IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION, Defendant Below, Petitioner,

v.

FRANCIS IACOVONE, individually, and as Administrator of the Estate of ROCCO IACOVONE, Plaintiff Below,

Respondent.

Appeal From Circuit Court of Kanawha County Trial Civil Action No. 20-C-602

RESPONSE BRIEF ON BEHALF OF FRANCIS IACOVONE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ROCCO IACOVONE

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ASSIGNMENTS OF ERROR

The Circuit Court of Kanawha County did not err during the trial of this matter.

I. The Circuit Court, in its discretion, properly excluded all irrelevant evidence of liability or fault of health care provider Wexford, with whom Respondent settled prior to trial, and did not err in limiting Petitioner's cross-examination and attempted impeachment of Respondent's expert witness through use of such evidence.

II. The Circuit Court, in its discretion, properly prohibited Petitioner from examining lay witness Francis Iacovone regarding the fault of health care provider Wexford or the settlement with Wexford prior to trial.

III. Petitioner knew through discovery responses, witness lists, and deposition testimony that inmates at Huttonsville had factual knowledge long before trial, and Respondent's Pre-Trial Memorandum disclosing the specific names of said witnesses, who were previously known and available to Petitioner, did not constitute trial by ambush.

IV. The Circuit Court, in its discretion, did not err by rejecting Petitioner's instruction regarding mitigation of damages.

V. The Circuit Court did not err in giving Respondent's instructions on how to determine the deliberate indifference of the Petitioner, which correctly stated West Virginia law.

VI. The December 16, 2022, Judgment Order was not contrary to established West Virginia law, and was superseded by the Amended Judgment Order of March 10, 2023.

VII. The final Amended Judgment Order was not contrary to established law.

WHEREFORE, Respondent respectfully prays that the appeal of the Petitioner be **DENIED,** and that the Amended Judgment Orders entered by the Circuit Court of Kanawha County on March 10, 2023, be **AFFIRMED.**

STATEMENT OF THE CASE

Respondent and Plaintiff below, Francis Iacovone, is the Administrator of the Estate of Rocco Iacovone, deceased. (JA0007). In March 2018, Rocco Iacovone became an inmate at the Huttonsville Correctional Complex ("Huttonsville") in Randolph County, West Virginia, a facility owned by Defendant West Virginia Division of Corrections and Rehabilitation ("WVDCR").

(JA0009). Upon entering the custody of the WVDCR, Mr. Iacovone disclosed his medical history to the employees and corrections officers of the WVDCR, including a history of cardiac issues and endocarditis. (JA0256, JA0261). Additionally, family members of Mr. Iacovone contacted the administration at Huttonsville to report concern about Mr. Iacovone's health and specifically noted his history of cardiac issues. (JA0974, JA1166-JA1169).

The corrections officers at Huttonsville, as agents and employees of WVDCR, had actual and constructive knowledge of the medical condition of Mr. Iacovone due to prior interactions with him as an inmate. As such, the WVDCR was well aware of Mr. Iacovone's medical history. WVDCR agents and employees failed to take action in response to the worsening condition of Mr. Iacovone, notwithstanding his requests for medical assistance and help and calls from his family. Mr. Iacovone languished in his cell for days, growing increasingly weaker and sicker. He did not leave his cell and failed to appear for or participate in regularly scheduled activities, including meals and standing counts of inmates. (JA0007 – JA0020). Mr. Iacovone became septic due to infection and died despite that fact that a simple course of antibiotics would have saved his life. Dr. Charish, a board certified cardiologist, testified that had Mr. Iacovone received medical care a mere seven hours earlier, he would have had a better than 50% chance of survival. Had he received medical care the night before, he would have had a 90% chance of survival. (JA1189-JA1213)

On August 28, 2018, Mr. Iacovone's cellmate reported to Billy Greene, a correctional counselor, that Mr. Iacovone was not well. (JA1000, JA1002, JA1004, JA1008). Mr. Greene obtained a wheelchair and, with the assistance of the cellmate, wheeled Mr. Iacovone to the Huttonsville medical unit. (JA1006-JA1010). Mr. Green testified that Mr. Iacovone was grey in color and did not have his usual energy when returning from his daily shower. (JA1133, JA1138).

Finally, August 28, 2018, after days of inactivity and lethargy, chills, fever, and racing heart, correctional officers took Mr. Iacovone to Wexford Health ("Wexford"), the medical unit at Huttonsville. (JA0272). Staff at Wexford immediately arranged for Mr. Iacovone to be transported to Davis Medical Center in Elkins, West Virginia. (JA0272). Upon his arrival, medical staff there attempted to stabilize Mr. Iacovone and arranged for his transport to another facility via helicopter. (JA0283). Unfortunately, Mr. Iacovone suffered cardiac arrest while in transport and ultimately died. (JA0187). The Report of Death Investigation and Post-Mortem Examination Findings concluded that Rocco Iacovone died as aa result of acute bacterial endocarditis due to complications of congenital aortic stenosis. (JA0187).

On July 20, 2020, Francis Iacovone, as Administrator of the Estate of Rocco Iacovone, filed his complaint for negligence against the Defendant WVDCR in the Circuit Court of Kanawha County. (JA0001) Respondent filed his Amended Complaint on October 30, 2020, which added as defendants Wexford and Dr. David Allen Proctor, the Medical Director of Wexford. (JA0001) Respondent settled with Wexford prior to trial and agreed to the dismissal of both Wexford and Dr. Proctor. (JA0346, JA0375) Petitioner and Respondent further agreed to the dismissal of other claims and proceeded to trial against WVDCR only on the issue of deliberate indifference. [1]

Witness lists submitted during discovery listed as potential witnesses inmates at Huttonsville who were incarcerated at the same time as Rocco Iacovone. The mother of Rocco Iacovone, Janette Iacovone, testified on March 3, 2021, that she communicated with and received letters from inmates stating her son had not been properly treated (JA1509, 1522). Respondent's Pre-Trial Memorandum of October 31, 2022, disclosed as witnesses the specific names of Michael Hoosier, a cellmate of Mr. Iacovone, and former inmate William Hardman. (JA0298-JA0302).

[1] At no time during the course of the proceedings did Petitioner WVDCR ever file a cross-claim or third-party claim of any kind against Defendant Wexford.

Both of these witnesses were inmates at the time Mr. Iacovone died, and were both in the care and control of the WVDCR.. Both witnesses were available to the WVDCR at all times, and were persons Petitioner knew or should have known had relevant facts and information.

On November 8, 2023, Respondent noticed the evidentiary deposition of inmate Michael Hooser, to which Petitioner objected. (JA0358, JA0350). Petitioner also moved to exclude witnesses not previously disclosed from testifying at trial. (JA0354). By order entered on November 10, 2022, the Circuit Court granted Respondent's motion to take and use the evidentiary deposition, finding that such testimony was relevant, and noting Petitioner's objections. (JA0362). On November 10, 2022, Respondent took the evidentiary deposition of Michael Hoosier; counsel for WVDCR attended the deposition and fully participated in the same. (JA1531-JA1541).The November 14, 2023, pre-trial conference transcript reflects that Petitioner never again mentioned excluding the testimony of either witness at trial; nor did it seek a continuance of trial, despite knowing full well the trial court's rulings on this issue. (JA889-JA915).

The trial commenced on November 14, 2022. Dr. Bruce Charash, a Board-certified internist and cardiologist, was a key witness for Respondents and opined that the cause of the death of Mr. Iacovone was the delay in obtaining medical treatment for him. (JA1189-JA1213) During cross-examination counsel for Petitioner attempted to re-direct the focus of Dr. Charash's testimony towards the negligence of Wexford instead of remaining within the scope of direct examination questions regarding the negligence of WVDCR. The Circuit Court properly sustained Respondent's objections and prohibited Petitioner from improperly eliciting irrelevant, out of context, and prejudicial testimony to the jury. (JA1215-JA1229).

Respondent also called as a witness Dr. David Proctor, the Medical Director of Huttonsville, who testified about the treatment Rocco Iacovone received from Wexford medical

staff. (JA1032) Counsel for Petitioner had every opportunity to cross-examine Dr. Proctor regarding the nature and quality of care received by Mr. Iacovone and thereby put the issue of Wexford's liability directly before the jury, but failed to do so. His cross-examination of the witness was merely confirmation of direct testimony and medical records. (JA1081 – JA1089).

