IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FRED STARLIPER,
Petitioner,

v.

ADRIENNE JOHNSON,
Respondent.

Case No.: 24-ICA-263
Case No. Below: CC-19-2021-C-20

RESPONDENT'S BRIEF

Submitted by:

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II. STATEMENT OF THE CASE

On March 2, 2019, while awaiting to merge onto Route 9 near Ranson, West Virginia, Respondent Adrienne Johnson's (hereinafter referred to as "Ms. Johnson") vehicle was struck from behind by the Petitioner Fred Starliper (hereinafter referred to as "Mr. Starliper") due to Mr. Starliper's negligent conduct. J.A. 000539 – 40; 000009. Ms. Johnson was in immediate pain, and she was taken from the scene of the collision to Jefferson Medical Center, by ambulance, where she was seen in the Emergency Department and was diagnosed with various injuries, including, but not necessarily limited to, whiplash injury, lumbar strain, and a closed head injury. J.A. 000540 – 46; 000365 – 69.

While Ms. Johnson was being taken to Jefferson Medical Center, Ms. Johnson's daughters, Ainslee and Anelise MacLeod, remained at the scene of the collision as the vehicle was a rental car, and the rental car company instructed them to leave the vehicle at the scene and wait for a tow truck. Ms. Johnson had rented the vehicle for the next several days, but she did not receive any refund from the rental car company for the unused days of the rental.

Over the next several weeks, Ms. Johnson experienced continued pain, as well as numbness and tingling in her wrist and fingers. J.A. 000378 – 79. At the time of the collision, Ms. Johnson did not have a primary care physician, so Ms. Johnson sought a primary care physician. J.A. 000379. She made the first available appointment with Dr. Sara Levy of Allegheny Health Network, that appointment being May 22, 2019. J.A. 000380 – 81. During that appointment, Ms. Johnson expressed pain in her neck and shoulders, as well as numbness and tingling in her fingers and wrist. Dr. Levy provided a referral to physical therapy. J.A. 000381 – 83.

Over the next several months following the completion of the physical therapy ordered by Dr. Levy in 2019, Ms. Johnson began experiencing recurrent pain and numbness. J.A. 000396 – 400. However, she was unable to make any appointments with Dr. Levy due to the COVID-19 Pandemic. J.A. 000400. In 2021, Ms. Johnson was able to make a follow-up appointment with Dr. Levy in March 2021, when Ms. Johnson received a second physical therapy referral. J.A. 000402 – 4.

After experiencing recurrent pain a second time, Ms. Johnson requested a referral to orthopedics in November 2021, making an appointment with Dr. Steven Regal in December 2021. J.A. 000405 – 10. During that appointment, Dr. Regal diagnosed Ms. Johnson with chronic right shoulder pain, bilateral carpal tunnel syndrome, acute pain of the right wrist, hand pain, pain of the upper extremity, cervical radiculopathy, and right carpal tunnel syndrome. J.A. 000896. Dr.

Regal ordered a nerve conduction study, which was completed in December 2021, which confirmed the diagnosis of carpal tunnel syndrome. J.A. 000896; 000969. Further, Dr. Regal provided a referral to a spine specialist regarding Ms. Johnson's neck and shoulder pain. J.A. 000896.

On January 7, 2022, Ms. Johnson presented to Dr. Sauber, the spine specialist. Dr. Sauber diagnosed Ms. Johnson with cervical spondylosis with chronic neck pain. J.A. 000912. Dr. Sauber recommended conservative treatment with medical management of her symptoms, activity modification avoidance, physical therapy, and topical modalities. J.A. 000912. If Ms. Johnson's symptoms were not relieved, continued care would be ordered. J.A. 000912. During that visit with Dr. Sauber, a third referral to physical therapy was made. J.A. 000912.

In February 2022, Ms. Johnson again presented to Dr. Regal who provided injection treatments for Ms. Johnson's carpal tunnel diagnosis. J.A. 000969. Dr. Regal further recommended a cock-up wrist brace. In March 2022, Ms. Johnson presented again to Dr. Regal, requesting a renewal or extension of the physical therapy ordered by Dr. Sauber, which was made by Dr. Regal. J.A. 000984.

Ms. Johnson presented to Dr. Regal a fourth time in February 2023 when additional injection treatments were provided for Ms. Johnson's carpal tunnel diagnosis. J.A. 001347. During that visit, Dr. Regal advised Ms. Johnson that when her carpal tunnel syndrome symptoms progress, she will require corrective surgery. J.A. 0001347.

At trial, Dr. regal testified that, in his expert medical opinion, Ms. Johnson's injuries and complaints were related to, i.e. caused by or exacerbated by, the collision resulting from the Petitioner's negligence. J.A. 000131; 000159 – 62; 000165; 000168; 000179 – 80; 000187; 000189 – 90; 000204; and 000206 – 7. Dr. Regal testified that he would not state the treatment or care was

caused by the accident. J.A. 000765 – 66. However, Dr. Regal testified that the injuries and complaints of Ms. Johnson were caused or exacerbated by the collision, and Ms. Johnson's injuries and complaints are the cause of the treatment. J.A. 000205 – 6.

