IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0010

CHRISTOPHER MCKENZIE,

Petitioner,

v.

DONALD L. SEVIER,

Respondent.

PETITIONER'S BRIEF

Samuel D. Madia (WVSB 10819)
Jonathan Wesley Prince (WVSB 13250)
Shaffer Madia Law, PLLC
1056A Maple Drive
Morgantown, WV 26505
Phone: 304-622-1100
Fax: 304-599-5859
sam@shaffermadialaw.com
wes@shaffermadialaw.com

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INTRODUCTION

On July 7, 2015, Petitioner and Respondent lived across the street from one another in Fairmont, West Virginia. This civil lawsuit proceeded to trial. At trial, Respondent and Respondent's wife testified that on July 7, 2015, Respondent hit Petitioner in the face with a closed fist whereupon Petitioner stumbled back, clipped his heel on the lip of Petitioner's driveway, fell into his own driveway, and struck the back of his head on the concrete therein. Ultimately the Jury concluded that the Respondent battered Petitioner on July 7, 2015. Petitioner's devastating and permanent injuries are reflected in a photograph taken at the incident scene before law enforcement's arrival and a photograph of the Petitioner while in the Intensive Care Unit at Ruby Memorial Hospital approximately one day after the battery.[1]

As a result of hitting the back of his head on the concrete in his driveway, Petitioner suffered a left brain stem hemorrhagic stroke, an intracranial hemorrhage, a subdural hematoma, a subarachnoid hematoma, and a permanent severe traumatic brain injury. As a result of these injuries, Petitioner was hospitalized from July 7, 2015, through July 16, 2015. Thereafter, Petitioner was transferred directly from the hospital to intensive inpatient rehabilitation from July 16, 2015, to August 12, 2015. At trial, medical bills in excess of One Hundred Eighty Thousand Dollars ($180,000.00) were introduced into evidence. During opening statements, Respondent's counsel conceded that Petitioner was injured.[2] During closing argument, Respondent's counsel conceded that Petitioner was "hurt much more significant than [Respondent] would have ever possibly imagined."[3] Although the jury concluded Respondent battered Petitioner on July 7, 2015, the jury awarded Petitioner Zero Dollars ($0) in damages. Because the Jury failed to award at least

[1] *See* P.A. 000797 and P.A. 001028.
[2] P.A. 000134.
[3] P.A. 000746.

some damages to Petitioner, the verdict was inadequate and inconsistent and the Circuit Court of Marion County erred in refusing to grant a new trial solely on the issue of damages.

ASSIGNMENT OF ERROR

Whether the Circuit Court of Marion County erred in denying Petitioner's Motion for a New Trial on damages following a jury finding that Petitioner was battered by Respondent and awarding Petitioner Zero Dollars ($0) in damages even though Petitioner suffered a permanent severe traumatic brain injury resulting in more than One Hundred and Eighty Thousand Dollars ($180,000) of medical bills.

STATEMENT OF THE CASE

This case arises out of a battery that occurred on July 7, 2015.[4] On July 6, 2016 Plaintiff/Petitioner Christopher McKenzie filed suit in the Circuit Court of Marion County alleging that Defendant/Respondent Donald L. Sevier committed battery upon Plaintiff/Petitioner.[5] Defendant/Respondent Mr. Sevier filed a counterclaim against Petitioner for battery and violating W. Va. Code § 55-7-2, otherwise known as the insulting words statute.[6] After the completion of discovery, a three-day trial commenced in the Circuit Court of Marion County on August 22, 2018. Following the presentation of evidence, the jury unanimously found "by a preponderance of the evidence that Donald Sevier committed Battery against Christopher McKenzie."[7] Notwithstanding this finding, the jury awarded $0.00 in damages despite Petitioner having received a permanent severe traumatic brain injury. Judgment was entered on the verdict on September 27, 2018.[8] On October 12, 2018, Petitioner timely filed a motion for a new trial on damages.[9] Following an October 29, 2018 hearing, Circuit Judge Patrick N. Wilson denied the post-trial motion for a new trial on damages by order entered on December 11, 2018.[10] This appeal followed.

