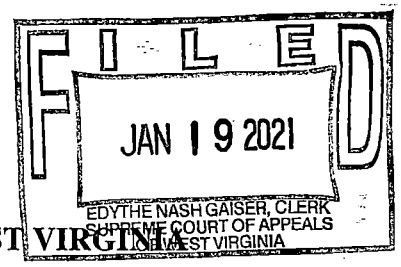
No. 20-0848



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Defendant Below, Petitioners,

vs.

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

Plaintiffs Below, Respondents.

BRIEF FOR PETITIONERS

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

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ASSIGNMENT OF ERRORS

(1) The Circuit Court erred by *sua sponte* invading the province of the jury and doubling the amount of the jury's Verdict because the judgment as entered is not supported by the jury's Verdict.

(2) The Circuit Court erred when it entered judgment because it failed to reduce the jury's Verdict on damages, which totaled $248,475.52, by Plaintiff's Decedent's 50% comparative fault.

(3) The Circuit Court erred in doubling the jury's Verdict because it deprived the Defendants of their rights under Article III, Section 13 of the West Virginia Constitution.

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

STATEMENT OF THE CASE

I. Procedural History

This appeal arises from an accident that occurred on August 9, 2016, on Interstate 68 in Monongalia County involving a collision between a motorcycle operated by Plaintiff's Decedent, Jackie Blaine Koontz, and a motor vehicle operated by Defendant, Doug Brake. (Appx. Vol. I, pp. 11-12; ¶¶ 11-12; Appx. Vol. II, pp. 45, 57-58) As a result of the accident, the Plaintiff filed a two-count, Wrongful Death Complaint on December 19, 2016, against the Petitioners and Defendants, Rexroad Heating and Cooling, LLC and Doug Brake, in the Circuit Court of Monongalia County, West Virginia at Case No. 16-C-615 seeking monetary damages as a result of Mr. Koontz's death. (Appx. Vol. I, pp. 9-15, 102.)

The Defendants filed an Answer and Affirmative Defenses on February 3, 2017, wherein they denied all liability and raised the defense of Mr. Koontz's comparative negligence. (Appx. Vol. I, pp. 16-21, 102.)

At the conclusion of the three-day trial in this negligence case presided over by the Honorable Judge Susan B. Tucker, the jury rendered its Verdict on August 20, 2020. (Appx. Vol. II, pp. 360-62.) The jury determined that the Plaintiff's Decedent was 50% at fault and the Defendants were 50% at fault for the motor vehicle accident at issue. (Appx. Vol. I, p. 27; Appx. Vol. II, p. 361.) In its Verdict, the jury determined Plaintiff's damages to be as follows: Loss of Household Services: $0; Loss of Social Security Benefits: $186,660; Loss of Pension Plan: $47,420; Hospital and Funeral Expenses: $14,395.52; and Sorrow and Mental Anguish: $0. (Appx. Vol. I, p. 28; Appx. Vol. II, pp. 361-62.)

After the jury returned its Verdict, neither party raised any issues or requested that the Court poll the jury. (Appx. Vol. II, p. 362.) Nevertheless, the Circuit Court, *sua sponte*, raised questions regarding the deliberative process of the jury and whether the jury had, without saying so and in disregard of the Court's instruction and the Verdict Form, reduced its determination of damages by the percentage of fault the jury had attributed to Plaintiff's Decedent. (Appx. Vol. II, pp. 363-64.) The day after the jury returned its Verdict, the Circuit Court entered an Order titled "Order Accepting Verdict," on August 21, 2020. (Appx. Vol. I, pp. 1-5.) In that Order, the Circuit Court arbitrarily doubled the Verdict to $496,951.04 before then reducing the Verdict by 50% based upon the Decedent's comparative fault. (Appx. Vol. I, pp. 2-3.)

The doubling of the Verdict and the final judgment entered by the Circuit Court negated the application of W. Va. Code § 55-7-13c(c), which mandates that "the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault." Thereafter, on August 31, 2020, Defendants filed a timely Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va.

R.C.P. 59(a). (Appx. Vol. I, pp. 29-42, 106.) On September 4, 2020, the Plaintiff filed a Motion Requesting Additur and for Imposition of Prejudgment Interest. (Appx. Vol. I, pp. 53-67, 106.)

After a hearing on the parties' respective post-trial motions, the Circuit Court entered an Order on September 24, 2020, denying the Defendants' Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va. R.C.P. 59(a). (Appx. Vol. I, pp. 6-7, 107.) The Circuit Court also denied the Plaintiff's request for an additur but granted her request for the imposition of prejudgment interest. (Appx. Vol. I, pp. 6-7, 107.) On October 21, 2020, the Defendants filed a timely Notice of Appeal to this Court.

II. Statement of Facts

On August 9, 2016, Plaintiff's Decedent, Jackie Blaine Koontz, was operating his motorcycle on Interstate 68 in Monongalia County when he rear-ended a truck operated by Defendant, Doug Brake. (Appx. Vol. I, pp. 11-12, ¶¶ 11-12; Appx. Vol. II, pp, 45, 50, 57-58, 67, 218.) At the time of the accident, Mr. Brake was driving the pick-up truck back to his employer, Rexroad Heating's business. (Appx. Vol. II, pp. 91, 94, 98.) In the Complaint, Plaintiff alleged that "Defendant Brake negligently or intentionally changed lanes; moving from the right hand lane of the Interstate to the left hand lane directly in front of Jackie Blaine Koontz" and "in doing so proximately caused a collision" with Mr. Koontz's 2008 Harley-Davidson motorcycle. (Appx. Vol. I, p. 12, ¶ 12.) As a result of the accident, Plaintiff filed a Complaint seeking monetary damages for Mr. Koontz's death. Plaintiff sought to recover damages for "sorrow, companionship, comfort, guidance, kindly offices, financial support and advice of the decedent," hospital and medical care expenses, and funeral expenses. (Appx. Vol. I, p. 13, ¶ 21.) The Defendants filed an

Answer and Affirmative Defenses denying all liability and raising the defense of Mr. Koontz's comparative negligence. (Appx. Vol. I, pp. 19-20, ¶ 28.)

