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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

No. 19-0200

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

REPLY BRIEF OF THE PETITIONER

Counsel for Petitioners

Ancil G. Ramey
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington WV 25722-2195
T: 304.526.8133
F: 304.933.8738
ancil.ramey@steptoe-johnson.com

Counsel for Respondents

Scot S. Dieringer
WV Bar No. 1015
333 Lee Avenue
Clarksburg, WV 26301
T. 304.623.3636
ddmosssax@aol.com

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I. STATEMENT OF THE CASE

Although R. App. P. 10(c)(4) and (d) collectively provide that the statement of the case section in a respondent's brief must be "[s]upported by appropriate and specific references to the appendix or designated record, the brief of the Respondents in this case, Charlotte Trent ["Mr. Trent," "Ms. Trent," or "Plaintiffs"], contains in its statement of the case section but four references to the appendix - to the Trents' contract with the Defendant, Roof Service of Bridgeport, Inc. ["Roof Service" or "Petitioner"],[1] to Roof Service's invoice,[2] to the traffic accident report,[3] and to the trial court's order denying Roof Service's post-trial motion.[4]

Similarly, although R. App. P. 10(c)(7) and collectively provide that the argument section in a respondent's brief "must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal," the argument section of the Plaintiff's brief contains but four references to the appendix - to roofing contract,[5] to time sheet records,[6] to selected pre-accident medical records for Mr. Trent,[7] and to a colloquy concerning the verdict form.[8]

Here, perhaps because of their non-compliance with the Rules of Appellate Procedure, there are statements in the Plaintiffs' brief not supported by the record.

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[1] Brief of the Respondents at 8.

[2] Id.

[3] Id. at 9.

[4] Id. at 11.

[5] Id. at 20.

[6] Id. at 29.

[7] Id. at 38.

[8] Id.

For example, in violation of the rules that it is improper to reference matters outside the record[9] or settlement negotiations,[10] the Plaintiffs reference settlement negotiations in their brief.[11]

Also, the statement that, "Prior to the accident in this matter, Mr. Trent was a robust eighty-one (81) year old" is not supported by any record reference because the actual evidence in

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[9] *Lee Trace, LLC v. Berkeley County Council*, 2017 WL 1535075 at *1 n.2 (W. Va.)(memorandum)("To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.")(citation omitted); *Berkhouse v. Great American Assur. Co.*, 2013 WL 6152414 at *3 n.2 (W. Va.)(memorandum)("To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.'")(citation omitted); *DeVane v. Kennedy*, 205 W. Va. 519, 532, 519 S.E.2d 622, 635 (1999)("We have held, on numerous occasions, that this Court's appellate review of a case is limited to the record presented to us on appeal.").

