IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

No. ~~19-0220~~ 19-0200

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

v.

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

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

BRIEF OF THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY AND TRIAL

This case involves the Plaintiff, Robert Trent ["Mr. Trent"] an eighty-one year old man, (now eight-five years old) who was run over by a pickup truck, driven by Defendant Bruce Wilfong ["Mr. Wilfong"], while traveling backwards down Mr. Trent's sidewalk, striking him as he was standing on the sidewalk, with his back to Mr. Wilfong, causing him severe bodily injuries. Mr. Wilfong, the supervisor/foreman of Defendant Roof Service of Bridgeport, Inc., ["Roof Service", "Petitioner" or "Defendant Corporation"] was/is in charge of the hands-on work in regard to roofing for Roof Service.

To date, no monies have been offered in settlement of the claim in this matter either before trial or subsequent to trial.

Mr. Trent was hospitalized from June 9, 2015 through July 17, 2015 (approximately 38 days). Mr. Trent incurred One Hundred Eighty-one Thousand Dollars ($181,000.00) in medical bills. All but Thirty-two Thousand Six Hundred Seventy-eight and 85/100 Dollars ($32,678.85) were stipulated to by the Petitioner, Roof Service of Bridgeport, Inc..

Mr. Trent suffered an arrhythmia/heart attack during his treatment at UHC. He incurred the sum of Thirty-two Thousand Six Hundred Seventy-eight and 85/100 Dollars ($32,678.85) for his care as a result of the cardiac problems. Again, the remainder of the medical bills were stipulated to by the Defendant Corporation. The Defendant Corporation maintained that the heart attack/ arrhythmia was not related to the subject accident which was contradicted by Dr. Richard Smith, a Board Certified Cardiologist, and the jury awarded the amount for such hospitalization (this issue was not appealed). The jury awarded Mr. Trent the total sum of One Hundred Eighty-

one Thousand Dollars ($181,000.00) for his injuries.

Prior to the accident in this matter, Mr. Trent was a robust eighty-one (81) year old (now 85 years of age) who walked the Meadwobrook Mall every morning (seven days a week) at a brisk pace. He did have cardiac problems and went to cardiac rehab approximately three (3) days per week but, otherwise, he was a robust eighty-one year old. Prior to the accident, Mr. Trent was also able to raise his arm above his head, sketch caricatures, walk without a cane or assistive device, and perform household chores and basically enjoyed his life with his lovely wife, Plaintiff Charlotte Trent ["Mrs. Trent"]. Mr. Trent is now limited and not able to enjoy his life as he had before the accident.

Prior to the accident, Mr. and Mrs. Trent had contracted with Roof Service of Bridgeport, Inc., to replace the roof on their home in which they had lived for many years. Included in the contract and agreement was the duty on behalf of Roof Service to, among other things, remove the job debris from the Trent residence. (See Plaintiff's Exhibit 3 at App.-1430.) In short, the Trent's paid for the debris removal that was part of the job to be performed by Defendant Corporation. It is interesting to note that after Mr. Trent was severely injured in this matter by Mr. Wilfong (supervisor/foreman of Roof Service), the Trents were charged an additional sum for a small piece of gutter, that was added to the bill. The Trents promptly paid the bill when presented by Defendant John Cole ["Mr. Cole" or "Owner"], the owner of the corporation. (See Plaintiff's Exhibit 3 at App.-1430).

On June 9, 2015, the Roof Service began removing the old shingles from the Trent residence. Mr. Cole lived approximately one block from the Trent's work site (residence). It is undisputed that Mr. Wilfong and two or three other employees returned to the Cole residence

before 3:00 p.m. where they had parked their vehicles. Mr. Wilfong then proceeded back to the work site (Trent's residence) to retrieve scrap metal as he had done for many years for Roof Service. Mr. Wilfong, while backing down the sidewalk in his personal pickup truck, with his vision obscured/obstructed by a camper in the bed, struck Mr. Trent on the sidewalk while traveling backwards down the Trent sidewalk.

The record shows that Mr. Trent had been waiting for a FedEx delivery of medications to take to Mrs. Trent, who was in UHC, after a hip replacement. Mr. Trent had gone outside to watch for the FedEx delivery and noticed that the trash bin of his neighbors across the street was still out on their sidewalk. Mr. Trent, knowing that they were out of town, crossed the street and returned the trash bin to its proper area. The record shows that Mr. Trent (who was the only witness to this accident) walked back across the street to his residence and was watching for FedEx truck. The record shows that he had established himself on the sidewalk in front of his residence when he was struck by Mr. Wilfong. (See App.-1025 and also Plaintiff's Exhibit 1, the Accident Report at App.-1418).

Officer J. D. Collins of the Bridgeport Police Department investigated this accident and prepared an accident report. The Crash Data Report showed Mr. Trent with his legs on the sidewalk and his torso on the street after he was struck. There is no evidence that Mr. Trent was struck in the street in this matter, as was found by the trial judge in his order denying Roof Service's post-trial motions. Mr. Trent testified that he had crossed the street and stepped up onto the sidewalk in front of his residence and was facing oncoming traffic, while watching for the FedEx truck, when he was struck from behind. Unfortunately, Mr. Wilfong was backing down the Trents' sidewalk (his vision obscured by the camper in his truck bed) when he struck Mr. Trent.

Given the facts of this case, the assertion that Mr. Trent was at fault in this accident is ridiculous. The Petitioner further asserted that their foreman was acting as an independent contractor when he returned to remove scrap metal from the Trent residence. The record shows that Mr. Wilfong had been the supervisor/foreman of the crew that was working at the Trent residence on the day of the accident. He had been given carte blanch permission to return and remove the scrap metal from the Trent work site, which was a part of the Petitioner's custom and habit of allowing him, for many years, to return to work sites to remove scrap metal.

Mr. Cole, owner of Roof Service, testified that Mr. Wilfong was allowed to return to jobs to recover the scrap metal with the full knowledge and permission of Mr. Cole. Furthermore, the retention of the scrap metal by Mr. Wilfong was a "bonus" for the years of service to Roof Service. Mr. Cole testified as follows, "I think I probably did say that. If someone worked for you for thirty-five years, you ought to reward them." Furthermore, in Mr. Cole's deposition, which was Exhibit 4 attached to Plaintiffs' Response to Defendant Corporation's Motion for Summary Judgment, Mr. Cole testified, "It's a reward for having worked for thirty-five years."

The argument that Mr. Wilfong was an independent contractor is pure fiction. The petitioner stipulated that Mr. Wilfong was an employee of Roof Service, leaving the question to be answered as to whether or not he was working within the scope of employment. The jury found that Mr. Wilfong was an employee of the Petitioner; that he was 100% negligent; and awarded Mr. Trent the sum of Five Hundred Thousand Dollars ($500,000.00) for general damages, One Hundred Eighty-one Thousand Dollars ($181,000.00) for past medical expenses, and awarded Mrs. Trent the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) for loss of spousal consortium.

Roof Service filed a motion with the court for a new trial or a remittitur of the damage

award, which was denied by the Circuit Court Judge by Order entered on the 15 th day of February, 2019. (See Denial Order at App.-2176)

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiffs would ask that this be orally argued due to the importance of this Court's decision concerning this elderly couple.

