IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DAVID SNYDER and MARY SNYDER,
Personal Representatives of the
Estate of Michael Snyder, deceased,

Plaintiffs/Petitioners herein,

vs.

Case No. 101579
Jefferson County Civil Action No. 06-C-243

HUNTFIELD, L.C.,
RYAN INCORPORATED CENTRAL,
CHS TRAFFIC CONTROL SERVICES, INC.,
VIP LIMOUSINE SERVICE, LTD.,
GLEN M. LEE, d/b/a VIP LIMOUSINE SERVICE, LTD.,
HEATHER L. STRACHAN, and
LEE JAMES CRAWFORD,

Defendants/Respondents herein.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RESPONSE TO LEE CRAWFORD'S PETITION FOR APPEAL
BY PETITIONERS/RESPONDENTS DAVID AND MARY SNYDER,
PERSONAL REPRESENTATIVES OF THE ESTATE OF MICHAEL SNYDER.

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I. SUMMARY OF ARGUMENT

This is a wrongful death case. Petitioner Lee Crawford struck and killed Michael Snyder, who was flagging traffic at a highway construction site. Substantial evidence reflected that Crawford had been dispatched by VIP Limousine Service, a company owned by a Maryland resident that transports Medicaid patients to appointments. The wreck occurred during road construction work at a site owned by a Virginia company real estate development company called Huntfield, which, by its own admission, failed to comply with the requirements of the West Virginia Division of Highways Highway Entrance Permit, primarily by neglecting to have a "One Lane Road 1000 Feet" sign in place.

Without benefit of the required warning sign, Crawford, accompanied by VIP's dispatcher and office manager, diverted his attention to a cup in his vehicle and collided with Michael Snyder, throwing him ninety feet down the highway. Both Rosemary Livingood, one of the passengers, and Mary Weaver, the mother of the other passenger, testified they arranged the transportation by calling their regular contact at VIP Limousine Service and that VIP's regular staff provided the ride.

Because of reversible errors by the trial court, the jury erroneously placed 100% of the fault on the driver and dispatcher individually, and exonerated Huntfield, VIP Limousine Service, and the other Defendants. The jury awarded $2,509,308.00 in compensatory damages against the driver and dispatcher, and $300,000.00 in punitive damages against the driver. The car driven by Crawford had only $100,000 in liability insurance coverage.

II. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This case is a civil action for wrongful death pursuant to West Virginia Code § 55-7-5, *et seq*. The action was filed by David and Mary Snyder. Their son and only child, Michael, was killed while flagging traffic at Huntfield's construction site. The car which struck Michael was driven by Petitioner Lee Crawford. Substantial evidence showed that Crawford was dispatched by VIP Limousine Service. Huntfield, by its own admission, failed to comply with the public safety requirements of its Highway Entrance Permit, due to the absence of required traffic control elements, a "One Lane Road 1000 Feet" sign and operational flashing lights visible from 1000 feet on its signs.

III. STATEMENT OF FACTS

Michael Snyder was directing traffic as a flagman in an improperly-marked highway construction zone on Monday, July 19, 2004, when he was struck and killed by an oncoming car driven by Lee Crawford, the Petitioner herein. The errors leading to his death are the focus of this case.

Michael Snyder was David and Mary Snyder's only son. He was a twenty-eight-year-old graduate of Evergreen State College, and an Eagle Scout. He was a volunteer for the Frederick County Big Brothers, and was the Big Brother to Quamain Rozier, a Frederick youth. The jury heard poignant evidence concerning the Snyders' adoption of

Michael, their life with him, and the effect of his unnecessary death on them.[1] Although Michael planned a teaching career, he was working in the spring and summer of 2004 as a flagman for CHS Traffic Control Services, Inc., a Frederick, Maryland-based traffic control contractor. He had been certified as a flagger and traffic manager in Maryland for a few months and was working on CHS' first ever West Virginia job, at the entrance to a residential subdivision called Huntfield south of Charles Town. The road is a two-lane highway with a fifty-five mile per hour speed limit. The southbound lane was closed while another contractor performed shoulder work. Michael was flagging southbound traffic at the lane closure. The traffic control at the scene did not comply with the applicable regulations and did not comply with the highway entrance permit issued to the developer, Huntfield, LC.