July 7, 2015 – The Battery

On July 7, 2015, Petitioner and Respondent live across the street from one another in Fairmont, West Virginia.[11] On July 7, 2015, Respondent arrives home from work at approximately 6:30 p.m. to 6:45 p.m.[12] Approximately twenty (20) to thirty (30) minutes after Respondent arrives

[4] P.A. 000020 – P.A. 000029.
[5] *Id.*
[6] P.A. 000041 – P.A. 0000050.
[7] P.A. 001080.
[8] P.A. 001074 – P.A. 001085.
[9] P.A. 001086 – P.A. 001099.
[10] P.A. 001118 – P.A. 001121.
[11] P.A. 000171.
[12] P.A. 000166.

home from work, Respondent intentionally hits Petitioner in the face with a closed fist.[13] After being struck in the face by Respondent, Petitioner landed in his own driveway where Petitioner's head ultimately made contact with the concrete.[14] Notwithstanding Petitioner's obvious injury, Respondent did not call the Fairmont Police until 8:51 p.m. on July 7, 2015.[15]

Officer Reed Moran of the Fairmont Police Department was the first law enforcement officer to arrive at the incident scene.[16] When Officer Moran arrived at the incident scene, he observed Petitioner unresponsive lying in a pool of blood in Petitioner's own driveway.[17] Officer Moran performed an assessment of Petitioner and, once EMS arrived, began assisting EMS.[18] Once EMS arrived, Officer Moran observed damage to Petitioner's skull, noting that a portion of Petitioner's skull had buckled.[19] Additionally, upon assisting EMS and cleaning Petitioner's wound, Officer Moran could see a gelatinous material that he believed to be brain matter.[20] Petitioner was transported via EMS to Ruby Memorial Hospital (hereinafter "Ruby") in Morgantown, West Virginia.[21]

Sergeant Glenn Staley of the Fairmont Police Department arrived at the incident scene shortly after Officer Moran.[22] Sergeant Staley also observed Petitioner in an unresponsive state with what appeared to be brain matter near his head.[23] Sergeant Staley requested Detective Eric Hudson of the Fairmont Police Department come to Petitioner's home after Sergeant Staley took

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[13] *Id.*
[14] P.A. 000801.
[15] P.A. 000782 – P.A. 000796
[16] P.A. 000417.
[17] P.A. 000415.
[18] P.A. 000416 – P.A. 000417.
[19] P.A. 000417.
[20] *Id.*
[21] P.A. 000419.
[22] P.A. 000345.
[23] P.A. 000351 – P.A. 000352

written statements from Respondent and Respondent's wife.[24] After Detective Hudson arrived, Detective Hudson attempted to obtain a recorded statement from Respondent however Respondent declined to provide any further statements.[25]

In sum, on July 7, 2015, Respondent intentionally hit Petitioner in the face with a closed fist.[26] Respondent agrees that hitting Petitioner is what caused Petitioner to stumble back and trip.[27] Respondent acknowledges knowing that Petitioner was hurt and Petitioner was unresponsive.[28]

Testimony from Petitioner and His Wife

The testimony at trial provided undisputed evidence that Petitioner suffered a permanent sever traumatic brain injury as a result of being battered by Respondent on July 7, 2015. Much of the evidence regarding Petitioner's damages came from Petitioner, his wife Anna McKenzie, and his primary care physician Dr. Kokab Darbandi.

Petitioner testified that he does not recall anything about the incident or that day.[29] However, Petitioner understands that on July 7, 2015, he sustained a permanent severe traumatic brain injury.[30] Petitioner testified that his permanent severe traumatic brain injury affects his short term memory and long term memory.[31] Petitioner testified that the first thing he recalled after July 7, 2015, was waking up in either Ruby or HealthSouth MountainView Regional Rehabilitation Hospital (hereinafter "HealthSouth") and being in pain.[32] Petitioner testified that since July 7,

[24] P.A. 000352.
[25] P.A. 000376.
[26] P.A. 000163 – P.A. 000165.
[27] P.A. 000201.
[28] P.A. 000204.
[29] P.A. 000525.
[30] *Id.*
[31] *Id.*
[32] P.A. 000527 – P.A. 000528.

2015, he is in pain on a daily basis and on a scale of one to ten would rate his daily pain as being "down my neck, probably four, five. My neck is more like a nine."[33]

Petitioner testified about the difficult and painful rehabilitation he received at HealthSouth.[34] Petitioner testified that prior to July 7, 2015, he did not have a cane, walker, or wheelchair.[35] Petitioner testified that his ability to speak has changed since July 7, 2015.[36] Petitioner testified about his balance problems and how he falls approximately twenty to thirty times per year.[37] Further, Petitioner testified about having to buy a new home because his wife wanted to get away from Respondent and because his old home across the street from Respondent was a split-level which was difficult for Petitioner to access.[38]

