IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

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No. 21708

_____

GLENN M. WILT AND SANDRA B. WILT,
Plaintiffs Below, Appellees

v.

ROBERT BURACKER, SHERIFF AS SUCCESSOR
IN INTEREST TO ROY E. THOMPSON, ADMINISTRATOR
TO THE ESTATE OF CHARLES W. NICKELSON, JR.,
Defendant Below, Appellant

Appeal from the Circuit Court of Jefferson County
Honorable Ronald E. Wilson, Judge
Civil Action No. 88-C-186

AFFIRMED, IN PART,
REVERSED, IN PART,
AND REMANDED

Submitted: September 28, 1993
Filed: December 13, 1993

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JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. Under Rule 702 of the West Virginia Rules of Evidence, there is a category of expert testimony based on scientific methodology that is so longstanding and generally recognized that it may be judicially noticed and, a trial court need not ascertain the basis for its reliability.

2. In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.

3. """Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, syllabus, Overton v. Fields, 145 W. Va. 797 [117 S.E.2d 598 (1960)].' Syllabus Point 4, Hall v. Nello Teer Co., 157 W. Va. 582, 203 S.E.2d 145 (1974)." Syllabus Point 12, Board of Education v. Zando, Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990).

4. The loss of enjoyment of life resulting from a permanent injury is part of the general measure of damages flowing from the permanent injury and is not subject to an economic calculation.

5. "In an injury case where the manifestations of the permanent injury may be obscure and the extent of the injury itself may be obscure because of its character, positive medical evidence to a degree of reasonable certainty that the injury is permanent is sufficient to take the question to the jury and to support an award of damages for the future effects of such injury." Syllabus Point 13, Jordan v. Bero, 158 W. Va. 28, 210 S.E.2d 618 (1974).

6. "'If there be evidence tending in some appreciable degree to support the theory of proposed instructions, it is not error to give such instructions to the jury, though the evidence be slight, or even insufficient to support a verdict based entirely on such theory.' Syllabus Point 2, Snedecker v. Rulong, 69 W. Va. 223, 71 S.E. 180 (1911)." Syllabus Point 4, Catlett v. MacQueen, 180 W. Va. 6, 375 S.E.2d 184 (1988).

7. "Prejudgment interest, according to West Virginia Code § 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned." Syllabus Point 1, Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc., 186 W. Va. 583, 413 S.E.2d 404 (1991).

8. Expenditures for household services are included within the phrase "similar out-of-pocket expenditures" used in W. Va. Code, 56-6-31 (1981), and prejudgment interest may be awarded under that section.

9. "'Rule 59(a), [West Virginia Rules of Civil Procedure], provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages.' Syl. pt. 4, Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964)." Syllabus Point 3, Gebhardt v. Smith, 187 W. Va. 515, 420 S.E.2d 275 (1992).

10. Where liability is clearly established and the jury has made an erroneous over-calculation of damages, a remittitur may be directed on remand. If the plaintiff declines to accept the remittitur, then a new trial will be ordered solely on the issue of damages.

Miller, Justice:

This is an appeal from a jury verdict and final order of the Circuit Court of Jefferson County entered May 15, 1992, in favor of the appellees and plaintiffs below, Glenn M. Wilt and Sandra B. Wilt. The plaintiffs sustained permanent injuries when the automobile in which they were riding was struck by a vehicle driven by Charles W. Nickelson, Jr. Mr. Nickelson was killed in the collision, and this action was brought against his estate.

At trial, the plaintiffs presented the testimony of several police officers who testified that Mr. Nickelson had an empty bottle of "Wild Turkey" whiskey between his legs when they removed his body from the accident scene. The officers also testified that there were several other empty alcoholic beverage containers found in the vehicle and that the smell of alcohol coming from the vehicle was "extreme." Moreover, the deposition testimony of Lori Hall, a passenger in Mr. Nickelson's car, was read to the jury. It was to the effect that she and Mr. Nickelson had been drinking "Wild Turkey" whiskey earlier in the day, although she could not remember the quantity they had consumed.

