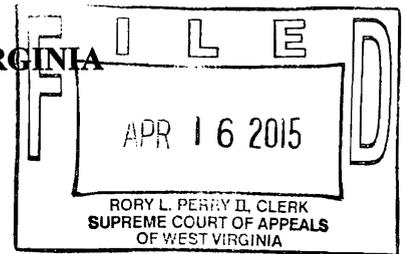


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**GERALD A. PHILLIPS and
TERESA L. PHILLIPS,
husband and wife, Plaintiffs Below,**

Petitioners,

vs.

**DOCKET NO.: 15-0011
(CIVIL ACTION NO.: 11-C-85)**

**JOSHUA D. STEAR, a Resident
of West Virginia, and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
a foreign company, Defendants Below,**

COPY

Respondents.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. THE LOWER COURT ERRED IN PERMITTING A VERDICT TO STAND WHICH WAS SO OBVIOUSLY OBTAINED BY FALSE TESTIMONY

- II. THE JURY WAS IMPROPERLY INSTRUCTED ON COMPARATIVE FAULT

- III. THE JURY WAS INSTRUCTED TO DISREGARD APPELLANT'S COUNSEL'S USE OF AN UNCERTIFIED DOCUMENT DURING CROSS EXAMINATION: THIS WAS UNFAIRLY PREJUDICIAL AS IT APPEARED THAT COUNSEL WAS TRYING TO MISLEAD THE JURY, WHEN THE FACT IS THAT STEAR WAS MISLEADING THE JURY.

- IV. DEFENSE COUNSEL MADE IMPERMISSIBLE CLOSING ARGUMENT BY REPEATEDLY TELLING THE JURY THEY COULD NOT "SPECULATE" ON WHAT HAPPENED, AND THEN HE REPEATEDLY SPECULATED ABOUT WHAT MIGHT HAVE HAPPENED

STATEMENT OF THE CASE

This is an underinsured motorist personal injury case. The appellant was operating a large commercial truck northbound on Interstate 79 near Weston, West Virginia, having entered the interstate at Exit 99 (See Appendix p. 200). The appellant had been in the left lane to pass a slower moving vehicle, and upon seeing another motorist quickly approach him from behind, he merged back into the right lane (See Appendix p. 201). The appellant testified that a maroon Chevrolet then passed him at a high rate of speed, pulled in front of him and slammed on his brakes in an act of apparent road rage, displaying an obscene gesture to him all along (See Appendix p. 201). The appellant locked up the brakes on his large truck to avoid running over the enraged motorist (See Appendix p. 217). The truck then flipped onto its side and skidded to a stop some distance down the interstate, while the motorist in the maroon Chevrolet sped on (See Appendix pp. 7; 202; 230). A Bridgeport physician saw the wreck happen and positively identified the maroon Chevrolet that caused the wreck (See Appendix pp. 7; 8; 86-91). She followed the vehicle to get the license number, called 911 while she had the vehicle in sight, and reported its license number (See Appendix p. 7; 88; 89). The state police later found the owner of the maroon Chevrolet and identified him as Joshua Stear, the defendant (See Appendix p. 225). Stear admitted to driving that vehicle northbound on Interstate 79 at about the time the wreck happened, but he denied involvement in or knowledge of the wreck (See Appendix pp. 193;194). Stear was subsequently charged in the Magistrate Court of Lewis County with an improper lane change, to which he pled no contest (See Appendix p. 51). The appellant suffered a very serious shoulder injury and other injuries, amassing around \$30,000.00 in medical expenses and a permanent injury (See Appendix p. 205). Stear's liability insurance carrier settled the claim for its policy limits of \$50,000.00 after determining that