Dr. Regal further testified to a reasonable degree of medical certainty that, despite Ms. Johnson's desire to avoid surgery, Ms. Johnson will require surgery at some time in the future to correct her carpal tunnel injury. J.A. 000190 – 91; 000243 – 44. Furthermore, the surgery would not address Ms. Johnson's continued complaints of neck and shoulder pain, which, according to Dr. Sauber as testified to by Dr. Regal, would require additional treatment if symptoms did not subside. J.A. 000192. As of the date of trial, Ms. Johnson continued to experience neck and shoulder pain. J.A. 000422; 000428-30; 000441.

As to Ms. Johnson's out-of-pocket expenses, documentary evidence was provided as to the medications prescribed (J.A. 000443), alternative travel via Uber (J.A. 000372) and Amtrak, and parking expenses during physical therapy appointments. However, Ms. Johnson and Ms. Johnson's daughter testified to other out-of-pocket expenses for which no documentary evidence was provided, such as CBD ointment (J.A. 000400), copper bracelets (J.A. 000400), a wrist brace (J.A. 000424), and the unused time/miles from the rental car after it was collected.

Based upon the evidence and testimony presented at trial, the jury, after deliberations, concluded that Mr. Starliper was One Hundred Percent (100%) at fault for the collision and that Ms. Johnson was due Twenty-Five Thousand Dollars ($25,000.00) for past medical and pharmacy bills, One Thousand Dollars ($1,000.00) for past out-of-pocket expenses, Twenty-Five Thousand Dollars ($25,000.00) for past pain and suffering, emotional distress, One Thousand Seven Hundred Ninety-Two Dollars ($1,792.00) for past lost employment, Twenty-Six Thousand Dollars ($26,000.00) for future medical expenses, and Twenty-Six Thousand Dollars ($26,000.00) for

future loss of enjoyment of life and pain and suffering. J.A. 000008 – 9. The jury's total award to Ms. Johnson was One Hundred Four Thousand Eight Hundred Eighteen Dollars ($104,818.00). J.A. 000009. Upon Ms. Johnson's motion for pre-judgment interest, the Circuit Court awarded pre-judgment interest in the amount of Four Thousand Six Hundred Fifty-Eight Dollars and 12/100 ($4,658.12). J.A. 000004 – 6. The Circuit Court entered judgment in favor of Ms. Johnson against Mr. Starliper in the amount of One Hundred Nine Thousand Four Hundred Seventy-Six Dollars and 12/100 ($109,476.12). J.A. 000004 – 6.

Mr. Starliper moved the Circuit Court for a new trial and/or a directed verdict, which was denied by the Circuit Court by Order dated May 27, 2024. J.A. 000001. Mr. Starliper then appealed to this Court.

III. STANDARD OF REVIEW

"The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, [a] court, after considering the evidence in the light most favorable to the nonmovant party, [should] sustain the granting [or denial] of a [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting [or denying] a directed verdict will be reversed." Syl. pt. 3, *Brannon v. Riffle*, 197 W.Va. 97 (1996).

IV. STATEMENT REGARDING ORAL ARGUMENT

Respondent does not believe that oral argument is necessary in this case as the facts and legal arguments are adequately presented by the briefs and appendix record in this matter.

V. SUMMARY OF THE ARGUMENT

The Circuit Court did not err in upholding the jury's award of past medical special damages. The requirement for Respondent is to present sufficient evidence to the jury, to a reasonable degree of medical probability, that would permit the jury to draw reasonable inferences that her injuries were caused or exacerbated by the Petitioner's negligence. There is no requirement within the law that states an expert witness must draw the conclusion that the medical invoices themselves are directly caused by the tortfeasor's negligence, only that the injury was caused or exacerbated by the tortfeasor's negligence and the corresponding medical treatment is reasonable and necessary.

Dr. Regal testified, numerous times throughout his videotaped deposition that was played at trial, that in his expert professional opinion, Ms. Johnson's injuries were caused or exacerbated by the collision caused by the Petitioner's negligence. Although not required under the law of this state, Dr. Regal further tied the medical appointments and invoices to the Petitioner's negligence in stating that the cause of the treatment is the injury and the cause of the injury is the collision.

The Court did not err in upholding the jury's award of future medical damages as Dr. Regal testified, in explicit terms, that Ms. Johnson's carpal tunnel injury that she suffered as a result of the Petitioner's negligence will require surgery. Petitioner grossly mischaracterizes Dr. Regal's testimony and medical record to suggest that Dr. Regal stated Ms. Johnson did not require surgery. However, Dr. Regal stated that Ms. Johnson did not require surgery at the time of the appointment because Ms. Johnson's symptoms were successfully being conservatively managed. Dr. Regal went on to state that at some point, in the future, Ms. Johnson will require corrective surgery. Carpal tunnel syndrome does not go away without corrective surgery.

