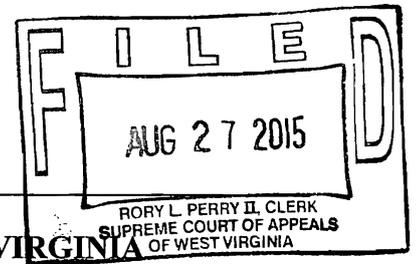


No. 15-0393



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**RYAN LYNN HARNISH**

**Defendant/Petitioner,**

**v.**

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

**Plaintiffs Below/Respondents**

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**BRIEF OF RESPONDENT**

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## I. STATEMENT OF THE CASE

This appeal arises from an Order of a Wood County Circuit Court in which the Court set aside the jury's verdict and ordered a new trial based upon the Court's finding that the jury's verdict was against the clear weight of the evidence. [See App. 178]

The underlying civil action arose from a rear end motor vehicle accident collision that took place on October 4, 2012 between Ryan Harnish and Charles Corra. Liability was admitted by Defendant Ryan Harnish as he had struck the rear of Charles Corra's vehicle as he was waiting to make a left hand turn. Mr. Harnish's attention was diverted away from the roadway by his cell phone.

Charles Corra testified that at the accident scene he was scared because he had recently had neck surgery in April of 2012 and he was worried about it hurting him (See App. 252). Mr. Corra was placed on a backboard and taken to the emergency room of Camden Clark Memorial Hospital where he testified that he "hurt pretty much all over" and was "[s]tiff, numb from all the hours of being strapped down in one position." [See App. 256]. Mr. Corra further testified that when he finally got off the backboard and was walking to the restroom that he noticed that his knee was hurting. [See App. 256]. When the pain in his knee progressed, Mr. Corra ended up having arthroscopic surgery on his right knee on December 26, 2012 by Dr. George Takodi. [See App. 263]. Dr. Takodi testified by video deposition at trial and without question related Charles Corra's knee condition to the October 4, 2012 motor vehicle accident. [See App. 329]. Dr. Takodi's testimony was two-fold. First, he testified that there was an acute large L-shaped full thickness defect on the medial femoral condyle that was caused by trauma

from the motor vehicle accident. [See App. 329]. Secondly, he testified that Mr. Corra had chondromalacia on the backside of the patella that was aggravated by the motor vehicle accident. [See App. 352-353]. The surgery was performed to repair these conditions. [See App. 328]

The Petitioner's sole medical expert at trial was Dr. David Santrock, an orthopedic surgeon. Dr. Santrock testified that the defect could not have been caused in the motor vehicle accident and was likely due to degenerative conditions in Mr. Corra's knee. [See App. 210]. However, Dr. Santrock admitted and agreed with Respondent's position that the October 4, 2012 motor vehicle accident, at a minimum, aggravated Charles Corra's preexisting degenerative condition in his right knee. Dr. Santrock also agreed that the December 26, 2012 surgery helped assist in alleviating the symptoms in Mr. Corra's right knee. [See App. 221, 222]

Despite the Court's proper jury instruction on aggravation of preexisting conditions, the jury failed to award the medical expenses associated with the surgery or Respondent's lost income relating thereto. Thus, the Circuit Court properly set aside the jury's verdict by stating the following:

Finally, respecting the crucial question whether Dr. Takodi's arthroscopic surgery on Mr. Corra was reasonable and necessary, taking Dr. Santrock's testimony as a whole, both on direct examination and cross examination, along with all other evidence presented on this issue, the Court finds that the jury's verdict excluding the expense is against the clear weight of the evidence.

[See App.178]

## **II. SUMMARY OF ARGUMENT**

Petitioner has focused their basis for this appeal on what he believes is a mistake in the Circuit Court's Order which bears no relationship to the Court's determination that the

jury's verdict was against the clear weight of the evidence. The basis for the Circuit Court's ruling was the fact that the opinions of Petitioner's own expert, Dr. David Santrock, corroborated Respondent's medical evidence that Mr. Corra's right knee surgery was reasonable and necessary as a result of aggravation caused to preexisting chondromalacia (degeneration) in his right knee from the subject motor vehicle accident. All medical witnesses agreed with this position. The basis of the Court's ruling is evidenced by the fact that within its Order the Circuit Court quotes over four (4) pages of the Dr. Santrock's testimony from the trial which acknowledges his agreement with Respondent's position as to aggravation and the necessity of the surgery in question. [See App. 173-177]. Petitioner's brief ignores the aggravation issue and merely cites testimony relating to the condition referred to as a "defect" in Mr. Corra's knee. The causation of the defect was heavily debated at trial. However, the Court awarded the new trial on the uncontroverted evidence that the surgery was necessary because of aggravation of the preexisting chondromalacia.

### **III. STATEMENT REGARDING ORAL ARGUMENT**

Respondent believes that the legal arguments relating to this appeal can be adequately stated in the briefs and that oral argument will not be necessary. However, should the Honorable Court be aided by presentation of oral argument, Respondent respectfully request the opportunity to present the same.

### **IV. STANDARD OF REVIEW**

Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, a Court is required to weigh the evidence and consider the credibility of the witnesses when determining

whether or not a litigant is entitled to a new trial. *Andrews v. Reynolds Memorial Hospital*, 201 W. Va. 624 , 499 S.E.2d 846, (1997). When the trial court has awarded a new trial on the basis that the verdict of the jury is against the clear weight of the evidence, the trial court's decision is to be reviewed by an abuse of discretion standard by the Appellate Court. *Summers v. Martin*, 486 S.E.2d 305, 214 W. Va. 565 (1997); *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995).

