No. 20-0848

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REXROAD HEATING AND COOLING, LLC, A WEST VIRGINIA LIMITED LIABILITY COMPANY AND DOUG BRAKE,

Defendant Below, Petitioners,

vs.

VELVA DARLEEN KOONTZ, EXECUTRIX OF THE ESTATE OF JACKIE BLAINE KOONTZ, DECEASED,

Plaintiffs Below, Respondents.

REPLY BRIEF FOR PETITIONERS

Appeal from the Circuit Court of Monongalia County
at Civil Action No. 16-C-615

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and Dough Brake

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STATEMENT OF THE CASE

This appeal arises from a collision that occurred on August 9, 2016, on Interstate 68 in Monongalia County between a motorcycle operated by Plaintiff-Respondent's Decedent, Jackie Blaine Koontz, and a motor vehicle operated by Defendant, Doug Brake. (Appx. Vol. I, pp. 11-12; ¶¶ 11-12; Appx. Vol. II, pp. 45, 57-58) At the conclusion of the trial, the jury rendered a Verdict where the jury determined that Plaintiff's Decedent was 50% at fault and Defendants were 50% at fault. (Appx. Vol. I, p. 27.) The jury in its Verdict also found that Plaintiff's total damages were $248,475.52 itemized as follows: Loss of Social Security benefits: $186,660; Loss of Pension Plan benefits: $47,420; and Hospital and Funeral expenses: $14,395.52. (Appx. Vol. I, p. 28.)

After the jury returned its Verdict, none of the parties raised any issues or requested the Circuit Court to poll the jury. (Appx. Vol. II, p. 362.) Nevertheless, the Circuit Court *sua sponte* raised questions about the jury's deliberative process and the manner in which the Verdict was reached. (Appx. Vol. II, pp. 363-89.) After its inquiry, the Circuit Court, in purportedly "accepting" the jury's Verdict, entered an Order finding that Plaintiff had proven damages of $373,320 for Loss of Social Security Benefits, $94,840 for Loss of Pension Plan, and $28,791.04 for Hospital/Funeral Expenses. (Appx. Vol. I, pp. 1-2.) These amounts are double the amounts the jury set forth on their Verdict Form. (Appx. Vol. I, p. 28.) In fact, these amounts are in excess of the amounts claimed by Plaintiff during trial as well as the amount of Hospital and Funeral Expenses stipulated to by the parties. (Appx. Vol. II, pp. 129-30, 173-74, 180, 232-33.)

During the trial, Plaintiff introduced evidence that her losses were $312,413 for Social Security benefits and $65,427 for Pension Plan benefits. (Appx. Vol. II, pp. 173-74, 180.) The parties stipulated that the Hospital/Funeral expenses were $14,395.52. (Appx. Vol. II, pp. 129-30, 232-33.)

Rather than actually accepting the Verdict as rendered by the jury, the Circuit Court inexplicably doubled the jury's Verdict to $496,951.04, which it then reduced by 50% based upon the comparative fault of the Plaintiff's Decedent, to arrive at a judgment in favor of the Plaintiff in the amount of $248,475.52. (Appx. Vol. I, pp. 1-2.) In her Brief, the Respondent contends the Circuit Court properly doubled the Verdict claiming that the jury had already reduced the Plaintiff's damages by the percentage of the Decedent's fault when arriving at its Verdict. (Respondent's Br., pp. 2-3, 5, 20.) However, there is no indication in the record that the jury failed to set forth on the Verdict Form the full amount of damages for each item of loss that they found Plaintiff had proven or that the jury reduced their award by the percentage of the Decedent's fault.

ARGUMENT

I. The jury did not reduce the amount of damages they awarded to the Plaintiff by the percentage of the Decedent's comparative fault.