Stear was at fault for the wreck. The case proceeded to trial on an underinsured motorist claim, with State Farm Mutual Automobile Insurance Company defending in the name of Joshua Stear. At trial, Stear denied any involvement in the wreck, although he admitted to being on Interstate 79 at the time the wreck occurred and he admitted to driving a maroon Chevrolet sedan bearing the registration number reported by the witness (See Appendix pp. 194; 195). Stear bolstered his own credibility by denying having any other traffic infractions, denying having any other speeding citations since 2006, and denying having any other problems with the law at all and claiming that he “absolutely” would not do such a thing and “was not raised that way” (See Appendix pp. 197; 198) His defense was that he was “wrongly accused” by the independent eye-witness, and that it was not in his character to commit such an offense (See Appendix p. 198). Stear claimed that he used his two (2) hour daily commute from Charleston to Bridgeport to “pray” (See Appendix p. 197). The jury returned a defense verdict (See Appendix pp. 289 - 293). The appellant then discovered evidence that Stear had perjured himself on several occasions. At the post-trial motions stage, the appellant presented the lower court with a certified copy of Stear’s driving record showing that he had indeed been convicted of speeding in Belmont County, Ohio, on August 1, 2011 (See Appendix pp. 305; 306), some four (4) months prior to his sworn denial in deposition testimony of being convicted of any traffic offenses and only forty-four (44) days prior to his sworn denial of other traffic infractions in answers to written discovery. Counsel also presented a certified copy of Stear’s driving record showing that he had been convicted of reckless driving Raleigh County in 2002 (See Appendix pp. 344; 345). Further, the plaintiff presented an affidavit from Rachel Gregis, Stear’s former wife, that Stear had been ticketed for speeding four (4) to five (5) times during their marriage from 2001 until 2009, that he had been involved in another act of road rage with a commercial truck, and that on

another occasion she knew that he had tried to evade the police to avoid a speeding charge (See Appendix pp. 377-379). The appellant maintains that Stear had plainly lied in his deposition and trial testimony and had secured a verdict based upon false testimony. While acknowledging doubts about whether Stear had testified truthfully (See Appendix p. 352), the lower court denied both the Rule 60(b) motion and the Rule 59 motion for a new trial (See Appendix pp. 380-385).

SUMMARY OF ARGUMENT

The trial court erred in failing to set aside a plainly unjust verdict when the evidence is compelling that Stear and/or State Farm secured the verdict with false testimony. It is important to note that there was an eyewitness who identified the vehicle Stear was driving as having caused the wreck, and the jury was presented with an audio recording of a 911 call wherein Stear's car was identified as it was fleeing the scene. The eyewitness testimony was presented by a video deposition, and at the time the witness testified, her cross examination by defense counsel failed to produce any material challenge to the identification of Stear's vehicle (See Appendix pp. 89-90). However, Stear took the stand and denied involvement, unexpectedly citing his good driving record, his relationship to law enforcement officials who would never permit him to violate the law in such a manner (See Appendix p. 197), and that he would simply not do such a thing. Stear very plainly brought his own character into issue by offering testimony that he simply would not do such a thing ("Absolutely not" was his testimony when asked if he would do such a thing (See Appendix p. 197). Stear's good driving record is now known to be quite dismal, and the evidence is that he has been involved in a road rage incident before and has been cited for reckless driving and speeding numerous times. His claims that he "forgot" being convicted of speeding fifteen miles per hour (15 mph) over the speed limit just four (4) months before his deposition testimony is not at all credible, especially given the fact that the evidence further shows a lengthy history of driving infractions (See Appendix pp. 355-359). It is important to point out that Stear's taking the witness stand and lying about his driving record was not expected by trial counsel. The testimony as to his past driving history was strictly inadmissible by the appellant, and was not expected to be brought up by Stear. When Stear did bring up his past record and lied about it, trial counsel cross-examined him with an uncertified

driving history and the court stopped the cross examination and instructed the jury to disregard counsel's reference to the document (See Appendix p. 199). This made the jury believe that appellant's trial counsel was not telling the truth when in fact it was Stear who was lying.