[10] *State of Idaho v. Bunker Hill Company*, 662 F. Supp. 725, 731 (D. Idaho 1987)("For purposes of determining Gulf and Pintlar's Motion for Relief from Order and Penn's motion to strike, the court deems as stricken those portions of Aetna and Pacific Indemnity's memorandum referring to the purported settlement negotiations."); *Gulf Coast Housing & Development Corp. v. Capital One*, 203 So. 3rd 366, 369 (2016)("Appellate briefs are not a part of the record on appeal, and this Court has no authority to consider facts referred to in appellate briefs, or in exhibits attached thereto, if those facts are not in the record on appeal. . . . Regarding the alleged impertinent statements and the reference to settlement negotiations, we give them no consideration as these contentions are not part of the record. For the reasons outlined herein, we grant the motion to strike portions of Gulf Coast's appeal brief referencing facts and comments that are not contained in the record."); *Fenske v. Tegman*, 157 Wash. App. 1064 at *2 n.1 (2010)("Fenske has moved to strike portions of the Tegmans' brief referring to pretrial settlement negotiations and posttrial improvements to their drainage system. The motion is granted."); *OEM-Tech v. Video Gaming Technologies, Inc.*, 2011 WL 13153640 at *1 n.1 (N.D. Cal.)("VGT also moves to strike those portions of the filing, also raised in OEM's opposition to VGT's motion to amend, that relate statements allegedly made in the course of settlement negotiations. See Fed. R. Evid. 408 and ADR Local Rule 5-12. Those portions of OEM's briefs were not considered by the Court, and OEM is hereby instructed that it may not make further reference to privileged settlement negotiations in its filings."); *Zhi Yang Zhou v. David*, 2012 WL 1668233 at *2 n.1 (N.D. Cal.)("Defendants note—and the Court agrees—that Plaintiffs improperly referenced settlement negotiations in their briefing. (Dkt. No. 97 at 2.) The Court did not consider this information in deciding the issues addressed in this Order."); *Liberty Manor Personal Care Home v. Department of Welfare*, 2015 WL 5432471 at *6 (Pa. Commw.)("Thus, this Court will strike the third and final argument section of Petitioners' brief and will not consider the references therein to the Department's alleged offers during settlement negotiations in this matter."); *Villarreal v. Villarreal*, 2016 WL 3926699 at *2 (Md. Ct. App.)("Husband filed a motion to strike and for sanctions, alleging that Wife had impermissibly referred to settlement negotiations between the parties in her brief to this Court. Husband contends that Wife stated in her brief that, during settlement talks at this Court, Husband indicated that he is unable to pay the judgments against him. Husband asserts that these discussions are subject to a confidentiality agreement, and because Wife has impermissibly alluded to inadmissible statements, she should be sanctioned. We will strike those statements in Wife's brief, but we decline to impose sanctions.").

[11] Brief of the Respondents at 7.

the record is to the contrary. For example, Ms. Trent admitted that **before the accident**, her husband had substantial problems with arthritis throughout his body, 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.[12] 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."[13] Similarly, Mr. Trent testified that he had been treated with physical therapy for neck and shoulder pain well before the accident.[14] He also admitted that **prior to the accident**, his shoulder was very arthritic;[15] that his treating physical indicated that he was a candidate for shoulder replacement surgery;[16] that he had previously broken the same arm;[17] that he suffered a condition called Scaphoid Lunate Advance Collapse in his wrist that required that it be rebuilt and a plate installed;[18] that he had open heart surgery followed by three months of rehabilitation;[19] 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

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

[13] App. at 952-953.

[14] App. at 973.

[15] App. at 986.

[16] App. at 987.

[17] App. at 987.

[18] App. at 1058.

[19] App. at 988.

replacement surgery;[20] and that he continues to treat for pre-accident cardiac issues.[21] He admitted that before the accident that he had reported 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.[22] 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.[23] Finally, 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 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**:

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[20] App. at 1044-1046.

[21] 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. 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.

[22] App. at 1045-1047.

[23] App. at 1049.

> [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.[24]

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.

Similarly, the statement in the Plaintiffs' brief that, "the retention of the scrap metal by Mr. Wilfong was a 'bonus' for the years of service to Roof Service,"[25] includes no reference to the appendix because although the Plaintiffs' counsel repeatedly referred to Mr. Wilfong's separate and independent salvage activities as a "bonus" throughout the trial, Roof Service's Owner testified in response to multiple "bonus" questions that, "it was either going to the dump, or if he wanted it, he could have it;"[26] "If he thought he could make some money at it, fine with me;"[27] "You can call it whatever you want to;"[28] and "the policy has been in effect for a number of years,

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[24] 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.

[25] Brief of the Respondents at 10.

[26] App. at 689.

[27] App. at 690.

[28] App. at 691.

it's a bonus for him, it's nothing for me."[29] There is absolutely no support in the record for the statement that Roof Service paid anything to Mr. Wilfong as a "bonus" relative to his separate and independent salvage activities.

