

/s/ David Hammer
Circuit Court Judge
Ref. Code: 1898ZKE1

E-FILED | 11/6/2018 5:05 PM
CC-19-2016-C-116
Jefferson County Circuit Clerk
Laura Storm

in the Circuit Court of Jefferson County, West Virginia

Carl Long,
Plaintiff,

vs.)

Case No. CC-19-2016-C-116

JANE DOE,
PROGRESSIVE CASUALTY INSUR CO)
(NTC DEF),
Progressive Commercial Casualty)
Company,)
United Financial Casualty Company,)
Jeffrey Cross ET AL,)
Defendants)

Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law

On the _____ day of October, 2018, the Court considered Defendant's Renewed Motion for Judgment as a Matter of Law, the Plaintiff's Response thereto, and Defendant's Reply. Upon review of the same and the applicable law, the Court is of the opinion that there is no basis to grant a Judgment as a Matter of Law in this matter.

LEGAL STANDARD

The West Virginia Supreme Court of Appeals has set forth standard that a trial court should follow when considering a motion for a directed verdict:

Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence.

Brannon v. Riffle, 475 S.E.2d 97 (W.Va. 1996)(citations omitted). This standard

applies after the jury returns its verdict and the defendant renews its motion pursuant to W.Va. R. Civ. P. 50(b):

[i]n determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Syl. Pt. 5, *Orr v. Crowder*, 315 S.E.2d 593 (W.Va. 1983).

It has long been the law in West Virginia that "[t]he admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Syl. Pt. 5, *Browning v. Hickman*, 776 S.E.2d 142 (W.Va. 2015). In addition, both circumstantial and direct evidence are relevant to a determination of sufficiency, and a verdict may overturned "only where the evidence points all one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Orr v. Crowder*, 315 S.E.2d at 605 (emphasis in original). Lastly, because "[i]t is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting," the finding of the jury should ordinarily not be disturbed on appeal. *Id.*

FINDINGS OF FACT

I. Mr. Long testified that he must make the majority of his income in just 6 months of the year; thus, his counsel argued that his inability to work the month

of April was the equivalent of Mr. Long losing 1/6 of his annual income.

2. Mr. Long testified that after he got the 2016 Peterbilt as a replacement truck, he still suffered losses attributable to the wreck because the Peterbilt could not perform as well as his 2005 Freightliner and it cost more money to run. This testimony was uncontroverted.

3. Mr. Long testified that he knew of no adverse weather events, no economic downturns, or no events in the local market, such as a new competitor in his niche business, that could have accounted for his lost business profits in 2016.

4. Mr. Long's accountant, Chad Lawyer, was in the courtroom to hear Mr. Long testify that there were no other causes for his 2016 lost profits but the hit-and-run wreck.

5. Defense counsel declined to challenge Mr. Lawyer's credentials before the Court allowed Mr. Lawyer to testify as an expert before the jury:

MR. SKINNER: Your Honor, I would move to qualify Mr. Lawyer as an expert in the field of accounting based on his qualifications, education, training and experience.

THE COURT: Any objections?

MR. CALTRIDER: No objection.

THE COURT: You are certified as an expert, sir.

6. Mr. Lawyer told the jury that he examined five years of Mr. Long's tax returns to determine what his average income would have been in 2016 had the wreck not occurred. Mr. Skinner asked Mr. Lawyer about Mr. Long's business profits in 2012, because they were significantly lower than the other years and how this

might have affected Mr. Lawyer's lost profit calculation:

MR. SKINNER: So let me ask you this question, looking at the bar graph—do you see the 2012—the second one from the left?

MR. LAWYER: Yes.

Q. That's—would you agree significantly lower than the rest?

A. Yes.

Q. Were you made aware that in 2012 Mr. Long had child custody issues? He could only work part of the day in that year.

A. Yes.

Q. . . . So, if you knew that in 2012 was a bad year for Carl why did you include it in your calculation?

A. Sure. I felt that a five year average would give a good baseline for Carl's business. You know, you're going to have—you can see on the chart into 2012 was below average, but 2014 and 2015 were above the average line, so averaging those two out—averaging the '12 year with the '14 and '15 year bring that to a way I can feel is conservative—a conservative estimate of his gross receipts.

Q. But wouldn't 2014 and 2015 - both good years, but also the most recent years—wouldn't they be a better representation of really what his lost income was going to be in 2016?

A. Potentially.

Q. So, you still kept the conservative numbers?

A. Yes, I went with five years conservative at that time.

Q. Okay. If you had not used the 2012 would you agree that your calculation of Carl's damages would have been much higher?

A. Yes, I agree.

(Trial Tr., p. 113, line 23- p. 115, line 10).

7. Plaintiff's counsel asked Mr. Lawyer whether he was aware of a recession in

the local economy in 2016 or the years immediately preceding it:

Q. So is it fair to say from your experience as an accountant [say] handling . . . at least another 500 more clients in this region—are you aware of the general ups and down of the economy here?

A. I think I am, yes.

Q. Okay.

A. I see what my businesses do, my clients' businesses do, you know, year after year and any indications of ups and downs, yes, I would notice those when preparing their returns.

Q. Were you familiar with the condition of the local economy back in 2016?

A. Again, through working with my clients I feel I have a good grasp on what the economy was in 2016, . .

Q. So was there a recession here—based on your personal experience—back in 2016.

A. Not that I'm aware of.

Q. How about in 2015?

A. Not that I'm aware of.

Q. 2014.

A. No.

Q. Okay. Is it fair to say that 2014, 2015, 2016 were fairly similar from the external economy based on your experience?

A. I think that's a fair estimation, yes, sir.

Q. Is it fair to say that you would have expected—just based on the local economy—that Carl Long's business would have done about as well in 2016 as it had in the previous couple of years?

A. Yes.

...

Q. So during your deposition did—or since have you learned of any reason to think that the economy in 2016 was any different?

A. No, sir.

Q. So does this five year average—does that take into account the ups and downs of Carl's particular market?

A. Yes, I think it does.

Q. And what makes you say that?

A. Well, in any given year as we saw earlier—earlier reports from Mr. Long—different days worked. Then we heard about different weather conditions. All those things are going to affect Mr. Long's business, so I essentially tried to—tried to even those out through averaging the five years.

Q. So, the amount you determined were Mr. Long's lost profits were \$18,428, is that right?

A. Yes.

Q. Do you hold that opinion to a reasonable degree of certainty?

A. Yes, I do.

Q. Is there anything that makes you think—that gives you doubt about how accurate that was?

A. No, sir.

Trial Tr., p. 116, line 13- p. 119 line 10).

