IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23–ICA–148

West Virginia Division of Corrections
and Rehabilitation, Defendant below,

Petitioner,

v.

Francis Iacovone, individually and
as Administrator of the Estate of
Rocco Iacovone, Plaintiff Below,

Respondent.

Appeal from a trial in Circuit
Court of Kanawha County
(Case No. 20–C–602)

PETITIONER WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION'S BRIEF

William E. Murray
W. Va. State Bar I.D. 2693
Jaden P. Rhea
W. Va. State Bar I.D. 13454

Anspach Meeks Ellenberger LLP
500 Virginia Street, East, Suite 525
Charleston, West Virginia 25301
304–205–8063 – telephone
340–205–8062 – facsimile
wmurray@anspachlaw.com
jrhea@anspachlaw.com
Counsel for Petitioner West Virginia Division of Corrections and Rehabilitation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Secondary Sources

ASSIGNMENTS OF ERROR

The circuit court erred during the trial of this case; erred in denying Petitioner's Rule 59 Motion; and erred in entering the Judgment Order entered on December 16, 2022, and the Amended Judgment Order entered on March 10, 2023. Petitioner asserts the following assignments of error:

I. Petitioner should have been permitted to examine and/or impeach Respondent's expert Dr. Charash regarding his prior allegations that Wexford was at fault;

II. Petitioner should have been permitted to examine Respondent Francis Iacovone regarding prior allegations that Wexford was at fault;

III. Respondent never disclosed Michael Hoosier and/or William Hardman as witnesses until two weeks before trial which was trial by ambush;

IV. Petitioner's instruction regarding mitigation of damages should have been given to the jury;

V. The jury was not instructed that they needed to determine that Mr. Iacovone suffered a "serious medical need" which is part of the deliberate indifference standard;

VI. The Judgment Order entered on December 16, 2022, must be amended and altered because it is contrary to established law in the State of West Virginia; and

VII. The Amended Judgment Order entered on March 10, 2023, was entered in error and is also contrary to established law in the State of West Virginia.

Petitioner respectfully moves this Court to reverse the circuit court's order denying Petitioner's Rule 59 Motion, vacate the Judgment Order entered on December 16, 2022 and the Amended Judgment Order entered on March 10, 2023, and remand for a new trial on these grounds.

STATEMENT OF THE CASE

I. Statement of Facts

Respondent Francis Iacovone ("Respondent"), acting as administrator of the estate of Rocco Iacovone, filed his Complaint against Petitioner West Virginia Division of Corrections and Rehabilitation ("Petitioner") alleging it is at fault for the death of Rocco Iacovone ("Mr. Iacovone"), an inmate previously incarcerated at the Huttonsville Correctional Center and Jail. (App. 7–20.) Specifically, Respondent alleged the Petitioner engaged in malicious conduct and violated the West Virginia Constitution. (App. 13–14.) Respondent also asserted claims against Petitioner for negligence in its hiring, retention, and supervision of employees and asserted other general negligence claims. (App. 15–19.)

Mr. Iacovone was diagnosed with a heart condition at birth and underwent multiple heart surgeries throughout his life. (App. 152–153.) However, Petitioner and its employees did not have access to Mr. Iacovone's medical records or have access to information about his chronic health condition because such sensitive patient health information is protected from being disclosed by HIPAA. (App. 159.) Mr. Iacovone died on August 28, 2018, while he was incarcerated Huttonsville Correctional Center and Jail due to what the medical examiner classified as acute bacterial endocarditis. (App. 1455.)

On Tuesday, August 28, 2018, Billy Green ("Mr. Green"), a correctional counselor at Huttonsville Correctional Center and Jail, was working in the control room of Mr. Iacovone's

dorm when Mr. Iacovone's cellmate came and told Mr. Green that Mr. Iacovone was not looking well. (App. 158–160.) Mr. Green then got a wheelchair from the control room, and Mr. Iacovone's cellmate helped Mr. Green get Mr. Iacovone into the wheelchair. (App 161.) Mr. Green observed that Mr. Iacovone was grey in color, and Mr. Green escorted Mr. Iacovone to medical by himself. (*Id.*) Mr. Green took Mr. Iacovone up to medical, pushed him into the observation room, and the officer assigned to medical and nurses came in. (App 162.) Mr. Green then returned to the control room in the pod. (App. 161.)

Earlier in the day, Mr. Green had seen Mr. Iacovone coming back from the shower and noted that Mr. Iacovone did not have his usual energy, but, again, Mr. Iacovone never alerted anyone to his illness himself or requested to go to medical. (*Id.*) At trial, Plaintiff was unable to present any evidence to show that Mr. Iacovone himself requested to go to medical. (App. 1013.) In fact, former inmate William Hardman ("Hardman") testified that Mr. Iacovone did not want to go to medical on Monday, August 27, which was one day before Mr. Iacovone's death. (App. 1021–1022.) There was also a dispute over whether Mr. Iacovone walked to the shower unassisted or whether Hardman asked C.O. Timothy Kittle to get medical assistance for Mr. Iacovone in the days prior to his death. (App. 997–1002.)

II. Procedural History

Prior to trial, Defendants Wexford Health Sources, Inc. ("Wexford") and David Allen Proctor, D.O. were dismissed as parties to this case. (App. 346–347, 375–376.) Wexford settled its claims with Respondent prior to trial, (App. 375–376), and Dr. Proctor was voluntarily dismissed, (App. 346–347). Next, a jury trial was held in this case beginning on November 14, 2022. At trial, Respondent agreed to the dismissal of the following counts: Count II claim for malicious conduct, Count III for violations of the West Virginia Constitution, Count VI for negligent hiring, retention, and supervision, and Count VII for violations of the Freedom of

information Act. (App. 1230–1233.) Only Count IV for negligence and Count V for vicarious lability were submitted to the jury. (App. 1233–1234.) In order to overcome Petitioner's qualified immunity, Respondent relied on the Eighth Amendment to the United States Constitution's prohibition on cruel and unusual punishment and submitted that question to the jury. (App. 1233–1234.)

On November 17, 2022, the jury returned a verdict for Respondent Francis Iacovone, acting as administrator of the estate of Rocco Iacovone, in the amount of $16,237.00 for funeral and burial expenses, $400,000.00 for lost earning capacity, $275,000.00 for lost household services, and $20,000.00 for Rocco Iacovone's pain and suffering totaling $711,237.00. (App. 1411–1412, 731–732.) The jury allocated no fault to Mr. Iacovone or Wexford and allocated 100% fault to Petitioner. (*Id.*) After the trial, both Respondent and Petitioner submitted separate proposed judgment orders and Petitioner filed an objection to Respondent's proposed order. (App. 455–484.) Further, the circuit court entered the Judgment On Jury Verdict order as submitted by Respondent on December 16, 2022. (App. 485.)

Next, on January 25, 2023, Petitioner filed its Rule 59 Motion asserting the same assignments of error raised here and moved for a new trial and to amend the Order entered on December 16, 2022, because it is contrary to established law. (App. 490–539.) Respondent filed a response to this Motion, (App. 541–582), and this motion was set for hearing on February 7, 2023, (App. 538). This Motion was denied, (App. 677–717), and the circuit court then entered an Amended Judgment Order on March 10, 2023. This appeal followed.

SUMMARY OF ARGUMENT

The circuit court erred during the trial of this case as well as in its entry of both the Judgment Order and the Amended Judgment Order. Due to the five assignments of error which

occurred at trial and the two assignments of error related to the entry of the judgment orders, Petitioner was substantially prejudiced at trial and is subject to judgment orders that which are in violation of established law in the State of West Virginia.