The plaintiffs also presented the testimony of John Kaputska, who observed the Nickelson vehicle for several minutes immediately prior to the accident. Mr. Kaputska testified that the Nickelson vehicle caught his attention because it was being driven erratically, was following his vehicle too closely, and was not being driven in a straight line. The Nickelson vehicle then passed Mr. Kaputska at a high rate of speed, and Mr. Kaputska lost sight of the Nickelson vehicle as it went around a curve in the road. As Mr. Kaputska came around the curve, he saw that the Nickelson vehicle had struck the Wilt vehicle.

I.

The primary reason we accepted this appeal was to determine whether the testimony of an economist calculating a monetary amount of damages for the loss of enjoyment of life, often called hedonic damages, is admissible evidence. This Court held in Flannery v. United States, 171 W. Va. 27, 297 S.E.2d 433 (1982), that damages for the loss of enjoyment of life are a valid element of recovery when a plaintiff has suffered a permanent injury. "[O]nce a permanent injury has been established . . . the plaintiff is entitled to additional damages . . . for the permanent effect of the injury itself on 'the capability of an individual to function as a whole man.'" 171

W. Va. at 30, 297 S.E.2d at 436, quoting Jordan v. Bero, 158 W. Va. 28, 51, 210 S.E.2d 618, 634 (1974). We went on to explain in Flannery:

> "[T]he loss of enjoyment of life is encompassed within and is an element of the permanency of the plaintiff's injury. To state the matter in a slightly different manner, the degree of permanent injury is measured by ascertaining how the injury has deprived the plaintiff of his customary activities as a whole person. The loss of customary activities constitutes the loss of enjoyment of life." 171 W. Va. at 30, 297 S.E.2d at 436.

A.

Before we embark on a discussion of hedonic damages, it is necessary to establish the test for admissibility of expert testimony. Our cases contain some variation on this issue, particularly after our adoption of Rule 702 of the West Virginia Rules of Evidence. We note that our Rule 702 is identical to Rule 702 of the Federal Rules of Evidence. Of some significance, then, is the United States Supreme Court's recent decision in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. ___, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), that discussed the relationship of Rule 702 with the traditional federal evidentiary rule on expert testimony that was first articulated in Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

Before we adopted Rule 702, we recognized the Frye test and set out our version of it in Syllabus Points 7 and 8 of State v. Clawson, 165 W. Va. 588, 270 S.E.2d 659 (1980):

> "7. In order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle which underlies the test.
>
> "8. There are certain scientific tests that have been widely used over a long period of time, such that their general acceptance in the scientific community can be judicially noticed."

See also State v. Armstrong, 179 W. Va. 435, 369 S.E.2d 870

(1988); State v. Barker, 179 W. Va. 194, 366 S.E.2d 642 (1988). As we stated in Syllabus Point 8 of Clawson, where the scientific test is generally accepted, it can be judicially noticed and the expert need not demonstrate its scientific validity. We also stated in note 4 of State v. Armstrong, 179 W. Va. at 439-40, 369 S.E.2d at 874-75 (1988), that there is a general trend under Rule 702 to liberalize the Frye rule:

> "An increasing number of the courts and many of the leading commentators interpret Rule 702 of the Federal Rules of Evidence, which is identical to our Rule 702, as limiting the Frye 'general acceptance' test to a test solely for determining whether judicial notice can be taken of the scientific test's general reliability. See P. Giannelli and E. Imwinkelreid, Scientific Evidence §§ 1-5, 1-5 (E)-(F), 1-6, 1-6(A)-(D) (1986) (collecting authorities); Giannelli, General Acceptance of Scientific Tests--Frye and Beyond, in Scientific and Expert Evidence 11-32 (E. Imwinkelreid 2d ed. 1981). Therefore, according to this view, a scientific expert's testimony is admissible if shown to involve relevant scientific tests which assist the trier of fact to understand the evidence, even if such tests and the underlying scientific principle(s) are not yet generally accepted in the particular scientific field." (Emphasis in original).