The Petitioner is not entitled to remitter of future medical damages as the jury was provided sufficient evidence to conclude that Ms. Johnson will require future medical treatment, aside from the carpal tunnel release surgery. Dr. Sauber, who did not testify at trial but whose medical records were included in the trial exhibits and within the Appendix, stated that Ms. Johnson should be seen back for future treatment if Ms. Johnson's neck and shoulder pain persisted. Furthermore, the physical therapist for Ms. Johnson, who also did not testify at trial but whose records were included in the trial exhibits and within the Appendix, stated that Ms. Johnson should continue her conservative management of her neck and shoulder pain. Ms. Johnson testified that, as of the date of trial, her neck and shoulder pain persisted. The carpal tunnel release surgery will not correct or relieve any symptoms of Ms. Johnson's neck and shoulder pain. Additionally, the jury was provided the approximate cost of additional treatment as they jury had numerous medical invoices and bills admitted into the record at trial from which it could determine how much additional medical expense Ms. Johnson may incur. Dr. Regal testified that the conservative management of Ms. Johnson's neck and shoulder pain was reasonable and necessary given her complaints, as well as the costs associated.

The Petitioner is not entitled to remitter of out-of-pocket damages awarded to Ms. Johnson. While documentary evidence of alternative travel was provided to the jury in the amount of One Hundred Fifteen Dollars and 52/100 ($115.52), other out-of-pocket damages were submitted as evidence, both in documentary form and testimony from Ms. Johnson and her daughter. The jury's award of out-of-pocket damages is not excessive to suggest the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case.

The Circuit Court did not err in permitting Ms. Johnson to testify as to her personal beliefs and reasons as to why she had not yet had the carpal tunnel release surgery recommended by Dr.

Regal. Ms. Johnson did not testify to any medical or expert testimony, but she only testified as to her beliefs. The Petitioner had the opportunity to rebut Ms. Johnson's beliefs as unreasonable through his own expert witness, Dr. Cirincione, but he failed to do so. The Petitioner's rights were not infringed or affected by Ms. Johnson's testimony, and any error of the Circuit Court to this effect was harmless as there is no suggestion that the jury's verdict was influenced by one (1) answer throughout a four (4) day trial.

VI. ARGUMENT

A. The Circuit Court did not err in upholding the jury's award of past medical special damages because Dr. Regal provided sufficient and ample evidence to warrant the jury's reasonable inference that the Petitioner's negligence caused Ms. Johnson's injuries and therefore her medical costs and bills were proximately caused by the motor vehicle collision.

Due to the overlapping nature of the Petitioner's Assignment of Errors 1 and 5, Respondent combines her responses to both within Section VI.A. of this Brief for efficiency.

The Petitioner argues that the Circuit Court erred in upholding the jury's award of past medical damages because, he claims, Dr. Regal did not sufficiently state that the direct cause of Ms. Johnson injuries was the collision caused by the Petitioner. Petitioner further argues that Dr. Regal did not sufficiently state that the direct cause of the medical appointments and treatment was the collision caused by the Petitioner. However, such a strict and rigid reading of the laws of this state and the holdings of the Supreme Court of Appeals of West Virginia is absolutely and explicitly not required,.

The Petitioner, in his brief, accurately states and provides this Court with the law. However, the Petitioner grossly mischaracterizes the law. As provided by the Petitioner "[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) (emphasis added). The Petitioner argues this statement of the law means

that the physician or medical provider, in this case Dr. Regal, must state, unequivocally, that the direct cause of the medical treatment is the defendant's negligence. *Pygman,* and its litany of progeny following, do not go this far. Each of the cases cited by the Petitioner in his brief state only that the negligence of the defendant is the proximate cause of the ***injury***. Nowhere is it stated that the negligence must be the proximate cause of the ***medical treatment***.

The Petitioner next cites to *Collins v. Bennet*, 486 S.E.2d 793, 798 (W.Va. 1997) for the premise that there must be a causal connection between the negligent act and the medical treatment. However, the Petitioner takes the quote he cites out of context. Petitioner quotes: "Where the defendant objects to the introduction of medical bills, indicating [that the] defendant's evidence will raise a substantial contest as to [either the question of medical necessity or] the question of causal relationship, the court may admit the challenged medical bills only with the foundation expert testimony tending to establish [medical necessity or] causal relationship, [or both, as appropriate]." See Pet.'s Brief, pg. 8-9 (quoting *Collins*, 486 S.E.2d at 798). Petitioner fails to cite *Collins* further for the premise it truly stands for:

> "Since the proof must show that medical and hospital services were reasonably necessitated by a personal injury, it must necessarily follow that bills for service must be for services reasonably necessary before they are admissible into evidence, and in *Pygman v. Helton*, 148 W.Va. 281, 134 S.E.2d 717 (1964), the Court implicitly did recognize that ***there must be a causal relationship between a defendant's acts and the plaintiff's injuries*** before evidence of the injuries may be admitted into evidence."

Collins, 486 S.E.2d at 798. *Collins* does not stand for the position that the Petitioner argues it does, rather it states the exact opposite: that there must be a causal relationship established between the negligent act and the injuries, not the medical bills, prior to evidence of the medical bills being introduced as evidence.

Petitioner further cites to *Totten v. Adongay*, 337 S.E.2d 2, 8 (W.Va. 1985), *Stoudt v. Eads*, 889 S.E.2d 305, 311 (W.Va. App. 2023), and *Dellinger v. Pediatrix Medical Group, P.C.*, 750

S.E.2d 668 (W.Va. 2013) to argue that Dr. Regal did not establish a causal relationship between the medical treatment and bills and the Petitioner's negligence. Again, each of these cases does not require anywhere near the strict requirements argued by the Petitioner. See *Totten*, 337 S.E.2d at 8 (holding that medical testimony is necessary to establish a causal relationship between the claimed negligence and the ***injury***); see also *Stoudt*, 889 S.E.2d at 311 (holding that expert testimony based on a reasonable degree of probability must be sufficient to permit the jury to draw reasonable inferences); see also syl. pt. 5, *Dellinger*, 750 S.E.2d 668 (holding that a physician must testify in terms of reasonable probability when establishing a casual relation between a ***physical condition*** and the defendant's negligence).