Petitioner testified about how his life has changed since July 7, 2015, explicitly referencing the fact that Petitioner has not driven a vehicle since July 7, 2015.[39] Petitioner testified that he has difficulty tying his shoes and his wife has to hold him while he stands up to tie a tie.[40] Additionally, Petitioner testified that he has not taken a shower by himself since July 7, 2015, and when he does shower his wife has to help him.[41] Also, Petitioner testified that since July 7, 2015, he hasn't had sex, hasn't been on vacation, and hasn't been to any sporting events.[42] Further, Petitioner testified that since July 7, 2015, he hasn't been to church.[43] Prior to July 7, 2015, Petitioner went to church every Sunday and holy day.[44] Petitioner testified that he misses playing with his granddaughter,

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[33] P.A. 000528.
[34] P.A. 000529.
[35] P.A. 000529 – P.A. 000530.
[36] P.A. 000530.
[37] P.A. 000531.
[38] P.A. 000537 – P.A. 000538.
[39] P.A. 000530.
[40] P.A. 000532 – P.A. 000533.
[41] P.A. 000534.
[42] P.A. 000536.
[43] P.A. 000537.
[44] *Id.*

doing chores around the house, and being able to fool around in his shed.[45] Petitioner testified that because of his permanent severe brain injury, his day primarily consist of waking up in the afternoon, and sitting in a powered recliner in his living room until it's time to go to sleep.[46]

Petitioner's wife, Mrs. Anna McKenzie, testified that after the battery she first saw Petitioner on July 8, 2015, at the Intensive Care Unit (hereinafter "ICU") of Ruby.[47] When Mrs. McKenzie first saw Petitioner in the ICU of Ruby her knees buckled and someone grabbed her arm and sat her in a chair.[48] Petitioner's condition while in the ICU of Ruby is best understood by a picture Mrs. McKenzie took of Petitioner in the ICU.[49] Mrs. McKenzie testified that while in the ICU, Petitioner was in a coma with a neck brace and a breathing tube.[50] While Petitioner was in the ICU is when Mrs. McKenzie learned that Petitioner had very serious and deep brain bleeds.[51] Eventually, Mrs. McKenzie realized Petitioner would never be the same.[52] In fact, Mrs. McKenzie learned Petitioner was lucky to survive his injuries.[53]

Mrs. McKenzie testified about the nature of Petitioner's wound and the staples in Petitioner's head.[54] Mrs. McKenzie testified that Petitioner did not regain consciousness until July 10, 2015, which corresponds to the day Petitioner was transferred from the ICU to a step down unit at Ruby.[55] Mrs. McKenzie testified that Petitioner was at Ruby from July 7, 2015, until July 16, 2015, when Petitioner was transferred to HealthSouth.[56] Mrs. McKenzie testified that from

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[45] P.A. 000538 – P.A. 000539.
[46] P.A. 000533.
[47] P.A. 000563.
[48] *Id.*
[49] P.A. 001028.
[50] P.A. 000563.
[51] *Id.*
[52] P.A. 000566.
[53] *Id.*
[54] P.A. 001030.
[55] P.A. 000569.
[56] P.A. 000570.

July 16, 2015, to August 12, 2015, Petitioner was an overnight patient at HealthSouth.[57] Also, Mrs. McKenzie testified that Petitioner was transported to Ruby, via ambulance, for doctors' appointments while Petitioner was at HealthSouth.[58] Mrs. McKenzie testified that on August 12, 2015, Petitioner was discharged from HealthSouth and Petitioner began physical, occupational, and speech therapy at HealthPlex.[59] Mrs. McKenzie also testified that Petitioner participated in physical therapy at Country Roads Physical Therapy.[60]

Mrs. McKenzie testified that since July 7, 2015, she has to assist Petitioner with ninety-five percent of his daily living activities which includes cooking, showering, shaving, dressing, and going to the bathroom.[61] Additionally, Mrs. McKenzie testified that since July 7, 2015, Petitioner has fallen down numerous times, which sometimes cause severe injuries to Petitioner.[62] Also, Mrs. McKenzie testified that Petitioner's speech has been affected by his permanent severe traumatic brain injury.[63] Mrs. McKenzie testified that Petitioner's memory has been affected by his permanent severe traumatic brain injury, so much so that Petitioner often confuses her with his family members.[64] Lastly, Mrs. McKenzie testified that Petitioner did not use walking devices such as canes and wheelchairs before Respondent battered Petitioner on July 7, 2015.[65]

Expert Testimony

The evidence of Petitioner's injuries were not limited to lay witnesses. The jury heard evidence from Dr. Kokab Darbandi. At trial, Dr. Darbandi was qualified as an expert in internal