First, at trial, the circuit court improperly limited the scope of cross-examination of Respondent's medical expert and key witness Dr. Charash and prohibited Petitioner from examining and/or impeaching him regarding his prior opinions in which he placed the entirety of the fault for Mr. Iacovone's death on Wexford, another defendant in this case who settled prior to trial. The circuit court deprived Petitioner of a meaningful cross-examination of Dr. Charash because the wrong standard was applied to limit cross too strictly within the scope of the direct examination. The circuit court prohibited Petitioner from cross–examining Dr. Charash regarding both the fault of Wexford and his prior inconsistent statements that Wexford, not Petitioner, was at fault for Mr. Iacovone's death. The circuit court went even further and prohibited Petitioner from mentioning Wexford at all during its examination to even allow Dr. Charash the opportunity to explain why his opinion has changed. This was reversible error because Petitioner was substantially prejudiced.

Second, the circuit court prohibited Petitioner from mentioning that Wexford was a prior defendant in this action and from examining Plaintiff Francis Iacovone regarding any prior allegations or statements he made regarding the fault of Wexford. Petitioner was clear that it did not want to introduce evidence regarding any type of settlement Wexford made with Respondent. Instead, Petitioner sought to impeach Respondent to the extent he blamed Petitioner entirely for the death of Mr. Iacovone because Respondent and others made prior allegations and statements regarding the fault of Wexford. This blocked Petitioner's ability to present its defense and undoubtedly was reversible error.

Third, the circuit court allowed Respondent to conduct an evidentiary deposition of Michael Hoosier on November 10, 2022, and to call William Hardman as a witness in the trial of this matter despite the fact that Respondent chose to never disclose these individuals as witnesses in this case during the course of discovery. Petitioner was surprised and ambushed by these two witnesses and the admission of this evidence was prejudicial and reversible error.

Fourth, the Court should have given Petitioner's mitigation of damages jury instruction and the failure to give this instruction was reversible error. Based on this precedent, Petitioner's mitigation instruction was a correct statement of the law and the jury should have been given an instruction stating that Mr. Iacovone had a duty to himself ask for medical care and to seek help to treat his own illness. Further, the failure to give this instruction seriously impaired Petitioner's ability to assert its comparative negligence defense. The jury should have been instructed that Mr. Iacovone's decision not to seek medical care was a breach of his own duty. There was no guidance to the jury in the charge that Mr. Iacovone had any duty to himself or that he had a duty to seek medical care for himself. This instructional error is sufficient enough to warrant a reversal of the verdict and to grant a new trial.

Fifth, the circuit court rejected Petitioner's deliberate indifference jury instruction and used Respondent's instructions only. However, the Court failed to instruct the jury that they must find by a preponderance of the evidence that Mr. Iacovone needed medical care for a serious medical need in order to find that Petitioner was deliberately indifferent. This is a well-established part of the deliberate indifference standard and is reversible error.

Sixth, the Judgment Order entered on December 16, 2022, awarded Respondent prejudgment interest contrary to established law in the State of West Virginia, begins post-judgment interest from the date of the jury verdict which is contrary to the language of West

Virginia Code § 56–6–31, and awards varying interest rates on the prejudgment interest from 2018 to 2022 which is also contrary to West Virginia Code § 56–6–31. Finally, the Amended Judgment On Jury Verdict Order entered on March 10, 2023, seeks prejudgment interest contrary to established law in the State of West Virginia, seeks to begin post-judgment interest from the date of the Amended Judgment On Jury Verdict which is contrary to the language of West Virginia Code § 56–6–31, and improperly allows post-judgment interest on the award of prejudgment interest. For these reasons, Petitioner respectfully moves this Court to reverse the circuit court's order denying Petitioner's Rule 59 Motion, vacate the Judgment Order entered on December 16, 2022 and the Amended Judgment Order entered on March 10, 2023, and remand for a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that that oral argument is necessary and appropriate, pursuant to the criteria set forth in Rule 19 of the Rules of Appellate Procedure. Petitioner asserts that this matter may be appropriate for memorandum decision pursuant to Rule 21(d).

STANDARD OF REVIEW

"Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. Pt. 1, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000) (quoting Syl. Pt. 1, *Andrews v. Reynolds Mem'l Hosp*., *Inc.*, 201 W. Va. 624, 499 S.E.2d 846 (1997)). Further,

> [i]n reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Id. at Syl pt. 3.

ARGUMENT

I. ASSIGNMENT OF ERROR I: Petitioner should have been permitted to examine and/or impeach Respondent's expert Dr. Charash regarding his prior allegations that Wexford was at fault.

At trial, the circuit court improperly limited the scope of Petitioner's cross-examination of Respondent's medical expert and key witness Dr. Charash and prohibited Petitioner from examining him and/or impeaching him regarding his prior opinions in which he placed the entirety of the fault for Mr. Iacovone's death on Wexford. Respondent raised this assignment of error when it occurred at trial, (App. 1214–1225), and in its Rule 59 Motion, (App. 491).

In this case, Wexford settled with Respondent before trial, but Petitioner sought to allocate fault to Wexford pursuant to W. Va. Code § 55–7–13d(a)(2), which states that "[f]ault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty . . . ." Further, "[w]here a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather than by the amount of the nonparty's or party's settlement . . . ." W. Va. Code § 55–7–13d(a)(3). This was one of Petitioner's central theories and main defenses at trial, and Petitioner sought to cross–examine Dr. Charash regarding his prior statements that Wexford was at fault for the death of Mr. Iacovone, which was inconsistent and contrary to his testimony at trial.

The West Virginia Supreme Court has "recognized that as a general rule the scope of cross-examination is within the discretion of the trial court and usually limited to matters brought out on direct. However, a trial court may not control the scope of cross-examination so far as to

prejudice the defendant." *State v. Jenkins*, 176 W. Va. 652, 656, 346 S.E.2d 802, 807 (1986). In addition,

> Several basic rules exist as to cross examination of a witness. The first is that the scope of cross examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross examination.

Syl. Pt. 1, *State v. Barnett*, 226 W. Va. 422, 701 S.E.2d 460 (2010). Further, with regard to impeachment, the West Virginia Supreme Court has held that:

> Generally, after a proper foundation has been laid, a witness may be impeached by evidence of his declarations or statements which are either inconsistent or contradictory to his testimony at trial. The fact that he has stated the matters differently on a previous occasion tends to demonstrate either a failure of memory, or a lack of integrity, and in either event it weakens and impairs the value of his testimony.

State v. Spadafore, 159 W. Va. 236, 245, 220 S.E.2d 655, 661 (1975). Further, "prior statements made under oath in a judicial atmosphere either by deposition or at a prior trial and which have been subject to cross-examination by the defendant's counsel are admissible for the truth of the matter asserted . . . ." *Id.* at 664. Finally,

> [t]he prior statement, no matter the form, must be inconsistent with the witness's trial testimony. Direct inconsistency is not required. The test for any inconsistency is whether the prior statement or omission has a reasonable tendency to discredit the testimony of the witness. To fulfill the necessary requirement of inconsistency, the [***14] witness's statements need not be explicitly contradictory, e.g., "the light was red" versus "the light was green." On the other hand, the testifying witness may even be impeached with prior statements that are inconsistent with the "impression" the witness's testimony creates.