With any record reference, the Plaintiffs also contend that "Mr. Wilfong had not ended his work day"[30] when the Owner testified that on the date of the accident, Mr. Wilfong returned to the Trent residence in his personal vehicle for independent salvage work **even though the distance between the company and the Trent residence is only a "block**" taking "**three or four minutes**"[31] and 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,[32] was not part of his job duties, nor was it a bonus for work performed for Roof Service,[33] and was done "On my time. . . . I was off the clock. I was on my own time."[34]

Finally, the Plaintiffs' statement that, "There is no evidence that Mr. Trent was struck in the street in this matter,"[35] again with no record reference, is simply incorrect as there was substantial testimony at trial that he was in the street.[36]

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[29] App. at 692.

[30] Brief of the Respondents at 28.

[31] App. at 710-711.

[32] App. at 822-823.

[33] App. at 848.

[34] App. at 859.

[35] Brief of the Respondents at 9.

[36] App. at 827 ("I walked behind my truck, and Mr. Trent was laying behind my truck in the street."); 829 ("He was in the street."); 832 ("I thought his legs was more in the street than on the sidewalk."); 1026 ("Q. And as you walked across the street, did you continue to look both ways? A. I didn't have to, wasn't anything in site [sic] . . . I wasn't going to take a week to go across the street."); 713 ("When I arrived, Mr. Trent was on the street, right behind Bruce's truck. Q. . . . Was he on the sidewalk

II. ARGUMENT

A. THE CIRCUIT COURT ERRED BY FAILING TO AWARD JUDGMENT AS A MATTER OF LAW 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.

Stated succinctly, "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."[37] Consequently, "within the context of an employee driving his or her own automobile in going to or returning from the workplace, a general rule that such travel is not within the scope of the employment, for the purpose of imposing vicarious liability upon the employer for the negligence of the employee-driver."[38]

Because 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,[39] the Plaintiffs in their brief attempt to avoid that burden in two ways.

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or on the street? A. He was on the street."); 828 ("He was in the street. His head was against the sidewalk."); 865 ("He wasn't on the sidewalk when I started backing down through there.").

[37] Christopher Vaeth, *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R.5th 174 at §2[a] (1995)(footnote omitted).

[38] Id. at § 3. This is because "while such activity is work motivated, the element of control is lacking." Id. Here, of course, there was no evidence that Mr. Wilfong had been directed to return to the worksite for his salvaging operations; rather, he did so completely on his own.

[39] 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").

First, they argue that because "Mr. Wilfong testified that he was an employee"[40] and that Roof Service "never denied that Mr. Wilfong was their employee,"[41] Roof Service's argument that he was not within the scope of his employment when he was separately and independently engaged in salvage activities on his own time and using his own vehicle "is perplexing."[42] This specious argument warrants no reply as an employer is not liable, for example, when an employee like Mr. Wilfong is involved in an accident in his own vehicle while returning to a workplace.[43]

Second, although they acknowledge that "where the facts are such that only on reasonable inference can be drawn therefrom, the question" of whether someone was acting within the scope of his or her employment "is one of law for the court to decide,"[44] the Plaintiffs argue that there were genuine issues of fact regarding the elements of "(1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control, "[45] but the evidence in this case was undisputed that 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. The fact that Roof

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[40] Brief of the Respondents at 13.

[41] Id.

[42] Id.

[43] Supra note 38.

[44] Id. at 14.

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

Service may have derived some incidental benefit from its contractual obligation to clean up the worksite being performed by Mr. Wilfong for his exclusive financial benefit did not bring his return to the worksite within the scope of his employment.