III. STANDARD OF REVIEW

In determining whether to grant judgment notwithstanding a verdict, the following should be considered: (1) the evidence must be reviewed in a light 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. *James v. Knotts*, 227 W.Va. 65, 67 (W. Va. 2010), citing Syl. Pt. 4 *Pipemasters, Inc. v. Putnam County Com'n*, 281 W.Va.512 (W. Va. 2005). However, if the Plaintiff fails to establish a *prima facie* right to recover, the Court should grant the motion. *James v. Knotts*, 227 W.Va. 65, 67 (W. Va. 2010).

Ultimately, the jury's verdict will not be set aside unless plainly contrary to the weight of the evidence or where there is not sufficient evidence to support the verdict. *Tippie v. Tippie*, 195 W.Va. 697 (W. Va. 1995).

A motion for a new trial is governed by a different standard than a motion for a directed verdict. *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999). If the trial

judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. *Id.* The Supreme Court of Appeals of West Virginia has often stated that a trial judge should rarely grant a new trial. *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 124, 454S.E.2d 413, 418 (1994), *cert. denied sub nom.*, *W.R. Grace & Co. V. West Virginia*, 515 U.S. 1160, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995). Furthermore, 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[.]" *Id.* (citations omitted).

IV. ARGUMENT

A. The Circuit Court Did Not Err by Failing to Award Judgment as a Matter of Law or in the Alternative for a New Trial in Favor of Defendant Corporation in Regard to the Scope of Employment Issue.

Roof Service filed "Defendant's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial". The Trents filed a response and memorandum in response to said motion. Oral argument was heard with the court subsequently issuing an order on February 15, 2019, denying said motion. I have restated the Court's ruling which includes finding of facts and conclusions of law which addressed the issues in regard to Respondeat Superior contained in this appeal as follows:

CIRCUIT COURT DECISION

"Analysis and Conclusions of Law

A. The Court did not err in denying Summary Judgment and Judgment as a Matter of Law on the issue of whether Mr. Wilfong was acting within the scope of his employment.

Defendants numerous arguments regarding why the Court erred by failing to grant summary judgment and judgment as a matter of law on the issue of whether Mr. Wilfong was acting within the scope of his employment can be distilled down to two arguments: 1) the undisputed evidence fails to show that a master-servant relationship existed for purposes of imposing liability under the doctrine of respondeat superior; and, 2) even if a master-servant relationship existed, Mr. Wilfong's actions were, for various reasons, outside the course and scope of such employment.

1. The Court did not err in allowing the factfinder to determine the issue of whether a master-servant relationship existed.

Defendants first argue that the evidence conclusively failed to establish the existence of a master-servant relationship for purposes of the doctrine of respondeat superior. Defendants' argument is perplexing given that they stipulate, and the evidence unmistakably shows that, Mr. Wilfong was an employee of Defendants. Thus, rather than arguing that a master-servant relationship never existed, Defendants seemingly contend that the Court and the factfinder, in order to determine if Mr. Wilfong's actions at the time of the accident were within the course and scope and of his employment, should have analyzed whether the four elements bearing upon a master-servant relationship were present at the exact time of the accident.

This analysis overlooks that Mr. Wilfong testified that he was an employee of Defendants. Once the master-servant relationship is established, the inquiry shifts to a different analysis to determine whether the employee's actions were within the course and scope of his employment. Further, to this Court's knowledge, until presenting this argument in their post-trial memorandum, Defendants' have never denied that Mr. Wilfong was their employee. Rather, this Court had always understood Defendants' position to be that, although an employee, Mr. Wilfong's actions at the time of the accident were outside the course and scope of his employment. Nevertheless, even if the

Court were to undertake the analysis as suggested by Defendants, it cannot agree with Defendants' conclusion that the evidence indisputably fails to show a master-servant relationship at the time of the accident.

The question as to whether a person is an employee or an independent contractor depends on the facts in any given case and all elements must be considered together. *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111,116, 133 S.E.2d 735, 739 (1963)(citing 27 Am.Jur., Independent Contractor, § 5, page 485). In *Paxton v. Crabtree*, 184 W.Va. 237,400 S.E.2d 245 (1990), the Supreme Court of Appeals of West Virginia set forth four factors for courts to consider when deciding whether a defendant is an "employer" who can be held vicariously liable for a contractor's negligence. In Syllabus Point S of *Paxton*, the Court stated that it is the power to control the subordinate's work that is determinative of whether an employer-employee relationship exists:

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

France v. S. Equip. Co., 22SW. Va. 1 ,7-8,689 S.E.2d 1,7-8 (2010).

Further, where the evidence relating to an independent contractor or employee is conflicting, or if not conflicting, where more than one inference can be derived therefrom, the question is one of fact for jury determination, but where the facts are such that only one reasonable inference can be drawn therefrom, the question is one of law for the court to decide. *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111,118, 133 S.E.2d 735,740 (1963)(citing 56 C.J.S. Master and Servant,§ 13; *Hicks v. Southern Ohio Quarries Co.*,116 W.Va.748, 182 S.E. 874; *Rice v. Builders Material Co.*, 120 W.Va. 585, 2 S.E.2d 527; *American Telephone & Telegraph Company v. Ohio*

Valley Sand Co., 131 W.Va. 736, 50 S.E.2d 884).

Defendants contend that the evidence demonstrated that Roof Services did not select or engage Bruce Wilfong for purposes of salvaging scrap metal from the Plaintiff's property to be sold exclusively for Mr. Wilfong's financial benefit. This contention overlooks that the evidence showed that Defendants knew and allowed Mr. Wilfong to return to this job site (and every other job site) for the purpose of salvaging scrap metal; it further overlooks the evidence showing that cleaning up and hauling away debris, such as scrap metal, was part of the contract with Plaintiffs and, thus, Mr. Wilfong's actions benefited Defendants.

Defendants also contend that the evidence demonstrated that Roof Services did not pay Mr. Wilfong compensation for anything done after he returned the company vehicle at the end of his workday. This contention overlooks the testimony of Mr. Cole that it was Defendants' policy for many years that Mr. Wilfong was allowed to retrieve and sell scrap metal from the job sites as a bonus or a reward for having worked for Defendants for 35 years.

Finally, Defendants argue that Roof Services did not control Mr. Wilfong relative to his operation of his personal vehicle or personal activities. This overly broad contention ignores that Defendants, for years, were aware of and had allowed Mr. Wilfong to re-enter their job sites in his personal vehicle for the purpose of salvaging scrap metal. Thus, it can at least be inferred that Defendants did exercise control over Mr. Wilfong's actions in his personal vehicle, as pertains to him bringing such personal vehicle onto their job site. The Supreme Court of Appeals has noted, in regards to this determinative factor, the inquiry is "whether the right of control or supervision over the work done existed in the person for whom the work was done, and not the use of such control or supervision." *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111, 117, 133 S.E.2d 735, 739

(1963). Here, Defendants controlled access to the job sites and could have, at any time, barred Mr. Wilfong from re-entering them to collect his bonus scrap, that Defendants never exercised such control is immaterial.

