IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-263

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FRED STARLIPER,

Petitioner,

v. 24-ICA-263
(CC-19-2021-C-20)

ADRIENNE JOHNSON,

Respondent.

Petitioner's Reply Brief

SUBMITTED BY:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

The basis of Petitioner's appeal in this matter is straightforward: the Respondent, Plaintiff below, failed to sufficiently prove that the automobile accident was the proximate cause of her carpal tunnel syndrome; failed to establish that her past medical bills were causally related to the vehicle accident; failed to establish that any future surgery was caused by the vehicle accident; failed to establish out-of-pocket expenses in an amount awarded by the jury; and improperly presented speculative testimony regarding her potential future disability and speculative concerns over termination from her job due to a hypothetical carpal tunnel surgery. Because of these improprieties, the jury's award of damages for the alleged carpal tunnel syndrome, past medical special damages, future medical expenses, and out-of-pocket expenses had no foundation in law or fact, and was therefore not supported by the evidence presented at trial. Accordingly, the Circuit Court erred in upholding those awards to the degree previously set forth in Petitioner's Brief, and also by denying Petitioner's motion for directed verdict.

"To 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). Put another way, it is a "fundamental legal principle" that, in order for a claim of negligence to succeed, the alleged negligence "must be the proximate cause of the injury complained of . . ." Syl. Pt. 2, *McCoy v. Cohen*, 149 W. Va. 197, 140 S.E.2d 427 (1965). "Proximate cause is a ***vital*** and an ***essential*** element of actionable negligence and must be proved to warrant a recovery in an action based on negligence." *Id.* at Syl. Pt. 3. (emphasis added). "The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred." Syl. Pt. 1, *Mays v. Chang*, 213 W. Va. 220, 579 S.E.2d 561 (2003) (quoting Syl. Pt. 5, Syl. Pt. 5, *Hartley v. Crede*, 140 W. Va. 133, 82 S.E.2d 672 (1954), *overruled on other grounds*, *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d

412 (1983)). Most notably, as the Supreme Court of Appeals of West Virginia has long recognized, "[o]ne requisite of proximate cause is an act or an omission which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury, ***and the other requisite is that such act or omission did produce the injury.***" Syl. Pt. 4, *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 77 S.E.2d 180 (1953)(emphasis added). In other words, testimony that suggests an injury "could have" been caused by alleged negligence is insufficient to prove that the alleged negligence was, in fact, the proximate cause of the injury.

II. ARGUMENT

A. Respondent blatantly mischaracterizes the underlying record in an attempt to skirt the clear legal requirement to establish proximate cause.

Upon review of Respondent's Brief, Petitioner was surprised by how blatantly the Respondent misstated the record on the key issue in the entire case, namely, whether the Plaintiff's lone expert witness, Steven Regal, provided the requisite testimony to support the Plaintiff's claims that her injury, her medical bills, and her future medical bills were proximately caused by the accident in question. As this Court is aware, Petitioner contends that the requisite testimony was never provided at the trial below, and Respondent has done nothing in her Brief to sufficiently rebut Petitioner's argument in this regard.

Respondent, near the outset of her Brief, falsely contends that "[a]t trial, Dr. regal [sic] 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."[1] Resp't's Br. at 3. In support of this false assertion, Respondent directs the Court to nine (9) separate portions of the record below: J.A. 000131; 000159-000162; 000165; 000168; 000179-

[1] Dr. Regal's "testimony" at the trial was presented in the form of his previously-recorded videotaped deposition, which occurred on November 20, 2023 (i.e., his trial "testimony" and his deposition testimony are one in the same).