The jury trial in this negligence case was conducted from August 18th to August 20th, 2020. (Appx. Vol. II, pp. 1-390.) During Plaintiff's case, Plaintiff presented the testimony of Daniel Selby who was offered "as an expert in the realm of forensic accounting." (Appx. Vol. II, pp. 165, 167.) Mr. Selby opined regarding the present value of the Plaintiff's claimed loss of social security benefits, loss of pension benefits, and loss of household services. (Appx. Vol. II, pp. 173-75.) Mr. Selby testified that the present value of the loss of social security benefits was $312,413. (Appx. Vol. II, p. 173.) Mr. Selby also testified that the present value of the loss of pension benefits was $65,427. (Appx. Vol. II, pp. 174, 180.) Finally, Mr. Selby testified that the present value of the loss of household services was $296,658. (Appx. Vol. II, pp. 175-77.)

During trial, the parties stipulated that Plaintiff's loss for Hospital/Funeral Expenses were $14,395.52. (Appx. Vol. II, pp. 129-30.)

At the conclusion of the parties' cases, the Circuit Court instructed the jury on what Plaintiff needed to prove in order to recover monetary damages for loss of household services, pension income, Social Security income, and the recovery of reasonable medical expenses. (Appx. Vol. II, pp. 326-27.) The Court further instructed the jury that any award of damages for these items was to be reduced to present value:

> If you decide that plaintiff's harm includes future economic damages for loss of various pensions, household services, and Social Security earnings, then the amount of those future damages must be reduced to their present dollar value. This is necessary because money received now, will, through an investment, grow to a larger amount in the future. To find present dollar value you must determine the amount of money that if reasonably invested today will provide plaintiff with the amount of plaintiffs future damages. You may consider expert testimony in determining the present dollar value of future economic damages.

(Appx. Vol. II, p. 327.)

The Circuit Court also charged the jury that, "Defendants contend that plaintiff's decedent, Jackie Blaine Koontz, was comparatively negligent in traveling at an unsafe speed, in failing to stop his motorcycle, in failing to slow down, and in operating his motorcycle in an unsafe manner." (Appx. Vol. II, p. 324.) The Circuit Court, moreover, instructed the jury regarding the effect of Jackie Blaine Koontz's negligence, if any. (Appx. Vol. II, pp. 323-24.) The Court properly instructed the jury as follows:

> If you find that Jackie Blaine Koontz was negligent and it was less than or equal to defendants['] negligence do not reduce any money damages that you may award plaintiff by the percentage that you find Jackie Blaine Koontz was at fault. I will reduce plaintiff's damages by the percentage that you find Jackie Blaine Koontz was at fault. I will calculate the actual reduction after you returned your verdict.

(Appx. Vol. II, p. 324.)

Following the Court's charge and closing arguments, the jury rendered its Verdict on August 20, 2020. (Appx. Vol. II, pp. 360-62.) The jury determined that Plaintiff's Decedent was 50% at fault and the Defendants were 50% at fault for the motor vehicle accident at issue. (Appx. Vol. I, p. 27; Appx. Vol. II, pp. 360-62.)

The jury also determined Plaintiff's damages to be as follows: Loss of Household Services: $0; Loss of Social Security Benefits: $186,660; Loss of Pension Plan: $47,420; Hospital and Funeral Expenses: $14,395.52; and Sorrow and Mental Anguish: $0. (Appx. Vol. I, p. 28.) These damages total $248,475.52. (Appx. Vol. I, p. 28.)[1]

After the jury returned its Verdict, the Court inquired if "either the Plaintiff or the defendant[s] wished to have the jury polled." (Appx. Vol. II, p. 362.) Neither part raised any issues, and counsel for the Plaintiff and counsel for the Defendants both indicated that they did not

[1] The jury's award of $186,660 for the loss of Social Security benefits is 59.7% of Plaintiff's claimed loss of Social Security benefits, while the award of $47,420 for the loss of loss of pension benefits is 72.4% of Plaintiff's claimed loss of pension benefits. The jury's award of $14,395.52 was 100% of the stipulated Hospital/Funeral Expenses.

wish to have the jury polled. (Appx. Vol. II, p. 362.) The Circuit Court then informed the jury that their "work is done." (Appx. Vol. II, p. 362.)

Inexplicably and without any prompting from the parties, the Circuit Court, *sua sponte*, began to raise questions into the deliberative process and the manner in which the jury had reached its verdict and whether the jury had, without saying so and in disregard of the Court's instruction and the Verdict Form, reduced its determination of damages by the percentage of fault the jury had attributed to Plaintiff's Decedent. (Appx. Vol. II, pp. 363-64.) During a subsequent sidebar conference regarding the Verdict, the Circuit Court questioned the Verdict and indicated that the Court did not understand how the jury reached its result. (Appx. Vol. II, p. 372.)[2]

The Circuit Court raised the possibility that the jury may have reduced the Verdict by the Decedent's percentage of negligence or reduced the damages to present value. (Appx. Vol. II, pp. 363, 365, 372.) The Circuit Court eventually proposed to question the jury regarding their verdict. (Appx. Vol. II, pp. 375-77.) Specifically, the Circuit Court proposed to question each juror as follows:

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

(Appx. Vol. II, p. 375.) The Defendants objected to such an inquiry and to this specific question. (Appx. Vol. II, p. 377.) Over the Defendants' objection, the Court proceeded to query the jury about the Verdict and whether they wanted it reduced by the percentage of the Decedent's fault. (Appx. Vol. II, pp. 379-80; 386-87.) Based upon the Court's questioning of the jury, the Court concluded that what the jury wanted was "to send home" the amount of $248,475.52. (Appx. Vol. II, p. 387.)

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[2] Specifically, the Court stated that, "So, I have no freaking clue what they [the jury] did." (Appx. Vol. II, p. 372.)