For example, in *Ludwig v. McDonald*, 204 A.3d 935, 944 (Pa. Super. 2019), the court recently held that even assuming there was some incidental benefit to an employer when an off-duty employee returned to the worksite in his own personal vehicle to retrieve some tools to repair his porch, because there was "no evidence that" his employer "exercised actual or potential control over" the employee's "vehicle or the use of such vehicle at the time and place of the accident" that the employer's "actual or potential control" could be inferred, particularly where, as in this case, his employer "provided pick-up trucks to be used during work hours."[46]

In its brief, Roof Service relied on this Court's recent decision in *Pratt v. Freedom Bancshares, Inc.*, 2018 WL 6016075 (W. Va.)(memorandum),[47] in which it held that a bank officer was not within the scope of his employment as he was driving from his home to a meeting of the

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[46] See also *Sussman v. Florida East Coast Properties, Inc.*, 557 So.2d 74 (Fla. Ct. App. 1990)(driver was outside scope of employer's business when she detoured on her way to work, at her employer's request, to purchase cake for fellow employee's birthday celebration, and driver's employer was thus not vicariously liable for plaintiff's injuries); *Ehlenfield v. State*, 62 A.D.2d 1151, 404 N.Y.S.2d 175 (1978)(where, at time of vehicular accident, New York state trooper was between tours of duty, attired in civilian clothes and was driving his pickup truck to police station to begin his next shift, trooper was not acting in scope of employment because any benefit which may have been conferred upon the employer by installation of refrigerator was too speculative as ground for application of doctrine of respondeat superior); *S. & W. Const. Co. v. Bugge*, 194 Miss. 822, 13 So.2d 645 (1943)(being required to complete paperwork at home did not bring employee's commute back to work in his own vehicle within his scope of employment); *Humphry v. Safeway Stores*, 4 Cal.App.2d 589, 41 P.2d 208 (1935)(delivery of daily report at employer's main store before employee traveled to his ultimate work destination did not make trip between locations within the scope of employment).

[47] In its brief, Roof Service also relied on this Court's decision in *Falls v. Union Drilling Inc.*, 223 W. Va. 686, 72 S.E.2d 204 (2008), but the Plaintiffs' brief not only makes no effort to distinguish the holding in that case, it fails to even cite it.

bank's board of directors.[48] The Plaintiffs' argument relative to *Pratt* and the other law relied on by Roof Service[49] which, again, are noticeably absent from the Plaintiffs' brief, is that "the 'going

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[48] See also *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, supra at § 1[a](footnote omitted).

[49] For example, 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; 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 which he is employed is not an act within the scope of employment; and 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; see also *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 (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 Americ*a, 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.

and coming rule' is not applicable because . . . Mr. Wilfong's salvaging of scrap metal . . . at least partially fulfilled one of the employer's contractual obligations to Plaintiffs,"[50] for which the Plaintiffs offer absolutely no legal support because the law is to the contrary.

For example, in *Nabors v. Harwood Homes, Inc.*, 77 N.M. 406, 423 P.2d 602 (1967)(emphasis supplied), yet another case relied on by Roof Service not cited in Plaintiffs' brief, 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**."[51] This includes, for example, where

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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).

[50] Brief of the Respondents at 19.

[51] 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

as in the instant case, an employee on his own time uses his own vehicle to return to a worksite to engage in business activities for his own financial benefit.[52]

Furthermore, the Plaintiffs' coming and going argument is, on its face, illogical as there is no dispute that Mr. Wilfong's workday had ended and he was no longer "on the clock;" he drove his company truck to company headquarters; he picked up his own truck; he drove back to the Plaintiffs' house; and as he was backing up struck Mr. Trent **before** he commenced his salvage

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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); *Hoy v. Great Lakes Retail Services, Inc.*, 2016 IL App (1st) 150877, 52 N.E.3d 386, 402 Ill. Dec. 465 (2016)(employee was not acting within the scope of his employment when he rear-ended motorist as he was driving himself to a regular workplace to attend a meeting with his employer, and thus, employer was not vicariously liable for employee's action); *Winzer v. Richards*, 185 So.3d 876 (La. Ct. App. 2016)(employee's allegedly tortious actions in rear-ending vehicle after leaving his employer's work site after the termination of his employment was not a risk of harm fairly attributable to the employer's business, and thus, employer was not responsible for passenger's injuries);

[52] 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).

operations. Thus, even assuming when he arrived at the worksite, he would have been acting within the scope of his employment, which Roof Service vigorously contests relying on the undisputed evidence, **Mr. Wilfong was still traveling to the worksite at the time he struck Mr. Trent** and there any many cases which hold that an employer is not liable for the automobile accidents of their employees driving their personal vehicles while traveling to or from a worksite.[53]

Finally, throughout their brief, without providing any substantive analysis, the Plaintiffs repeatedly argue that the issue of scope of employment was a jury issue, but this Court's decision in *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) illustrates that where the salient facts are undisputed as in this case, the legal implications of those facts are for the court, not for a jury.