Each of Respondent's arguments in opposition to this appeal hinges entirely upon the fiction that the jury reduced the Plaintiff's damages by Plaintiff-Decedent's 50% comparative fault before rendering their Verdict. (Respondent's Br., pp. 2-3, 5, 17-18, 20.)[1] The gist of each of the Respondent's arguments is that the trial court properly doubled the jury's Verdict before reducing that Verdict by the Decedent's 50% share of fault because this was necessary to negate the jury's alleged reduction of the Verdict. (Respondent's Br., p. 3, 17-18, 20; Appx. Vol. I, pp. 1-5.) This argument fails for two equally dispositive reasons. First, this argument is premised entirely upon the Circuit Court's *sua sponte*, improper questioning of the jury about its deliberative process despite the fact the Verdict was proper on its face. Second, the evidence introduced at trial and

[1] This Section of Petitioner's Reply Brief addresses the specific arguments raised by Respondent in Sections IV.B, IV.C, and IV.D of her Brief.

the Verdict itself conclusively confirm that the jury did not reduce its award of damages by the percentage of the Decedent's fault.

Plaintiff relies heavily upon an exchange between the Circuit Court and the Jury Foreperson following the Verdict for the proposition that the jury may have reduced the Plaintiff's damages by the percentage of the Decedent's fault. (Respondent's Br., pp. 2, 5; Appx. Vol. II, p. 364.) Plaintiff's proposition, however, simply is not supported by the record:

> THE COURT: Did you reach a number and then reduce it to get to these numbers?
>
> FOREPERSON: Yes, I think, if I'm understanding.
>
> JUROR: No. We didn't.
>
> JUROR: No.
>
> FOREPERSON: I still don't understand. I'm sorry.

(Appx. Vol. II, p. 364.) The Jury Foreperson eventually indicated she did not understand the Court's question while two other jurors clearly stated that the jury did not make any such reduction.[2]

Any confusion by the Jury Foreperson may have related to her misunderstanding as to the use of the term "reduced" in the initial question posed by the Circuit Court. The questioning began as follows:

> THE COURT: Okay. Ms. Layton, please understand why I'm asking this. You may recall that in the instructions I said that if there – I'm going to paraphrase it, but if there was a split in the assessment of negligence that you should come to the number damages and I would do the math on that. Remember that?

[2] As discussed below, at most, the record may arguably support the proposition that the jury did not want the Circuit Court to reduce their award by the percentage of the Decedent's fault, but not that they had made any reduction based upon the Decedent's comparative fault. (Appx. Vol. II, pp. 381, 387.) Whether or not the verdict should be reduced for comparative fault is not within the jury's purview as it is the function of the Circuit Court to reduce a Verdict in accordance with W. Va. Code § 55-7-13c and the percentage of fault attributed to a plaintiff by the jury.

FOREPERSON: Yes.

THE COURT: Okay. So, I just want to confirm on the record that the damages that you have filled out were not just automatically mathematically reduced by any assessment of the negligence. These are the true numbers that you found?

FOREPERSON: Like in the documents?

THE COURT: I can't hear you.

FOREPERSON: In the documents? Is that what you're asking?

THE COURT: I can't hear you. Sorry.

FOREPERSON: Like are you asking if those totals are from the documents?

THE COURT: I can't understand. I'm so sorry. Can you stand up and please just take your mask off for one minute.

FOREPERSON: I said are you asking like if those are like the totals from like the documents that had like the numbers, or I'm not sure if I fully understand.

(Appx. Vol. II, p. 363-64.)

It became readily apparent from the Foreperson's responses that she was referring to the fact that the jury did not award the amount of damages claimed by the Plaintiff in the documents submitted during trial, in other words, the jury awarded something less. This may explain why the Foreperson repeatedly referred to "the documents" when responding to the Court's questions. After discussing the issue with counsel at sidebar, the Court acknowledged that the Foreperson "...just didn't understand what I was talking about." (Appx. Vol. II, p. 367.) The Circuit Court then indicated, "So, I'm going to add all of this up [the verdict] and reduce it by fifty percent, and it's all good." (Appx. Vol. II, p. 367.) At this point, Plaintiff's counsel asked the Circuit Court, "Are you going to confirm with them that that's what their true verdict was?" (Appx. Vol. II, p. 367.) The Circuit Court replied "I believe the numbers confirm it. Do you not?" (Appx. Vol. II,

p. 367.) Then, rather than enter the verdict as stated on the Verdict Form, the Court resumed its inquiry into the jury's deliberative process.

