IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-263

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FRED STARLIPER,

Petitioner,

v. 24-ICA-263

ADRIENNE JOHNSON, (CC-19-2021-C-20)

Respondent.

Petitioner's Brief

SUBMITTED BY:

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II. STATEMENT OF THE CASE

This case arises out of a March 2, 2019 low-speed motor vehicle accident ("Accident") between Respondent and Petitioner. There was no airbag deployment in the Accident, and the Respondent was released from the emergency room the day of the Accident without a bruise, bump, or scratch caused by the Accident. At the emergency room, Respondent complained only of neck pain and a headache and said nothing about either wrist. It was not until two (2) years and nine (9) months later that Respondent presented to a provider with wrist pain. At trial, on December 16, 2023, Respondent claimed the Accident caused her to suffer from carpal tunnel syndrome.

Respondent presented evidence of Respondent's alleged damages arising from the Accident through Respondent's medical records and medical invoices ranging from March of 2019

through February of 2023. Respondent called just one of her treating providers as a medical expert, Steven Regal, M.D. ("Dr. Regal"), an orthopedic surgeon who diagnosed Respondent with carpal tunnel syndrome for the first time two (2) years and nine (9) months after the Accident. [J.A. 647-811.] While Dr. Regal provided Respondent with treatment for the carpal tunnel diagnosis on two occasions in 2022 and recommended a future surgery, Dr. Regal could not, and did not, relate Respondent's medical treatment or Respondent's future carpal tunnel surgery to the Accident with Respondent. [J.A. 647-811.] It was Respondent's burden to prove that the Accident proximately caused Respondent's injuries, which resulted in treatment that is reasonable and necessary. Respondent failed to prove causation. Despite Respondent failing to present any evidence on causation, the Circuit Court below denied Petitioner's motion for directed verdict and renewed motion for directed verdict. [J.A.506-19.] Subsequently, the jury returned a verdict for Respondent, awarding $25,000.00 in past medical specials, $1,000.00 in past out-of-pocket expenses, and $26,000.00 for future medical expenses. [J.A. 000008-9, 812.]

A. Facts Related to Respondent's Past Medical Specials

At trial, Petitioner did not contest Respondent's ambulance transport to the emergency room and the emergency room visit, itself. The unchallenged past medical specials total $4,995.17. [J.A. 97-98.] However, Petitioner did challenge the remainder of Respondent's past medical specials by presenting expert testimony from his medical expert, Dr. Robert Cirincione, who opined that Respondent's carpal tunnel syndrome and treatment were not causally related to the Accident. [J.A. 548-646.] Notably, as discussed below, Dr. Regal could not relate *any* of Respondent's contested past medical specials to the Accident. [J.A. 647-811.]

B. Facts Related to Respondent's Future Medical Specials

At trial, Respondent presented future medical specials in the amount of $10,885.37 to the jury, i.e., the cost of carpal tunnel release surgery with Dr. Regal. [J.A. 430, 722, 812.] However,

the jury awarded an excess verdict of $26,000.00 in future medical specials, which is not supported by any evidence submitted at trial. [J.A. 9.] Importantly, Respondent's counsel failed to ask Dr. Regal whether, to a reasonable degree of medical certainty, the Accident caused the need for the future carpal tunnel surgery. [J.A. 506-19, 647-811.] The entire trial was void of any proof establishing causation. Over Petitioner's counsel's objections, Respondent was permitted to testify about her concerns of a three-to-six week disability that may result from her future carpal tunnel release surgery and was permitted to testify that she was concerned that her employer would terminate her as a result of her temporary disability. [J.A. 431-38.] This is despite the fact that this Court struck Respondent's post-carpal tunnel release surgery physical therapy damages prior to trial because Dr. Regal opined that only 10% of his carpal tunnel release patients require physical therapy. [J.A. 11-13.] There was no medical or expert basis for Respondent's testimony. It was pure conjecture and speculation, and Respondent is a layperson who cannot offer medical testimony.

C. Verdict

At the close of Respondent's case-in-chief, Petitioner, through counsel, moved for a directed verdict based upon Respondent's failure to prove that the carpal tunnel syndrome proximately resulted from the Accident and her failure to establish medical causation of special damages, both past and future. [J.A. 506-19.] The Circuit Court below denied Petitioner's motion for directed verdict. [J.A. 517-18.] Thereafter, after the close of Petitioner's case-in-chief, Petitioner, through counsel, renewed the motion for directed verdict on the same legal grounds. The Circuit Court below also denied Petitioner's renewed motion for directed verdict.

III. SUMMARY OF ARGUMENT

Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter

judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, Petitioner requests that this Court instruct the Circuit Court below to enter a remittitur of the jury's awards for: (1) past medical specials; (2) future medical expenses to expenses to $0.00; and (3) out-of-pocket expenses to the amount supported by the evidence presented at trial.

First, the Circuit Court below committed clear legal error in allowing the jury's award of past medical specials to stand. Respondent utterly failed to prove a direct causal connection between the Accident and her subsequent medical treatments other than the uncontested emergency room visit and ambulance transport, which totaled $4,995.17. This amount was conceded by Petitioner and is not in dispute. However, for all other medical treatments, Respondent did not meet her legal burden of proving causation. The only medical expert called by Respondent, Dr. Regal, unequivocally testified that he could not relate Respondent's carpal tunnel syndrome—or any other injuries—to the Accident. Without this crucial medical testimony, the remaining medical bills are unsupported by competent evidence.