Respondent established special damages through its expert economist, Dr. Clifford B. Hawley, who utilized various tables in calculating lost wages and lost household services. Dr. Hawley advised that the jury could shorten or lengthen the applicable dates at their discretion depending upon the evidence presented to them, their view of when the decedent would have been released from jail, and when they believed he would have entered the workforce or required household services. (JA1102-JA1108). Petitioner did not present any evidence to the contrary.

At Petitioner's insistence, the trial court submitted a special jury verdict form that included options for allocating fault. (JA1215-1229, JA1305-JA1306, JA1310-JA1316). The jury could assess fault in any proportion against Rocco Iacovone, Wexford, or the WVDCR. On November 17, 2022, the jury allocated ZERO fault to Mr. Iacovone; ZERO fault to Wexford; and 100% fault to Petitioner WVDCR. (JA0731-JA0732). The jury then awarded Respondent $16,237.00 for funeral and burial expenses; $400,000 for lost earning capacity; $275,000 for lost household services; and $20,000.00 for pain and suffering on the part of Rocco Iacovone, for a total verdict of $711,237.00. (JA0731-JA0732).

Both parties submitted proposed judgment orders for the Court's review. WVDCR filed its objection to Respondent's proposed order on December 5, 2023, and Respondent filed a response on December 13, 2022. (JA0488-JA0508). The Circuit Court entered Respondent's proposed order on December 16, 2022. (JA0485-JA0486). Petitioner then filed a Rule 59 Motion on December 28, 2022, seeking a new trial and an amendment of the final order. (JA0490-JA0508) The Circuit

Court denied the motion and entered a final Amended Judgment Order on March 10, 2023. (JA0728-JA0730).

SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County did not commit any of the errors alleged by Petitioner in its appeal. The parties engaged in extensive discovery for over two years prior to trial, and Respondent settled with Wexford during mediation. Petitioner knew full well that as a result of the settlement, the only remaining issue at trial was the deliberate indifference claim against WVDCR. Petitioner also knew, or should have known, the identities of each of the witnesses who supported those claims, especially those who were inmates and in the custody of WVDCR. There was no error at trial by the Circuit Court, nor was there any surprise or prejudice to Petitioner. The Amended Judgement Order properly reflected the verdict returned by the jury, and appropriately applied pre-judgment and post-judgment rates and dates.

The settlement with Wexford resolved the medical negligence claims against Wexford, and the Circuit Court properly excluded any cross-examination into the liability of Wexford or the subsequent settlement. The only issue presented in Respondent's case in chief was the deliberate indifference of WVDCR employees. Prior to the settlement there were two different defendants, with two different types of negligence and applicable standards. Once Wexford and its physicians were dismissed, the Circuit Court properly precluded any undue confusion or prejudice by limiting the scope of cross examination of witnesses, especially that of expert Dr. Charash, to the only remaining issue brought out on direct. Petitioner was free to present witnesses of its own regarding the alleged medical negligence of Wexford, but it failed to do so.

The Circuit Court also properly excluded any testimony or inference that Wexford was a defendant in the matter or that Respondent had settled with Wexford. Prior to the start of trial,

Petitioner assumed that Francis Iacovone, the father of Rocco Iacovone, would be testifying at trial, and sought leave to impeach his testimony with his previous deposition testimony.[2] The trial court specifically asked counsel for Petitioner "What authority is there that requires me to allow this jury to know that Wexford A, was a defendant and B, has already settled their case?" (JA1232). Counsel for Petitioner could not provide any such authority. (JA1232-JA1234). Therefore, the Court properly prohibited Petitioner from mentioning that Wexford was a dismissed defendant, and limited the cross-examination of Francis Iacovone, precluding any mention of settlement or allocation of fault[3].

Petitioner attempted to circumvent the trial court's rulings by insisting upon a special jury verdict form that included Wexford as a defendant. The trial court submitted the special verdict form to the jury, which allowed the jury to assess fault in any proportion against Rocco Iacovone, Wexford, or the WVDCR. The jury allocated ZERO fault to Mr. Iacovone, and ZERO fault to Wexford. The jury specifically allocated 100% fault to WVDCR. Thus, any perceived prejudice or error regarding Wexford's fault was corrected by the use of the special jury verdict form. The jury made it very clear that they found no fault with any party except WVDCR. Consequently, the use of the special jury form provided Petitioner with any advantages reflected in *W.Va. Code* § 55-7-13d(a)(3), and Petitioner became bound by the requirements of *W.Va. Code §* 55-7-13d(a)(6).[4]

The Circuit Court correctly found that Petitioner knew or should have known about the cellmates of Mr. Iacovone and that the specific disclosure of their names in the Pre-Trial Memorandum and the noticing of Mr. Hoosier's deposition two weeks prior to trial were not

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[2] Deana Roberts, sister of Rocco Iacovone, testified that Francis Iacovone had dementia. (JA1246) Neither Petitioner nor Respondent called Francis Iacovone as a witness at trial, and neither party submitted his deposition.

[3] Respondent chose not to call Francis Iacovone at trial and he was not called by WVDCR. Therefore, Petitioner failed to lay any foundation for such cross-examination before the Court. Petitioner cannot cry foul now after sitting on its hands at trial.

[4] Petitioner did not raise the requirements of *W.Va. Code §* 55-7-13d at trial, nor in its motion for new trial under Rule 59, and therefore should be precluded from asserting the statute on appeal.

surprising or prejudicial. These witnesses were in the custody of WVDCR at the time of Mr. Iacovone's death, and Petitioner had every opportunity – in fact, the best opportunity – to interview them and ascertain their knowledge of the facts. Petitioner was the one party who had unhindered access to these witnesses. Wexford named all inmates as witnesses, and Respondent adopted that disclosure by reference. The mother of Mr. Iacovone testified on March 3, 2021, long before trial, that her son's cellmates had contacted her and that she had letters from them – letters Petitioner knew about and never requested.

Claims of surprise and trial by ambush are not supported by the record in this matter. Given the disclosures and testimony noted above, there can be no surprise that Mr. Hoosier and Mr. Hardman were called as witnesses by Respondent. Petitioner's velleity to find error in this regard fails as a result of its own lack of diligence and opportunity. As noted by the trial court at the pre-trial conference: "You all [WVDCR] were at an advantage from the very first day as to having that information as to who was right there in the pod with this person or even in the cell."(JA0755). Any alleged surprise to the Petitioner was alleviated when Mr. Hoosier was deposed. Moreover, if Petitioner was that surprised and unprepared for these witnesses, it could have filed a motion to continue. Petitioner failed to do so, and its retrospective allegations of error are unfounded.

The Circuit Court, in its discretion, properly excluded Petitioner's mitigation of damages instruction. The proposed instruction did not correctly state the standard for mitigation of damages in West Virginia; did not state what, exactly, Mr. Iacovone should have done; how he could have acted (given that he was in jail); and in what time frame he should have acted. The trial court did not err in rejecting the rather convoluted instruction and adopting Respondent's version instead.

The Circuit Court did give Petitioner the opportunity to infer that a portion of the liability in the case should have been attributed to Mr. Iacovone and/or Wexford through the use of the

special jury verdict form, submitted at the insistence of Petitioner. That form specifically directed the jury to consider any purported failure to mitigate on the part of Mr. Iacovone. The jury did not find the inference credible and allotted ZERO fault to Mr. Iacovone.

The Circuit Court, in its discretion, also properly rejected Petitioner's proposed jury instruction on deliberate indifference. Respondent's instructions accurately reflected West Virginia law on deliberate indifference. During the pre-trail conference, Petitioner argued issues of intent on the deliberate indifference instructions, but never raised any objection about the use of the word "serious" in any portion of the instructions. (JA0889 0 JA0915). Petitioner's Rule 59 motion was the first time WVDCR argued that the instructions should have included language about a "serious medical condition." The trial court did not abuse its discretion by rejecting an instruction that did not correctly state West Virginia law.

Petitioner's request to vacate the original Judgment Order of December 16, 2022, should be considered moot, inasmuch as the final Amended Judgment Order entered on March 10, 2023, superseded the prior order. However, both judgment orders properly awarded pre-judgment interest and post-judgment interest as required by *W.Va. Code §* 56-6-31. West Virginia Supreme Court of Appeals annual orders established interest rates for pre-judgment interest, which varied from the time of Mr. Iacovone's injuries in 2018 to the time of the trial in 2020. Likewise, the post-judgment interest was properly calculated based on the date of the trial and the entry of the final Amended Judgment Order.