The Circuit Court, however, should never have *sua sponte* questioned the jury about the Verdict and its deliberative process. This is because "[w]hen the verdict of a jury is in proper form, is duly signed by its foreman, and represents the final agreement of the jury, it should be received and entered by the trial court." *Toler v. Hager*, 205 W. Va. 468, 476, 519 S.E.2d 166, 174 (1999). As discussed at length in Petitioner's principal Brief, the Circuit Court erred as a matter of law when it failed to receive and enter the Verdict as rendered by the jury and when it invaded the province of the jury by *sua sponte* inquiring into the jury's deliberative process. *McDaniel v. Kleiss*, 198 W. Va. 282, 480 S.E.2d 170 (1996).

The false narrative that the jury reduced Plaintiff's damages by the percentage of the Decedent's fault, which is 50%, is not supported by the record because the jury awarded the Plaintiff more than 50% percent of her claimed damages for Social Security benefits, Pension benefits, and Hospital and Funeral expenses. (See Appx. Vol. I, p. 28; Appx. Vol. II, pp. 129-30, 173-74, 180, 232-33.) Logically, had the jury made any reduction based upon the Decedent's comparative fault it would have awarded Plaintiff no more than 50% of her claimed damages for Social Security benefits, Pension benefits, and Hospital and Funeral expenses. The fact that the jury did not reduce its award based upon the Decedent's comparative fault is best illustrated by the following chart which shows that Plaintiff recovered more than 50% of her claimed damages for Social Security benefits, Pension benefits, and Hospital and Funeral expenses:

Categories of Awarded Damages	Amounts Claimed by Plaintiff[3]	Amounts Awarded by Jury on Verdict Form[4]	Percentage of Claimed Damages Awarded by Jury	Amount Jury Would Have Awarded Had They Reduced Claimed Damages by 50%
Social Security Benefits	$312,413	$186,660	59.7%	$156,206.50
Pension Benefits	$65,427	$47,420	72.4%	$32,713.50
Hospital and Funeral Expenses	$14,395.52	$14,395.52	100%	$7,197.76

The above chart debunks Respondent's contention that the jury reduced the Plaintiff's recovery by the percentage of the Decedent's 50% share of fault. In fact, nothing was reduced by 50% and the percentage of reductions for each category was not the same. The jury awarded Plaintiff 59.7% of her total damages claimed for Social Security benefits, 72.4% of her total damages claimed for Pension benefits, and did not reduce the Hospital and Funeral expenses at all. The numbers confirm that a proper verdict was returned by the jury.

Respondent's reliance upon *McCullough v. Consolidated Corporation*, 937 F.3d 1167 (3d Cir. 1991), for the proposition that the Circuit Court can arbitrarily double the jury's Verdict is completely misplaced. (Respondent's Br., pp. 12-14.) The *McCullough* decision involved a negligence case where the jury returned a verdict in the amount of $235,000 in favor of the plaintiff, who had been found to be 50% contributorily negligent. *Id.*, at 1168. After the verdict was returned, the judge went into the jury room to thank the jurors for their service. *Id.* At that time, the jury foreperson asked whether the plaintiff would receive the entire $235,000. The judge informed the jurors that because of the finding that the plaintiff was 50% contributorily negligent,

[3] See Appx. Vol. II, pp. 129-30, 173-74, 180, 232-33
[4] See Appx. Vol. I, p. 28.

the $235,000 verdict would be reduced by 50%. *Id.* The foreperson and several other jurors stated that they had already deducted 50% from the verdict and intended the net recovery to be $235,000. *Id.* The judge then reconvened the jury to inquire whether the jurors had reduced the plaintiff's recovery by his 50% share of contributory negligence. *Id.* After the jurors confirmed that they had already reduced the award by the plaintiff's share of fault, the District Court entered a judgment in favor of the plaintiff in the amount of $235,000. *Id.* The Sixth Circuit held that this was proper, but it emphasized that its holding was narrow and limited to the particular facts of that case. *Id.*, at 1172.

The *McCullough* case is easily distinguishable for two reasons. First, the issue with the verdict in *McCullough* was brought to the District Court's attention by the jury without any prompting or interference by the District Court. In other words, the trial court did not *sua sponte* invade the jury's deliberative process by questioning the jury about what it perceived *might* have been a problem with the jury's Verdict. Rather, the District Court's inquiry occurred only after the jurors on their own advised the District Court that they had already reduced the plaintiff's damages by his comparative fault. The Sixth Circuit found this factor to be significant, stating:

> **Finally, the circumstances of this case present no danger of harassment of the jurors.** ... [T]he jurors themselves brought the mistake in the verdict to the court's attention. The short time between the adjournment of court and the jurors' revelation to the judge in the jury room assured that the amendment of the verdict stemmed from the jurors' own volition and not from any overreaching by the parties or their counsel.