Thus, rather than categorically disproving a master-servant relationship at the time of the accident, the evidence at the time of Defendants' Motion for Summary Judgment and Motion for Judgment as a Matter of Law was conflicting, or if not conflicting, at least such that more than one inference could be derived from it and, thus, presented a question of fact properly determined by the jury.

2. The Court did not err in allowing the factfinder to determine issue of whether Mr. Wilfong's actions were within the course and scope of his employment.

In *Griffith v. George Transfer & Rigging, Inc.* 157 W.Va. 316, 201 S.E.2d 281 (1973), the Supreme Court of Appeals noted:

> The universally recognized rule is that an employer is liable to a third person for any injury to his person or property which results proximately from tortious conduct of an employee acting within the scope of his employment. ***The negligent or tortious act may be imputed to the employer if the act of the employee was done in accordance with the expressed or implied authority of the employer.***

157 W.Va. al 324-25, 201 S.E.2d at 287 (emphasis added). In *Griffith*, the Court discussed its holding in *Cochran v. Michaels*, 110 W.Va. 127, 157 S.E. 173 (1931), and noted the following language from Mechem on Agency, Second Edition, 1879:

> [A] servant is acting within the course of his employment when he is engaged in doing, for his master, either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural, direct and logical result of it. If in doing such an act, the servant acts negligently, that is negligence within the course of the employment.

In *Cochran*, the Court emphasized the need to examine the relation which the act bears to the employment and, in the syllabus, explained that "[a]n act specifically or impliedly directed by the master, or any conduct which is an ordinary and natural incident or result of that act, is within the scope of the employment."

As the Court noted in *Griffith*, " '[s]cope of employment' is a relative term and requires a consideration of surrounding circumstances including the character of the employment, the nature of the wrongful deed, the time and place of its commission and the purpose of the act." 157 W.Va, at 326,201 S.E.2d at 288.

The Court held in Syllabus Point four of *Griffith*, whether an agent is "acting within the scope of his employment and about his employer's business at the time of a collision, is *generally* a question of fact for the jury and a jury determination on that point will not be set aside *unless clearly wrong*." (emphasis added). *See also* Syl. Pt. 1, in part, *Laslo v. Griffith*,143 W.Va.469, 102 S.E.2d 894 (1958) ("When the facts relied upon to establish the existence of an agency are undisputed, and conflicting inferences cannot be drawn from such facts, the question of the existence of the agency is one of law for the court[.]"); *Cremeans v. Maynard*,162 W.Va . 74, 86, 246 S.E.2d 253, 259 (1978) (stating where evidence "conclusively' shows lack of authority and where conflicting inferences cannot be drawn" the court may decide issues of agency). Our Supreme Court cited the holding of the Supreme Court of California in *Mary M. v. City of Los Angeles*, as an example of when it would be appropriate for a court to remove such a determination from the purview of the factfinder:

> Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when "the facts are undisputed and no conflicting inferences are possible." In some cases, the relationship between an employee's work

> and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment. 285 Cal.Rptr. 99, 814 P.2d at 1347 (citations omitted).

W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B., 234 W.Va.492, 509, 766 S.E,2d 751, 768 (2014).

Defendants argue that the evidence regarding the course and scope of employment issue was undisputed such that they were entitled to Summary Judgment and Judgment as a Matter of Law. Defendants contend that "the evidence is undisputed that "[Mr. Wilfong] had not been directed by his employer to return to the worksite." This contention again overlooks evidence that Defendants were aware of and allowed Mr. Wilfong for years and years to return to job sites in his personal vehicle to salvage scrap metal; it also overlooks evidence that this was a regular practice that occurred on every job site. Defendants contend that "[Mr. Wilfong] was not being compensated by his employer at the time of the accident." This again overlooks Mr. Cole's testimony that retrieving and selling the scrap metal was a bonus or a reward for Mr. Wilfong in recognition of his years of service. Defendants contend that "[Mr. Wilfong's] employer exercised no direction or control over [the] personal salvage activities." This contention overlooks the evidence that Defendants themselves controlled the salvage activities by allowing them to occur, for years, on every job site. Defendants also contend that "[Mr. Wilfong'sl employer did not financially benefit from [the] salvage activities." This contention overlooks the evidence that removing and hauling away debris from the job site, such as scrap metal, was part of the contract with Plaintiff and, thus, Defendants arguably did derive a benefit from the salvage activities.

Defendants also contend that respondeat superior liability for Mr. Wilfong's actions is barred by the "going and coming" rule. The "going and coming rule" has its foundations in workers

compensation law and is articulated in syllabus point two of *De Constantin v. Public Service Commission*, 75 W.Va. 32,83 S.E. 88 (1914). "[T]he doctrine of respondeat superior is not typically applicable while [an] employee is coming or going to work." *Pratt v. Freedom Bancshares, Inc.*, No. 18-0180, 2018 WL 6016075, at *5 (W. Va. Nov. 16, 2018)(quoting *Courtless v. Jolliffe*,203 W.Va. 258, 263, 507 S.E.2d 136, 141 (1998)). "The reasoning underlying this rule is that the employee is being exposed to a risk identical to that of the general public; the risk is not imposed by the employer." *Id.* (quoting *Brown v. City of Wheeling*, 212 W.Va. 121, 126, 569 S.E.2d 197,202 (2002)).

The "going and coming rule" traditionally applies where the only evidence linking the employer to the accident was the fact that the employee was coming or going to work. *Courtless v. Joliliffe*, 203 W.Va. 258,263, 507 S.E.2d 136, 1 41 (1998). Various nuances of the rule may serve to alter its application where additional evidence exists linking the employer to the accident. *Id.* In Pratt, the Supreme Court of Appeals noted that the application of the "going and coming" rule may be altered

> where additional evidence exists linking the employer to the accident[,]" such as when the use of the roadway is required in the performance of the employee's duties for the employer, when the employee is rendering an express or implied service to the employer, or when there is an incidental benefit to the employer that is not common to ordinary commuting trips. *Keller v. Temple*, 2013 WL 6118679, al *4 (N.D.W.Va. Nov. 21, 2013)(citing *Courtless*, 507 S.E.2d at 141-142)

Pratt v. Freedom Bancshares, Inc., No. 18-0180, 2018 WL 6016075, at *5 (W. Va. Nov.16, 2018). Here, the "going and coming rule" is not applicable because there is evidence that Mr. Wilfong's salvaging of scrap metal from the job site at least partially fulfilled one of the employer's contractual obligations to Plaintiffs, to clean up and haul away debris from the job site. This

evidence could reasonably be inferred to show that Mr. Wilfong was rendering an implied service to his employer or to show that Mr. Wilfong's actions had an incidental benefit to the employer that is not common to ordinary commuting trips.

Rather than categorically disproving that Mr. Wilfong's actions were outside the course and scope of his employment, the facts were not so undisputed that no conflicting inferences were possible; nor did the evidence show a relationship between Mr. Wilfong's actions and his work that was so attenuated that a jury could not reasonably conclude his actions were within the scope of his employment. Further, the "going and coming rule" is not applicable to the instant case, Thus, the issue of whether Mr. Wilfong was acting within the course and scope of his employment was a question of fact properly determined by the jury.]"