Petitioner complains that Dr. Regal testified in probabilities, using terms such as "can be," "likely," or "could have." Again, such a strict and rigid reading of this state's law is not required. In fact, Dr. Regal testified exactly as he is required to – in a manner that is based upon a reasonable degree of medical probability that permits the jury to draw reasonable inferences.

Additionally, despite the Petitioner's argument that Dr. Regal's testimony must have established causation between the negligence and the medical bills having absolutely zero merit, the Petitioner's argument is fatal even further still because Dr. Regal met the standard which Petitioner's wrongfully argue. The Petitioner points to two questions during Dr. Regal's cross examination when he stated that he would not testify as to whether each appointment with physicians and the related medical records or bills were related to the accident. However, the Petitioner intentionally omits key questions and answers from Dr. Regal's testimony.

> Q: In your opinion, Doctor, being an orthopedic doctor and having a specialty in hands and upper extremity injuries, what is the cause of Ms. Johnson's continued pain symptoms and injuries?
>
> A: I believe her symptoms are multifactorial, which means they come from multiple regions. I believe her cervical spine pain and stiffness is related to arthritis, which may be post-traumatic in nature. I believe her hand numbness and tingling is

directly attributable to her carpal tunnel syndrome. Her thumb pain can be explained by her trigger thumbs, as well as her carpal metacarpal joint arthritis.

Q: And these diagnoses, is it your opinion that they were exacerbated by the March 2nd, 2019 car accident?

A: I believe her neck pain and stiffness is attributable to the motor vehicle collision. I believe her new onset of worsening hand numbness can be attributed to a motor vehicle collision. Her trigger thumbs, I believe, are attributed more to her carpal tunnel syndrome than the actual motor vehicle accident. The arthritis and her thumb can be exacerbated from trauma as well.

Q: And these are your opinions to a reasonable degree of medical certainty. Is that right?

A: That's correct.

J.A. 000189 – 90.[1] Clearly, Dr. Regal adequately and sufficiently tied Ms. Johnson's symptoms, complaints, and injuries to the collision caused by the Petitioner's negligence to permit the jury to draw reasonable inferences that, based on Dr. Regal's medical expert opinion based on a reasonable degree of medical probability (although the question and response state "certainty"), Ms. Johnson's symptoms, complaints, and injuries were caused or exacerbated by the collision. And further still, on no less than Ten (10) occasions throughout Dr. Regal's testimony, Dr. Regal explicitly tied Ms. Johnson's injuries to the collision caused by the Petitioner's negligence. See J.A. 000131; 000159 – 62; 000165; 000168; 000179 – 80; 000187; 000204; and 000206 – 7.

[1] Respondent notes that two (2) objections appear within the quote taken from the transcript of Dr. Regal's testimony in the Joint Appendix. Prior to trial, at the pre-trial hearing before the Circuit Court, these objections were overruled. Accordingly, the transcript and video of Dr. Regal's trial deposition were edited prior to playing the video deposition at trial. Respondent, upon receiving the Petitioner's Rule 7 list of the proposed appendix, requested that the redacted version of the trial deposition be transcript be provided to this Court. Petitioner elected to provide the unredacted version of the transcript, which contains objections and other content of Dr. Regal's testimony which was struck from the video and transcript prior to its presentation to the jury, as well as the redacted version which appears difficult to read.

Even further still, to Petitioner's own question on cross examination, Dr. Regal testified that the cause of the treatment is the symptoms, complaints, and injuries of the patient, which Dr. Regal previously tied to the collision:

Q: And so you can't give an opinion as to the cause of the treatment and all those records, correct?

A: The cause of the treatment is of the patient's ongoing symptoms.

Q: Right.

A: I believe her treatment and everything that was billed was appropriate –

Q: Right.

A: -- indicated.

J.A. 000205 – 6.

To further the argument that Dr. Regal did not testify sufficiently, Petitioner cites to *Spencer v. McClure*, 217 W.Va. 442 (2005). Petitioner argues that the circumstances in *Spencer* are "almost perfectly analogous." However, the circumstances are drastically different. While the plaintiff in *Spencer* was hit from the rear, much like Ms. Johnson, the plaintiff in *Spencer* was involved in a multi-car, multi-impact collision. *Spencer*, 217 W.Va. at 444 – 45. The plaintiff filed suit against Timothy McClure, the driver of the vehicle which caused the initial collision, Phillip Davis, the owner of the vehicle driven by Mr. McClure, and against Sarah Harpold, the driver of the vehicle which caused the second collision. *Id.* at 444.

At trial, the plaintiff argued that there were three separate and distinct impacts: one by Mr. McClure, a second by Mr. McClure, and a third by Ms. Harpold. *Id.* at 444. Due to the chain reaction of events, the plaintiff's treating physicians, Dr. Thaxton and Dr. Zakaib, could testify only speculatively as to whether the collision and impact caused by Ms. Harpold further injured or exacerbated the plaintiff's injuries she suffered resulting from the initial two impacts created by

the collision caused by Mr. McClure. *Id.* The doctors could not testify as to how much or whether Ms. Harpold contributed to the plaintiff's injuries. *Id.* at 447.