There is no basis for granting Petitioner's appeal on any issue. The Circuit Court of Kanawha County committed no error in the trial of this matter. The jury delivered a reasonable and just verdict; the Judgment Orders properly reflect the verdict, pre-judgment and post-judgment

interest rates. As such, Petitioner's appeal fails in both fact and at law. Therefore, Respondent prays that the appeal be **DENIED,** and that the final Amended Judgment Order be **AFFIRMED.**

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument is necessary and appropriate under Rule 19 of the W. Va. R. App. P. The decision of this Court may also be appropriate for a memorandum opinion under Rule 21(d). The Respondent believes the appeal is without merit and should be promptly denied in order to permit the Respondent to proceed with collection of the judgment.

STANDARD OF REVIEW

An appeal of a ruling on a motion for new trial is subject to the abuse of discretion standard. *In re State Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994). "[I]n reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. 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." *Andrews v. Reynolds Memorial Hospital., Inc.,* 201 W. Va. 624, 499 S.E.2d 846 (1997); *Lively v. Rufus*, 207 W. Va. 436, 440-441, 533 S.E.2d 662 (2000). A trial court's ruling will be reversed on appeal only when it is clear that it has acted under some misapprehension of the law or the evidence. *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976); *State v. Vance,* 207 W.Va. 640, 535 S.E.2d 484 (2000); *Just. Highwall Mining, Inc. v. Varney*, 2023 W. Va. App. LEXIS 189, *13; *Grimmett v. Smith,* 238 W. Va. 54, 792 S.E.2d 65, 66-67 (2016).

ARGUMENT

The Circuit Court of Kanawha County committed no error this matter, and was correct in denying Petitioner's motion for a new trial. The jury that considered this case rendered a just and reasonable verdict in favor of the family of Rocco Iacovone after consideration of all of the evidence that was presented without error, prejudice, or procedural harm to Petitioner WVDCR. The trial court, in its discretion, properly kept the testimony focused on the issue of deliberate indifference on the part of the WVDCR, and committed no error in precluding testimony that would unnecessarily cloud the issues by mentioning that Wexford was a dismissed defendant; inferring the fault of Wexford; or noting the settlement with Wexford. The trial court, in its discretion, presented instructions that correctly reflected West Virginia law, and subsequently entered judgment orders that properly applied pre-judgment and post-judgment interest. Therefore, the Petitioner's appeal should be **DENIED.**

I. The Circuit Court Properly Limited the Scope of Cross-Examination of Respondent's Expert Witness.

The trial court had the discretion to limit all cross-examination in the trial of this matter, and properly focused the cross-examination of Respondent's expert witness to questions brought out during direct examination. The Circuit Court complied with all cross-examination standards and rules, and correctly limited questioning by Petitioner's counsel to the opinion of the expert witness presented by Respondent on the causation of death of Rocco Iacovone. Petitioner's attempts to discredit or impeach the expert witness by referring to opinions on irrelevant issues that Plaintiff did not present the witness for purposes of at trial were improper, and the Circuit Court did not err in halting such prejudicial efforts. Petitioner was free to call its own expert on those issues but failed to do so at trial.

"The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in the case of manifest abuse or injustice." Syl. Pt. 4, *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956); *State v. Wood*, 167 W.Va. 700, 280 S.E.2d 309 (1981); *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000).

The standard for cross-examination is within the discretion of the trial court and is usually limited to matters brought out on direct examination. *U.S. v. Simpkins*, 505 F.2d 562 (4th Cir.1974), *cert. denied*, 420 U.S. 946 (1975); *State v. Foster*, 171 W.Va. 479, 300 S.E.2d 291 (W. Va. 1983). Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness's character. The third rule is that the trial judge has discretion as to the extent of cross-examination. Syl. Pt. 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982); Syl. Pt. 1, *State v. Barnett*, 701 S.E.2d 460, 226 W.Va. 422 (2010).

The Circuit Court properly applied the standards for cross-examination in this matter, and did not err in limiting the cross-examination of Respondent's expert witness to the issue of causation. That key witness was Dr. Bruce Charash, a Board-certified internist and cardiologist. When asked for his opinion on the cause of Rocco Iacovone's death, Dr. Charash stated that the cause of death was the delay in obtaining medical treatment for Mr. Iacovone. Dr. Charash reviewed the testimony of other witnesses, including other inmates at the jail, medical records, and jail records, and opined to a reasonable degree of medical certainty that if Petitioner would have

got Mr. Iacovone to medical by Sunday or even as late as Monday morning, he would have been alive today. (JA1208-JA1209, JA1212).

Dr. Charash testified about the time-line of events that led up to the death of Rocco Iacovone. He noted that upon admission to Wexford on Tuesday, August 28, 2018, Mr. Iacovone was cyanotic, mottled, and entering septic shock due to a severe bacterial infection. (JA1199). Dr. Charash explained that Mr. Iacovone did not get to this extreme catastrophic state overnight. Medical records reflected that "probably four to five days before he died . . . his kidneys shut down which would mean that that's the first concrete evidence we have that he had bacteria in his blood." (JA1204).

On cross-examination, counsel for Petitioner began asking Dr. Charash whether the corrections officer, Mr. Kittle, was at fault. Counsel for Respondent, objected, noting that Respondent offered Dr. Charash for proximate causation in the case against WVDCR, and did not request his opinion on liability. (JA1214).[5] The trial court sustained the objection. Counsel for Petitioner then attempted to elicit testimony from Dr. Charash regarding Wexford's fault. Again, counsel for Respondent objected, and the Court conducted a sidebar conference to hear and consider arguments. Respondent's counsel asserted that WVDCR was attempting to put a non-party, Wexford, in front of the jury. (JA1216). Counsel for Petitioner insisted that the jury verdict form would ask for an allocation of fault, including the fault attributed to Wexford; that the jury was entitled to know that Wexford was a dismissed party; and that Dr. Charash had previously opined that Wexford was at fault. (JA1218).

[5] Dr. Charash clarified that he did not evaluate the case from a liability standpoint. "I was asked to provide the timeline of his survival. So that's basically all I can do." (JA1215).

Respondent argued that Dr. Charash was not an expert on the standard of care, but rather a causation expert, and that the scope of cross-examination should be limited to the causation timeline, since there were no questions on direct regarding medical negligence on the part of anyone, including Wexford. Petitioner did not have an expert on standards, and was trying to use the Respondent's expert on causation for an improper purpose. (JA1223).[6] The trial court sustained the objections, and properly limited the scope of Petitioner's cross-examination of Dr. Charash to his testimony on direct. The ruling precluded Petitioner from wandering into the issue of liability or medical negligence on the part of Wexford through an expert not presented on that issue.

The Circuit Court recognized that Wexford was a prior defendant, but held that WVDCR did not have the right to call Wexford a "defendant" or say anything about the settlement or dismissal. (JA1219). The trial court further limited cross-examination to the scope of the Respondent's direct and for the purpose for which the expert was called. The Court specifically noted that any attempts by Petitioner otherwise would result in confusion and speculation. (JA1220). Counsel for Petitioner noted his objection but never presented his own expert.[7]

Petitioner now argues that its intended scope of cross-examination of Dr. Charash was permissible under *W.Va. Code* §55-7-13d(a)(2), which allows consideration of a settlement with a non-party in allocating proportionate damages. That argument fails for several reasons. First, Petitioner did not argue the provisions of *W.Va. Cod*e § 55-7-13d(a)(2) at trial or in its Rule 59 motion, and it should not be permitted to do so on appeal. Wexford was <u>not</u> a non-party – it was a defendant until such time as Respondent settled that portion of the claim and dismissed Wexford.

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[6] Counsel for Respondent argued: "But to use a causation witness here that was never a standard of care witness in the prior case, all he's trying to do is tell the jury that there was a prior settlement. That's why he used the word defendant, which is entirely improper because they need to disregard that. Now they know there was another defendant." (JA1223).

[7] Respondent called as a trial witness Dr. David Proctor, the Medical Director at Huttonsville. Counsel for Petitioner had the opportunity to examine Dr. Proctor in depth about the actions of Wexford, but failed to do so. He also chose not to call Dr. Proctor as his own witness, nor did he present any other evidence regarding the fault of Wexford.