In Daubert, supra, the United States Supreme Court re-examined the Frye standard and determined that it was too stringent as applied to the admissibility of expert testimony in light of Rule 702 of the Federal Rules of Evidence. The plaintiffs in Daubert sought to introduce expert testimony showing the relationship between a drug manufactured by the defendant and birth defects in children whose mothers had taken the drug while pregnant with those children. The defendant argued that the expert testimony offered by the plaintiffs could not meet Frye's "general acceptance" test. The trial court and the Ninth Circuit Court of Appeals agreed, with the Court of Appeals stating that because the expert testimony proffered had not been published or subjected to peer review, it could not be shown to be a generally accepted scientific technique, and was thus violative of the Frye standard.

The United States Supreme Court reversed and held that the Frye test was superseded by Rule 702 because the Frye test was not included within Rule 702:

> "Nothing in the text of [Rule 702] establishes 'general acceptance' as an absolute prerequisite to admissibility. . . . The drafting history makes no mention of Frye, and a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' Beech Aircraft Corp. v. Rainey, 488 U.S. [153,] 169, [109 S. Ct. 439, 450, 102 L. Ed. 2d 445, 463 (1988)] (citing Rules 701 to 705)." 509 U.S. at ___, 113 S. Ct. at 2794, 125 L. Ed. 2d at 480. (Citation omitted.)

Nonetheless, the Supreme Court clearly concluded that the standard established in Rule 702 would not "result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." 509 U.S. at ___, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484. The Supreme Court emphasized that in supplanting the Frye test by Rule 702, this did not abandon all limits on the admissibility of purportedly scientific evidence, but rather that, "under the Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at ___, 113 S. Ct. at 2795, 125 L. Ed. 2d at 480.

The Supreme Court outlined the various types of considerations that a trial court must take into account when determining the admissibility of expert testimony under Rule 702, and concluded that the inquiry must be a flexible one: "[The] overarching subject [of Rule 702] is the scientific validity--and thus the evidentiary relevance and reliability--of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not the conclusions that they generate." 509 U.S. at ___, 113 S. Ct. at 2797, 125 L. Ed. 2d at 484.

The Court also recognized:

> "[I]n practice, a gatekeeping role for the

> judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for particularized resolution of legal disputes." 509 U.S. at ___, 113 S. Ct. at 2798-99, 125 L. Ed. 2d at 485. (Footnote omitted).

In summary, the Supreme Court concluded:

> "'[G]eneral acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence--especially Rule 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests upon a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." 509 U.S. at ___, 113 S. Ct. at 2799, 125 L. Ed. 2d at 485.

We also note that the Court in Daubert found that certain scientific theories could be judicially noticed. The Court stated in note 11: "Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed. Rule Evid. 201." 509 U.S. at __, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482. See also note 5, supra. We also are of the view that, under Rule 702, there is a category of expert testimony based on scientific methodology that is so longstanding and generally recognized that it may be judicially noticed, and, therefore, a trial court need not ascertain the basis for its reliability.

Thus, we believe that Daubert is directed at situations where the scientific or technical basis for the expert testimony cannot be judicially noticed and a hearing must be held to determine its reliability. We conclude that Daubert's analysis

of Federal Rule 702 should be followed in analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence. The trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.

B.

Our customary rule for determining whether a trial court's ruling on the admissibility of expert testimony is erroneous is contained in Syllabus Point 12 of Board of Education v. Zando, Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990):

> """Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, syllabus, Overton v. Fields, 145 W. Va. 797 [117 S.E.2d 598 (1960)].' Syllabus Point 4, Hall v. Nello Teer Co., 157 W. Va. 582, 203 S.E.2d 145 (1974)."

Applying Rule 702 to the case at bar, we must consider whether the specialized knowledge of the plaintiffs' expert was relevant to the calculation of damages for the plaintiffs' loss of enjoyment of life such that it would "assist the trier of fact to understand the evidence or to determine a fact in issue." Because we are not convinced that the testimony offered by the plaintiffs' expert has any relevance whatsoever to a calculation of damages for the loss of enjoyment of life, we conclude that the trial court abused its discretion by allowing the testimony at trial.