In this case, there was no chain reaction of events, multiple impacts or collisions, or any other mechanism which could have caused or was alleged to have caused Ms. Johnson's injuries. Dr. Regal testified that Ms. Johnson's injuries could be attributed to, caused by, or exacerbated by a rear-end motor vehicle collision. See J.A. 000189 – 90. Dr. Regal went further even to describe *how* Ms. Johnson's injuries, especially to her wrist, could or would be caused in a motor vehicle collision from the rear:

> Q: And Dr. Levy suspected bilateral carpal tunnel syndrome. Do you [attribute] any of that to the motor vehicle accident?
>
> A: I think it could be related. Carpal tunnel syndrome is usually idiopathic, which means you get it for no reason at all. In a car accident, you can have stretching of the median nerve, the carpal tunnel nerve, if you're holding the steering wheel and the wrist go backwards, you can get something called a neuropraxia or a stretch of the nerve. It can either make your hand numb just for that injury alone or it can make your underlying carpal tunnel syndrome exacerbated or worse.

J.A. 000160 – 61. On cross examination, Dr. Regal continued:

> Q: So with keeping that in mind, that there's no evidence of trauma in the records, and there's no evidence of complaint of wrist pain in the wrist for two full years in the records that we introduced up until this one, and this mentions that her shoulder was injured when she was taking out the trash and she heard something tear. It's difficult to make a causal connection between the carpal tunnel syndrome when you saw her two years and nine months later and the accident when there's no evidence that she sustained any trauma in the accident, right?
>
> A: Part of the caveat with the time discrepancy is the COVID pandemic where I was canceling carpal tunnel surgery. Patients would call me and say, my hands numb, and we'd tell them, put a brace on.
>
> Q: Right.
>
> A: I'll see you in six months or a year once the world reopens.
>
> Q: Well, but she didn't complain to anybody about it in the whole year of 2019, which was before COVID.
>
> A: Correct.

Q: Is there any evidence of that?

A: There's not.

Q: Okay. So the longer that we go away, doesn't that make it less and less likely that the accident had anything to do with it, especially if there is no evidence that she sustained any trauma to her wrist in the accident?

A: I would expect you to have some neuropraxia from a stretch injury or development of –

Q: If she had, if she had that?

A: Yes.

J.A. 000203 – 4.

Following Dr. Regal's testimony while drawing reasonable inferences, the jury made the determinations from the totality of the evidence presented during trial that Petitioner's negligence caused the collision (J.A. 000008); that Petitioner's negligence either caused or exacerbated Ms. Johnson's injuries; that the cause of Ms. Johnson's treatment and corresponding medical invoices were her symptoms, complaints, and injuries which were caused by the Petitioner's negligence; and that Ms. Johnson was owed One Hundred Four Thousand Eight Hundred Eighteen Dollars ($104,818.00) as compensation for those injuries. J.A. 000008 – 9.

Based on the above and the totality of Dr. Regal's testimony, the jury was provided sufficient evidence to draw reasonable conclusions as to the cause of Ms. Johnson's injuries, as well as the cause of Ms. Johnson's medical treatment, although causation of the medical treatment itself is not required by West Virginia law, and the Circuit Court did not err in denying the Petitioner's motion for a directed verdict based on the same.

B. The Circuit Court did not err in upholding the jury's award of future medical damages as the jury was provided sufficient and ample evidence to support the award.

The Petitioner argues that Ms. Johnson did not sufficiently prove her future medical damages to a reasonable degree of medical certainty. The Petitioner further argues, again wrongly,

that Dr. Regal was required to specifically state that the future carpal tunnel surgery was directly caused by the Petitioner's negligence.[2]

"To form a legal basis for recovery of future [] consequences of the negligent infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury; contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery." Syl. pt. 7, *Jordan v. Bero*, 158 W.Va. 28 (1974).

The Court in *Jordan* was asked to determine, essentially, "how much medical evidence is necessary to meet the standard of reasonable certainty which will support. . . [a jury's] award of damages to lasting and permanent effect of an injury. . ." 158 W.Va. at 43. Convincingly, in *Jordan*, a treating physician and an evaluating neurosurgeon testified on behalf of the plaintiff that he had suffered a traumatic brain injury that left him unconscious for a period of six days and in the hospital for a total period of ten days. *Id.* at 43-44. According to the testimony of the treating physician, despite the plaintiff's "good condition upon his discharge from the hospital, or that he was asymptomatic at the time of the examination, or that there was a 'good prognosis' for recovery, the plaintiff's traumatic brain injury was permanent in nature. *Id.* at 43-45. Although the treating physician at trial was not willing to "play God in prognosticating the future effects of the plaintiff's permanent injury," the Court held that sufficient evidence was presented to the jury to permit their finding of a permanent injury although the jury's award of future medical damages was unsupported by any evidence of the cost of future medical expenses. *Id.* at 44-45, 51.