Id. (Emphasis added.) The Sixth Circuit held, "that under the facts of this case, where all jurors agreed that by mistake a verdict other than that agreed upon had been delivered in court, amendment of the verdict does not violate FRE 606(b)." *McCullough*, 937 F.2d at 1172. Notably, the Sixth Circuit took pains to "emphasize that our holding is narrow and limited to the facts of this case." *Id.*

Secondly, the *McCullough* decision is distinguishable because all of the jurors in that case admitted that they had reduced the plaintiff's claimed damages by his percentage of contributory negligence. This crucial fact is absent here. In the present case, the jurors did not admit that they mistakenly reduced the Plaintiff's recovery by the Decedent's share of fault. In fact, the record confirms that the jury did not reduce the Plaintiff's recovery by the Plaintiff's Decedent's share of fault. The fact that the jurors never admitted that they reduced the Plaintiff's damages by the Decedent's comparative fault distinguishes the present appeal from the narrow holding of the *McCullough* Court.

If the jury had reduced the claimed damages by the Decedent's 50% comparative fault, the verdict would have been no more than 50% of the Plaintiff's claimed damages for Social Security benefits, Pension benefits and Hospital and Funeral expenses. However, the jury's award of $186,660 for the loss of Social Security benefits is 59.7% of Plaintiff's claimed loss of Social Security benefits, while the award of $47,420 for the loss of loss of pension benefits is 72.4% of Plaintiff's claimed loss of pension benefits. The jury's award of $14,395.52 was 100% of the stipulated Hospital/Funeral expenses. It simply defies all logic to contend that the jury arrived at an amount of Plaintiff's total damages and then reduced this amount by the Decedent's 50% comparative fault.

Nevertheless, Plaintiff takes the position that, "[a] mistake [by the jury] was made due to a misapprehension of the law and it was promptly corrected." (Respondent's Br., p. 14.) The only mistake made in the case was the improper doubling of the verdict by the Circuit Court. Even assuming *arguendo* that the jurors had misunderstood the law, this would not justify the Circuit Court's modification of the Verdict. This Court has recognized that, "[o]rdinarily, a juror's claim that he was confused over the law or evidence and therefore participated in the verdict on an

incorrect premise is a matter that inheres in or is intrinsic to the deliberative process and cannot be used to impeach the verdict." *Brooks v. Harris*, 201 W. Va. 184, 185, 495 S.E.2d 555, 556 (1997), citing Syl. pt. 3, *State v. Scotchel,* 168 W.Va. 545, 285 S.E.2d 384 (1981); *McDaniel*, 198 W. Va. at 283, 480 S.E.2d at 171. This is because "[a] jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." *Brooks*, 201 W. Va. at 185, 495 S.E.2d at 556, *citing* Syl. pt. 3, *Scotchel,* 168 W.Va. 545, 285 S.E.2d 384.

Aside from the fact that there never should have been any inquiry into the deliberative process of the jury, the inquiry itself was grossly confusing and comprised of poorly crafted questions that could not produce any insightful information. The Circuit Court repeatedly asked the jury questions about their verdict and what they "intended," while in the process defining a jury award thirteen different ways. For example, during the questioning, the Circuit Court made reference to what a jury award represents using the following phrases or variations thereof: true numbers, numbers that you intended, actual verdict, amount to walk home with, amount to take home, give her, what they wanted to send home, final amount you wanted to send home with her, in total, wind up with, amount you want me to reduce, amount you thought the court would reduce, or your intention.[5]

As the inquiry progressed, the focus suddenly changed to explaining to the jury that the Circuit Court was required to reduce the Verdict by 50% for comparative fault and that in order to

[5] These terms are found in Appendix Volume II on the following pages: true numbers (363), numbers that you intended (369), actual verdict (380), amount to walk home with (381), amount to take home (381), give her (369), what they wanted to send home (387), final amount you wanted to send home with her (387), in total (386), wind up with (380), amount you want me to reduce (379), amount you thought the Circuit Court would reduce (386), or your intention (369).

keep the Verdict the same, the amount of the award would have to be doubled. (Appx. Vol. II, p. 380.) At one point the Circuit Court even instructed the jury as follows:

> THE COURT: And you know what, if I misunderstood you misunderstood. So, I'm going to send you back to the jury room only for the purpose of writing down the numbers that you intended and you still have the charge back there. My instructions were first you cite what the estate is entitled to without reduction by the negligence percentage, which I will do after you give me the numbers that you intended. Do you understand what I am getting at now?
>
> FOREPERSON: Yes.