West Virginia law is clear that to recover medical expenses, a plaintiff must provide expert testimony establishing that the injuries for which she seeks compensation were proximately caused by the defendant's actions. The lack of this essential evidence is glaring in this case. Respondent did not present any competent testimony connecting her post-accident medical treatments to the low-speed collision with Petitioner. Therefore, under well-established principles, including the holdings in *Pygman v. Helton* and *Collins v. Bennet*, the jury's award of past medical specials beyond the $4,995.17 in uncontested expenses was erroneous as a matter of law. The Circuit Court should have granted Petitioner's motion for a directed verdict on this issue, and its failure to do so warrants reversal or remittitur.

Second, the Circuit Court further erred by upholding the jury's excessive award of $26,000.00 in future medical expenses, an amount that far exceeds the $10,885.37 presented by Respondent at trial for a potential carpal tunnel surgery. Respondent's claim for future medical expenses was speculative, at best, and unsupported by the required expert testimony. Dr. Regal, Respondent's own expert, could not testify with any reasonable degree of medical certainty that future surgery was necessary or that the need for surgery was caused by the accident. In fact, Dr. Regal explicitly stated that, as of Respondent's last visit, she did not require surgery and had shown significant improvement in her symptoms.

West Virginia precedent is clear that future damages must be proven with reasonable certainty, and awards cannot be based on speculation or possibilities. The standard set forth in *Jordan v. Bero* requires that future medical expenses must be tied to injuries that are established by competent expert testimony to be reasonably certain to occur. Here, no such testimony was provided. The Circuit Court's failure to properly scrutinize this speculative evidence led to an inflated jury award that was not supported by the evidence introduced at trial.

Third, the Circuit Court's decision to uphold the jury's award of $1,000.00 in out-of-pocket expenses constituted clear legal error. Respondent presented evidence of only $115.52 in out-of-pocket expenses at trial, yet the jury awarded nearly ten times that amount without any evidentiary basis. This result is plainly inconsistent with West Virginia law, which requires that special damages, including out-of-pocket expenses, be proven with evidence. Special damages are not to be awarded based on speculation or assumptions, and Respondent failed to provide any proof justifying this excessive award.

As established in *Sargent v. Malcomb*, damages must align with the evidence presented, and where the jury's award exceeds the proven damages by such a gross margin, remittitur or

reversal is necessary. The Circuit Court should have reduced the award to reflect the $115.52 that was actually proven at trial, and its failure to do so represents a clear legal error.

Fourth, the Circuit Court erred by allowing Respondent to present speculative and unqualified lay testimony about her potential future disability and concerns over possible termination from her job following a hypothetical carpal tunnel surgery. This testimony was purely speculative, unsubstantiated by expert evidence, and in direct contravention of the Court's earlier ruling striking similar testimony from Dr. Regal. The speculative nature of Respondent's testimony was obvious—she had not undergone surgery, and her lay predictions about potential recovery and employment consequences were not grounded in any medical or factual evidence.

West Virginia law clearly mandates that future damages, including those relating to a temporary or permanent disability, must be established through competent expert testimony. Respondent's lay testimony, which was not based on any medical expertise, was improperly admitted and served only to inflame the jury and contribute to the excessive award for future medical expenses. The jury's reliance on this speculative testimony to award $26,000.00 in future medical expenses—when Respondent had only blackboarded $10,885.37—demonstrates the prejudicial effect of this error. The Circuit Court's decision to allow this testimony was a clear abuse of discretion and warrants reversal or, at minimum, a significant reduction of the award.

Finally, the Circuit Court below erred in denying the Petitioner's Post-Trial Order, as the Respondent failed to establish causation between her alleged injury and the Accident with the Petitioner. At his evidentiary deposition, Respondent's sole medical expert, Dr. Regal, testified that the Accident could have caused or exacerbated her carpal tunnel but failed to express this opinion to a reasonable degree of medical probability, as required by West Virginia law.

Proximate cause is a vital and essential element of negligence, and it must be demonstrated by expert testimony when not apparent. Dr. Regal's testimony, which expressed only possibilities and lacked definitive causation, fell short of this evidentiary requirement.

Despite this failure, the Circuit Court allowed the case to proceed to the jury, erroneously concluding that the doctor's ambiguous and speculative statements were sufficient. Furthermore, Petitioner's expert, Dr. Cirincione, testified unequivocally that Respondent's injuries were unrelated to the Accident, emphasizing that no wrist injury was reported immediately after the incident and that it was biomechanically improbable for the Accident to have caused such injuries when Respondent's first complaints of wrist pain were two (2) years and nine (9) months after the Accident. Based on these deficiencies in proof, the Circuit Court should have granted relief for Petitioner through its Post-Trial Order. It did not.

Accordingly, Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, Petitioner requests that this Court instruct the Circuit Court below to enter a remittitur of the jury's awards for: (1) past medical specials; (2) future medical expenses to expenses to $0.00; and (3) out-of-pocket expenses to the amount supported by the evidence presented at trial.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 19 argument and disposition by a memorandum decision. *See* W. VA. R. APP. P. 19(a) ("cases involving assignments of error in the application of settled law").

V. ARGUMENT

This Court's standard of review arising from an appeal from an order granting or denying a Rule 50(b) motion under the West Virginia Rules of Civil Procedure is de novo. *See* syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009) ("The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure . . . . is de novo."); *see also Gregory v. Long*, No. 23-ICA-421, 2024 WL 4041383, at *3–4 (W. Va. App. Sept. 4, 2024).