Regardless of the semantics, Petitioner received the full benefit of *W.Va. Code §* 55-7-13d(a)(3) and (6) when it proposed, and the trial court accepted, the special jury verdict form that required the jury to make specific findings, indicating the percentage of the total fault allocated to each party and nonparty. The jury had the opportunity to consider and allocate fault among Rocco Iacovone, Wexford, and the WVDCR – and found the Petitioner to be 100% at fault. Petitioner could have called any number of witnesses to present a theory of liability against Wexford; chose not to do so; and only now complains about the result of its own failures.

The trial court properly limited the cross-examination of Dr. Charash to the material evidence given during Respondent's direct examination of the witness. Dr. Charash was offered solely for the purpose of determining the time-line of the illness of Mr. Iacovone, and his inability to obtain timely medical assistance. Dr. Charash was not asked at trial to give an opinion on liability or on the standard of care for anyone, especially Wexford.

The Circuit Court did not err in prohibiting attempted impeachment of Dr. Charash through the use of other opinions he may have rendered during his deposition that were not presented in his direct testimony, especially those regarding Wexford, who was no longer a part of the case. The opinions which Petitioner attempted to use were not relevant to the issue of causation of negligence by WVDCR as presented by the direct testimony. Respondent called Dr. Charash solely as a causation witness. Had Petitioner wished to present expert testimony and provide opinions on medical negligence by Wexford, it was free to do so in its own presentation. However, to attempt to go beyond the scope of direct and beyond the opinions presented by Respondent's expert in cross would have been improper, and the trial court rightly prohibited the same. The Court correctly found that it would have been improper and confusing for WVDCR to put such issues into the trial through a witness Respondent called for the limited purpose of causation.

The trial court also correctly precluded Petitioner from seeking to impeach the expert witness by bringing in prior deposition testimony of Dr. Charash regarding Wexford employees, and the administration of Motrin and antibiotics to Mr. Iacovone, none of which was relevant to the issue of causation. Those statements were made regarding the negligence of Wexford, not WVDCR, and were made prior to the settlement with Wexford. At trial, Dr. Charash opined nothing about Wexford.[8]

The fact that Dr. Charash offered opinions on several issues during his deposition did not render his testimony at trial lacking in credibility or reliability. Dr. Charash did **not** testify at trial that Petitioner WVDCR was "solely at fault for Mr. Iacovone's death." (JA0492, JA0493-JA0494). He was never asked that question at trial, and never made such a statement in his deposition. Dr. Charash's opinion at trial, to a reasonable degree of medical certainty, was that if Mr. Iacovone had received medical attention and antibiotic treatment earlier, he would have lived. (JA1212-JA1213). "I'm just saying if he were recognized, he'd be alive." (JA1214). In fact, in answering a question from counsel for Petitioner, Dr. Charash confirmed that he was not there to pass judgment on the testimony of any other witness in the case. (JA1215)

The trial testimony of Dr. Charash was not any different from his deposition testimony; causation was just one of several issues that caused Dr. Charash concern. The first issue was that no one warned Mr. Iacovone about the dangers of his taking Motrin given his medical condition. (JA1504).[9] Secondly, Dr. Charash noted the "kind of mess of complete information" and lack of documentation in the medical records of Mr. Iacovone, which did address the proper standard of

[8] As determined by the jury, the delay in taking Mr. Iacovone to the medical unit had nothing whatsoever to do with Wexford, or whether he took Motrin, antibiotics, or any other medicines. Petitioner's attempts to insert such irrelevant information does nothing but obfuscate the clear liability for deliberate indifference that the jury attributed solely to WVDCR.

[9] The Motrin issue was later raised at trial, and Dr. Charash confirmed his concerns as noted in his deposition.

care of the medical providers working for Wexford. (JA1504). His final concern was "whether or not his deterioration was both noticed and handled in a timely manner" by Petitioner WVDCR, which was the main issue at trial. (JA1505). None of the deposition opinions given by Dr. Charash constitute a prior inconsistent statement as to the causation issue or the time-line of events.

Three requirements must be satisfied before admission at trial of a prior inconsistent statement: (1) the statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of the applicable rule – notice and an opportunity to explain or deny – must be met; and, (3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact. Rule 613, *W.Va. Rules of Evidence*; *State v. Guthrie,* 518 S.E.2d 83, 92, 205 W.Va. 326 (1999); *State v. Blake,* 197 W.Va. 700, 478 S.E.2d 550 (1996).

For an allegedly prior inconsistent statement to be admitted for impeachment of the trial testimony of a witness, the statement must be a prior inconsistent statement of the witness; the witness must be afforded opportunity to explain or deny having made the statement; and the opposing party must be afforded the opportunity to interrogate the witness concerning the statement. *State v. Carrico,* 437 S.E.2d 474, 189 W.Va. 40 (1993).

A prior statement must be relevant to the present testimony, and not be used as a means of introducing otherwise inadmissible evidence. The West Virginia Supreme Court of Appeals specifically held that such a sleight of hand was not permissible in a case where it excluded a rape victim's false statement to medical providers because it was merely a guise by the defendant to imply that the victim was not chaste:

> At best however, this evidence was only marginally relevant as impeachment evidence because there was no testimony regarding the alleged false statement Mrs. Guthrie made to hospital officials concerning prior sexual intercourse. Rather, the true impact of the evidence was to prejudice the State by showing that Mrs. Guthrie had sexual intercourse with other men while she was married.

State v. Guthrie, 518 S.E.2d at 96 (emphasis added.)

In the present matter, the Circuit Court did consider the law governing the admission of a witness's prior inconsistent statements, and properly found that Petitioner's proposed line of questioning was not relevant and not related to the standard of care or liability of Petitioner. The trial court did not err when it prevented Petitioner from attempting to impeach Dr. Charash through his deposition testimony regarding other parties or issues. Dr. Charash's opinion in his deposition regarding causation and the deliberate indifference of WVDCR was identical to the opinion he gave at trial and was not in any manner false or inconsistent. The opinions Dr. Charash rendered during his deposition on other matters, including the medical negligence of Wexford, were not false, nor were they relevant to the remaining issues that were presented to the jury. His deposition testimony did not constitute prior inconsistent statements nor any basis for attacking his credibility.

Offering Dr. Charash's deposition transcript for the truth of the matter asserted would not have demonstrated any lack of credibility, but would have resulted in undue prejudice to Respondent. While the deposition testimony would have confirmed Dr. Charash's opinion as to causation, it would have confused the jury and gone beyond the purpose for which Respondent called the expert witness. Such cross-examination would have allowed Petitioner to deliberately conflate the moot opinion regarding the standard of care applied to Wexford with the causation opinion regarding the failure to notice and respond to Mr. Iacovone's symptoms. This would have resulted in consideration of irrelevant, if not "marginally relevant" evidence, at best. The true impact of the prior testimony would be to suggest to the jury that there was a settlement with

another defendant, Wexford. (JA1216-1217). The Circuit Court properly limited the scope of Petitioner's cross-examination, and correctly prohibited Petitioner from using the irrelevant, prejudicial deposition testimony of Dr. Charash to purportedly attack his credibility. Petitioner certainly could have developed a contention that Wexford was at fault in its own case-in-chief, but failed to do so in any way whatsoever.

Petitioner was not deprived of a "meaningful cross-examination of Dr. Charash," nor did Petitioner suffer any prejudice by the Circuit Court's rulings. Petitioner speculates that allowing it to attack the credibility of Dr. Charash could have changed the outcome of the trial because his opinion would have been weakened and impaired his value with the jury, but offers nothing in fact or law to support that position. Petitioner's later argument that the inmate witnesses were the key witnesses to the case negates its position in the present argument that Dr. Charash was the crucial witness. Moreover, Petitioner could have called its own expert, but failed to do so.

The Circuit Court did not err in limiting the cross-examination of Respondent's expert witness, and further did not err in denying the use of his deposition testimony as a means of impeachment. The Petitioner's appeal on these issues should therefore be **DENIED.**

II. The Trial Court Properly Limited Cross-Examination of a Lay Witness Regarding Fault and Settlement With the Dismissed Medical Provider.