On August 21, 2020, the day after the jury returned its Verdict, the Circuit Court entered an Order titled "Order Accepting Verdict." (Appx. Vol. I, pp. 1-5.) In that Order, the Circuit Court arbitrarily doubled the Verdict to $496,951.04 before reducing the Verdict by 50% based upon the Decedent's comparative fault. (Appx. Vol. I, pp. 2-3.) In doubling the jury's award for "Loss of social security benefits," "Loss of pension plan," and "Hospital and funeral expenses," the Circuit Court concluded that the jury intended to award damages in excess of both the total amount of losses claimed by Plaintiff as well as the losses stipulated by the parties at trial.

Thereafter, on August 31, 2020, Defendants filed a timely Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va. R.C.P. 59(a). (Appx. Vol. I, pp. 29-42, 106.) Plaintiff then filed a Motion Requesting Additur and for Imposition of Prejudgment Interest on September 4, 2020. (Appx. Vol. I, pp. 53-67, 106.) After a hearing on the parties' respective post-trial motions, the Circuit Court entered an Order on September 24, 2020, denying the Defendants' Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va. R.C.P. 59(a). (Appx. Vol. I, pp. 6-7, 107.) The Circuit Court also denied the Plaintiff's request for an additur but granted Plaintiff's request for the imposition of prejudgment interest. (Appx. Vol. I, pp. 6-7, 107.)

SUMMARY OF ARGUMENT

It is well established that when a jury's verdict is in proper form, is duly signed by its foreperson, and represents the final agreement of the jury, it should be received and entered by the trial court. The Circuit Court erred when it failed to receive and enter the Verdict as rendered by the jury and when it invaded the province of the jury by *sua sponte* inquiring into the jury's deliberative process. *McDaniel v. McDaniel*, 198 W. Va. 282, 480 S.E.2d 170 (1996).

At the conclusion of the trial, the jury rendered a Verdict, which was in proper form, where the jury determined that Plaintiff's Decedent was 50% at fault and Defendants were 50% at fault. The jury in its Verdict found that Plaintiff's total damages were $248,475.52 itemized as follows: Loss of Social Security Benefits: $186,660; Loss of Pension Plan: $47,420; and Hospital and Funeral Expenses: $14,395.52. (Appx. Vol. I, p. 28, Verdict, p. 3.) After the return of the Verdict, the Circuit Court raised questions about the jury's deliberative process and the manner in which the Verdict was reached. (Appx. Vol. II, pp. 363-89.) Thereafter, the Circuit Court, in purportedly "accepting" the jury's Verdict, entered an Order finding that Plaintiff had proven damages of $373,320 for Loss of Social Security Benefits, $94,840 for Loss of Pension Plan, and $28,791.04 for Hospital/Funeral Expenses. (Appx. Vol. I, pp. 1-2.) These amounts are in excess of the total amounts claimed by Plaintiff during trial and are also in excess of the amount of Hospital and Funeral Expenses stipulated to by the parties. During trial, Plaintiff introduced evidence that her losses were $312,413 for Social Security Benefits and $65,427 for Pension Plan benefits. (Appx. Vol. II, pp. 173-74.) The parties stipulated that the Hospital/Funeral Expenses were $14,395.52. (Appx. Vol. II, pp. 129-30, 232-33.)

After the Verdict was returned, the Circuit Court, in accordance with W. Va. Code § 55-7-13c(c), should have reduced the damages listed in the Verdict based upon Plaintiff's Decedent's 50% comparative fault to arrive at the amount of the judgment, which should have been $124,237.76 in favor of Plaintiff. The Circuit Court erred when it doubled the jury's Verdict to $496,951.04, which it then reduced by 50% based upon the comparative fault of the Plaintiff's Decedent, to arrive at a judgment in favor of the Plaintiff in the amount of $248,475.52. (Appx. Vol. I, pp. 1-2.) In essence, the Circuit Court erred by rejecting the jury's Verdict as rendered.

The doubling of the jury's Verdict by the Circuit Court is essentially an impermissible additur which deprived the Defendants of their right to a jury trial under Article III, Section 13 of the West Virginia Constitution. It is well-established in this State that a judgment rendered without complying with Section 13 of Article III is void and cannot stand.

Finally, it is axiomatic that a Verdict which is in excess of the losses claimed by a plaintiff is excessive and must be set aside. All told, the Circuit Court determined that Plaintiff's damages for Loss of Social Security Benefits, Loss of Pension Plan, and Hospital/Funeral Expenses were $104,715.52 beyond Plaintiff's claimed losses for these categories. (Appx. Vol. I, pp. 1-2; Appx. Vol. II, pp. 129-30, 173-74, 232-33.) Under West Virginia law, a verdict which is in excess of the amount which the evidence shows a plaintiff is entitled to recover should be set aside. This Court, therefore, should reverse the judgment and remand this case to the Circuit Court to enter a new judgment in accordance with the jury's findings as set forth in their Verdict.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners represent that oral argument is necessary in accordance with the criteria set forth in Appellate Rule 18(a). Petitioners submit that this appeal should be set for argument under Appellate Rule 19(a) for the following reasons.

It is well established in this State that a jury's verdict as to damages should be reduced by the percentage of fault attributed to a plaintiff. In the present case, the jury assessed the Plaintiff's Decedent with 50% negligence. The Circuit Court's doubling of the jury's Verdict completely eviscerated the proper application of W. Va. Code § 55-7-13c(c), which mandates that "the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault."

During trial, Plaintiff introduced evidence that her losses were $312,413 for Social Security Benefits and $65,427 for Pension Plan benefits. (Appx. Vol. II, pp. 173-75.) The parties stipulated

that the Hospital/Funeral Expenses were $14,395.52. (Appx. Vol. II, pp. 129-30, 232-33.) The jury in its Verdict determined that Plaintiff's damages totaled $248,475.52, itemized as follows: Loss of Social Security Benefits: $186,660; Loss of Pension Plan: $47,420; and Hospital and Funeral Expenses: $14,395.52. (Appx. Vol. I, p. 28, Verdict, p. 3, Appx. Vol. II, pp. 361-62.)