State v. Scarbro, 229 W. Va. 164, 169,727 S.E.2d 840, 845 (2012) (quoting Franklin D. Cleckley, *Handbook On Evidence For West Virginia Lawyers*, Vol. 1, § 6-9(B)(5), p. 6-179 (2000).)

Here, the circuit court both improperly limited the scope of cross-examination and also prohibited Petitioner from introducing the witness's prior inconsistent statement under Rule 613 of the West Virginia Rules of Evidence. (App. 1214–1225.) At trial, the circuit court never considered the law governing the admission of a witness's prior inconsistent statements. *See* Syl. Pt. 1, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996). The circuit court deprived Petitioner of a meaningful cross-examination of Dr. Charash because the wrong standard was applied to limit cross examination too strictly within the scope of the direct examination. The circuit court held that this line of questioning was not impeachment or within the scope of cross-examination. The circuit court held this was instead related to the standard of care provided by Wexford and not causation or liability, which Respondent stated was the purpose of this witness, and was outside the scope of the direct examination. (App. 1225.) The circuit court held that cross examination was limited to the "timeline of [Mr. Iacovone's] infection," and Petitioner was further prohibited from mentioning Wexford at all during Dr. Charash's cross-examination. (App. 1225). Petitioner was prohibited from mentioning Wexford by name at all and from questioning Dr. Charash regarding his prior testimony where he placed all the blame for Mr. Iacovone's death on Wexford alone. (App. 1225.) This was incredibly prejudicial.

Dr. Charash testified at trial that Petitioner was solely at fault for Mr. Iacovone's death, which is in direct contrast with his deposition testimony. In fact, Respondent's counsel classified the purpose of Dr. Charash's testimony during his direct examination and stated "you've been retained in this case to give an opinion on causation, whether or not the liability and the misconduct on the part of the Department of Corrections caused the death of Rocco Iacovone." (App. 1208.) Then, Dr. Charash testified at trial "with reasonable medical certainty" that Mr. Iacovone would have been alive today if Petitioner's staff would have taken him to medical at

10:30 a.m. on Monday the day before his death. (App. 1208–1209.) Dr. Charash further testified that Mr. Iacovone would have had a 90 to 95 percent chance of survival if he had received medical attention on the Sunday before he died. (App. 1212.) He further testified that Mr. Iacovone would have had a 50 to 55 percent chance of survival if he would have received medical attention at 7:00 a.m. on the day he died. (App. 1212–1213.) Dr. Charash never mentioned Wexford in his direct examination at trial and instead stated that Petitioner's failure to get Mr. Iacovone medical care wholly caused his death.

However, in his deposition, Dr. Charash never mentioned Petitioner and instead exclusively blamed Wexford. (*See generally* App. 1500–1508.) Specifically, Dr. Charash stated that it was actually Wexford and its employees who failed to timely recognize Mr. Iacovone's infection and that these failures led to his death. (App. 1504.) Dr. Charash then stated in his deposition that Wexford failed to advise Mr. Iacovone that he should not take Motrin, that Physician's Assistant Blake prescribed Mr. Iacovone an antibiotic which was stopped after two days, and that Wexford failed to monitor Mr. Iacovone and notice his deterioration. (App. 1504–1505.) This deposition testimony was exactly what Petitioner sought to cross–examine Dr. Charash about at trial because this clearly contradicts Dr. Charash's statements that Mr. Iacovone would be alive today if Petitioner's staff had taken him to medical. (App. 1208–1209.)

However, once Petitioner mentioned Wexford at trial, Respondent immediately objected. (App. 1215.) Petitioner's counsel argued that "I ought to be able to ask him about his prior opinions in this case and the fact that originally he came in here hired to assist Wexford, and now he's coming in here giving opinions that he didn't give back when he gave his deposition." (App. 1218.) Respondent's counsel argued that Dr. Charash was a causation expert and not a standard of care expert, but Petitioner clearly sought to cross–examine him regarding prior

statements that Wexford's actions were the cause of Mr. Iacovone's death, which was clearly within the scope of direct. (App. 1219.) Petitioner's counsel was clear that he intended examine and/or impeach Dr. Charash by asking

> him about his prior testimony in this case about Wexford and their failure to educate him, according to him, on the use of Motrin. He testified very specifically that Mr. Iacovone's use of Motrin was dangerous and was improper. And we know he did because -- we know he used Motrin because he told nurse Hollen when it came up which is in Exhibit 3 he said, I took Motrin 20 to 30 minutes ago. And this doctor testified that's a really bad thing and he should have been -- should have been cautioned by Wexford to never do that and that they didn't do it.

(App. 1224–1225.) This alleged improper use of Motrin clearly relates to the cause of Mr. Iacovone's death, the timeline of his infection and its progression, and Petitioner wanted to cross–examine Dr. Charash regarding these prior statements where he stated the use of Motrin contributed to his death. However, the Court then ordered as follows: "I think that I'm going to limit you. I'm going to limit it to his opinion with respect to causation. He's talked about the timeline of his infection. And I don't want you getting into what Wexford -- anything about Wexford." (App. 1225.)

The West Virginia Supreme Court is clear that a party may cross-examine a witness about matters affecting his credibility or matters within the scope of direct. However, the circuit court prohibited Petitioner from examining this witness at all regarding Wexford and also from attacking the credibility of Dr. Charash regarding his prior inconsistent statements that Wexford, not petitioner, was at fault for the death of Mr. Iacovone, which goes directly to causation and liability. That line of questioning was clearly "coextensive with, and limited by, the material evidence given on direct examination" because, as Respondent's counsel stated in their own words, Dr. Charash was a witness for causation and liability alone. Syl. Pt. 1, *Barnett*, 701 S.E.2d 460. Examining this witness regarding the extent Wexford contributed to Mr. Iacovone's

death was well within the scope of direct because the testimony Dr. Charash gave during trial clearly contradicted his deposition testimony. The circuit court never reviewed this deposition transcript before making this ruling and instead found that this line of questioning related to the standard of care, which is simply incorrect and a complete mischaracterization.

Petitioner sought to impeach this witness and introduce his prior deposition testimony because Petitioner argued that Wexford was at fault and/or contributed to fault under the theory of comparative negligence, a central theory to its case. This circuit court prohibited Petitioner from cross examining Dr. Charash regarding these prior statements, and Petitioner was prohibited from mentioning Wexford at all during its examination to even allow Dr. Charash the opportunity to explain why or if his opinion has changed.

The circuit court's ruling was obviously reversible error because Petitioner was substantially prejudiced. As the West Virginia Supreme Court has held, "[t]he extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in the case of manifest abuse or injustice." Syl pt. 1, *State v. Allman*, 182 W. Va. 656, 391 S.E.2d 103 (1990) (internal citations omitted). In this case, this ruling denied Petitioner a fair trial because it created injustice and was an abuse of the circuit court's discretion. The jury even returned a question asking for the transcript of Dr. Charash's testimony which shows how influential he was to the jury. (App. 1407.) This ruling could have changed the outcome at trial because Petitioner was wholly prohibited from mentioning and attributing fault to Wexford and was prohibited from attacking this witness's credibility at all. If this examination became an impeachment, it could have weakened Dr. Charash's influence and impaired his with the jury. In addition, Petitioner could have offered Dr. Charash's

deposition transcript for the truth of the matter asserted during this impeachment. *Spadafore*, 220 S.E.2d at 664. Allowing this evidence to be given to the jury could have also changed the outcome of the trial because the witness previously placed fault solely on Wexford, who was on the verdict form. As a result, Petitioner should be granted a new trial.

