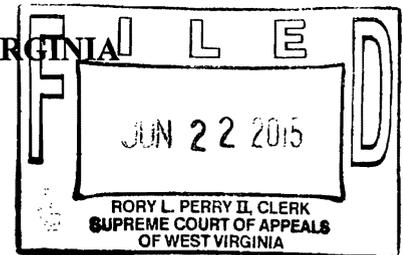


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**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.

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED PETITIONERS' PETITION FOR RELIEF FROM JUDGMENT AS RESPONDENTS' TESTIMONY AT TRIAL WAS NOT CLEARLY AND DISTINCTLY FRAUDULENT; NEWLY DISCOVERED EVIDENCE IS FOR IMPEACHMENT, WAS AVAILABLE PRIOR TO TRIAL, AND NOT LIKELY ADMISSIBLE; AND THE JURY REACHED ITS VERDICT BASED ON ALL THE EVIDENCE PRESENTED AT TRIAL.

Respondents seek to trivialize the false testimony of Joshua Stear as mere "impeachment" material, claiming that Mr. Stear's testimony was technically correct and that it was easy to understand how Mr. Stear could "forget" a citation that had been issued years before. Respondents do not explain how Mr. Stear "forgot" about his 2011 speeding citation in Ohio just forty-four (44) days before answering interrogatories, and how he also "forgot" that same conviction some four (4) months later when he was deposed. He "forgot" it again at trial when he assured the jury that he had never been in any trouble at all (See *Appendix* p. 197), used his two-hour commute to pray (See *Appendix* p. 197), and it was simply not in his character to do such a thing as three (3) eyewitnesses reported (See *Appendix* p. 197). He also "forgot" about his reckless driving conviction in 2002 and the other incident of road rage he had been involved in which his former wife described in her Affidavit, as well as the four (4) or five (5) other speeding tickets he received between 2001 and 2009. Respondents cannot explain how Mr. Stear "forgot" all of these incidents when he assured the jury of his good character and safe driving practices and respect for the law.

It is important to note that this is not a case of a witness forgetting a routine speeding citation which occurred some years before testifying. This witness brought his character for safe driving into issue, and then claims he "forgot" about at least six (6) other traffic citations; one incident of road rage similar to the one he perpetrated on Mr. Phillips, and also a reckless driving conviction. None

of this is explained in Respondents' brief, and is clearly and distinctly fraudulent under any reasonable criteria.

Mr. Stear even bragged that his wife has two sisters-in-law in law enforcement, and that if he ever got in trouble, his sisters-in-law would "take care of me." (See *Appendix* p.197). He says this in connection with his sworn testimony that he has never been in trouble with the law (See *Appendix* p. 197). He claims sympathy for victims of road rage, saying that if such things are not illegal, they should be (See *Appendix* p. 197). This is clearly not the true character of a man who has such a dismal driving record and has engaged in an act of road rage before.

Respondents are also critical of Petitioners' counsel for not being aware of Mr. Stear's driving record before trial. The fact is that Petitioners' counsel did seek discovery of Mr. Stear's driving record prior to trial and Mr. Stear lied about it. Not until trial did Petitioners' counsel learn that Mr. Stear's discovery responses and deposition testimony were false. It is not reasonable for Mr. Stear to lie in his responses to written discovery requests and then lie in his deposition, and then complain that Petitioners did not find out about it sooner.

A. THE NEW EVIDENCE IS NOT LIKELY ADMISSIBLE.

Respondents claim that the evidence of prior traffic infractions would not be admissible for impeachment purposes because Mr. Stear did not testify as to any lack of citations prior to 2006. First, this is not true because of the 2011 conviction for driving fifteen miles per hour (15 mph) or more over the speed limit, which Mr. Stear denied in answers to interrogatories, deposition and trial. Secondly, to suggest that none of his traffic infractions are admissible as impeachment material simply because Mr. Stear only denied traffic infractions after 2006 is wrong. Very clearly Mr. Stear brought his whole driving

record into issue, as well as his character for safe driving, by assuring the jury that he “absolutely” would not do such a thing (See *Appendix* p.197); that he was not “raised that way” (See *Appendix* p.197); that he sympathized with a victim of road rage; that he drove below the speed limit to maximize his fuel economy (See *Appendix* p. 194); and that he was “wrongly accused” (See *Appendix* p. 198). He should not be permitted to lie so extensively and then claim there is no fraud because a small portion of his testimony was technically correct.