The Court's finding was consistent with the Trents' response to Roof Service's post-trial motion.

Prior to June 9, 2015 (date of the accident) Roof Service of Bridgeport, Inc., and Mr. and Mrs. Trent entered into a contract regarding the "re-roofing" of the Trents' home. (See Plaintiff's Exhibit 3 at App. 2176) This contract provided that in exchange for the plaintiffs paying Roof Service $10,900.00 Roof Service would provide the following:

1. Removing old roofing, cleanup and haul away;
2. Install #30 Titanium underlayment;
3. Install drip edge at eaves;
4. Replace flanges;
5. Install rubber roofing under valleys;
6. Install nail over ridge vents;
7. Install Owens-Corning "TruDefinition Duration" Shingles- Estate Gray Color.

The contract was prepared by John K. Cole, Owner, of Roof Service of Bridgeport, Inc. The work was performed by employees of Roof Service including, but not limited to Mr. Wilfong.

CERTIFICATE OF SERVICE

I, Scot S. Dieringer, counsel for Plaintiffs, Robert Joseph Trent and Charlotte Trent, do hereby certify that on the 12th day of August, 2019, I served a true copy of the foregoing "BRIEF OF THE RESPONDENTS" by depositing a true copy in the Unied States mail, postage prepaid, addressed as follows:

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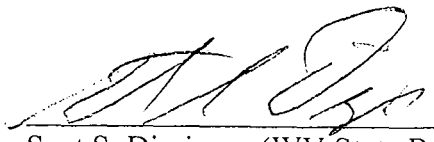

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There is no question that Mr. Wilfong was an employee of Roof Service of Bridgeport, Inc.. The Petitioner acknowledges the employee/employer relationship in the Memorandum of Law in Support of its Motion for Judgment as a Matter of Law Or in the Alternative for a New Trial at page 5 where it states as follows:

> The undisputed evidence in this case is as follows:
> - The subject motorist, Bruce Wilfong, was employed by Roof Services.

Once Mr. Wilfong was admitted to be an employee assigned by Roof Service to work on the Trents' roof, he is an employee for all purposes. France v. Southern Equipment Company, 225 W.Va. 1, 689 S.E.2d 1 (2010). The only remaining inquiry for Respondeat Superior liability is if the conduct of Mr. Wilfong was in the scope of his employment with Roof Service of Bridgeport, Inc..

It cannot be contested that Roof Service had a contractual obligation to "clean up and haul away" all of the debris and scrap which was the byproduct of the "re-roofing" of the Trents'

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[1] The original total cost of $10,900.00 was stricken through and an increased cost of $11,700.00 was added. The plaintiff was paid the $11,700.00 after Mr. Trent was hurt in the collision.

residence. Accordingly, Roof Service of Bridgeport, Inc., owed a duty to the Trents to clean up the job and remove any scrap and debris.

How Roof Service of Bridgeport, Inc., performed this duty to clean up and remove debris was up to the Petitioner The alleged deal with its employee, Mr. Wilfong, was not known to the Trents and is not relevant for Respondeat Superior liability.

Furthermore, the same was stipulated to by the Petitioner at trial.

Contrary to the assertions of Roof Service, the decisions of the West Virginia Supreme Court of Appeals as well as other jurisdictions regarding employees going to or coming from work; coming and going from lunch; personal errands; and/or doctor's appointments, is not what happened in this case as the jury very clearly found. Mr. Wilfong was backing his truck on the Trent sidewalk in front of the Trents' home (job site) attempting to back into the Trents'yard, to recover debris from the roof job at the home, when Mr. Trent was hit by Mr. Wilfong's truck while it was traveling backwards down the Trent sidewalk.

Mr. Wilfong was backing his truck into the Trents' yard to fulfill the obligation of the contractual obligation of Roof Service. The Trents had no information as to any alleged deal between Mr. Cole and Mr. Wilfong, all Mr. and Mrs. Trent knew is that Roof Service of Bridgeport, Inc., had the obligation to clean up and haul away the scrap and debris from the roof replacement job.

Mr. Wilfong was not driving to work; he was not driving home from work; he was not on a public highway; nor any of the other deviancies from his work for the Petitioner, Roof Service of Bridgeport, Inc., invented by Petitioner and which were not evidence at this trial. The clear, uncontroverted evidence is that Mr. Wilfong, an employee of the Petitioner, on June 9, 2015 at 3:00 p.m., was backing his truck down the sidewalk at the home of Mr. and Mrs. Trent when he hit Mr. Trent, knocking him to the ground and severely injuring him. (Mr. Trent incurred in excess of $181,000.00 in hospital bills and spent approximately thirty-eight (38) days in the hospital.)

Mr. Wilfong intended to back into the yard of the Trents' home, pick up debris from the roof job and remove it from the Trents' property. This was an obligation of Roof Service and was being performed by its employee, Mr. Wilfong, and the jury found that this activity was in the

scope of Mr. Wilfong's employment with Roof Service of Bridgeport, Inc.. See Judgment Order at page 4 of 7.

In regard to scope of employment, the court in Courtless v. Jolliffe, 203 W.Va. 258, 507 S.E.2d 136 held "that the scope of employment is a relative term and requires the consideration of surrounding circumstances including the character of the employment, the nature of the deed, the time and place of commission, and the purpose of the act." Furthermore, Courtless, supra held: "this court emphasized the need to examine the relation which the act bears to the employment and, in the syllabus, explained that "an act specifically or impliedly directed by the master, or any conduct which is an ordinary and natural incident or result of that act, is within the scope of the employment." citing Cochran v. Michaels, 110 W.Va. 127, 157 S.E. 173 (1931). Furthermore, the court reiterated, as stated in Courtless, supra, "that the scope of employment is a relative term and requires a consideration of surrounding circumstances including the character of the employment, nature of the wrongful deed, the time and place of its commission, and the purpose of the act." West Virginia Supreme Court cases have stated, "When the evidence is conflicting, the questions of whether the relation of principal and agent existed and, if so, whether the agent acted within the scope of his authority and in behalf of his principal are questions for the jury."

Undisputed evidence in this case is as follows:

1. that the defendant Wilfong was an employee of the defendant corporation (more importantly, the foreman and supervisor of all jobs);

2. that the removal of debris was included in the contract between defendant corporation and the plaintiffs, and plaintiffs were actually charged for and paid for this removal pursuant to the contract;

3. that defendant Wilfong had express/implied authority from his employer to return to the job site to recover the debris;

4. that the accident occurred at the job site when defendant Wilfong backed his truck up on the sidewalk to enter the plaintiffs' yard. Defendant Wilfong was compensated by virtue of his retention of the value of the debris; and

5. that the defendant corporation had given defendant Wilfong express permission to enter the job site for retrieval of the debris, which had occurred for thirty (30) years, with the full knowledge and acquiescence of the defendant corporation.

These issues were, at the very least, a jury question and decided, by the jury, in the favor of the Trents.