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[57] P.A. 000571.
[58] P.A. 000573 - P.A. 000574.
[59] P.A. 000575.
[60] *Id.*
[61] P.A. 000579.
[62] P.A. 000580. *See* also P.A. 001038 – P.A. 001050.
[63] P.A. 000585.
[64] P.A. 000586.
[65] P.A. 000585.

medicine.[66] Dr. Darbandi testified that she is Petitioner's primary care physician and first saw Petitioner on March 13, 2015.[67] Additionally, Dr. Darbandi explained that she developed a baseline (a basic understanding of Petitioner's medical problems) prior to Petitioner being battered by Respondent.[68] After Petitioner was battered by Respondent, Dr. Darbandi first evaluated Petitioner on September 4, 2015.[69] In total, Dr. Darbandi has evaluated Petitioner thirteen (13) times since Petitioner was battered by Respondent.[70]

Dr. Darbandi testified that, as a result of being battered by Respondent, Petitioner was diagnosed with a left brain stem hemorrhagic stroke, an intracranial hemorrhage, a subdural hematoma, and a subarachnoid hematoma.[71] Dr. Darbandi explained that Petitioner's injuries were classified as a permanent severe traumatic brain injury.[72] After Petitioner received these injuries and was discharged from Ruby on July 16, 2015, medical professionals recommended Petitioner obtain acute rehab in an inpatient setting at HealthSouth.[73] Dr. Darbandi testified that Petitioner's referral to HealthSouth for inpatient rehabilitation and the treatment Petitioner received at HealthSouth was medically necessary.[74]

Dr. Darbandi testified that in March of 2016 Petitioner had prostate surgery which was not related to the injuries sustain by Petitioner on July 7, 2015.[75] However, Dr. Darbandi testified that Petitioner's second stint at HealthSouth from March 17, 2016 to April 2, 2016 for inpatient

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[66] P.A. 000433.
[67] P.A. 000426.
[68] *Id.*
[69] P.A. 000427.
[70] *Id.*
[71] P.A. 000436.
[72] P.A. 000441 - P.A. 000442.
[73] P.A. 000440.
[74] P.A. 000440 – P.A. 441.
[75] P.A. 000446.

rehabilitation, after his prostate surgery, was medically necessary because of the injuries he received on July 7, 2015.[76]

Additionally, Dr. Darbandi testified that the injuries Petitioner received on July 7, 2015, cause Petitioner to suffer numerous neurological deficits.[77] Dr. Darbandi explained that Petitioner's neurological deficits are foot drop, imbalance, dizziness, right-sided motor weakness, difficulty elevating right leg, disconjugate gaze, slurred speech, worsening memory, double vision, and problems with depth perception.[78] Moreover, Dr. Darbandi testified that Petitioner's neurological deficits are permanent injuries.[79]

In addition to Petitioner's permanent neurological deficits, Dr. Darbandi explained that Petitioner's injuries affect his ability to perform activities of daily living which include but are not limited to showering, managing finances, and transferring positions (i.e. laying to sitting and sitting to standing).[80] Also, Dr. Darbandi testified that Petitioner will need future medical care related to the injuries Petitioner sustained on July 7, 2015.[81] Further, Dr. Darbandi testified that it is reasonable to believe that Petitioner is still experiencing some pain.[82] Lastly, Dr. Darbandi testified to a reasonable degree of medial probability that the medical treatment Petitioner received and the more than $180,000.00 of medical bills Petitioner incurred as a result of being battered by Respondent were medically necessary.[83]

As noted above, the jury concluded that Petitioner was battered by Respondent on July 7, 2015. However, notwithstanding the substantial testimony and photographic evidence regarding

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[76] P.A. 000448. *See* also P.A. 000956 – P.A. 000967
[77] P.A. 000450.
[78] P.A. 000450 - P.A. 000451.
[79] P.A. 000453.
[80] P.A. 000454.
[81] P.A. 000455.
[82] P.A. 000501.
[83] *See* generally P.A. 000443 – P.A. 000449.

Petitioner's permanent injuries, the jury did not award Petitioner any financial compensation.[84] The jury's verdict is contrary to the clear weight of the testimony which established permanent and serious compensable injuries.

A new trial on damages is warranted in this case.

[84] P.A. 000938 – P.A. 001019.