In *A.B.*, a prisoner sued the regional jail authority alleging it was responsible for her sexual assault arguing, much like the Plaintiffs in this case, that because the employee's employment provided him with the opportunity to assault her, his employer was liable for the assault. Ruling as it has done in other cases,[54] this Court held that the issue of whether the employee was within the scope of his employment relative to the assaults was a matter of law, not a matter of fact:

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[53] See supra notes 46, 49, 51; see also *Pesio v. Sherman*, 285 Minn. 246, 172 N.W.2d 748 (1969)(employer was not liable for injuries sustained by pedestrian struck by employee in personally owned automobile while enroute to second place of business by employee who had completed work for day even though employee stated that purpose of traveling was to discuss business matters); *Traynor v. Super Test Oil & Gas Co.*, 245 So.2d 916 (Fla. Ct. App. 1971)(setting aside jury verdict where evidence showed that gas station employee who on his own time did repair work for gas station customer and had been off duty approximately five hours when involved in accident while driving customer's car in order to pick up customer at the place of her employment).

[54] See, e.g., *R.Q. v. West Virginia Div. of Corrections*, 2015 WL 1741635 (W. Va.)(memorandum)(affirming summary judgment to employer regarding alleged respondeat superior liability); Syl. pt. 7, *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982)("When a patient asserts that a particular method of medical treatment, such as surgery, was performed by the patient's privately retained physician without the patient's consent, the hospital where that treatment was performed will ordinarily not

> In Syllabus Point six of *Courtless v. Jolliffe*, 203 W. Va. 258, 507 S.E.2d 136 (1998) we held: "'An act specifically or impliedly directed by the master, or any conduct which is an *ordinary and natural incident or result of that act*, is within the scope of the employment.'" (quoting Syllabus, *Cochran v. Michaels*, 110 W. Va. 127, 157 S.E. 173 (1931) (emphasis added)); see also *Griffith v. George Transfer & Rigging, Inc.*, 157 W. Va. 316, 326, 201 S.E.2d 281, 288 (1973) ("'Scope of employment' is a relative term and requires a consideration of surrounding circumstances including the character of the employment, the nature of the wrongful deed, the time and place of its commission and the *purpose* of the act." (emphasis added)).
>
> The "purpose" of the act is of critical importance and this element echoes throughout our jurisprudence. Moreover, the Restatement (Second) of Agency § 228 (1958) states that a servant is within scope of employment if the conduct is 1) *of the kind he is employed to perform*; 2) occurs within the authorized time and space limits; 3) it is actuated, at least in part, by a *purpose to serve the master*, and; 4) if force is used, *the use of force is not unexpectable by the master.*(Emphasis added). "Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or *too little actuated by a purpose to serve the master.*" Id. (emphasis added). . . .
>
> Respondent has failed to adduce any evidence bringing these alleged criminal acts within the ambit of D.H.'s employment beyond merely suggesting that his job gave him the opportunity to commit them. Equally importantly, there are no disputed material facts which require a jury's determination. We recognize that by virtue of his position as a correctional officer, D.H. was unquestionably in a particularly unique position to perpetrate such acts, if any. However, the mere proximity and opportunity that his job provided to commit such acts do not, alone, bring them within the scope of his employment.

Likewise, in the present case, where 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.

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be held liable to the patient upon the consent issue, where the physician involved was not an agent or employee of the hospital during the period in question.").

Wilfong would negligently operate his personal motor vehicle causing the subject accident, Roof Service was entitled to judgment as a matter of law.