The Trents, without question, made a prima facia showing of an agency relationship because of the above mentioned facts which were determined by the jury. Once this prima facia case of agency was shown, the defendant then had the burden to establish his independent contractor defense. Zirkle v. Winkler, 214 W.Va. 19, 585 S.E.2d (2003). See also Sanders v. Georgia Pacific Corporation, 159 W.Va. 621, 225 S.E.2d 218 (1976) wherein the court held: "One who would defend against tort liability by contending that the injuries were inflicted by an independent contractor has the burden of establishing that he neither controlled nor had the right to control the work, if there is a conflict in the evidence and there is sufficient evidence to support a finding of the jury, the determination of whether an independent contractor relationship existed is a question for jury determination."

Roof Service further stated that, "There are four general factors which bear upon whether a master/servant relationship exists for the purposes of Respondeat Superior:

1. selection and engagement of the servant;

2. payment or compensation;

3. power of dismissal; and

4. power of control.

These factors are relevant to Roof Service's establishing that Mr. Wilfong was an independent contractor rather than an employee.

Plaintiffs allege that upon showing a prima facia case of defendant Wilfong acting within the scope of employment the burden shifted to defendant corporation to prove the above mentioned four (4) elements in regard to whether or not he was an independent contractor. Defendant argued this principle of law and the jury was instructed in regard to the same. Even if plaintiffs had a burden to prove those elements the law only requires the showing that defendant corporation had "power of control". In any event, defendant Wilfong was (1) selected and engaged as the employee (foreman/supervisor); (2) received compensation by virtue of the value of the material to be removed from the job site; and, (3) he could have been discharged by defendant corporation for his activities at the work site. More importantly, the evidence showed that the defendant corporation exercised its control letting defendant Wilfong return to the job site to remove the debris which was part of the contract between the defendant corporation and the plaintiffs. Again, this was the defendant corporation's burden of proof, but even if it was not, the plaintiffs purely proved those elements. It is absurd to maintain that defendant Wilfong was an independent contractor and had his own business for the removal of debris. He was clearly an employee of defendant corporation.

Defendant corporation cites Pratt v. Freedom Bancshares, Inc., et al. 2018 WL 601 607 5 (W.Va.) as further support for defendant corporation's position that it is not vicariously liable for Mr. Wilfong's actions at the time of the accident because he was outside the scope of his employment, and in fact had left the work place for his own personal endeavor. In the first instance, the Pratt case, supra, did not accept the "coming and going rule" in regard to civil actions.

The court in Pratt, supra, citing Courtless, supra, in fact held at footnote number six (6): "We have not previously had occasion to wander extensively through the vicissitudes of the "going and coming rule" nor to delineate whether the rule as it had been interpreted in the workers compensations context is equally applicable to the tort context.

The court in Pratt, supra, reached its decision and stated, "Whether an act by a servant is within the scope of his employment is determined by the relation which the act bears to the employment." See Cochran v. Michaels, 110 W.Va. 127, 157 S.E. 173 (1931). Further, Pratt supra, cited Griffith v. George Transfer & Rigging, Inc., 157 W.Va. 316, 326, 201 S.E.2d 281, 288 (1973) and stated, "Scope of employment is a relative term and requires the consideration of surrounding circumstances including the character of the employment, the nature of the wrongful deed, the time and place of its commission, and the purpose of the act."

In Pratt, supra, the chairman of the board had negligently struck another vehicle far from his ultimate destination while traveling to a board meeting. The court found that the board member was not acting in scope of employment by, basically, traveling to a board meeting with no connection to the work of the employer incident to the travel. However, the facts in the instant case are purely distinguishable from Pratt, supra, as discussed above in regard to agency relationship. This case as stated clearly shows that, at the very least, a jury question.

In regard to the "going and coming rule" which has been cited by the defendant corporation (plaintiffs maintain this is not a "going and coming rule" case, the same has not been decided by the Supreme Court) the Pratt court stated, "however, the "going and coming rule" traditionally applies where the only evidence linking the employer to the accident was the fact that the employee was going and coming to work. Various nuances of the rule may serve to alter its application where additional evidence exists linking the employer to the accident."

Again, plaintiffs would reiterate that the defendant Wilfong was not going to or coming from work but, instead, had arrived at the job site to remove the debris that was required by the defendant corporation. There is an abundance of evidence linking the defendant corporation to the accident. Those elements have been previously listed and discussed.

A new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. State ex rel. Meadows v. Stephens, 207 W.Va. 341, 532 S.E.2d 59 (1997). When a case such as this action involves conflicting testimony and circumstances which have been fairly tried, under proper instructions, the verdict of the jury must not be set aside unless that verdict is clearly plainly contrary to the evidence or without sufficient evidence to support it. Neely v. Belk, Inc., 222 W.Va. 560, 668 S.E.2d 189 (2008) . It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury on such facts will not ordinarily be disturbed. Graham v. Crist, 146 W.Va. 156, 118 S.E.2d 640 (1961).

Rule 59 of the West Virginia Rules of Civil Procedure grants the trial judge the authority to vacate a jury verdict and award a new trial, however, such authority should rarely be exercised. In re: State Public Building Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994). Such authority should not be exercised in this case.

In determining whether to grant a new trial, the trial court has the authority to weigh evidence and consider the credibility of witnesses. Coleman v. Sopher, 194 W.Va. 90, 459 S.E.2d 367 (1995). However, in order to grant a new trial the court must find that the verdict is against the clear weight of evidence; is based on false evidence; or, will result in a miscarriage of justice. Toothman v. Brescoach, 195 W.Va. 409, 465 S.E.2d 866 (1995).

Contrary to the assertion of the defendant when a circuit court reviews a jury verdict, all reasonable and legitimate inferences must be considered in favor of the party for whom the verdict was returned. Harnish v. Corra, 237 W.Va. 609, 788 S.E.2d 750 (2016).

The West Virginia Supreme Court of Appeals has consistently recognized that it 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 and the finding of the jury upon such facts will not ordinarily be disturbed. Skeen v. C&G Corp., 155 W.Va. 547, 185 S.E.2d 493 (1971). In Syllabus Point 3 of Walker v. Monongahela Power Company, 147 W.Va. 825, 131 S.E.2d 736 (1963) the Supreme Court Stated that:

> In determining whether the verdict of a jury 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 those facts, which the jury might properly find under the evidence must be assumed as true.

Although not cited by the defendant corporation, a motion for judgment as a matter of law is addressed by Rule 50 of the West Virginia Rules of Civil Procedure. A motion for judgment as a matter of law is distinct from a motion for new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. Gonzalez v. Conley, 199 W.Va. 288, 484 S.E.2d 171 (1997).

Furthermore, the defendant corporation's assignment of error in regard to their post-trial motions and summary judgment motion continually state the following facts are undisputed when in fact they are disputed:

That Mr. Wilfong had not ended his work day.