000180; 000187; 000189-000190; 000204; and 000206-000207. *Id.* Nowhere in these portions of the record does Dr. Regal provide the necessary testimony that Respondent's injury, her medical bills, and her future medical bills were proximately caused by the accident in question. Below, Petitioner addresses each reference to the trial transcript individually:

1. Joint Appendix 000131:

BY ATTORNEY JORGENSEN:

> Q. Dr. Regal, what is your expert and professional opinion regarding Ms. Johnson's injuries?
>
> A. I believes she was in a --- I don't know the date of her car accident. She was in motor vehicle collision, had worsening of her neck pain and hand numbness. I believe that the mechanism she described to me **MAY HAVE EXACERBATED** any conditions **SHE MAY HAVE HAD**. And her diagnosis of moderate to severe carpal tunnel syndrome, **I BELIEVE COULD BE RELATED**. [Emphasis added].

2. Joint Appendix 000159–000162:

> [With respect to her right shoulder]
>
> Q. The post-traumatic arthritis, in your expert opinion, what is that attributable to?
>
> A. Post-traumatic arthritis is when there's an injury to a joint, the joint can undergo degenerative changes and progress into an arthritic condition.
>
> Q. In terms of what caused that trauma, what was that trauma that would have caused that degenerative change?
>
> A. Trauma ---.
>
> . . . [*objection omitted*]
>
> THE WITNESS: The suspected cause would be the traumatic injury of a vehicle striking another vehicle and causing a sudden motion to Ms. Johnson.

BY ATTORNEY JORGENSEN:

Q. And Dr. Levy suspected bilateral carpal tunnel syndrome. Do you contribute 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 carpel tunnel syndrome exacerbated or worse.

Q. Can you explain what carpal tunnel syndrome is?

A. Carpal tunnel syndrome is truly a tunnel inside your body. The bottom is made out of eight bones. The top is made out of ligament. The thought is that if the ligament becomes thicker or the tunnel becomes tighter, puts pressure on the nerve, which then can cause ischemia, which is a fancy word for decreased blood flow. If the nerve has decreased blood flow to it, it gives you symptoms of numbness and tingling, pain in the hand.

Q. And you said that carpal tunnel is sometimes idiopathic. What does that mean, idiopathic?

A. So idiopathic means we don't know why patients develop it. I tell my patients that you won a lottery, something you didn't want to win. Sometimes we can't identify a direct cause of why you have it.

Q. How can carpal tunnel syndrome be exacerbated?

A. It can be exacerbated by a fracture of the wrist or carpal bones in the hand. It can be exacerbated by a sudden stretch on the wrist, stretching the nerve, indicating a neuropraxia, which is the word for stretching the nerve.

Q. Can it be exacerbated, exacerbated by a traumatic injury to the hands, neck, wrist, shoulders, and nerves?

A. More so the hand and wrist.

Q. Okay.

A. A neck injury usually does not exacerbate a carpal tunnel syndrome.

Q. So a traumatic injury to the wrist, and I think you would described as holding onto the steering wheel and being hit the rear?

A. That **COULD** exacerbate it, yes.

Q. In your opinion, your expert opinion, was Ms. Johnson's carpal tunnel syndrome exacerbated or made worse by the motor vehicle collision on March 2nd, 2019?

A. So I'm unable to prove whether the accident directly did it, but I do believe that it's beyond a reasonable medical doubt that **IT COULD HAVE** exacerbated her symptoms and made them worse. [Emphasis added].

3. Joint Appendix 000165:

Q. The post-traumatic arthritis that Dr. Levy was concerned, what is the trauma that would have caused the post-traumatic arthritis?

. . . [*objection omitted*]

BY ATTORNEY JORGENSEN:

Q. You can answer the question.

A. Any trauma to the shoulder region can exacerbate, get worse with years, and develop arthritis. And that trauma could be any sort of mechanical injury to the joint.

Q. Could that being rear-ended in a vehicle?

A. **IT COULD BE**. [Emphasis added].

4. Joint Appendix 000168:

Here, Dr. Regal gives no opinion whatsoever with respect to causation, as he was merely asked to read part of the records that were introduced as Exhibit 8 at the deposition. He was asked to read physical therapy records—which were not even his own records—which pertained to Respondent's right shoulder and treatment related thereto in 2021. These records indicated that Respondent had chronic right shoulder pain, which she claimed started with the vehicle accident

in 2019, with intermittent issues until January of 2021 when she was lifting a trash bag and felt a tear in her anterior shoulder.