A. THE CIRCUIT COURT ERRED BY UPHOLDING THE AWARD OF PAST MEDICAL SPECIALS BECAUSE RESPONDENT FAILED TO ESTABLISH A DIRECT CAUSAL LINK BETWEEN THE ACCIDENT AND RESPONDENT'S MEDICAL SPECIALS.

Petitioner appeals the Circuit Court's Post-Trial Order because it upheld the jury's award of past medical specials to Respondent when Respondent failed to present any evidence at trial to establish that the past medical treatments received by Respondent were causally related to the Accident.[1]

Under well-settled West Virginia law, "[t]o permit a recovery of damages based on negligence the negligence of the defendant must be the proximate cause of the injury for which the plaintiff seeks to recover." Syl. pt. 3, *Pygman v. Helton*, 134 S.E.2d 717 (W. Va. 1964); *See also* syl. pt. 6, *Spencer v. McClure*, 618 S.E.2d 451 (W. Va. 2005) ("Proximate cause is a vital and an essential element of actionable negligence and must be provided to warrant a recovery in an action based on negligence."). "Where the defendant objects to the introduction of medical bills, indicating . . . defendant's evidence will raise a substantial contest as to . . . the question of causal

[1] Petitioner did not contest Respondent's past medical specials for her emergency room visit and ambulance transport after the Accident. Those past medical specials total $4,995.17. The jury's award of those past medical special damages totaling $4,995.17 is not part of Petitioner's assignment of error.

relationship, the court may admit the challenged medical bills only with the foundation expert testimony tending to establish . . . causal relationship." *Collins v. Bennet*, 486 S.E.2d 793, 798 (W. Va. 1997) (citing *McMunn v. Tatum*, 379 S.E.2d 908, 914 (W. Va. 1989)).

> In many cases the cause of injury is reasonably direct or obvious, thereby removing the need for medical testimony linking the negligence with the injury. Additionally, "[d]irect testimony, expert or otherwise, is not always necessary to prove the causal connection between the negligence or wrong of a tortfeasor and the injury suffered by the victim. Circumstantial evidence may be sufficient." *Smith v. Slack*, 125 W. Va. 812, 818, 26 S.E.2d 387, 390 (1943). In other instances, **medical testimony is warranted to establish the proximate cause link between the claimed negligence and injury**.

Totten v. Adongay, 337 S.E.2d 2, 8 (W. Va. 1985).

To be admissible and sufficient evidence, Respondent's medical testimony relating the injuries to the Accident with Petitioner must be "of such character as would warrant a reasonable inference by the jury that the injury in question was caused by the negligent act or conduct of the defendant." Syl. pt. 1, in part, *Pygman*, 134 S.E.2d 717, "As a general rule, proximate cause . . . is a determination for the factfinder which should be premised upon reasonable inferences drawn from expert testimony based on a reasonable degree of probability." *Stoudt v. Eads*, 889 S.E.2d 305, 311 (W. Va. App. 2023). "Where a physician is testifying as to the causal relation between a given physical condition and the defendant's negligent act, he [or she] need only state the matter in terms of a reasonable probability." Syl. pt. 5, *Dellinger v. Pediatrix Medical Group, P.C.*, 750 S.E.2d 668 (W. Va. 2013).

In this case, Respondent never presented any—much less sufficient—medical testimony on whether Respondent's past and future medical treatment were causally related in any way to Respondent's Accident with Petitioner. [J.A. 647-811.] Petitioner admitted to the ambulance bill and the emergency room bill, but contested the remainder of the Respondent's past medical bills.

[J.A. 101.] Therefore, under *Collins* and *Pygman* and *Totten,* Respondent never established that the remaining medical bills, which were challenged by Petitioner's medical expert,[2] were causally connected to the Accident. [J.A. 506-519; 647-811.]

At Respondent's expert's evidentiary deposition, Respondent's counsel asked Dr. Regal to review Respondent's medical records and associated invoices from March 2, 2019, through present, and to opine whether the treatment received by Respondent during those instances was reasonable and necessary based upon the complaints Respondent presented. [*See* J.A. 647-811.] Because it appeared Dr. Regal was not familiar with the medical records, defense counsel conducted voir dire of Dr. Regal and discovered that he did not intend to provide medical testimony as to causation of any of Respondent's past medical specials.

> Q: Doctor, of all these records over the course of a couple of years, it appears that you first saw her on December 3 of 2021, which was exhibit 11, which was two years and nine months after the accident. Correct?
>
> A: Correct.
>
> Q: Okay. And then we went through the exhibits before. I think one was the ambulance run sheet, and then we got the ER records, and we went through 2 through up until 11. Had you seen those? When did you first see those records or did you review those records?
>
> A: The emergency visit?
>
> Q: No, I'm talking about the Exhibit 3, the bill from Right Aid; Exhibit 4, the visit with first establishing new patient care with Sara Levy on 05/22/19; Exhibit 5, physical therapy; Exhibit 6, another visit to Allegheny when she had a colonoscopy; Exhibit 7, an outpatient visit with Sara Levy when she had a bone density study; Exhibit 8, a visit with Angela Silva; Exhibit 9, where she had a health maintenance visit, and had lipid panels, and mammograms, and blood tests, those ones. When did you review those?

[2] [J.A. 549-645.]

