Freedom, which decision was upheld on appeal.

In affirming the holding that Freedom was not vicariously liable for Mr. Hott at the time of the accident as a matter of law, this Court first noted that vicarious liability requires the employee to be within the scope of his employment,[107] stating that, "'Scope of employment' is a relative term and requires consideration of surrounding circumstances including the character of the

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[104] *Pratt*, supra at *1.

[105] Id.

[106] Id.

[107] Id. at *3.

employment, the nature of the wrongful deed, the time and place of its commission and the purpose of the act."[108]

Pertinent to the Court's conclusion that Mr. Hott was not within the scope of his employment were the following facts: (1) the Bylaws provided that the scope of Mr. Hott's work was to manager and administer the affairs of the Bank and, the routine commute had nothing to do with that work; (2) Mr. Hott did not conduct any business of Freedom between the time he left his home and the time of the accident; and (3) no payment was made by Freedom to Mr. Hott for that particular meeting; rather, a fee was paid annually for his work as a Board member and no mileage monies were paid.[109]

As with Mr. Hott, Mr. Wilfong was in his own vehicle on a routine commute that had nothing to do with his roofing work for Roof Service. His regular work day had ended, and he left both the jobsite and his employer's property. Mr. Wilfong did not conduct any business for Roof Service after dropping his work truck off and retrieving his personal vehicle. Moreover, Mr. Wilfong did not receive any compensation from Roof Service for the personal salvage activities he undertook.

The *Pratt* Court also addressed the "going and coming rule," finding that Mr. Hott's circumstances fell squarely within its boundaries.[110] The bases for that conclusion were that "Freedom did not require petitioner to use any particular roadway during his commute and that Mr. Hott was not managing or administering Freedom's business and affairs during his commute.

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[108] See id., citing *Griffith v. George Transfer & Rigging, Inc.*, 157 W. Va. 316, 326, 201 S.E.2d 281, 288 (1973).

[109] Id.

[110] See id. at *5.

Nor was there any evidence that Freedom received some incidental benefit from Mr. Hott's commute."[111]

Again, as with Mr. Hott, the evidence in this case is undisputed that, at the time of the accident, Roof Service did not require Mr. Wilfong to use a particular roadway, and Mr. Wilfong was not engaged in any of the roofing work that his job with Roof Service required of him. Moreover, Roof Service received no benefit whatsoever from Mr. Wilfong's personal salvage activities.

The *Pratt* decision properly applies the rules respecting when an employer may be vicariously liable for the conduct of its employee. Where an employee is in his personal vehicle, driving to or from his regular workday and not engaged in any business benefitting his employer during that travel, he is outside the scope of his employment.

Simply stated, "An employer is not liable under the doctrine of respondeat superior for the negligent operation by an employee of a motor vehicle owned by the employee unless the employee was acting within the scope of the employment at the time of the accident."[112]

Section 233 of the RESTATEMENT (SECOND) OF THE LAW OF AGENCY provides that the conduct of a servant is within the scope of employment only during a period which has a reasonable connection with the authorized period. Here, the evidence is undisputed that Mr. Wilfong's compensated workday was over.

Section 235 of the RESTATEMENT (SECOND) OF THE LAW OF AGENCY provides that an act of a servant done with no intention to perform it as a part of or incident to a service because of

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[111] Id.

[112] Christopher Vaeth, *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R.5th 174 at § 1[a](1995) (footnote omitted).

which he is employed is not an act within the scope of employment. Here, the evidence is undisputed that Mr. Wilfong could have removed the scrap metal during his regular compensated workday using the company vehicle and, of course, had the accident occurred during that period, Roof Service would have been liable under the doctrine of respondeat superior. But, he did not do so. Instead, he waited until he was outside the course and scope of his employment on his on adventure and for his exclusive financial benefit to remove the scrap metal from the worksite for purposes of sale.

In this regard, Section 237 of the RESTATEMENT (SECOND) OF THE LAW OF AGENCY provides a servant who temporarily departs in space or time from the scope of employment does not re-enter it until he or she is again reasonably near the authorized space and time limits **and is acting with the intention of serving his or her master's business**. Again, there is no dispute in the evidence that Mr. Wilfong was serving his own business interests - and not those of Roof Service - when he returned to the worksite in his own personal vehicle to salvage scrap metal.

