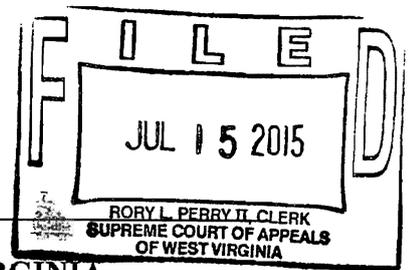


No. 15-0393



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RYAN LYNN HARNISH,

Defendant Below / Petitioner,

v.

**CHARLES M. CORRA and
ELIZABETH G. CORRA,**

Plaintiffs Below / Respondents.

BRIEF OF PETITIONER

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I. STATEMENT OF CASE

This appeal arises from the Wood County Circuit Court's decision to set aside a jury verdict, and order a new trial on issues that were already decided by a competent jury. [App. 169-78.] Accordingly, the Petitioner, Ryan Lynn Harnish ("Mr. Harnish"), hereby requests that this Honorable Court reverse the Circuit Court's decision to grant the Respondents' Motion for a New Trial, and reinstate the jury's original verdict.

Respondents filed the underlying civil action after an automobile accident that took place on October 4, 2012, between vehicles being driven by Mr. Harnish and Respondent Charles Corra ("Mr. Corra"), in Vienna, West Virginia. [App. 1.] Immediately before the accident, the vehicle driven by Mr. Corra was stopped in the northbound lane of Williams Highway, Route 14, while Mr. Corra was waiting to turn left into his place of employment. [App. 2.] As Mr. Corra was waiting for an opportunity to turn, his vehicle was rear-ended by Mr. Harnish's vehicle. [App. 2.]

Mr. Corra claimed that the accident caused injury to his neck, back and right knee. [App. 2.] Specifically, Mr. Corra alleged that he suffered past medical expenses of \$25,642.62. [App. 21-24.] Of this amount, \$9,620.59 accounted for Mr. Corra's alleged neck/back problems. The remainder of his medical expenses were for an alleged knee injury. These expenses included a knee surgery that Mr. Corra underwent on December 26, 2012, which he claimed was made necessary by the accident.

Mr. Harnish admitted liability for the accident, and further admitted that Mr. Corra's neck and back problems were caused by the accident. However, Mr. Harnish denied that the accident injured Mr. Corra's knee, and denied that the accident caused him to need knee surgery. Instead, Mr. Harnish argued that Mr. Corra's knee problems were caused by a preexisting condition that was unrelated to the accident.

A trial was held on December 9-10, 2014, so that the jury could determine, among other things, whether Mr. Corra's knee condition and corresponding knee surgery were attributable to the October 4, 2012, accident.

At trial, Mr. Corra supported his theory that his knee injury was caused by the accident by soliciting testimony from Dr. George Tokodi ("Dr. Tokodi"), who performed the above-mentioned knee surgery on Mr. Corra. [App. 313-54.] Dr. Tokodi generally agreed that the knee defect was caused by the accident.

However, the evidence presented at trial demonstrated that Mr. Corra did not initially complain of a knee injury. There was no mention of a knee injury in the narrative provided by the ambulance service that transported Mr. Corra after the accident. [App. 136.] Further, there was no mention of a knee injury in the emergency room records on the date of the accident. [App. 118-29.] Moreover, there was no mention of a knee injury in Mr. Corra's medical records for an entire month after the accident.

In further support of his position, Mr. Harnish called Dr. David Santrock ("Dr. Santrock") to provide an expert opinion regarding whether Mr. Corra's knee injury was caused by the accident. Dr. Santrock ultimately opined that Mr. Corra's knee defect was not caused by the wreck, but was instead caused by a preexisting condition. [See App. 204; App. 210; App. 216.]

Dr. Santrock supported this opinion in numerous ways. First, Dr. Santrock explained that Mr. Corra's knee surgery was performed to correct a defect that was behind his patella. [App. 216.] Dr. Santrock testified that the only way the subject accident could have caused such a defect was if Mr. Corra suffered a direct blow to his kneecap. [App. 207.] Dr. Santrock further explained that there was no evidence of **any** trauma to the knee after the subject accident, much less direct

trauma. [App. 210.] Thus, because the evidence did not show that Mr. Corra suffered a direct blow to his knee, it did not show that the accident caused his knee condition.¹

Second, Dr. Santrock testified that it was significant that Mr. Corra did not complain of knee pain in the emergency room, or in the days/weeks following the accident. [App. 204.] The accident occurred on October 4, 2012, yet the first mention of knee pain in any of the medical records was a note by Dr. Charles Levy made nearly one month later on November 2, 2012. [See App. 96.] Dr. Santrock explained at trial that if the accident caused Mr. Corra's knee defect, Mr. Corra would have experienced knee pain at the time of the accident. [App. 213.]