A: I reviewed some of the records over the weekend, the Dr. Levy records. She's the one who referred this patient to my care, so I read her note, her describing her neck pain and hand numbness. That was directly reviewed at my first visit as well as my subsequent visits.

Q: Okay. So you first looked at those ones I just mentioned over the weekend?

A: Yes, sir.

Q: Okay. You hadn't seen them before this weekend?

A: You listed about 20 visits. So some of those visits ---

Q: Right.

A: --I had reviewed before.

Q: Right.

A: Some of those I've not reviewed until this weekend.

Q: Okay. All right. And so based on your review, are you prepared to say that those are authentic records that were generated in the course of the treatment of Plaintiff?

A: Of the Allegheny Health Network records that I have reviewed . . . . I believe that they were obtained in a satisfactory manner.

Q: But are you prepared to testify that each one of those are related to the accident?

A: That, I cannot speak on.

[J.A. 000680-83 (emphasis added).]

Later, on cross-examination, Dr. Regal once again testified that he could not, and would not, provide any expert testimony on whether Respondent's past medical specials sustained by Respondent was a result of the Accident:

Q: Okay. Well, we'll go and look at that real quick. But what I'm looking at is what I had was that you saw here 2/11/22 and gave her the injection in the wrist. Well, then it says you saw her in March 11 of '22, so that's one more visit after.

But then I don't have any records from what he introduced that you saw her between March 11, '22 and February 10 of '23. You can quickly go through those. Look at them real quick. So there's March 11, '22, [exhibit] 15 and 16 was the physical therapy record. And then this is 17.

A: So it's prior to this visit that I gave her an injection.

Q: It was February 11.

A: February 11. This was ---

Q: '22

A: So a year.

Q: Year, that's what I'm getting at. That was a year in between. Right?

A: Correct.

A: Okay.

Q: So that – and that, when you did that – that was exhibit 14. You said with respect to all those questions, you said that the treatment was reasonable and necessary for the problem. Right?

A: Yes.

Q: **You're not saying what the cause was. You're saying the treatment was reasonable and necessary.**

A: **That is correct.**

[J.A. 765-66 (emphasis added).] Throughout Dr. Regal's trial testimony, counsel asked Dr. Regal whether he related Respondent's carpal tunnel syndrome diagnosis—or any of Respondent's other injuries—to Petitioner's conduct and the Accident. Dr. Regal refused to relate Respondent's carpal tunnel syndrome diagnosis—or any other injury/treatment received by Respondent—to the Accident; instead, opting to speak in terms of speculative possibilities using terms like "can" and "could," rather than reasonable medical probabilities. [J.A. 511-19, 647-811.] Thus, Dr. Regal never testified that Respondent's medical treatment was causally related to the Accident, meaning

Respondent failed to prove causation, a *prima facie* element of her negligence claim, against Petitioner at the trial below.

Aside from Respondent's own self-serving, layperson testimony,[3] Dr. Regal was the only other witness called by Respondent during her case-in-chief to testify as to Respondent's past medical specials and proximate cause of Respondent's injuries. As noted, *supra*, layperson testimony is not sufficient to prove causality when the cause of injury is not reasonably direct or obvious, as in the case *subjudice*.

This Court provided clear instructions to the jury on the necessity of Respondent proving causation as part of her negligence claim. Specifically, jury instruction number 5 states that Respondent must provide by a greater weight of the evidence "[t]hat Fred Starliper's negligence was the proximate cause of Respondent's injuries." [*See* J.A. 284-85.] Jury instruction number 6 states, in relevant part, as follows:

> An injury or damage is proximately caused by an accident whenever it appears from the evidence in the case, that the accident played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probably consequence of the accident. Accordingly, you may not find for Plaintiff Adrienne Johnson in this case unless you believe that the accident played a substantial part in bringing about or actually causing the Plaintiff's injuries.
>
> **When Plaintiff claims damages from injury that are not obvious, the Plaintiff must prove causation by medical testimony to a reasonable degree of medical probability. If Plaintiff has not done so, she has failed to prove causation.**
>
> Fred Starliper's conduct proximately caused the injury if: (1) the conduct, in the natural and probable sequence of events, brought about the injury and (2) the injury would not have happened without the conduct.

[3] [J.A. 426-448.]

[J.A. 285.] Jury instruction number 9 "instructs the jury that should you find, by a preponderance of the evidence, that the Defendant was negligent and that such negligence proximately caused or contributed to Respondent's injuries, then she is entitled to recover for her damages and losses." [J.A. 287.]

This case is almost perfectly analogous to *Spencer v. McClure*, wherein the Supreme Court of Appeals of West Virginia upheld the trial court's Rule 50(a) directed verdict at the close of the Respondent's case-in-chief. Similar to the instant case, in *Spencer*, the plaintiff was rear-ended by defendant.[4] At trial, the plaintiff in *Spencer* called Stephen Thaxton, a chiropractor that treated the plaintiff after the plaintiff's motor vehicle accident with the defendant. Dr. Thaxton "stated that [the plaintiff's] injuries were consistent with injuries that might be received in a rear-end collision . . . [but] he could not say what portion of [the plaintiff's] symptoms was caused by the [defendant's] impact." *Id.* at 454. The plaintiff also called her treating doctor, Dr. George Zakaib, at trial. As shown below, Dr. Zakaib's trial testimony is nearly identical to the causation opinions (or lack thereof) provided by Dr. Regal in the instant case:

> Dr. Zakaib examined [the plaintiff] on one occasion and recommended surgery for her left shoulder. When asked whether [the plaintiff's] shoulder injury was related to the accident, Dr. Zakaib at first stated that he would be 'hard pressed' to make the connection. However, he later said that he believed [the plaintiff's] shoulder was injured in the accident because that was what [the plaintiff] told him.