The Circuit Court, in its August 21, 2020, Order, arbitrarily doubled the Verdict to $496,951.04 before it applied the provisions of W. Va. Code § 55-7-13c(c). (Appx. Vol. I, pp. 1-5.) The Circuit Court, in "accepting" the jury's Verdict, found that Plaintiff had proven damages of $373,320 for Loss of Social Security Benefits, $94,840 for Loss of Pension Plan, and $28,791.04 for Hospital/Funeral Expenses. (Appx. Vol. I, pp. 2-3.) These amounts are $104,715.52 in excess of the amounts claimed by the Plaintiff during trial. Thus, the judgment in favor of Plaintiff for $248,475.52 is against the weight of the evidence and is excessive as a matter of law.

This case is not appropriate for a memorandum decision as the Petitioners are seeking reversal of a clearly erroneous judgment. West Virginia Rule of Appellate Procedure 21 provides that a, "memorandum decision reversing the decision of a circuit court should be issued in limited circumstances." *Id.*

STANDARD OF REVIEW

This Court reviews an order denying a Rule 59(a) motion under the following standard of review: "The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syllabus Point 2, *Estep v. Mike Ferrell Ford Lincoln–Mercury, Inc.*, 223 W .Va. 209, 672 S.E.2d 345 (2008). In other words, "[a]lthough an appellate court accords great respect to the ruling of a trial court in granting or denying a motion for a new trial, it will reverse the trial court when it is

clear that the trial court has acted under some legal misapprehension." Syllabus Pt. 2, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 629–30, 225 S.E.2d 218, 223 (1976). This Court has elaborated on its review standards involving a lower court's ruling on a motion for a new trial, stating:

> 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 a *de novo* review.

Tennant v. Marion Health Care Found., Inc., 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995).

"The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R.Civ.P.59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus Point 1, *Wickland v. American Travellers Life Insurance Co.,* 204 W. Va. 430, 431513 S.E.2d 657, 658 (1998). In considering whether a Rule 59(e) motion should have been granted following a jury verdict, this Court explained its standard of review as follows:

> 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 a de novo review.
>
> Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640, 641, 535 S.E.2d 484, 485 (2000). "Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Mey v. Pep Boys–Manny, Moe & Jack*, 228 W. Va. 48, 57, 717 S.E.2d 235, 244 (2011).

Black Bear, LLP v. Halsey, No. 16-0232, 2016 WL 7210151, at *5 (W. Va. Dec. 12, 2016) (Memorandum Decision).

Finally, this Court reviews a trial court's decision not to grant a Rule 60(b) motion under an abuse of discretion standard. *Davey v. Estate of Haggerty*, 219 W. Va. 453, 455–56, 637 S.E.2d 350, 352-53 (2006). This Court has observed:

> "[a] motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." ... "A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W. Va. R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits."

Davey, 219 W. Va. at 456, 637 S.E.2d at 353, *citing Delapp v. Delapp,* 213 W. Va. 757, 584 S.E.2d 899 (2003).

ARGUMENT

I. The Circuit Court erred by *sua sponte* invading the province of the jury and doubling the amount of the jury's Verdict because the judgment as entered is not supported by the jury's Verdict.

This Court has held that, "[t]he judge cannot substitute his opinion for that of the jury merely because he disagrees." *Toler v. Hager*, 205 W. Va. 468, 475, 519 S.E.2d 166, 173 (1999). In rendering the Verdict, the jury determined that Plaintiff's Decedent was 50% at fault and the Defendants were 50% at fault for the motor vehicle accident at issue. (Appx. Vol. II, p. 361.) The jury also determined Plaintiff's damages to be as follows: Loss of Social Security Benefits: $186,660; Loss of Pension Plan: $47,420; and Hospital and Funeral Expenses: $14,395.52. (Appx. Vol. II, pp. 361-62.) These damages total $248,475.52.

After the jury returned its Verdict, the Circuit Court *sua sponte* raised questions about the manner in which the jury had reached its Verdict and whether the jury had reduced its determination as to damages by the percentage of fault attributed to Plaintiff's Decedent. (Appx. Vol. II, pp. 363-64.) There is no indication in the record that the jury failed to set forth on the

Verdict Form the full amount of damages for each item of loss that they found Plaintiff had proven. Nevertheless, the Circuit Court, in purportedly "accepting" the jury's Verdict, found that Plaintiff had proven damages of $373,320 for Loss of Social Security Benefits, $94,840 for Loss of Pension Plan, and $28,791.04 for Hospital/Funeral Expenses. (Appx. Vol. I, pp. 1-2.) These amounts are in excess of the total amounts claimed by the Plaintiff and are also in excess of the amount of Hospital/Funeral Expenses stipulated to by the parties. All told, the Court inexplicably determined that Plaintiff suffered damages in an amount $104,715.52 beyond Plaintiff's claimed losses. (Appx. Vol. I, pp. 1-2; Appx. Vol. II, pp. 129-30, 173-74, 232-33.) Thus, the judgment is excessive as a matter of law and should be reversed. *See* Syllabus, *Rodgers v. Bailey*, 68 W. Va. 186, 69 S.E. 698, 698 (1910) ("A verdict in excess of damages proved should be set aside ....").

It is the function of the jury to decide issues of liability and damages, which the jury did in this case. *See Wilburn v. McCoy*, No. 14-0054, 2014 WL 5712761, at *4 (W. Va. Nov. 3, 2014) (Memorandum Decision) (holding "that the function of the jury is to weigh the evidence with which it is presented and to arrive at a conclusion regarding damages and liability"). The mere fact that the Circuit Court may have disagreed with the Verdict or felt that the jury's award was inadequate does not justify the Court's doubling of the Verdict. *See Toler*, 205 W. Va. at 476, 519 S.E.2d at 174 ("In an appeal from an allegedly inadequate damage award, the evidence concerning damages is to be viewed most strongly in favor of the defendant."). The Circuit Court, therefore, erred as a matter of law when it invaded the province of the jury and inquired into the jury's deliberative process. *McDaniel v. McDaniel*, 198 W. Va. 282, 480 S.E.2d 170 (1996).