This court then proceeded to instruct the jury on comparative fault (See Appendix p. 255), suggesting that the appellant himself could have been at fault for the wreck, and since there was no evidence whatsoever of comparative fault, the jury was confused even further. The active fraud of the defendant, Joshua Stear, coupled with the Court's unwarranted embarrassment of appellant's counsel and defense counsel's encouraging the jury to speculate on facts not in evidence denied the injured plaintiff a fair trial. This was all to the benefit of State Farm Mutual Automobile Association, Inc.

To add to the jury's misapprehensions, when defense counsel failed to raise obvious questions with the eyewitness during her testimony and then in closing argument faulted her for failing to answer the questions that he did not ask, the jury was simply encouraged to speculate (See Appendix pp. 221-222). Given Stear's false testimony and the court's instruction on comparative fault, the jury's speculation was particularly damaging.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The appellant believes oral argument is necessary under Rule 18(a), and the appellant believes a Rule 19 argument is appropriate because the matter involves application of a settled area of the law. The appellant believes that a memorandum decision is appropriate.

ARGUMENT

I. THE LOWER COURT ERRED IN PERMITTING A VERDICT TO STAND WHICH WAS SO OBVIOUSLY OBTAINED BY FALSE TESTIMONY

W.V.R.C.P. 60(b) provides for relief from judgments which are based upon “fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.” It is clear that Stear obtained a defense verdict, to the benefit of State Farm, based upon lies. The only evidence the jury had to return a defense verdict was his denials and his reliance on his character for good and courteous driving. The jury accepted his testimony against the testimony of Dr. Amy Hebb, an impartial eyewitness who reported the matter to 911 *as it was happening*. Furthermore, Stear’s testimony about his clean driving record and good driving habits were clearly not true. Stear testified in his deposition on December 7, 2011 (See Appendix pp. 43-57) that he had no speeding tickets or serious driving infractions. The record shows, though, that he was convicted of speeding only four (4) months before his testimony [eighty-four miles per hour (84 mph) in a sixty-five mile per hour (65 mph) zone] (See Appendix pp. 344-345). At the post-trial motions stage, Stear submitted an affidavit admitting that he had been convicted of speeding fifteen miles per hour (15 mph) or more over the speed limit only four (4) months before his testimony, but that he forgot the conviction in the intervening four (4) months (See Appendix pp. 355-360). He apparently also forgot that same conviction just 44 days after entering the plea, though, as he failed to mention it in his answers to written discovery requests in August, 2011. He was also confronted in post-trial motions about the reckless driving charge he was convicted of in Raleigh County in 2002. Again, his post-trial affidavit indicated that he “forgot” that conviction when he testified as to his clean driving record and his penchant for safe driving (See Appendix pp. 355-360). Last, Stear’s former

wife, Rachel Gregis, furnished a post trial affidavit saying that Stear had been cited for speeding four (4) to five (5) times during their marriage between 2001 and 2007 (See Appendix pp. 377-379). She further swore that Stear had been involved in another act of road rage during their marriage wherein an aggrieved truck driver was so upset at Stear's driving that he chased Stear down, pulled him out of his car and ripped his shirt. Yet another time, Stear attempted to evade an officer in Beckley who observed him speeding, although the officer declined to charge him with fleeing an officer.

This Court should reverse the decision of the lower court because of the substantial injustice in permitting a verdict to stand when it was so clearly obtained by false testimony, and was so clearly against the weight of the evidence.

It is important to note that the appellant's liability case centered around the testimony of Dr. Amy Hebb, a Bridgeport doctor who was traveling up Interstate 79 behind the appellant's truck (Dr. Hebb was a passenger in a vehicle driven by her husband). Dr. Hebb's testimony was preserved and presented by video deposition (See Appendix pp. 86-91): since the trial was continued at least twice, and scheduling a live appearance would have required cancelling all her patients for a speculative trial date (See Appendix p. 88). Dr. Hebb testified that she called 911 and reported seeing a maroon Chevrolet sedan pull in front of the appellant's vehicle and slam on the brakes (See Appendix p. 88). The vehicle then sped away, and Dr. Hebb and her husband followed the offending vehicle, called 911 and read the license number of the vehicle to the operator (See Appendix pp. 88-89). The 911 tape was played for the jury, and because the sound system was not working well in the courtroom, the Circuit Court judge permitted a transcript of the call to be distributed to the jury (although the jury was not permitted to take the transcript into evidence) (See Appendix pp. 7-8). The 911 call was as follows:

911: 911 what is your emergency?

