IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No.: 20-0848

REXROAD HEATING AND COOLING, LLC,
a West Virginia limited liability company,
and DOUG BRAKE,

Defendants Below, Petitioners,

v.

VELVA DARLENE KOONTZ, Executrix of the Estate of
Jackie Blaine Koontz, deceased,

Plaintiff Below, Respondent.

(On Appeal from the Order of September 24, 2020 of the Circuit Court of Monongalia County, West Virginia; The Honorable Susan B. Tucker, Civil Action No. 16-C-615)

RESPONDENT'S BRIEF

RESPONDENT, by Counsel:

Jeffrey D. Van Volkenburg (WVSB #10227)
Counsel of Record
jdvanvolkenburg@vv-wvlaw.com
Debra Tedeschi Varner (WVSB #6501)
dtvarner@vv-wvlaw.com
Varner & Van Volkenburg, PLLC
360 Washington Avenue
Clarksburg, WV 26301
Telephone: (304) 918-2840
Facsimile: (304) 566-1161

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I. STATEMENT OF THE CASE

A. Procedural History

The underlying civil action arose from a collision of a motorcycle and truck that occurred on August 9, 2016 on Interstate 68 in Monongalia County, West Virginia. Jackie Blaine Koontz, was operating the motorcycle involved in the collision. Doug Brake operated the truck. (R. Vol. I, 11) The collision resulted in the death of Jackie Blaine Koontz. Mr. Brake was employed with Rexroad Heating & Cooling, LLC ("Rexroad") at the time of the incident. (R. Vol. I, 11) Mr. Brake was operating a truck owned by Rexroad at the time of the accident. (R. Vol. I, 11-15). Respondent, Velva Darlene Koontz, Executrix of the Estate of Jackie Blaine Koontz, (Plaintiff below) filed a civil action in the Circuit Court of Monongalia County, Civil Action No. 16-C-615, against Petitioners Rexroad and Doug Brake (Defendants below) on December 19, 2016 (R. Vol. I, 11-15). Respondent's Complaint requested relief against Petitioners pursuant to the West Virginia Wrongful Death Act, W. Va. Code § 55-7-5. (R. Vol. I, 14.)

After Petitioners answered the Complaint, the parties completed discovery, following a stay and extended continuance in the proceedings. See, Docket, at pp. 37-38 (R. Vol. I, 103). Thereafter, the parties completed the remaining discovery. The case was tried before a jury on August 18, 19, and 20, 2020. (R. Vol. II 1-390) During trial, Respondent presented evidence that Respondent was entitled to damages due to the loss of pension income, social security income, and loss of household services due to the death of Respondent's decedent. (R. Vol. II, 165-195.) Respondent also presented evidence concerning sorrow and mental anguish arising from the loss of Respondent's decedent. (R. Vol. II, 148:22-154:1-7) Following the presentation of all evidence, the jury returned a verdict finding Respondent Douglas Brake negligent in the operation of his vehicle, which led to the death of Respondent's decedent. (R. Vol. I, 3) The jury further found that Petitioner Doug Brake's negligence was a proximate cause of the accident leading to the death

of Respondent's decedent. (R. Vol. I, 3.) The jury also found Respondent's decedent 50% at fault for the incident. (R. Vol. I, 3.)

The jury's verdict listed damages in the amount of $186,660 for Loss of Social Security Income; $47,420 for loss of pension plan, and $14,420 for hospital and funeral expenses. (R. Vol. I. 5.) Prior to the jury being dismissed and just after receiving the verdict form, the Honorable Susan B. Tucker, noted an issue ("Don't leave. Just one minute I have to have a conference here.") (R. Vol. II, 363:4-5; 7-13.) In response to the issue, Judge Tucker asked the juror foreperson to confirm that the damages awarded on the verdict form were not reduced by any assessment of comparative negligence against Respondent's decedent. (R. Vol. II, 363:14-17; 364:6-7.) The juror foreperson responded that the jury had reached a number and then reduced it. (R. Vol. II, 364:6-8.) The Court then conferred with counsel concerning how to address the fact that the jury had assumed the role of the Court and reduced the award to account for the comparative fault of Respondent's decedent. (R. Vol. I, 365-378:21.) Following the bench conference with counsel, the Court inquired of each juror, individually, whether the numbers written on the verdict form reflected the amount that the juror intended to award plaintiff in total or if it was the number the juror wanted the court to reduce by the percentage Respondent's decedent was found to be negligent. (R. Vol. II, 379:13-381:17.) Each juror affirmatively stated, on the record, they intended for Respondent to receive the amounts listed on the verdict form. (*Id.*) The Court's questioning of each juror confirmed that they had improperly assumed the role of the Court and reduced the award to reflect the comparative negligence that the jury assessed against Respondent's decedent. The juror foreperson affirmatively acknowledged the confusion of the jury concerning the mechanism by which an award would be reduced to account for comparative negligence. (R. Vol. II, 386:9-11.)

The day following the jury's verdict, the circuit court entered an "Order Accepting Verdict." (R. Vol. I, pp. 1-5.) The Order correctly accounted for the jury's misapplication of the comparative negligence of Respondent's decedent so as to permit the jury's verdict to accurately reflect its intended award after it mistakenly applied comparative negligence to reduce the award Respondent was to receive. The "Order Accepting Verdict" also reflected the unanimous polling of the jury prior to the jurors being released by the Court.