Consequently, many courts have held that whether using a company vehicle or an employee's vehicle, an employer is not liable for an automobile accident involving an employee unless, at the time of the accident, the employee was furthering the employer's business, was being directed in some manner by the employer, and was within the course and scope of employment.[113]

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[113] See, e.g., *J & C Drilling Co. v. Salaiz*, 866 S.W.2d 632, 639 (Tex. Ct. App. 1993) (despite being on 24-hour call and driving employer's vehicle, employee was not in course and scope when returning to work site from lunch); *Andrews v. Houston Lighting & Power*, 820 S.W.2d 411, 414 (Tex. Ct. App. 1991) (using company vehicle to get lunch is not in furtherance of employer's business); *Jones v. Blair*, 387 N.W.2d 349, 356 (Iowa 1986)("While Moorhead granted travel reimbursement to its employees, it had no right to control Blair before the time he was required to report for work, such as during his travel from Ankeny to Lansing or travel back to his home again. Moorhead had no right to dictate Blair's manner of travel, his speed, that he use his car to go and come from Ankeny to Lansing, or that he ever return to Ankeny at all. Moorhead had no claim to Blair's time until he actually reported to the job site in the morning, and it had no claim to his time once the job was completed."); *Roberts v. H-40 Drilling, Inc.*, 501 Fed. Appx. 759, 760

This includes accidents occurring at or near the workplace, as in this case, on the employee's own time while operating the employee's personal vehicle.

(10th Cir. 2012)("Mr. Danner was not rendering any service for H-40 when the accident occurred; instead, he was on his way home from work, intending to stop on the way for a personal doctor's appointment."); *Jones v. Latex Const. Co.*, 2012 WL 613855 (11th Cir. 2012)(employee was not acting within the course and scope of his employment while he was 'headed to work' at the time of auto accident, wherein he fatally collided with motorist's car, and therefore employee's employer was not vicariously liable for accident; there were no circumstances to except incident from the going and coming rule); *Jorge v. Culinary Institute of America*, 2016 WL 4938798 (Cal. App. 1st Dist. 2016)(motorist, who worked as chef instructor at culinary school, did not need to use his car or have it be available during the work day in order to perform his duties, motorist was not compensated for his drive home, and use of car to transport knifes and chef's jackets did not require any special route or increase risk of injury); *Archer Forestry, LLC v. Dolatowski*, 771 S.E.2d 378 (Ga. Ct. App. 2015)(a servant in going to and from his work in an automobile acts only for his own purposes and not for those of his employer, and consequently the employer is not to be held liable for an injury occasioned while the servant is en route to or from his work); *Freeman v. Hutson*, 738 So. 2d 148 (La. Ct. App. 1999)(employee's trip to bank was solely for his personal purposes, and thus employer was not vicariously liable for injuries sustained when plaintiffs' automobile was struck by vehicle driven by employee, as employee was not required to go to bank, was not compensated for use of his car, and was not awarded mileage allowance, and employee and his supervisor agreed that he did no business for employer while on trip, although employer acceded to employee's request to leave premises on personal business to take care of his banking at time when bank was less busy than at lunchtime); *Swierczynski v. O'Neill*, 41 A.D.3d 1145, 840 N.Y.S.2d 855 (4th Dep't 2007)(doctrine of respondeat superior as it relates to employee using his or her vehicle applies only where employee is under control of his or her employer from time that employee enters his or her vehicle at start of workday until employee leaves vehicle at end of workday, as in case, for example, of traveling salesperson or repairperson); *Clough v. Interline Brands, Inc.*, 925 A.2d 477 (Del. 2007)(respondeat superior did not apply to salesman driving home in his personal vehicle after his last appointment of the work day, as would allow motorist to hold salesman's employer vicariously liable for her injuries arising out of collision with salesman, where no purpose of employer was served at the time of the accident); *Patterson v. Southeastern Newspapers, Inc.*, 243 Ga. App. 241, 533 S.E.2d 119 (2000)(special mission exception to general rule that employee who is driving to or from work in automobile acts only for his own purposes and not those of employer **requires that the errand or mission itself be a special or uncustomary one, made at the employer's request or direction**); *Young v. Mooney*, 815 So. 2d 1107 (La. Ct. App. 2002)("connexity," for purposes of finding that negligent acts of employee occurred during course and scope of employment, is established when at time of accident employer had reason to expect that employee would undertake mission **and employee had reason to expect to be compensated for it**); *Colvin v Ellis Constr. Co.*, 840 F. Supp. 59 (N.D. Miss. 1993)(where driver was using a borrowed tractor-trailer to haul gravel for the employer, and the accident occurred as the driver was going to return the vehicle to the owner, it was not within the course and scope of employment because although from the point he drove into the gravel pit until he chose to return home, the employee was within the employer's right to control, once the driver chose to return home, not only did the employment relationship terminate, but the employee was also beyond the employer's right to control).