Hebb: Uh we are on I79 North, we just got on the interstate at Weston

911: Yes North bound?

Hebb: Yes, this car, we are following it now, this car caused this truck to flip off the road

911: What's the tag number of the car?

Hebb: We're trying to get a good look at it, it's a Chevy Maroon vehicle um, he braked, oh my, I know we don't want a speeding ticket while we are trying to get this number. I cannot believe this person could do this. It's a Chevy Malibu, the number is 7 N-Nancy, P as in Paul, 985

911: And its still going north bound?

Hebb: Its still going north bound, we are behind it right now we are almost to the Jane Lew exit now. *Inaudible.*

911: Is it speeding?

Hebb: No its going the regular speed limit now

911: And it cut the vehicle off and cause it to wreck?

Hebb: Oh my gosh he pulled over in front of this truck and slammed on his brakes and caused this truck to flip.

911: Ok what's your name Ma'am? The officer may want to speak to you later.

Hebb: It is, its Amy Hebb, H-E-B-B. And it's a Maroon Chevy Impala. *Inaudible.*

911: And what's your cell phone number?

Hebb: It is 703-

Hebb: Uh uh

Hebb: _50

911: Yes

Hebb: um 3653

911: Okay, the officer may want a statement but I'll have him call you if he wants to talk to you. Okay?

Hebb: Absolutely if he wa/needs anything at all

911: Alright. Thank you.

Hebb: Thank you. Bye, bye!

In her videotaped testimony presented at trial, Dr. Hebb confirmed that she saw the maroon Chevrolet pull in front of the appellant's truck and slam on the brakes, thereby causing the wreck (See Appendix p. 88). Dr. Hebb testified that her husband followed the vehicle (See Appendix p. 90) and she called 911 and gave the license number of the vehicle to the dispatcher (See Appendix p. 89). She further testified that the vehicle was driven by a short haired male, and that there was only one person in the vehicle (See Appendix p. 90). Upon cross examination, Dr. Hebb's testimony was not significantly challenged. Defense counsel questioned her about how far away she was from the truck, whether she observed any other erratic driving, and other similar questions, but he did not challenge her identification of the correct vehicle in any manner (See Appendix p. 90).

State Trooper Shane Morgan testified that he ran the license number given by Dr. Hebb and it came back registered to Joshua Stear, the defendant. He visited Stear and issued him a citation for an improper lane change. Stear pled "no contest" to the citation, although evidence of the conviction was not admitted under W.V.R.E. 410.

Stear then took the witness stand and admitted to being on Interstate 79 on December 3, 2010, at approximately 4:30 p.m., in the northbound lane, by himself in the vehicle, driving a maroon Chevrolet bearing the same registration number as that identified by Dr. Hebb (See Appendix p. 195). Stear's testimony was that he was driving home to Bridgeport from his job in Charleston. He denied, however, slamming on his brakes in front of a truck in an act of road rage (See Appendix p. 195). He denied knowing anything about the wreck and insisted that the person who identified his vehicle as being mistaken. He bolstered his testimony with character to conduct evidence as follows:

A I told the officer I obviously didn't know anything about it. I said I would have been on the road that day, but similar to what I just Mr. Estep, I – nothing stands out as being extraordinary.

Q How many days – in other words, about when was it that the officer came to see you?

A About ten days later.

Q Ten days after this accident on the 3rd?

A Yes.

Q Okay, so you and your wife talked about where you were and what happen on – back ten days earlier, is that how you reconstruct it?