The Circuit Court did not err in prohibiting Petitioner from mentioning the prior settlement with Wexford or from asking Plaintiff/Respondent Francis Iacovone about his claims against the medical provider. Francis Iacovone was the father of Rocco Iacovone, was not named as an expert witness, had no medical training, and therefore could not render an opinion on fault or causation. The Petitioner's anticipated questioning of him about the settlement with Wexford was not an attack on the witness's credibility, but rather an additional effort to disclose to the jury the resolved

medical negligence claims against Wexford. When asked by the trial court to provide authority for presenting such evidence to the jury, counsel for Petitioner could not do so. (JA1234).

Respondent did not present Francis Iacovone as a witness at trial, and did not offer his deposition testimony. Petitioner did not call Mr. Iacovone as witness, nor did it offer his deposition, despite being free to do so. As such, Petitioner missed its opportunity to attempt to lay a foundation and revisit the Court's rulings, and its supposedly anticipated cross was moot.[10]

The Circuit Court considered Petitioner's efforts at length, and, in its discretion, correctly decided the cross-examination would be limited to the sole issue of the deliberate indifference by WVDCR as presented by Respondent. The trial court also properly found that Petitioner's questions of Respondent Francis Iacovone as to fault and the settlement with Wexford were improper, prejudicial, and confusing. (JA1232, 1235).

Petitioner's anticipated line of questioning was an attempt to introduce highly prejudicial evidence that is absolutely prohibited under West Virginia law:

> **Compromise offers and negotiations.**
>
> (a) **Prohibited Uses**. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim, the liability of a party in a disputed claim, or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim.

Rule 408, *W.Va. Rules of Evidence*.

The decision of whether to admit evidence of compromise offers for a purpose other than to prove liability for or invalidity of a claim is within the sound discretion of the circuit court.

[10] As noted previously, Francis Iacovone has dementia and was not able to testify at trial. (JA1246).

Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 4-8(F), at 402 (3d ed. 1994) If evidence of a settlement is offered for another purpose, the court has discretion to admit it. See, *Bituminous Constr., Inc. v. Rucker Enters., Inc.*, 816 F.2d 965, 968-69 (4th Cir.1987); *Belton v. Fibreboard Corp.*, 724 F.2d 500, 505 (5th Cir.1984); *Lively v. Rufus*, 207 W.Va. 436, 533 S.E.2d 662.

Petitioner had several opportunities to delve more into the actions or inactions of Wexford through other witnesses, and failed to do so. Dr. David Proctor, the Wexford physician and Medical Director of Huttonsville, testified at the trial regarding his employment with Wexford and the contract for medical services that Wexford had with WVDCR. (JA1039-JA1040). Dr. Proctor testified about the number of Wexford employees at Huttonsville in 2018 and the number of employees on staff the day that Rocco Iacovone died. (JA1041-JA1045). Counsel for Petitioner had the opportunity to elicit testimony from Dr. Proctor that might have allowed the jury to conclude that Dr. Proctor/Wexford knew about Mr. Iacovone's medical history and the fact that he was sick, but failed to properly treat or advise him. Petitioner never took advantage of these opportunities, and should not be permitted to complain now.

Petitioner's efforts to allude to the liability of Wexford through a lay witness was not a proper method of impeaching Respondent Francis Iacovone. Mr. Iacovone did not testify in his deposition that he believed that Wexford was at fault; he merely testified that his son had a right to health care, which would imply criticism only of WVDCR, since Wexford has no constitutional duties. None of that testimony could have been used for impeachment purposes, nor was it necessary since the jury heard from Dr. Proctor and Dr. Kerns regarding the medical treatment provided by Wexford. Despite knowledge of Dr. Kerns' prior deposition testimony, Petitioner did not seek to present any additional portions of that video deposition to the jury that would have

supported its efforts to spread the liability in this matter. The efforts of Petitioner were again merely subversive means of implying to the jury that (1) there was another defendant, and (2) Respondent must have settled with said defendant.

Petitioner's reliance on *W.Va. Code* § 55-7-13d(a)(2) was never raised at the trial below, nor was it noted in the motion for a new trial. Therefore, that argument should not be considered now. The law requires that "a party must alert a tribunal as to perceived defects at the time such defects occur," and if the tribunal is not so alerted, the appellate court will not consider an error which was not properly preserved in the record nor apparent on the face of the record. *Hanlon v. Logan Cnty. Bd. of Educ.,* 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997); *State v. Browning*, 199 W. Va. 417, 425, 485 S.E.2d 1, 9 (1997). The motions, memoranda, instructions, and transcripts of argument in this matter do not reveal a single instance when Petitioner raised the requirements of *W.Va. Code* § 55-7-13d(a)(2).

Assuming, arguendo, that review of said statute is appropriate, Petitioner's insistence that sub-paragraph (2) required consideration of the Wexford settlement is rendered moot by the application of sub-paragraphs (3) and (6) of the statute, which provides, in part:

> (2) Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault;
>
> (3) In all instances where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty. Where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather than by the amount of the nonparty's or party's settlement;
>
> * * * * *

> (6) In all actions involving fault of more than one person, unless otherwise agreed by all parties to the action, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating the percentage of the total fault that is allocated to each party and nonparty pursuant to this article. For this purpose, the court may determine that two or more persons are to be treated as a single person.

W.Va. Code § 55-7-13d.

Petitioner received the benefit of *W.Va. Code* § 55-7-13d when it emphatically requested the special verdict form, instructing the jury to consider the fault of Rocco Iacovone, Wexford, and WVDCR. That form was in keeping the special interrogatories contemplated by sub-paragraph (6). Petitioner's insistence on the special verdict form serves as a caution that one should be careful what is asked for: Petitioner received an answer to its request: 100% liability against WVDCR, and 0% against Wexford.

By insisting upon the special jury verdict form, the Petitioner became subject to the provisions of *W.Va. Code* § 55-7-13d(a)(3), which encompasses an allocation of liability among all parties assessed with a percentage of fault. The jury assessed Rocco Iacovone with zero percent fault; assessed Wexford with zero percent fault; and assessed Petitioner with 100% fault. Under the plain language of the statute, the 100% fault assessed against WVDCR can only be reduced by zero.

The sole purpose of even mentioning Wexford was an attempt to draw attention to another defendant and the inference of settlement with that dismissed party. Petitioner's anticipated cross-examination was not intended to impeach Francis Iacovone, but rather to confuse the jury with irrelevant, prejudicial, and prohibited evidence. Such motives are clearly precluded by Rule 408 and the West Virginia Supreme Court of Appeals. As such, this argument fails, and Petitioner's appeal should be **DENIED.**

III. Petitioner Suffered No Prejudice or Harm From the Testimony of Witnesses It Knew or Should Have Known Had Factual Knowledge.

A trial court's decision on admitting evidence – or not – is a discretionary matter and should rarely be disturbed. "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 1, *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003); *State v. Surbaugh*, 230 W.Va. 212, 737 S.E.2d 240 (2012). "A judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syl. Pt 3, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995); Syl. Pt. 7, *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E.2d 684 (1991).

A motion for a new trial requires a showing of substantial prejudice and the inability of the moving party to overcome that prejudice. Factors to be considered include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of the party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded. *McDougal v. McCammon*, 193 W.Va. at 797; *First Nat'l Bank in Marlinton v. Blackhurst*, 176 W.Va. 472, 345 S.E.2d 567 (1986); *State v. Bass*, 189 W.Va. 416, 432 S.E.2d 86 (1993).

The trial court did not err, nor did it abuse its discretion, in permitting Respondent to present the testimony of the two inmates who had direct knowledge about many of the facts at issue. Petitioner had sufficient notice of each witness called by Respondent, including Michael Hoosier and William Hardman. There was no surprise or "trial by ambush" since the pleadings and discovery responses tendered by Respondent and Wexford all noted and listed as witnesses inmates who communicated with Mr. Iacovone, and resided in his "pod." The mother of Rocco Iacovone testified as early as March 3, 2021, more than a year prior to trial, that she received

communications and letters from her son's cellmates about the incident. Respondent noticed the deposition of Mr. Hoosier, and counsel for Petitioner attended the deposition, having every opportunity available to cross-examine him.

The deposition of Jeanette Iacovone provided Petitioner with specific knowledge about inmates who knew about the facts leading up to the death of Rocco Iacovone and the indifference of WVDCR employees. On March 3, 2021, Jeanette Iacovone testified that inmates who were on the same unit as her son had communicated with her on how sick Rocco Iacovone was in the days prior to his death; how he was treated; and how they thought he was not treated properly. (JA1522) She testified that Mr. Iacovone's cellmate sent her a letter about the matter. (JA1523) Counsel for Petitioner participated in the deposition of Jeanette Iacovone on March 3, 2021, and had plenty of opportunity to delve into her disclosures, including ascertaining the name of Mr. Iacovone's cellmate, but failed to do so. (JA1510).