SUMMARY OF ARGUMENT

In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. On appeal of a damage issue that has been tried by a jury, the allegation of inadequate damages should be viewed by considering the evidence most strongly in favor of the defendant. However, even under this restrictive standard, a new trial on damages is the appropriate resolution where a jury verdict is inadequate because it does not include elements of damage which are specifically proven with undisputed evidence including a substantial amount as compensation for injuries and the consequent pain and suffering.

In this case the clear weight of the evidence presented at trial is that Petitioner was injured and experienced pain and suffering following the battery committed by Respondent on July 7, 2015. Petitioner's injuries were established in uncontroverted evidence from Petitioner, Petitioner's wife, and Dr. Kokab Darbandi, Petitioner's primary care physician. Moreover, Petitioner's serious injuries can be seen in a picture taken at the incident scene before police officers or EMS arrived and in a picture taken by Petitioner's wife while Petitioner was unconscious in the ICU at Ruby.[85] Despite this testimony and the photos, the jury awarded no compensation for pain and suffering or the more than $180,000.00 of medical bills incurred by Petitioner following the battery committed by Respondent. This is a prime example of a civil miscarriage of justice justifying a new trial on damages.

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[85] *See* P.A. 000797 and P.A. 001028.

In denying the motion for a new trial on damages the Circuit Court relied solely on the fact that the case was fairly tried with proper instructions before a jury. In using this argument to distinguish the cases noted above requiring a new trial, the Circuit Court improperly disregarded the evidence of Petitioner's injury, Petitioner's pain and suffering, and Respondent being found liable for the intentional tort of battery.

Furthermore, the cases relied on by the Respondent and the Circuit Court are negligence cases involving disputed factual records unlike the case at bar. Where, like here, evidence of Respondent's intentional tort and Petitioner's injury is unconverted, the evidence, even viewed most strongly in favor of Respondent, requires finding that the jury award of zero damages is inadequate and inconsistent.

Last, the fact that the jury ignored, in their entirety, the more than $180,000.00 of medical bills which Petitioner incurred as a result of Respondent's intentional tort, is *prima facie* evidence of a miscarriage of justice.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument. Pursuant to West Virginia Rule of Appellate Procedure 20, Petitioner believes that this case involves a matter of first impression over the standard to be applied for granting a new trial on damages when a jury fails to award noneconomic damages to a plaintiff, who clearly received medical treatment for injuries caused by a defendant that committed an intentional tort.

Alternatively, this case is appropriate for a Rule 19 argument under West Virginia Rule of Appellate Procedure 19(a)(1), 19(a)(2), 19(a)(3). Under either circumstance, a memorandum decision is not appropriate as this case does not present such a limited circumstance where reversal of the Circuit Court can be accomplished via a memorandum decision as the factual record is substantial.

ARGUMENT ON INADEQUATE DAMAGES

I. An order denying a new trial is subject to review for abuse for discretion.

The law regarding the standard of review applicable to an order granting or denying a motion for a new trial is clear:

> As a general proposition, we review a circuit court's rulings on a motion for a new trial under an abuse of discretion standard. *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994) ... Thus, in 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 *de novo* review.[86]

II. The Circuit Court abused its discretion in refusing to grant Petitioner a new trial on damages for inadequate damages when the evidence established causation and damages.

The standard for granting a motion for a new trial based on inadequate damages is also well established:

> In syllabus point three of *Walker*, we held as follows:
>
> In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.
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> In syllabus point two of *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W. Va. 643, 461 S.E.2d 149 (1995), we explained:
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> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the

[86] *Williams v. Charleston Area Med. Ctr.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797 (2003) (quoting *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995)); *see* also *Big Lots Stores, Inc. v. Arbogast*, 228 W. Va. 616, 619, 723 S.E.2d 846, 849 (2012) (quoting *Williams*).

> evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. Syl. pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984), Syl. pt. 6 *McClung v. Marion County Comm'n.*, 178 W. Va. 444, 360 S.E.2d 221 (1987).[87]

On appeal of a damage issue that has been tried by a jury, the allegation of inadequate damages should be viewed considering the evidence most strongly in favor of the defendant.[88]

Thus, even under this restrictive standard a new trial on damages is the appropriate resolution where a jury verdict is inadequate:

> In a civil action for recovery of damages for personal injuries in which the jury returns a verdict for the plaintiff which is manifestly inadequate in amount and which, in that respect, is not supported by the evidence, a new trial may be granted to the plaintiff on the issue of damages on the ground of the inadequacy of the amount of the verdict.[89]

A verdict's adequacy is tested by as follows:

> 'Where a verdict does not include elements of damages which are specifically proven 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).[90]

Additionally, this Court has held that when such a verdict is wholly inadequate in amount "the case will be remanded to the trial court with directions that the plaintiff be granted a new trial upon

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[87] *Marsch v. Am. Elec. Power Co.*, 207 W. Va. 174, 181, 530 S.E.2d 173, 180 (1999).