This is disputed by the fact that this action occurred right around 3:00 p.m. which Mr. Wilfong testified is when he generally ended his work day. Mr. Wilfong would call the bookkeeper for Roof Service and give her the number of hours worked for each day of the week. The only

evidence that was entered into the record was the Time Sheet Notes showing the days and hours worked. (See Plaintiff's Exhibit 4 at App. -1431) Mr. Cole was questioned about this exhibit which basically shows initials for each day of the week, that being M for Monday, W for Wednesday, T for Thursday and F for Friday.

The accident in this matter occurred on June 9, 2015, which was a Tuesday, however, Mr. Cole testified at trial that the T did not stand for Thursday, but rather Tuesday. Counsel for the Trents argued to the jury that this was ridiculous.

The jury had to make the decision as to whether he showed time for Monday, Wednesday, Thursday and Friday or unbelievably, Monday, Wednesday, Tuesday, Friday. The hours worked by Mr. Wilfong for Tuesday, June 9, 2015, were not reflected in the only evidence that was provided by defendant corporation to the Trents. Furthermore, the accident report showed that the accident was reported by Mr. Wilfong at 3:06 p.m. and that the accident occurred at 3:01 p.m., which was very close to the time shown on the Time Sheet that he was off work at 3:00 p.m. that day. The time is disputed and was presented as an issue to the jury.

Roof Service further states that it is undisputed that Mr. Wilfong had returned to the Trent work site to complete a personal matter as a subcontractor in this case. It was restated and found by the Circuit Court Judge that Mr. Wilfong was completing a contractual obligation to remove the debris from the Trent residence, for which the Trents paid Roof Service. Furthermore, Mr. Cole testified in his deposition that Mr. Wilfong was given permission to re-enter job sites to retrieve scrap metal. Furthermore, as discussed before, Mr. Cole testified at the trial that retention of the scrap metal monies was a bonus for Mr. Wilfong and was a reward for his thirty-five (35) years of service to him.

Further, Roof Service has continued to assert that Mr. Wilfong's returning to the site was

completely outside the supervision and control of his employer. This also is disputed. It is absurd to find that there was a subcontractor relationship between Mr. Wilfong and Roof Service. This was discussed in the Circuit Court's order. Roof Service had control and could have refused permission for Mr. Wilfong to re-enter the job site for removal of the scrap metal. Again, these are not undisputed facts in this case and the jury was the proper body to make this determination.

Counsel for the Trents has assumed that defendant corporation's appeal does not include their error presented to the lower court that the jury's verdict on the issue of scope of employment was against the weight of the evidence.

Wherefore, Mr. and Mrs. Trent request that Roof Service's appeal should be dismissed.

B. The Circuit Court Did Not Err in the Exclusion of Evidence Concerning Plaintiff's Ambulatory and Shoulder Problems Caused by the Subject Accident

There is more than sufficient evidence to establish that the Mr. Trent suffered significant and severe injuries as a direct and proximate result of the June 9, 2015 incident, which included an acute comminuted fracture of the distal radial metaphysis extending to the joint with angulation and displaced fracture fragments (bone sticking through the skin); a large abrasion and injury to his right shoulder (damaged shoulder); and, acute fractures of the right acetabulum anterior and posterior pillars extending to the right superior and inferior pubic rami including involvement adjacent to the pubic symphysis (broken pelvis) suffered as a result of being struck by a vehicle operated in the course and scope of the business of the defendant.

Mr. Trent was on the sidewalk in front of his home when he was backed over by a pickup truck driven by an employee of the Petitioner acting within the course and scope of his employment. The employee intended to remove scrap and other debris from the Trents' yard which

was the result of a construction project being done by Roof Service for the Trents.

Mr. Trent was initially taken to United Hospital Center Emergency Room but his injuries were so severe he was transported to Ruby Memorial Hospital. The significant injuries suffered by Mr. Trent include injuries which the defendant claims are inadmissible due to a lack of medical testimony establishing such injuries were caused by Mr. Trent being backed over, however, Mr. Trent did not have a broken elbow, bruised contused shoulder or broken pelvis prior to being hit by the truck of the defendant's employee.

The West Virginia Supreme Court of Appeals stated that:

> (a) a permanent injury is one from which there can be no complete recovery;
>
> (b) the testimony of a lay witness as to the physical condition of a party to an action which is based upon observations of the conduct and actions of the party is admissible;
>
> (c) a plaintiff attempting to recover for the future effects of injuries received may infer consequences from a sufficient quantum of evidence;
>
> (d) where an injury is of such a character as to be obvious, the effects of which are reasonably common knowledge, it is competent to prove future damages either by lay testimony from the injured party or others who have viewed his injuries, so long as the proof abduced thereby is to a reasonable degree of certainty.

Jordean v. Bero, 158 W.Va. 28, 210 S.E.2d 618 (1974). In Totten v. Adongay, 175 W.Va. 634, 337 S.E.2d 2 (1985), the West Virginia Supreme Court of Appeals held that medical testimony regarding the proximate cause of an injury is not required where the injury is of such a character as would warrant a reasonable inference by the jury that the injury in question was caused by the negligent act or conduct of the defendant.

Mr Trent, was backed over by the employee of the Petitioner on June 9, 2015. Mr. Trent

was taken by Bridgeport Fire Department Emergency Squad to the United Hospital Center Emergency Room.

The Bridgeport Fire Department Emergency Squad noted that Mr. Trent had pain in his right hip; and, an obvious complex fracture above his elbow. Upon arriving at the United Hospital Center Emergency Room, the plaintiff underwent x-rays and a CT scan which established the following:

(a) Upper extremity exam including findings of inspection abnormal, deformity and open bleeding area to right elbow. Large abrasion to posterior right shoulder.

(b) Lower extremity: pelvis tender but stable.

(c) Acute comminuted fracture is present of the distal radial metaphysis extending to the joint with angulation and displaced fracture fragments.

(d) Acute fractures present involving the right acetabulum anterior and posterior pillars extending to the right superior and inferior pubic rami including involvement adjacent to the pubic symphysis.

(e) Heterogeneous fluid is present medial to the right hip suggestive of hemorrhage in the extraperitoneal space related to the recent fracture.

(f) There is additional heterogeneous fluid lateral to the right hip representing ecchymosis or developing superficial hematoma.

The testimony of Mr. Trent, Mrs. Trent, and Ed Tomes regarding Mr. Trent's mobility limitations and the permanent effects of the injuries to his shoulder, elbow and pelvis are sufficient for the jury to consider the permanent effect of such significant injuries. Strahin v. Clevenger, 216 W.Va. 175, 603 S.E.2d 197 (2004). Although medical or other expert opinion testimony is

required to establish the future effects of an **obscure injury** to a reasonable degree of certainty, where an injury is such a character to be **obvious** the effects of which are reasonably common knowledge, it is competent to prove future damages by lay testimony from the injured party or other persons who have viewed the injuries of the injured party. Cook v. Cook, 216 W.Va. 353, 607 S.E.2d 459 (2004).

Even if there was a standard for medical testimony, Plaintiffs allege per Hovermale v. Berkley Springs Moose Lodge No. 1483, that causal testimony include probability, or even the possibility that the injury is related to the accident.