(Appx. Vol. II, pp. 369.)

Instead of sending the jury back to the jury room, the Circuit Court decided to ask the jurors the following question:

> Do the numbers written on the verdict form reflect the amount you intended to award plaintiff in total or the number you want the Court to reduce by the percentage you found plaintiff's decedent to be negligent?

(Appx. Vol. II, p. 375; see also Appx. Vol. II, p 379.) Aside from being confusing, this question was inherently defective and improperly invited the jury to weigh in on the application of the legal requirement of reducing the Verdict by the percentage of comparative fault. The first problem is that the question was presented as a choice between two competing alternatives, when in fact the correct answer would be both options. Technically, the verdict of the jury should be the total amount of damages—the first option—but that same amount is also the amount the Court must use when making a reduction for comparative fault. The problem is that the jury was never asked to enter an award that it "wanted" the Court to later reduce, so it is not surprising that the jury did not choose the second option, especially in view of the fact that the first option is exactly what the jury was instructed to do. Next, the Circuit Court's question incorrectly implied that there are two

types of verdicts: one verdict for the total damages, and another verdict if there is going to be a reduction for comparative fault.

In essence, the way the Circuit Court handled the inquiry, resulted in engaging the jury in an exchange about reducing the Verdict for comparative fault, which is the sole function of the Circuit Court. In this process, the Circuit Court specifically asked the jury if they wanted the Circuit Court to reduce the Verdict and then explained to the jury a way to avoid the impact of the reduction. (Appx. Vol. II, pp. 379-82.)

Eventually, it became apparent that the jurors were hopelessly confused by the Circuit Court's repeated questions, however, they were not confused as to what they did in arriving at their Verdict. Cherry-picking a response of the jury out of context to prove that the Verdict was anything other than what was clearly stated on the Verdict Form is misleading. (See Respondent's Br., p. 2.) In the end, despite the lengthy questioning, the jury never indicated they reached a number or an amount and then reduced that number or amount by 50%.

The jury properly decided Plaintiff's damages and properly recorded the amounts on the Verdict Form. The Verdict was in proper form, and, pursuant to W. Va. Code § 55-7-13c(c), the Circuit Court should have reduced the Verdict based upon the Plaintiff's Decedent's 50% comparative fault to arrive at the amount of the judgment, which should have been $124,237.76 in favor of Plaintiff. Rather than accept the Verdict as rendered by the jury, the Circuit Court interjected itself into the jury's deliberative process and asked the jurors a series of confusing and harassing questions about what the Circuit Court perceived to be a problem with the Verdict. Simply put, there were no problems with the Verdict, and the Circuit Court erred when it arbitrarily doubled the Verdict and entered judgment in favor of the Plaintiff in the amount of $248,475.52.

Accordingly, this Court should vacate the judgment, and remand this case to the Circuit Court with directions to enter judgment in Plaintiff's favor in the amount of $124,237.76.

II. The Circuit Court erred when it entered its August 21, 2020, Order modifying the Verdict because the modified Verdict is excessive and not supported by the evidence.

It is well-established that a verdict in excess of the amount of damages proven at trial cannot stand. *See* Syllabus, *Rodgers v. Bailey*, 68 W. Va. 186, 69 S.E. 698 (1910). Respondent, however, contends that the modified Verdict is somehow supported by the evidence because of the allegedly "uncontroverted evidence of loss of household services presented at trial" and evidence of "sorrow and mental anguish." (Respondent's Br., pp. 17, 21.)[6] The jury, however, rejected these claimed damages when it rendered its Verdict. (Appx. Vol. I, p. 28.) As instructed by the Circuit Court and as directed by the Verdict Form, the jury stated the following total amount of damages for each category of damages that Plaintiff had established (or failed to establish) by a preponderance of the evidence:

Loss of social Household Services: $0.00
Loss of social security benefits:.....$186,660.00
Loss of pension plan: $47,420.00
Hospital and funeral expenses: $14,395.52
Sorrow and Mental Anguish:.....$0.00

(Appx. Vol 1, p. 28.)