Lastly, Dr. Santrock referenced a diagram,² originally introduced by the Respondents, which showed the roughened part of Mr. Corra's femoral condyle and the L-sized defect. [App. 206; App. 58.] Dr. Santrock explained that the roughened part of Mr. Corra's femoral condyle and the L-sized defect would have been directly behind the back of Mr. Corra's kneecap. [App. 206.] Dr. Santrock further explained that Mr. Corra had a preexisting patella chondromalacia (roughening of the cartilage on the back of the knee cap), and that it was very likely the defects Dr. Tokodi operated on was caused by this degenerative condition and not the accident. [App. 216.]

The initial lack of knee complaints in Mr. Corra's medical records and Dr. Santrock's testimony served as the primary support for Mr. Harnish's contention that the knee

¹ Dr. Santrock further testified that when Mr. Corra was rear-ended, his body should have moved backward in his seat. [App. 210-11.] As such, there was no reason to believe that Mr. Corra suffered any blow to the knee, because such a blow would have only occurred if his body was propelled forward.

² Although the diagram included the word "traumatic," Dr. Tokodi testified that his preoperative diagnosis of grade three chondromalacia is a degenerative condition. [App. 344-45.] Dr. Tokodi further testified that he does not believe Mr. Corra suffered a direct blow to the knee. [App. 350.]

defect and related expenses were not caused by the accident, but were instead caused by Mr. Corra's preexisting medical condition.

The jury ultimately returned a verdict that awarded Mr. Corra past medical damages of \$9,620.59 - the exact amount of damages Mr. Corra suffered for his neck/back injury. [App. 355.] This figure represented the exact amount of the medical damages that were undisputed by the parties and did not include any compensation for the medical treatment that Mr. Corra claimed was necessary to treat his knee. Mr. Corra was also awarded \$3,943.80 in pain and suffering. [App. 355.] As such, the total verdict awarded by the jury equaled \$13,564.39. [App. 355.] The amount of this verdict evidenced that the jury agreed with Mr. Harnish that Mr. Corra's knee injury was not caused by the subject accident.

After the trial, the Respondents filed a Motion for a New Trial. [App. 149-50.] In their Motion, the Respondents argued that a new trial was necessary because they claimed the "uncontroverted" evidence showed that Mr. Corra's knee condition was caused by the subject accident. [App. 150.] In support of their assertion that the evidence conclusively showed that Mr. Corra injured his knee during the wreck, Respondents cited only to Dr. Tokodi's trial testimony and Dr. Santrock's deposition testimony. [See App. 149-57.] Respondents failed to address Mr. Corra's initial lack of knee complaints in his medical records after the accident.

In response, Mr. Harnish cited to Dr. Santrock's trial testimony to establish that Dr. Santrock had, in fact, provided evidence supporting the conclusion that Mr. Corra's knee was not injured in the accident, and that his knee surgery was necessitated by a preexisting condition. [App. 161-63.] Mr. Corra subsequently filed a "Second Memorandum in Support of Their Motion for a New Trial" which quoted a select portion of Dr. Santrock's trial testimony, and which claimed that this quotation supported the original Motion for a New Trial. [App. 165-67.]

Ultimately, on April 6, 2015, the Wood County Circuit Court granted Respondents' Motion for a New Trial. [App. 169-78.] The Circuit Court's Order proclaimed that "[t]he plaintiff had preexisting neck and back conditions and made no claim that they were caused by or aggravated by the accident." [App. 169.] The Circuit Court went on to state:

The Court notes that it was the jury's determination that the plaintiff suffered injuries as a proximate result of the defendant's negligence. The clear weight of the evidence, indeed the only evidence presented, showed that the plaintiff's injuries were to his right knee. *No evidence was presented respecting injuries to plaintiff's neck and back and no claim was made respecting the same.*

[App. 172 (emphasis added).]

Based on this erroneous belief that Mr. Corra did not allege any injuries to his neck or back, the Circuit Court concluded that the jury's verdict, which awarded Mr. Corra past medical damages, was "compatible only with a conclusion that the accident aggravated or accelerated plaintiff's preexisting [knee] condition and he therefore suffered injuries proximately caused by the accident." [App. 172.] This conclusion served as the primary basis for the Circuit Court's decision to grant Respondents' Motion for a New Trial.