[88] *Lenox v. McCauley*, 188 W. Va. 203, 209, 423 S.E.2d 606, 612 (1992), we reiterated that where a damage issue has been tried by a jury, the allegation of inadequate damages should be weighed on appeal by *Id.* At 209, 423 S.E. 2d at 612.

[89] Syl. pt. 3, *Biddle v. Haddix*, 154 W. Va. 748, 179 S.E.2d 215 (1971).

[90] *Marsch*, 207 W. Va. at 180, 530 S.E.2d at 179 (quoting Syl. pt. 2, *Maynard v. Napier*, 180 W. Va. 591, 378 S.E.2d 456 (1989)).

the single issue of the quantum of damages which, under the evidence, he is justly entitled to recover."[91]

The clear weight of the evidence presented at trial is that Petitioner suffered a brain injury and experienced pain and suffering following the battery by Respondent on July 7, 2015. The failure of the jury to award any damages after finding Petitioner was battered on July 7, 2015, clearly meets this standard.

As noted above, in addition to testimony from Petitioner regarding his injuries, extensive medical treatments, and rehabilitation, testimony was also offered from Mrs. Anna McKenzie (Petitioner's Wife) and Dr. Kokab Darbandi (Petitioner's primary care physician). In addition to testimony from the above-referenced witnesses, Officer Moran and Officer Staley testified to the seriousness of Petitioner's injury and what appeared to be brain matter surrounding Petitioner's head wound. Also, the seriousness of Petitioner's injuries is evident in the photograph taken at the incident scene before police officers arrived and in the photograph taken by Petitioner's wife while Petitioner is unconscious in the ICU at Ruby.[92] Further, Respondent's counsel admitted in his opening statement and closing argument that Petitioner was injured. Despite the admission and testimony, the jury awarded no money for more than $180,000.00 medical bills incurred by Petitioner or the pain and suffering endured by Petitioner following the battery by Respondent on July 7, 2015. This is a prime example of a civil miscarriage of justice justifying a new trial on damages.

In *Payne v. Gundy*, the plaintiff sued the defendant for assault and battery.[93] The circuit court found liability and the jury awarded punitive damages but no compensatory damages. The

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[91] Syl. pt. 2 *Hall v. Groves*, 151 W. Va. 449, 153 S.E.2d 165 (1967).
[92] *See* P.A. 000797 and P.A. 001028.
[93] 96 W. Va. 82, 468 S.E.2d 335 (1996).

plaintiff moved for a new trial pursuant to Rule 59 relating to the adequacy of the verdict. The circuit court denied plaintiff's motion and an appeal followed. On appeal this Court overturned the lower Court's decision noting this Court has "consistently held that where there is uncontroverted evidence of damages and liability is proven, a verdict not reflecting them is inadequate."[94]

Similarly, in "a jury verdict awarding no damages cannot stand where the preponderance of the evidence, or, as in this case, the un-contradicted evidence, shows injury of a substantial nature. A verdict of the jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case."[95]

In *Godfrey v. Godfrey*, plaintiff, a seven (7) year old girl, had three toes amputated because of the negligent operation of a lawnmower by plaintiff's step sister-in-law.[96] The jury found Mr. Godfrey (plaintiff's father) 40% negligent and plaintiff's step sister-in-law 60% negligent and awarded plaintiff thirty thousand dollars ($30,000) in damages.[97] On appeal, this Court held the verdict was manifestly inadequate in amount and stated "the jury refused to make the required award of a substantial amount of compensation for [plaintiff's] injuries and her consequent pain and suffering.[98] Additionally, this Court granted plaintiff a new trial solely on the issue of damages because "it would have been exceedingly difficult to prove that [plaintiff] shared any blame for the accident, given that she was only seven years old at the time.[99]