A Yes, sir. Yeah. She's very good at helping me remember.

Q All right. Good. So what did you figure out? Where were you heading that night?

A I would have been heading home from work.

Q Okay, Did you all have plans?

A We were going to eat dinner at her parents' house in Bridgeport.

- Q I see.**
- A She was already there, so I was just going to meet them there.**
- Q Do you have any anger issues?**
- A No.**
- Q Did you perform any acts of road rage while you drove to Charleston and back during that time frame?**
- A No, I used that time just to relax and get in the zone, on the way to work, and relax and maybe pray on the way back or just relax.**
- Q The description that's been made of what you're accused of doing, have you been –**
- A No, sir.**
- Q Would you do that?**
- A Absolutely not.**
- Q Do you realize that would endanger somebody in a vehicle, and yourself, if you did?**
- A Absolutely, putting everyone's lives in danger. I mean, if it's not illegal, it should be.**
- Q You, traveling 1-79 five or six days a week, must have had a lot of speeding tickets.**
- A Not one.**
- Q Not one? Driving from Clarksburg to Charleston five to six days a week?**
- A Yes, sir.**
- Q When's the last time you had a speeding ticket?**

- A** Maybe 2006.
- Q** Okay. Did you – have you had any trouble with the law?
- A** No, sir. I'd be in much bigger trouble with other family issues if I was in trouble with the law.
- Q** What do you mean by that?
- A** I – both of my wife's sisters are in law enforcement. So, one's a city officer in Bridgeport and the other is a State Trooper in Martinsburg.
- Q** Let me ask you, Josh, what would your fiancé do to you if you pulled a shenanigan like you're accused of doing?
- A** Oh, she's have her sisters take care of me.
- Q** Okay. You've never looked to them to get you out of a bad situation?
- A** No, I haven't. I wouldn't take advantage of something like that.
- Q** Have you been arrested or been in any trouble at all?
- A** No, sir.
- Q** Back at that time, when you were driving and working too, from Charleston –
- A** Yes, sir.
- Q** Driving back and forth, did you carpool?
- A** No, sir.
- Q** Did anyone ever ride with you to work?
- A** No, sir, not to – no.
- Q** While traveling from Charleston to Clarksburg, no one ever rode with you?

- A** No, sir, it's a long work day. And combined with the two-hour drive each direction, there's no way that – there's no reason and no way to bring anybody, for any reason.
- Q** Did you ever pick up any hitchhikers back at that time?
- A** No, sir.
- Q** Josh, do you use alcohol?
- A** No, I don't.
- Q** Do you use drugs?
- A** No, sir.
- Q** At that time, in December, did you use alcohol or drugs?
- A** No, sir.
- Q** Was there ever an occasion when you drove between – in the Weston area, on I-79, either under the influence of alcohol or drugs?
- A** No, sir, I don't use either of those at all.
- Q** Have you had any problems with brakes on your car?
- A** No, sir.
- Q** Okay. What's it like to be falsely accused?
- A** It's really frustrating. I've spent the last three and a half years of my life having this issue dangle out over me and it's not something I was involved in, it's not something that I would do, it's not something that's in my character, it's not something I was raised to do. It's frustrating to be accused of something that I wasn't involved in at all.
- Q** Are you glad we're going to get it resolved?
- A** I am very glad to be able to hopefully take care of this this week.

Stear's testimony as to his sterling driving record and his concern for public safety was grossly exaggerated at best, and more likely was outright false. It is important to point out that the testimony about Stear's character for good driving would never have been admissible in the appellant's case in chief. Stear opened the door to his character for good driving and bolstered his standing with the jury with false testimony.