Defendant Huntfield, L.C., is a Virginia real estate development company which had purchased and developed part of a large parcel of property located at the southern end of Augustine Avenue, in Charles Town, West Virginia. It wanted to add more houses to the development. In order to provide appropriate access to the enlarged development, the West Virginia Division of Highways (WVDOH) required Huntfield to reconstruct a portion of Augustine Avenue to add a center turn lane, tapers, drainage structures, curbs, and a gutter before it could continue with home construction.

The road work necessitated entry by workers and equipment onto Augustine Avenue, and required, at times, closure of the southbound lane of travel. On April 26,

[1] Tr. of Dec. 3, 2009, at page 115-127 and Tr. of Dec. 4, 2009, at page 55 - 75, 79 - 82.

2004, the WVDOH granted to Huntfield a highway entrance permit authorizing the encroachment.

The permit expressly required Huntfield "to protect its employees, equipment and the users of the highway at all times in accordance with the current Division of Highways manual 'Traffic Control for Streets and Highways Construction and Maintenance Operations.'"[2] The permit further required Huntfield "to comply with all applicable state and federal laws in the performance of work under this permit."[3] The traffic control manual required a series of three signs in a lane closure situation. In order approaching the lane closure, the required signs were "ROAD WORK AHEAD," followed by "SHOULDER WORK AHEAD," followed by "ONE LANE ROAD 1000 FEET," followed by a sign showing the flagger symbol.

In mid-July, 2004, Huntfield's project manager Travis Witmer hired CHS to perform the traffic control associated with the roadwork. Huntfield planned to manage CHS' work, and CHS was to bill Huntfield's contractor, Defendant Ryan Incorporated Central (hereafter Ryan).[4] At no time did Huntfield's status as the permit-holder change.

On July 19, 2004, Michael Snyder was directing traffic as a flagman for CHS on the project. It was his second day on the Huntfield job and, although he was nominally the traffic control manager at the site, he was the least experienced of CHS' employees on the site that day. Mr. Snyder's supervisor, Troy Weikert, the only CHS employee to

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[2] Exhibit 1 to Plaintiffs' Motion for Partial Summary Judgment Against Huntfield, at ¶ 4.
[3] Exhibit 1 to Plaintiffs' Motion for Partial Summary Judgment Against Huntfield, at ¶ 5.
[4] See Exhibit 4 to Plaintiffs' Motion for Partial Summary Judgment Against Huntfield, email correspondence between Mr. Witmer and representatives of Ryan.

attend a meeting with West Virginia Division of Highways representatives about traffic control for the site, was absent from the scene.

Huntfield's worksite did not comply with the requirements of the state permit. The flashing lights on CHS' signs were inoperable and, importantly, the sign for southbound traffic stating "ONE LANE ROAD 1000 FEET" was not in place. In the absence of the flashing lights and the sign warning of the lane closure, southbound driver Petitioner Lee Crawford had no notice that his lane would be closed. He did not have the required notice that the man he thought he saw either in the road or on the shoulder ahead was directing traffic in his lane. Without the warning of the lane closure, Mr. Crawford diverted his attention, reached for his cup in the cup holder, and collided with Michael Snyder, throwing him ninety feet through the air and killing him.

Crawford's driving that morning, to all the world, was on behalf of VIP Limousine Services, Ltd. (hereafter "VIP"). VIP is a transportation company based in Keyser, West Virginia, owned by Maryland resident Glen Lee. VIP is paid by the State to transport Medicaid and Medicare recipients to medical and other appointments. To carry out this work, VIP has a number of vans in which it transports clients. Crawford began working as a driver for VIP in approximately October 2001.[5] At that time, Heather Strachan was a dispatcher for VIP.[6] Strachan was Crawford's boss.[7] In 2003, VIP opened a second office in a building in Martinsburg.

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[5] Crawford Deposition I, Exhibit 1 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 18, line 1.
[6] *Id.*, at page 24, lines 10 – 16.
[7] Lee Deposition, Exhibit 2 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 70, lines 5 – 6.