Id.

At the close of the plaintiff's case in *McClure*, the defendant moved for a directed verdict, which the trial court granted. *Id.* Subsequently, the plaintiff appealed to the Supreme Court of

[4] The only factual difference being that, in *Spencer,* the plaintiff was rear-ended by multiple cars by a chain reaction accident.

Appeals of West Virginia, which upheld the trial court's granting of the defendant's directed verdict affirming that the plaintiff failed to show that the defendant's tortious conduct proximately caused the plaintiff's injuries. In so holding, the Supreme Court stated as follows:

> [The plaintiff] offered expert medical testimony from Dr. Thaxton and Dr. Zakaib. **However, neither doctor was able to testify that the negligence of [the defendant]] caused or contributed to [the plaintiff's] injuries**. In particular, Dr. Thaxton was only able to say that the third collision which involved [the defendant] *could have* exacerbated the injuries suffered by [the plaintiff] as a result of the first and second collisions. When questioned further, Dr. Thaxton stated that he could not say what portion of [the plaintiff's] injuries resulted from the third collision. Likewise, Dr. Zakaib did not attribute any of [the plaintiff's] injuries to the actions of [the defendant]. Dr. Zakaib only testified that he believed that [the plaintiff's] left shoulder was injured in the accident because that was what she told him . . . . **Dr. Thaxton only testified that it was *possible* that [the plaintiff's] injuries were aggravated by the collision involving [the defendant]. Such testimony does not provide a sufficient basis from which a reasonable jury could find that [the defendant] proximately caused [the plaintiff's] injuries.**

Id. at 456 (italics in original) (bold added for emphasis). Moreover, just like in the instant case, in *Spencer*, the only other evidence offered by the plaintiffs on defendant's proximate cause was plaintiff's own testimony. The Supreme Court found plaintiff's testimony "offered no evidence from which a jury could conclude that [the defendant] proximately caused or contributed to [the plaintiff's injuries." *Id.*

There is very little factual distinction between *Spencer* and the instant case on the issue of proximate causation. In both cases, plaintiffs' medical experts failed to relate or attribute plaintiffs' injuries to the defendants' tortious conduct. Moreover, in both cases, plaintiffs' trial testimony failed to provide any evidence that could lead a jury to conclude that the defendants' proximately caused plaintiffs' injuries.

Accordingly, the Circuit Court below erred in admitting the challenged medical bills without the appropriate foundation expert testimony establishing causality. *See, e.g.*, *Collins*, 486 at 798. Accordingly, Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, Petitioner requests that this Court instruct the Circuit Court below to enter a remittitur of the jury's awards for: (1) past medical specials; (2) future medical expenses to expenses to $0.00; and (3) out-of-pocket expenses to the amount supported by the evidence presented at trial.

B. THE CIRCUIT COURT ERRED IN UPHOLDING THE JURY'S AWARD OF FUTURE MEDICAL EXPENSES NOT SUPPORTED BY EVIDENCE PRESENTED AT TRIAL.

Petitioner appeals the Circuit Court's Post-Trial Order because: (1) Respondent failed to present sufficient evidence to prove that future carpal tunnel surgery was required as a proximate result of the Accident; and (2) Respondent failed to present any evidence to establish that Respondent will actually require the carpal tunnel surgery in the future within a reasonable degree of certainty. For those reasons, the Circuit Court below erred in denying Petitioner's Post-Trial Order, and this Court should vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, Petitioner requests that this Court instruct the Circuit Court below to enter a remittitur of the jury's awards for: (1) past medical specials; (2) future medical expenses to expenses to $0.00; and (3) out-of-pocket expenses to the amount supported by the evidence presented at trial.

West Virginia jurisprudence requires a plaintiff to prove her future damages to a reasonable degree of certainty. *See* syl. pt. 9, *Jordan v. Bero*, 210 S.E.2d 618 (W. Va. 1974) ("The

permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages."). "The prognosis of the future effect of permanent injuries . . . must be elicited from qualified experts, evaluated first by the trial court and then, if found sufficient, considered by the jury upon proper instruction from the court." *Id.* at syl. pt. 8. "[W]here the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.") *Id.* at syl. pt. 11, in part. "Proof of future medical expenses is insufficient as a matter of law in the absence of any evidence as to the necessity and cost of such future medical treatment." *Id.* at syl. pt. 16. This Court provided the jury with clear instructions on future medical specials and the burden of proof required to award such damages. Specifically, jury instruction number 13 states:

> You are further instructed that Plaintiff Adrienne Johnson may not recover any damages for the future effects of her injuries unless she proves with reasonable certainty that the injuries she claims are, either permanent, or will have future effects.
>
> If after considering the evidence, you find that she has failed to prove by a preponderance of the evidence that the injuries she claims are, either permanent in nature, or will have future effects, you may not award her damages for the future effects of the alleged injuries, if any.
>
> You are instructed that any claim for future medical expenses must be proven with reasonable certainty. You may not award such damages based on speculation or the possibility that such expenses may be incurred. You are further instructed that the Plaintiff is not allowed to recover future medical expenses for conditions unrelated to the accident.
>
> Therefore, if after the evidence has been presented, you find that it is not reasonably certain that Adrienne Johnson will incur future medical costs claimed, you may disregard those items as elements of damages.