Stear testified that he had never had a speeding ticket traveling from Charleston to Bridgeport every day of the week. This was at best a half truth. Stear failed to mention that he had been convicted in Ohio in 2011 of speeding fifteen miles per hour (15 mph) or greater over the speed limit, actually during the current litigation. In fact, according to the affidavit from Stear's former wife, Stear had been cited for speeding some five (5) or six (6) times between 2001 and 2007, including one conviction for reckless driving and one incident of road rage with a commercial truck. Clearly, Stear's testimony that he had never had a speeding ticket was misleading and, in fact, false.

Furthermore, Stear testified that he had never been in trouble with the law bragging that certain members of his family were in law enforcement and they would "take care of" him if he ever got in trouble with the law (See Appendix p. 197). Again, this is directly at odds with the fact that Stear has a significant history of driving infractions and troubles with the law. It is also directly contradicted by the fact that Stear pled no contest to the improper lane change in connection with the current case, which was ruled inadmissible by the Circuit Court. Clearly, Stear was not telling the truth in the only defense that he had, and the jury was misled into believing him.

Not only did Stear lie at trial, but he lied in his deposition and in his answers to interrogatories. The underlying wreck happened on December 3, 2010. From evidence discovered after trial, it is clear that Stear was then convicted of driving fifteen miles per house (15 mph) or

more over the speed limit in Belmont County, Ohio, on August 1, 2011 (See Appendix p. 345). On September 14, 2011, some forty-four (44) days later, Stear answered interrogatories and failed to disclose the conviction, despite being directly asked about traffic infractions (See Appendix pp. 27-39). Then on December 7, 2011 he was deposed and again failed to disclose the speeding conviction (See Appendix pp. 43-57). When caught in the lie during post-trial motions, Stear claimed he “forgot” the conviction (See Appendix pp. 357-360). He also “forgot” the Raleigh County reckless driving conviction from 2002, the four (4) to five (5) other speeding citations between 2001 and 2007 and the other incident of road rage described by his former wife. While the Circuit Court observed the unlikelihood of forgetting this many infractions with the law (See Appendix p. 352), the Circuit Court nevertheless denied the motion for relief from the verdict.

The gravity of Stear’s lies is striking, and given that his whole defense rested on his credibility, the Circuit Court abused its discretion in failing to award a new trial. “A court, in exercise of the remedial powers given it by Rule 60(b) W.V.R.C.P. should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases should be decided on the merits.” Fernandez v. Fernandez, 218 W.Va. 340, 624 S.E.2d 777 (2005).

The leading case on setting aside a judgment based on newly discovered evidence offered to establish fraudulent testimony is Gerver v. Benevides, 207 W.Va. 228, 530 S.E.2d 701. In Gerver, a medical malpractice verdict was returned in favor of a plaintiff, and the defense obtained a post trial video of the plaintiff performing yard work and other physical tasks, which the defense maintained contradicted the plaintiff’s testimony as to his physical impairments. The decision to grant a new trial was reversed, with this Court reasoning that the video of the plaintiff did not

directly contradict his testimony. This Court went on to hold that Rule 60(b) would permit a court to set aside a judgment based on fraud *or misrepresentation* (emphasis added) discovered after entry of judgment. *Id* at 232. A high burden of proof is required to prove actual fraud, but the fact is that Stear misrepresented the following: a reckless driving conviction in 2002, a conviction of speeding fifteen miles per hour (15 mph) or more above the speed limit just forty-four (44) days before denying it in discovery, at least four (4) to five (5) other speeding violations while he was married to Rachel Gregis, another act of road rage in which a truck driver ripped his shirt, and another attempt at fleeing the police when he was speeding. The overwhelming evidence of these infractions directly contradicts Stears' testimony that he had only one speeding infraction in St. Louis some five (5) years prior. It further contradicts his testimony that he usually traveled at sixty to sixty-five miles per hour (60 - 65 mph) to conserve fuel (See Appendix p. 194), and it directly contradicts his testimony that there were law enforcement officers in his wife's family who would make sure that he does not violate the law, that he simply would not perpetrate an act of road rage because he was not "raised" that way.