Strachan lived in VIP's Martinsburg office and was VIP's Martinsburg dispatcher and manager. VIP retained control of the Winchester Avenue premises,[8] and Strachan's residence there was a benefit of her employment.[9] Several of the VIP vans were kept at VIP's Martinsburg office. VIP issued a cellular telephone to Strachan.[10] In late 2003, VIP required Crawford, who maintained a Keyser address with his family, to begin living in VIP's Martinsburg premises during the week.[11]

Warren "Bubba" Weaver, a teen-aged child with Smith-Magenis Syndrome who lived in Charles Town with his mother Mary Weaver, was a long-time client of VIP. Bubba attended the Grafton School in Winchester, Virginia, and VIP, by its driver Crawford, and often accompanied by VIP's dispatcher and manager Strachan, transported Bubba to school daily. The trip from Bubba's home to Winchester each morning, and the return trip in the afternoon, was a regular VIP route for Crawford.[12] VIP was paid by the mile by the State of West Virginia for the trip, and Crawford was paid a percentage of that amount. Crawford testified that he made the trip daily for a period of about two to two-and-one-half years.[13]

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[8] *Id.*, at page 34, lines 10 – 15.
[9] *Id.*, at page 37, line 17 – 19.
[10] *Id.*, at page 32, lines 1 – 13.
[11] Crawford Deposition II, Exhibit 3 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 59, lines 7 – 21.
[12] Tr. of Dec. 2, 2009, at page 66 – 67, 145.
[13] Crawford Deposition I, Exhibit 1 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 42, lines 3 – 13.

Each day from Monday, July 12, 2004, to Friday, July 16, 2004, Crawford, driving VIP's van, transported Bubba to and from Winchester.[14] On July 13, 2004, one of VIP's vans became disabled and was placed for service at Baer's Auto Repair, near VIP's office on Winchester Avenue.[15] The disabled van was one which was regularly kept at VIP's Martinsburg location.[16] The vehicle was still out of operation on July 19, 2004.[17] On Sunday, July 18, 2004, Strachan asked permission to borrow her mother Sharon Wilson's car.[18] Sharon Wilson allowed Strachan and Crawford to borrow her car. Crawford testified that he was pretty sure that he heard Strachan tell someone that the VIP vehicle he usually used was not available that day.[19]

On Monday, July 19, 2004, Crawford picked up Ms. Wilson's car from her residence in Keyser.[20] At that time, Ms. Wilson believed that Crawford worked for VIP.[21] He then drove to the Martinsburg VIP office, where he picked up Strachan. Crawford remembers another VIP van being at the Martinsburg VIP office at that time.[22] They then picked up Rosemary Livingood, a frequent VIP customer. Ms. Livingood

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[14] See DHHR vouchers, attached as Exhibit 4 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd.
[15] Lee Deposition, Exhibit 2 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd. at page 63, lines 2 – 5; Baer's invoice, attached as Exhibit 5 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd. *See also* Plaintiffs' Trial Exhibit 47.
[16] Lee Deposition, Exhibit 2 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 63, line 21 – page 64, line 2.
[17] *Id.*, at page 63, lines 6 – 8.
[18] Wilson Deposition, Exhibit 6 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 25, lines 6 – 10.
[19] Crawford Deposition I, Exhibit 1 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 85, line 5 – page 86, line 6.
[20] Wilson Deposition, Exhibit 6 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 27, lines 4 – 15.
[21] *Id.*, at page 37, line 7 – page 38, line 5.
[22] Crawford Deposition II, Exhibit 3 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 82, lines 11 – 21.

testified that she made her arrangements for the trip as a customer of VIP, and that she thought VIP was taking her to her doctor's appointment.[23] She understood that both Strachan and Crawford were working for VIP on July 19, 2004.[24] As usual, Crawford then drove to the Weaver home in Charles Town, where he picked up Bubba. Mrs. Weaver testified that, even though they were driving a car instead of a VIP van, she believed Crawford and Strachan were picking her son up as employees of VIP, and that VIP was the business that was transporting her son to school.[25] At trial, VIP claimed that it had notified Ms. Weaver and Ms. Livingood that Crawford and Strachan had left its employ. Nonetheless, VIP transported her son to Grafton the very next day that he went to school after the collision.[26] Moreover, Kenny White, who worked for VIP for over eleven years,[27] testified that on July 19, 2004, the day of Michael Snyder's death, he reported to the Martinsburg VIP office to pick up his VIP van and that he received his assigned VIP runs for the day from Heather Strachan.[28]