The Defendants objected to the Court's questioning of the jury after the Verdict was returned. (Appx. Vol. II, p. 377). It is well established in this State that, "[w]hen the verdict of a jury is in proper form, is duly signed by its foreman, and represents the final agreement of the jury,

it should be received and entered by the trial court." *Toler*, 205 W. Va. at 476, 519 S.E.2d at 174. Accordingly, the Defendants filed a timely Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va. R.C.P. 59(a) on the basis that the Circuit Court erred in invading the province of the jury and erred when it failed to receive the Verdict as rendered by the jury. (Appx. Vol. I, pp. 31-33.)

The Verdict, as modified by the Circuit Court before entry of the Judgment, is excessive. "In a civil action to recover damages for personal injuries, the amount which the plaintiff is entitled to recover being indeterminate in character, the verdict of the jury may not be set aside by the trial court or by this Court on the ground that the amount of the verdict is excessive, unless the verdict in that respect is not supported by the evidence or is such that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case." *Jordan v. Bero*, 158 W. Va. 28, 59, 210 S.E.2d 618, 638 (1974), *citing* Syllabus, *Sargent v. Malcomb*, 150 W. Va. 393, 146 S.E.2d 561 (1966). Generally, "[i]n determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." *Faris v. Harry Green Chevrolet, Inc.*, 212 W. Va. 386, 388, 572 S.E.2d 909, 911 (2002). In the present case, the ***modified*** Verdict is not supported by the evidence.

In *McDaniel, supra*, the plaintiff brought a negligence action against the defendant seeking to recover for personal injuries sustained in an automobile accident. *Id.*, 198 W. Va. at 284, 480 S.E.2d at 172. At the conclusion of a two-day jury trial, the jury found total damages in the amount of $154,283.42. *Id.* The jury also concluded that the plaintiff "was contributorily negligent,

apportioning his percentage of fault as forty percent and [the defendant's] fault as sixty percent. *Id.* After reducing the jury award by 40%, the trial court entered judgment in the amount of $92,893.80 plus prejudgment interest. *Id.*

The plaintiff in *McDaniel* thereafter filed a motion seeking to alter or amend the judgment on the grounds that the jury made a mistake by deducting the 40% liability that it apportioned to him from the award of damages. *Id.* As grounds for this motion, the plaintiff "relied on his discovery that the jury had already deducted the forty percent liability apportioned to [him] in making its award of damages." *Id.* Apparently, "[t]his information was discovered when the jury foreperson ... inquired of the bailiff at the conclusion of the trial regarding whether [the plaintiff] would receive the full amount of the damages that they had awarded," and the bailiff reported this inquiry to the trial court. *Id.*, n.3. The plaintiff contended that the trial court's reduction of the jury award by 40% reduced his damages improperly by assessing his percentage of fault against him a second time. *Id.*, 198 W. Va. at 285, 480 S.E.2d at 173.

The Circuit Court believed it was apparent from the face of the verdict that the jury had intended to award the plaintiff damages in the sum of $258,039.04 but that the jury made a technical and computational error by making a *sua sponte* deduction based upon the finding of 40% negligence. *Id.* In granting the plaintiff's motion, the Circuit Court stated:

> the difference between the total damages demanded by the Plaintiff, Jeffrey Lynn McDaniel[,] at the trial ($258,039.04) and the total damages awarded by the Jury ($154,823.42) is $103,215.62. The Court takes judicial notice that the sum of $154,823.42 is precisely 60% of the damages proven by the Plaintiff. The Court ... takes judicial notice thereof, that the difference between the $258,039.04 and $154,823.42, the sum of $103,215.62 is precisely 40% of the total damages.

Id. The Circuit Court, therefore, awarded the plaintiff the *net* sum of $154,823.42 after reducing the sum of $258,039.04 by 40%. *Id.*

On appeal, this Court held that the verdict should not have been disturbed, observing that a "clerical error [was] simply not apparent from the face of the jury verdict form." *Id.*, 480 S.E.2d at 175. This Court stated:

> [The defendant] argues, and we agree, that the jury verdict form undisputably is stated in terms of *total* damages. Nowhere on the verdict form is there any suggestion that the jurors were to adjust their determination of damages for that portion of fault attributable to [the plaintiff]. Furthermore, the jurors were instructed by the circuit court to:
>
> > First, determine the total damages without reducing the amount for any fault of the plaintiff. The Court will do that later. Then, determine the plaintiff's percentage of fault. Then, determine the percentage of fault for the defendant and remember, the total of fault cannot exceed 100 percent.
>
> Not only is this a correct statement of the law of comparative negligence, it is clearly and simply stated in a way that a jury could understand the instruction. Furthermore, lawyers have an opportunity during closing arguments to explain the concept in terms that might better assist a jury in its comprehension of the law.

Id., 198 W. Va. at 298, 480 S.E.2d at 175.

On appeal, this Court reversed the trial court because it had improperly impeached the jury's verdict, explaining it decision as follows:

> Our examination of whether the trial court abused its discretion in modifying the judgment under Rule 60(b) requires a review of our holding in syllabus point one of *State v. Scotchel*, 168 W. Va. 545, 285 S.E.2d 384 (1981), that "[a] jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." In *Scotchel*, we discussed the historical rationale for not allowing jury verdicts to be impeached by matters intrinsic to the deliberative process:
>
> > The reason traditionally advanced to preclude impeachment of the jury verdict based on what occurred during the jury's deliberations is primarily grounded on public policy protecting the privacy of the jurors. This policy prevents both litigants and the public from being able to gain access to the jury's deliberative process. Inherent in this proposition is the recognition that ensuring the privacy of the jury's deliberations will promote a full, frank and free discussion of all the issues submitted to the jury. It is also recognized that the very nature

> of the deliberative process, which requires the jurors to arrive at a unanimous verdict, must of necessity require accommodation of individual views. This process of accommodation should not be utilized as a means to attack the general verdict. The rule against impeachment of the verdict also serves to prevent litigants from attempting to influence or tamper with individual jurors after the verdict has been rendered. There is also recognition that limiting impeachment promotes finality of jury verdicts.
>
> 168 W. Va. at 548, 285 S.E.2d *at* 387.