5. Joint Appendix 000179–000180:

> Q. The carpal metacarpal arthritis, what is that?
>
> A. That is arthritis at the base of the thumb joint.
>
> Q. And how does that develop?
>
> A. Most arthritis is idiopathic as well, which means it just develops with time. It can also be worsened due to trauma. You can get post-traumatic arthritis or you just get an exacerbation of underlying arthritis due to trauma.
>
> Q. Do you attribute Ms. Johnson's carpal metacarpal arthritis to any specific trauma?
>
> . . . [*objection omitted*]
>
> THE WITNESS: I believe that carpal metacarpal joint arthritis **CAN BE EXACERBATED FROM A TRAUMA**, including a motor vehicle collision. [Emphasis added].

6. Joint Appendix 000187:

Although Respondent cites this section, there is, again, no opinion given by Dr. Regal with respect to causation. Rather, he discusses Respondent's "trigger thumbs" and the treatment he provided for trigger thumbs.

7. Joint Appendix 000189 to 000190:

> Q. Okay.
>
> 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?
>
> . . . [*objection omitted*]

THE WITNESS: 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 ATTRIBUTED 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?

. . . [*objection omitted*]

THE WITNESS: 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. [Emphasis added].

8. Joint Appendix 000204:

In order to understand the questioning in JA000204, it is important to note that it followed three pages of questions from defense counsel pertaining to the fact that the Plaintiff had made no complaints of wrist pain in the two years following the accident in question. *See* J.A. 000201–000204. Beginning on JA000201, Dr. Regal was asked:

Q. Okay.

But there's no indication that she, even in this, that she specifically injured her right wrist two years before in the accident, is there?

A. That is correct.

Q. And you mentioned as far as carpal tunnel syndrome is idiopathic, which means a lot of times you don't know the cause.

Correct?

A. Correct.

Q. And isn't it --- since you were an expert in this, a lot of people have secretaries and typists and people that use their wrists a lot in fingers get carpal tunnel syndrome from what they call repetitive use.

Right?

A. Yes.

Q. Without having been in any accident whatsoever.

Right?

A. That's correct.

Q. And just typing, being on the computer using the mouse clicking and so forth.

Right?

A. Correct.

Q. And she told you that she was, you knew she was an attorney that did extensive document reviews.

Right?

A. Yes.

Q. And so doing document reviews, she uses her mouse and clicks on --- every time she's going to review a document, she has to click with the mouse and open it up and that sort of thing.

Correct?

A. That is correct.

Q. And so that type of repetitive use over the years can itself cause carpal tunnel syndrome.

Right?

A. It would be idiopathic. You know, there's lots of secretaries, lawyers that type all day that never develop carpal tunnel syndrome.

Q. Right.

A. Could it be exacerbated from typing all day? **IT CERTAINLY COULD**.

Q. Right.

Now, we didn't hear any of that in the questioning of you, but it was assumed that she had an injury. But from the emergency room record, there's no indication of any trauma to either wrist right or left is there?

A. That's correct.

Q. And we went through these records, but we didn't go through them in detail. But you can't say that before this time that she came, went to Dr. Levy on March 12 of '21, which is two years after the accident, that she mentioned at any time, her wrist pain of either wrist at any time before that.

A. That is correct.

Q. Okay.

So with keeping that in mind, that there's no evidence of trauma in the records, and there's no evidence of complaint of 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 she sustained any trauma in the accident.

Right?

[Start J.A. 000204]

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. [Emphasis added].

9. Joint Appendix 000206 to 000207:

Q. But you understand what we're talking about is causation. That was, that was, what's one of the main issues. But counsel didn't ask you about the causation of those, each and every one of those visits.