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[2] To the extent necessary, Respondent incorporates her arguments contained in Section VI.A. of this brief by reference in response to Petitioner's argument that Dr. Regal was required to testify that medical appointments or treatments were directly caused by the Petitioner's negligence. Again, pursuant to *Pygman* and its progeny, the requirement is that Dr. Regal testify to a reasonable degree of medical probability that the injuries were caused by the Petitioner's negligence, and the medical treatment thereafter was medically reasonable and necessary.

Petitioner points to one minor portion of Dr. Regal's testimony, which misleads this Court as to Dr. Regal's testimony. Petitioner argues that because Dr. Regal testified that as of February 2023 when Dr. Regal last met with Ms. Johnson and her symptoms were being conservatively managed with success, that Dr. Regal testified that Ms. Johnson would never need future carpal tunnel surgery. Petitioner's argument to this effect is disingenuous.

Q: Do you have any professional opinions as to Ms. Johnson's necessity for continued care or surgical intervention?

A: I believe that she'll require a carpal tunnel surgery in the near future. Carpal tunnel syndrome does not usually resolve on its own. It's usually slowly progressive and moderate to severe. I believe it should require surgery.

Q: And again, that opinion is to a reasonable degree of medical certainty that she'll require that surgery?

A: That is correct.

J.A. 000190 – 91.

Q: Regardless whether or not Ms. Johnson wants surgery or surgical intervention, the fact is your opinion to a reasonable degree of medical certainty, is that Ms. Johnson needs this surgery. Is that right?

A: A patient with symptoms and moderate to severe carpal tunnel syndrome, EMG is likely to undergo a surgical procedure, and I would recommend that for them.

Q: Okay. And to a reasonable degree of medical certainty, you state that she will need this surgery or she will likely need this surgery at some point?

A: Yes.

Q: Whether that's tomorrow, or six months from now, you're a year from now, she will need this surgery?

Attorney Mohler: Objection. Asked and answered already.

A: Yes.

J.A. 000243 – 44.

After Dr. Regal testified that Ms. Johnson's injuries were caused by or exacerbated by the Petitioner's negligence, Dr. Regal stated, in unequivocal terms, that Ms. Johnson will require this

surgery. The symptoms, pain, and condition will not go away on its own, and it requires surgical intervention. Dr. Regal stated he recommends the surgery to his patients with carpal tunnel syndrome, and accordingly, recommended it to Ms. Johnson. See J.A. 000243 – 44. Despite Ms. Johnson's desire to avoid surgical intervention, Dr. Regal stated, to a reasonable degree of medical certainty, that one of the injuries caused by the collision caused by the Petitioner's negligence will require surgical intervention to repair at some point.

The Circuit Court did not err in denying the Petitioner's request to direct a verdict as to Ms. Johnson's future medical damages awarded by the jury.

C. The Circuit Court did not err in upholding the jury's award of out-of-pocket expenses because there is no evidence the award of out-of-pocket damages was influenced by passion, partiality, prejudice, corruption, or entertained a mistaken view of the case.

The Petitioner argues that the Circuit Court erred as to the jury's award of future medical damages and out-of-pocket expenses, claiming that the awards are excessive and not tethered to the reasonable value of the anticipated medical treatment and that the out-of-pocket expenses are excessive.

1. Award of Future Medical Expenses

"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*, 158 W.Va. 28. "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." Syl. pt. 16, Jordan, 158 W.Va. 28. "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference fairly arising from the evidence in favor of the party for whom the verdict was returned, must be

considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syl. pt. 17, Jordan, 158 W.Va. 28. "[T]he court may permit the plaintiff who attempts to recover for the future effects of his injuries, to infer consequences from a sufficient quantum of evidence, but a court must be scrupulous to prevent pure speculation." Jordan, 185 W.Va. at 50.

The Petitioner points to the cost of the future carpal tunnel surgery (J.A. 000192) as the only evidence of future medical care necessary. However, other evidence was introduced that Ms. Johnson will continue to have other medical treatment and costs for the injuries she sustained in the collision.

Dr. Regal testified that the carpal tunnel surgery would cost, as of the estimate prepared, Ten Thousand Eight Hundred Eighty-Five Dollars and 37/100 ($10,885.37). J.A. 000192. Additionally, Dr. Regal testified that the carpal tunnel surgery would not address Ms. Johnson's other pain and symptoms that she was experiencing. Specifically, Dr. Regal stated that the surgery "would not improve her neck stiffness. It would not improve her shoulder pain." J.A. 000192.

As to whether additional treatment would be necessary for those injuries and symptoms, Dr. Sauber stated in his medical record, as testified to by Dr. Regal, that if Ms. Johnson continued to experience pain, she would require subsequent care, including an MRI or other conservative care such as physical therapy. J.A. 909 – 43. Furthermore, as provided by Ms. Johnson's physical therapist and the associated records, Ms. Johnson was to continue with "skilled progression of therapeutic exercises." J.A. 001312. As testified to by Ms. Johnson at trial, she continued to experience pain and symptoms of the injuries Ms. Johnson suffered in her neck and shoulders, but she was unable to continue with the physical therapy at that time because her referral had run out. J.A. 000422; 000428-30; 000441. Additionally, the jury was provided ample evidence of the cost

of continued physical therapy, conservative treatment, and imaging studies. Throughout the trial, evidence of the expenses Ms. Johnson incurred as a result of her treatments, including physical therapy, imaging studies, and other treatments. Upon receiving evidence that Ms. Johnson was continuing to experience symptoms, Dr. Sauber recommended further care, her physical therapist recommended further care, and the cost of that further care, the jury was free to, and did, award Ms. Johnson additional damages for future medical expenses.