This is in keeping with the case of Pygman v. Helton, 148 W.Va. 281, 134 S.E.2d 717(1964). In *Pygman*, the Plaintiff was injured in a car accident on December 27, 1961. On January 2, 1962, he consulted with his physician and was found to have a moderately large hernia in his abdomen. The doctor who performed the surgery in this matter stated that "it was possible that the accident caused the hernia." The Trial Court excluded the evidence for lack of a reasonable degree of medical certainty relative to the cause of the injuries. The Supreme Court overruled the Trial Court's exclusion of the evidence. The Supreme Court held as follows:

> "upon a motion to exclude evidence the Trial Court should entertain every reasonable and legitimate inference favorable to the party opposing such motion fairly arising from the evidence, considered as a whole, and should assume as true facts which a jury might properly find from such evidence."

The West Virginia Supreme Court further held:

> "...a medical expert is not barred from expressing an opinion merely because he is not willing to state it with absolute certainty; his opinion is admissible into evidence as to the cause which produced, or probably produced, or might have produced, a certain physical

> condition, the opinion of an expert as to the probability, of even the possibility, of the cause of a certain condition may frequently be of aid to the jury, for when the facts tend to show that an accident was the cause of the condition, the assurance of an expert that causal connection is scientifically possible may be helpful in determining what are the reasonable inferences to be drawn from the facts."

Pygman specifically rejected the requirement that the physician tie the injury to the negligence by way of a reasonable degree of medical certainty and eschewed any rigid incantation or formula as it quoted at considerable length from Bethlehem-Sparrows Point Shipyard, Inc. V. Scherpenisse, 187 Md. 375, 50 A.2d 256 (1946), including this statement:

> ...his opinion is admissible in evidence as to the cause which produced or probably produced, or might have produced, a certain physical condition, the opinion of an expert as to the probability, or even the possibility, or the cause of a certain condition, the assurance of an expert that causal connection is scientifically possible may be helpful in determining what are the reasonable inferences to be drawn from the facts. See also: Charlton Brothers Transportation Company v. Garrettson, 188 Md. 85, 51 A.2d 642; Oklahoma National Gas Company v. Kelly, 194 Okla. 646, 153 P.2d 1010.

Consequently, all *Pygman* requires is testimony that the probability, or even the possibility, of the cause of a condition may be helpful in determining what are the reasonable inferences to be drawn from the facts.

Furthermore, in Myers v. Pauley, 2013 WL 3184917 (W. Va. June 24,1964), the Plaintiff was injured in an automobile accident in August of 2008. When he went to the Emergency Room an x-ray of his hip did not show a fracture. On September 15, 2009, over one (1) year later, a surgery was necessary on Plaintiff's hip. The Trial Court denied the Defendant's motion for

summary judgment and motion in limine to exclude medical testimony evidence and arguments stating that the Plaintiff did not sufficiently show that the hip injury, suffered by the Plaintiff, was proximately caused by the automobile accident. The Plaintiff had called three (3) treating physicians in regard to his acetabular injury (hip/pelvis). The three physicians could not testify to a reasonable degree of medical probability that the fractured hip was related to the accident in question, but one physician did say that the fracture was one that was commonly associated with an automobile accident. Plaintiff argued that there was a reasonable inference created that his injuries were a result of the automobile accident. The Court held:

> "Respondent presented sufficient evidence to show Petitioner's negligence, including evidence of the accident investigation. Petitioner's account of the accident was, at best, not creditable and changed several times. Upon a review of the record, this Court finds that there was certainly a legally sufficient evidentiary basis to find in favor of Respondent. Moreover, the medical testimony was sufficient to relate Respondent's injuries to Petitioner's negligence."

Myers specifically reiterated the holding in *Pygman,* supra, in regard to causation even without any medical evidence showing that there was a reasonable degree of probability that the injury suffered by the plaintiff was related to the accident.

There is no question that the injuries to the right shoulder, pelvis and right arm of Mr. Trent were caused by being backed over by the employee of the Petitioner. These injuries are not obscure, beyond the understanding of the jury without expert testimony or uncommon from being backed over by a pickup truck.

In Totten v. Adongay, 175 W.Va. 634, 337 S.E.2d 2 (1985), cited by defendant corporation, the court did find, as defendant corporation stated, "In many cases the cause of the injury is reasonably direct or obvious, thereby removing the need for medical testimony linking the

negligence with the injury." Furthermore, the court in Totten, supra, further reiterated *Pygman* by restating, "All that is required to render such testimony admissible and sufficient to carry it to the jury is that it should be of such character as would warrant a reasonable inference by the jury that the injury in question was caused by the negligent act or conduct of the defendant."

In regard to defendant corporation's statement concerning Dr. France, the Trents would ask the Court to consider his entire testimony in this matter in light of the cases that have been cited by counsel for the Trents. Dr. France testified that the injuries are permanent. The record showed that these injuries did not occur prior to the accident.

The record shows that Dr. France's testimony did provide aid to the jury in determining the connection to these injuries that were obviously a result of the accident, and permanent in nature and his testimony was consistent with West Virginia law on causation.

In regard to the shoulder, counsel for the Trents maintains that it was an aggravation of his pre-existing condition which Dr. France testified to pursuant to *Pygman* in regard to cause.

Counsel for Roof Service further argued that Dr. France gave testimony that it was not probable that Mr. Trent's ambulatory problems were caused by the accident. This is not a fair reading of the entire testimony of Dr. France. Dr. France testified that as in multiple trauma cases that it could have affected Mr. Trent and also his strength. He further testified that the injuries were reasonably certain to continue and were permanent concerning the plaintiff Robert Trent's ambulation and other problems which certainly provided a sufficient basis to present this evidence to the jury.

In regard to the shoulder injury, a fair reading of the entire testimony shows that although Mr. Trent had a severe arthritic shoulder that the same could have been aggravated by the accident

and the rehabilitation that he underwent. Furthermore, Dr. France testified that it was reasonably certain that Mr. Trent's injury was permanent. The Court previously ruled that any inconsistences concerning Dr. France's testimony went to the weight and sufficiency, not the admissibility.

Mr. and Mrs. Trent testified, as did Ed Tomes, that before the accident in question this eighty-one (81) year old man (at the time of the accident) never complained of any problems with his shoulder and ambulation nor pain related thereto. The only health problem that he had was related to his cardiac care. Mr. Trent walked approximate four (4) miles a day seven (7) days per week and was very robust and did not use a cane. They further testified that Mr. Trent could not sketch as he had done prior to the accident.

Subsequent to the accident the evidence is uncontraverted that Mr. Trent can no longer walk very far without the use of a cane (this is since the date of the accident), and has difficulty raising his left arm together with other problems not contested by the defendant corporation.

Accordingly, Roof Service's appeal must be denied. The injuries suffered by Mr. Trent cannot reasonably, in good faith, be questioned by the Petitioner. There was no delay in Mr. Trent seeking treatment for the comminuted fracture of his elbow; the fracture of his pelvis; or the injury to his right shoulder.

All of these injuries are acute injuries suffered on June 9, 2015 and immediately treated by medical personnel. There is nothing obscure or uncommon about the injuries resulting from Mr. Trent having been struck by the pickup truck operated by Mr. Wilfong.