B. 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, Mr. Trent'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. In fact, he testified that the walking limitations were "probably not" caused by the accident.[55] As 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,[56] and "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.[57]

Similarly, Dr. France testified that the severe arthritic condition in Mr. Trent's shoulder pre-existed the accident.[58] Specifically, 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.[59]

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[55] App. at 465.

[56] 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").

[57] *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").

[58] App. at 465.

[59] App. at 466.

In the section of the Plaintiffs' brief addressing this issue,[60] there is but a single record reference to some pre-accident medical records indicating that Mr. Trent, whom the Plaintiff's elsewhere describe as "a robust eighty-one (81) year old," had seven past surgeries, was taking as many as ten medications, had coronary heart disease, diabetes, hypertension, osteoarthritis (including the knee), rheumatoid arthritis, diverticulosis, esophageal reflux, aortic stenosis, carotid stenosis, sinus arrhythmia, pyuria, macrocytosis, intermittent claudication, acute renal failure, and other disorders.[61] How this contradicts Dr. France's causation testimony is not explained.[62]

C 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

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[60] Brief of the Respondents at 30-38.

[61] Id. at 38, App. at 1511-1541.

[62] The Plaintiffs' legal arguments are equally non-responsive. They note the undisputed fact that Mr. Trent suffered injuries in the accident, Brief of the Respondents at 32, but the issue on appeal is not one of injury, but of permanency, which was disputed by Mr. Trent's treating physician. Similarly, the Plaintiffs cite this Court's decision in *Pygman v. Helton*, 148 W. Va. 281, 134 S.E.2d 717 (1964), but (1) *Pygman* dealt with the causation of an injury, not its permanency, and (2) in *Serbin v. Newman*, 157 W. Va. 71, 198 S.E.2d 140 (1973), this Court limited *Pygman* to where the testimony is "uncontradicted" that a medical condition did not exist before the subject accident. Next, with respect to the decision in *Bethlehem-Sparrows Point Shipyard v. Scherpenisse*, 187 Md. 375, 382, 50 A.2d 256, 260 (1946), what the court actually held was, "It is undeniable that mere possibility of causal connection between a workmen's accidental injury and his death is not of itself sufficient to make a submissible case." Finally, the Plaintiffs reference *Myers v. Pauley*, 2013 WL 3184917 at *2 (W. Va.)(memorandum), but unlike this case, the plaintiff's treating physician there testified that "the type of fracture suffered by respondent is usually associated with an automobile accident, and that fractures are sometimes missed on regular x-rays," which explained the absence of a fracture on a post-accident x-ray. In the present case, unless Mr. Trent's attorney is also permitted to serve as his medical causation expert, the Circuit Court erred by failing to exclude argument or evidence contrary to the sworn testimony of Mr. Trent's treating physician.

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."[63] Here, Roof Service's verdict form,[64] which was rejected, presented its defense of independent contractor consistent with the law and the evidence. Indeed, the Circuit Court instructed the jury on the law of independent contractor.[65] Thus, it erred if failing to include 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.[66] Again, this was consistent with the evidence and the law as contained in the Circuit Court's instructions.[67] 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.[68]

Plaintiffs' sole substantive argument regarding the improper verdict form is one of waiver,[69] but the citation to the record did not involve the issue of the content of the verdict form, but its return by the jury at the end of their deliberations.[70]

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[63] *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).

[64] App. at 150-152.

[65] App. at 1183-1185.

[66] App. at 150-152.

[67] App. at 1185.

[68] App. at 1410-1412.

[69] Brief of the Respondents at 38.