On August 31, 2020, Petitioners filed a Motion for Relief from Judgment or Order pursuant to W. Va. R. Civ. P. 59 and W. Va. R. Civ. P. 60(b)(6). Alternatively, Petitioners moved for a new trial pursuant to W. Va. R. Civ. P. 59(a). (R. Vol. I, 29-40.) Respondent timely filed a Motion Requesting Additur and for Imposition of Prejudgment Interest on September 4, 2020. (R. Vol. I, 53-67.) Each party responded to the respective post-trial motions of the other party. After a hearing, the Court entered an Order on September 24, 2020 denying Petitioners' Motion for Relief from Judgment and Motion for a New Trial. (R. Vol. I, 6-7, 107.) The circuit court denied the Respondent's request for additur but correctly granted the request for the imposition for prejudgment interest. (R. Vol. I, 6-7, 107). Petitioners have timely filed their Notice of Appeal.

B. Statement of Facts

On August 9, 2016, Respondent's decedent was attempting to enter Interstate 68 westbound from Exit 1, US 119 – University Avenue/Downtown (hereafter, Exit 1.) Respondent's Complaint alleged that Petitioner Brake was traveling on Interstate 68 and that "Brake negligently or intentionally changed lanes; moving from the right-hand lane of the Interstate to the left-hand lane directly in front of [Respondent's decedent]." (R. Vol. I, 12 ¶ 12.) Respondent's Complaint alleged this action by Petitioner Brake "proximately caused a collision" with the motorcycle operated by Respondent's decedent. (R. Vol. I, 12 ¶ 12.) It was uncontroverted that Petitioner Brake was operating the truck involved in the incident in the course and scope of his employment

with Petitioner Rexroad. Petitioners responded to the Complaint denying all liability and asserting that Respondent's decedent was comparatively negligent. (R. Vol. I, 19-20, ¶ 28.)

During the trial, Captain Mark Ralston of the Monongalia County Sheriff's Department testified about his investigation into the circumstances leading to this accident. (R. Vol. II, 30-90.) He noted that his investigation revealed that prior to the accident, Respondent's decedent had obtained gas for his motorcycle at the Sheetz located near Exit 1 on Interstate 68. (R. Vol. II, 50:18-22.) Respondent's decedent proceeded to enter Interstate 68 heading towards Interstate 79 with the goal of traveling southbound towards Fairmont. (R. Vol. II, 50:21-23.)

Captain Ralston spoke with Petitioner Brake after the incident and obtained a written statement from him wherein he noted that Petitioner Brake was traveling west on Interstate 68. Petitioner Brake volunteered that he encountered slowing traffic and that he did not think he was going to be able to slow down or stop so he merged into the "fast" lane. (R. Vol. II, 52:7-15; 53:19-20.) Likewise, Captain Ralston testified that Petitioner Brake did not believe he could stop or slow his truck due to slowing traffic in front of him without colliding with the vehicles in front of him so he made a "quick" lane change to the left. (R. Vol. II, 53:22-24; 54:1-4; 60:2-4.)

Captain Ralston detailed for the jury that Respondent's decedent traveled from Exit 1 onto Interstate 68 and merged into the left-hand lane of traffic. (R. Vol. II, 60:15-16.) He testified that while Respondent's decedent merged into the left-hand lane prior to when he should have done so, he also observed other individuals undertaking the same action on the date of the accident. (R. Vol. II, 60:17-21.) He confirmed that drivers were taking this action due to the ongoing slowdown in traffic on Interstate 68, which was occurring due to an accident that occurred the previous night. (R. Vol. II, 60:20-24.) Captain Ralston confirmed that it made sense why people were trying to undertake such an action in light of the condition of traffic. (R. Vol. II, 61:1-5.) Captain Ralston also confirmed that his investigation found that Respondent's decedent had established himself in

the left-hand lane of travel prior to Petitioner Brake quickly moving into the left-hand lane to avoid the automobiles in front of him. (R. Vol. II, 62:2-7.) Ralston testified that Petitioner Brake, if he looked in his rearview mirrors prior to changing lanes, "didn't do it well enough" because the motorcycle was in the lane when Brake changed lanes. (R. Vol. II, 62:11-13.) Respondent's decedent collided with the rear of Petitioner's truck. The parties also offered competing, retained forensic experts at trial to provide the jury testimony regarding the circumstances surrounding the crash. (R. Vol. II, 196:19-231:22; 245:22-304:18.)

Respondent's economic damages were presented through the testimony of Dan Selby, who was duly qualified by the circuit court as an expert in forensic accounting. (R. Vol. II, 165-195.) Petitioners did not call an expert economist to rebut Mr. Selby's damage calculations. The parties further stipulated to hospital and funeral expenses in the amount of $14,395.52. (R. Vol. I, 22-23.)