VIP argued Strachan quit in early July, although she retained possession of its office and continued using its fax machine and cell phone, and that Crawford quit the Friday before the fatal collision. However, VIP paid Strachan for the pay period after the

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[23]Livingood Deposition, Exhibit 7 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., page 14, line 12 – page 15, line 5; Tr. of Dec. 2, 2009, at pages 68 – 70.
[24]*Id.*, at page 42, lines 7 – 12; Tr. of Dec. 2, 2009, at page 70.
[25] Weaver Deposition, Exhibit 8 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 73, lines 4 – 11. Ms. Weaver died during the pendency of the case; her deposition was read at trial.
[26] *Id.*, at page 74, lines 16 – 20.
[27] White Deposition, Exhibit 11 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd., at page 11, lines 2 – 10.
[28] *Id.*, at page 49, line 10 – page 54, line 12; Tr. of Dec. 2, 2009, at page 118 - 120.

date she allegedly quit.[29] Strachan used the VIP fax from its office the day after the wreck. Further, VIP produced in discovery a purported termination letter to Crawford.[30] The letter was dated July 20, 2004, (the day after the fatal collision), was noted to have been hand-delivered to Crawford on July 24, 2004, (five days after the fatal collision), and purports to confirm, retroactively, Crawford's termination on July 16, 2004. No document pre-dating the fatal incident reflects Crawford's termination as a VIP driver. Strachan died during the pendency of this case, and prior to the completion of her deposition. Her partial deposition was not read at trial.

At trial, the only evidence to the contrary came from VIP's witnesses Mike and Tammy Lepley, who asserted Crawford quit before the fatal trip and that Weaver and Livingood had been informed of Crawford and Strachan's termination. VIP's three witnesses were patently incredible; Robin Lee, VIP's owner's wife, testified that the Lepleys had been fired for taking money from the company,[31] Tammy Lepley testified that Robin Lee was not truthful,[32] and Mike Lepley implied that his wife stole money from VIP[33] and admitted to pleading guilty to theft in Maryland.[34]

Petitioners filed a motion for partial summary judgment against Huntfield asserting that Huntfield had a non-delegable duty to comply with the highway entrance permit and requirements of the regulations, and that the violation of the permit and

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[29] Tr. of Dec. 8, 2009, at page 100, lines 4 – 8.
[30] Exhibit 10 to Plaintiffs' Motion for Summary Judgment against VIP Limousine Services, Ltd..; Plaintiffs' Trial Exhibit 60.
[31] Tr. of Dec. 8, 2009, at page 110.
[32] Tr. of Dec. 8, 2009, at page 161.
[33] Tr. of Dec. 8, 2009, at page 185.
[34] Tr. of Dec. 8, 2009, at page 192.

regulations, designed for the protection of the public safety, constituted *prima facie* negligence. Huntfield thus had a non-delegable duty to comply with the statute. The trial court erroneously denied the motion. Due to the denial, Petitioners were compelled to maintain Defendants Ryan Incorporated Central (Huntfield's general contractor) and CHS Traffic Control Services (Michael Snyder's employer) in the case. The trial court then improperly instructed the jury on the issues concerning Huntfield's fault, wrongly converting the determination of legal duty from a judicial function to a jury issue.

Petitioners also filed a motion for partial summary judgment against VIP, contending that VIP could not, as a matter of law, deny that Crawford and Strachan were VIP's agents, in light of the overwhelming evidence that it was a VIP trip, arranged and dispatched by it and from its office.