The economic calculations for Mrs. Wilt's claim for

hedonic damages were presented through the testimony of economist Michael Brookshire, Ph.D. Dr. Brookshire utilized a theory that every human life has the same whole-life value. This "bench-mark" whole-life value was arrived at by combining and averaging the economic values arrived at in over 50 "willingness-to-pay" studies. According to Dr. Brookshire, this whole-life value is the same for all persons and is set at $2.5 million. From this amount, he subtracts another average value that he terms the "economic machine." The economic machine represents the value of a person's average lifetime economic earnings, such as wages, fringe benefits, and household services. This value is estimated at $800,000, leaving as a "bench-mark" value $1.7 million, which is contended to be the general value of the loss of enjoyment of life to the average unknown American.

The plaintiffs also presented the testimony of a psychologist who estimated that Mrs. Wilt, based upon loss-of-enjoyment-of-life tests he had devised, had suffered a 51-60 percent loss of her enjoyment of life. Using the percentage assigned by the psychologist, Dr. Brookshire then calculated Mrs. Wilt's net economic loss of enjoyment of life by applying it to the bench-mark figure of $1.7 million and factoring in Mrs. Wilt's life expectancy. Mrs. Wilt's net economic loss of enjoyment of life was fixed at $685,493.

Our initial concern is that the willingness-to-pay studies upon which Dr. Brookshire's calculations are based have no relevance to the particular loss of enjoyment of life suffered by a plaintiff due to a given permanent injury. The willingness-to-pay studies that were used did not involve persons suffering a permanent injury in a personal injury context. Moreover, the willingness-to-pay studies did not use methodology designed to calculate the loss of enjoyment of life, but were nonetheless extrapolated by Dr. Brookshire into what he claimed to be valid data for calculating damages for Mrs. Wilt's loss of enjoyment of life.

The underlying studies were not presented into evidence and are not a part of the record. Consequently, it is not possible to determine their precise methodology. Certainly, under any Rule 702 analysis, without a detailed explanation of the underlying studies' methodology, the expert testimony would not meet the reliability standard and the testimony should be excluded.

Even if we were to assume that Dr. Brookshire's

explanation of the reliability of the willingness-to-pay studies was sufficient, the question would then be whether the studies were sufficiently relevant to support his calculations on loss of enjoyment of life. In his testimony, Dr. Brookshire gave an example of the loss-of-enjoyment-of-life methodology. This example was based on wage-versus-risk studies and involved a hypothetical illustration of 10,000 window washers working on skyscrapers and the risk of death between those working on the first-floor windows and those working on the top floors. From federal statistics, he found a 1 in 10,000 greater chance of death for top-floor window washers than other window washers. He then assumed a wage differential of $300 per year for top-floor washers. Thus, the bottom-floor washers were willing to accept $300 less a year to avoid the top-floor work. He concluded that if the 10,000 workers were willing to accept $300 less, then the value of one life in that context is $3,000,000.

Although the foregoing illustration was not taken from any of the willingness-to-pay studies, Dr. Brookshire testified that it was designed to illustrate the methodology used in a wage-versus-risk study approach to determine the total value of a life. Even if we were to assume that this methodology has some valid economic basis, we reject it from a legal standpoint because it has nothing to do with defining the particular value of the loss of enjoyment of life in this case.

Moreover, the calculations are based on assumptions that appear to controvert logic and good sense. Anyone who is familiar with the wages of coal miners, policemen, and firefighters would scoff at the assertion that these high risk jobs have any meaningful extra wage component for the risks undertaken by workers in those professions.