Following the conclusion of the presentation of evidence, the Court's charge, and closing arguments, the jury rendered its verdict on August 20, 2020 (R. Vol. II, 360-62) finding that Petitioner Brake was negligent and a proximate cause of the incident leading to this civil action. The jury also found Respondent's decedent 50% at fault for the incident. (R. Vol. I, 3.) The jury's verdict form listed awarded damages in the amount of $186,660 for Loss of Social Security Income; $47,420 for loss of pension plan, and $14,420 for hospital and funeral expenses. (R. Vol. I. 5.)

Prior to the jury being dismissed and immediately after receiving the verdict form, the Honorable Susan B. Tucker, told the jury not to leave. (R. Vol. II, 363:4-5; 7-13.) At that time, Judge Tucker asked the juror foreperson to confirm that the damages awarded on the verdict form were not reduced by any assessment of comparative negligence against Respondent's decedent. (R. Vol. II, 363:14-17; 364:6-7.) The juror foreperson responded that the jury had reached a number and then reduced it. (R. Vol. II, 364:6-8.) The Court then conferred with counsel

concerning how to address the fact that the jury had assumed the role of the Court and reduced the award to account for the comparative fault of Respondent's decedent. (R. Vol. I, 365-378:21.)

Following the bench conference with counsel, the Court inquired of each juror, individually, on the issue of the award. (R. Vol. I, 379:13-381:17.) Each juror affirmatively stated, on the record, they intended for Respondent to receive the amounts listed on the verdict form. (*Id.*) The Court's questioning of the jurors confirmed that they had improperly assumed the role of the Court and reduced the award to reflect the comparative negligence that the jury assessed against Respondent's decedent. The juror foreperson affirmatively acknowledged the confusion of the jury concerning the mechanism by which an award would be reduced to account for comparative negligence. (R. Vol. II, 386:9-11.) ("I just – I know myself; I don't believe none of us, I don't think, understood that you were taking fifty percent of those.")

The day following the jury's verdict, the circuit court entered an "Order Accepting Verdict." (R. Vol. I, 1-5.) The Order correctly accounted for the jury's misapplication of the comparative negligence of Respondent's decedent so as to permit the jury's verdict to accurately reflect its intended award after it mistakenly applied comparative negligence to reduce the award Respondent was to receive. The "Order Accepting Verdict" also reflected the unanimous polling of the jury prior to the jurors being released by the Court.

Thereafter, Petitioners timely filed a Motion for Relief from Judgment or Order pursuant to Rules 59 and 60(b)(6) of the West Virginia Rules of Civil Procedure on August 31, 2020. Alternatively, Petitioners moved the circuit court for a new trial pursuant to W. Va. R. Civ. P. 59(a). (R. Vol. I, 29-40, 106.) Respondent timely filed a Motion Requesting Additur and for Imposition of Prejudgment Interest on September 4, 2020 (R. Vol. I, 53-67, 106.) After a hearing on the parties' respective post-trial motions, the circuit court entered an Order on September 24, 2020 denying Petitioners' Motion for Relief from Judgment or Order pursuant to W. Va. R. Civ.

P. 59 and W. Va. R. Civ. P. 60(b)(6) and Motion for a New Trial pursuant to W. Va. R. Civ. P. 59(a). (R. Vol. I, 6-7, 107.) The circuit court denied Respondent's motion requesting additur but granted Respondent's request for an award of prejudgment interest. Respondent does not appeal the denial of request for additur by the circuit court. While briefly discussed by Petitioners, they have not specifically appealed the award of prejudgment interest by the circuit court. *Id.*

II. SUMMARY OF ARGUMENT

The circuit court acted properly by assuring that the verdict rendered by the jury reflected the intent and understanding of the individual jurors. The circuit court's actions did not violate Rule 606(b) of the West Virginia Rules of Evidence. Rather, the court's actions were appropriate under the standard explained in *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991).

Petitioners assert that the verdict, as awarded, exceeded the damages proved at trial by the Respondent. However, the Petitioners neglected to include proved and uncontroverted damages in their calculations. Instead, the result of the same calculations with all applicable figures included, shows that not only was the award not excessive, but it was also reasonable.

The Petitioners assert that the jury's verdict, affirmed by the circuit court denied the Petitioners of their Constitutionally protected right to a trial by jury. However, under Petitioners' theory of this case, it is Respondent that would have been subjected to a denial of her Constitutionally protected rights. The jury, prior to dismissal, clearly and unanimously confirmed on the record that it had misconstrued the application of the comparative fault it found against Respondent's decedent. Rather than protecting the rights of the parties, overturning the ruling of the circuit court, after full and unanimous input of the jury to affirm its intended verdict would serve to deprive Respondent of a trial by jury by requiring each party to abide by a verdict which the jury did not intend to enter.

The final assignment of error asserted by the Petitioners is a reiteration of the excessiveness of the ultimate award. As stated in the Respondent's response to the first assignment of error, the Petitioners relied on an incomplete set of data in their calculations, resulting in an improper and deficient representation of the damages which were proven at trial. Calculations which include the full set of damages proven at trial show that the amended verdict was not excessive, and it was reasonable when viewed in the light of the total damages proved.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent agrees with Petitioners to the extent that there are no novel issues of law raised in this appeal, pursuant to W. Va. R.A.P. 19. Respondent believes that this case is appropriate for issuance of a memorandum decision, pursuant to W. Va. R.A.P. 21(c). Petitioners' appeal involves (1) no substantial question of law; (2) there is no prejudicial error considering the applicable standard of review for Petitioner's assignments of error; and (3) other just cause exists for issuance of a memorandum decision denying Petitioners' requested relief. The undisputed facts confirm that the circuit court correctly requested the jury to confirm the award they intended to issue.