Petitioner had plenty of opportunities – in fact, the most unique opportunity, as warden of the witnesses – to find out what other inmates knew about Mr. Iacovone and his illness. Petitioner was in the best position to discover that information, and was in the best position to track down all of the witnesses. The trial court specifically noted in its order granting Respondent's request to take the evidentiary deposition of Mr. Hoosier that Petitioner had the opportunity to interview any of the inmates at its own facility; that both parties named general witnesses who may have had knowledge of the matters at bar; and that any prejudice to Respondent would be alleviated by virtue of Petitioner being able to depose the witness. (JA0850-JA0858).

Petitioner had plenty of opportunities to prevent the presentation of the witness and/or testimony at trial, but failed to convince the Circuit Court of the need for such action. Petitioner filed an opposition to Respondent's motion to depose Michael Hoosier; filed a motion to exclude

the testimony of both witnesses; and objected to both witnesses testifying at trial. The Circuit Court, in its discretion, did not find any of the Petitioner's attempts persuasive. Consequently, counsel for Petitioner appeared at the evidentiary deposition and engaged in pointed and informational cross-examination, reflecting that (1) said counsel could prepare for the depositions on short notice; and (2) there was no surprise or prejudice suffered by Petitioner. Counsel for Petitioner was also afforded time to meet with witness Hardman privately prior to his testimony at trial. He could have done so previously when Mr. Hoosier was still an inmate in Huttonsville prior to trial, but failed to do so. Finally, if Petitioner felt so strongly about being ambushed or prejudiced at trial, it could have requested a continuance of the trial, but did not.

The testimony of Mr. Hoosier and Mr. Hardman was proper, relevant, and not at all prejudicial to the Petitioner. Their testimony was not the only evidence in the case that established the deliberate indifference of WVDCR to the medical needs of Rocco Iacovone, and is not the evidence that won the case. Other evidence could have easily led the jury to reach the same conclusion – that the WVDCR failed to provide medical assistance to Mr. Iacovone in a timely manner. The medical records reviewed by Dr. Charash, for example, clearly reflect that Mr. Iacovone had not seen any medical provider for days, and that his toxic condition was the result of the buildup of a bacterial infection that remained unnoticed and untreated. The opinion rendered by Dr. Charash that established the cause of death was most likely the more significant evidence on that issue, as evidenced by the fact that the jury requested the entire transcript of the trial testimony of Dr. Charash.

Petitioner was not surprised, was not ambushed, and suffered no prejudice by the trial court permitting the testimony of Michael Hoosier or William Hardman. The evidence supports the

jury's findings, even without such testimony. Therefore, there is no basis for a new trial, and Petitioner's appeal should be **DENIED.**

IV. The Circuit Court Did Not Err by Refusing Petitioner's Proposed Instruction on Mitigation of Damages.

As with every other issue raised by Petitioner's appeal, the decision of the Circuit Court on whether to give the proposed instruction on mitigation of damages was entirely discretionary, and there is no basis for finding that the refusal of Petitioner's proposed instruction was in error.

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead [sic] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

State v. Guthrie, 194 W.Va. at 664, 461 S.E.2d at 169; *State v. Surbaugh,* 237 W.Va. 242, 786 S.E.2d 601.

If there is any evidence tending in some appreciable degree to support the theory of a party's proposed instructions, it is not error to give such instructions to the jury, "though the evidence be slight, or even insufficient to support a verdict based entirely on such theory." Syl. Pt. 2, *Snedeker v. Rulong*, 69 W. Va. 223, 71 S.E. 180 (1911); Syl. Pt. 4, *Catlett v. MacQueen*, 180 W. Va. 6, 375 S.E.2d 184 (1988); Syl. Pt. 3, *Craighead v. Norfolk & Western Railway Company*, 197 W. Va. 271, 475 S.E.2d 363 (1996).

A trial court's refusal to give a requested instruction is reversible error only if: "(1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it

seriously impairs a defendant's ability to effectively present a given defense." Syl. Pt. 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994); *State v. Surbaugh*, 237 W.Va. at 251.

Mitigation of damages is an affirmative defense, the burden of which lies entirely upon the party asserting it. *Voorhees v. Guyan Mach.*, 191 W.Va. 450, 456, 446 S.E.2d 672, 678 (1994). "[A] person whose property is endangered or injured [must] use reasonable care to mitigate damages; but such person is only required to protect himself from the injurious consequence of the wrongful act by the exercise of ordinary effort and care and moderate expense." *Hardman Trucking, Inc. v. Poling Trucking Co.*, 176 W.Va. 575, 579, 346 S.E.2d 551, 555 (1986); *Oresta v. Romano Bros., Inc.*, 137 W.Va. 633, 650-51, 73 S.E.2d 622, 632 (1952).

In its analysis of *Rowe v. Sisters of the Pallottine Missionary Soc'y,* 211 W.Va. 16, 560 S.E.2d 491 (2001), Petitioner merges the issue of mitigation of damages in a negligence case into an argument of comparative negligence in a medical malpractice case. This is not a medical negligence case. Even so, the *Rowe* holding finds, "There is a presumption of ordinary care in favor of the plaintiff, and where the defendant relies upon contributory negligence, the burden of proof rests upon the defendant to show such negligence unless it is disclosed by the plaintiff's evidence or may be fairly inferred by all of the evidence and circumstances surrounding the case." *Id.,* 560 S.E.2d at 498.

As recognized by the United States Supreme Court of Appeals, a prisoner is dependent upon his warden for all matters, including medical care, and the duty rests upon the jailer, not the inmate, to provide that care:

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," *In re Kemmler*, supra, the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial

> of medical care may result in pain and suffering which no one suggests would serve any penological purpose. Cf. *Gregg v. Georgia,* supra, at 173, 96 S.Ct. at 2924-25 (joint opinion). The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."...

Estelle v. Gamble, 429 U.S. 97 (1976).

Petitioner submitted a proposed instruction that reversed that duty and asserted that Rocco Iacovone had the obligation to seek medical attention "and to use reasonable efforts to mitigate his damages." The instruction went on to state that if Mr. Iacovone "unreasonably failed to take advantage of an opportunity to lessen his damages, you must attribute fault to Rocco Iacovone." The proposed instruction makes no sense whatsoever, given that Mr. Iacovone was in jail, and could do nothing more than ask for medical assistance. He could not have simply left Huttonsville and gone to a doctor or hospital. He obviously had no means to treat himself. Witnesses testified that he kept crying out and asked for help. As noted by both counsel for Respondent and the Circuit Court, the proposed instruction did not establish a time frame in which Mr. Iacovone should have exerted his duty to help himself, nor did it state what he could have or should have done.

Any prejudice perceived by Petitioner by the rejection of its proposed instruction was rectified by the jury verdict form which allowed for an allocation of damages not only between the WVDCR and Mr. Iacovone, but also Wexford. The jury allocated 100% of the liability to the WVDCR, and 0% against Mr. Iacovone and Wexford. If the jury felt Mr. Iacovone had a duty to mitigate and failed to do so, it would have been reflected on the verdict form.

"The doctrine of mitigation of damages does not permit damages reduction based on what could have been avoided through Herculean efforts, . . ." *Rubin Res., Inc. v. Morris*, 237 W.Va. 370, 787 S.E.2d 641, 647 (2016). Only through extraordinary efforts could Rocco Iacovone have done anything to prevent his illness, treat himself, or provide his own medical care. He was in jail;

he was clearly sick; and Petitioner had the duty to provide him with medical assistance. Mr. Iacovone had no means or opportunity to rectify the situation, and the Circuit Court was correct in rejecting the proposed instruction on mitigation of damages. Therefore, the Petitioner's appeal on this issue should be **DENIED.**

V. The Circuit Court Did Not Err By Excluding Petitioner's Instruction on Deliberate Indifference.

The Circuit Court did not abuse its discretion in rejecting Petitioner's proposed instruction on deliberate indifference because they did not correctly state West Virginia law. Petitioner's argument that the instructions adopted by the trial court were erroneous because there was no evidence that Rocco Iacovone had any clearly protected constitutional right is clearly wrong.