The majority of jurisdictions that have addressed whether expert testimony based upon willingness-to-pay studies is relevant to one's loss of enjoyment of life have concluded that such testimony is inadmissible. The most thorough analysis of this issue was made by the Court of Appeals for the Seventh Circuit in Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992):

> "[W]e have serious doubts about [the] assertion that the studies [relied] upon actually measure how much Americans value life. For example, spending on items like air bags and smoke detectors is probably influenced as much by advertising and marketing decisions made by profit-seeking

> manufacturers and by government-mandated safety requirements as it is by any consideration by consumers of how much life is worth. Also, many people may be interested in a whole range of safety devices and believe they are worthwhile, but are unable to afford them. More fundamentally, spending on safety items reflects a consumer's willingness to pay to reduce risk, perhaps more a measure of how cautious a person is than how much he or she values life. Few of us, when confronted with the threat, 'Your money or your life!' would, like Jack Benny, pause and respond, 'I'm thinking, I'm thinking.' Most of us would empty our wallets. Why that decision reflects less the value we place on life than whether we buy an airbag is not immediately obvious." (Emphasis in original).

The Mercado court also addressed the relevancy of other studies that have been used to support calculations for hedonic damages. Those studies were similar to the ones used by Dr. Brookshire and included the amount of extra salary paid to those who perform risky work. Another study focused on government estimates concerning increased costs for complying with health and safety regulations:

> "To say that the salary paid to those who hold risky jobs tells us something significant about how much we value life ignores the fact that humans are moved by more than monetary incentives. For example, someone who believes police officers working in an extremely dangerous city are grossly undercompensated for the risks they assume might nevertheless take up the badge out of a sense of civic duty to their hometown. Finally, government calculations about how much to spend (or force others to spend) on health and safety regulations are motivated by a host of considerations other than the value of life: is it an election year? how large is the budget deficit? on which constituents will the burden of the regulations fall? what influence and

> pressure have lobbyists brought to bear? what is the view of interested constituents? And so on." 974 F.2d at 871. (Emphasis added).

In Foster v. Trafalger House Oil & Gas, 603 So.2d 284 (La. App. 1992), the court recognized, as we did in Flannery, that the loss of enjoyment of life is an element of general damages. That court went on to elaborate on the nature of the task of determining the amount of such damages:

> "[C]ompensation [for general damages] is never a true measure or a true compensation for what is lost. The task of awarding general damages is a uniquely human endeavor, not only calling upon the trier of fact to consider the host of factors unique to each individual case, but also requiring the trier of fact to draw upon the virtually unlimited factors unique to us as human beings. . . .
>
> "[E]conomic theories which attempt to extrapolate the 'value' of human life from various studies of wages, costs, etc., have no place in the calculation of general damages." 603 So. 2d at 286.

See also Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993) (applying North Carolina law); Sterner v. Wesley College, Inc., 747 F. Supp. 263 (D. Del. 1990) (applying Delaware law); Fetzer v. Wood, 211 Ill. App. 3d 70, 84, 155 Ill. Dec. 626, ___, 569 N.E.2d 1237, 1246 (1991) ("the jury is in a better position to decide without imposing an expert's theory as to valuation.").

Finally, in order to lay to rest any future confusion over whether a different methodology can make this type of evidence admissible under Rule 702, we believe this issue is similar to that addressed in Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961). In Crum, we held that, from a substantive law standpoint, testimony could not be introduced placing a monetary value on a plaintiff's pain and suffering. As we stated in Syllabus Point 4 of Crum: "In the trial of an action for damages for personal injuries based in part on pain and suffering, testimony attempting to place a money value on pain and suffering is inadmissible."

Moreover, not unlike the situation addressed in Crum, in Flannery, supra, we discussed the question of loss of enjoyment of life in terms of a subjective jury evaluation issue rather than as an objective calculable item:

> "Here, however, we have an element, a component, of damages that may be considered by a jury in determining the amount of its award. Just as a jury may consider the nature, effect and severity of pain when fixing damages for personal injury, or may consider mental anguish caused by scars and disfigurement, it may consider loss of enjoyment of life." 171 W. Va. at 32, 297 S.E.2d at 438. (Emphasis in original; citations omitted).

Consequently, we conclude that the loss of enjoyment of life resulting from a permanent injury is part of the general measure of damages flowing from the permanent injury and is not subject to an economic calculation.