IV ARGUMENT

A. Standard of Appellate Review.

When reviewing a trial court's decision to deny a Rule 59(a) motion, the following standard of review applies: "The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syllabus Point 2, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W.Va. 209, 672 S.E.2d 345 (2008).

Appeals arising from a trial court's ruling on a Rule 59(e) motion to alter or amend a judgment will be reviewed according to the same two-pronged approach outlined in *Tennant v.*

Marion Health Care Found., Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995), which states the following:

> We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Id. at 104. Further, "[t]he standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus Point 1, *Wickland v. American Travellers Life Insurance Co.*, 204 W.Va. 430, 431, 513 S.E.2d 657, 658 (1998).

Lastly, appeals arising from a circuit court's decision to deny a Rule 60(b) motion shall be reviewed through an abuse of discretion standard. *Davey v. Estate of Haggerty*, 219 W.Va. 453, 637 S.E.2d 350 (2006).

B. The circuit court's post-trial order properly entered judgment to reflect the intent of the jury and cure the jury's confusion concerning the application of its comparative fault finding.

Petitioners' first assignment of error attempts to portray the circuit court as having unilaterally changed the verdict rendered by the jury. The record below explicitly negates this contention. Respondent agrees with Petitioners' contention that "[t]he judge cannot substitute [her] opinion for that of the jury merely because [she] disagrees." *Toler v. Hager*, 205 W. Va. 468, 475, 519 S.E.2d 166, 173 (1999); *Petitioners' Brief*, at p. 12. The circuit court's extensive efforts to confirm the jury's understanding of the nature of the jury's award confirmed that it had been confused about the reduction in any award to account for the jury's comparative negligence finding. Petitioners' Brief completely ignores the specific and reasoned steps taken by the circuit court to assure the verdict rendered by the jury reflected their intent.

After realizing there was an issue with the jury, the circuit court questioned the jury foreperson to confirm that the jurors had not reduced their damage assessment by any comparative negligence. (R. Vol. II, 363:14-18.) The circuit court inquired whether the jury reached a number and then reduced it to arrive at the numbers reflected on the verdict form. (R. Vol. II, 364:6-7.) The juror foreperson responded, "Yes. I think, if I'm understanding." (R. Vol. II, 364:8.) Other jurors then responded to the court's question. This was followed by the foreperson stating that she did not understand. (R. Vol. II, 364:11.) Thereafter, the court initiated a sidebar conference with counsel to determine the best path forward in light of the confusion being expressed by the jury. (R. Vol. II, 365:2-378:20.) The court's stated goal was to try to assure that the parties did not have "to do this trial all over again." (R. Vol. II, 366:16-19.)

After the discussion with counsel, the court formulated the following question to be asked of each juror:

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

(R. Vol. II, 379:15-18.) The first juror questioned responded, "The amount is what I wanted awarded." (R. Vol. II, 379:21). The court further confirmed the first juror's understanding with a follow-up question, "Not the amount that you wanted me to reduce by fifty percent?" (R. Vol. II, 379:22-23). The first juror confirmed this understanding by responding, "Correct". (R. Vol. II, 379:24.). The court then asked, "Okay. If I'm understanding you then, if I doubled these numbers that would be the verdict that you want me to reduce by fifty percent, right?" (R. Vol. II, 380:1-3.) The first juror responded, "Yes." (R. Vol. II, 380:4.) In a further effort to confirm the jury's misunderstanding of the application of the comparative negligence finding, the court then asked, "You already reduced it by fifty percent. Is that what you are saying? I thought that's what you said." (R. Vol. II, 380:5-7.) The juror responded, "Yes, if that's what she did that's what we would

have come up with. That was what we wanted awarded." "We didn't understand that you were taking fifty percent of that, right?" (R. Vol. II, 380:10-12.) Another juror then added, "Right." (R. Vol. II, 380:12.)

The court then stated, "Okay. So, [juror] is saying is correct. And [juror], was that your understanding of what you were doing? The questioned juror then stated, "That's what I came to an agreement with, yes." (R. Vol. II, 380:15.) The court then asked the remaining jurors, individually, if this was their understanding, as well. (R. Vol. II, 380:13-21.). They each responded affirmatively. (*Id.*) In yet a further effort to determine if the jury had misapplied the law, the court then asked, "So, if I'm understanding you, your actual verdict is two times these numbers, which you believe I would reduce and wind up with the numbers you have written down?" (R. Vol. II, 380:22-24). Several jurors responded noting they agreed with the court. (R. Vol. II, 381:2-9.) The court then asked the question, "This is the amount you wanted the plaintiff to walk home with, not the amount you wanted me to reduce, correct?" (R. Vol. II, 381:10-12.) A juror responded, "I did not want you to reduce anything." (R. Vol. II, 381:13.) Another juror then added, "Yes, that's [sic] we thought would be awarded." (R. Vol. II, 381:15.)