For example, in *Nabors v. Harwood Homes, Inc.*, 77 N.M. 406, 423 P.2d 602 (1967)(emphasis supplied), as in this case, a construction worker was involved in an accident in his own truck while on his way to one of his employer's construction projects even though his employer had not directed him to do so. The appellate court affirmed judgment for the employer stating, "We hold that an employee enroute to, or returning from, his place of employment, using his own vehicle is not within the scope of his employment absent additional circumstances **evidencing control by the employer at the time of the negligent act or omission of the employee**."[114] This includes, for example, where as in the instant case, an employee on his own

[114] See also *Munyon v. Ole's Inc.*, 136 Cal. App. 3d 697, 186 Cal. Rptr. 424 (1982)(employee was not required or compelled to pick up her paycheck on Friday, and that it was an option available at the election of the employee solely for the benefit of the employee); *Duff v. Vazquez*, 544 So. 2d 1124 (Fla. Ct. App. 1989)(employee was not within course and scope of employment while, on his day off, traveling to one of his employer's stores to socialize with people who worked there); *Pierce v. Ellis*, 519 So. 2d 251 (La. Ct. App. 1988)(employee who was returning to work to retrieve a list she forgot was not within the course and scope of employment where the employee was driving her personal car, and there were no expense accounts or reimbursements by the employer; her job was capable of being carried out completely at her office and normally was done so; the task that she decided to do at home after the workday was for her own convenience and at her choosing because she had to pick up her child and get home; the only reason that she was driving at all at the time was to go home; her return to the office was also for her own personal convenience because she wished to do work at home; her traveling was no more employment connected than at any other time; the fact that the employer might benefit eventually by the work she planned to do at home was purely incidental to and not connected with her traveling; and her trip at the time was not contemplated by the employer so the accident could not be regarded as a risk of harm fairly attributable to the employer's business); *Runyan v. Pickerd*, 86 Or. App. 542, 740 P.2d 209 (1987)(accident involving store manager driving his personal vehicle to his store on Sunday was not within course and scope where only reason for the employee's trip was his voluntary decision to perform his normal duties at an unusual time); *Morales-Simental v. Genentech, Inc.*, 2017 WL 4700383 (Cal. Ct. App. 2017)(employer was not liable for fatal traffic accident where employee of his own volition decided to come to work on his day off to respond to a problem at work); *Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc.*, 51 Wisc. 2d 170, 840 N.W.2d 132 (Wisc. Ct. App. 2013)(employee was not acting within scope of her employment when she was involved in accident with county bus while employee drove to employer's store on employee's day off to pick up store receipts and deposit them at local bank, and thus employer was not vicariously liable for damage to bus; employer did not exercise control over employee's route or method of travel, and travel was not integral part of employee's responsibilities as assistant manager).

time uses his own vehicle to return to a worksite to engage in business activities for his own financial benefit.[115]

In the instant case, because the evidence is undisputed that (1) Mr. Wilfong was in his own vehicle; (2) he had not been directed by his employer to return to the worksite; (3) he was not being compensated by his employer at the time of the accident; (4) his employer exercised no direction or control over his personal salvage activities; (5) his employer did not financially benefit from his salvage activities; and (6) his employer did nothing to increase the risk that Mr. Wilfong would negligently operate his personal motor vehicle causing the subject accident, Roof Service is entitled to judgment as a matter of law.