On April 9, 2015, counsel for Mr. Harnish sent a letter to the Circuit Court that asked the Court to reconsider its decision. [App. 179-89.] This letter pointed out that, at trial, and all relevant times during the litigation, Mr. Corra **did** allege his neck and back were injured during the accident, and that in fact he **did not**, for an entire month, complain of knee pain. [App. 179.] Thus, this letter asked the Court to review the record and reverse its decision to award Mr. Corra a new trial. [App. 180.]

On April 28, 2015, the Court issued a second Order, which acknowledged that the original Order misstated the record and that Mr. Corra did allege injury to his neck and back at trial.

[App. 190-91.] Nonetheless, this second Order upheld the Court's original ruling and summarily stated that the clear weight of the evidence supported the conclusion that Mr. Corra's preexisting knee condition was aggravated or accelerated by the subject accident. [App. 190-91.] Subsequently, Mr. Harnish filed the present appeal.³

II. SUMMARY OF ARGUMENT

The Circuit Court's original Order which granted Respondents' Motion for a New Trial makes clear that it was based primarily, if not entirely, on the idea that that Mr. Corra did not allege injury to his neck or back at trial, and that he only alleged injury to his right knee. Thus, the Order reasoned that because the jury awarded Mr. Corra past medical damages, the jury agreed with Mr. Corra that the accident caused injury to his right knee. The Circuit Court then determined that if the jury agreed with Mr. Corra on the knee issue, then the clear weight of the evidence necessitated that Mr. Corra be awarded past medical damages for his knee surgery, which the jury did not award. Thus, the Circuit Court granted Respondents' Motion for a New Trial.

However, the foundation of this decision - that Mr. Corra did not allege injury to this neck or back - was factually inaccurate. Mr. Corra did allege injury to his neck and back at trial, and Mr. Harnish did not contest these injuries. Thus, the jury's verdict did not evidence that the jury found that Mr. Corra injured his knee in the wreck. Instead, the verdict clearly shows that the jury agreed with Mr. Harnish, and found that Mr. Corra did not injure his knee in the accident.

Mr. Harnish introduced ample evidence to support the proposition that Mr. Corra did not injure his knee in the accident. The majority of this evidence came from the lack of initial

³ The Respondents filed their Motion for New Trial on December 23, 2014. The Circuit Court's original Order granting a new trial was entered on April 6, 2015. While the Circuit Court had not yet entered a judgment order at the time the notice of appeal was filed, the judgment order was entered on June 8, 2015. [See App. 355-56.] Therefore, this matter is ripe for appeal.

complaints regarding a knee injury and the deposition testimony of Dr. Santrock, who testified that the accident did not cause Mr. Corra's knee defect, and that the defect was instead caused by a preexisting condition. Mr. Santrock provided lengthy testimony that explained how he reached this conclusion and why the evidence did not support Mr. Corra's theory that he injured his knee in the accident.

While Respondents took steps to impeach Dr. Santrock's testimony, such impeachment did not change the fundamental nature of Dr. Santrock's conclusions or the underlying reasoning he used to reach those conclusions. When the jury considered Mr. Corra's initial medical records and weighed Dr. Santrock's testimony against the Respondents' evidence and attempts at impeachment, the jury appropriately sided with Mr. Harnish on the knee issue. The Circuit Court abused its discretion by disrupting the finding that was made by the jury, and that abuse of discretion should be reversed by this Honorable Court.

III. STATEMENT REGARDING ORAL ARGUMENT

Mr. Harnish believes that the legal arguments relating to this appeal can be adequately stated in the briefs, and that oral argument will not be necessary. Nonetheless, if this Honorable Court feels it can be aided by the presentation of oral arguments, Mr. Harnish requests the opportunity to present the same. *See* W. Va. R. App. P. 18(a).

IV. STANDARD OF REVIEW

Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, when a litigant moves for a new trial, the trial judge is required to weigh the evidence and consider the credibility of the witnesses. *See Ware v. Howell*, 217 W. Va. 25, 27-28, 614 S.E.2d 464, 466-67 (2005). If the circuit court finds the verdict is against the clear weight of the evidence, is based on false evidence

or will result in a miscarriage of justice, the trial judge may set aside the verdict and grant new trial. *Id.*

Nonetheless, [i]n reviewing a jury verdict, all reasonable and legitimate inferences must be considered in favor of party for whom the verdict was returned.” *Shiel v. Ryu*, 203 W. Va. 40, 47, 506 S.E.2d 77, 84 (1998). Rule 59 grants relief only in extreme cases as courts have “historically favored supporting jury verdicts and will affirm a verdict, short of compelling reasons to set a verdict aside.” *Pipemasters, Inc. v. Putnam County Comm’n*, 218 W. Va. 512, 518, 625 S.E.2d 274, 280 (2005).