Correct.

A. **CORRECT**.

Q. And then when you were asked about what the accident did or didn't do, I wrote this --- I tried to write it down because that's the whole important part of the whole case, is whether the accident caused the problem with her wrist or the accident caused the problem with her shoulder. You stated, I think you said that you couldn't say that it caused it, but then you said the accident **COULD HAVE** exacerbated it.

Right?

A. Correct.

Q. Okay.

Could have.

Right?

A. Correct.

Q. And when you, and when we're saying it, are we talking about her neck and shoulder or are we talking about her wrist?

A. I think all of her complaints **COULD BE ATTRIBUTED TO A MOTOR VEHICLE CONDITION**. [Emphasis added].

Q. Okay.

Could?

A. **CORRECT**.

Q. But that would be assuming that she suffered some trauma to her wrist and or her neck in the accident.

Right?

A. Yes.

Q. But there's no evidence in the records that says that she suffered any trauma to the wrists.

A. That's correct.

Q. She doesn't complain, she doesn't say what's the word that you said, in praxia?

A. **NEUROPRAXIA**.

Q. Neuropraxia. Well, of course she wouldn't use that word. But she didn't say, I tensed up my wrists or I hyperflexed either of my wrists or I banged my wrists or I hurt my wrists, did she?

A. **SHE DID NOT**. [Emphasis added].

As is now evident based on this painstaking revisitation of the record, the doctor never gave his expert opinion that the Plaintiff's complaints actually **WERE** proximately caused by or exacerbated by the accident. Rather, he gave the opinion that her condition "could be" caused or exacerbated by the accident. Thus, Respondent's contention—which he states for a **second time**

at page 11 of his brief—that "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[]" is patently false. Resp't's Br. at 11 (emphasis added). As support for this second and renewed false assertion, Respondent again cites to the same nine (9) portions of the record discussed above. This cited testimony is, as shown, not what Respondent claims it is.

Put simply, it is well-settled law in West Virginia that causation cannot be sufficiently proven by expert testimony that something is merely "possible." *Stoudt v. Eads*, 889 S.E.2d 305 (W. Va. 2023) ("the law is clear that the mere possibility of causation is not sufficient to allow a reasonable jury to find causation.").

Importantly, there are two other significant points made clear by Dr. Regal's testimony that Respondent simply glosses over and/or ignores: First, Dr. Regal clearly testified that repetitive use of Respondent's wrists through typing and clicking a mouse for the last several years "certainly could" cause and exacerbate carpal tunnel. *See* J.A. 000201–000202; *see also* J.A. 000208. As is apparent, not only did Dr. Regal fail to offer sufficient testimony to establish that Respondent's carpal tunnel was caused by the vehicle accident, but he also expressly stated a clear means of alternative causation. *See Id.*

Second, Dr. Regal testified that *if* Respondent had hyperextended her wrists in the vehicle accident, he would expect her to have exhibited "neuropraxia." *See* J.A. 000204. As Dr. Regal acknowledged, he never found that the Respondent had neuropraxia. J.A. 000206–208. In effect, Dr. Regal's testimony in this regard makes it abundantly clear that he would expect—if Respondent had injured her wrists in the vehicle accident—her to exhibit symptoms of neuropraxia. She did not exhibit such symptoms and, as Dr. Regal further acknowledged, she

never complained that she tensed up her wrists, hyperflexed her wrists, or otherwise injured her wrists in the vehicle accident.[2]

Furthermore, the Respondent, in her Brief, also implies that she suffered more serious injuries than she actually did, including a lumbar strain and a closed head injury. Resp't's Br. at 1. The relevant medical records in this case, however, contradict Respondent's claim that she ever suffered a lumbar strain. The nurse's initial triage note indicated that the patient was a seat-belted driver with no airbag deployment involved in a low-speed MVA, and that the patient presented in a c-collar with complaints of right neck pain and the history of an old neck injury. J.A. 000466–000467. Respondent admitted on cross-examination that she complained of headaches and right-sided neck pain, J.A. 000469, and, with respect to her closed head injury, the Respondent admitted on cross-examination that the emergency room personnel found that her head was atraumatic and normocephalic, J.A. 000473, and she admitted that the emergency room probably diagnosed a closed head injury because she had complained of headaches. *See* J.A. 000473:13-16. Notably, it is undisputed that the Respondent never complained that she had hurt, sprained, jammed, or hyperflexed her wrists at the time of the accident. J.A. 000470-000471.