C. THE CIRCUIT COURT ERRED BY FAILING TO EXCLUDE EVIDENCE ALLEGING THAT A PLAINTIFF'S PHYSICAL LIMITATIONS WERE CAUSED BY AN ACCIDENT WHEN THE PLAINTIFF'S TREATING PHYSICIAN TESTIFIED THAT THOSE PHYSICAL LIMITATIONS WERE NOT CAUSED BY THE ACCIDENT.

Dr. France, Plaintiff's orthopedic surgeon, could not testify to a reasonable degree of probability that the issues that Mr. Trent describes with walking limitations were caused by the accident at issue. He testified, in fact, that the walking limitations were "probably not" caused by the accident.[116]

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[115] See *Baptist v. Robinson*, 143 Cal.App.4th 151, 49 Cal.Rptr.3d 153 (2006)(winery employee was not acting in course and scope of his employment, thereby precluding respondeat superior liability, when he was on his way on his own time to purchase grapes in his pickup truck and winery's agricultural bin fell from truck and was struck by motorcyclist, even though employee was authorized to make small quantities of his own wine on winery premises; employee was not authorized to use bin, that type of bin was not used for hauling grapes, and employee's making wine did not profit winery).

[116] App. at 465.

The causative effect of an event on a person's medical condition must be supported by competent medical evidence where, as here, the link is not direct or obvious.[117] "Potentially" and "possibly" is not sufficient causation testimony to support the claims that Plaintiffs are making with regard to the limitations allegedly occurring due to his hip fracture.[118] Moreover, where, as here, a plaintiff offers medical evidence in the form of testimony from a treating physician like Dr. France, a plaintiff's non-medical testimony regarding causation contradicting medical testimony and medical evidence is insufficient to support a jury's verdict.[119]

Thus, the Circuit Court erred in failing to exclude the Plaintiff's causation testimony which contradicted that of his treating physician and his own medical records.

Ms. Trent also complained that Mr. Trent has limitations and pain in his shoulder, which she attributed to the accident.[120] Dr. France testified, in no uncertain terms, however, that the severe arthritic condition in Mr. Trent's shoulder pre-existed the accident.[121] Specifically,

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[117] See Syl. pt. 3, *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W. Va. 689, 271 S.E.2d 335 (1980) (physician must state causal relationship between physical condition and the alleged negligent act in terms of reasonable probability); *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985) ("[i]n many cases the cause of the injury is reasonably direct or obvious, thereby removing the need for medical testimony linking the negligence with the injury").

[118] *Tolley v. ACF Indus., Inc.*, 212 W. Va. 548, 558, 575 S.E.2d 158, 168 (2002) ("indeterminate expert testimony on causation that is based solely on possibility . . . is not sufficient to allow a reasonable juror to find causation").

[119] See, e.g., *Sunshine Plumbing v. Benecke*, 558 So.2d 162, 165 (Fla. Ct. App. 1990)("In the instant case, not only is claimant's lay testimony the sole evidence of causation, it is unsupported and/or contradicted by the meager medical evidence. . . . Here the medical evidence is not in conflict and consistently relates claimant's cervical problems solely to his 1987 fall without reference to his 1983 lumbar injury. Under the circumstances of the instant case causation has not been proven. Claimant has therefore failed to satisfy the first prong of the subsequent accident compensability test by failing to prove the 1987 fall was a direct and natural result of the 1983 injury. We therefore reverse the award of benefits, costs and attorney's fees.").

[120] App. at 884-885.

[121] App. at 465.

consistent with his deposition testimony, he described the Plaintiff's shoulder issues as "old, long standing, something that's been going on for a long time" prior to the accident.[122]

Again, where a plaintiff offers medical evidence in the form of testimony of treating physicians and medical records that do not establish a causal relationship to a reasonable degree of medical certainty, a plaintiff's non-medical testimony regarding causation contradicting medical testimony and medical evidence is insufficient to support a jury's verdict, and the Circuit Court erred in failing to exclude such evidence.