This Honorable Court reviews a circuit court’s decision to grant a new trial using an abuse of discretion standard. *See Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). The underlying factual findings of the circuit court are reviewed using a clearly erroneous standard. *See Ware*, 217 W. Va. at 27-28, 614 S.E.2d at 466-67. Questions of law are subject to a *de novo* review. *Id.*

While this Court has made clear that a circuit court’s decision to grant a new trial is entitled to “great respect and weight,” this Court has also held that “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.* at syl. pt. 3 (citing Syl. Pt. 4, in part, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976)). “[W]hen a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on error that had no appreciable effect on the outcome, it is this Court’s duty to reverse.” *Tennant*, 194 W. Va. at 106, 459 S.E.2d at 383. “Where the trial court improperly sets aside the verdict of the jury, such verdict will be reinstated by this Court and judgment rendered thereon.” *Bronson v. Riffe*, 148 W. Va. 362, 369, 135 S.E.2d 244, 248 (1964).

V. ARGUMENT

A. *The Wood County Circuit Court Abused Its Discretion By Granting a New Trial Based on an Erroneous Understanding and Application of the Evidence.*

The Circuit Court granted Respondents' Motion for a New Trial based on the erroneous belief that Mr. Corra did not allege injury to his neck or back at trial. Thus, the Circuit Court reasoned that since the jury returned a verdict that was favorable to the Respondents, that the jury concluded that Mr. Corra's knee injury was caused by the accident. The Circuit Court further found that "[n]evertheless, the verdict awarded plaintiff his medical expenses incurred up to but excluding his arthroscopic procedure. This element of the verdict is consistent only with a conclusion that the surgery performed by Dr. Tokodi was not reasonable and necessary." The Circuit Court found that such a conclusion was against the clear weight of the evidence.

Accordingly, the Circuit Court's original Order performed an analysis of Dr. Santrock's trial testimony for the purpose of determining whether that trial testimony supported a conclusion that the accident caused Mr. Corra's knee defect, but that his knee surgery was, nonetheless, not reasonable and necessary.

The Circuit Court correctly concluded that, if the jury had decided that the subject accident caused Mr. Corra's knee defect, then it would be against the clear weight of the evidence to subsequently decide that the knee surgery performed by Dr. Tokodi was not reasonable and necessary. However, the jury **did not** find that the accident caused injury to Mr. Corra's knee, as the Circuit Court erroneously believed. The jury's verdict clearly indicates that the jury found that the accident caused injury to Mr. Corra's neck and back, which Mr. Harnish admitted prior to trial, but that the accident did not cause injury to his knee. This is evidenced by the fact that the jury's award for past medical damages aligns perfectly with the amount that Mr. Corra alleged for his neck and back injuries.

Therefore, the Circuit Court's entire Order granting Respondents' Motion for a New Trial is based on a chain of reasoning that starts with a flawed assumption. There is no question that Mr. Corra was seeking damages for his neck and back injuries. In fact, the Circuit Court later acknowledged that Mr. Corra was seeking damages for his neck and back injuries in its second Order.

While the Circuit Court's Order entered April 28, 2015, correctly acknowledged that Mr. Corra sought damages for his neck and back injuries, that same Order goes on to summarily reiterate its basis for granting the Motion for a New Trial, without providing any additional explanation or analysis. This reiteration of its original decision ignores that the original Order was based almost entirely on the mistaken idea that the jury found in favor of Mr. Corra regarding the cause of his knee injury.

Ultimately, the acknowledgment that Mr. Corra alleged neck and back injuries at trial completely eviscerates the rationale employed in the Circuit Court's original Order, and the Circuit Court should have reversed its decision once it realized that Mr. Corra did allege injury to his neck and back.