A jury is free to reject a plaintiff's claimed damages in a negligence action even where the amounts are uncontroverted at trial. Syllabus Point 2, *Bressler v. Mull's Grocery Mart*, 194 W. Va. 618, 619, 461 S.E.2d 124, 125 (1995). Respondent's reliance upon *McKenzie v. Sevier*, No. 19-0010, 2020 WL 7223169 (W. Va. Nov. 18, 2020), for the proposition that a jury must award damages for uncontroverted amounts is misplaced. The *McKenzie* case involved a zero dollar

[6] Respondent raises this argument in Sections IV.B and IV.E. of her Brief.

award to a plaintiff who introduced into evidence approximately $170,000 in medical bills related to a traumatic brain injury he suffered after the defendant punched him in the face. *McKenzie*, 2020 WL 7223169, at *1, * 11. Unlike the *McKenzie* case, the jury awarded Plaintiff damages as a result of her husband's death. The jury, however, was not required to award Plaintiff all of her claimed damages in this case where liability was hotly contested as demonstrated by fault being apportioned equally between the Plaintiff's Decedent and the Defendants.

In any event, Respondent has not cross-appealed the zero dollar awards for "loss of household services" and for "sorrow and mental anguish." (See Respondent's Br., p. 7.)[7] As a result, she has waived her right to assert that she is entitled to any compensation for these damages or that these categories of damages can be considered in determining whether the evidence supports the Verdict. *Tice v. Veach*, No. 19-1117, 2021 WL 816141, at *9 (W. Va. Mar. 3, 2021) ("[Defendant] did not cross-appeal the Judgment Order" and "[c]onsequently, he has waived his right to challenge the circuit court's finding ....").

The present case is analogous to *Bressler, supra*, where the jury awarded the plaintiff some but not all of her claimed damages. In *Bressler,* this Court reversed the Circuit Court's order granting the plaintiff's motion for an additur involving undisputed medical expenses. In that case, the jury awarded a verdict for the plaintiff in a negligence action arising from a slip and fall accident. *Id.*, 194 W. Va. at 619, 461 S.E.2d at 125. The jury awarded damages in the amount of $53,500, which included an award of $20,000 for future medical expenses, and determined that the plaintiff's comparative negligence was 25%. *Id.* The Circuit Court subsequently entered judgment in the amount of $40,125 based upon a reduction for the plaintiff's 25% comparative negligence. *Id.*

[7] "Respondent does not appeal the denial of request for additur ["for loss of household services or mental anguish"] by the circuit court." (Respondent's Br., p. 7; Appx. Vol. I, p. 55.)

Thereafter, the plaintiff filed a motion seeking additur or alternatively, a new trial on the issue of future medical damages. The amount of the additur "sought was $33,827.80, the exact difference between the amount of future medical expenses testified to by [the plaintiff's] expert witness ($53,827.80) and the amount actually awarded by the jury ($20,000)." *Id.* The Circuit Court granted the plaintiff's additur motion, and "awarded her the sum of $33,827.80 minus her percentage of contributory negligence." *Id.* The defendant appealed, challenging the additur award on two grounds: (1) that the award of an additur violated the Constitutional right to a jury trial; and (2) that the award invaded the province of the jury. This Court agreed that additur was improper even though the amount of future medical damages was uncontroverted.