There were further inaccuracies with respect to Respondent's complaints that followed the accident. For example, the Respondent claims in her brief that she expressed numbness and tingling in her fingers when she first saw Dr. Levy on May 22, 2019. Resp't's Br. at 2. However, when presented with Dr. Levy's 24-page record from May 22, 2019, which was marked as Exhibit 4, the Respondent acknowledged that there was no mention of her wrist or her fingers anywhere in that 24-page document. J.A. 000457. Lastly, with respect to her right shoulder pain, the

[2] In fact, as stated above, the first documented occurrence of Respondent's wrist pain was not made until over two (2) years after the vehicle accident.

Respondent admitted that when she saw Dr. Levy on the March 12, 2021, visit, her right arm started hurting after she took out the trash and felt a tearing sensation in her shoulder when she lifted up the kitchen bag of garbage. J.A. 000460-000462.

Based on these misrepresentations and inaccuracies, as well as a sound review of the record below, it is readily apparent that the Respondent failed to establish that the vehicle accident proximately caused her injuries relevant to this appeal.

B. Past Medical Special Damages.

Respondent contends that Petitioner's reliance on *Collins v. Bennett*, 486 S.E.2d 793, 798 (W. Va. 1997), is taken out of context. Resp't's Brief at 9. Specifically, Respondent states that "[t]he Petitioner next cites to [*Collins*] 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." *Id.* Respondent's argument in this regard is misguided. First of all, this premise—which Petitioner accurately stated—is not some sort of novel legal theory concocted by Petitioners. To the contrary, it is an accurate recitation of *Collins* and a clear reflection of the "fundamental legal principle" that, in order for a claim of negligence to succeed, the alleged negligence "must be the proximate cause of the injury complained of . . ." *See* Syl. Pt. 2, *McCoy v. Cohen*, 149 W. Va. 197, 140 S.E.2d 427 (1965).

Second, it is the Respondent—not the Petitioner—who takes *Collins* out of its appropriate context and mischaracterizes the nature of its holding. In *Collins*, the jury returned a verdict for the defendant. 486 S.E.2d 793 (W. Va. 1997). The plaintiff appealed, arguing, among other things, that the trial judge erred in refusing to admit into evidence certain medical bills. *Id.* At the underlying trial, the plaintiff sought to introduce certain medical bills into evidence, to which the defendant's attorney objected, arguing that the plaintiff had failed to establish that the bills were incurred for injuries proximately caused by the alleged incident. *Id.* "The trial court ruled that the

bills were admissible, ***but only if*** the appellant could show that they were for expenses ***incurred as a result*** of the [alleged incident]." *Id.* (emphasis added). The plaintiff ultimately failed to make the appropriate showing and, as a consequence, the trial court declined to admit the bills into evidence. *Id.* On appeal, the Supreme Court of Appeals of West Virginia, at that time being without any controlling West Virginia caselaw on this issue, found the Supreme Court of Appeals of Virginia's decision in *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989), to be persuasive. In *McMunn*, the Supreme Court of Appeals of Virginia announced the proposition that now controls this issue in West Virginia:

> [W]here 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 of the question of causal relationship, the court may admit the challenged medical bills only with foundation expert testimony tending to establish medical necessity or causal relationship, or both, as appropriate.