Totten, supra, held: "Under established principles, the lay and medical testimony in this case, taken together, presented a reasonable basis for a proper finding on proximate cause."

Again, the evidence shows that Mr. Trent was not only healthy, but robust and had no

previous complaints prior to the injury. Dr. France's testimony was properly admitted and the jury had sufficient grounds to find that the accident caused the injuries to which Mr. Trent and his witnesses testified, together with Dr. France's testimony.

The Circuit Judge found that testimony was proper. Furthermore, the Petitioner did not object during trial to the testimony that came in from lay witnesses.

If there is any question as to whether or not Mr. Trent suffered these injuries prior to the accident, one need only to look at Dr. Angott's notes that were entered into evidence as Exhibit 11 at App.-1511. Records of office visits from May 10, 2012 through December 16, 2014. They show that Mr. Trent visited Dr. Angotti for semi-annual checkups. A review of those records shows that he was in good health except for his cardiac problem and there were no complaints that could be related to the injuries that he suffered in the subject accident.

Wherefore, Mr. and Mrs. Trent request that Roof Service's appeal be denied.

C. The Circuit Court Did Not Err and Did Not Fail to Allow Defendant to Present His Defense of Independent Contractor to the Jury nor Fail to Permit a Determination of Contributory Negligence by the Jury

Plaintiffs are a bit surprised by the allegations about the verdict form and the apportionment of plaintiff's negligence. The Court had instructed counsel to agree and prepare a joint verdict form in this matter. The verdict form was redacted, upon agreement of counsel, and presented to the jury without an objection by the defendant corporation. This is shown by the Court's asking the defendant corporation's counsel if he had any objection to the verdict form as follows:

> Q. Court: Anybody - - have you looked over the verdict form as amended? Is everybody in agreement with the verdict form?
>
> A. Mr. Cooper: Yes. (at App.-2145)

Petitioner was able to argue the independent contractor defense to the jury and I believe the Court had asked whether or not either party wanted a special interrogatory in that regard. In any event, Roof Service failed to prove their case in regard to the independent contractor defense and, after approximately an hour of deliberation, the jury found that Mr. Wilfong was acting within the scope of employment.

In regard to not asking whether there was a preponderance of the evidence that Mr. Trent's negligence contributed to the subject accident, this was clearly shown on the verdict form, the instructions to the jury, and argument of Roof Service's counsel. The jury found zero percent (0%) negligence on the part of Mr. Trent. He was standing on his sidewalk and was run down by Mr. Wilfong while traveling backwards down the Trent sidewalk. Again, this was a joint verdict form which was not objected to by Defendant Corporation.

Wherefore, Mr. and Mrs. Trent request that Roof Service's appeal be denied.

D. The Circuit Court Did Not Err by Failing to Set Aside a Jury Verdict Attributing No Contributory Negligence on the Part of Mr. Trent

Counsel for Mr. and Mrs. Trent finds this argument ridiculous, as did the trial court. Mr. Trent was the only individual who witnessed this accident and testified that he had stepped up on to the Trent sidewalk and was watching (with his back to Mr. Wilfong's vehicle) for a FedEx truck to bring medicine for his wife who was in the hospital. The evidence conclusively shows that Mr. Trent was not hit while crossing the street, but was hit on his sidewalk. This, once again, was a jury question that was resolved in favor of the Trents. The only evidence of the accident was provided by Mr. Trent. There is no evidence that he was struck while crossing the roadway. He was standing on his sidewalk looking in the opposite direction for a FedEx truck for delivery of

medicine for his hospitalized wife. The assertion that he did not look both ways before crossing the street is not accurate given the context of the facts in this case.

Again, the investigating officer testified that it would be negligent not to look both ways before crossing the street. However, this is not applicable to this case. Mr. Trent was not crossing the street when he was struck. When the officer was questioned whether there was anything in his report or investigation that would show any negligence on the part of Mr. Trent the officer, after taking several minutes to review his report, testified that Mr. Trent had not done anything negligent in his opinion. Mr. Trent testified that he had looked both ways before he started to cross the street. (App.-1025).

Wherefore, Mr. and Mrs. Trent request that Roof Service's appeal be denied.

E. The Jury's Verdict to the Plaintiff was not Redundant, Excessive, and Against the Weight of the Evidence, Warranting a New Trial or a Remittitur.

There were over One Hundred Eighty Thousand Dollars ($180,000.00) in medical bills in this matter with severe permanent injuries. Mr. Trent was hospitalized for approximately thirty-eight (38) days and has never recovered from these injuries. He still walks with a cane, cannot walk the mall as he had done in a robust manner, as prior to the accident, cannot sketch, cannot raise his arm above his head, an has difficulty writing his name. Mr. Trent's life has been inalterably changed for the short time that he has remaining in his life (Mr. Trent is now eighty-five (85) years of age). He further has limitations in regard to his shoulder and Dr. France testified that all these injuries were, beyond a reasonable doubt, permanent.

In regard to excessiveness, in the recent Supreme Court case of Miller v. Allman, 240 W.Va. 438; 813 S.E.2d 91, the court held: "the jury verdicts should not be set aside as excessive

unless they are monstrous, enormous, beyond all measure, unreasonable, outrageous, and manifestly show jury passion...". Plaintiff's award of Five Hundred Thousand Dollars ($500,000.00) for non-economic damages is approximately three (3) times medical bills in this matter as stated before. This is not an excessive verdict.

The Circuit Court Judge found that "Under both State and Federal Constitutions, courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption. Addair v. Majestic Petroleum Co., 160 W. Va. 105, 232 S.E.2d 821 (1977) U.S.C.A.Const. Amend. 7: Const. art. 3, § 13 (page 16 of defendant corporation's post-trial motions).

Prior to the subject accident, Mr. Trent was a robust eighty-one (81) year old man who enjoyed life. Mr. Trent can no longer walk the mall as he had done before, has to use a cane (except when he is inside his house), has nightmares and trouble sleeping because of the accident, as previously discussed.

Wherefore, Mr. and Mrs. Trent request that Roof Service's appeal be denied.

F. The Jury's Verdict to Plaintiff's Spouse for $250,000.00 for Loss of Consortium is Not Excessive and Against the Clear Weight of the Evidence, Warranting a New Trial or a Remittitur.

The jury's verdict to Mr. Trent's spouse for Two Hundred Fifty Thousand Dollars ($250,000.00) for loss of consortium is not excessive and against the clear weight of the evidence, warranting a new trial or a remittitur. Mrs. Trent, has been saddled with a life sentence because of the injuries suffered by her husband in the accident. The jury heard the testimony of both Mr. and Mrs. Trent in regard to how their lives have inalterably been changed. Mrs. Trent has had to

perform household chores, provide comfort and aid to her husband, etc.. This verdict is proper under the principles enunciated in Miller, supra.

Wherefore, Mr. and Mrs. Trent request that Roof Service's appeal be denied.

WHEREFORE, Robert Joseph Trent and Charlotte Trent, his wife, pray that Roof Service of Bridgeport, Inc.'s appeal be DENIED for the above stated reasons.

Dated this 12th day of August, 2019.

Respectfully Submitted,

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