II. ASSIGNMENT OF ERROR II: Petitioner should have been permitted to examine Respondent Francis Iacovone regarding his prior allegations that Wexford was at fault.

Next, the circuit court again prohibited Petitioner from mentioning that Wexford was a prior defendant in this action and from examining Plaintiff Francis Iacovone regarding any prior allegations or statements he made regarding the fault of Wexford. Respondent raised this assignment of error when it occurred at trial, (App. 1231–1235), and in its Rule 59 Motion, (App. 494).

As stated at trial, Petitioner's sought to ask Francis Iacovone, the Respondent in this case, "about the fact that he originally brought suit against Wexford because he felt they were at fault, and that he and his lawyers hired people and all that because they were at fault and ask him if he still feels that Wexford was at fault in the death of his son." (App. 1231.) Petitioner raised this issue prior to calling Francis Iacovone as a witness due to the rulings related to Dr. Charash. Petitioner was clear that it did not want to introduce evidence regarding any type of settlement Wexford made with Plaintiff. (App. 1234.) Instead, Petitioner sought to question Francis Iacovone to the extent he blamed Petitioner entirely for the death of Mr. Iacovone because he and others made prior allegations and statements regarding the fault of Wexford. Further, Respondent had filed this case against Wexford as well.

However, the circuit court again barred Petitioner from engaging in this line of questioning and ruled as follows:

> The jury doesn't know what resolved is. Maybe they think there wasn't enough evidence in that case and it was thrown out for some reason. I mean, it's so prejudicial.
> …
>
> I think it's entirely improper, I agree with that for that to go in front of a jury that they were a defendant and that that matter has been resolved. I just -- I think that it could confuse the jury. I think it's improper, and I'm not going to allow you to question him about Wexford.

(App. 1232, 1235.) The circuit court completely mischaracterized Petitioner's statements and found that he sought to introduce evidence of a settlement, despite counsel's clear statements to the contrary. Petitioner's counsel clearly stated that "I'm not going to say there was a settlement. What I want to point out is originally they filed this suit and alleged fault against Wexford. They felt that Wexford was at fault, not just us." (App. 1234.) However, the circuit court found that this was actually prejudicial to Respondent and completely forbid Petitioner was questioning Francis Iacovone regarding his decision allege fault against Wexford and his prior statements that they were responsible for Mr. Iacovone's death. This was reversible error.

As discussed in Section (A)(i) above, Petitioner sought to allocate fault to Wexford pursuant to W. Va. Code § 55–7–13d(a)(2), which states that "[f]ault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty . . . ." Further, "[w]here a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather than by the amount of the nonparty's or party's settlement . . . ." W. Va. Code § 55–7–13d(a)(3). This was one of Petitioner's central theories and main defenses at trial. As a result, Petitioner should have been permitted to call Francis Iacovone as a witness and question him regarding his prior statements regarding Petitioner's fault, like it should have been allowed to do with Dr. Charash. Petitioner was not called as a witness at trial by Respondent and Petitioner

was prohibited from calling Francis Iacovone because it was barred from questioning this witness regarding Wexford, which was the entire reason it sought to call this witness.

Further, Petitioner asserted theories of comparative negligence against both Mr. Iacovone and Wexford. The ruling that Petitioner was not allowed to mention that Wexford was a prior defendant in this case or that Respondent previously blamed it for Mr. Iacovone's death was incredibly prejudicial to Petitioner. This blocked Petitioner's ability to present its defense and undoubtedly was reversible error. The Court prevented Petitioner from calling Francis Iacovone as a witness in this case and from presenting Petitioner's own defense of comparative fault which could have undoubtedly changed the verdict. As a result, Petitioner should be granted a new trial.

III. ASSIGNMENT OF ERROR III: Respondent never disclosed Michael Hoosier or William Hardman as witnesses until two weeks before trail which was trial by ambush.

The circuit court allowed Respondent to conduct an evidentiary deposition of Michael Hoosier on November 10, 2022, which was played a trial, and to call William Hardman as a witness in the trial of this matter despite the fact that Respondent chose to never disclose these individuals as witnesses in this case during the course of discovery. Respondent raised this assignment of error when it occurred at the pretrial, (App. 850–858), in its Rule 59 Motion, (App. 495), in a Response filed in opposition to Respondent's motion to depose Michael Hoosier, (App. 350), filed a Motion *in Limine* to exclude witnesses and exhibits not previously disclosed, (App. 354), and raised objections to William Hardman when he was called at trial, (App. 991–992). Petitioner was surprised and ambushed by these two witnesses and the admission of this evidence was prejudicial and reversible error.

"[O]ne of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure.

Nevertheless, a new trial will not be granted unless the moving party was prejudiced." *McDougal v. McCammon*, 193 W. Va. 229, 236–237, 455 S.E.2d 788, 795-796 (1995). As the West Virginia Supreme Court has acknowledged:

> The fairness and integrity of the fact-finding process is of great concern to this Court; and, when a party fails to acknowledge the existence of evidence that is favorable or adverse to a requesting party, it impedes that process. Normally, when this type of violation impacts the outcome of the trial, this Court will require redress in the form of a new trial. As a general rule, wrongfully secreting relevant discovery materials makes it inequitable for the withholder to retain the benefit of a favorable verdict.

McDougal, 455 S.E.2d at 797. In *Prager v. Meckling*, the West Virginia Supreme Court stated factors to be considered in determining whether the failure to supplement discovery requests should require the exclusion of evidence relating to the supplementary material. Syl. Pt. 5, 172 W. Va. 785, 310 S.E.2d 852 (1983). These factors include:

> (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of the party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded.

Id. Further, under Rule 26(e) of the Rules of Civil Procedure, the Court can sanction a party for its failure to supplement a discovery request by excluding that evidence. *McDougal*, 455 S.E.2d at 797. Further, to preserve a claim for unfair surprise as the basis for exclusion of evidence the party must move for a continuance or a recess. *Id.* at Syl. Pt. 4.

In this case, the circuit court failed to apply this standard or discuss any of the *Prager* factors and allowed Respondent to use both of these witnesses without inquiring as to why they chose to never disclose them. It is undisputed that neither of these witnesses' names were disclosed to Petitioner until two weeks before trial. Respondent attempted to argue that both of these witnesses has been "identified throughout discovery," but Respondent has never been able to show a single place where their names are mentioned prior to the filing of their Pretrial

Memorandum. (App. 851.) These individuals were certainly not included in Plaintiff's Fact Witness Disclosure. (App. 44–45.)

Further, the circuit court ruled that Respondent had successfully noticed these witnesses because Wexford's Fact Witness Disclosure noticed "[u]nknown inmates that interacted with the deceased prior to his death," (App. 40), and then Respondent's Fact Witness Disclosure noticed "[a]ny and all witnesses identified by the Defendant in this matter," (App. 45). This was found to be sufficient notice. The circuit court further ruled that Petitioner was "at an advantage from the very first day" because these two witnesses were inmates in the same pod as Mr. Iacovone and because Petitioner had "tons of resources" and should have sent someone down to speak to every inmate located in the same unit as Mr. Iacovone. (App. 855, 857.) The circuit court went further to hold that Petitioner would not suffer any prejudice because Hoosier's videotaped deposition, which would be played a trial, would be filmed prior to the trial. (App. 856.) These rulings are contrary to the law, ignore the obvious prejudice suffered by Petitioner, and are reversible error.