The United States Supreme Court of Appeals declared long ago that a prisoner has an Eight Amendment right to medical treatment, which is a clearly established law.

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, supra, at 182-183, 96 S.Ct. at 2925 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

Estelle v. Gamble, 429 U.S. at 105. The Fourth Circuit has agreed:

> The constitutional right in question here is appropriately defined as a pretrial detainee's right to adequate medical care and freedom from deliberate indifference to his serious medical needs. And, here, failing to transport Decedent to a hospital and failing to ensure law enforcement transported Decedent to a hospital or jail constitute the alleged ways in which Appellants violated that right.

Tarashuk v. Givens Nos. 21-1930, 21-1931 (4th Cir. 2022) (emphasis added.) The *Tarashuk* Court further elaborated on what constitutes knowledge of a clearly established constitutional right and deliberate indifference when an inmate clearly needs medical assistance:

> [O]ur Circuit's case law gave Appellants "fair warning" that disregarding a substantial risk of serious injury to the detainee or knowing of and ignoring a detainee's serious need for medical care violates the due process clause. See, e.g., *Young*, 238 F.3d at 575-76 ("Deliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care."); *Cooper*, 814 F.2d at 945 ("[G]overnment officials who ignore indications that a prisoner's or pretrial detainee's initial medical treatment was inadequate can be liable for deliberate indifference to medical needs."); *White ex rel. White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) ("A claim of deliberate indifference . . . implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice."). Our precedent also gave Appellants "fair warning" that providing "some treatment does not mean they have provided constitutionally adequate treatment." *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 211 (4th Cir. 2017).

Tarashuk v. Givens Nos. 21-1930, 21-1931 (4th Cir. 2022)

In order to establish deliberate indifference there must be a showing that a defendant jailor actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care. *Young v. City of Mt. Rainer*, 238 F.3d 567, 575–76 (4th Cir. 2001). Deliberate indifference is more than mere negligence, but less than acts or omissions done for the very purpose of causing harm or with knowledge that harm will result. Deliberate indifference to the rights of others is the conscious or reckless disregard of the consequences of one's acts or omissions. While deliberate indifference is more than mere negligence or ordinary lack of due care, it is less than acting with a specific purpose to cause harm or less than having knowledge that harm will result. See *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Scinto v. Stansberry*, 841 F.3d 219, 226 (4th Cir. 2016).

Under West Virginia law, the standard an inmate must meet to demonstrate deliberate indifference by prison employees is exacting: "To establish that a health care provider's actions constitute deliberate indifference to a prison inmate's serious medical need, the treatment, or lack thereof, must be so grossly incompetent, inadequate, or excessive as to shock the conscience or be

intolerable to fundamental fairness." Syl. Pt. 5, *Nobles v. Duncil*, 202 W.Va. 523, 526, 505 S.E.2d 442, 445 (1998);. Respondent must objectively show that the deprivation suffered or the injury inflicted was sufficiently serious. *Farmer v. Brennan*, 511 U.S. at 834. A serious medical need "is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008). There must be a showing that Petitioner acted with deliberate indifference to this serious medical need. See *Farmer*, 511 U.S. at 834.

The trial court adopted Respondent's Instruction No. 4 and No. 5, both of which stated the law, clearly and distinctly:

> No. 4: This Court instructs the jury that to be liable, "[d]eliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care." Source: *Young v. City of Mt. Rainer*, 238 F.3d 567, 575–76 (4th Cir. 2001).
>
> No. 6: This Court instructs the jury that the deliberate indifference to an inmate's serious medical needs can be found when: Prison staff ignore obvious conditions; or Prison staff fail to investigate enough to make an informed judgment. Source: *Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 540, 545 (6th Cir. 2008); *McElligott v. Foley*, 182 F.3d 1248, 1252, 1256–57 (11th Cir. 1999); *Liscio v. Warren*, 901 F.2d 274, 276–77 (2d Cir. 1990).

Petitioner blindly argues that the trial court erred because the deliberate intent instructions should have included the word "serious" in describing the medical condition of Mr. Iacovone. Instruction No. 4 notes the "serious need for medical care." Instruction No. 6 refers to the "serious medical needs."[11] The placement and order of the word "serious" is not reversable error in this case. The evidence clearly established that Mr. Iacovone's condition was indeed serious, and that WVDCR employees knew about his serious heart condition as a result of his repeated lodging at

[11] Petitioner's emphasis on Plaintiff's Instruction No. 24 is misplaced; that instruction deal with the vicarious liability of the WVDCR and not the standard for deliberate indifference.

the jail. Mr. Iacovone obviously languished for several days, growing weaker, more delusional, mottled, and unable to even move. He clearly suffered from a serious condition that needed serious attention, and Respondent made that clear in its instructions.

Petitioner incorrectly notes its objection to the instructions. The pre-trial transcript reflects that counsel for WVDCR objected to the instructions because they were "more general on just a subjective intent." (JA1298). He then propounded on whether WVDCR intentionally denied or delayed access to medical care, but never emphasized that the word "serious" should be included before need, medical care, injury, or any other word. While Petitioner did object to the instructions, it was not for the reasons now argued on appeal. (JA1295 – JA1299)

The Circuit Court did not abuse its discretion in requiring the instructions to comply with applicable West Virginia law. Petitioner's arguments are the same asserted during the trial, and for the same reasons noted by the Circuit Court then, must fail here. The appeal is without sufficient basis at law and should be **DENIED.**

VI. The Judgment Orders Correctly Award Pre-Judgment and Post-Judgment Interest.

After the jury returned its verdict awarding special damages to Respondent, including funeral costs, lost wages and household services, the Circuit Court properly granted Respondent prejudgment interest on the special damages. Petitioner does not dispute that Respondent is entitled to prejudgment interest on the funeral costs and burial expenses, but objects to prejudgment interest on the awards for lost wages and household services, the applicable dates on post-judgment interest, and the methods used to calculate the interest. Petitioner's position

lacks sufficient basis at law, and this Court did not err in adopting the final Amended Judgment Order presented by Respondent.[12]

A circuit court's award of prejudgment or post-judgment interest on a verdict is a matter of discretion. See, *Jackson v. Brown*, 801 S.E.2d 194 (2017); *Perdue v. Doolittle*, 186 W.Va. 681, 414 S.E.2d 442 (1992). "Under the abuse of discretion standard, a determination by the circuit court with respect to prejudgment interest will not be disturbed unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." *Jackson*, 801 S.E.2d at 205. "In reviewing a circuit court's award of prejudgment interest, we usually apply an abuse of discretion standard. When, however, a circuit court's award of prejudgment interest hinges, in part, on an interpretation of our decisional or statutory law, we review *de novo* that portion of the analysis." Syl. Pt. 2, *Hensley v. W. Va. Dep't of Health & Human Res.*, 203 W. Va. 456, 508 S.E.2d 616 (1998); *Just. Highwall Mining, Inc. v. Varney*, 2023 W. Va. App. LEXIS 189, *24-25.

Respondent is entitled to pre-judgment interest on all of his claims, including lost wages and lost household services. "Under *W.Va. Code*, 56-6-31, as amended, prejudgment interest on special or liquidated damages is recoverable as a matter of law and must be calculated and added to those damages by the trial court rather than by the jury." Syl. Pt. 1, *Grove v. Myers*, 181 W.Va. 342, 382 S.E.2d 536 (W.Va. 1989).

> Except where it is otherwise provided by law, every judgment or decree for the payment of money entered by any court of this State shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: Provided, that if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued, as determined by the court. Special

[12] Petitioner seeks to vacate the first Judgment Order of December 16, 2022, as well as the second order, the Amended Judgment Order entered March 10, 2023. Respondent maintains that the second order superseded and replaced the first order as a matter of law, and that any argument regarding the validity of the original order is moot.

> damages includes lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court. The rate of interest shall be ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any other provisions of law.

W.Va. Code § 56-6-31 (1981) (emphasis added.)

"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Comp. Com'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). Moreover, a "statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951); *State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W. Va. 73, 726 S.E.2d 41 (2011).

Both Judgment Orders in this matter awarded Respondent pre-judgment interest on the award of $16,23 for funeral and burial expenses; $400,000 for lost earning capacity; $275,000 for lost household services. Each of the awards are entitled to pre-judgment interest inasmuch as they are special damages recognized by law as "lost wages and income" and "similar out-of-pocket expenditures, as determined by the court." Those damages are entitled to the accrual of interest from the date the right to bring the same shall have accrued.