After an additional sidebar with counsel, the juror foreperson then added, "Yeah, that's what I mean. Before we did anything on this paper, yes, we came to an agreement on this. I just – I know myself, I don't believe none of us, I don't think, understood that you were taking fifty percent of those. So, yes, we were in agreement." (R. Vol. II, 386:7-11.) The final juror questioned then added, "It was the total. I did not realize there was any reduction." (R. Vol. II, 386:24; 387:1). In an effort to confirm the final juror's understanding, the court then asked, "Okay. This is what you wanted to send home with her?" The juror responded, "Yes." Finally, the court asked the entire jury the following:

> **Court:** Okay. Now I believe it is clear that her answer is the same as the other five. This what they wanted to send home. So, what I'm going to do is acknowledge this discussion, I have to do an order. That was one thing I wanted to teach you all. Everything that happens in court is reduced to writing and then there's an order. So, what I will do is say that each of you and unanimously agree that this was the final amount you wanted to send home with her, not the amount that you wanted me to reduce by the amount of negligence. So say you all?
>
> **Jurors:** Yes.

(R. Vol. II, 387:5-15).

Settled case law is clear that "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 Federal Rule of Evidence 606(b)." *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167, 1172 (6th Cir. 1991).

The most analogous set of facts to the underlying case can be found in *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991). In *McCullough*, the jury was asked to answer six special verdict questions. During deliberations, the jury sent a question out to the judge regarding whether the verdict was supposed to reflect the entire amount of damages proven or the damages reduced by the degree to which the plaintiff was contributorily negligent. The judge confirmed the former, and a verdict was rendered. *Id.*, at 68.

Following the entry of the verdict, the jury foreman asked whether the entire amount of the verdict would be distributed to the plaintiff. The court responded that only half of the award would be given to the plaintiff, as the jury found the plaintiff to be fifty percent contributorily negligent. At that point, multiple members of the jury expressed to the judge that they had already reduced the amount of the damages in accordance with the plaintiff's degree of fault and did not intend for the verdict rendered to be reduced any further. *Id.*

After notifying counsel, the judge reconvened the jury and asked the jury foreman whether the jury intended to bring back an award of $235,000 (the already-reduced award issued by the

jury) minus the fifty percent. The jury foreman answered in the negative and the judge asked the jury foreman to explain the jury's intention. *Id.* at 1168. The jury foreman explained that the jury intended the award of $235,000 to be distributed to the plaintiff in full, without being reduced any further. In other words, the jury intended to issue a verdict awarding $470,000 to the plaintiff, which would then be reduced by fifty percent to account for the fault of the plaintiff. Each juror indicated the same. Following the individual questioning, the amended judgment was entered. *Id.* at 1169. The court in *McCullough* analyzed the above fact pattern to determine whether the conduct of the court violated Rule 606(b) of the Federal Rules of Evidence. The Rule states, in pertinent part:

> [d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Fed. R. Evid. 606(b)(1). However, Rule 606(b)(2) states that "[a] juror may testify about whether: ... (C) a mistake was made in entering the verdict on the form." Fed. R. Evid. 606(b)(2). The advisory committee notes of Rule 606 state that the purpose of the rule is to promote "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." Fed. R. Evid. 606 advisory committee's note.

In its reasoning, the court determined that the amendment of the verdict did not frustrate the stated purposes of the Rule and was therefore a proper amendment by the court. The court reasoned that because the amendment was made mere minutes after the entering of the original verdict, the stability and finality of verdicts were not threatened. *McCullough*, 937 F.2d at 1172. The court further determined that the amendment did not present a threat of harassment to the jurors. The fact that the jurors themselves brought this mistake to the judge coupled with the

proximity in time between the verdict and raising the issue of mistake eliminated the possibility of outside influence over the jurors. *Id.*

In the present case, the amendment of the verdict by the judge did not frustrate the purposes of Rule 606(b) of the West Virginia Rules of Evidence. Like in *McCullough*, the mistake was revealed to the judge immediately after the reading of the verdict and prior to the dismissal of the jury. (R. Vol. II, 364:6.) The minimal amount of time between the return of the verdict and the immediate recognition of the mistake eliminated any potential for harassment of or undue influence over the jurors. The jurors did not have a chance to speak to counsel or anyone outside the members of the jury involved in the deliberative process. Consequently, their representations to the Court were immediate. The jurors did not even have an opportunity to consult with each other prior to being questioned by the court. The short period of time also served to fortify, not weaken, the stability and finality of the verdict. A mistake was made due to a misapprehension of the law and it was promptly corrected. The immediacy of the correction, without an opportunity for input from any outside source, even from fellow jurors, ensured that the interests of justice were confirmed by correcting a mistaken verdict and preserving the intent of the jury.