With regard to the first *Prager* factor, Petitioner first received notice of these key witnesses in Respondent's Pretrial Memorandum filed at the end of the day on October 31, 2022. (App. 298–304.) Respondent's counsel had been in the possession of letters written by both these individuals since the very beginning of this case but chose not to disclose their identity until two weeks before trial. (App. 1968–1972.) William Hardman's letter is dated May 16, 2019, and Michael Hoosier's letter is dated August 29, 2018. (*Id.*) Respondent admitted at the Pretrial Conference that Mr. Iacovne's mother identified these letters as being in her lawyer's possession a year and a half ago. (App. 859.) Respondent never disclosed these letters during

discovery, and Petitioner was given absolutely no notice that these individuals had information regarding this case let alone what their testimony would be.

Further, these witnesses were highly prejudicial to Petitioner and were the key witnesses for Respondent. The testimony of these witnesses was the only evidence Respondent presented that Mr. Iacovone ever asked for help on his own or that any of Petitioner's employees were aware of Mr. Iacovone's illnesses. They were also the only witnesses that contradicted the testimony of Petitioner's witnesses William Green and Tim Kittle. This case came down to whether the jury found Hoosier and Hardman more credible than Green and Kittle. The prejudice of allowing this evidence when Respondent had so blatantly failed to disclose these witnesses cannot be overstated. This evidence is what won Respondent this case, and the jury even returned two questions regarding Michael Hoosier, which shows how influential his testimony was here. (App. 1406, 1407.) It is clear that the admission of Hoosier and Hardman's testimony was key to Plaintiff's case, and Plaintiff's decision not to disclose these individuals provided them a key tactical advantage.

With regard to the second factor, Petitioner had no time to depose these individuals prior to the close of discovery and had no idea what testimony they would provide. Further, Respondent was aware of these witnesses likely from the very beginning of the case and chose to never disclose their identity or the letters they had written which provided some notice of their testimony. Respondent was never questioned at trial regarding when these letters were received or even how long they were aware of these witnesses prior to their disclosure. In addition, the first time Petitioner heard what testimony Hoosier would provide was during the videotaped evidentiary deposition conducted on November 10, 2022, which was played at trial. Petitioner

was not given any time to cure this prejudice and was required to continue on with the trial of this case.

Further, Respondent's Pretrial Memorandum failed to disclosure the address and phone number of William Hardman. (App. 298–304.) The circuit court then ordered Respondent to provide the phone number and address for William Hardman so that Petitioner could track him down and speak to him within the week before trial. (App. 883.) Respondent stated that the information would be provided that date, but that was false. (App. 883.) It is unclear how long Respondent was in the possession of this information before it was provided to Petitioner, but Respondent failed to disclose this information to Petitioner until either November 9 or 10, 2022, which was less than a week before trial. Respondent eventually did provide Petitioner with an address and a phone number, but neither belonged to Hardman. As a result, Petitioner was not even able to locate Hardman prior to trial. However, it was clear that Respondent did possess the correct information because they located him and brought him in to testify at trial. Petitioner renewed its objection to Hardman at trial, and Respondent was never required to explain why they provided a false address and phone number.

Next, for the third *Prager* factor, there was clear bad faith and willfulness on the part of Plaintiff. They knew the identity of the individuals and chose to never disclose their names or the letters they wrote. In Jeanette Iacovone's deposition, she stated that an individual named Bobby and two other people wrote her letters stating they were upset that Mr. Iacovone died. (App. 522.) She then stated that her lawyers had the letters. (*Id.*) Respondent never provided those letters to Petitioner and then failed to disclose these witnesses in their Fact Witness Disclosure. They were never questioned as to why they never disclosed this information or refused to disclose the identity of the key witnesses in their case.

Finally, it is clear that this evidence was the key evidence here and Petitioner suffered severe prejudice. Respondent blatantly disregarded the Rules of Civil Procedure, and this evidence should have been excluded. A new trial must be granted for Petitioner.

IV. ASSIGNMENT OF ERROR IV: Petitioner's instruction regarding mitigation of damages should have been given to the jury.

The circuit court should have given Petitioner's mitigation of damages jury instruction to the jury and the failure to give this instruction was reversible error. Respondent raised this assignment of error when it occurred at trial, (App. 1310–1313, 1327), and in its Rule 59 Motion, (App. 498).

Petitioner requested the following instruction:

> The Court instructs the jury that Rocco Iacovone had a duty to seek medical attention and to use reasonable efforts to mitigate his damages. To mitigate means to avoid or reduce damages. This only applies if you find that Defendant is liable and that Plaintiff suffered damages. If you find that Rocco Iacovone unreasonably failed to take advantage of an opportunity to lessen his damages, you must attribute fault to Rocco Iacovone.

(App. 444.) Petitioner sought this instruction because this related to percentages of fault. At trial when jury instructions were being discussed, Respondent argued that an inmate cannot have a duty to mitigate his damages, like simply asking to go to medical or for some type of medical attention, because he is incarcerated. (App. 1305, 1312.) However, as Petitioner's counsel argued, Hardman testified at trial that Mr. Iacovone did not want to go to medical and Respondent failed to present any evidence to show that Mr. Iacovone himself requested to go to medical or sought assistance for his illness. (App. 1312–1313.) The circuit court took these arguments under advisement and then stated broadly that it researched the issue and declined to give the instruction. (App. 1327.) The court did not state what case law supported this decision and did not explain this ruling further.

The West Virginia Supreme Court has held that

> [a] trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

Syl pt. 5, *State v. Surbaugh*, 230 W. Va. 212, 737 S.E.2d 240 (W. Va. 2012) (quoting Syl. pt. 11, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)). In this case, all these factors are satisfied and the circuit court committed reversible error.

First, this instruction is a correct statement of law. This case is a negligence case, and it is well established that the principle of mitigation of damages applies in these cases. The West Virginia Supreme Court has held

> [a] plaintiff's duty to mitigate damages focuses on whether the plaintiff took reasonable steps to avoid or reduce damages that were proximately caused by the negligence of the defendant. A damaged party is only expected to do what is reasonable under the circumstances and need not embark upon a course of action that may cause further detriment to him or her. The doctrine of mitigation of damages does not permit damages reduction based on what could have been avoided through Herculean efforts, and a plaintiff's duty to mitigate damages does not extend to accepting a position that entails great hardship or personal embarrassment. An injured party is only accountable for those hypothetical ameliorative actions that could have been accomplished through ordinary and reasonable care, without requiring undue effort or expense. Furthermore, when both of the parties have the same opportunity to reduce damages, the defendant cannot later contend that the plaintiff failed to mitigate.

Rubin Res., Inc. v. Morris, 237 W. Va. 370, 376–377, 787 S.E.2d 641, 647–648 (2016). Further, it is established that a patient in a medical malpractice case owes a duty to himself. *Rowe v. Sisters of the Pallottine Missionary Soc'y*, 211 W. Va. 16, 23, 560 S.E.2d 491, 498 (2001). In *Rowe,* the West Virginia Supreme Court held that "[i]n order to establish the defense of comparative negligence [the defendant] had to prove each of the elements of negligence: that [the plaintiff] owed herself a duty of care, that she breached that duty and that the breach was the proximate cause of the damages she sustained." *Id.* In that case, the plaintiff had wrecked a

motorcycle and was transported by ambulance to the hospital where he was told he had a sprain of his knee and was discharged. *Id.* at 494–495. This was the incorrect diagnosis and the plaintiff had actually dislocated his knee and almost lost his leg. *Id.* at 495. The hospital defendant argued that the jury should have been instructed regarding the plaintiff's comparative negligence because he did not return to the hospital's emergency room for further treatment. *Id.* at 496. The Court never questioned whether the plaintiff had a duty to himself. It instead found that the plaintiff never breached "any duty of care he may have owed himself" and held that he followed the instructions of his doctor and returned to the emergency room the next day. *Id.* at 498.