This Honorable Court explained in *Maynard v. Adkins*, 193 W. Va. 456, 459, 457 S.E.2d 133, 136 (1995), that a trial court's decision to award a new trial should be reversed if that decision is "clearly wrong." (quoting *Sargent v. Malcomb*, 150 W.Va. 393, 395, 146 S.E.2d 561, 563 (1966)). A review of this Court's decisions on the issue makes clear that, while a trial court's decision to grant a new trial should rarely be reversed, one of the most compelling reasons for such a reversal is when the trial court misapprehended the law or evidence. See Syl. Pt. 4, *Sanders*, 159 W. Va. at 621, 225 S.E.2d at 218; *Ware*, 217 W. Va. at 27-28, 614 S.E.2d at 466-67; Syl. Pt. 1, *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W. Va. 624, 626, 499 S.E.2d 846, 848 (1997); *Foster*

v. *Sakhai*, 210 W. Va. 716, 722, 559 S.E.2d 53, 59 (2001); *Stillwell v. City of Wheeling*, 210 W. Va. 599, 604, 558 S.E.2d 598, 603 (2001); and Syl. Pt. 2, *Brooks v. City of Huntington*, 234 W. Va. 607, 768 S.E.2d 97 (2014).

In this case, the Circuit Court's Order was primarily, if not entirely, based on the assumption that Mr. Corra did not allege damages for his neck and back injuries at trial, and that the jury found that the accident caused injury to his knee. This is the exact type of misapprehension that is contemplated in *Sanders* and its progeny. For this reason, the Circuit Court abused its discretion when granting Respondents' Motion for a New Trial, and the original verdict of the jury should be reinstated by this Honorable Court.

B. The Wood County Circuit Court Abused its Discretion by Holding that the Jury's Verdict Was Contrary to the Clear Weight of the Evidence.

Having dispelled the notion that Mr. Corra did not request damages for his neck or back injuries at trial, most of the reasoning employed in the Circuit Court's Order becomes inapplicable. To the extent the remaining portions of that Order hold that the jury's decision was against the clear weight of the evidence, such a holding is not supported by the record that was introduced at trial. Further, the Circuit Court interjected its own judgment in place of the jury's careful considerations.

When deciding motions for a new trial pursuant to Rule 59, circuit courts are authorized to weigh the evidence that was submitted at trial. *See* Syl. Pt. 3, *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 122, 454 S.E.2d 413, 416 (1994). However, "such authorization does not obviate the essential role of the jury in resolving conflicting evidence." *Shiel*, 203 W. Va. at 46, 506 S.E.2d at 83. This Court has consistently said that "[i]t is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of

witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed.” *Id.* at syl. pt. 5 (quoting Syl. Pt. 4, *Young v. Ross*, 157 W.Va. 548, 202 S.E.2d 622 (1974) (internal quotations and additional citations omitted)). In other words, “[w]here, in the trial of an action at law before a jury, the evidence is conflicting, it is the province of the jury to resolve the conflict, and its verdict thereon will not be disturbed unless believed to be plainly wrong.” *Id.* at syl. pt. 6 (quoting Syl. Pt. 2, *French v. Sinkford*, 132 W.Va. 66, 54 S.E.2d 38 (1948)).

The important role of the jury is underscored in *Shiel v. Ryu*, *supra*. In *Shiel*, the Plaintiff filed suit for medical malpractice after having two carpal release surgeries performed on each of his wrists. 203 W. Va. at 43, 506 S.E.2d at 80. After a trial was held on the issue, the jury found in favor of the Defendants. *Id.* Subsequently, the trial judge set aside the jury’s verdict and ordered for a new trial to be held. *Id.* at 44, 506 S.E.2d at 81. When deciding to grant this new trial, the trial judge said that the “evidence presented by the defendants was not sufficient to overcome the clear evidence of devastating personal injury suffered by the plaintiff. . . .” *Id.* The trial judge further noted that the medical records relating to the surgeries contained “multiple references to infection and rejection attributable to the implantation of a foreign material[,]” that the Defendant surgeon admitted to having cut fascicles in the plaintiff’s nerves and that the subject surgeries were only the third and fourth times that the Defendant surgeon had performed a procedure with a vein graft. *Id.* at 44-45, 506 S.E.2d at 81-82.