Following the procedure utilized by the court in *McCullough*, the circuit court questioned each juror individually to determine whether the verdict reflected the intent of the jury. The circuit court confirmed with each juror that the verdict was not the intended "take-home" amount for the Respondent which the jury intended. (R. Vol. II, 363-387). After individually and expressly confirming the intention of each juror, the circuit court appropriately corrected the verdict to reflect the express and uncontroverted intent of the jury. (R. Vol. II, 363-387.) The circuit court, after individually questioning the jurors, additionally questioned the entire jury to confirm their previous misapplication of the law concerning the comparative negligence. (R. Vol. II, 387:5-15.) Petitioners have not cited to a single question or answer in support of the contention that the circuit

court sought to glean insight into the jury's deliberative process. The circuit court simply sought to ensure justice was administered by confirming that the verdict reflected the intent of the jury. *Id.*

While *McCullough* was a federal case implementing the Federal Rules of Evidence, the Rule is mirrored within the West Virginia Rules of Evidence. Rule 606(b) of the West Virginia Rules of Evidence is identical to its federal counterpart. In fact, the comment on Rule 606 states that "Rule 606(b) was taken verbatim from its federal counterpart." W. Va. R. Evid. Rule 606 Comment. Therefore, the same reasoning used by the Sixth Circuit in *McCullough* should be applied to this case.

The Petitioners' argument in support of its first assignment of error combines the issue of the alleged Rule 606(b) violation with the issue of the corrected verdict not being supported by the evidence. *See Petitioners' Brief, p. 12-14.* With respect to the former, the Petitioners primarily rely upon *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E.2d 170 (1996) (mistakenly cited by the Petitioners as *McDaniel v. McDaniel*) in asserting their position. As explained by the Petitioners, this Court held in *McDaniel* that the trial court wrongly invaded the deliberative process of the jury, in violation of Rule 606(b) of the West Virginia Rules of Evidence. *Id.* at 289-290. However, the facts present in the current case are easily distinguishable from *McDaniel.*

In *McDaniel,* this Court recognized the ruling in *McCullough,* but distinguished the ruling based on the fact that the jury in *McCullough* was reconvened immediately after its dismissal to address the error, as opposed to days later like in *McDaniel. Id.* at 288-289. In the present case, the facts are similar to the facts presented in *McCullough* and distinguishable from *McDaniel.* The circuit court in this matter corrected the verdict immediately after its entry due to the readily apparent nature of the jury's misapplication of comparative negligence. (R. Vol. II, 363-387.) In *McDaniel,* the recognition of the mistake did not occur until much later, which would admittedly

threaten the guidance provided by Rule 606(b). *McDaniel,* 198 W. Va. at 284, 480 S.E. 2d at 172. Since the misunderstanding by the jury in the present case was recognized mere minutes after the entry of the verdict, and prior to the jurors speaking to anyone, including each other, the Court must find that the purpose of Rule 606(b) of the West Virginia Rules of Evidence were preserved, the interests of justice were served by ensuring the verdict reflected the intent of the jury, and the circuit court did not err by correcting the jury verdict, following the unanimous consent of the individual jurors.

The second issue presented in this assignment of error was that the corrected jury verdict was not supported by the evidence, which is also asserted as the Petitioners' fourth assignment of error. *See Petitioners' Brief, p. 14.* To the extent it is included within the Petitioners' first assignment of error, the Respondent will address the issue here.

As stated in Petitioners' Brief, West Virginia law discourages the setting aside of verdicts on the grounds that the verdict is excessive.

> In a civil action to recover damages for personal injuries, the amount which the plaintiff is entitled to recover being indeterminate in character, the verdict of the jury may not be set aside by the trial court or by this Court on the ground that the amount of the verdict is excessive, unless the verdict in that respect is not supported by the evidence or is such that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case.

McDaniel, citing *Jordan v. Bero*, 158 W.Va. 28, 59, 210 S.E.2d 618, 638 (1974), *citing* Syllabus, *Sargent v. Malcomb*, 150 W.Va. 393, 146 S.E.2d 561 (1966). Further, as indicated by Petitioners, "[i]n 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 assumed as true." *Faris v. Harry Green Chevrolet, Inc.*, 212 W.Va. 386, 388, 572 S.E.2d 909, 911 (2002). In the present case, the corrected verdict is supported by the weight of the evidence.

The jury awarded damages as follows:

Loss of Household Services:	$ 0.00
Loss of Social Security Benefits:	$ 186,660.00
Loss of Pension Plan:	$ 47,420.00
Hospital and Funeral Expenses:	$ 14,395.53
Sorrow and Mental Anguish:	$ 0.00

(R. Vol. I, p. 2). Petitioners assert that the circuit court determined that the Respondent suffered damages in an amount $104,715.52 greater than that which the Respondent proved at trial. *Petitioners' Brief at p. 13.* However, the Petitioners failed to acknowledge in their argument the uncontroverted evidence of loss of household services presented at trial.

The Respondent introduced expert testimony of Dan Selby, who opined that the reasonable loss of the Respondent's household services was $296,658. (R. Vol. II, 176-177). This evidence was not refuted by any opposing expert. The Respondent also introduced further evidence of the severe emotional toll caused to her by the sudden loss of her husband. (R. Vol. II, 150-154). In *Maynard v. Napier,* 180 W. Va. 591, 378 S.E.2d 456 (1989), this Court held:

> Where a verdict does not include elements of damage which are specifically proved in uncontroverted amounts and a substantial amount as compensation for injuries and the consequent pain and suffering, the verdict is inadequate and will be set aside. *Hall v. Groves,* 151 W.Va. 449, 153 S.E.2d 165 (1967)." *King v. Bittinger,* 160 W.Va. 129, 231 S.E.2d 239, 243 (1976).' Syllabus Point 1, *Kaiser v. Hensley,* [173] W.Va. [548], 318 S.E.2d 598 (1983).