Finally, the Court held that "[w]e find no affirmative evidence in the record . . . indicating that [the plaintiff] was negligent in the time he took to go to another emergency room, nor do we find any evidence that the passage of this time was a proximate cause of any portion of his damages." *Id.* at 499. Based on this precedent, Petitioner's mitigation instruction was a correct statement of the law and the jury should have been given an instruction stating that Mr. Iacovone had a duty to himself to seek help to treat his own illness and/or to ask for medical care.

Next, with regard to the second *Surbaugh* factor, there was no instruction that covered this charge and the jury was not instructed that Mr. Iacovone had a duty to seek medical care for himself or to make reasonable efforts to mitigate his own damages. Finally, the failure to give this instruction seriously impaired Petitioner's ability to assert its comparative negligence defense. This instruction conveys to the jury that, even if it finds that Petitioner was deliberately indifferent to Mr. Iacovone's medical needs, Mr. Iacovone had a duty to request medical care on his own and to mitigate his damages. This was integral to Petitioner's defense. It is undisputed that Mr. Iacovone was incarcerated in a prison which provided him with 24/7 access to medical care, if he requested it. Evidence was presented to show that he did not ask to go to medical and

that he never attempted to get medical care for his illness. William Hardman testified at trial that Mr. Iacovone did not want to go to medical and did not want medical attention. (App. 1021–1022.) Respondent's own expert Dr. Charash stated that if Mr. Iacovone had received medical care even hours earlier that he might be alive. (App. 1208–1209, 1212–1213.) He went further and stated that Mr. Iacovone would be alive had he received care even a day earlier. Thus, the jury should have been instructed that Mr. Iacovone's decision not to seek medical care was a breach of his own duty. There was no guidance to the jury in the charge that Respondent had any duty to himself or that he had a duty to seek medical care for himself. This instructional error is sufficient enough to warrant a reversal of the verdict and to grant a new trial.

V. ASSIGNMENT OF ERROR V: The jury was not instructed that they needed to determine that Mr. Iacovone suffered a "serious medical need," which is part of the deliberate indifference standard.

The Court rejected Petitioner's deliberate indifference jury instruction and used Respondent's instructions only. However, the circuit court failed to instruct the jury that they must find by a preponderance of the evidence that Mr. Iacovone needed medical care for a serious medical need in order to find that Petitioner was deliberately indifferent. This is a well-established part of the deliberate indifference standard and is reversible error. Respondent raised this assignment of error when it occurred at trial, (App. 1295–1303), and in its Rule 59 Motion, (App. 501).

In general, the Eighth Amendment prohibits "cruel and unusual punishment." *Farmer v. Brennan*, 511 U.S. 825 (1994). In determining whether the Petitioner acted with deliberate indifference, Respondent must be able to prove both an objective and a subjective component. In 1976, the Supreme Court set the standard for evaluating whether a prisoner's Eighth Amendment right to be free from cruel and unusual punishment was violated based upon a prison

healthcare provider's deliberate indifference (subjective component) to the prisoner's serious medical needs (objective component). *Estelle v. Gamble*, 429 U.S. 97 (1976).

Even if Respondent could identify a clearly established law violated, the Respondent must also point to evidence that the actions of the officer(s) were "deliberately indifferent" to the serious medical needs of Mr. Iacovone. To succeed on such a claim, a plaintiff must offer "proof that the medical need in question is objectively 'serious,' and that the defendant acted with subjective indifference, meaning he or she 'kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.'" *Adams v. Ferguson*, 884 F.3d 219, 227 (4th Cir. 2018) (alterations in original) (quoting *Farmer*, 511 U.S. at 834). A "serious medical need" is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008). Further, the subjective mental state required of a deliberately indifferent actor is "more than mere negligence." *Farmer*, 511 U.S. at 835. It is instead "somewhere between negligence and purpose or knowledge: namely, recklessness of the subjective type used in criminal law." *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995) (citing *Farmer*, 511 U.S. at 835). This means that a correctional officer must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Farmer*, 511 U.S. at 837.

Here, the Court rejected Petitioner's proposed deliberate indifference instruction and submitted Plaintiff's proposed instructions to the jury. (App. 1295–1303.) Petitioner's jury instruction included the serious medical need language, which in indisputably the correct statement of law. (App. 440.) The circuit court declined to give this instruction and instead gave Plaintiff's instruction numbers 4, 5, and 24. (App. 1300.)

Plaintiff's Instruction No. 24 is the only instruction in the charge that mentions the phrase "medical needs" but it fails to instruct the jury that they must make this finding or that the medical need must be "serious." (App. 407.) That instruction states only that "[i]f any of the correctional officers and/or correctional counselors were deliberately indifferent to the medical needs of Rocco Iacovone during their employment with West Virginia Division of Corrections and Rehabilitation, then those acts are considered the acts of West Virginia Division of Corrections." (App. 1344.) This instruction relates to the employee and employer relationship, but the "medical need" statement is contrary to established law from the Supreme Court of the United States and was improper. Further, Petitioner's instruction made it clear that the jury would need to determine that Mr. Iacovone needed medical care for a "serious medical need" and then defined that term. (App. 440.)

The circuit court did also give Plaintiff's instruction No. 4, which stated as follows: "This Court instructs the jury that to be liable deliberate indifference requires a showing that the Defendant actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care." (App. 1343–1344.) However, this instruction also failed to instruct the jury regarding the correct standard and relates only to the Petitioner's knowledge. As a whole, the jury instructions failed to instruct the jury that they must determine what Mr. Iacovone needed medical care for a serious medical need. This determination was required to be made in order to find that Petitioner's acted with deliberate indifference. As a result, this determination was never made by the fact finder.

In addition, the Court ruled that the following statement from Petitioner's proposed instruction was not to be given to the jury: "In the context of medical needs, deliberate indifference can manifest in at least three contexts: (1) by prison doctors in their response to the

prisoner's needs, (2) by prison guards in intentionally denying or delaying access to medical care, and (3) by prison guards in intentionally interfering with the treatment once prescribed." (App. 440.) This language is quoted exactly from the United States Supreme Court's decision in *Estelle v. Gamble.* 429 U.S. at 104. As a result, this ruling was not proper and there was no basis for refusing Petitioner's instruction, especially when it was the only instruction that fully laid out all the findings the jury must make in order to determine that Petitioner acted deliberately indifferent.

As the West Virginia Supreme Court has held, "[a] trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law." *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 672, 558 S.E.2d 663, 671 (2001). Further, :[a] trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law." *Id.* Here, the law is clear that deliberate indifference is a two part test, but the jury here failed to make this finding because it was not included in their instructions. These jury instructions do not accurately reflect the law and the charges failed to instruct the jury properly. As a result, their verdict is in error and the finding that Petitioner acted with deliberate indifference is invalid and was not made in accordance with established law. The jury verdict must be overturned because the jury was not told it must make all the required findings to hold Petitioner liable for deliberate indifference. A new trial must be granted for Petitioner on this basis.

VI. ASSIGNMENT OF ERROR VI: The Judgment Order entered on December 16, 2022, must be amended and altered because it is contrary to established law in the State of West Virginia.