The Circuit Court could have granted relief from the unjust verdict, and abused its discretion in failing to do so. "When a trial judge vacates a jury verdict and awards a new trial pursuant to W.V.R.C.P. 59, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds that 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, even if supported by substantial evidence, and grant a new trial." Sayre v. Roop, 205 W. Va. 193, 517 S.E.2d 290 (1999). In this case, the Circuit Court acknowledged doubt about whether Stear was telling the truth (See Appendix p. 352) and could plainly see that the verdict was against the

weight of the evidence. Furthermore, a miscarriage of justice is certain to ensue if State Farm is allowed to benefit from the false testimony of an underinsured motorist.

This Court allowed a final judgment to be set aside in the case of Hager v. Hager, 215 W.Va. 195, 597 S.E.2d 910 (2001). Hager was a divorce case in which the court determined the judgment was obtained by false testimony and this Court reversed an award of alimony because a party's testimony was false or incomplete. If an award of alimony can be set aside because of misleading testimony of a party, it is even more important not to allow an underinsured motorist carrier to escape liability by way of false or incomplete testimony.

The lower court apparently did not appreciate the effect such false evidence had on the jury. Although a trial court's decision on granting a new trial is due great respect and weight, a new trial will be granted "where it is clear that the trial court acted under some misapprehension of the law or the evidence." Syl. Pt. 4, Sanders v. Georgia Pacific Corp. 159 W.Va. 621, 225 S.E.2d 218 (1976).

II. THE JURY WAS IMPROPERLY INSTRUCTED ON COMPARATIVE FAULT

There was no evidence of comparative fault whatsoever, yet the lower court's instructions on comparative fault indicated to the jury that the wreck may have been caused by something the appellant did. Defense counsel requested the instruction, but it was not supported by the evidence and counsel was not able to articulate why the instruction was justified. This Court should review this point because the law is clear that instructions must be a correct statement of the law and must be supported by the evidence.

"A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. A jury instruction cannot be dissected on appeal; instead, the entire instruction is

looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury do long as the charge accurately reflects the law. Deference is given to a trial court concerning specific wording of the instruction and the precise extent and character of any specific instruction will be reviewed only by an abuse of discretion. State v. Guthrie, 194 W.Va. 657, 461 S.E2d 163 (1995). While the lower court clearly had broad discretion, the law is clear that the instruction must be supported by the evidence, and there was no evidence whatsoever of comparative fault. The testimony was that the appellant was traveling in the left lane, and that he merged over into the right lane when he was approached by the maroon Chevrolet. The eyewitnesses said that the maroon Chevrolet then pulled in front of the appellant's commercial truck, that the appellant had to slam on the brakes to avoid running over him, and that the truck then flipped over and skidded down the interstate. The defense was not able to call a single witness who could say that the appellant did anything negligent. Defense counsel did not argue comparative fault in closing, yet insisted on the instruction. Clearly, the jury was confused and believed that the appellant could have been responsible since the possibility was mentioned by the court. The cumulative effect of the false testimony by Stear, the exclusion of the evidence that Stear had been ticketed and an unsupported instruction was unfairly prejudicial to the appellant and contributed to a verdict unsupported by the evidence.

III. THE JURY WAS INSTRUCTED TO DISREGARD APPELLANT'S COUNSEL'S USE OF AN UNCERTIFIED DOCUMENT DURING CROSS EXAMINATION: THIS WAS UNFAIRLY PREJUDICIAL AS IT APPEARED THAT COUNSEL WAS TRYING TO MISLEAD THE JURY, WHEN THE FACT IS THAT STEAR WAS MISLEADING THE JURY

Plaintiff's counsel attempted to cross examine Stear on his driving record by confronting him with a speeding conviction which Stear had denied (See Appendix pp. 198-199). Counsel was

referring to a driving history which indicated Stear was not telling the truth. The driving history was not certified, nor did plaintiff's counsel introduce it into evidence. The lower court did not permit the continued cross examination, and since counsel did not have a certified copy of the driving record, the jury was instructed to disregard counsel's reference to the document (See Appendix p. 199). This gave the impression that Stear was telling the truth, which he was not, and even worse, it gave the jury the impression that counsel was not telling the truth, which he was. This likely contributed to the jury's verdict, which was against the weight of the evidence.