The trial began on December 1, 2009. The evidence at trial was largely the same as that developed during the summary judgment briefing. Crawford is a resident of Keyser. His counsel transported him to one day of the trial. Mr. and Mrs. Snyder's counsel called him as an adverse witness. Crawford came to trial with an oxygen tank. His early testimony was unclear, his breathing was labored, and he seemed unwell. During a sidebar concerning an objection, it became clear that Crawford was having difficulty breathing. Ultimately, it was determined that his oxygen tank was nearly empty. The trial court was forced to recess until emergency medical services personnel could bring a new oxygen tank. The replenished oxygen did not aid the clarity of his testimony. He had been deposed over two days during the pendency of the case, and his testimony at trial was different from his deposition testimony and, at times, inconsistent

with his earlier trial testimony. Mr. and Mrs. Snyder's counsel's examination of Mr. Crawford focused largely upon his driving on the day of Michael Snyder's death and his relationship to VIP. Crawford's own counsel then attempted to inquire about the effect the traffic control failings had on his driving. Counsel for Ryan Incorporated Central objected, asserting that the question was outside the scope of direct examination. The trial court sustained the objection. Crawford did not attend any other day of trial and was never able to testify to the effect the signage failings had on his driving.

The jury returned a verdict finding that Lee Crawford was 100% responsible for Michael Snyder's death, that Lee Crawford was engaged in a joint venture with Heather Strachan, that Huntfield and Ryan Incorporated Central were without fault, that CHS had not waived its workers compensation immunity, and that neither Crawford nor Strachan were agents of VIP. The jury further returned a verdict for $2,509,308.00 in compensatory damages and $300,000.00 in punitive damages against Crawford. The trial court denied all motions for new trial.

IV. ASSIGNMENTS OF ERROR AND MANNER DECIDED BELOW

Petitioner Lee Crawford first asserts that the trial court erred in limiting the cross-examination of Mr. Crawford by his counsel, while he was on the stand during Plaintiffs' case in chief, to the areas testified to on cross examination.

Petitioner Crawford next asserts that the trial court erred in allowing an entry on the verdict form for loss of solace, and a separate entry for sorrow and mental anguish, as they are one item of damages under West Virginia's wrongful death statute.

Petitioner Crawford's third assignment of error is that the trial court erred in allowing the report of Mike Fanning, submitted as an exhibit by Defendant Ryan Incorporated Central, to be admitted into evidence, as it did not meet the business record exception to the hearsay rule.

Petitioner Crawford's fourth and fifth assignments of error essentially seek a punitive damages review, and assert that the trial court erred by allowing the jury to consider an award of punitive damages against Defendant Crawford, as such an award was not supported by the evidence at trial, and that the trial court erred by denying Petitioner's Motion for New Trial and Petitioner's request for a remittitur of the punitive damages awarded by the jury.

V. POINTS AND AUTHORITIES RELIED UPON

Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009)

TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd,* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)

Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895)

Alkire v. First National Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996)

McDavid v. United States, 213 W.Va. 592, 584 S.E.2d 226, 230 (2003)

Bradshaw v. Soulsby, 210 W.Va. 682, 558 S.E.2d 681 (2001).

State ex rel. Valley Radiology, Inc., v. Gaughan, __ W.Va. __, 640 S.E.2d 136 (2006)

Combs v. Hahn, 205 W.Va. 102, 516 S.E.2d 506 (1999)

W.Va.R.Evid. 102.

W.Va.R.Evid. 611(b)(1)

Garnes v. Fleming Landfill, Inc., 18 W. Va. 656, 413 S.E.2d 897 (1992)

W.Va. Code §55-7-6 (1992)

VI. DISCUSSION OF LAW

A. The trial court erred by limiting the cross-examination of Mr. Crawford by his counsel, while Crawford was on the stand during Plaintiffs' case in chief.

The trial court limited the cross-examination of Crawford by his own counsel to matters covered in the direct examination. Crawford claims that this was error, and Mr. and Mrs. Snyder agree. The trial court erroneously sustained Defendant Ryan Incorporated's objection to testimony by Crawford as to the effect on his driving that the missing "One Lane Road" sign would have had. This evidence directly addressed the proximate cause issue which was the focus of the contractor defendant's defense. The questions were asked by Crawford's counsel as part of his examination of his own client, after Mr. and Mrs. Snyder's counsel had called Crawford as a witness.

