STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Bonnie Toothman and Gary Toothman
Plaintiffs Below, Petitioners

vs) No. 11-0960 (Marion County 08-C-204)

Kari Lynn Jones,
Defendant Below, Respondent

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Roger D. Curry, Counsel for Petitioners
E. Kay Fuller, Counsel for Respondent

MEMORANDUM DECISION

Petitioners Bonnie and Gary Toothman, by Roger D. Curry, their attorney, appeal the Circuit Court of Marion County's order denying a new trial subsequent to a jury verdict. The appeal was timely perfected by counsel, and the Respondent, Kari Lynn Jones, by Jeffrey Robinette, her attorney, has filed her response.

This Court has considered the parties' briefs, the record on appeal, and the oral arguments of the parties. Upon consideration of the foregoing, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

This case is based upon injuries allegedly suffered by the Petitioner, Bonnie Toothman, in an automobile accident occurring on June 7, 2006, in which the Respondent's car struck the Petitioner's car. Petitioners Mr. and Mrs. Toothman thereafter filed a civil action, alleging that Petitioner Mrs. Toothman had suffered cervical strain and other medical injuries due to the accident. A trial was conducted on January 11, 2011, and the jury returned a verdict awarding special damages of $5,972.35, an amount $600.00 less than the medical expenses submitted by the Petitioners. The jury did not award any general damages.

Subsequent to the Petitioners' request for a new trial, the lower court denied the new trial but ordered an additur of $2,000.00 for past pain and suffering.

On appeal of the lower court's denial of the motion for a new trial, the Petitioners initially included an assignment of error alleging that the jury verdict was inadequate because the jury awarded an amount less than the proven medical damages. The Petitioners subsequently withdrew that assignment of error, arguing only the remaining two assignments of error, and essentially contending that the lower court erred in (1) preventing reference to the Respondent's insurance coverage and (2) requiring future pain and suffering to be proven to a reasonable degree of medical certainty.

This Court has consistently reviewed a circuit court's rulings on a motion for a new trial under an abuse of discretion standard. As this Court explained in *Williams v. Charleston Area Medical Center, Inc*., 215 W.Va. 15, 592 S.E.2d 794 (2003),

> "[a]s a general proposition, we review a circuit court's rulings on a motion for a new trial under an abuse of discretion standard. *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994). . . . Thus, in reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review."

215 W.Va. at 18, 592 S.E.2d at 797, quoting *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995). This Court also noted in *Williams* that "[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." *Id*., 459 S.E.2d at 381 (internal citations omitted).

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With regard to the Petitioners' contention that the existence of the Respondent's insurance should have been acknowledged at trial,[1] the Petitioners argue that they sought to raise the issue of insurance to explain that the insurance company was handling the claim on behalf of the Respondent. The Petitioners also contend that the gaps in Petitioner Mrs. Toothman's medical treatment subsequent to the accident could have been explained more fully to the jury if she had been permitted to explain that funding through the Respondent's insurance company had become an issue.

This Court has explained that "[t]he West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court." Syl. Pt. 1, in relevant part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995); *see also* Syl. Pt. 3, *Barlow v. Hester Industries, Inc*., 198 W.Va. 118, 479 S.E.2d 628 (1996); Syl. Pt. 1, *Voelker v. Frederick Business Properties Co.*, 195 W.Va. 246, 465 S.E.2d 246 (1995); Syl. Pt. 2, *State v. Perolis*, 183 W.Va. 686, 398 S.E.2d 512 (1990).

Rule 411 of West Virginia Rules of Evidence permits introduction of a reference to insurance only under very limited circumstances:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

In *Reed v. Wimmer*, 195 W.Va. 199, 465 S.E.2d 199 (1995), this Court clarified the scope of Rule 411, explaining as follows:

> The prohibition in Rule 411 is based on the assumption that jurors who are informed about the insurance status of a party may find that party liable only because the liability will be cost-free to the party, or that jurors will increase the amount of

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[1]Reference to the issue of the existence of insurance had been excluded by motion in limine prior to trial.

> damages in that only an insurance company will be affected adversely. By the adoption of this exclusionary language, Rule 411 forbids two inferences. First, the Rule does not permit the trier of fact to infer that an insured person is more likely than an uninsured person to be careless. Second, Rule 411 rejects the inference that the foresight to take out insurance is indicative of a responsible attitude, making negligence less likely. Although both the inferences and their probative force are highly questionable, under the West Virginia Rules of Evidence, the doctrine is clear, and compliance with Rule 411 and the other rules discussed in this opinion is not a matter of judicial discretion.

195 W.Va. at 205, 465 S.E.2d at 205.

While not all uses of evidence regarding the existence of insurance are excluded by Rule 411, a decision regarding the appropriate circumstances for the potential introduction of insurance evidence must be made by the trial court and properly lies within the trial court's discretion. As with introduction of evidence generally, the trial judge must engage in an evaluation of the evidence offered and ultimately determine whether the evidence is relevant and whether its probative value is outweighed by its prejudicial effect. *See* W. Va. R. Evid. 403. In the present case, the Petitioners presented the trial court with an insufficient basis for permitting the introduction of evidence of the existence of the Respondent's insurance. The trial court did not abuse its discretion in failing to permit introduction of evidence regarding insurance and in denying the Petitioners' motion for a new trial. As the trial court aptly observed, there is "no reason to change the longstanding evidentiary rule prohibiting the introduction of a defendant's insurance coverage into evidence at trial. . . ."