Regardless of whether Petitioners’ information that Mr. Stear obtained a verdict by false evidence is admissible, the fact remains that he secured the verdict with false evidence. There is no reasonable doubt that Mr. Stear failed to tell the truth, and that his credibility was at least a major factor in the jury believing his story.

B. THE VERDICT WAS BASED ON THE ENTIRETY OF THE EVIDENCE PRESENTED AT TRIAL.

The verdict simply had to be based upon the jury finding Mr. Stear credible, as practically all the evidence pointed to him as the culprit. Mr. Stear cannot dispute that he was driving a maroon Chevrolet Malibu up Interstate-79 in Lewis County, West Virginia, at the time of the wreck. Dr. Hebb’s identification of Mr. Stear’s vehicle was unequivocal. The witness expressed no doubt whatsoever that she was identifying the proper vehicle (which identification was played for the jury via the 911 recording *as it was happening*), and in fact, her testimony was not challenged on cross-examination. It was not until the end of trial, after all the evidence had been introduced, that counsel for State Farm Mutual Insurance Company came up with several absolutely speculative and unsupported arguments that she

had identified the wrong vehicle.

Respondents claim in their brief that the identification of the vehicle is “conflicting” among the three (3) eyewitnesses because Mr. Garrett, the wrecker driver, was only able to describe the offending vehicle as a small maroon General Motors car, while Dr. Hebb identified it more specifically as a maroon Chevrolet Malibu. This is in no way inconsistent, and Respondents seek to introduce a controversy where there is none. Likewise, Mr. Phillips testified that the offending vehicle was a maroon Chevrolet. Although Respondents complain that Mr. Phillips did not identify the vehicle as a Chevrolet until trial, his testimony was in no way inconsistent with either Hebb’s or Garrett’s. The only possible conflict in the identification of the vehicle that Respondents can come up with is Mr. Garrett’s statement that he “believed” someone was in the back seat. Neither of the other two (2) witnesses saw anyone in the back seat, and this is the only conflict in the testimony of the three (3) eyewitnesses to the wreck. It is clear that the mainstay of the defense verdict was the jury’s belief in what Mr. Stear said, much of which is now known to be false.

II. THE JURY WAS PROPERLY INSTRUCTED ON COMPARATIVE FAULT.

Respondents maintain that the jury should have been instructed on comparative fault because Mr. Phillips lost control of his vehicle in an effort to keep from running over Mr. Stear and possibly killing him. No other theory for comparative fault has been advanced, and in fact, even that theory was not advanced at trial. The comparative fault instruction was offered over objection of Petitioners’ counsel, and no reason for the instruction was articulated at trial. Respondents’ counsel did not argue or even mention comparative fault in his closing argument. Therefore, if there was no factual basis for the instruction and it was not argued by its proponent, its only function was to

confuse the jury.

III. PETITIONERS' FAILURE TO TIMELY OBJECT TO THE TRIAL COURT'S INSTRUCTION TO DISREGARD AN UNCERTIFIED DOCUMENT WAIVES THEIR RIGHT TO ASSERT ANY ERROR ON APPEAL.

The record is clear that Mr. Stear took the stand and not only denied being involved in the wreck with M. Phillips, which was expected, but he went much further and extolled his record for safe driving, claimed that he “absolutely” would not do such a thing (See *Appendix* p. 197); that it was not in his character to disobey traffic laws (See *Appendix* p. 198); that he had never been in trouble with the law (See *Appendix* p. 197); and that he had no speeding infractions since “maybe” 2006 (See *Appendix* p.197). Petitioners’ counsel sought to impeach Mr. Stear with a driving report which clearly showed he had been convicted of speeding fifteen miles per hour (15 mph) or greater over the speed limit in 2011. The trial judge stopped Petitioners’ counsel from using the document because it was uncertified – although Petitioners’ counsel did not seek to admit the document into evidence. The only reason certification of the document might have been pertinent is if counsel had sought to admit the document – which he did not. The alarming part of the trial judge’s ruling, though, was that the court instructed the jury to disregard counsel’s reference to the document and told the jury that it was “not an acceptable document” (See *Appendix* p. 199). This made it appear to the jury that Petitioners’ counsel was trying to mislead them unscrupulously, when in fact, it is now known that Mr. Stear was lying. In a case where credibility was everything, it appeared to the jury that the court believed that Petitioners’ counsel was doing something wrong by using an “unacceptable” document when in fact, counsel is permitted to cross-examine a witness with an uncertified document, and the document is now known to be accurate. The colloquy with the court was as follows:

(At the Bench.)

BY THE COURT: I said approach the Bench with that document, let's see what it is. Okay. Okay, let me ask you this question. Who ran a Triple I, CIB on him –

MR. ESTEP: **Your Honor, I'm not sure.**

BY THE COURT: I hope it wasn't one of his law enforcement relatives because you would be in trouble, because these are not – these are for law enforcement purposes and not for –

MR. SMITH: **I've never seen this before, I have no idea what this is.**

BY THE COURT: And actually, when you – you can ask him the questions but I'm going to let you use that to impeach him, because that – even if you had this, if you had a Magistrate Court disposition or something like that, certified, I might let you use it, but Triple I, CIBs are not certified records of any kind of conviction, so –

MR. SMITH: **Well, I'm going to object to him even asking about it. Is it, I mean –**

BY THE COURT: Well, I think he can ask, it's just – (inaudible) – but –

MR. SMITH: **But I'm objecting to him showing the document there, because this document may be a farce.**

MR. ESTEP: (inaudible)

MR. SMITH: **And I've never seen it before.**

MR. ESTEP: (inaudible)

BY THE COURT: Well, I think the Court's ruled –

MR. SMITH: What are you going to do with that? What's your point?

MR. ESTEP: I'll just move on.

MR. SMITH: Let it go? Okay. We got it, Judge.

(inaudible conversation)

BY THE COURT: I don't even see where it says that he was convicted.

(inaudible conversation)

MR. ESTEP: I'm assuming that's what this means here, where it says –

(inaudible conversation)

BY THE COURT: Okay, let's – let me –

MR. SMITH: Can you instruct them to disregard?

BY THE COURT: I will.

(End of Bench Conference.)

BY THE COURT: Okay. Ladies and gentlemen, the Court is going to sustain the objection with regard – the Court's going to permit the question and answer of the Defendant in this case, whether or not he had a speeding ticket, but from the point where Mr. Estep referenced and indicated that he had a document that reflected that, and the jury is to disregard that, because the Court's examined that document and the Court is not going to permit the witness to be questioned with that document and the jury is to disregard the fact the Mr. Estep may or may not have some kind of document that purports Mr. Stear was convicted of that, because it's

not an acceptable document for the Court, so – you can ask him the question if he had a speeding ticket, Mr. Estep and he’s denying that, so I think that’s about as far as we go with it.

MR. ESTEP: **Thank you, your Honor.**

BY THE COURT: You’re welcome.

(See *Appendix* pp. 198 – 199).

This Court should also take note that Mr. Stear was an accomplished and practiced liar, as evidenced by his statements. Mr. Stear was never quite sure just how much counsel already knew, so he left himself some plausible deniability by saying he simply did not remember any other convictions- thus leaving himself room in case counsel knew more than Mr. Stear thought. When Petitioners’ counsel sought to cross examine Mr. Stear with evidence of a 2011 conviction, Mr. Stear’s response was to question counsel back to see exactly how much was known:

REDIRECT EXAMINATION

BY MR. ESTEP:

Q. No speeding tickets at all?

A. **Not since, I’d say, probably 2006, to the best of my recollection.**

Q. Your address 309 Ohio Avenue, Nutter Fort, now?

A. **No, it’s 612 Milford Street in Clarksburg.**

Q. Do you recognize the address of 309 Ohio Avenue?

A. **It is a house that we used to live in, yes.**

Q. Do you know your driver’s license number?

A. **No, sir, I don't.**

Q. Your date of birth 07-29-79?

A. **It is, yes.**

Q. No speeding ticket?

A. **I don't believe, since 2006. Unless for one reason or another there's one that escapes me.**

Q. Well, would it surprise you to learn that you were convicted of Speeding, 15 miles per hour or more above the limit, on August 1st, 2011? That would surprise you?