Looking to the totality of the evidence presented to the jury, it is not mere speculation that Ms. Johnson may require further treatment to her neck and shoulder injuries. There is a significant quantum of evidence presented to the jury upon which it could, and did, find that Ms. Johnson will require additional future medical treatment aside from the carpal tunnel release surgery.

In upholding the jury's award regarding future medical damages in excess of the anticipated costs of the carpal tunnel surgery, the Circuit Court did not err.

2. Award of Out-of-Pocket Expenses

The Petitioner complains that the jury's award of out-of-pocket expenses to Ms. Johnson was excessive as to the out-of-pocket damages evidence that was provided to the jury. In arguing that the Circuit Court erred in upholding the jury's award of out-of-pocket expenses, the Petitioner cites only to one parenthetical, stating that a verdict should be overturned when it is clearly in excess of the amount which the evidence shows. See *Sargent v. Malcomb*, 150 W.Va. 393, 395-96 (1966).

However, the burden on the Petitioner in showing that the verdict was "clearly in excess" is more than just arguing that the jury's award was greater than the out-of-pocket damages that Ms. Johnson presented to the jury.

"In a civil action to recover damages for personal injuries, the amount which the plaintiff is entitled to recover being indeterminate in character, the verdict of the jury may not be set aside by the trial court or by this Court on the ground that the amount of the verdict is excessive unless the verdict in that respect is not supported by the evidence or is such that the amount thereof indicates that the jury was influences by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case." Syl. pt. *Sargent v. Malcolmb*, 150 W.Va. 393 (1966). "[A] verdict of a jury will not be disturbed except where it plainly appears to have resulted from mistake, partiality, passion, prejudice or lack of due consideration. . ." *Webb v. Brown & Williamson Tobacco Co.*, 121 W.Va. 115, 122 (1939). *In Armstead v. Holbert*, the Court stated that excessiveness alone cannot be reason to set aside a jury verdict. 146 W.Va. 582, 587 (1961).

The simple fact that the out-of-pocket damages awarded by the jury is excessive is not sufficient to support the Petitioner's request for remitter. The award must be so excessive that it indicates the jury was "influence[d] by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case." Syl. pt. *Sargent*, 150 W.Va. 393.

Petitioner complains that out-of-pocket expenses blackboarded by Ms. Johnson during trial was One Hundred Fifteen Dollars and 52/100 ($115.52), but other evidence was presented of out-of-pocket expenses that were not blackboarded that Petitioner fails to bring to the attention of this Court. Specifically, the documented evidence presented to the jury of out-of-pocket expenses was Sixty Dollars and 43/100 ($60.43) for medications prescribed to Ms. Johnson (J.A. 000443)[3], Sixty-Two Dollars and 52/100 ($62.52) for alternative travel in the form of Uber (J.A. 000372), Fifty-Three Dollars ($53.00) for alternative travel in the form of Amtrak, Thirty-Six Dollars

[3] At trial, Respondent blackboarded the cost of the prescriptions below the cost of the other medical appointments and expenses and were not included in the blackboarded cost of other out-of-pocket expenses amounting to the $115.52 cited by the Petitioner.

($36.00) for parking during physical therapy appointments.[4] Other expenses testified to by Ms. Johnson and her daughter, Ainslee MacLeod, which did not include specific documented amounts include CBD ointments (J.A. 000400), copper bracelets (J.A. 000400), the portion of the rental car fee that was unused following the rental car company's collection of the vehicle following the collision[5] (J.A. 000372), and a wrist brace recommended by Dr. Regal (J.A. 000424).

Petitioner's argument that Ms. Johnson's only out-of-pocket expenses were those for the alternative travel (the $53.00 for Amtrak and $62.52 for Uber equaling the amount cited by Petitioner as $115.52), were not the only out-of-pocket expenses for Mr. Johnson. The jury had other documentary evidence upon which it could rely to increase the award from the amount cited by the Petitioner, as well as ample testimonial evidence from Ms. Johnson and Ms. MacLeod upon which it could rely.

The award by the jury is not so excessive that it requires remitter, and it is not so excessive that it suggests the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case. The Circuit Court did not err in upholding the jury's award of out-of-pocket damages to Ms. Johnson.

D. The Circuit Court did not err in upholding the award of future medical damages as the Respondent did not testify to any medical opinion regarding future disability and only testified as to her reasonable belief of the consequences of corrective surgery.

Petitioner argues that the Circuit Court erred in upholding the jury's award of future medical damages, claiming that the only supporting evidence of future medical damages is Dr. Regal's

[4] At trial, documentary evidence was submitted to the jury regarding the costs for the Amtrak and parking during physical therapy appointments, although the Appendix does not include those exhibits to the jury.

[5] Ainslee MacLeod testified as to the lack of a refund from the rental car company, although Petitioner did not request or include Ms. MacLeod's testimony within the Appendix.

testimony which the Petitioner takes issue with and is responded to above in Section VI.B.[6] and Ms. Johnson's answer to a single question explaining why she had not yet had the surgical procedure recommended by Dr. Regal.

