

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

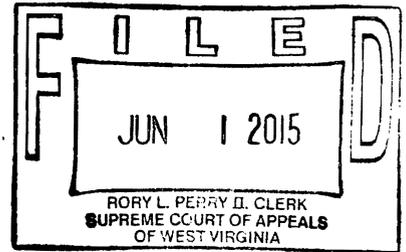
**GERALD A. PHILLIPS and
TERESA L. PHILLIPS,
husband and wife, Plaintiffs Below,**

Petitioners,

v.

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

Respondents.



**Case No. 15-0011
(On Appeal from Lewis County
Circuit Court, Civil Action No.
11-C-85)**

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

I. FACTUAL HISTORY

On December 3, 2010, Plaintiff below and Petitioner herein, Gerald A. Phillips (hereinafter referred to as "Petitioner"), was operating a large commercial truck while traveling North on Interstate 79 near Weston, Lewis County, West Virginia. (A.R. 200). Petitioner had entered Interstate 79 from U.S. Route 33, passed a slow-moving tow truck driven by Jerry Garrett (hereinafter referred to as "Mr. Garrett"), and returned to the right lane after noticing a small maroon Chevrolet quickly approaching him from behind. (A.R. 200-201). Petitioner alleges that after he returned to the right lane, the driver of the maroon Chevrolet swerved toward him, gave him the finger, cut in front of him, and then twice slammed on the brakes. (A.R. 201-202). In an effort to avoid colliding with the Chevrolet, Petitioner first let off the gas and allowed his truck's Jake brake to slow his vehicle. (A.R. 217). Apparently this did not create enough space between Petitioner's truck and the Chevrolet, and when the unknown driver hit its brakes a second time, Petitioner lost control of his vehicle. (A.R. 217-218). As a result, Petitioner's truck flipped and slid some distance to a stop. (A.R. 218). The unknown driver continued traveling north on Interstate 79. (A.R. 202). There were two independent witnesses to the accident, the driver of the tow truck, Mr. Garrett, and Dr. Amy Hebb.

As a result of the accident, Petitioner suffered, primarily, a left shoulder injury requiring surgery. (A.R. 205, 207). Petitioner also claimed he suffered from severe pyarthrosis in his left thumb, which he alleged had resulted from an MRI arthrogram. (A.R. 206). The thumb injury also required surgery. (A.R. 207). Petitioner alleged a permanent injury and claimed approximately \$30,000.00 in medical expenses.

II. PROCEDURAL HISTORY

Petitioners filed their Complaint against Joshua D. Stear and his liability carrier eventually settled for its policy limits of \$50,000.00. Thereafter, State Farm Mutual Automobile Insurance Company, Petitioners' underinsured motorist carrier, took over the defense in the name of Stear (hereinafter collectively referred to as "Respondent"), and the matter was tried March 25 - 28, 2014.

At trial, two independent witnesses testified regarding their observations of the accident. Dr. Amy Hebb testified that while traveling north on Interstate 79 with her husband, she witnessed a maroon Chevrolet Malibu cut in front of Petitioner's truck and slam on its brakes one time thereby causing Petitioner to swerve and crash. (A.R. 88, 90). She described watching the truck flip and slide down Interstate 79. (A.R. 88). Dr. Hebb testified that she did not stop at the scene and instead decided to attempt to get the maroon car's license plate number.¹ (*Id.*) Dr. Hebb testified that she and her husband chased the car; caught up with it at or near the Jane Lew Exit, approximately five miles away; and called 911.² (A.R. 88-89). Dr. Hebb admitted she was unable to see the make of the car and license plate number until the car was slowed by traffic. (A.R. 89). She only saw one individual in the car and that individual had short hair which lead her to believe the driver was a man. (A.R. 90).

Mr. Garrett, on the other hand, testified that he saw Petitioner pass him and that he then observed a small reddish or maroon car pass Petitioner. (A.R. 229-231). Mr. Garrett described

¹The license number provided was eventually determined to belong to Respondent who was driving a maroon Chevrolet Impala. (A.R. 225-226).