8. Mr. Lawyer reviewed Mr. Long's 2017 business profits and, without the business interruption and increased expenses that Mr. Long suffered because of the wreck, Mr. Lawyer testified that business profits bounced back to pre-crash

levels. The 2017 tax returns were direct evidence supporting Mr. Lawyer's conservative opinion regarding Mr. Long's lost profits in 2016.

9. On cross-examination, defense counsel tried to impeach the credibility of Mr.

Lawyer and his opinions:

MR. CALTRIDER. Would you agree with this statement "the first step in determining business interruption loss is to build the foundation. This requires the finding of financial performance that would have occurred assuming the interruption never occurred, developing the foundation relies on assessing the historical trends of the business, the market trends, and competitive trend?"

MR. LAWYER: I agree with that statement. That is verbatim from all the information that I found on the internet.

Q. That's one of the statements that you found about how to do the gross receipts method for evaluating his loss.

A. Yes.

Q. You only focused on assessment of historical trends through tax returns.

A. Yes, I did, except that if the market analysis is very difficult in Mr. Long's case where he's a sole individual. There is no public trade company that does exactly the same thing as Mr. Long. That made it almost impossible to obtain.

Q. So you did no analysis of market trends.

A. That is correct.

Q. You did no analysis of competitive trends.

A. Again small, individual, sole proprietor there's probably not another contractor in the area that does exactly like Mr. Long, so, if you're talking about, you know, public trade companies have information available. That can be done, but this is not that case. This is a small, individual, sole proprietor.

(Trial Tr., p. 139 line 19- p. 140, line 23).

10. Mr. Caltrider tried to impeach Mr. Lawyer because he allegedly did not take into consideration changes in Mr. Long's business over the years:

MR. CALTRIDER: We've heard testimony from Mr. Long that his business has changed over the years. You didn't take that into consideration, did you?

MR. LAWYER: No, sir, I didn't.

(Trial Tr., p. 141 lines 6-9).

11. However, Mr. Lawyer did consider the fact that Mr. Long's business changed after 2012 to make it more profitable. He did this by giving the years 2011-2013 the same weight as the years 2014 and 2015, after Mr. Long made the changes that made his business more profitable. Mr. Lawyer kept the prior years 2011-2013 in his calculation in order to get a conservative figure for lost profits.

12. Defense counsel's cross-examination continued:

MR. CALTRIDER: So if I understand correctly the basic premise for your lost income projections is that all things are consistent over all the years—2011 through 2016—but for this accident.

MR. LAWYER: All things are not consistent, but the variables that would impact Mr. Long are—would factor in some each year, so each year has a varying weather pattern. Each year would have potentially a varying impact if, you know, there were any significant changes in the economy in those five years. It would all factor into each of those year's tax returns. I'm simply averaging five years and coming up with a number.

Q. You just assume that there were no outside forces that you were aware of in 2016 that would have caused Mr. Long's business to decline.

A. That's correct.

Q. But you did not analysis to verify that.

A. That is correct.

Q. Mr. Long told you that he felt his business would have been about the same or better?

A. Yes.

Q. So you just took that at face value?

A. When I'm—when I'm analyzing this particular and/or analyzing business, say a client wants to acquire a business I'm looking at historical data to determine a value for that business, and the, you know, I think the idea or assumption then is that business will do the [same] if not better assuming there's no major interruptions, and so yes, I feel that using my historical numbers I've given—I've sort of given a conservative calculation on what the business would have done.

(Trial Tr., p. 149 line 8- p. 150, line 10).

13. Mr. Lawyer testified that he had experience working with hundreds of local companies and he was unaware of any additional adverse event in Mr. Long's business that could have accounted for Mr. Long's business losses, other than the wreck. Mr. Lawyer was also permitted to rely upon Mr. Long's statement that the wreck was the cause of his losses.

14. One of the Court's jury instructions was as follows:

An expert witness is a witness who has more specialized knowledge than an average person has about a particular subject. This specialized knowledge may be from education, training, or experience. In deciding the weight to give an expert's testimony, you

may consider the witness's skill, knowledge, experience, background, and familiarity with the facts of the case. You may also consider the expert's truthfulness and take into account whether the expert testimony is sensible or reliable, and compare it to other evidence. After considering the facts and circumstances on which an expert's opinion is based, you may give each expert's testimony the weight you believe it is entitled to receive. You can believe, or not believe, any part of any expert's testimony.

Charles Lawyer, CPA, an expert witness, relied on out-of-court material in forming his expert opinion. Mr. Lawyer may not have had personal firsthand knowledge of this out-of-court material. An expert's opinion is only as good as the out-of-court material upon which he relies in forming his opinion. You may consider whether the out-of-court material relied upon by Mr. Lawyer is accurate and reliable and compare it to other evidence. It is up to you to determine the value of an expert witness's testimony.

(See jury instructions, p.5).

15. Mr. Long was certain that the hit-and-run wreck was the sole cause of his

business losses, and Mr. Lawyer relied upon Mr. Long's statements as to causation. The jury was instructed by the Court that it could accept or reject any witnesses' testimony, including that of Mr. Long:

You needn't accept all of the evidence as true or accurate. You are the sole judges of the credibility of witnesses and the weight of evidence. "Credibility of a witness" means the truthfulness, or lack of truthfulness, of a witness. "Weight of the evidence means the extent to which you are, or are not, convinced by the evidence. If you believe that any witness in this case has knowingly testified falsely as to any material fact, you may, after full consideration, disregard the testimony in whole or in part, or give it such weight and credit you believe it deserves.

To determine the credit and weight you will give to the testimony of any witness you may consider the following:

- good memory, or lack of memory, of the witness;
- interest, or lack of interest, of the witness in the outcome of the trial;
- relationship of any witness to any of the parties or other witnesses;
- demeanor and manner of testifying of the witness;
- opportunity and means, or lack of opportunity and means, to have knowledge of the matters concerning the witness' testimony;
- Reasonableness, or unreasonableness, of the testimony of the witness;
- Apparent fairness, or lack of fairness, of the witness;
- Intelligence, or lack of intelligence, of the witness;
- Bias, prejudice, hostility, friendliness, or unfriendliness of the witness, for, or against, the plaintiff or defendant;
- Contradictory statements of any witness, if you believe any were made by the witness, and that they contradict his or her testimony;
- Contradictory acts of any witness, if you believe that the witness made any, and that they contradict his or her testimony.

From these considerations, and all other evidence and circumstances appearing in the trial, you may give such credit and weight, to the testimony of each witness as you believe it is entitled to receive.

(Jury Instructions, p. 2 of 11).