Id. Thus, in relying on *McMunn*, the West Virginia Supreme Court aptly concluded that:

> [i]n view . . . of the guidance provided by the Virginia Court in *McMunn v. Tatum, supra,* this Court cannot conclude that the trial court erred by ruling that it was incumbent upon the [plaintiff below] to establish an appropriate foundation for the medical bills in question before those bills would be introduced into evidence. Further, since no such foundation was established, this Court cannot conclude that the trial court erred in refusing to admit the bills.

Collins, 486 S.E.2d 793 (1998). The West Virginia Supreme Court affirmed the trial court's judgment, thereby clearly recognizing that, in West Virginia, if a defendant objects to a plaintiff's introduction of medical bills due to lack of a sufficient causal foundation, the medical bills may be admissible only if the plaintiff can show, **VIA EXPERT TESTIMONY**, that the medical expenses were incurred as a result of the alleged negligence. *See id.*

Having now placed *Collins* in its appropriate light, it is abundantly clear that Petitioner accurately stated, and properly relied upon, the West Virginia Supreme Court's decision in *Collins*.

Consequently, as Petitioner argued in his initial brief, the Circuit Court of Jefferson County erred in upholding the jury's award of past medical special damages because Respondent failed to establish that the vehicle accident was the proximate cause of the medical bills claimed at trial. *See generally*, Pet'r's Br.

As has been discussed at length, in this case, the Respondent simply failed to establish such a causal link. In fact, when Petitioner's counsel asked Dr. Regal, in his evidentiary deposition, when he had first seen Plaintiff's Exhibits 2 through 11 (the medical records and bills), Dr. Regal indicated that he first saw those exhibits the weekend prior to his deposition. Defense counsel then asked Dr. Regal the following:

> Q. But are you prepared to testify that each one of those [exhibits] are related to the accident?
>
> A. That I cannot speak on.

J.A. 000151–JA000153.

Additionally, Petitioner's counsel further followed up with Dr. Regal on this issue during cross-examination as follows:

> Q. And each time that Counsel went over, each one of these exhibits over and over and over again, he asked you, were the charges reasonable and necessary. Was the treatment reasonable and the charges reasonable? That's irrespective of the cause.
>
> Correct? In other words, doesn't make any difference what the cause is. The treatment is reasonable based on the complaint.
>
> A. That is correct.
>
> Q. All right.
>
> But when I asked you on the voir dire, when you were going through those about your ability to comment on those records, I asked you about that, whether you could say that

the cause of the treatment was the accident, and your exact words were I can't speak to that.

Correct?

A. Correct.

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

Correct?

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

Q. Right.

A. I believe her treatment and everything that was bill was appropriate ---

Q. Right.

A. --- indicated.

Q. But you understand what we're talking about is causation. That was, that was, what's one of the main issues. But Counsel didn't ask you about the causation of those, each and every one of those visits.

Correct?

A. Correct.

As this testimony makes evident, we again reach the unavoidable conclusion that the Plaintiff clearly failed to prove, by expert testimony, the causal relationship between the treatment and the accident in question as required by *Collins v. Bennett*. There is no doubt about that.

C. Future Medical Damages.

Regarding future medical expenses, the Respondent argues that, although they introduced evidence valuing the cost of a carpal tunnel release procedure at $10,885.00, there was obviously additional treatment that was necessary. Resp't's Br. at 18. However, at trial, there was no

testimony which provided, to a reasonable degree of medical certainty, that any additional future treatment was required; nor did any medical expert testify as to the future costs of this mysterious future treatment. These facts clearly show that Respondent failed to satisfy the requirements set forth in *Jordan v. Bero*, namely that future medical expenses must be tied to injuries that are established by competent expert testimony to be reasonably certain to occur, and that the cost of any future medical treatment must be proved by competent evidence. *See Jordan v. Bero*, 210 S.E.2d 618 (W. Va. 1974).[3]