A. **It would. Does it give a location?**

Q. No. But you're saying you weren't convicted on August 1st, 2011, of Speeding, 15 miles or more above the speed limit?

A. **I don't recall that incident.**

Q. You're denying that you have five points added to your license for that?

A. **I'm not aware of what you are speaking of, sir.**

MR. ESTEP: Well, if I could approach the witness, Your Honor?

BY THE COURT: Well, why don't you – before you do that, why don't you bring up here to the Bench and let's see what you've got, so –

MR. ESTEP: I beg your pardon?

(See Appendix p. 198)

IV. RESPONDENT'S CLOSING ARGUMENT WAS NOT IMPROPER AND PETITIONER'S FAILURE TO TIMELY OBJECT TO RESPONDENT'S CLOSING ARGUMENT WAIVES THEIR RIGHT TO ASSERT THE ERROR ON APPEAL.

Again, Respondents assert that Dr. Hebbs' testimony was "inconsistent" with the other two eyewitnesses. With the exception of Mr. Garrett saying that he "believed" there were people in the back seat of Mr. Stear's vehicle, there were no inconsistencies in the testimony of the three (3) eyewitnesses. While Dr. Hebb was able to positively identify the vehicle as a Maroon Malibu and Mr. Garret and Mr. Phillips were only able to identify it as a maroon General Motors vehicle, these stories are certainly not inconsistent. One witness having better view of the car than the others does not make the witness's identification less reliable and does not create an inconsistency. In fact, the identifications of the vehicle were spot on. Further, Respondent's counsel repeatedly admonished the jury not to speculate about what happened, and then proceeded to speculate on what might have happened with no evidence whatsoever to back up his speculation. Counsel failed to impeach Dr. Hebb in any manner to her face, but then told the jury her testimony was false. This, coupled with the false testimony of Mr. Stear and the trial court's erroneous suggestion that Petitioner's counsel was using a false document to cross-examine Mr. Stear, was enough to mislead the jury into finding an unjust verdict.

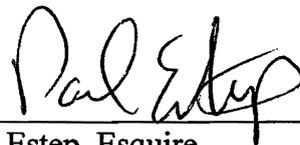
CONCLUSION

Petitioners contend that the jury's verdict was against the clear weight of the evidence; was based on false evidence; and will result in a miscarriage of justice. The lower court should have granted a new trial under W.V.R.C.P. Rule 59. Furthermore, the lower court abused its discretion in failing to set aside the verdict under W.V.R.C.P. Rule 60(b), insofar as the verdict was obtained with false evidence and W.V.R.C.P. Rule 60(b) should be "liberally construed for the purpose of achieving justice." Fernandez v. Fernandez, 218 W.Va. 340, 624 S.E.2d 777 (2005).

WHEREFORE, Petitioners pray for an order reversing the trial court's order of October 20, 2014 and awarding a new trial on the issues of liability and damages.

SIGNATURE PAGE

Dated this 19th day of June, 2015.

A handwritten signature in black ink, appearing to read "Paul Estep", written over a horizontal line.

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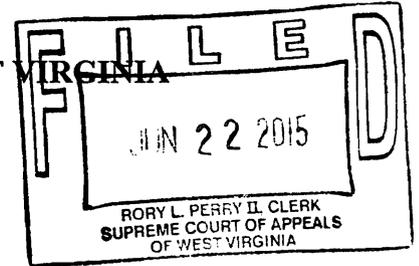
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**DOCKET NO.: 15-0011
(CIVIL ACTION NO.: 11-C-85)**

COPY

CERTIFICATE OF SERVICE

I, C. Paul Estep, counsel of record for the Petitioners, do hereby certify that on the 19th day of June, 2015, I served a true and actual copy of the hereto annexed "**PETITIONERS' REPLY BRIEF**" upon the following via U.S. Mail, postage prepaid, as follows:

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