Gebhardt v. Smith, 187 W. Va. 515, 519, 420 S.E.2d 275, 279 (1992), citing *Maynard v. Napier*, 180 W. Va. 591, 378 S.E.2d 456 (1989). According to the case law cited herein, but for mistake of the jury, the verdict should have reflected the uncontroverted damages sustained by the Respondent. As such, the gross amount of the corrected verdict was well within the range of damages proven at trial. Petitioners' assertion that the corrected verdict awarded damages in excess of what had been proven at trial is, therefore, simply incorrect. Additionally, the extensive questioning of the jury, individually and collectively, confirmed the intent of the jury to award the amounts reflected in the verdict, after accounting for comparative negligence.

West Virginia law has long recognized that "in reviewing challenges to damages awards generally, a deferential standard is employed: 'in the absence of any specific rules for measuring damages, the amount to be awarded rests largely in the discretion of the jury, and courts are reluctant to interfere with such a verdict....'" 22 Am.Jur.2d *Damages* § 1021, at 1067 (1988) (footnotes omitted). This judicial hesitance stems from the "strong presumption of correctness assigned to a jury verdict assessing damages." *Reel v. Ramirez,* 243 Va. 463, 466, 416 S.E.2d 226, 228 (1992). Accordingly,

> [a] jury verdict ... may not be set aside as excessive by the trial court merely because the award of damages is greater than the trial judge would have made if he had been charged with the responsibility of determining the proper amount of the award. This Court cannot set aside a verdict as excessive ... merely because a majority or all members of the Court would have made an award of a lesser amount if initially charged with the responsibility of determining the proper amount of the award.

Kessel v. Leavitt, 204 W. Va. 95, 185, 511 S.E.2d 720, 810 (1998). Here, there was ample and uncontroverted evidence to support an award that was significantly higher than the jury ultimately awarded.

C. The circuit court properly reduced the damages awarded by the jury to reflect the degree of fault attributable to the Decedent.

The second assignment of error asserted by the Petitioners is that the circuit court erred as a matter of law when it failed to reduce the jury's determination of damages by the degree to which the Decedent was at fault. *Petitioners' Brief, p. 19.* This assignment of error simply does not reflect the facts of this case. After the entry of the verdict, the trial judge polled the jury to determine whether the verdict as written on the verdict form reflected the intent of the jury. (R. Vol. II, 378-381). After representation made by the jurors confirming the jury's confusion, the trial judge properly corrected the verdict in accordance with the stated intent of the jury. (R. Vol. I, 1-2). It is undisputed that the jury reduced the verdict by the fault of the decedent. (R. Vol. II, 380-382).

It was that function wherein the mistake occurred as the jury clearly reduced the verdict prior to completing the verdict form. (R. Vol. II, 380-382).

The Petitioners' argument completely disregards the reduction of the corrected verdict in compliance with Section 55-7-13C(c) of the West Virginia Code, which provides as follows:

> (c) Any fault chargeable to the plaintiff shall not bar recovery by the plaintiff unless the plaintiff's fault is greater than the combined fault of all other persons responsible for the total amount of damages, if any, to be awarded. If the plaintiff's fault is less than the combined fault of all other persons, the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault.

W. Va. Code § 55-7-13C(c). When analyzing the facts of the underlying case, it is clear that the circuit court complied with this provision. (R. Vol. I, 1-2).

The crux of the Petitioners' appeal is the assertion that the amendment of the jury verdict was improper as a matter of law. While the Petitioners may disagree with the circuit court's decision to amend the verdict, a decision which could be asserted by either party before the Court, it is an incontrovertible fact that the trial court reduced the amount of the corrected verdict by the degree of the fault of Respondent's decedent. (R. Vol. I, 1-2). This assignment of error is a misapplication by the Petitioners of the law to the facts of the underlying case and, therefore, should be denied. Contrary to Petitioners' contentions, there was no reversible error committed by the circuit court as there is no "question of law" involving the interpretation of W. Va. Code § 55-7-13C(c). It is undisputed that the circuit court reduced the ultimate award pursuant to the finding of comparative negligence. The fact that the jury incorrectly applied its finding of comparative negligence does not create an issue of law. *Petitioners' Brief*, at 20.

D. The circuit court properly corrected the jury verdict to protect the Respondent's right to a jury trial under Article III, Section 13 of the West Virginia Constitution.

According to the West Virginia Constitution, the right to a trial by jury shall be preserved:

> In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved[.]

W. Va. Const., Art. III, § 13. While the Petitioners assert that they have a Constitutional right to a trial by jury, this is also a right afforded to the Respondent – a right which would be denied by preventing the verdict from reflecting the intent of the jury. Yet again, Petitioners completely ignore the exchange between the circuit court and jurors at the conclusion of the trial transcript.

A reversal of the decision of the circuit court's correction of the verdict would not serve as a defense of the Constitutional right to a trial by jury of the Petitioners. Reinstating a mistaken verdict would have the opposite effect of defending the Constitutional rights of the Petitioners. By adopting a mistaken verdict, each party would be deprived of their right to a trial by jury by having to abide by a verdict which the jury did not intend to render.