D. THE CIRCUIT COURT ERRED BY FAILING TO INCLUDE ON THE VERDICT FORM IN A RESPONDEAT SUPERIOR CASE THE EMPLOYER'S INDEPENDENT CONTRACTOR DEFENSE WHERE EVIDENCE WAS ADMITTED IN SUPPORT OF THAT DEFENSE AND BY FAILING TO INCLUDE ON THE VERDICT FORM IN A NEGLIGENCE CASE WHETHER AN INJURED PLAINTIFF'S NEGLIGENCE CONTRIBUTED TO HIS INJURIES WHERE EVIDENCE WAS SUBMITTED IN SUPPORT OF THE DEFENSE OF COMPARATIVE CONTRIBUTORY NEGLIGENCE.

This Court has held that the criterion for determining whether a circuit court has abused its discretion regarding a verdict form "is whether the verdict form, together with any instruction relating to it, allows the jury to render a verdict **on the issues framed** consistent with the law, with the evidence, and with the jury's own convictions."[123]

Here, Roof Service's verdict form,[124] which was rejected, presented its defense of independent contractor consistent with the law and the evidence. Indeed, the Circuit Court

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[122] App. at 466.

[123] *Adkins v. Foster*, 195 W. Va. 566, 572, 466 S.E.2d 417, 423 (1995) (citing See 9A Charles Allan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2508 (1995); *Martin v. Gulf States Utilities Co.*, 344 F.2d 34 (5th Cir. 1965); *McDonnell v. Timmerman*, 269 F.2d 54 (8th Cir. 1959)) (emphasis supplied).

[124] App. at 150-152.

instructed the jury on the law of independent contractor.[125] Thus, it erred if failing to allow the jury to render a verdict on this issue by not including it on the verdict form.

Similarly, Roof Service's verdict form required the jury to answer the question of whether the Plaintiff's own negligence contributed to the accident prior to allocating fault between the Plaintiff and Mr. Wilfong.[126] Again, this was consistent with the evidence and the law as contained in the Circuit Court's instructions.[127] Instead, the Circuit Court used a verdict form that did not set up the question of allocating fault with the question of whether there was evidence of the Plaintiff's own negligence.[128]

Because Roof Service was deprived of is right to have "a verdict on the issues framed consistent with the law" and "the evidence," it is entitled to a new trial

E. THE CIRCUIT COURT ERRED BY FAILING TO SET ASIDE A JURY VERDICT ATTRIBUTING NO COMPARATIVE CONTRIBUTORY NEGLIGENCE TO A PLAINTIFF WHO ADMITTED AT TRIAL THAT HE DID NOT LOOK BOTH WAYS BEFORE CROSSING A STREET IMMEDIATELY BEFORE STEPPING INTO THE STREET.

Perhaps because the verdict form failed to ask the jury whether there was evidence of the Plaintiff's negligence, it allocated no fault to the Plaintiff even though he admitted at trial that he did not look both ways before crossing the street and the investigating office testified that the Plaintiff violated his legal duty to look both ways before crossing the street into the path of Mr. Wilfong's vehicle.

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[125] App. at 1183-1185.

[126] App. at 150-152.

[127] App. at 1185.

[128] App. at 1410-1412.

Clearly, pedestrians have a duty to look both ways before crossing the street and the failure to do so, in states without comparative fault, warrant the award of summary judgment to a motorist who strikes a pedestrian.[129]

Here, where the Plaintiff admitted that he did not look both ways before crossing the street, but only looked in one direction,[130] and where the investigating officer testified that the Plaintiff had a duty to look both ways before crossing the street into the path of the driver's vehicle,[131] the jury's verdict is clearly contrary to the evidence and a new trial is warranted.

F. THE CIRCUIT COURT ERRED BY FAILING TO SET ASIDE THE JURY'S VERDICT OF $250,000 FOR THE PLAINTIFF'S PAST GENERAL DAMAGES AND $250,000 FOR HIS FUTURE GENERAL DAMAGES, AND BY FAILING TO SET ASIDE THE JURY'S VERDICT TO THE PLAINTIFF'S SPOUSE OF $250,000 FOR LOSS OF CONSORTIUM, WHERE SUCH AWARDS WERE REDUNDANT, EXCESSIVE, AND AGAINST THE CLEAR WEIGHT OF THE EVIDENCE, WARRANTING A NEW TRIAL OR REMITTITUR.