In an attempt to side-step this fact which is problematic for her case, Respondent argues that "other evidence was introduced that Ms. Johnson will continue to have other medical treatment and costs for the injuries she sustained in the collision." Resp't's Br. at 18. To support this claim, Respondent points to Respondent's own self-serving testimony that she "continued to experience pain and symptoms of the injuries Ms. Johnson suffered in her neck and shoulders[.]" *Id.* This, of course, is similarly insufficient under *Jordan*, because "[t]he prognosis of future effect of permanent injuries . . . must be elicited from qualified experts[,]" and "mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof." *Jordan*, at Syl. Pts. 8, 11. Absent the expert testimony required under *Jordan*, Plaintiff's self-serving testimony, alone, is insufficient as a matter of law. *See id.*

Regarding the costs of any future medical treatment, Respondent claims that "the jury was provided with ample evidence of the cost of continued physical therapy, conservative treatment, and imaging studies[,]" because, "[t]hroughout the trial, evidence of the expenses Ms. Johnson incurred as a result of her treatments, including physical therapy, imaging studies, and other

[3] Petitioner addressed this issue in its initial Brief and incorporates its arguments to that effect herein. *See* Pet'r's Br. at 16–19.

treatments." Resp't's Br. at 19. Make no mistake, Respondent seemingly argues that, because the jury was presented with evidence of Respondent's ***past*** medical expenses, it was permitted to speculate as to costs associated with ***future*** medical treatment. This is ***also*** improper under *Jordan*, and, in fact, exemplifies a reason why the West Virginia Supreme Court stated that courts "must be scrupulous to prevent pure speculation[]" regarding future medical damages. *Jordan*, 210 S.E.2d 618, 633 (W. Va. 1974).

More importantly, Respondent still refuses to acknowledge that her counsel failed to ask Dr. Regal whether the carpal tunnel surgery release that he felt was medically indicated was a ***direct and proximate result of the accident***. Again, this essential question was never asked. Petitioner again challenges the Respondent to point to one sentence in Dr. Regal's testimony where he gave the opinion that the carpal tunnel surgery—which, interestingly, Respondent has still not undergone—was proximately caused by the now five years ago accident of March 2, 2019. Therefore, Respondent failed to prove the $10,885.00 cost of the carpal tunnel surgery was a proximate result of the vehicle accident.

In the final analysis, Respondent, in her Brief, does not point to any expert testimony that could support a claim for any future medical costs and there was, therefore, no basis for the jury awarding $26,000 for future medical expenses.

D. Out-Of-Pocket Expenses`

Regarding out-of-pocket expenses, Respondent argues that "other evidence was presented of out-of-pocket expenses that were not blackboarded[.]" Resp't's Br. at 20. Respondent puts forth costs regarding medical prescriptions in the amount of $60.43, costs surrounding physical therapy sessions in the amount of $36.00, as well as undocumented amounts for CBD ointments, copper bracelets, and portion of a rental car fee. None of these costs, which potentially amount to a little over one hundred dollars ($100.00), change the Petitioner's argument set forth in his

original brief, wherein he argued that the Circuit Court erred in upholding the jury's excessive award of out-of-pocket expenses.

III. CONCLUSION

Based on the foregoing, as well as those reasons which were set forth in Petitioner's initial Brief, Petitioner respectfully requests that this Court vacate the Circuit Court of Jefferson County'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 special damages totaling $4,995.17. Alternatively, Petitioner requests that this Court instruct the Circuit Court below to enter a remittitur of the jury's awards for: (1) past medical special damages; (2) future medical expenses to $0.00; and (3) out-of-pocket expenses to the amount supported by the evidence presented at trial.

FRED STARLIPER

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-263

FRED STARLIPER,

Petitioner,

v. 24-ICA-263
(CC-19-2021-C-20)

ADRIENNE JOHNSON,

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 **19th day of November 2024**, I e-filed "***Petitioner's Reply Brief***" via the Court's E-Filing system, which will provide notification of same to counsel of record as follows:

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