On review, the *Shiel* Court noted that numerous disputed facts had been submitted to the jury for determination, and that there was no indication of “improper instruction or other error in the presentation of evidence.” *Id.* at 46, 506 S.E.2d at 83. The Court noted that “[w]hile conflicting evidence was presented by both parties, such is the case in most trials[,]” and when such disputes of fact occur, it is for the jury to decide whose evidence is the most convincing. *Id.*

Ultimately, the Court held that the trial court abused its discretion when ordering a new trial, despite the considerable evidence which suggested that the Plaintiff had been injured by the surgeries. The Court stated that affirming the trial court's decision to grant a new trial would have permitted the trial judge to "intrude upon the exclusive province of the jury to weigh and decide questions of fact." *Id.*

In the present case, the same type of intrusion will be permitted if the Circuit Court's decision to grant a new trial is affirmed. At trial, both sides presented evidence regarding the extent of Mr. Corra's damages and which damages were attributable to the accident. The jury heard testimony and considered evidence that supported the Respondents' position. Ultimately, the jury's verdict makes clear that it agreed with Mr. Harnish on the issue of whether Mr. Corra's knee was injured during the accident.

Sufficient evidence was presented at trial to prove that Mr. Corra's knee was not injured during the accident. Importantly, the medical records presented as evidence demonstrated that Mr. Corra did not initially complain of a knee injury. There was no mention of a knee injury in the narrative provided by the ambulance service that transported Mr. Corra after the accident. Further, there was no mention of a knee injury in the emergency room records on the date of the accident. Indeed, there was no mention of a knee injury in Mr. Corra's medical records for an entire month after the accident.

Additional evidence came from Dr. Santrock's direct examination testimony. After Dr. Santrock explained his credentials and preparation for the case, he expressly testified that: (1) the surgery was "directed at a preexisting condition[,]" (2) there was no evidence Mr. Corra suffered direct trauma to his knee, which would have been necessary in order for the accident to have caused the defect that ultimately resulted in surgery, (3) Mr. Corra did not complain of knee

pain in the days/weeks following the accident, and (4) roughened chondromalacia actually caused the degenerative damage to Mr. Corra's femoral condyle, which ultimately resulted in the knee surgery.

On cross-examination, Mr. Corra's legal counsel attempted to negate Dr. Santrock's direct examination testimony. The Circuit Court's original Order that granted Respondents' Motion for a New Trial concentrated heavily on this cross-examination testimony, and quoted almost three pages worth of such cross-examination testimony. This three-page quotation included Dr. Santrock's reiteration that he "obviously" did not think Mr. Corra's knee problems were caused by the accident. Despite the quotation's length, the only portion of that quotation that even potentially weighed against Dr. Santrock's ultimate conclusion is the last exchange within the quotation, which was highlighted by the Circuit Court. During this exchange, Dr. Santrock admits that Mr. Corra's knee injury was "aggravated" by the accident. Both Mr. Corra and the Circuit Court seemed to conclude that this admission completely negated all of Santrock's prior direct examination testimony and his ultimate opinion that the accident did not cause Mr. Corra's knee defect.

While the statement regarding aggravation is not insignificant, it is a statement that the jury was required to weigh when deciding whether Mr. Corra's knee defect was caused by the accident. Indeed, the jury was instructed that it could accept or disregard the testimony of either parties' expert witness. Instead, the Circuit Court drew its own conclusions from the statement, and supplanted the jury's conclusions.

However, even if that statement is taken into account, a complete analysis of Dr. Santrock's trial testimony supports the proposition that Mr. Harnish did not cause the knee defect or the resulting knee surgery. Thus, the jury appropriately sided with Mr. Harnish on that issue because it found Mr. Harnish's evidence to be the most convincing.

The jury's finding was certainly supported by sufficient evidence. Yet when analyzing that finding, the Circuit Court failed to make "every reasonable and legitimate inference, fairly arising from the evidence" in favor of Mr. Harnish, as it was required to do under West Virginia law. Syl. Pt. 3, *Faris v. Harry Green Chevrolet, Inc.*, 212 W. Va. 386, 572 S.E.2d 909 (2002). Accordingly, as in *Shiel*, the Circuit Court abused its discretion by vacating the jury's decision and ordering a new trial. That decision should be reversed by this Honorable Court.

VI. CONCLUSION

The Circuit Court of Wood County abused its discretion when it vacated the jury's verdict in favor of Mr. Harnish and ordered a new trial because that decision was mostly based on a misapprehension of the facts in evidence. Further, the jury's verdict was not against the clear weight of the evidence. The Circuit Court failed to make every reasonable and legitimate inference, fairly arising from the evidence, in favor of Mr. Harnish. Accordingly, the jury's original verdict should be upheld, and this Honorable Court should reverse the Circuit Court's decision to grant a new trial in this matter.



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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Petitioner, hereby certify that I served a true copy of the foregoing upon counsel for the Respondent, via U.S. Mail, postage prepaid, on this 15 **th** day of July, 2015.



David A. Mohler (WVSB #2589)