When asked by counsel why Ms. Johnson had not yet had the surgery, Ms. Johnson explained that it was a surgery. It came with the typical risks associated with surgery, and, at that time, Ms. Johnson was unwilling to acquiesce to those risks. J.A. 000432. Following the Petitioner's objection at trial, there was a lengthy recess for the jury in which the Court took up argument from the parties. During that recess, the Petitioner argued ad nauseum that Ms. Johnson's testimony that she believed there may be a period of disability or use of her hand was medical testimony. J.A. 000433 – 38. The Circuit Court overruled the Petitioner's objection, stating that Ms. Johnson "was giving her [rationale] for why she is choosing not to go forward with the surgery. Whether she is correct or incorrect in that [rationale], you can challenge with your expert's opinion." J.A. 00437.

Ms. Johnson went on to further explain her personal reasoning as to why she had delayed the surgical repair of her carpal tunnel syndrome:

> A: Well, the reason that I am delaying the surgery is because there is going to be a period of time when I can't use my right hand at all. I won't be able to work during that time period.
>
> I am trying to put that time off as much into the future as I can because I am concerned that during this time when I am not able to work, my employer is going to replace me. They have to replace me because the work goes on. My job might not be there when I am finally able to return to work.

J.A. 000439.

[6] To the extent necessary, Respondent incorporates by reference her arguments contained in Section VI.B. of this Brief as to the Petitioner's argument against future medical damages awarded by the jury.

Much as the Circuit Court stated during its ruling noted above, the Petitioner had the ability to call his own expert witness to rebut any testimony of Ms. Johnson, as well as Dr. Regal, that the Petitioner disagreed with. The Petitioner took up that opportunity, and called Dr. Robert Cirincione. J.A. 000550 – 637. However, throughout Dr. Cirincione's entire testimony presented at trial, the Petitioner utterly failed to question Dr. Cirincione whether he believed any follow-up treatment regarding Ms. Johnson's neck pain or shoulder pain was medically necessary, failed to question Dr. Cirincione regarding whether there was any follow-up treatment regarding Ms. Johnson's surgical procedure, and failed to question Dr. Cirincione whether Ms. Johnson's fear of a temporary disability of her right hand following surgery was reasonable or what the standard recovery time is following a carpal tunnel release surgery is.

If the Circuit Court did err in this respect to permitting Ms. Johnson to testify as to her belief regarding a temporary disability as a personal reason for her putting off the surgical procedure, any error committed by the Circuit Court would be harmless error and not grounds to overturn the Circuit Court's discretion in denying the Petitioner's Motion. "Error in evidentiary ruling is 'harmless error' when it is trivial, formal, or merely academic, and not prejudicial to substantial rights of party assigning it, and where it in no way affects outcome of trial." *Miller v. Wheeling Park Commission*, 2024 WL 4052778 (W.Va. App. Sept. 4, 2024) (quoting *State v. McIntosh*, 207 W.Va. 651, 577 (2000)).

The Petitioner had the full ability and right to rebut any evidence placed upon the record by Ms. Johnson and/or Dr. Regal. No infringement of the Petitioner's rights were made. Furthermore, and most importantly, the overwhelming evidence as to Ms. Johnson's continued need for further treatment beyond the carpal tunnel release surgery weighs in favor of Ms. Johnson, especially so as no evidence was offered by the Petitioner that Ms. Johnson had no need for

continued care. Dr. Cirincione merely testified that, in his opinion, Ms. Johnson's injuries and complaints were unrelated to the collision caused by Mr. Starliper's negligence. Clearly, the jury weighed the evidence presented by both parties, rejected Petitioner's position, and awarded Ms. Johnson the amount it felt necessary to make Ms. Johnson whole again.

The Circuit Court did not err in permitting Ms. Johnson to testify as to her personal reasoning why she had not yet had the surgery, but if the Circuit Court did err, it was harmless error as the Petitioner's rights were not affected or infringed upon, and the overwhelming weight of the evidence weighs in favor of Ms. Johnson.

VII. CONCLUSION

The Circuit Court did not err in denying the Petitioner's motion for a directed verdict as Dr. Regal sufficiently testified so as to permit the jury to draw reasonable inferences, Dr. Regal is not required to explicitly state that the medical invoices were directly caused by the Petitioner's negligence, the jury was provided ample medical expert testimony and evidence to support the award of future medical damages, the Petitioner is not entitled to remitter of any future medical expenses nor any past out-of-pocket damages, and Ms. Johnson did not provide any medical or expert testimony nor did Ms. Johnson's testimony permitted by the Circuit Court infringe the Petitioner's ability to rebut the testimony of Ms. Johnson or Dr. Regal. As such, this Court should affirm the Circuit Court's Order denying the Petitioner's motion for a directed verdict and uphold the jury's award to Ms. Johnson.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FRED STARLIPER,
Petitioner,

v.

Case No.: 24-ICA-263
Case No. Below: CC-19-2021-C-20

ADRIENNE JOHNSON,
Respondent.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 1st day of November, 2024, he served a true and accurate copy of the foregoing ***Respondent Adrienne Johnson's Brief*** via United States Mail, postage pre-paid, upon the following:

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