The Petitioners also contend that the trial court erred in requiring future pain and suffering to be proven to a reasonable degree of medical certainty. The Petitioners argue that the expert witnesses found it difficult to state an opinion regarding the Petitioner's future pain and suffering with any degree of medical certainty. The Respondent astutely maintains that the standard at issue is another longstanding legal rule. In *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 271 S.E.2d 335 (1980), for instance, this Court explained that it is necessary for a medical expert to give an opinion on questions of future pain and suffering to a reasonable degree of medical certainty. 165 W.Va. at 696-97, 271 S.E.2d at 340-41. Likewise, in *Pygman v. Helton*, 148 W.Va. 281, 134 S.E.2d 717 (1964), this Court stated that "it is necessary to establish future pain and suffering . . . by

medical testimony that there is reasonable certainty that such pain and suffering will result. . . ." 148 W.Va. at 286, 134 S.E.2d at 721. In syllabus point nine of *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974), this Court solidified the issue as follows: "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." *See also Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (1998); *Delong v. Kermit Lumber & Pressure Treating Co.*, 175 W.Va. 243, 332 S.E.2d 256 (1985).

Upon review of this matter, this Court finds that the trial court did not abuse its discretion in requiring future pain and suffering to be proven to a reasonable degree of medical certainty. That established standard has been consistently required by this Court, and the trial court was correct in its conclusion that there is "no reason to change the rule" in this case. Based upon the foregoing, this Court finds no merit in the Petitioners' assignments of error, and this case is hereby affirmed.

Affirmed.

ISSUED: November 15, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum, writing concurring opinion
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

1No. 11-0960 – Bonnie Toothman and Gary Toothman,
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Ketchum, Chief Justice, concurring:

Requiring a medical doctor to opine to a "reasonable degree of medical certainty" should be abolished. The question, "Doctor, do you have an opinion to a reasonable degree of medical certainty" contains antiquated legalistic jargon.[1]

Medical doctors, who are not professional or seasoned witnesses, always ask what the question means. Does it mean that the doctor's opinion must be absolutely certain, scientifically certain, reasonably probable, medically probable, greater than 50% possible, more likely than not, or somewhere in between? Worse yet, the lawyers I ask all give me a different definition, including "beyond a reasonable doubt."[2]

We should require the question to be asked in plain English. "Doctor, do you

[1] Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty about "Reasonable Medical Certainty,"* 57 MD. L. Rev. 380 (1998). *See also*, Nelson Abbott & Landon Magnusson, *An Enigmatic Degree of Medical Certainty*, 21 Utah B. J. 20 (2008) ("[T]he phrases 'reasonable degree of medical certainty' and 'reasonable degree of probability' are simply not necessary in the court room, do more harm than good, and should consequently be eliminated from the legal lexicon.").
[2] The problem is illustrated by the various terms associated with "certainty" found in Burton's Legal Thesaurus (4th ed. 2007). The terms, among others, include a spectrum from *absence of doubt* and *absoluteness* to *confidentness*, *substantiality* and *sure presumption*.

have a medical opinion of which you are reasonably certain?" The doctor can then be cross-examined as to whether his opinion is based on a possibility, probability or an absolute certainty.

After the cross-examination, the trial judge will determine whether the doctor's opinion meets the required standard of proof. If the case goes to the jury, the jury can consider its weight after being instructed on the degree of proof required for different elements of the case, e.g., causation, permanent disability, and future medical expenses.

The most logical way to handle this legalistic jargon problem is to adopt a version of the solution proposed by Justice Neely in 1974 in his futuristic concurrence in *Jordan v. Bero*.[3] In the concurrence, Justice Neely indicated that a jury, upon proper instruction, could award damages based on the overall probability that the plaintiff will suffer a future disability, *i.e.*, a disability the medical doctor reasonably believes will occur. The doctor's testimony could set forth his or her medical experience and his or her "evaluation of statistical information from recorded cases of similar injuries." 158 W.Va. at 65, 210 S.E.2d at 641. In so stating, Justice Neely recognized that, although the probability of a future disability may be less than fifty percent in some cases, it is still possible to award appropriate damages without becoming speculative.

[3] *See,* concurring opinion of Justice Neely in *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974).

In his concurring opinion, Justice Neely observed that the traditional rule requiring that future damages be proved to a reasonable degree of medical certainly is stated "in relatively vague language."[4] Consequently, the thrust of the concurrence expresses the need to clarify and simplify the complex information the jury is expected to absorb in a personal injury trial. I would add that the questions propounded to a medical doctor with regard to the traditional rule should also be clarified and simplified. Rather than robotically tracking the language of the rule, "Doctor, do you have an opinion to a reasonable degree of medical certainty," the required question should be, "Doctor, do you have a medical opinion of which you are reasonably certain?"[5]

On that basis, I concur.

[4] 158 W.Va. at 62, 210 S.E.2d at 640.

[5] In the context of the future consequences of an injury, the majority opinion in *Jordan v. Bero* uses both phrases, "reasonable certainty" and "reasonably certain."