This Court also agreed with the defendant's argument, "that the circuit court's award of additur invaded the jury's province by second-guessing the jury's intended award of future medical expenses." *Id.* The Court declared that, "[o]ur legal system expressly reserves for the jury "the right to weigh the testimony of all witnesses, experts and otherwise." *Id.* (Citation omitted.) This is true even where the defendant does not present evidence to dispute the plaintiff's claimed damages. *Id.*, 194 W. Va. at 622, 461 S.E.2d at 128 ("Regardless of whether [the defendant] contested the issue of future medical expenses propounded by [the plaintiff's] expert witness, the jury is required to weigh the evidence presented to it, including that of expert witnesses, and to assess appropriate damages by attaching whatever weight and value it deems appropriate to such testimony in connection with the circumstances of the particular case."). This Court held that, "[i]n granting [the plaintiff's] motion for additur and increasing the amount of the jury award for future medical expenses from $20,000 to $53,827.80, the court below was obviously operating under the mistaken notion that the absence of evidence presented on behalf of [the defendant] regarding the issue of future medical expenses necessitated a jury award equivalent to the amount

sought by [the plaintiff]." *Id.* Therefore, this Court reversed the award of the additur, holding that "the circuit court's award of additur clearly invaded the jury's province." *Id.*

Similarly, the Respondent cannot rely upon damages which were expressly rejected by the jury to justify the Circuit Court's doubling of the Verdict. By claiming that the modified Verdict is supported by evidence introduced during trial for "loss of household services" and "sorrow and mental anguish," the Respondent is essentially arguing that the Circuit Court's doubling of the Verdict can be supported if an additur were permitted for these categories of damages. This Court, however, has held that an additur is appropriate only in certain limited circumstances, none of which are present here. *Id.*, 194 W. Va. at 619, 461 S.E.2d at 125.

Despite the fact that the damages determined by the jury totaled $248,475.52, the Circuit Court arbitrarily doubled the Verdict to $496,951.04, before reducing the Verdict by 50% based upon the Decedent's comparative fault. (Appx. Vol. I, pp. 1-2.). The Circuit Court's actions completely eviscerated the proper application of W. Va. Code § 55-7-13c(c), which mandates that "the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault." *Id.*

In doubling the jury's award for "Loss of social security benefits," "Loss of pension plan," and "Hospital and funeral expenses," the Circuit Court inexplicably concluded that the jury intended to award damages for these items which exceeded the total amount of losses claimed by Plaintiff as well as the losses stipulated to by the parties. The amount determined by the Circuit Court for "Loss of Social Security Benefits" and "Loss of Pension Plan" is $90,320 more than Plaintiff's claimed losses, and the amount of damages determined by the Circuit Court for "Hospital/Funeral Expenses" is 200% of the amount stipulated by the parties. (Appx. Vol. I, pp. 1-2; Appx. Vol. II, pp. 129-30, 173-74, 232-33.) All told, the Circuit Court determined that

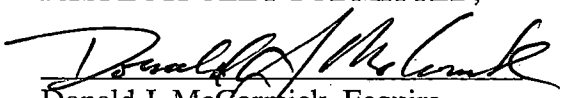
Plaintiff's damages for these losses were $104,715.52 beyond Plaintiff's claimed losses. (Appx. Vol. I, pp. 1-2; Appx. Vol. II, pp. 129-30, 173-74, 232-33.)

Under West Virginia law, a verdict which is clearly in excess of the amount which the evidence shows the plaintiff is justly entitled to recover should be set aside. *Winters v. Campbell*, 148 W. Va. 710, 727, 137 S.E.2d 188, 199 (1964). Here, both the Verdict, as increased by the Circuit Court, and the judgment are excessive as a matter of law and should be set aside. This Court, therefore, should reverse the judgment and remand this case to the Circuit Court to enter a new judgment in accordance with the jury's findings as set forth on the jury's Verdict Form.

CONCLUSION

For the foregoing reasons, the Petitioners-Defendants Below respectfully request that this Court reverse the judgment, reverse the Order awarding pre-judgment interest, and remand this case to the Circuit Court with directions to enter judgment in Plaintiff's favor in the amount of $124,237.76. In the alternative, the Petitioners-Defendants Below request that this Court reverse the judgment and remand this case for a new trial.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Reply Brief for Petitioners** has been served upon the following counsel of record by first class U.S. Mail, postage prepaid this 23rd day of March, 2021.

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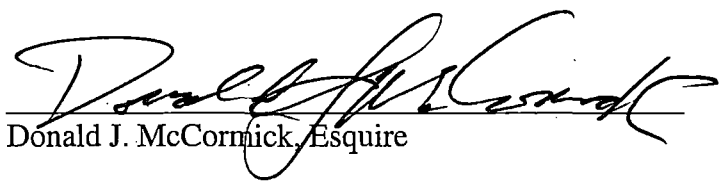

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