Prejudgment interest on special or liquidated damages is calculated from the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted. Syl. Pt. 2, *Jackson v. Brown*, 801 S.E.2d 194.

> Under *W.Va. Code* 56-6-31, as amended, prejudgment interest is to be recovered on special or liquidated damages incurred by the time of the trial, whether or not the injured party has by then paid for the same. If there is sufficient evidence to demonstrate that the injured party is obligated to pay for medical or other expenses incurred by the time of the trial, and if the amount of such expenses is certain or reasonably ascertainable, prejudgment interest on those expenses is to be recovered from the date the cause of action accrued.

Id., Syl. Pt. 3.

Petitioner continues to rely on *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (1992) as a basis for its motion, a position that was specifically rejected by the West Virginia Supreme Court. In *Jackson,* the Court noted that the portion of a loss wage award prior to the date of the jury verdict appropriately receives prejudgment interest. *Jackson* at 206. The Court then also recognized as appropriate prejudgment interest on a $32,000.00 future lost wage award, which was equivalent to one year of the decedent's salary that would have accrued between the death and the jury verdict. *Id.* Thus, the Court determined it was proper under *W.Va. Code* §56-6-31 for the circuit court to award prejudgment interest on future lost wages. *Id.* The *Jackson* Court held that reliance on *Pasquale* was misplaced because that case dealt with specific testimony and a specific jury award where the interest applied was for the period after the jury's verdict. *Id.*

That same misplaced reliance applies in the present matter, and Petitioner's argument that the holdings and reasonings in *Jackson* and *Pasquale* are the same is incorrect. Pursuant to the correct reading of the *Jackson* decision, Petitioner is indeed entitled to prejudgment interest on the future lost wage claim awarded by the jury.

The lost wages award was not for wages that accrued between the date of Mr. Iacovone's death and the trial date, but rather was for wages he could have earned once he was either released from prison or granted parole. As noted by Petitioner, Dr. Clifford B. Hawley testified that the economic loss calculation began after Mr. Iacovone's anticipated release from prison, and not while he was incarcerated. (JA1078 – 1079) Those are future lost wages that, per *Jackson,* are clearly entitled to prejudgment interest.

Household services may be included in special damages entitled to statutory interest.

> We have held that actual "[e]xpenditures for household services are included within the phrase 'similar out-of-pocket expenditures' used in *W.Va. Code*, 56–6–31 (1981), and prejudgment interest may be awarded under that section." Syl. Pt. 8, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993). We further explained that these expenditures were "*out-of-pocket funds* the plaintiffs lost due to the negligence of the defendant's decedent [.]" *Id.*, 191 W.Va. at 51–52, 443 S.E.2d at 208–09 (emphasis added). Thus, our holding in Wilt authorizes prejudgment interest for loss of household services only where the claimant has incurred an obligation to pay some sort of compensation for household services.

Doe v. Pak, 784 S.E.2d 328 (2016).

Respondent presented the testimony of expert economist Dr. Clifford B. Hawley, who established parameters for the jury to consider in calculating damages for lost wages and lost household services. (JA1102-JA1108). Dr. Hawley clearly and succinctly testified about the various options the jury could consider in determining lost wages and household services. Petitioner failed to offer its own expert on damages, did not object to the jury verdict form that listed those damages, and in fact, specifically agreed to that portion of the verdict form. Likewise, Petitioner failed to present a specific interrogatory for the jury with respect to the time frames for the damage awards and the interest thereon.

The jury verdict for lost wages and lost household services were based upon the evidence presented in the case and were the result of the jury following Dr. Hawley's analysis and explanations about how to determine the claims. Ultimately, however, the Jury did not simply follow the specific numbers in Dr. Hawley's tables. Instead, they made their own determinations of $400,000.00 for lost wages and $275,000.00 for lost household services. These are not the total figures from Dr. Hawley's illustrations in his tables. Instead, the jury followed Dr. Hawley's analysis and explanations about how to determine lost wages and household services and, after hearing all of the evidence presented in the case they determined these numbers were the correct amounts.

While Petitioner wishes to complain about the proposed interest. Instead, it should complain about its own failure to request any further delineation or specific interrogatories from the jury regarding the time frame or amount utilized per year for the awards. WVDCR made no request at trial for specific interrogatories to the jury regarding when these amounts began or ended, nor as to how much was awarded per year. Although Petitioner chose this course during the trial, it now seeks to place an arbitrary limitation of time on these awards when it failed to ask the trier of fact to delineate the same on the verdict form. If Petitioner wanted to argue against prejudgment interest it should have called its own economist or sought a special interrogatory to the jury on the time frames and amount of the annual awards. Petitioner did neither, and it now cries sour grapes, not over any true dispute, but in reality over its own failures.

Respondent is also entitled to post-judgment interest on each of the damage claims, including lost wages and household services. For the same reasons argued above, Petitioner objects to those damages, as well as the post-judgment interest thereon. Moreover, Petitioner asserts the post-judgment interest should not begin as of the date of the jury verdict on November 17, 2020, but rather on the date of the final judgment order. In this case, the final order was not the first order entered in December 2022, but, after much argument and protest by Petitioner, the Amended Judgment Order entered March 10, 2023. Petitioner cannot have it both ways: The proper date for calculating post-judgment interest is the date of the verdict, November 17, 2022, or, if using the "final order" argument, the date of the Amended Judgment Order, March 10, 2023. Regardless, the interest should <u>not</u> begin on December 16, 2022.

The varying interest rates on the damage awards applied by the Circuit Court were properly calculated according to the orders issued by the West Virginia Supreme Court of

Appeals and the provisions of *W.Va. Code* § 56-6-31. There is no question that pre-judgment interest on the damage awards should run from the time the cause of action accrued (August 28, 2018). However, given the pendency of the case and the delay in reaching the final verdict in November 2022, the Circuit Court properly applied the interest rates applicable for each year, namely 2018, 2019, 2020, 2021, 2022, and, using the "final judgment" argument, 2023.

The jury verdict for lost wages and household expenses and the Amended Judgment Order of the Circuit Court of Kanawha County were based on credible evidence and were for damages recognized by West Virginia law. As such, Petitioner's request for reversal of the same should be **DENIED.,** and the Amended Judgment Order should be **AFFIRMED.**

VII. The Trial Court Did Not Err in Calculating The Effective Date of Post-Judgment Interest.

The final argument of Petitioner's appeal is confusing, filled with double-speak, and appears to be an attempt to circumvent the interest rates on judgments as established by the West Virginia Supreme Court of Appeals. [13]. In the previous argument, Petitioner asserted that post-judgment interest should not begin as of the date of the jury verdict, but rather at the date of the later Judgement Order. Now, Petitioner argues that post-judgment interest should be calculated under the provisions of *W.Va. Code §* 56-6-31 as of the date of the entry of the first Judgement Order, rather than as of the date of Amended Judgment Order. The difference is 3.5%.

According to the Petitioner's own arguments and the provisions of *W.Va. Code §* 56-6-31, post-judgment interest should begin as of the date of the final judgment or decree. Inasmuch as the Petitioner found the first Judgment Order to be erroneous, to the extent that it pushed for an Amended Judgment Order, the absolute final order on the judgment in this case was entered

[13] Pursuant to Supreme Court annual orders, the interest rate for 2022 was 4.5%; the interest rate for 2023 is 7.0%.

on March 10, 2023. That is the order upon which the effective date of post-judgment interest should be determined. As such, Respondent is entitled to pre-judgment and post-judgment interest on each of his claims, including funeral and burial expenses, lost wages, and household services in the amounts and through the dates as calculated by the Circuit Court in the final Amended Judgment Order entered on March 10, 2023.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny Petitioner's appeal for a new trial, its request to vacate the Judgement Order and Amended Judgment Order, and for all other relief included in the appeal. Respondent prays that the appeal be **DENIED,** and that the decisions of the Circuit Court be **AFFIRMED.**

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CERTIFICATE OF SERVICE

I, W. Jesse Forbes, do hereby certify that I have served a copy of the foregoing ***"PLAINTIFF'S RESPONSE BRIEF"*** was sent via electronic submission on this 21st day of August, 2023, upon the following:

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