The Petitioners also attempted to frame the amendment of the verdict as an additur in an effort to heighten the standard which must be met. However, the facts indicate that the present case is of the kind for which additur is appropriate under West Virginia law.

The Petitioners cite *Bressler v. Mull's Grocery Mart*, 194 W.Va. 618, 619, 461 S.E.2d 124, 125 (1995) in support of their position that the amendment of the jury verdict was improper. *Petitioners' Brief, p. 22-23.* However, the rule articulated by this Court in *Bressler* provides that additur would be only appropriate in cases with fact patterns similar to that of the underlying case. "An award of additur is appropriate under West Virginia law only where the facts of the case demonstrate that the jury has made an error in its award of damages and the failure to correct the amount awarded would result in a reduction of the jury's intended award." *Bressler,* 194 W. Va. at 621, S.E.2d at 127.

As stated by the jurors themselves, the entry of the verdict as written would have resulted in a reduction of the jury's intended award. (R. Vol. II, 378-382). Like in *McCullough* mentioned above, the jury reduced the damages awarded by the Decedent's fault prior to completing the verdict form. (R. Vol. II, 380-382). The jury wished for the amount written on the verdict form

to be delivered to the Respondent in full, not reduced any further by the Court. (R. Vol. II, 378-382). A denial of an amendment of the verdict to reflect the intent of the jury would amount to nothing short of denial of the Respondent's right to a trial by jury guaranteed by Article III, Section 13 of the West Virginia Constitution.

E. The corrected verdict is not excessive, is supported by the evidence, and is reasonable in light of the total damages proven at trial.

As argued briefly in response to the Petitioners' first assignment of error, the corrected verdict did not exceed the damages which were proven at trial. Further, the corrected verdict was reasonable when considering the amount of damages proven at trial.

West Virginia law discourages setting aside verdicts on grounds that they are excessive.

> In a civil action to recover damages for personal injuries, the amount which the plaintiff is entitled to recover being indeterminate in character, the verdict of the jury may not be set aside by the trial court or by this Court on the ground that the amount of the verdict is excessive, unless the verdict in that respect is not supported by the evidence or is such that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case."

Jordan v. Bero, 158 W.Va. 28, 59, 210 S.E.2d 618, 638 (1974), *citing* Syllabus, *Sargent v. Malcomb*, 150 W.Va. 393, 146 S.E.2d 561 (1966).

When discussing the damages claimed and proven at trial, the Petitioners fail to include the proven damages for loss of household services and sorrow and mental anguish. *See Petitioners' Brief, p. 10.* As stated previously, expert testimony from Dan Selby showed that the reasonable loss of the Respondent's household services was $296,658. (R. Vol. II, 177.) This evidence was not refuted by any opposing expert. The Respondent also introduced further evidence of the severe emotional toll caused to her by the sudden loss of her husband. (R. Vol. II, 150-154). According to this Court in *McKenzie v. Sevier*, 2020 WL 7223169 (W. Va. November 18, 2020), a verdict that does not include "elements of damage which are specifically proved in unconverted amounts and a substantial amount as compensation for injuries and the consequent pain and suffering is inadequate

as a matter of law." *Id.* at 7. Therefore, verdicts must include uncontroverted damages, and even when viewing damages in a light most favorable to the Respondent, the damages for loss of household services were specifically proven and uncontroverted. These were damages that the Petitioners neglected to include in their calculations. By only including the readily quantifiable and uncontroverted damages for loss of household services, the corrected award was actually at least $48,182.49 less than what the Respondent proved at trial. The damages calculation set forth in the corrected verdict cannot be viewed as excessive in light of the unilateral reduction in value by the Petitioners.

The Petitioners repeated a deficient calculation throughout their Brief when discussing the excessiveness of the corrected verdict. However, when viewing the corrected verdict in terms relating to the actual amount of damages proven at trial, it is clear that the corrected verdict was not excessive. Therefore, this Court should uphold the well-reasoned, correction of the award by the circuit court.

V. CONCLUSION

For the reasons set forth herein, and as evidenced by the developed record, the Respondent, Plaintiff below, respectfully requests that this Honorable Court affirm Order awarding pre-judgment interest and further affirm the Order of the circuit court denying Petitioners' post-trial motions.

Respectfully submitted the 5th day of March, 2021.

RESPONDENT, by Counsel:

Jeffrey D. Van Volkenburg (WVSB #10227)
Counsel of Record
jdvanvolkenburg@vv-wvlaw.com
Debra Tedeschi Varner (WVSB #6501)
dtvarner@vv-wvlaw.com
Varner & Van Volkenburg, PLLC
360 Washington Avenue
Clarksburg, WV 26301
Telephone: (304) 918-2840
Facsimile: (304) 566-1161

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of March, 2021, the undersigned counsel served the foregoing "***RESPONDENT'S BRIEF***" upon the following via facsimile and/or by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed as follows:

Donald J. McCormick, Esquire
djm@dellmoser.com
Dell, Moser, Lane & Loughney LLC
Two Chatham Center, Suite 1500
112 Washington Place
Pittsburgh, PA 15219
Fax (412) 471-9012
Counsel for Petitioner