"Ultimately, in reviewing an award of compensatory damages, a court should consider (1) whether the award is monstrously excessive; (2) where there is no rational connection between the award and the evidence; and (3) whether the award is roughly comparable to awards made in

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[129] See, e.g., *Bufkin v. Felipe's Louisiana, LLC*, 171 So.3d 851, 861 (La. 2014)(Guidry, J., concurring)("He then failed to look both ways before stepping out into the street from behind the dumpster. . . . Accordingly, I agree with the majority that there are no genuine issues of material fact and that the defendant is entitled to summary judgment in its favor as a matter of law."); *Smith v. Diamond*, 421 N.E.2d 1172, 1180 (Ind. Ct. App. 1983)("While it may be that Smith's view of northbound traffic would have been obscured by the southbound car which he ran behind, it is clear that had he looked, he would have known it was unsafe to cross precisely because his view was thus blocked. In that event, Smith's act of crossing the street without making any effort to look would clearly be a 'substantial factor in causing his injury.' W. Prosser, HANDBOOK OF THE LAW OF TORTS, (4th ed. 1971) at 421."); see also *Haymon v. Pettit*, 9 N.Y.3d 324, 880 N.E.2d 416, 417, 849 N.Y.S.2d 872, 873 (2007)(affirming summary judgment for the defendants where, among other things, the plaintiff "failed to look both ways before crossing the street").

[130] App. at 990 ("I was looking in the other direction . . . I was expecting him [the FedEx truck] momentarily."); App. at 1025 ("I was looking to my right."); App. at 1027 ("I was concentrating on the right.").

[131] App. at 653-656.

similar cases."[132] Plainly, a combined award of $500,000 to the Plaintiff is excessive when considering similar awards in other cases.

For example, in *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004), the jury awarded $250,000 for physical pain and suffering, mental and emotional distress, and loss of enjoyment of life suffered to date, and $250,000 for future pain and suffering, mental anguish, emotional distress, and inability to enjoy life, the same amount as in the instant case, where the plaintiff was shot by the defendant severely and permanently injuring his arm despite several corrective surgical procedures.

Similarly, in *Foster v. Sakhai*, 210 W. Va. 716, 559 S.E.2d 53 (2001), the jury awarded $250,000 for pain and suffering and $350,000 for loss of enjoyment of life in a medical malpractice action against a surgeon who allegedly removed healthy tissue instead of the patient's brain tumor, causing the patient had to undergo a second brain operation and suffering numerous and serious limitations on his ability to read, see, walk, or generally enjoy his life and his family.

Plainly, the evidence in this case does not support the compensatory damages awarded to the Plaintiff and either a new trial or a remittitur is appropriate.[133]

Similarly, the jury's award of $250,000 to the Plaintiff's spouse for loss of consortium was excessive compared to awards in other cases.[134] Accordingly, because the evidence in the case does

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[132] Palmer & Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 5TH at § 59(a)[5][b](2)(2017)(footnote omitted).

[133] See, e.g., *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993).

[134] See, e.g., *Harris v. Martinka Coal Co.*, 201 W. Va. 578, 499 S.E.2d 307 (1997)($200,000 awarded to employee's wife was not excessive where employee suffered serious spinal injuries requiring three months in body cast, had permanent health conditions and restrictions and was in continuous pain, economic expert testified that employee's economic losses were between $336,638 and $436,915 and that lost household services were valued at $143,934, and employer did not convert damage evidence in any way).

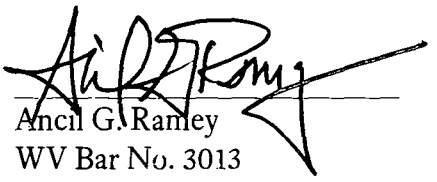
not support this award of damages for loss of consortium, either a new trial or remittitur is appropriate.

VI. CONCLUSION

WHEREFORE, the Petitioner, Roof Service of Bridgeport, Inc., respectfully requests entry of an order setting aside the judgment and remanding the case for entry of judgment for the Petitioner or, in the alternative, entry of an order setting aside the judgment and remanding for a new trial or for entry of a judgment with a remittitur of damages.

ROOF SERVICE OF BRIDGEPORT, INC.

By Counsel:



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CERTIFICATE OF SERVICE

I certify that on June 14, 2019, I served the foregoing "BRIEF OF THE PETITIONER" by depositing a true copy in the United States mail, postage prepaid, addressed as follows:

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