16. The Defendant failed to provide the jury with any evidence of an adverse weather event, economic downturn, or entry of a new competitor into Mr. Long's niche business that might have accounted for his lost business profits in 2016.

17. Mr. Long's tax records in the two years preceding the wreck showed

that Mr. Long's business was doing well prior to the wreck.

18. The Defendant did not counter CPA Lawyer's testimony with its own expert.

19. Mr. Long's 2017 tax returns provided the jury additional evidence of causation because the returns showed that once Mr. Long was able to work a full year without interruption, using a Freightliner that performed virtually identically to the one that he lost, profits rebounded to 2014 and 2015 levels.

20. The Court correctly instructed that the jury could rely upon direct evidence, like Mr. Long's tax records, and that the jury could also make reasonable inferences based upon their own life experiences and common sense:

[d]irect evidence means a fact was proven by a document or by testimony from a witness who heard or saw the fact first hand. . . . When direct evidence is proven, you may infer other facts that naturally or logically follow according to your common experience. This is called indirect or circumstantial evidence You may draw reasonable inferences from the evidence, but there must be a logical connection between the proven facts and your conclusion. You may use your experience and common sense to reach conclusions from facts that have been proven.

(See jury instructions, p. 4).

21. It was properly a question of fact for the jury to decide whether an established business like Mr. Long's would suffer substantial losses in having to shut its doors for an entire month during the busiest time of the work year.

22. During deliberations, the jury asked the Court if they could

independently assess Mr. Long's lost profits for 2016. The Court asked the parties' position and both parties agreed that the jury could independently assess Mr. Long's 2016 lost profits.

23. Two of the jury members—one third of the jury panel—were accountants with backgrounds in auditing and tax preparation.

24. After considering all of the evidence, which may have included discounting the 2012 downturn in plaintiff's business profits due to the unique circumstances of the effect of his divorce on his ability to devote his full attention to the demands of his business, the jury placed \$40,000 in the verdict for Mr. Long's lost profits.

25. The jury's lost profit verdict does not appear to be supported by the evidence and a remittitur may be appropriate. However, the Defendant is not entitled to a new trial on lost profits.

CONCLUSIONS OF LAW

Mr. Lawyer was "qualified as an expert by knowledge, skill, experience, training, or education" to opine about Mr. Long's increased expenses and business losses, and he was permitted to testify "in the form of an opinion or otherwise." W.Va. R. Evid. 702(a). The Defendant did not object to Chad Lawyer's qualifications to testify as an expert at trial and the Court qualified Mr. Lawyer to testify as an expert.

Chad Lawyer testified to a reasonable degree of accounting certainty that Mr.

Long's lost profits were \$18,428. Mr. Lawyer ensured that his calculated lost profits were conservative by including Mr. Long's down years in 2011-2013, including the year in which Mr. Long had child custody issues and he could not work full-time. Chad Lawyer acknowledged that including the 2012 figure would drag down his calculation for Mr. Long's lost profits in 2016, but he felt that with the inclusion of this off year, he could testify confidently that, to a reasonable degree of accounting certainty, Mr. Long's 2016 lost profits were, at a minimum, \$18,428.

Although the Defendant attacked Mr. Lawyer for not conducting an independent analysis of Mr. Long's business to determine market or competitive trends, Mr. Lawyer explained that, because Mr. Long has a niche market without competitors, this additional analysis was really not possible. Mr. Lawyer's testimony on this point remained uncontroverted.

In addition, Mr. Lawyer cited his own experience in working with hundreds of businesses in the Eastern Panhandle and he affirmed that the economy did not suffer from a recession that might explain Mr. Long's lost profits in 2016. The jury was allowed to either accept or reject the expert witness' testimony, including on this point. When the Defendant came forward with no evidence showing that a recession might have caused Mr. Long's business losses, the jury reasonably rejected this and similar arguments by the Defendant as hollow.

Defendant also faulted Mr. Lawyer for not independently verifying Mr. Long's statement that his business would have done as well in 2016, as it did in

2014 or 2015. However, Mr. Lawyer did verify this by preparing Mr. Long's 2017 tax returns and confirming that once Mr. Long was able to return to work full time, with a truck that performed like his 2005 Freightliner did, his business was able to return to normal.

The reasonable certainty standard does not require lost profits be proven with absolute mathematical precision. In *Mollohan v. Black Rock Contracting*, 235 S.E.2d 813 (W.Va. 1977), a defendant argued that the plaintiff failed to present sufficient evidence of his lost profits and therefore, the jury's verdict was based upon speculation and conjecture. The Court disagreed noting that "[i]t [would be] impossible for the plaintiff in a case such as this, to predict weather delays, fuel and equipment price changes, and other items of cost to be deducted from the contract price, leaving him a precisely calculated profit to present to the jury as his damages." *Id.* The Court upheld the jury's verdict, noting that a plaintiff was not required to "prove his damages or items of damage to the exactitude of a mathematical calculation." *Id.* (citing *Belcher v. King*, 96 W. Va. 562, 123 S.E. 398 (1924)). *Id.*

It is clear that when viewing all of the witnesses' testimony and seven years of Mr. Long's tax returns in the light most favorable to Mr. Long, Defendant cannot meet his burden for judgment as a matter of law.

However, the Court does find that the lost profits verdict of \$40,000 may not have sufficient evidentiary support. The Plaintiff's expert testified that Mr.

Long's lost profits were \$18,428. As such, the Court has offered the Plaintiff a remittitur of the lost profits verdict to \$18,428, as more fully set forth in the Court's Order denying Defendant's Motion for a New Trial.

It is accordingly **ADJUDGED** and **ORDERED** that Defendant's Renewed Motion for Judgment as a Matter of Law is **DENIED**.

ENTERED: _____

/s/ Laura C. Davis
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/s/ David Hammer
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courts.wv.gov/e-file/ for more details.

/s/ David Hammer
Circuit Court Judge
Ref. Code: 18496IVN

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JANE DOE,
PROGRESSIVE CASUALTY INSUR CO
(NTC DEF),
Progressive Commercial Casualty
Company,
United Financial Casualty Company,
Jeffrey Cross ET AL,
Defendants

Order Denying Defendant's Motion for a New Trial

On the 6th day of November, 2018, the Court considered Defendant's Motion for a New Trial, the Plaintiff's Response thereto, and Defendant's Reply. Upon review of the same and the applicable law, the Court believes that when viewing the facts in favor of the non-moving party, there is not a sufficient basis to grant a new trial.

LEGAL STANDARD

"[A] trial judge should rarely grant a new trial." *Morrison v. Sharma*, 488 S.E.2d 467, 469 (W.Va. 1997). The trial court is governed by W.Va. R. Civ. P. 61, which states that

no error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding, which does not

affect the substantial rights of the parties.