[J.A. 289.]

The evidence presented at trial, viewed in the light most favorable to Respondent, does not establish that Respondent will require future carpal tunnel syndrome surgery as a proximate result of the Accident with the reasonable certainty required under West Virginia law. Respondent last presented to Dr. Regal in February of 2023, wherein Respondent advised that her hand numbness is much improved, and that she does not have significant symptoms of her carpal tunnel. During his evidentiary deposition, Dr. Regal conceded that—as of the time of her last visit—Respondent did not need or require carpal tunnel release surgery.

> Q: So it looks like based on [the February 2023 visit], there is not need for [carpal tunnel] surgery.
>
> A: At that time point, correct.
>
> Q: But that's the last time you saw [Respondent]?
>
> A: Yes.
>
> Q: Okay. So based on the last time you saw [Respondent], based on the complaints, there's really not an indication for [surgery]. And then you haven't seen [Respondent] since?
>
> A: That is correct.

[J.A. 768.]

More importantly, Respondent's counsel never asked, and Dr. Regal never testified, that the Respondent required the possible future surgery **because of the Accident**. [J.A. 647-810.] The entire deposition of Dr. Regal is absolutely void of any reference to any causal connection between the surgery and the Accident.

Accordingly, Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested

medical specials totaling $4,995.17. In the alternative, this Court should vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17.

C. THE CIRCUIT COURT ERRED IN UPHOLDING THE JURY'S AWARD OF OUT-OF-POCKET EXPENSES NOT SUPPORTED BY EVIDENCE PRESENTED AT TRIAL.

The jury's verdict award for Respondent's future medical specials and out-of-pocket expenses are excessive and not supported by any evidence submitted at trial. Specifically, the jury awarded $26,000.00 in future medical specials, when Respondent only blackboarded $10,885.37 in future medical specials at trial, i.e., the estimated cost of a possible carpal tunnel release surgery with Dr. Regal. [J.A. 8-9.] Moreover, the jury awarded $1,000.00 in out-of-pocket expenses, when Respondent only blackboarded $115.52 in out-of-pocket expenses. [J.A. 8-9.]

"To warrant a recovery for future medical expenses, the proper measure of damages is not simply the expenses or liability which shall or may be incurred in the future but it is, rather, the reasonable value of medical services as will probably be necessarily incurred by reason of the permanent effects of a party's injuries." Syl. pt. 15, *Jordan v. Bero*. In this case, Respondent presented evidence that a future carpal tunnel surgery with Dr. Regal, if ultimately required, would cost $10,885.37. [J.A. 430.] That is the only evidence of future medical expenses admitted into evidence at trial. Despite that, the jury awarded approximately 2.5x the blackboarded future medical specials. [J.A. 4-9.] As made clear in syllabus point 15 of *Jordan v. Bero*, the proper measure of future medical damages is "the reasonable value of medical services." Syl. pt. 15, *Jordan v. Bero*. The jury's award is excessive and not tethered to the "reasonable value" of Respondent's carpal tunnel release surgery with Dr. Regal. Remittitur is necessary to remedy this error.

Likewise, the jury awarded Respondent nearly 10x the amount of out-of-pocket expenses that Respondent admitted into evidence at trial. [*See* J.A. 4-9.] Under West Virginia Code § 56-6-31, out-of-pocket expenses are considered a special damage. *See* W. VA. CODE § 56-6-31. Special damages must be proven with evidence. *See Sargent v. Malcomb*, 146 S.E.2d 561, 395-96 ("[T]his court will reverse the action of the trial court in refusing to set aside the verdict on the ground of excessiveness where the verdict is clearly in excess of the amount which the evidence shows the Respondent is entitled to recover.").

Accordingly, Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, this Court should vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17.

D. THE CIRCUIT COURT ERRED IN UPHOLDING AN AWARD OF FUTURE MEDICAL SPECIALS SUPPORTED ONLY BY RESPONDENT'S SPECULATIVE LAY TESTIMONY REGARDING FUTURE DISABILITY.

The Circuit Court below erred in permitting Respondent to testify about a 3- to 6-week disability resulting from future carpal tunnel surgery and her belief that she might be fired due to this disability. Respondents sought to blackboard $14,000.00 in future medical specials for Respondent's physical therapy treatment after any future carpal tunnel surgery. At the pre-trial, Petitioner moved to strike portions of Dr. Regal's testimony relating to the $14,000.00 physical therapy, arguing that future physical therapy was not proven to a reasonable degree of medical certainty because Dr. Regal testified that only 10% of his carpal tunnel patients require post-surgical therapy. [J.A. 52; 291-311.] However, out of the 10% that do require physical therapy

after carpal tunnel release surgery, he noted he generally writes a prescription for 6 to 12 weeks of therapy. [J.A. 52.] The Circuit Court agreed and granted Petitioner's motion to strike and ordered as follows: "Plaintiff is prohibited from introducing any opinion evidence from Dr. Regal that the Plaintiff requires physical therapy in the future." [J.A. 11-13.]