The Judgment Order entered on December 16, 2022, awarded Respondent prejudgment interest contrary to established law in the State of West Virginia; begins post-judgment interest from the date of the jury verdict which is contrary to the language of West Virginia Code § 56–6–31; and awards varying interest rates on the prejudgment interest from 2018 to 2022 which is also contrary to West Virginia Code § 56–6–31. (App. 468.) Respondent raised this assignment of error in an Objection filed to this proposed Judgment Order, (App. 437–453), and in its Rule 59 Motion, (App. 485).

First, the Judgment Order awards Respondent prejudgment interest on the following damage awards: $16,237.00 for funeral and burial expenses; $400,000.00 for lost earning capacity; and $275,000.00 for lost household services. Petitioner does not object to the award of prejudgment interest on the $16,237.00 for funeral and burial expenses. However, the award of prejudgment interest for the $400,000.00 for lost earning capacity and $275,000.00 for lost household services is contrary to clearly established law.

The West Virginia Supreme Court is clear that "future wage loss accruing after the jury verdict is not a prejudgment loss or 'special damage' under W. Va. Code, 56-6-31." *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 311, 418 S.E.2d 738, 757 (1992). In *Pasquale*, the plaintiff was awarded a substantial lost wages damage award in a wrongful death case against a utility company. The West Virginia Supreme Court found that the trial court erred when it granted prejudgment interest on the entire lost wages award. *Id.* at 756. The Court held that "the plaintiff was entitled to recover prejudgment interest on the decedent's lost wages from the date of his death until the date of the judgment on the jury verdict." *Id.* at 757. However, the Court was clear that it is error to award prejudgment interest on the entire amount of the lost wages award without considering the time period for which the award was intended.

At trial, Respondent introduced the testimony of Dr. Clifford B. Hawley, and he was clear that he started the economic loss calculation after Rocco Iacovone's anticipated release date from prison of October 23, 2025. (App. 1078–1079, 1092.) Dr. Hawley stated at trial that "I began those losses I say in October of 2025, about three years hence." (App. 1079.) His written expert reports reflect this opinion. (App. 511.) Further, Table 1 of this report was submitted to the jury and the start date is clearly the year 2025. (App. 514.) Respondent presented no evidence of lost wages between the time of the death and the jury verdict. As a result, Respondent is not entitled to any award of prejudgment interest on the $400,000.00 for lost earning capacity because the testimony presented at trial clearly began the calculation three years from the date of the verdict. Further, granting interest on the entirety of the $400,000.00 award is exactly the error that was committed by the trial court in *Pasquale*.

Further, the West Virginia Supreme Court's decision in *Jackson v. Brown* only further supports Petitioner's arguments. 239 W. Va. 316, 801 S.E.2d 194 (2017). In *Jackson*, the West Virginia Supreme Court of Appeals held it was proper under W. Va. Code § 56-6-31 to award prejudgment interest on a lost wages award because the award was "equivalent to one year of [the deceased's] salary, which would have accrued between June 2014 (when the accident occurred) and the trial date." *Id.* at 206. Again, this is exactly the same holding as *Pasquale*. Here, Respondent did not request a loss wages award for wages that accrued between the date of death and the trial date. Mr. Iacovone was incarcerated at the time of his death, and Respondent's own expert is clear that the award begins after October 2025, which was Mr. Iacovone's anticipated release date. Respondent is clearly not entitled to any prejudgment interest on the lost wages award, and this Judgment Order was entered in error.

Next, Respondent is not entitled to prejudgment interest on the award for lost household services. Again, the West Virginia Supreme Court of Appeals has held the following: "our holding in *Wilt* authorizes prejudgment interest for loss of household services only where the claimant has incurred an obligation to pay some sort of compensation for household services." *Doe v. Pak*, 237 W. Va. 1, 7, 784 S.E.2d 328, 334 (2016) (citing *Wilt v. Buracker*, 191 W. Va. 39, 51–52, 443 S.E.2d 196, 208–209 (1993)). Further, the plaintiff in *Doe* was "not entitled to prejudgment interest under West Virginia Code § 56-6-31 for her loss of household services because she did not pay, or incur an obligation to pay, for those services." *Id.*

Here, there is absolutely no evidence that Mr. Iacovone or anyone else was obligated to pay for any household services incurred by the time of trial. It is undisputed that he was incarcerated at the time of his death, and Respondent's own economic expert provides further support for Petitioner's argument. Dr. Hawley's Table 2 was provided to the jury and the table clearly begins the calculation for household services in the year 2025, which was when Mr. Iacovone was anticipated to be released from prison. (App. 515.) Dr. Hawley's testified the same at trial. (App. 1088–1089.) Accordingly, there is no evidence that Respondent incurred any household expenses prior to trial and the damage award clearly begins in the year 2025. Respondent is not entitled to prejudgment interest on the award for future household services, and the Judgment Order is contrary to established law and should be altered and amended.

Next, the Judgment Order begins post-judgment interest on November 17, 2022, which was the date the verdict was returned from the jury. Again, this is contrary to the law. West Virginia Code § 56–6–31 is titled "Interest on judgment or decree" and section (c) of that statute is further titled "post–judgment" and states, in relevant part:

> *Once the rate of interest is established by a judgment or decree* as provided in this section that established rate shall after that remain constant for that particular judgment or decree, notwithstanding changes in the Federal Reserve District discount rate in effect in subsequent years.

W. Va. Code § 56–6–31(c) (emphasis added). This Section is clear that "the rate of interest is established by a judgment or decree." Thus, post-judgment interest does not begin at the time the jury returns the verdict but instead when the judgment is entered by the court because the rate is established by that judgment order. The language of W. Va. Code § 56–6–31(b)(1) is also clear that prejudgment interest begins when "the right to bring the action" occurs and accrues until "the date of the judgment or decree," which refers to the judgment order as entered by the circuit court. Accordingly, post-judgment interest in this case must begin on the date the Judgment Order was entered by the circuit court which was December 16, 2022. (App. 467.) Awarding Respondent a month of extra interest is error and the Judgment Order must be amended and altered.

Finally, the Judgment Order awards varying interest rates on the prejudgment interest for the awards for funeral and burial expenses, lost earning capacity, and lost household services totaling $691,327.00 in the following rates: "at the rate of 4.5% from August 28, 2018 through December 31, 2018 ($10,652.50); at the rate of 5.5% from January 1, 2019 through December 31, 2019 ($38,018.03); at the rate of 4.75% from January 1, 2020 through December 31, 2020 ($32,833.75); at the rate of 4.0% from January 1, 2021 through December 31, 2021 ($27,649.48); and at the rate of 4.0% from January 1, 2022 through November 17, 2022 ($24,240.64); totaling $133,394.41 in prejudgment interest." (App. 467–468.) This is also error and is contrary to West Virginia Code § 56–6–31.

Section 56–6–31(b)(1) clearly states:

> the rate of prejudgment interest is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the right to bring the action has accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgement or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree:
>
> . . . .
>
> Once the rate of prejudgment interest is established as provided in this section, that established rate shall remain constant for the prejudgment interest for that particular judgment or decree, notwithstanding changes in the Federal Reserve District discount rate in effect in subsequent years.