Id. citing *Maynard v. Adkins*, 457 S.E.2d 133 (W.Va.1995)(finding that a motion for a new trial must be denied). To that end, if an error occurs at trial,

a basic rule of trial practice is that a party must promptly lodge an objection to the error. By objecting, the party alerts the opposing party and the judge of the error so it may be corrected before a jury renders a verdict. A party's failure to object usually waives the right to complain about the error after the trial.

McInarnay v. Hall, 2018 W. Va. LEXIS 510 (June 12, 2018).

It is the law of our state that

[t]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, and the trial court's ruling will be reversed on appeal only when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

Syl. Pt. 2, *JWCF, LP v. Farruggia*, 752 S.E.2d 571 (W.Va. 2013).

When a party files a motion for a new trial, the trial court should:

(1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Syl. Pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983). Stated differently,

[I]n determining whether a jury verdict is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and all facts which the jury might properly have found in support of its verdict must be assumed as true.

Syl. Pt. 5, *Poe v. Pittman*, 144 S.E. 2d 671 (W.Va. 1965). In addition,

in an action where damages are indeterminate in character, the verdict of the jury may not be set aside as excessive unless it is not supported by the evidence or is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case.

Syl. Pt. 7, *Poe v. Pittman*, 144 S. E. 2d at 671. Significantly, a "mere difference of opinion between the court and the jury concerning the proper amount thereof will not justify the court in setting aside such verdict." Syl. Pt. 5, *Browder v. County Court of Webster County*, 116 S.E.2d 867 (W.Va. 1960).

Lastly, the Supreme Court has said that because jury verdicts are entitled to "considerable deference," an appellate court will decline to disturb a trial court's award of damages on appeal as long as that award is supported by some competent, credible evidence going to all essential elements of the award." Syl. pt. 4, in part, *Reed v. Wimmer*, 465 S.E.2d 199 (W.Va. 1995).

**FINDINGS OF FACT REGARDING THE
ANNOYANCE AND INCONVENIENCE VERDICT**

1. At the Pretrial, the Court bifurcated the Plaintiff's annoyance and inconvenience claims into two parts, to ensure that the Plaintiff was made whole for all of his annoyance and inconvenience damages, while avoiding the mention of insurance during the UM trial. (See Pretrial Tr., p. 14, line 11- p. 17, line 24).

2. The Court reasoned that Mr. Long's time without a dump truck was a clear and obvious demarcation point for Plaintiff's annoyance and inconvenience claim because the annoyance and inconvenience was primarily caused by the

UM wreck, as opposed to how Progressive handled the Plaintiff's claim. *Id.*

3. Both parties agreed, and the Court ruled, that Mr. Long's annoyance and inconvenience damages that were tried on June 12, 2018, would be limited to annoyance and inconvenience that occurred between March 29, 2016 and April 27, 2016. *Id.*

4. The Court's ruling allowed the Plaintiff to present evidence of his annoyance and inconvenience beginning on the date of the wreck, or March 29, 2018, including the moments immediately following the hit-and-run wreck and ending on April 27, 2016.

5. This ruling did not limit the *type* of evidence that the Plaintiff could present concerning the annoyance and inconvenience that he suffered immediately after the wreck through the end of April 2016.

6. At the Pretrial, the Plaintiff did not oppose Defendant's motion *in limine* 5, which precluded any argument or testimony regarding punitive damages. (Pretrial Tr., p. 21, lines 22-24).

7. Defendant conceded that the Plaintiff was not seeking punitive damages but still argued that because liability was stipulated, Plaintiff should not be allowed to call the investigating officer at trial:

MR. CALTRIDER: When the only elements of damages are what annoyance and inconvenience did Mr. Long have related to the loss of his truck, not the circumstances of the accident, that's not relevant to his annoyance and inconvenience.

THE COURT: I'm not sure I agree with you on that, but go ahead.

MR. CALTRIDER: But, I guess, my point is that none of that testimony bears on the three elements of damages at issue. That's our position

(Pretrial Tr., p. 57, line 18- p. 58, line 2).

8. The Court stated that it understood the Defendant's position, but that the officer's testimony was relevant to Mr. Long's annoyance and inconvenience:

THE COURT: . . . finding that his principle asset is laying over on its side and then having to stop working and deal with that, that to me does seem to go to his annoyance and inconvenience so I'm going to allow it. I understand your point on this, and I hope that plaintiff's counsel doesn't dwell [on the officer's testimony], and take a lot of time on this issue given that it's stipulated that the truck was totaled. But to at least set the scene for why he was in an exigency he had to do what he had to do, I think that it is relevant.

(Pretrial Tr., p. 58, lines 6-15).

9. With respect to Defendant's motion *in limine* 5, which sought to preclude evidence or argument probative of punitive damages, Plaintiff did not oppose it: "We both agree that the motions *in limine* 1 and 2 are moot and Plaintiff does not oppose Progressive's motions *in limine* 5, 6, or 7." (Pretrial Tr., p. 21, lines 22-24). As such, Progressive's motion was granted.

10. After the Pretrial, Defense counsel offered to prepare the initial draft of the Pretrial Order and provide it to Plaintiff's counsel. Both sides were busy before the trial, and so the Order was not prepared. As a result, no Pretrial Order was entered to ensure that all parties had the same understanding regarding the Court's pretrial rulings.

11. Defendant now complains that the Plaintiff violated a "limiting

instruction" with respect to Defendant's motion *in limine* 5 with respect to punitive damages as follows: "I hope that plaintiff's counsel doesn't dwell on this and take a lot of time on this issue given that it's stipulated that the truck was totaled."

12. The "this" to which the Court was referring was the investigating officer's testimony.

13. The Court never ruled that the Plaintiff could not elicit testimony or refer during argument to the fact that Jane Doe fled the scene of the wreck.

14. During Plaintiff's direct examination, Plaintiff testified regarding his reaction after discovering that Jane Doe had fled the scene:

Q. Okay. What's the first moment that you realized that the other driver had fled the scene?

A. Well, there was... there was some confusion going on. Where people were saying "Where's the other driver? Where's the other driver?" You know, like and then somebody started saying "well, you know, we saw her running down the street" or ... and so there's all these people, you know, saying stuff. I didn't know what was going on, and then when Officer ---

Q. Tiong.

A. I can't say his name, gave me a ride down to there, he said the lady that I saw standing there was actually a passenger, that the driver had fled the scene, and they had looked for her. Couldn't find her.

Q. Well, how did that make you feel when you realized that the other driver ---

A. Made me sick, because then, because the first thing in my mind was "okay. Well how am I going to get it fixed? How am I going to, you know, if there's nobody how do you get it fixed?"