II.

A.

Future Dental Expenses

The defendant also cites as error the admission of the testimony of the plaintiffs' dental expert, Dr. Leroy Jackson, who testified concerning the future dental expenses that Mr. Wilt would incur. The defendant contends that Dr. Jackson was unable to testify with a reasonable degree of certainty about Mr. Wilt's future dental expenses. The jury awarded Mr. Wilt $5000 under this category of damages. Dr. Jackson stated that while Mr. Wilt had dentures prior to the car accident, those dentures would have to be replaced because, prior to the accident, Mr. Wilt required only a partial-plate denture, and after the accident, he required a full-plate denture. Dr. Jackson testified that, to a reasonable degree of medical certainty, he was certain that Mr. Wilt would require one or two additional upper dentures in his lifetime. Dr. Jackson was not asked to separate the difference between Mr. Wilt's dental impairment before and after the accident.

In Syllabus Point 13 of Jordan v. Bero, supra, we stated:

> "In an injury case where the manifestations of the permanent injury may be obscure and the extent of the injury itself

> may be obscure because of its character, positive medical evidence to a degree of reasonable certainty that the injury is permanent is sufficient to take the question to the jury and to support an award of damages for the future effects of such injury."

It is clear that Dr. Jackson testified to a degree of reasonable certainty that Mr. Wilt had suffered a permanent dental injury as a result of the accident. Thus, it was not error for the trial court to allow Dr. Jackson's testimony to be considered by the jury and the jury was free to award damages for the future effects of Mr. Wilt's injury.

B.

Punitive Damages

The jury verdict included an itemized award of $500,000 in punitive damages to each of the plaintiffs. The defendant contends that such a large award of punitive damages was violative of constitutional due process safeguards. The defendant also contends that it was error, under the evidence presented at trial, for the trial court to instruct the jury that driving under the influence of alcohol was evidence of reckless negligence and that punitive damages could be awarded therefor.

The instruction given by the trial court regarding driving under the influence of alcohol was as follows: "By statute in W. Va. a person may not drive a vehicle in this State while he is under the influence of alcohol and a person may not drive a vehicle in reckless disregard of the safety of others." The defendant contends that giving such an instruction was error because no direct evidence was admitted at trial to the effect that Mr. Nickelson was intoxicated or driving under the influence of alcohol. We disagree. The instruction given by the trial court is in line with several of our cases where we recognized that a person who drives while under the influence of alcohol in reckless disregard of the safety of others may be subject to an award of punitive damages. See Hensley v. Erie Ins. Co., 168 W. Va. 172, 283 S.E.2d 227 (1981). Cf. Perry v. Melton, 171 W. Va. 397, 299 S.E.2d 8 (1982).

There was abundant testimony to the effect that Mr. Nickelson had been drinking "Wild Turkey" whiskey shortly before the accident, and that the "Wild Turkey" bottle was between his

legs at the time of the accident. Moreover, the investigating police officers noticed an "extreme" smell of alcohol coming from the vehicle, and Mr. Nickelson was observed driving "erratically" and at a "high rate of speed" immediately before the accident. As we stated in Syllabus Point 4 of Catlett v. MacQueen, 180 W. Va. 6, 375 S.E.2d 184 (1988):

> "'If there be evidence tending in some appreciable degree to support the theory of proposed instructions, it is not error to give such instructions to the jury, though the evidence be slight, or even insufficient to support a verdict based entirely on such theory.' Syllabus Point 2, Snedecker v. Rulong, 69 W. Va. 223, 71 S.E. 180 (1911)."

Clearly, the evidence presented by the plaintiffs was sufficient to instruct the jury that driving under the influence of alcohol is prohibited by statute in this State, and the trial court did not commit error by giving that instruction.

The defendant also contends that the award of punitive damages violated constitutional due process guarantees because the trial court failed to adequately instruct the jury so as to protect the defendant from a punitive award "grossly disproportionate to the severity of the offense or to accomplish society's goals of punishment and deterrence[.]" Our general rule on the adequacy of jury instructions concerning punitive damages was stated in Syllabus Point 13 of TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. ___, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). We find that the jury instruction was adequate under TXO and, under this standard, the amount of punitive damages awarded was not improper even if the hedonic damage evidence had been excluded.