Crawford's counsel should have been allowed to examine his client. The applicable rule of evidence is explicit. "A party may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interest of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination." W.Va.R.Evid. 611(b)(1). The subject matter of the precluded inquiry was certainly relevant to issues in the case; one of the most hotly contested issues at trial was whether or not the traffic control failings were a proximate cause of Michael Snyder's death. The question asked by Crawford's counsel directly addressed this issue. The questioning was clearly relevant. Refusing to allow the questioning was an abuse of discretion.

Moreover, the interests of justice were thwarted, rather than furthered, by the limitation on the cross-examination. The rules of evidence are to "be construed to secure fairness in administration, [and] elimination of unjustifiable expense and delay[.]" W.Va.R.Evid. 102. The trial court should have allowed Crawford's counsel to inquire fully concerning relevant issues in the case. The rules were not fairly administered in this situation, where defense counsel often inquired at length on "cross examination" as to matters outside the scope of direct. An example of this is Huntfield's "cross examination" of CHS' expert witness. The trial court's ruling on this issue prejudiced Mr. and Mrs. Snyder as well as Crawford.

Further, where Crawford, a party, was on the witness stand, under oath, and being examined by his own counsel, and it was not clear he could return for another day of trial due to his medical condition, the trial court's ruling did not eliminate unjustifiable expense and delay. Crawford had a medical condition that necessitated a recess in order for emergency services to bring him a fresh container of oxygen, and it was not clear that he could return to trial.

The trial court abused its discretion by refusing to allow Crawford, a party, to answer questions from his own counsel concerning relevant matters. This error, concerning Huntfield's liability, merits a new trial.

B. The trial court did not err by allowing an entry on the verdict form for loss of solace, and a separate entry for sorrow and mental anguish.

Crawford's second assignment of error concerns the verdict form. Crawford waived this error by failing to object to the damages portion of the verdict form. The waiver rule with respect to a verdict form is clear:

> Absent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharge, constitutes a waiver of the defect or irregularity in the verdict form.

Syl. Pt. 3, *State ex rel. Valley Radiology, Inc., v. Gaughan*, __ W.Va. __, 640 S.E.2d 136 (2006); Syl. Pt. 2, *Combs v. Hahn*, 205 W.Va. 102, 516 S.E.2d 506 (1999).

Moreover, the verdict form was not erroneous. The verdict form set forth the damages recoverable in a wrongful death case, delineated in the precise manner of the jury instructions.[35] No rule requires all of the damages to be categorized as one entry on the verdict form, and Crawford cites no case to this effect.

Crawford's argument is that the different items of damages listed in the wrongful death statute are actually the same thing. Crawford thus argues for a very restrictive statutory construction concerning wrongful death damages, contrary to holdings of this

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35 The instruction stated:

If you find that any defendant was guilty of negligence, and that this negligence proximately caused the death of Michael Snyder, then you may find for the Plaintiffs and award them damages. In determining the appropriate amount of damages to award, it is your duty to award monetary damages for the following:

(1) the sorrow and mental anguish suffered by Michael Snyder's parents;

(2) the loss of solace, which may include society, companionship, comfort guidance, kindly offices and advice, which has been suffered by Michael Snyder's parents as a result of his death; and,

(3) compensation for the reasonably expected loss of (i) income of Michael Snyder, and (ii) services, protection, care and assistance provided by Michael Snyder.

Court. "Because the wrongful death act alleviates the harshness of the common law, it is to be given a liberal construction to achieve its beneficent purposes." *McDavid v. United States,* 213 W.Va. 592, 584 S.E.2d 226, 230 (2003); Syl. Pt. 6, *Bradshaw v. Soulsby,* 210 W.Va. 682, 558 S.E.2d 681 (2001). This Court has specifically analyzed the Legislature's intent concerning wrongful death damages and concluded that "[b]y crafting the damages portion of the wrongful death act so broadly, the Legislature established the principle that juries have almost unfettered discretion in awarding damages for a death caused by the wrongful act, neglect or default of another." *McDavid*, 584 S.E.2d at 235. Moreover, "the Legislature's choice of the phrase 'include[s], but may not be limited to' indicates that a jury in a wrongful death action has broad discretion in the losses it may consider an damages it may award[.]" *Id.* at 236 – 37. As applied to this situation, the statute further defines "solace" by providing examples, such as "kindly offices and advice." None of the examples of "solace" are synonyms of "sorrow" or "mental anguish," further demonstrating the correctness of the verdict form.