(Trial Tr., p. 73, line 19).

15. This testimony was directly relevant to Mr. Long's annoyance and inconvenience immediately after the wreck.

16. Defense counsel failed to object at trial that this line of questioning allegedly violated Defendant's motion *in limine* 5 or any "limiting instruction."

17. During closing argument Plaintiff's counsel referred to Mr. Long's testimony regarding how he felt after learning that Jane Doe had fled the scene because it was relevant to his annoyance and inconvenience.

18. Defense counsel failed to object that Plaintiff's argument allegedly violated Defendant's motion *in limine* 5 or any "limiting instruction."

19. During the rebuttal, Plaintiff's counsel referred to Jane Doe as unrepentant because she refused to accept liability for the full amount of damages that she caused.

20. Plaintiff's counsel's argument was in response to comments defense counsel made during his closing when he had tried to curry favor with the jury by emphasizing that Jane Doe had admitted liability.

21. To the extent that the defense counsel believed that Plaintiff's counsel's rebuttal argument crossed any line, he did not object at the time

and request a curative instruction.

FINDINGS OF FACT REGARDING THE LOST PROFITS VERDICT

1. Mr. Long testified that he must make the majority of his income in just 6 months of the year; thus, his counsel argued that his inability to work the month of April was the equivalent of Mr. Long losing 1/6 of his annual income.

2. Mr. Long testified that after he got the 2016 Peterbilt as a replacement truck, he still suffered losses attributable to the wreck because the Peterbilt could not perform as well as his 2005 Freightliner and it cost more money to run. This testimony was uncontroverted.

3. Mr. Long testified that he knew of no adverse weather events, no economic downturns, or no events in the local market, such as a new competitor in his niche business, that could have accounted for his lost business profits in 2016.

4. Mr. Long's accountant, Chad Lawyer, was in the courtroom to hear Mr. Long testify that there were no other causes for his 2016 lost profits but the hit-and-run wreck.

5. Defense counsel declined to challenge Mr. Lawyer's credentials before the Court allowed Mr. Lawyer to testify as an expert before the jury:

MR. SKINNER: Your Honor, I would move to qualify Mr. Lawyer as an expert in the field of accounting based on his qualifications, education, training and experience.

THE COURT: Any objections?

MR. CALTRIDER: No objection.

THE COURT: You are certified as an expert, sir.

6. Mr. Lawyer told the jury that he examined five years of Mr. Long's tax returns to determine what his average income would have been in 2016 had the wreck not occurred. Mr. Skinner asked Mr. Lawyer about Mr. Long's business profits in 2012, because they were significantly lower than the other years and how this might have affected Mr. Lawyer's lost profit calculation:

MR. SKINNER: So let me ask you this question, looking at the bar graph—do you see the 2012—the second one from the left?

MR. LAWYER: Yes.

Q. That's—would you agree significantly lower than the rest?

A. Yes.

Q. Were you made aware that in 2012 Mr. Long had child custody issues? He could only work part of the day in that year.

A. Yes.

Q. . . . So, if you knew that in 2012 was a bad year for Carl why did you include it in your calculation?

A. Sure. I felt that a five year average would give a good baseline for Carl's business. You know, you're going to have—you can see on the chart into 2012 was below average, but 2014 and 2015 were above the average line, so averaging those two out—averaging the '12 year with the '14 and '15 year bring that to a way I can feel is conservative—a conservative estimate of his gross receipts.

Q. But wouldn't 2014 and 2015 - both good years, but also the most recent years—wouldn't they be a better representation of really what his lost income was going to be in 2016?

A. Potentially.

Q. So, you still kept the conservative numbers?

A. Yes, I went with five years conservative at that time.

Q. Okay. If you had not used the 2012 would you agree that your calculation of Carl's damages would have been much higher?

A. Yes, I agree.

(Trial Tr., p. 113, line 23- p. 115, line 10).

7. Plaintiff's counsel asked Mr. Lawyer whether he was aware of a recession in the local economy in 2016 or the years immediately preceding it:

Q. So is it fair to say from your experience as an accountant [say] handling . . . at least another 500 more clients in this region—are you aware of the general ups and down of the economy here?

A. I think I am, yes.

Q. Okay.

A. I see what my businesses do, my clients' businesses do, you know, year after year and any indications of ups and downs, yes, I would notice those when preparing their returns.

Q. Were you familiar with the condition of the local economy back in 2016?

A. Again, through working with my clients I feel I have a good grasp on what the economy was in 2016, . .

Q. So was there a recession here—based on your personal experience—back in 2016.

A. Not that I'm aware of.

Q. How about in 2015?

A. Not that I'm aware of.

Q. 2014.

A. No.

Q. Okay. Is it fair to say that 2014, 2015, 2016 were fairly similar from the external economy based on your experience?

A. I think that's a fair estimation, yes, sir.

Q. Is it fair to say that you would have expected—just based on the local economy—that Carl Long's business would have done about as well in 2016 as it had in the previous couple of years?

A. Yes.

...

Q. So during your deposition did—or since have you learned of any reason to think that the economy in 2016 was any different?

A. No, sir.

Q. So does this five year average—does that take into account the ups and downs of Carl's particular market?

A. Yes, I think it does.

Q. And what makes you say that?

A. Well, in any given year as we saw earlier—earlier reports from Mr. Long—different days worked. Then we heard about different weather conditions. All those things are going to affect Mr. Long's business, so I essentially tried to—tried to even those out through averaging the five years.

Q. So, the amount you determined were Mr. Long's lost profits were \$18,428, is that right?

A. Yes.

Q. Do you hold that opinion to a reasonable degree of certainty?

A. Yes, I do.

Q. Is there anything that makes you think—that gives you doubt about how accurate that was?

A. No, sir.

Trial Tr., p. 116, line 13- p. 119 line 10).

8. Mr. Lawyer reviewed Mr. Long's 2017 business profits and, without the business interruption and increased expenses that Mr. Long suffered because of the wreck, Mr. Lawyer testified that business profits bounced back to pre-crash levels. The 2017 tax returns were direct evidence supporting Mr. Lawyer's conservative opinion regarding Mr. Long's lost profits in 2016.

9. On cross-examination, defense counsel tried to impeach the credibility of Mr. Lawyer and his opinions:

MR. CALTRIDER. Would you agree with this statement "the first step in determining business interruption loss is to build the foundation. This requires the finding of financial performance that would have occurred assuming the interruption never occurred, developing the foundation relies on assessing the historical trends of the business, the market trends, and competitive trend?"