Despite this prior ruling from the Circuit Court, Respondent made an end-run around the Circuit Court's Order and testified, as a layperson that the carpal tunnel surgery would cause her to be disabled for the same exact period of time that Dr. Regal testified at trial that 10% of his patients receive physical therapy post-carpal tunnel release—6 to 12 weeks—as follows:

> Q: You have not yet had [the carpal tunnel surgery]?
>
> A: That is correct.
>
> Q: Tell the jury basically first, why are you still not taking that option if it may ultimately help your wrist and possibly give you more of a long-term effect?
>
> A: There are all the normal dangers of surgery. There's a likely possibility that it won't improve anything, that it might actually make things worse. But the one thing that is very clear is it is going to be a period of disability and I won't be able to use my hand at all. Your hand is cut open by the surgery and in order for it to heal you have a brace on your wrist.
>
> Mr. Mohler: Objection, Your Honor. Again, she is giving medical testimony that the doctor – I don't know what they asked the doctor that and now she is going to talk about it.
>
> The Court: Overruled. The testimony here is why she is choosing not to go forward with the surgery at this time. It's not a medical opinion. It's her testimony of why she is choosing not to have it. Overruled.
>
> The Witness: There will be a period of disability that is going to be at least I would say I am estimating six weeks to three months.
>
> Mr. Mohler: I object and move to strike.

Mr. Brewer: I think she is, again, able to give an understanding of what she would anticipate from surgery.

The Court: The objection is noted for the record and overruled.

[J.A. 432-33.]

Ultimately, despite Respondent only presenting $10,885.37 in future medical specials for the carpal tunnel surgery, based on her inappropriate layperson testimony regarding her disability following the surgery, the jury awarded $26,000.00 in future medical specials. [J.A. 8-9.]

West Virginia jurisprudence requires a plaintiff to prove her future damages to a reasonable degree of certainty. *See* syl. pt. 9, *Jordan v. Bero*, 210 S.E.2d 618 (W. Va. 1974) ("The permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages."). "The prognosis of the future effect of permanent injuries . . . must be elicited from qualified experts, evaluated first by the trial court and then, if found sufficient, considered by the jury upon proper instruction from the court." *Id.* at syl. pt. 8. "[W]here the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.") *Id.* at syl. pt. 11, in part. "Proof of future medical expenses is insufficient as a matter of law in the absence of any evidence as to the necessity and cost of such future medical treatment." *Id.* at syl. pt. 16.

In this case, there is no dispute that Respondent is a lay person not qualified to testify as a medical expert. There is also no dispute that Respondent's sole medical expert, Dr. Regal, could not testify with any degree of medical certainty that Respondent would even require the future

carpal tunnel surgery; and Dr. Regal's testimony concerning post-surgery rehabilitation was stricken prior to trial for not being based on any degree of medical certainty.

Accordingly, Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, this Court should vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17.

E. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S MOTION FOR DIRECTED VERDICT AND UPHOLDING THE JURY'S AWARD BECAUSE RESPONDENT FAILED TO PROVE, AT TRIAL, THAT HER ALLEGED INJURY WAS CAUSED OR EXACERBATED BY THE ACCIDENT.

Petitioner sets forth this assignment of error because the Circuit Court below erred in denying Petitioner's Post-Trial Order when Respondent, through her medical expert, Dr. Regal, utterly failed to prove at trial that her alleged injury was caused or exacerbated by the Accident with Petitioner.

The relationship of the Respondent's alleged injury to the Accident was never established. Respondent did not complain of wrist pain until two (2) years and nine (9) months later. [J.A. 150-51.] Because causation was not obvious, she was required to prove causation by expert testimony. *See* syl. pt. 6, *Spencer*, 618 S.E.2d 451 ("Proximate cause is a vital and an essential element of actionable negligence and must be provided to warrant a recovery in an action based on negligence.").

At trial, Respondent submitted the testimony of one medical witness, Dr. Regal, who never testified that the Accident caused her carpal tunnel, and he further never testified that it exacerbated

her carpal tunnel. Rather, Dr. Regal testified in his evidentiary deposition that an Accident **could have** done so, and that it **was possible** that it did. [J.A. 647-811 (emphasis added).] At Dr. Regal's deposition, Respondent's counsel first asked, "do you contribute [sic] any of that [carpal tunnel] to the accident?" Dr. Regal responded "It **could be** related" [J.A. 515 (emphasis added).]

Respondent's counsel then asked Dr. Regal if, "in your opinion, your expert opinion, was the carpal tunnel exacerbated or made worse by the motor vehicle accident?" [J.A. 162.] Dr. Regal responded, "So I'm unable to prove whether the accident directly did it, but I do believe beyond a reasonable doubt that **it could have**." [J.A. 162 (emphasis added.] In an attempt to clean up Dr. Regal's insufficient causation testimony, Respondent's counsel inquired further by specifically asking, "Do you attribute **her complaints** and symptoms **to the motor vehicle accident**?" [J.A. 173 (emphasis added).] Dr. Regal's response highlights Respondent's failure to attribute her injuries to the Accident, "I believe **a** motor vehicle collision **can** exacerbate her right hand numbness." [J.A. 173 (emphasis added).] Dr. Regal's testimony that "a" motor vehicle accident "can" cause right hand numbness is far from the reasonable degree of medical probability required to prove that <u>this</u> particular Accident actually caused Respondent's particular alleged injuries.