In light of these holdings, one can only conclude that sorrow and mental anguish must be different and distinct from loss of solace. It is well-established that "[a] common maxim of statutory construction is that statutes are to be construed so as to give meaning to every word in them," and that "every word used is presumed to have meaning and purpose, for the Legislature is thought by the courts not to have used language idly." *Bullman v. D & R Lumber Co.*, 195 W.Va. 129, 133, 464 S.E.2d 771, 775 (1995). Further, it has been a traditional rule of statutory construction that "the Legislature is

presumed to intend that every word used in a statute has a specific purpose and meaning," *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979), cited in *Keatley v. Mercer County Bd. of Educ.*, 200 W.Va. 487, 490 S.E.2d 306 (1997). Thus, the Legislature would not have listed the different elements of damages separately if the words meant the same thing. Crawford does not cite any authority for his argument that sorrow and mental anguish are the same as loss of solace. The damages portion of the verdict form was correct and a new trial on this point is not warranted.

C. The trial court erred in allowing the report of Mike Fanning, submitted as an exhibit by Defendant Ryan Incorporated Central, to be admitted into evidence, as it did not meet the business record exception to the hearsay rule.

Mr. and Mrs. Snyder agree with Petitioner Crawford as to this assignment of error. The report did not satisfy the requirements of the business records exception to the hearsay rule and, as noted by Crawford, was simply incorrect because it concluded that the traffic control at the site complied with the legal requirements. This conclusion was false.

D. Petitioner Crawford's arguments concerning punitive damages are not warranted, because Crawford's conduct merited punitive damages and the punitive damages awarded are not excessive.

The jury returned a punitive damages verdict against Defendant Crawford in the amount of $300,000. Based on the evidence at trial, the punitive damages were warranted and were not excessive.

A punitive damages review must be conducted in two steps:

> first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award . . .; second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive . . . .

Syl. Pt. 7, *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996). In the case at hand, Defendant Crawford's conduct toward Plaintiffs entitled them to punitive damages, and the jury's punitive damages verdict was not excessive.

A. Petitioner's conduct merits punitive damages.

The type of conduct which gives rise to punitive damages occurs "where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it[.]" Syl. Pt. 4, *Alkire v. First National Bank of Parsons,* 197 W.Va. 122, 475 S.E.2d 122 (1996); Syl. Pt. 4, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895). The Court must also be mindful of the post-trial review standard, and apply the question to consider as set forth in *Alkire*, at 129: "do the facts and inferences in this case point so strongly and overwhelmingly in favor of Defendant Crawford to the extent that he did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could have reached a verdict against him on the issue of punitive damages?" The answer in this case is no.

A brief summary of the evidence from this case demonstrates that the verdict for punitive damages was supported by the evidence. According to some evidence, after passing road construction signs and orange barrels, Crawford saw Michael Snyder in the roadway when he was hundreds of feet away; however, instead of driving cautiously,

Crawford diverted his attention to looking for his spit cup for a period of nearly six seconds. His inattention to the roadway was grossly negligent. Punitive damages were warranted.

B. The punitive damages verdict is not excessive.

Application of the *Garnes* factors shows that the jury's punitive damages award was not excessive. *Garnes v. Fleming Landfill, Inc.,* 18 W. Va. 656, 413 S.E.2d 897 (1992).

i. The punitive damages assessed "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." *Garnes*, at Syl. Pt. 3, in part. Crawford's gross negligence resulted in one person's death and could have led to serious injuries or death to others, such as the child or the cancer patient in the car or other workers in the construction zone.

ii. The punitive damages were also not excessive due to "the reprehensibility of the defendant's conduct." *Id.* Crawford's grossly negligent driving merited the punitive damages verdict by the jury.

iii. The punitive damages were not excessive because the punitive damages assessment "discourages future bad acts by the defendant." *Id.* The verdict is sufficient to discourage Crawford from future inattentive driving in work zones.