MR. LAWYER: I agree with that statement. That is verbatim from all the information that I found on the internet.

Q. That's one of the statements that you found about how to do the gross receipts method for evaluating his loss.

A. Yes.

Q. You only focused on assessment of historical trends through tax returns.

A. Yes, I did, except that if the market analysis is very difficult in Mr. Long's case where he's a sole individual. There is no public trade company that does exactly the same thing as Mr. Long. That made it almost impossible to obtain.

Q. So you did no analysis of market trends.

A. That is correct.

Q. You did no analysis of competitive trends.

A. Again small, individual, sole proprietor there's probably not another contractor in the area that does exactly like Mr. Long, so, if you're talking about, you know, public trade companies have information available. That can be done, but this is not that case. This is a small, individual, sole proprietor.

(Trial Tr., p. 139 line 19- p. 140, line 23).

10. Mr. Caltrider tried to impeach Mr. Lawyer because he allegedly did not take into consideration changes in Mr. Long's business over the years:

MR. CALTRIDER: We've heard testimony from Mr. Long that his business has changed over the years. You didn't take that into consideration, did you?

MR. LAWYER: No, sir, I didn't.

(Trial Tr., p. 141 lines 6-9).

11. However, Mr. Lawyer did consider the fact that Mr. Long's business changed after 2012 to make it more profitable. He did this by giving the years 2011-2013 the same weight as the years 2014 and 2015, after Mr. Long made the changes that made his business more profitable. Mr. Lawyer kept the prior years 2011-2013 in his calculation in order to get a conservative figure for lost profits.

12. Defense counsel's cross-examination continued:

MR. CALTRIDER: So if I understand correctly the basic premise for your lost income projections is that all things are consistent over all the years—2011 through 2016—but for this accident.

MR. LAWYER: All things are not consistent, but the variables that

would impact Mr. Long are—would factor in some each year, so each year has a varying weather pattern. Each year would have potentially a varying impact if, you know, there were any significant changes in the economy in those five years. It would all factor into each of those year's tax returns. I'm simply averaging five years and coming up with a number.

Q. You just assume that there were no outside forces that you were aware of in 2016 that would have caused Mr. Long's business to decline.

A. That's correct.

Q. But you did not analysis to verify that.

A. That is correct.

Q. Mr. Long told you that he felt his business would have been about the same or better?

A. Yes.

Q. So you just took that at face value?

A. When I'm—when I'm analyzing this particular and/or analyzing business, say a client wants to acquire a business I'm looking at historical data to determine a value for that business, and the, you know, I think the idea or assumption then is that business will do the [same] if not better assuming there's no major interruptions, and so yes, I feel that using my historical numbers I've given—I've sort of given a conservative calculation on what the business would have done.

(Trial Tr., p. 149 line 8- p. 150, line 10).

13. Mr. Lawyer testified that he had experience working with hundreds of local companies and he was unaware of any additional adverse event in Mr. Long's business that could have accounted for Mr. Long's business losses, other than the wreck.

Mr. Lawyer was also permitted to rely upon Mr. Long's statement that the wreck was the cause of his losses.

14. One of the Court's jury instructions was as follows:

An expert witness is a witness who has more specialized knowledge than an average person has about a particular subject. This specialized knowledge may be from education, training, or experience. In deciding the weight to give an expert's testimony, you may consider the witness's skill, knowledge, experience, background, and familiarity with the facts of the case. You may also consider the expert's truthfulness and take into account whether the expert testimony is sensible or reliable, and compare it to other evidence. After considering the facts and circumstances on which an expert's opinion is based, you may give each expert's testimony the weight you believe it is entitled to receive. You can believe, or not believe, any part of any expert's testimony.

Charles Lawyer, CPA, an expert witness, relied on out-of-court material in forming his expert opinion. Mr. Lawyer may not have had personal firsthand knowledge of this out-of-court material. An expert's opinion is only as good as the out-of-court material upon which he relies in forming his opinion. You may consider whether the out-of-court material relied upon by Mr. Lawyer is accurate and reliable and compare it to other evidence. It is up to you to determine the value of an expert witness's testimony.

(See jury instructions, p.5).

15. Mr. Long was certain that the hit-and-run wreck was the sole cause of his

business losses, and Mr. Lawyer relied upon Mr. Long's statements as to causation. The jury was instructed by the Court that it could accept or reject any witnesses' testimony, including that of Mr. Long:

You needn't accept all of the evidence as true or accurate. You are the sole judges of the credibility of witnesses and the weight of evidence. "Credibility of a witness" means the truthfulness, or lack of

truthfulness, of a witness. "Weight of the evidence means the extent to which you are, or are not, convinced by the evidence. If you believe that any witness in this case has knowingly testified falsely as to any material fact, you may, after full consideration, disregard the testimony in whole or in part, or give it such weight and credit you believe it deserves.

To determine the credit and weight you will give to the testimony of any witness you may consider the following:

- good memory, or lack of memory, of the witness;
- interest, or lack of interest, of the witness in the outcome of the trial;
- relationship of any witness to any of the parties or other witnesses;
- demeanor and manner of testifying of the witness;
- opportunity and means, or lack of opportunity and means, to have knowledge of the matters concerning the witness' testimony;
- Reasonableness, or unreasonableness, of the testimony of the witness;
- Apparent fairness, or lack of fairness, of the witness;
- Intelligence, or lack of intelligence, of the witness;
- Bias, prejudice, hostility, friendliness, or unfriendliness of the witness, for, or against, the plaintiff or defendant;
- Contradictory statements of any witness, if you believe any were made by the witness, and that they contradict his or her testimony;
- Contradictory acts of any witness, if you believe that the witness made any, and that they contradict his or her testimony.

From these considerations, and all other evidence and circumstances appearing in the trial, you may give such credit and weight, to the testimony of each witness as you believe it is entitled to receive.

(Jury Instructions, p. 2 of 11).

16. The Defendant failed to provide the jury with any evidence of an adverse weather event, economic downturn, or entry of a new competitor into Mr. Long's niche business that might have accounted for his lost business profits in 2016.

17. Mr. Long's tax records in the two years preceding the wreck showed that Mr. Long's business was doing well prior to the wreck.

18. The Defendant did not counter Mr. Lawyer's testimony with any expert testimony.

19. Mr. Long's 2017 tax returns provided the jury additional evidence of causation because the returns showed that once Mr. Long was able to work a full year without interruption, using a Freightliner that performed virtually identically to the one that he lost, profits rebounded to 2014 and 2015 levels.