[70] App. at 1265-1266 ("THE COURT: Please, be seated. Okay. Madam Foreperson, has the jury reached a verdict? JUROR: Yes, sir. THE COURT: Would you hand it to the bailiff, please. Counsel, come forward, please. BENCH CONFERENCE. THE COURT: View the verdict. Any objection? . . . MR. DIERINGER: No, sir. THE COURT: Mr. Cooper. MR. COOPER: No."). Frankly, for Plaintiffs

D. 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 concerning Mr. Trent's negligence, it allocated no fault to him even though he admitted he did not look both ways before crossing the street and the investigating office testified that MR. Trent violated his legal duty to look both ways before crossing the street into the path of Mr. Wilfong's vehicle because 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.[71]

Here, where Mr. Trent admitted that he did not look both ways before crossing the street, but only looked in one direction,[72] and where the investigating officer testified that Mr. Trent had a duty to look both ways before crossing the street into the path of the driver's vehicle,[73] the jury's verdict is clearly contrary to the evidence and a new trial is warranted.

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to argue this constituted a waiver of objections to the contents of the verdict form after the Circuit Court rejected the verdict form tendered by Roof Service is incomprehensible.

[71] 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").

[72] 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.").

[73] App. at 653-656.

Again, the Plaintiffs' brief misrepresents the record evidence. For example, they state, "Mr. Trent was the only individual who witnessed the accident,"[74] when Mr. Wilfong also witnessed the accident. They also state, "The evidence conclusively shows that Mr. Trent was not hit while crossing the street,"[75] when the evidence, as discussed, was to the contrary.[76] Finally, the Plaintiffs' statement, again without citation to the record, that "the officer . . . testified that Mr. Trent had not done anything negligent"[77] is inaccurate as the officer testified that (1) Mr. Trent told the officer that "as he stepped onto the sidewalk" from the street the accident occurred; (2) that, in the officer's opinion, Mr. Trent should have been able to see the truck had he been looking in that direction; and (3) Mr. Trent "had to have been violating basic due care."[78] Plainly, exacerbated by the failure to place any line on the verdict form to allocate fault to Mr. Trent well-supported by the evidence, the Circuit Court should have set aside the verdict.

E. 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

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[74] Brief of the Respondents at 39.

[75] Id.

[76] This included the testimony of the investigating officer who reported that when he arrived on the scene, everything but "a portion of" Mr. Trent's legs were in the street, not on the sidewalk, App. at 642, and a pedestrian does not fall forward when struck by a vehicle backing down a street. See also App. at 647 ("he was either at the edge of the sidewalk or on the road due to his body position").

[77] Brief of the Respondents at 40.

[78] App. at 655-656.

award and the evidence; and (3) whether the award is roughly comparable to awards made in similar cases."[79]

With respect to the evidence supporting an award to Mr. Trent of $500,000 in general damages, he reiterates the argument, contrary to the evidence, including from his own treating physicians and medical records, that "Prior to the accident, Mr. Trent was a robust eighty-one (81) year old man who enjoyed life."[80] Plainly, the evidence in this case does not support the compensatory damages awarded to Mr. Trent and either a new trial or a remittitur is appropriate.[81]

Similarly, the jury's award of $250,000 to Ms. Trent for loss of consortium was excessive compared to awards in other cases where, again, without any citation to the record, she states, "Mrs. Trent has been saddled with a life sentence because of the injuries suffered by her husband in the accident. . . . Mrs. Trent has had to perform household chores, provide comfort and aid to her husband, etc."[82] Respectfully, the record evidence in this case concerning Mrs. Trent's loss of consortium is not referenced in her brief because there is no rational connection between the actual evidence at trial and $250,000.

III. 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.

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

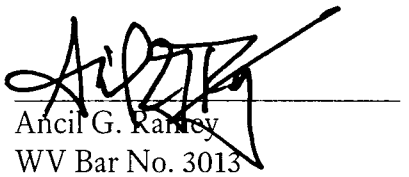
[80] Brief of the Respondents at 41.

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

[82] Brief of the Respondents at 41-42.

ROOF SERVICE OF BRIDGEPORT, INC.

By Counsel:



Ancil G. Ramey
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington WV 25722-2195
P. 304.526.8133
F. 304.933.8738
ancil.ramey@steptoe-johnson.com