IV. DEFENSE COUNSEL MADE IMPERMISSIBLE CLOSING ARGUMENT BY REPEATEDLY TELLING THE JURY THEY COULD NOT "SPECULATE" ON WHAT HAPPENED, AND THEN HE REPEATEDLY SPECULATED ABOUT WHAT MIGHT HAVE HAPPENED

The eye-witness to the wreck, Dr. Amy Hebb, testified that she saw the accident take place, she saw the maroon Chevrolet Impala that caused the wreck, and that she got close enough to it to get the license number and report it to the police. She testified by way of a video deposition because she was a busy physician in a small private practice and cancelling all her appointments to testify live at trial would have been an undue burden. Defense counsel participated in the deposition and did not cross-examine the witness on why she did not appear live, and did not question her sworn explanation that she would have to cancel all of her patients in order to appear live (See Appendix p. 89). Then at trial counsel argued that the witness refused to testify in person because she did not want to face the defendant because she knew her testimony was false (See Appendix p. 222). There was no evidence whatsoever that the witness did not want to face Josh Stear, and no evidence whatsoever that the witness was unsure of her testimony. This was purely made up by defense counsel with no suggestion of it from the witness.

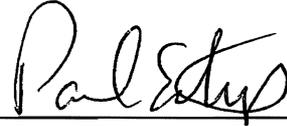
Defense counsel also made impermissible argument by pointing out all the facts that the witness did not mention, and then speculating himself on what those facts may have been (for example, defense counsel commented in closing that the witness did not specify what else she looked at just after the wreck, whether she considered stopping to render assistance, whether she looked away in order to dial 911 on her cell phone, etc.) (See Appendix pp. 221-222). Defense counsel told the jury how he personally would like to know the answers to these questions, but the witness failed to provide answers (See Appendix p. 222). The fact is that defense counsel participated in the deposition and was free to ask all the questions he wanted. Instead, he failed to ask the questions to the witness and then faulted the witness for not answering them. He clearly speculated on facts that were not in evidence, all the while admonishing the jury that they were not permitted to speculate. This was misleading to the jury, and constitutes “plain error” insofar as the appellant was prejudiced. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

CONCLUSION

The defense verdict was obtained by State Farm by Stear's false or misleading testimony. Added to the fact that the trial court suggested that appellant's counsel's reference to a document should be disregarded and then the jury was instructed on an inapplicable theory of the law and encouraged to speculate, the lower court surely should have granted a new trial, as it had authority to do under Rule 60(b) or Rule 59 W.V.R.C.P. Even if any single factor is not sufficient to warrant a new trial, under the cumulative error doctrine, all the errors together warrant a new trial to prevent a miscarriage of justice. State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).

SIGNATURE PAGE

Dated this 15th day of April, 2015.

A handwritten signature in cursive script that reads "Paul Estep". The signature is written in black ink and is positioned above a horizontal line.

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***COUNSEL FOR
PETITIONER***

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**GERALD A. PHILLIPS and
TERESA L. PHILLIPS,
husband and wife, Plaintiffs Below,**

Petitioners,

vs.

**DOCKET NO.: 15-0011
(CIVIL ACTION NO.: 11-C-85)**

**JOSHUA D. STEAR, a Resident
of West Virginia, and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
a foreign company, Defendants Below,**

Respondents.

CERTIFICATE OF SERVICE

I, C. Paul Estep, counsel of record for the Petitioners, do hereby certify that on the 15th day of April, 2015, I served a true and actual copy of the hereto annexed **“PETITIONER’S BRIEF”** and **“APPENDIX”** upon the following via U.S. Mail, postage prepaid, as follows:

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