20. The Court correctly instructed that the jury could rely upon direct evidence, like Mr. Long's tax records, and that the jury could also make reasonable inferences based upon their own life experiences and common sense:

[d]irect evidence means a fact was proven by a document or by testimony from a witness who heard or saw the fact first hand. . . . When direct evidence is proven, you may infer other facts that naturally or logically follow according to your common experience. This is called indirect or circumstantial evidence . . . You may draw reasonable inferences from the evidence, but there must be a logical connection between the proven facts and your conclusion. You may use your experience and common sense to reach conclusions from facts that have been proven.

(See jury instructions, p. 4).

21. It was for the jury to determine whether an established business like Mr. Long's would suffer substantial losses in having to shut its doors for an entire month during the busiest time of the work year.

22. During deliberations, the jury asked the Court if they could independently assess Mr. Long's lost profits for 2016. The Court asked the parties' position and both parties agreed that the jury could independently assess Mr. Long's 2016 lost profits.

23. Two of the jury members—one third of the jury panel—were accountants with backgrounds in auditing and tax preparation. Defendant chose not to strike these jurors, despite their expertise in the same field as the only expert in this matter.

24. After considering all of the evidence, the jury placed \$40,000 in the verdict for Mr. Long's lost profits.

25. The jury's lost profit verdict does not appear to be supported by the evidence and a remittitur may be appropriate. However, the Defendant is not entitled to a new trial on lost profits.

CONCLUSIONS OF LAW

In *Honaker v. Mahon*, 552 S.E. 788, 796 (W.Va. 2001), the West Virginia Supreme Court held that "in order for a violation of a trial court's evidentiary ruling to serve as the basis for a new trial, the ruling must be specific in its prohibitions,

and the violation must be clear.” Unlike the Court’s pretrial ruling in *Honaker*, however, in this case, there was no specific prohibition for the Plaintiff to violate. Mr. Long testified that he felt physically ill when he learned that Jane Doe fled and this testimony was probative of his annoyance and inconvenience.

Although Defendant cites *Jones v. Setser*, 686 S.E.2d 623 (W.Va. 2009) in support of its motion for a new trial, this case does not support Defendant’s position. In *Jones v. Setser*, defense counsel showed the jury a Wizard of Id cartoon where a fortune teller tells the woman seated at the table with her husband to “sue the doctor.” *Id.* at 630. The Supreme Court of Appeals found that the cartoon was an attempt to suggest that plaintiff’s case was an example of “lawsuit abuse” which contributed to the medical malpractice crisis in West Virginia. *Id.* The Court held in *Jones v. Setser* that whether the plaintiff’s malpractice case affected West Virginia’s medical malpractice litigation crisis was not in issue and thus, the cartoon should not have been allowed. *Id.* at 631.

In the instant case, the Plaintiff did not inject an issue into the case that was not already before the jury. Mr. Long testified under oath that Jane Doe’s fleeing the scene increased his annoyance and inconvenience and, during closing argument, Plaintiff’s counsel reminded the jury about this testimony. Summarizing evidence and arguing its significance is precisely the purpose of closing argument.

Also unlike the defendant in *Jones v. Setser*, the Defendant in this case failed to object at trial. Had the Defendant believed that the testimony or

argument violated any pretrial ruling, the Defendant was required to object to give the Plaintiff notice and allow the Court to give a curative instruction. A defendant may not sit by and allow alleged prejudice to pervade a trial, and then complain after an adverse verdict and demand a new trial.

The West Virginia Supreme Court of Appeals recently addressed an analogous case in *Miller v. Allman*, 813 S.E. 2d 91 (W.Va. 2018) where defense counsel failed to object when a plaintiff's attorney violated a clear pretrial ruling. In *Miller v. Allman*, the trial court granted defendant's motion *in limine* to prohibit any "golden rule" argument. On appeal, the Supreme Court acknowledged that "[t]he so-called 'golden rule argument' . . . has been widely condemned as improper." *Id.* at 104 (citing *Ellison v. Wood & Bush Co.*, 170 S.E.2d 321, 327 (W.Va. 1969)). Notwithstanding, because defense counsel failed to object at trial, the Supreme Court held that this violated the long-established evidentiary rule that

[f]ailure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syl. pt. 6, *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945). *See also, State v. Coulter*, 169 W. Va. 526, 530, 288 S.E.2d 819, 821 (1982) ("In order to take advantage of remarks made during an opening statement or closing argument which are considered improper an objection must be made and counsel must request the court to instruct the jury to disregard them.").

Id. at 105. Because defense counsel failed to object at trial, the West Virginia Supreme Court of Appeals held that the objection to plaintiff's violation of the

pretrial ruling was waived and the appeal must be denied. *Id.* at 106-107.

The facts of this case support a similar conclusion. Even assuming for argument's sake that there was a specific and clear pretrial ruling that prohibited this type of evidence and argument, which did not exist, and Plaintiff's counsel violated the Court's pretrial ruling, defense counsel's failure to object at trial waived any objection.

Defendant next requests a new trial because it claims that the Court erred when it allowed Plaintiff to present evidence about the facts of the wreck. However, because the investigating officer's testimony was relevant to Plaintiff's annoyance and inconvenience damages, it was properly admitted, and Defendant's stipulation did not extend to the amount of Plaintiff's annoyance and inconvenience damages, so they had to be proven at trial through relevant evidence.

The first witness to testify was Corporal Tiong. Despite having investigated hundreds of wrecks over his career, he recalled Mr. Long's countenance and demeanor immediately after the wreck and that Mr. Long was visibly upset and shaken. Cpl Tiong recalled that as Mr. Long looked at his truck on its side, he despairingly told him that the truck was his "livelihood." Cpl. Tiong's testimony was relevant to Mr. Long's annoyance and inconvenience damages. The testimony was not duplicative of any other witness's testimony and, in retrospect, it would have been unfairly prejudicial to Mr. Long had the Court excluded Cpl. Tiong.

Defendant claims that Mr. Long should not have been allowed to testify concerning how Jane Doe's fleeing the scene negatively impacted him. However, as Mr. Long credibly testified, Jane Doe fleeing significantly increased his annoyance and inconvenience in dealing with his property damage claim:

Q. Okay. What's the first moment that you realized that the other driver had fled the scene?

A. Well, there was... there was some confusion going on. Where people were saying "Where's the other driver? Where's the other driver?" You know, like and then somebody started saying "well, you know, we saw her running down the street" or ... and so there's all these people, you know, saying stuff. I didn't know what was going on, and then when Officer ---

Q. Tiong.

A. I can't say his name, gave me a ride down to there, he said the lady that I saw standing there was actually a passenger, that the driver had fled the scene, and they had looked for her. Couldn't find her.