iv. The punitive damages verdict "bears a reasonable relationship to compensatory damages." *Id.* In this case, the punitive damages were less than one-eighth of the compensatory damages. This ratio is far from that which the Court has identified

as impermissible. "The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1." Syl. Pt. 21, in part, *Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009); syl. pt. 15, in part, *TXO Production Corp. v. Alliance Resources Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd,* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). The punitive damages award was well below the maximum range.

v. The punitive damages award did not take into consideration the "financial position of the defendant," *Garnes* at Syl. Pt. 3, in part, but the reason was Crawford's failure to be present to testify to such matters.

vi. The punitive damages award was not excessive because the "costs of the litigation" were high. *Garnes,* at Syl. Pt. 4, in part. Plaintiffs utilized three expert witnesses for trial, and numerous depositions were taken. The litigation costs in this matter were substantial.

vii. The punitive damages were not excessive based upon a consideration of "[a]ny criminal sanctions imposed on the defendant for his conduct." *Id.* As noted in *Garnes*, at 905, the imposition of criminal sanctions is a mitigating factor. Defendant Crawford did not even plead guilty to the crime he was charged with; his defense counsel negotiated a no contest plea, with only thirty days in jail, for Michael Snyder's death.

viii. There were no "other civil actions against the same defendant, based on the same conduct." *Id.*

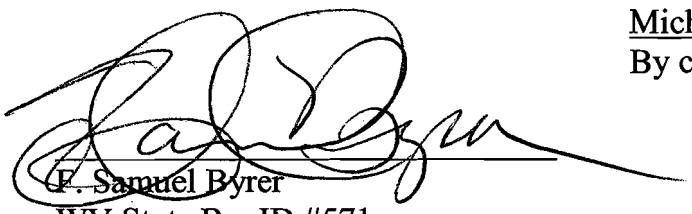
ix. The punitive damages are appropriate "to encourage fair and reasonable settlements when a clear wrong has been committed." *Id.* Hopefully, the punitive damage award in this case will encourage defendants in the future to fairly and reasonably settle cases when the defendant is clearly in the wrong.

Punitive damages were appropriate for the jury's consideration in this case, and the amount of the punitive damages was not excessive in relation to the compensatory damages. Neither a new trial nor a remittitur is appropriate.

VII. RELIEF REQUESTED

Mr. and Mrs. Snyder do not agree with all of the errors assigned by Petitioner Crawford. In light of the substantial error by the trial court in limiting Crawford's examination by his own counsel on a relevant point, and the errors raised in the Snyders' Petition for Appeal, Mr. and Mrs. Snyder pray that this honorable Court accept the Petition for Appeal on behalf of Lee Crawford.

David Snyder and Mary Snyder,
Personal Representatives of the Estate of
Michael C. Snyder, deceased, Petitioners
By counsel



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DAVID SNYDER and MARY SNYDER,
Personal Representatives of the
Estate of Michael Snyder, deceased,

Plaintiffs/Petitioners herein,

vs.

Case No. _____
Jefferson County Civil Action No. 06-C-243

HUNTFIELD, L.C.,
RYAN INCORPORATED CENTRAL,
CHS TRAFFIC CONTROL SERVICES, INC.,
VIP LIMOUSINE SERVICE, LTD.,
GLEN M. LEE, d/b/a VIP LIMOUSINE SERVICE, LTD.,
HEATHER L. STRACHAN, and
LEE JAMES CRAWFORD,

Defendants/Respondents herein.

Certificate of Service

I, F. Samuel Byrer, hereby certify that I have served a copy of the foregoing RESPONSE TO LEE CRAWFORD'S PETITION FOR APPEAL upon the following persons, by U.S. Mail, postage prepaid, on the 10th day of December, 2010:

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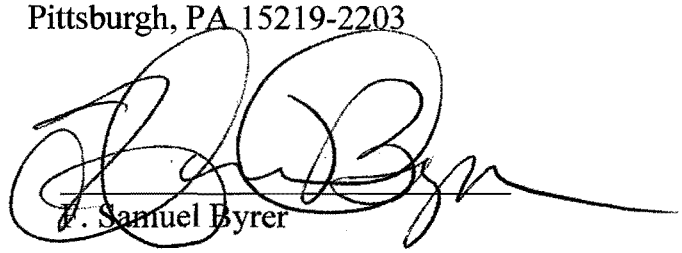

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