This statute is clear that varying interest rates, like what is applied in the Judgment Order, should not be applied. The 4.5% interest rate decreed by the West Virginia Supreme Court of Appeals for 2018 should be the rate that "shall remain constant for the prejudgment interest for that particular judgment or decree." *Id.* Mr. Iacovone died on August 28, 2018, and that is the date "the right to bring the action has accrued" and the statute is clear "that established rate shall remain constant from that date until the date of the judgement or decree." Accordingly, a 4.5% interest rate should have been applied to the funeral and burial expenses award beginning on August 28, 2018, and that interest rate should have remained the same from that date till the date of the entry of the judgment. This Judgment Order should be amended on these grounds.

VII. ASSIGNMENT OF ERROR VII: The Amended Judgment Order entered on March 10, 2023, was entered in error and is also contrary to established law in the State of West Virginia.

Finally, the circuit court entered an Amended Judgment on Jury Verdict order that was also entered in error and is contrary to established law. (App. 728.) At the hearing held on the Rule 59 Motion held on February 7, 2023, Respondent conceded some of the objections raised by Petitioner to the Judgment Order entered on December 16, 2022, and instead argued for an amended judgment order to be entered. (App. 1418–1419.) Respondent stated he would agree to entry of this amended order only if the circuit court to begin postjudgment interest from the

date of entry of this new order so Respondent could benefit from the 7.0% interest rate as declared by the West Virginia Supreme Court for 2023. Petitioner objected to the entry of this new judgment. (App. 1420.)

This Amended Judgment On Jury Verdict was entered on March 10, 2023, and seeks prejudgment interest contrary to established law in the State of West Virginia; seeks to begin post-judgment interest from the date of the Amended Judgment On Jury Verdict and not on the date of entry of the Judgment Order which is contrary to the language of West Virginia Code § 56–6–31; and allows post-judgment interest on the award of prejudgment interest. (App. 728.) Respondent raised this assignment of error in an Objection filed to this proposed Amended Judgment Order, (App. 721–723), raised these arguments at the hearing on the Rule 59 Motion held on February 7, 2023, (App. 1418–1430), and filed the Notice of Appeal on April 6, 2023. The Amended Judgment Order was entered after Respondent's Rule 59 Motion was filed.

First, Respondent again asserts its prior objections to the award of prejudgment interest for the $400,000.00 for lost earning capacity and $275,000.00 for lost household services as discussed in Section VI above. Just like the Judgment Order entered on December 16, 2022, the Amended Judgment Order awards prejudgment interest on these jury awards which is, again, contrary to established law.

Second, the Amended Judgment Order begins postjudgment interest on the date of the entry of the Amended Judgment On Jury Verdict, not upon the date the first judgment was entered by the Court, which was December 16, 2022. This is contrary to the law. As stated in Section VI above, West Virginia Code Section 56–6–31(b)(1) is clear that "that established rate shall remain constant from that date until the date of the judgement or decree." Thus, the post-judgment interest rate cannot be altered after a judgment order is entered by the circuit court.

The language of the statute is clear that prejudgment interest begins when "the right to bring the action" occurs and accrues until "the date of the judgment or decree," which refers to the judgment order as entered by the circuit court. Thus, post-judgment interest in this case must begin on the date the Judgment Order was entered by the circuit court which was December 16, 2022 and that interest rate is 4.5%.

As the Amended Judgment Order is currently written, Respondent's counsel is being allowed to profit from their own error in submitting the first judgment order which was clearly contrary to the law and was erroneously entered. Respondent's counsel recognized their error and agreed that the rate of prejudgment interest remains constant and was not to change annually as originally set forth in their proposed Judgment On Jury Verdict. However, it is obvious that Respondent sought this Amended Judgment Order in order to allow them to claim the 7.0% interest rate set for 2023, opposed to the 4.0% interest rate set for 2022. This is transparent and obviously contrary to established law. The correction of the varying interest rates as ordered in the Judgment Order entered on December 16, 2022, does not affect the Court's entry of judgment on December 16, 2022, and post-judgment interest is to accrue from that date, not the date of the entry on a new order correcting Respondent's clear error on interest calculations.

Third, the Amended Judgment Order alters the original judgment order to provide for post-judgment interest on the prejudgment interest awarded by the Court. This is contrary to the law. West Virginia Code § 56–6–31 is titled "Interest on judgment or decree" and states:

> (a) Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract, or otherwise, entered by any court of this state shall bear simple, not compounding, interest, whether it is stated in the judgment decree or not.

This Section is clear that "every judgment or decree for the payment of money . . . entered by any court of this state shall bear simple, not compounding, interest." Thus, post-judgment

interest does pay upon the prejudgment interest and prejudgment interest ends on the date of the jury verdict. To allow post-judgment interest to be paid on the prejudgment interest is to allow compounding of the interest contrary to the statute.

Here, the Amended Judgment Order orders prejudgment interest totaling $140,188.54, which is erroneously calculated as described above, and then orders "Plaintiff shall recover from and is awarded a total judgment in the amount of $851,425.54 against the West Virginia Division of Corrections and Rehabilitation with post-judgment interest thereon at the current rate of 7.0% from the date of entry of this Amended Judgment Order until paid." The amended order clearly adds the erroneously calculated prejudgment interest to the total verdict and then grants post--judgment interest on this amount. The prejudgment interest is just that, interest on a portion of the judgment, and is not a part of the judgment itself. The award of post-judgment interest is obviously contrary to law. Accordingly, this Amended Judgment Order should be vacated and amended on these grounds.

CONCLUSION

Petitioner respectfully moves this Court to reverse the circuit court's order denying Petitioner's Rule 59 Motion, vacate the Judgment Order entered on December 16, 2022, and the Amended Judgment Order entered on March 10, 2023, and remand this case for a new trial.

Respectfully submitted,

/s/ William E. Murray
Counsel for Petitioner West Virginia
Division of Corrections and Rehabilitation

William E. Murray
W. Va. State Bar I.D. 2693

Jaden P. Rhea
W. Va. State Bar I.D. 13454

Anspach Meeks Ellenberger LLP
500 Virginia Street, East, Suite 525
Charleston, West Virginia 25301
304–205–8063 – telephone
340–205–8062 – facsimile
wmurray@anspachlaw.com
jrhea@anspachlaw.com
Counsel for Petitioner West Virginia
Division of Corrections and Rehabilitation

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23–ICA–148

West Virginia Division of Corrections
and Rehabilitation, Defendant below,

Petitioner,

v.

Francis Iacovone, individually and
as Administrator of the Estate of
Rocco Iacovone, Plaintiff Below,

Respondent.

Appeal from a trial in Circuit
Court of Kanawha County
(Case No. 20–C–602)

CERTIFICATE OF SERVICE

I, the undersigned, counsel for Petitioner West Virginia Division of Corrections and Rehabilitation do hereby certify that on the 7th day of July 2023, I electronically filed the foregoing ***"Petitioner West Virginia Division of Corrections and Rehabilitation's Brief"*** with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following participants:

L. Dante diTrapano
Amanda J. Davis
CALWELL LUCE DITRAPANO, PLLC
Law and Arts Center West
500 Randolph Street
Charleston, WV 25302
Counsel for Respondent

and

William C. Forbes
W. Jesse Forbes
FORBES LAW OFFICES, PLLC
1118 Kanawha Blvd. East
Charleston, WV 25301
Counsel for Respondent

/s/ William E. Murray
William E. Murray, Esq. (WVSB #2693)
Jaden P. Rhea, Esq. (WVSB #13454)
ANSPACH MEEKS ELLENBERGER LLP
500 Virginia Street, East, Suite 525
Charleston, West Virginia 25301
304-205-8063 - telephone
304-205-8062 – facsimile
wmurray@anspachlaw.com
jrhea@anspachlaw.com