While telling, the aforementioned testimony from Dr. Regal was just the beginning of Dr. Regal's testimony, littered with speculation about how an accident in general could or can cause the injuries alleged by Respondent. For instance, Dr. Regal further testified that "I believe the carpal metacarpal joint arthritis **can be** exacerbated **by trauma**." [J.A. 180 (emphasis added).] Notably, Dr. Regal's testimony was not that Respondent's joint arthritis was—to a reasonable degree of medical probability—caused by this particular Accident. Similarly, when asked by Petitioner's counsel on cross-examination whether, "[i]n your opinion, Doctor, being an orthopedic doctor and having a specialty in hands, what is the cause of her continued pain and

symptoms?," Dr. Regal testified, "I believe her symptoms are multifactorial. I believe her cervical spine stiffness[5] is related and arthritis which **may be** post-traumatic and I believe her hand numbness and hand tingling **is attributable to her carpal tunnel**." [J.A. 190 (emphasis added).] Notably, however, Dr. Regal never attributed Respondent's carpal tunnel to the Accident.

Based upon the lack of causation evidence, at the close of Respondent's case-in-chief, Petitioner's counsel moved for directed verdict and highlighted the utter lack of Respondent's evidence establishing that the Accident with Petitioner caused or exacerbated Respondent's alleged injuries that Respondent sought to relate to the Accident. [J.A. 506-19.] Ultimately, the Circuit Court below denied Petitioner's motion for directed verdict while admitting:

> I think it is one of a close call. It would have been cleaner if the question had been asked in the form of whether or not there is a reasonable degree of medical probability that the carpal tunnel is related to the accident. It's inartful the way that the doctor responded. But I think it is to the degree where it does need to go to a jury based upon . . . Page 46, lines 17 through 20.
>
> That is where the doctor says, "I do believe that it's beyond a reasonable medical doubt that it **could have been** exacerbated her symptoms and made them worse."

[J.A. 518 (emphasis added).]

There can be no dispute that Dr. Regal, at his evidentiary deposition, failed to provide testimony to a reasonable degree of medical probability that attributed Respondent's contested injuries and damages to the Accident with Petitioner. [J.A. 647-811.] Testimony cannot be to a "reasonable degree of medical probability" if it is solely based upon causation testimony that car

[5] Notably, Dr. Regal did not see Respondent for two years and nine months after the Accident and never treated her for cervical stiffness. Dr. Sarah Levy was Respondent's doctor she saw for her cervical stiffness after presenting with complaints at emergency room of neck pain. Notably, Dr. Levy—nor any other medical professional—ever provided testimony—at trial or otherwise—that the Accident caused the cervical stiffness or that any treatment received by Respondent after her initial emergency room visit was causally related to Accident. Petitioner's medical expert, Dr. Cirincione, testified to a reasonable degree of medical certainty that Respondent's neck pain was caused by her previously neck injury and that pre-existing arthritis was not causally related to the Accident.

accidents, in general, can or could possibly cause the types of injuries allegedly sustained by Respondent in the Accident. As shown at trial, Dr. Regal's testimony was exactly that.

After the Circuit Court below denied Petitioner's directed verdict, Petitioner called their medical expert, Dr. Cirincione. Dr. Cirincione testified to a reasonable degree of medical certainty that Respondent's contested injuries and damages or any exacerbation thereof were not attributable to the Accident. [J.A. 572-591.] Specifically, first, Dr. Cirincione testified the emergency room personnel performed a physical exam of Respondent's wrists and hands after the Accident and documented no injury to either. [J.A. 574.] Second, Dr. Cirincione testified that the nature of the Accident, which involved Respondent being bumped from behind, would result in Respondent's body going backward after the impact, making it mechanically impossible for her to have jammed her wrist on the steering wheel as a result of the Accident—as implied by Dr. Regal's testimony. [J.A. 575-76.] Finally, Dr. Cirincione testified as follows:

> It's within a reasonable degree of medical probability impossible that the auto accident that has no injury and no complaint of any right wrist pain at the time of the accident in a patient who is a woman over 60 doing repetitive activities more than two years later has carpal tunnel.
>
> It is impossible to state within a reasonable degree of medical probability that those carpal tunnel syndrome symptoms and findings are associated with the motor vehicle accident. It's impossible. It doesn't make any sense.

[J.A. 578.]

For these reasons, Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, Petitioner requests that this Court instruct the Circuit Court below to enter a remittitur of the jury's awards for: (1) past medical specials; (2)

future medical expenses to expenses to $0.00; and (3) out-of-pocket expenses to the amount supported by the evidence presented at trial.

VI. CONCLUSION

For these reasons, Petitioner respectfully requests that this Court vacate the Circuit Court's Post-Trial Order and Judgment Order and remand this case, with instructions, to the Circuit Court below to enter judgment consistent with this Court's ruling in the amount of the uncontested medical specials totaling $4,995.17. In the alternative, Petitioner requests that this Court instruct the Circuit Court below to enter a remittitur of the jury's awards for: (1) past medical specials; (2) future medical expenses to expenses to $0.00; and (3) out-of-pocket expenses to the amount supported by the evidence presented at trial.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FRED STARLIPER

Petitioner,

v. 24-ICA-263

ADRIENNE JOHNSON, (CC-19-2021-C-20)

Respondent.

On Appeal from the Circuit Court of Jefferson County
Case No. CC-19-2021-C-20
The Honorable Judge Bridget Cohee

CERTIFICATE OF SERVICE

I, David A. Mohler, do hereby certify that on the **27th day of September 2024**, I e-filed "***Petitioner's Brief***" via the Court's E-Filing system, which will provide notification of same to counsel of record as follows:

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