McDaniel, 198 W. Va. at 286, 480 S.E.2d at 174.

This Court correctly observed that, "[t]he grounds upon which Mr. McDaniel relied to impeach the jury award involve the deliberative process itself." *Id.*, 198 W. Va. at 287, 480 S.E.2d at 175. This Court held that a circuit court cannot impeach a jury's verdict in a manner that involves the jury's deliberative process:

> For the reasons expressed in *Plummer* [*v. Springfield Terminal Railway Co.*, 5 F.3d 1 (1st Cir. 1993), *cert. denied*, 510 U.S. 1112, 114 S. Ct. 1057, 127 L.Ed.2d 377 (1994),] we conclude that when a trial court modifies a judgment entered pursuant to a jury verdict in a comparative negligence case based on juror testimony or a proffer of evidence that the jury wrongly deducted the plaintiff's apportionment of fault in arriving at its damage award, the court wrongly invades the jury's deliberative process in violation of Rule 606(b) of the West Virginia Rules of Evidence. *See* 5 F.3d *at* 4. Were we to hold otherwise, this Court would be inviting reexamination of every jury verdict that is reached through the jury's misapplication of legal principles. **We decline to set the stage for such a dangerous precedent that would undermine the historically valid basis for avoiding impeachment of jury verdicts on grounds intrinsic to the deliberative process itself**. *See Scotchel*, 168 W. Va. at 548, 285 S.E.2d at 387. Accordingly, we conclude that the circuit court abused its discretion in modifying the original judgment pursuant to Rule 60(b).

McDaniel, 198 W. Va. at 289-90, 480 S.E.2d at 177-78. (Emphasis added.)[3]

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[3] West Virginia Rule of Evidence 606(b) states:

> *Inquiry into validity of verdict or indictment.*—Upon an inquiry into the validity of a verdict or indictment, **a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations** or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's

A year later, this Court again rejected an intrusion into a jury verdict where the trial court determined that a new trial would be granted because of notes found in the jury room following the verdict which indicated that the jury had already reduced the verdict by the percentage of fault it attributed to that plaintiff. *Brooks v. Harris*, 201 W. Va. 184, 190, 495 S.E.2d 555 (1997). The plaintiff argued that the trial court's later application of a reduction for his fault constituted a second reduction. On appeal, this Court vacated the trial court's determination and reinstated the jury verdict as rendered:

> Consequently, under the principles of *Scotchel* and *McDaniel, supra,* the circumstances herein, *a fortiori,* warrant the conclusion that the circuit court abused its discretion in granting the appellee's motion for a new trial based upon the notes found in the jury room. The notes were never authenticated or explained, and the circuit court's determination that a new trial should be granted, because of the notes, resulted, in this action, in an improper inquiry into the jury's deliberative process.

Brooks, 201 W. Va. at 189, 495 S.E.2d at 560. (Footnote omitted.)

Turning to the present case, the jury decided Plaintiff's damages and properly recorded the amounts on the Verdict Form. In accordance with W. Va. Code § 55-7-13c(c), the Circuit Court should have then reduced the Verdict based upon the Plaintiff's Decedent's 50% comparative fault to arrive at the amount of the judgment, which should have been $124,237.76 in favor of Plaintiff. This is the only amount that the Plaintiff is entitled to recover. The Circuit Court, therefore, erred when it doubled the Verdict and entered judgment in favor of the Plaintiff in the amount of $248,475.52. Accordingly, this Court should vacate the judgment, and remand this case to the Circuit Court with directions to enter judgment in Plaintiff's favor in the amount of $124,237.76.

> affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. (Emphasis added).

II. The Circuit Court erred when it entered judgment because it failed to reduce the jury's Verdict on damages, which totaled $248,475.52, by the Plaintiff's Decedent's 50% comparative fault.

The Circuit Court erred when it entered judgment in favor of Plaintiff for $248,475.52 because it failed to mold the Verdict in accordance with the jury's determinations as to damages and comparative negligence as set forth on the Verdict Form. At the conclusion of the trial, the jury rendered its Verdict and determined that Plaintiff's Decedent was 50% at fault and the Defendants were 50% at fault for the motor vehicle accident. (Appx. Vol. I, p. 27; Appx Vol. II, pp. 361-62, Verdict, p. 2.) In its Verdict, the jury determined that Plaintiff's total damages were $248,475.52. (Appx. Vol. I, p. 28, Appx Vol. II, pp. 361-62.)

The Circuit Court, in accordance with W. Va. Code § 55-7-13c(c), should have reduced the Verdict based upon the Plaintiff's Decedent's comparative fault to arrive at the amount of the judgment, which should have been $124,237.76 in favor of Plaintiff. *See Clark v. Kawasaki Motors Corp., U.S.A.*, 200 W. Va. 763, 764, 490 S.E.2d 852, 857 (1997). However, over the Defendants' objection, the Court proceeded to query the jury about the Verdict and whether they wanted it to be reduced by the percentage of the Decedent's fault. (Appx. Vol. II, pp. 377, 379-80; 386-87.) This led the Court, in its August 21, 2020, Order, to arbitrarily double the Verdict to $496,951.04 before it applied the provisions of W. Va. Code § 55-7-13c(c).