C.

Prejudgment Interest

The defendant argues that the trial court erred when it awarded the plaintiffs prejudgment interest on their award of damages for the loss of household services. There was undisputed testimony at trial that a cousin of Mr. Wilt's performed those services because Mrs. Wilt was unable to do so, and that the cousin accepted significantly less compensation from the plaintiffs than the going rate for those services . The defendant contends that household services are not "special

damages" under W. Va. Code, 56-6-31 (1981), and thus prejudgment interest may not be paid on that award. We disagree.

> W. Va. Code 56-6-31, states, in pertinent part: "[I]f the judgement or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued, as determined by the court. Special damages includes lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court." (Emphasis added).

As we stated in Syllabus Point 1 of Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc., 186 W. Va. 583, 413 S.E.2d 404 (1991):

> "Prejudgment interest, according to West Virginia Code § 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned."

It is clear to us that expenditures for household services are included within the phrase "similar out-of-pocket expenditures" used in W. Va. Code, 56-6-31, and prejudgment interest may be awarded under that section. They are out-of-pocket funds the plaintiffs lost due to the negligence of the defendant's decedent and are intended to make the plaintiffs whole. Thus, household services expenditures are special damages for the purposes of W. Va. Code, 56-6-31, and the trial court did not err by awarding prejudgment interest upon those damages.

III.

Because the hedonic damage evidence was improperly admitted, this case must be remanded. We recognized in Syllabus Point 3 of Gebhardt v. Smith, 187 W. Va. 515, 420 S.E.2d 275 (1992), that where liability has been clearly established and, on appeal, error has been found to have occurred, a new trial may be

awarded on that issue alone:

> "'Rule 59(a), [West Virginia Rules of Civil Procedure], provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages.' Syl. pt. 4, Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964)."

In Roberts v. Stevens Clinic Hospital, Inc., 176 W. Va. 492, 345 S.E.2d 791 (1986), the jury awarded damages in the amount of $10 million in a wrongful death claim of a two-and-one-half-year-old child. We found the award excessive and remanded the case with directions to the circuit court "to enter a remittitur of $7,000,000 and enter judgment on the verdict for $3,000,000 or, in the alternative, at the option of the plaintiff, to award a new trial." 176 W. Va. at 504, 345 S.E.2d at 804.

Another approach was taken in Harless v. First National Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982). There, the jury returned a verdict in a personal injury case, which was broken down into various components. Upon analyzing the various damage components of the award, we found that some were not legally authorized under the facts of the case. The total award of damages was $80,000; however, we determined that the correct award should have been $25,000 and came to this conclusion:

> "We, therefore, accord the right of remittitur to the plaintiff on the basis that he may accept within forty-five days from the mandate of this Court a judgment of $25,000 together with interest thereon from the date of the jury verdict against the Bank and Wilson or the judgment will be set aside and he shall be entitled to a new trial on the issue of damages." 169 W. Va. at 698, 289 S.E.2d at 706.

Thus, these cases illustrate the principle that where liability is clearly established and the jury has made an erroneous over-calculation of damages, a remittitur may be

directed on remand. If the plaintiff declines to accept the remittitur, then a new trial will be ordered solely on the issue of damages.

Consequently, we conclude that because the plaintiffs offered substantial evidence supporting all their damage claims except for Mrs. Wilt's claim for loss of enjoyment of life, which was assessed separately by the jury, we remand the case with instructions that if the plaintiffs wish to remit the hedonic damage award, judgment may be entered on the remaining damages. If not, then the plaintiffs may have a new trial on the damage issue alone because liability clearly has been established.

Therefore, the judgment of the Circuit Court of Jefferson County is affirmed, in part, reversed, in part, and remanded.

Affirmed, in part;
reversed, in part;
and remanded. →