## V. ARGUMENT

### A. The Circuit Court did not base its award of a new trial on an Erroneous Understanding and Application of the Evidence.

Petitioner contends that the Court was incorrect when it prefaced its opinion by stating that “The Plaintiff had preexisting neck and back conditions and made no claim that they were caused by or aggravated by the accident. The plaintiff did claim that he suffered injury to his right knee as a proximate result of the accident for which he underwent arthroscopic surgery performed by Dr. Takodi on December 26, 2012”. This statement by the Court is a correct statement. The main issue at trial was whether or not Mr. Corra's knee surgery was related to the motor vehicle accident of October 4, 2012. There was very little testimony regarding Mr. Corra's neck or back conditions.

Mr. Corra's neck was certainly the focus of the emergency room personnel due to Mr. Corra's neck surgery six (6) months earlier in April of 2012. He had told the ambulance personnel at the accident scene about his prior neck surgery and that he was scared about his neck. However, Mr. Corra made no claim of on-going neck and back pain which he related to

the October 4, 2012 motor vehicle accident. In fact, when asked about back pain that he was having at time of trial he stated that he did not know the cause of the pain [See App. 269]. In addition, he testified that his neck and back were not bothering him on November 29, 2012 when he had visited Dr. Levy's office. [See App.298]. It was on this date, that Dr. Levy referred him to Dr. Takodi for the surgery referral.

At trial, Petitioner conceded that the ambulance and emergency room visit on the day of the motor vehicle accident was related to the Petitioner's negligence. Thus, there was no argument that these medical expenses were related to the October 4, 2012 motor vehicle accident. The entire trial was about the causation of the right knee condition to the motor vehicle accident. The medical records from the emergency room had no record of any complaint to Mr. Corra's right knee on the day of the accident. However, Mr. Corra had testified that he had not noticed the pain in his right knee until after he was taken off the backboard and tried to walk several hours after arriving at the emergency room. [See App. 256].

The Court correctly recites in its Order that:

It is undisputed that the plaintiff had a preexisting medical condition known as "chondromalacia" affecting the back of his right knee's patella and that during surgery Dr. Takodi found torn cartilage on plaintiff's femoral condyle. The arthroscopic procedure was directed at these conditions and injury. The central issues in the case were whether the accident was a proximate cause of plaintiff's injuries and whether the arthroscopic surgery was reasonable and necessary.  
[See App. 169]

The Court cites Dr. Santrock's testimony within its order evidencing his opinions as to the aggravation of Respondent's right knee condition and the success of the surgery to alleviate the aggravation. It is clear from the relevant language cited by the Court that it had a clear grasp Dr. Santrock's testimony and how it correlated with the medical evidence of the Respondent.

**B. The Circuit Court was correct in granting a new trial as the jury's verdict was contrary to the clear weight of the evidence.**

Every medical expert who testified at trial, agreed that the December 26, 2012 surgery on Respondent's right knee was necessary as a result of aggravation which was caused by the motor vehicle accident of October 4, 2012. Petitioner's expert, Dr. David Santrock, corroborated Respondent's expert, Dr. George Takodi, on the issue of aggravation. Dr. Takodi had testified that Mr. Corra's right knee surgery was reasonable and necessary as a result of aggravation caused to preexisting chondromalacia (degeneration) within his right knee. [See App 329, 352]. Dr. Takodi had also testified that it was his opinion that the motor vehicle accident had caused a defect in the cartilage as well. [See App. 329]. There was a substantial amount of conflicting testimony regarding the cause of this cartilage defect to the motor vehicle accident. However, the evidence was uncontroverted as to the necessity of the surgery as a result of aggravation caused by the October 4, 2012 motor vehicle accident.

Within its ten (10) page order, the Circuit Court cites over four (4) pages from Dr. Santrock's testimony and points out the two separate issues of causation of the defect to the motor vehicle accident and the necessity of the surgery caused by aggravation of Respondent's preexisting medical condition. The Circuit Court correctly determined that the jury's failure to include the surgery expense was against the clear weight of the evidence.

A Circuit Court's decision to award a new trial is not subject to appellate review unless the trial judge abused his or her discretion. *Stillwell v. City of Wheeling*, 210 W.Va. 599,

558 S.E.2d (2001); *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999); *Toler v. Hagar*, 205 W. Va. 468, 519 S.E.2d 166 (1999). In the present case, the trial judge had the opportunity to hear all the evidence presented. After doing so, the Court properly granted Respondent's Motion for New Trial by concluding that the jury's award was against the clear weight of the evidence.

## V. CONCLUSION

The Circuit Court did not abuse its discretion when it set aside the jury's verdict because the jury failed to include the medical expense of Respondent's December 26, 2012 surgery to his right knee as the evidence presented at trial was uncontroverted that the surgery was reasonable and necessary as a result of an aggravation of his prior medical condition of chondromalacia.



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CERTIFICATE OF SERVICE

I, the undersigned counsel for the Respondent, hereby certify that I served a true copy of the foregoing **BRIEF OF RESPONDENT** upon counsel for Petitioner, via U.S. Mail, postage prepaid on this 25<sup>th</sup> day of August, 2015.



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Richard D. Dunbar (WVSB #6885)