Q. Well, how did that make you feel when you realized that the other driver ---

A. Made me sick, because then, because the first thing in my mind was "okay. Well how am I going to get it fixed? How am I going to, you know, if there's nobody how do you get it fixed?"

(Trial Tr., p. 72, lines 23 and 24; P. 73, lines 1 to 19).

It was not error for Plaintiff to reference this testimony by Carl Long in closing argument either. Just as with Officer Tiong's testimony, the Defendant is wrong that "[n]one of this evidence had any bearing on the actual issues in the case." (Motion, p. 4).

The jury was entitled to take into consideration not only Mr. Long's stress and

aggravation during the entire month of April, when he was forced to find a replacement truck, keep his clients from firing him, and fight to keep his business afloat, but also in the moments immediately after the wreck.

Our Supreme Court has held that "[a] new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *Morrison v. Sharma*, 488 S.E.2d 467, 469 (W.Va. 1997) (citations omitted). However, in order to have standing to move for a new trial, the complaining party may not be the one to have introduced the prejudice into the trial.

Defendant's motion *in limine* to preclude the introduction of insurance during the UM trial was granted. The Court's bifurcation of Plaintiff's annoyance and inconvenience claim into two parts was intended to prevent the issues of insurance, and Progressive's bad faith claims handling, from being injected into the UM trial. However, almost as soon as defense counsel began cross-examining Carl Long, defense counsel violated his own motion *in limine* by injecting not just insurance into the case, but also Progressive's bad faith by publishing a part of the Plaintiff's deposition transcript.

The exchange between defense counsel, Mr. Long, and his counsel, included a sarcastic comment that defense counsel tried to exploit by having Mr. Long read the first part of the exchange. By publishing the entirety of p. 234 to the jury, and leaving it on the ELMO for several moments, the jury was allowed to read the remaining part of the exchange. In so doing, defense counsel likely

made it clear to the jury that it was not Jane Doe, but Mr. Long's insurer, who was the true party in interest:

MR. CALTRIDER: You assume that everything would have been the same between 2015 and 2016 to get you to the same daily average profit?

A. I am assuming that I could have made this much in 2016, yes.

Q. Okay. But do you know that's actually what you would have made?

A. No, I do not.

Q. Why not?

A. How would you know if you didn't work?

Q. Okay. Well, I mean, what I am asking you is, you have told us you don't have any record of the actual jobs that you would have done in 2016.

A. How do you know what you're going to make when you don't have a truck to work?

Q. Do you have a record of the jobs that you had lined up?

A. I told you no.

Q. So—

A. And how would you know what you're going to make off each job? What if you have a problem on the job and you get delayed and you can't go to the next job, or what if this job cancels, or what if, hey, I got done early and I got two jobs in today and I made even more than last year. There is absolutely no way to know that.

Q. You could have made more or you could have made less in 2016.

A. Exactly. There is no way to verify that.

Q. There is no way to know without speculating.

MS. DAVIS: Right.

BY MR. CALTRIDER: Right?

A. Exactly.

MS. DAVIS: And, therefore, I guess Progressive is asserting that it owes [you] no damages.

THE WITNESS: Because they don't know if I would make any money or not.

MS. DAVIS: Right.

(Long Dep. p. 233, line 16 through p. 234 line 16).

Defendant's insertion of insurance and Progressive's maltreatment of Mr. Long into the case could easily have easily had an adverse effect on the verdict. Defendant cannot violate its own motion *in limine*, introduce prejudicial information into the case, and then demand a new trial.

The Supreme Court has observed, that when

determining whether a jury verdict is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and all facts which the jury might properly have found in support of its verdict must be assumed as true.

Syl. Pt. 5, *Poe v. Pittman*, 144 S.E. 2d 671 (W.Va. 1965). In addition,

in an action where damages are indeterminate in character, the verdict of the jury may not be set aside as excessive unless it is not supported by the evidence or is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case.

Syl. Pt. 7, *Poe v. Pittman*, 144 S. E. 2d at 671.

In this case, the jury awarded more than \$104,000 for Mr. Long's business losses and less than \$76,000 for his annoyance and inconvenience. Even if this Court reduced the Plaintiff's lost profits to Chad Lawyer's conservative number of \$18,428, the jury's general damages verdict would still be less than Mr. Long's liquidated damages.

A general damages verdict which is less than one times the liquidated damages does not scream passion or prejudice. The Supreme Court has upheld many general damage awards where the verdict has been several times that of a plaintiff's special damages. *See e.g., Adkins v. Foster*, 421 S.E.2d 271 (W.Va. 1992)(finding jury award of \$222,133.00 not excessive where medical bills amounted to \$2,768.00); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W.Va. 1991)(concluding jury award of \$207,000.00 was not excessive where medical bills totaled \$8,000.00). This Court must likewise rule. The jury's verdict for Mr. Long's annoyance and inconvenience claim was not excessive and so this verdict must stand.

With respect to the jury's lost profits verdict, Chad Lawyer testified to a reasonable degree of accounting certainty that Mr. Long's lost profits were conservatively \$18,428. Mr. Lawyer took into account the variability of Mr. Long's work by including the latter good years in with the early bad years (which were not representative of Mr. Long's business in 2016). Mr. Long's historical tax records, and specifically the two years prior to the wreck, showed that Mr. Long's business was doing well. Mr. Long's 2017 tax returns showed that once Mr. Long

was able to work a full year without interruption, using a Freightliner which performed virtually identically to the one that he had lost in the wreck, business profits rebounded to 2014 and 2015 levels. Mr. Long testified that his 2016 losses were caused by the wreck and defense counsel never identified any other cause for the 2016 losses. Based upon the totality of the evidence presented, there was sufficient evidence to support Mr. Long's entitlement to lost profits.

During deliberations, the jury asked the Court if it would be permissible to independently assess the amount of Mr. Long's lost profits. When the Court asked defense counsel his opinion, he averred that the jury should be permitted to independently calculate Mr. Long's lost profits. To the extent that the Defendant now complains that the jury should not have done this, the objection was waived.

Notwithstanding, the Court finds that the jury's independent assessment of Mr. Long's losses was not sufficiently supported by the evidence. Therefore, in lieu for a new trial on lost profits, Plaintiff may accept a remittitur to \$18,428, in line with Mr. Lawyer's and Mr. Long's testimony. In light of the fact that the Plaintiff requested this alternative relief in lieu of a new trial, Plaintiff presumably agrees to the remittitur.

It is accordingly **ADJUDGED** and **ORDERED** that Plaintiff's lost profits verdict is hereby reduced to \$18,428, and Defendant's Motion for a New Trial is **DENIED**.

/s/ Laura C. Davis

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/s/ David Hammer
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.