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[94] *Id.* (citing *Raines v. Thomas*, 175 W. Va. 11, 14, 330 S.E.2d 334, 336 (1985). *See also* Syl. pt. 2, *Godfrey v. Godfrey*, 193 W. Va. 407, 456 S.E.2d 488 (1995); Syl. Pt. 1 *Bennett v., Angus*, 192 W. Va. 1, 449 S.E.2d 62 (1994); Syl. pt. 1, *Linville v. Moss*, 189 W. Va. 570, 433 S.E.2d 281 (1993); Syl. pt. 2, *Fullmer v. Swift Energy Co. Inc.*, 185 W. Va. 45, 404 S.E. 2d 534 (1991)).
[95] *Keiffer v. Queen*, 155 W. Va. 868, 189 S.E.2d 842 (1972) (citing Syl. pt. *Raines v. Faulkner*, 131 W. Va. 10, 48 S.E.2d 393 (1947)).
[96] *Godfrey v. Godfrey*, 193 W. Va. 407, 409, 546 S.E.2d 488, 490 (1995).
[97] *Id.* at 410.
[98] *Id.* at 411.
[99] *Id.* at 412.

Last, in *Bruno v. Hickman, et al.*, plaintiff filed suit against defendants alleging assault and battery.[100] The evidence showed that defendants assaulted and beat plaintiff rendering plaintiff unconscious.[101] Plaintiff was taken home in the unconscious states while bleeding profusely with a scalp wound.[102] Plaintiff was sick in bed for twenty-seven (27) days and under a doctor's care for six (6) months.[103] The jury returned a verdict for plaintiff and awarded plaintiff sixty dollars ($60) in damages.[104] The Wisconsin Supreme Court held that the fact that plaintiff "must have suffered pain is a matter of common knowledge."[105] Additionally, the Wisconsin Supreme Court held "[a] verdict for $60 for damages such as the evidence shows the plaintiff sustained is wholly inadequate, as a matter of common knowledge. Such verdicts bring reproach to the jury system and, if allowed to stand, lessen respect for courts. No court should lend its approval to such a palpable miscarriage of justice."[106]

In the case at bar, it is uncontroverted that Petitioner did not have any fault in the July 7, 2015, incident because the jury concluded that Respondent committed the intentional tort of battery. It is uncontroverted that Petitioner was injured by the battery.[107] It is uncontroverted that Petitioner received medical treatment for his injuries following the battery.[108] It is uncontroverted that Petitioner sustained pain and suffering following the battery.[109] Despite the uncontroverted evidence, the jury awarded no money. Accordingly, the jury's verdict not reflecting the

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[100] *Bruno v. Hickman, et al.*, 174 Wis. 63, 182 N.W. 356 (1921).
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See* P.A. 000797 and P.A. 001028.
[108] *See* generally P.A. 000443 – P.A. 000449.
[109] *See* P.A. 000797 and P.A. 001028. *See* also P.A. 001038 – P.A. 001050.

uncontroverted evidence is inadequate and a miscarriage of justice and clearly shows the jury was misled by a mistaken view of the case.

For the reasons stated above, the decision of the Circuit Court denying the motion for a new trial on damages was an abuse of discretion and should be reversed. This Court should award a new trial on the issue of harms and losses sustained in the July 7, 2015, battery, including but not limited to, past and/or future physical pain and mental pain and suffering, and reduced ability to enjoy life.

ARGUMENT ON INCONSISTENT VERDICT

I. The Circuit Court abused its discretion in refusing to grant Petitioner a new trial on damages for an inconsistent verdict when the undisputed evidence established causation and substantial damages.

West Virginia Rule of Civil Procedure 49(b) states, in part:

> When the answers [to special interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.[110]

"[A]bsent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharge, constitutes a waiver of the defect or irregularity in the verdict form."[111] "However, where a verdict is so uncertain, ambiguous, contradictory, or illogical that it cannot be clearly ascertained who it is for or against

[110] W. Va. R. C. P. 49(b)
[111] Syl. pt. 2, *Combs v. Hahn*, 205 W. Va. 102, 516 S.E.2d 506 (1999).

or what facts were found and the court cannot reasonably construe the language so as to give effect to what the jury unmistakably found as a basis of a judgment thereon, the vice in the verdict is more than formal. Such a condition is of the substance and affects the merits of the case. Where a verdict is of that character, the party against whom the judgment goes does not waive the defect by failing to ask that the jury clarify the verdict. He may raise the question on a motion for a new trial and the court should grant it."[112]

"When jury verdicts answering several questions have no logical internal consistence and do not comport with instructions, they will be reversed and the cause remanded for new trial."[113] "In determining whether jury verdicts are inconsistent, the Court has observed that with respect to inconsistent verdict, such inconsistency must appear after excluding every reasonable conclusion that would authorize the verdict."[114] *Modular Bldg. Consultants of W. Va., Inc. v. Poerio, Inc.*, 235 W. Va. 474 (2015) (*quoting Prager v. City of Wheeling*, 91 W. Va. 597 (1922)).