The Circuit Court erred as a matter of law when it failed to reduce the jury's determination of damages by the 50%. Defendants timely raised this issue in their Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va. R.C.P. 59(a). (Appx. Vol. I, pp. 31-33.) This issue presents a question of law which is subject to a de novo review. *Koerner v. W. Virginia Department of Military Affairs Public Safety*, 217 W. Va. 231, 235, 617 S.E.2d 778, 782 (2005)

(recognizing that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute [or regulation], we apply a *de novo* standard of review"); *Tennant*, 194 W. Va. at 104, 459 S.E.2d at 381.

This Court has recognized that courts "have an obligation to apply the law as the West Virginia Legislature has written it." *State of West Virginia v. Forty-Three Thousand Dollars and No Cents ($43,000.00) In Cashier's Checks*, 214 W. Va. 650, 654, 591 S.E.2d 208, 212 (2003). Section 55-7-13c(c) plainly provides:

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

W. Va. Code Ann. § 55-7-13c. (Emphasis added.)[4] The Circuit Court erred as a matter of law when it failed to apply this clear and unambiguous statutory mandate to the jury's Verdict.

The Circuit Court's doubling of the Verdict completely eviscerated the application of W. Va. Code § 55-7-13c(c), which mandates that "the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault." *Id.* The jury found that Plaintiff's damages totaled $248,475.52, and apportioned 50% fault to the Plaintiff's Decedent. (Appx. Vol. I, p. 28; Appx Vol. II, pp. 361-62.) Pursuant to W. Va. Code § 55-7-13c(c), the Circuit Court was required to reduce the Verdict of $248,475.52 by 50% prior to entering judgment in favor of Plaintiff. The failure of the Circuit Court to reduce the actual Verdict by 50% is reversible error. This Court, therefore, should vacate the judgment, and remand this case to the Circuit Court with directions to enter judgment in favor of Plaintiff in the amount of $124,237.76.

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[4] This Court has observed that, "W. Va. Code §§ 55–7–13a through -13d [2015] modified West Virginia's comparative fault law to bar recovery only where the plaintiff's fault is greater than the combined fault of all other persons responsible for the damages." *Jackson v. Brown*, 239 W. Va. 316, 321, 801 S.E.2d 194, 199, n. 6 (2017).

III. The Circuit Court erred in doubling the jury's Verdict because it deprived the Defendants of their rights under Article III, Section 13 of the West Virginia Constitution.

It is the function of the jury, not the trial court, to decide issues of liability and damages. *See Wilburn*, 2014 WL 5712761, at *4. The Circuit Court usurped the jury's function in this case simply because it disagreed with the jury's determinations of liability and damages, which led the Circuit Court to double the jury's Verdict. The Circuit Court's doubling of the jury's Verdict is in essence an impermissible additur which deprived the Defendants of their right to a jury trial under Article III, Section 13 of the West Virginia Constitution.

The Defendants filed a timely Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va. R.C.P. 59(a) asserting that the Circuit Court deprived the Defendants of their rights under Article III, Section 13 of the West Virginia Constitution. (Appx. Vol. I, pp. 32-33.) A circuit court's "factual findings relevant to a constitutional claim are reviewed under a clearly erroneous standard, and questions of law are subject to a de novo review." *Hudson v. Bowling*, 232 W. Va. 282, 290, 752 S.E.2d 313, 321 (2013). The present appeal involves a legal issue, and this Court's "standard of review for a constitutional challenge is, for legal issues, *de novo.*" *State v. Robert McL.*, 201 W. Va. 317, 319, 496 S.E.2d 887, 889, n. 3 (1997).

It is well-established in this State, "that art. III, § 13 of the West Virginia Constitution gives an absolute right to a jury trial in actions at law when the matter in controversy exceeds twenty dollars." *Mann v. Golub*, 182 W. Va. 523, 526, 389 S.E.2d 734, 737 (1989). Moreover, "a judgment rendered without complying with it [Article III, Section 13] is void." *Id.*, 182 W. Va. At 525, 389 S.E.2d at 735. The Circuit Court's *sua sponte* doubling of the jury's Verdict deprived

the Defendants of their Constitutional right to have damages decided by a jury, and, as a result, the judgment entered by the Circuit Court is void.

As noted above, the Circuit Court's doubling of the Verdict is essentially an additur. This Court has held that an additur is appropriate only in certain limited circumstances, none of which are present here. Syllabus Point 2, *Bressler v. Mull's Grocery Mart*, 194 W. Va. 618, 619, 461 S.E.2d 124, 125 (1995) (holding that the plaintiff was not entitled to an additur in a negligence action even for amounts which were uncontroverted at trial). The Circuit Court erred when it doubled the damages as set forth in the Verdict that was rendered by the jury and signed by the foreperson because the Circuit Court violated the Defendants' rights under Section 13 of Article III of the West Virginia Constitution.

Article III, § 13 of the West Virginia Constitution plainly provides:

> In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case other than according to rule of court or law.

W. Va. Const., Art. III, § 13. Under this Section, the Defendants have a Constitutional right to have the issues of liability and damages decided by a jury. *See Bostic v. Mallard Coach Co.*, 185 W. Va. 294, 295, 406 S.E.2d 725 (1991) (recognizing that "both parties remain[ed] entitled ... to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages").

This Court has reversed a Circuit Court's Order awarding a plaintiff damages in excess of the jury's verdict because of the "lack[] of any evidence to suggest that the jury intended to award [plaintiff] an amount other than the sum reflected by its verdict." *Bressler,* 194 W. Va. at 621, 461 S.E.2d at 127. In *Bressler,* this Court reversed the Circuit Court's order granting the plaintiff's

motion for an additur. In that case, the jury awarded a verdict for the plaintiff in a negligence action arising from a slip and fall accident. *Id.*, 194 W. Va. at 619, 461 S.E.2d at 125. The jury awarded damages in the amount of $53,500, which included an award of $20,000 for future medical expenses, and determined that the plaintiff's comparative negligence was 25%. *Id.* The Circuit Court then entered judgment in the amount of $40,125 based upon a reduction for the plaintiff's 25% comparative negligence. *Id.*

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

> [T]he instant case is completely lacking of any evidence to suggest that the jury intended to award Appellee an amount other than the sum reflected by its verdict. An award of additur is appropriate under West Virginia law only where the facts of the case demonstrate that the jury has made an error in its award of damages and the failure to correct the amount awarded would result in a reduction of the jury's intended award. This case simply does not fall within the parameters of the limited scenario in which this Court has approved the use of additur.

Bressler, 194 W. Va. at 621, 461 S.E.2d at 127.

This Court also agreed with the defendant's argument, "that the circuit court's award of additur invaded the jury's province by second-guessing the jury's intended award of future medical expenses." *Id.* This Court declared that, "[o]ur legal system expressly reserves for the jury "the

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

Turning to the present case, the Circuit Court's doubling of the jury's Verdict is neither warranted nor permitted under the West Virginia Constitution and existing law. As the *Bressler* decision makes clear, the Circuit Court was simply not permitted to substitute its own judgment for the judgment of the jury with respect to the determination of unliquidated tort damages because doing so invaded the province of the jury and denied the Petitioners their Constitutional right to have these issues decided by the jury.

The Circuit Court's approach in resolving the problems that it perceived with the Verdict deprived the Defendants of their Constitutional right to a trial by jury under Article III, § 13 of the West Virginia Constitution and circumvented the proper application of W. Va. Code § 55-7-13c.

Accordingly, this Court should reverse the judgment and remand this case to the Circuit Court to enter a new judgment in accordance with the jury's findings as set forth in the jury's actual Verdict.

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

It is well-established that a verdict in excess of the amount of damages proven at trial cannot stand. *See* Syllabus, *Rodgers v. Bailey*, 68 W. Va. 186, 69 S.E. 698, 698 (1910). Accordingly, a verdict may be set aside as excessive where it is not supported by the evidence. *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 494, 345 S.E.2d 791, 793 (1986) ("Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption."). Here, the Verdict as doubled by the Circuit Court resulted in a determination that Plaintiff somehow sustained damages $104,715.52 above Plaintiff's claimed damages for loss of Social Security Benefits, loss of Pension Plan benefits, and Hospital and Funeral Expenses. (Appx. Vol. I, pp. 1-2; Appx. Vol. II, pp. 129-30, 173-74, 232-33.)

It is axiomatic that a verdict in excess of a plaintiff's claimed losses is excessive and must be set aside. Accordingly, the Defendants filed a timely Motion for Relief from Judgment or Order pursuant to W. Va. R.C.P. 59 and W. Va. R.C.P. 60(b)(6), or, in the Alternative, Motion for a New Trial pursuant to W. Va. R.C.P. 59(a) on the basis that the Verdict, as doubled by the Circuit Court, is excessive. (Appx. Vol. I., p. 32.)

This Court's "review of a purportedly excessive jury verdict commands a deferential standard of appellate review." *Kessel v. Leavitt*, 204 W. Va. 95, 187, 511 S.E.2d 720, 812 (1998). In a civil action, "the verdict of the jury may not be set aside ... by this Court on the ground that

the amount of the verdict is excessive, unless the verdict in that respect is not supported by the evidence ...." Syllabus Point 18, *Jordan*, 158 W. Va. at 31, 210 S.E.2d at 623-24.

During trial, Plaintiff introduced evidence that her losses were $312,413 for Social Security Benefits and $65,427 for Pension Plan benefits, and the parties stipulated that the Hospital/Funeral Expenses were $14,395.52. (Appx. Vol. II, pp. 129-30, 173-75.) The jury in its Verdict determined the damages for these claimed losses to be as follows: Loss of Social Security Benefits: $186,660; Loss of Pension Plan: $47,420; and Hospital and Funeral Expenses: $14,395.52. (Appx. Vol. I, p. 28; Appx. Vol. II, pp. 361-62.)

Despite the fact that the damages determined by the jury total $248,475.52, the Circuit Court arbitrarily doubled the Verdict to $496,951.04, before reducing the Verdict by 50% based upon the Decedent's comparative fault. (Appx. Vol. I, pp. 1-2.) This occurred after the Defendants objected to the Circuit Court querying the jury and the Court's questioning of the jurors regarding whether they wanted the Verdict reduced by the percentage of the Decedent's fault. (Appx. Vol. II, pp. 377, 379-80; 386-87.) The doubling of the Verdict and the final judgment entered by the Circuit Court effectively negated the application of W. Va. Code § 55-7-13c(c), which mandates that "the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault." *Id.*

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

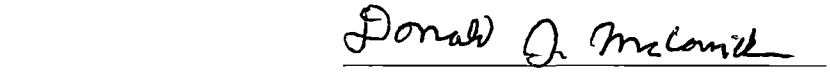
stipulated by the parties. (Appx. Vol. I, pp. 1-2; Appx. Vol. II, pp. 129-30, 232-33.) All told, the Circuit Court determined that Plaintiff's damages for the above losses were $104,715.52 beyond Plaintiff's claimed losses. (Appx. Vol. I, pp. 1-2; Appx. Vol. II, pp. 129-30, 173-74, 232-33.)

Under West Virginia law, "[a] Verdict which is clearly in excess of the amount which the evidence shows the plaintiff is justly entitled to recover should be set aside by the trial court." *Winters v. Campbell*, 148 W. Va. 710, 727, 137 S.E.2d 188, 199 (1964); *see also McCabe v. City of Parkersburg*, 138 W. Va. 830, 841, 79 S.E.2d 87, 94 (1953). Here, both the Verdict, as increased by the Circuit Court, and the judgment are excessive as a matter of law and should be set aside. This Court, therefore, should reverse the judgment and remand this case to the Circuit Court to enter a new judgment in accordance with the jury's findings as set forth on the jury's Verdict Form.

CONCLUSION

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

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief for Petitioners** has been served upon the following counsel of record by first class U.S. Mail, postage prepaid this 18th day of January, 2021.

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