In *Gunno v. McNair*, this Court held the jury verdict was inconsistent and remanded the case to the Circuit Court of Kanawha County, West Virginia for a new trial on damages.[115] In *Gunno*, plaintiff was injured in a car accident caused by defendant.[116] Because defendant admitted he was responsible for the accident, liability was not in dispute.[117] Further, plaintiff chose not to introduce medical bills into evidence or to seek recovery of the amount of the medical bills or lost wages.[118] Plaintiff's case went to the jury on two issues "(1) whether [plaintiff] was injured as a

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[112] *Combs v. Hahn*, 205 W. Va. 102, 107, 516 S.E.2d 506, 511 (1999) (citing *Anderson's Executrix v. Hockensmith*, 322 S.W.2d 489, 490-491 (Ky. 1959).
[113] Syl. pt. 1, *Reynolds v. Pardee & Curtin Lumber Co.*, 172 W. Va. 804, 310 S.E.2d 870 (1983).
[114] *Modular Bldg. Consultants of W. Va., Inc. v. Poerio, Inc.*, 235 W. Va. 474, 479, 774 S.E.2d 555, 560 (2015) (quoting *Prager v. City of Wheeling*, 91 W. Va. 597, 599, 114 S.E. 155, 156 (1922)).
[115] *Gunno v. McNair*, 2016 W. Va. LEXIS 895 (2016) (*memorandum decision*).
[116] *Id.*
[117] *Id.* at *6.
[118] *Id.*

proximate result of the automobile accident and, if so, (2) the amount of damages [plaintiff] should be awarded for harms or losses, including, but not limited to, past and/or future physical and mental pain and suffering, and reduced ability to enjoy life."[119] The jury answered the first question in the affirmative.[120] However, the jury awarded Plaintiff $0 in damages.[121]

In *Gunno*, the Circuit Court denied the motion for a new trial on damages because the Circuit Court found there was not clear uncontroverted evidence of [plaintiff's] actual pecuniary loss.[122] Further, the Circuit Court "reasoned that because [plaintiff] chose not to seek damages for her medical bills or other pecuniary loss, the jury's award of no damages to [plaintiff] should be entitled to great weight and deference."[123] On appeal, plaintiff argued that because the jury found plaintiff was injured because of the accident, which Defendant admitted was his fault, an award of $0 in damages was inconsistent.[124]

In *Gunno*, this Court held "[t]he award of zero dollars in damages is inherently inconsistent with the finding that [plaintiff] was injured as a proximate result of the accident" even when, as in *Gunno*, plaintiff's counsel did not object to the verdict form prior to the discharge of the jury.[125] Thus, in *Gunno*, this Court concluded plaintiff was entitled to a new trial on damages as a result of defendant's negligence.[126]

The case at bar is analogous to *Gunno*, however the present case is an even more extreme example of an inconsistent verdict because Petitioner introduced more than one hundred eighty thousand dollars ($180,000) of medical bills into evidence which Petitioner incurred because

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[119] *Id.*
[120] *Id.* at *7.
[121] *Id.*
[122] *Id.* at *8.
[123] *Id.*
[124] *Id.* at *9-10.
[125] *Id.* at *12.
[126] *Id.*

Respondent battered Petitioner on July 7, 2015.[127] Therefore, like *Gunno*, a new trial on damages is warranted because of the inconsistency of the verdict.

For the reasons stated above, the decision of the Circuit Court denying the motion for a new trial on damages was an abuse of discretion and should be reversed. This Court should award a new trial on the issue of harms and losses sustained in the July 7, 2015, battery, including but not limited to, past and/or future physical pain and mental pain and suffering, and reduced ability to enjoy life.

CONCLUSION

The jury's zero dollar verdict was against the clear weight of the evidence. The Circuit Court erred in failing to grant a new trial on damages. This Court should reverse the denial of the motion for a new trial and remand this action for a new trial on damages.

Respectfully Submitted,

Christopher McKenzie, *Petitioner*
By Counsel:

Samuel D. Madia (WV Bar No. 10819)
Jonathan Wesley Prince (WV Bar No. 13250)
SHAFFER MADIA LAW PLLC
1056A Maple Drive
Morgantown, WV 26505
304-622-1100 (Phone)
304-599-5859 (Fax)
sam@shaffermadialaw.com
wes@shaffermadialaw.com

[127] *See* generally P.A. 000443 – P.A. 000449 and P.A. 000938 – P.A. 001019.