²Video evidence of the roadway was presented during the testimony of Sergeant Shane Morgan, and showed several turns and humps in the roadway which may have caused Dr. Hebb to lose sight of the vehicle that caused the accident. (A.R. 228).

the small car as either a Cavalier or Cobalt. (A.R. 229). Even though he believed the car was one manufactured by General Motors, he admitted he was not entirely sure. (*Id.*) Mr. Garrett witnessed the small car get in front of Petitioner and slam on its brakes causing Petitioner to wreck. (A.R. 229-230). Mr. Garrett further testified that he had observed passengers in the rear seat of the small car. (A.R. 230, 232).

Petitioner was also asked to identify the car that caused the accident. At trial, for the first time, Petitioner identified the car as a later-model maroon Chevrolet, but admitted that he had only identified the car as a small maroon car to the investigating officer, his primary care physician, and to counsel during his deposition. (A.R. 202, 216- 217). Petitioner could not identify a single document evidencing that he had identified the car as anything other than a small maroon car prior to trial. (A.R. 217).

Respondent, on the other hand, testified at trial that although he had been traveling Interstate 79 north around the time the accident occurred, he did not cause or see what caused the accident, and never hauled passengers to and from work in Charleston, West Virginia. (A.R. 193, 195). Respondent also testified regarding his driving habits, driving history, lack of criminal history, and what it was like to be falsely accused. (A.R. 197-198).

Respondent further testified as follows:

Q: When is the last time you had a speeding ticket?

A: Maybe 2006.

(A.R. 197). This testimony was consistent with Respondent's discovery responses³, deposition

³Petitioners did not rely upon Respondent's discovery responses regarding past driving history for impeachment purposes at trial.

testimony, and his recollection. Although Petitioners' counsel questioned Respondent regarding a 2011 citation, Respondent could not recall the citation and Petitioners' counsel provided little information. That testimony was as follows:

Q: No speeding tickets at all?

A: Not since, I'd say, probably about 2006, to the best of my recollection.

.....
Q: No speeding tickets?

A: I don't believe, since 2006. Unless for one reason or another there is 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, for 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 am not aware of what you're speaking of, sir.

(A.R. 198). Respondent did not admit or deny that a citation had occurred, only that he could not remember. Prior to trial, Petitioners had obtained a Triple I CIB which is apparently a driving check utilized by law enforcement but not an admissible conviction record. (A.R. 198-199).

Throughout the proceedings, Respondent challenged the credibility of the eye witness accounts of both Dr. Hebb and Petitioner. (A.R. 216, 221-222). Respondent pointed out the

internal inconsistencies of Dr. Hebb's testimony and the inconsistencies between Petitioner's trial testimony and his prior deposition testimony. (*Id.*). Respondent also contrasted Dr. Hebb and Petitioner's testimony with that of the other available eye witnesses. (A.R. 221-222). Respondent further testified that he had no motive to harm Petitioner. Ultimately, Petitioner made some questionable claims⁴, and coupled with all the evidence, the jury determined that Petitioners had not carried their burden of proof, and rendered a verdict for Respondent. (A.R. 286-288).

Afterwards, Petitioners moved the trial court for a new trial arguing that the jury's verdict was against the clear weight of the evidence, was based on false evidence, and would result in a miscarriage of justice. (A.R. 295-297). Petitioners also argued that testimony from the investigating officer was improperly excluded, that a juror should have been disqualified, and the jury was inappropriately instructed on comparative fault. (*Id.*). The trial court properly denied the motion determining that there was sufficient evidence to support the jury's finding in favor of Respondent. (A.R. 383-384).

Petitioners also moved the Court pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure (hereinafter referred to as the "WVRCP") for relief from judgment arguing that Respondent's verdict was obtained by fraud and the improper arguments of Respondent's counsel. (A.R. 301-304). Petitioners argued that Respondent bolstered his own credibility with lies regarding his driving history and the unsupported argument of Respondent's counsel. (*Id.*). This argument was based upon a post-trial investigation Petitioners completed after the matter had been litigated for three years and tried. (A.R. 301-304, 344-345, 377-388). The trial court

⁴Petitioner claimed an unrelated thumb problem as a result of the accident and made a lost wage claim despite income tax returns that showed his business actually performed better following the accident. (A.R. 220, 442-479).

concluded that the new evidence did not directly contradict Respondent's testimony at trial. (A.R. 380-383). The trial court also noted that sufficient evidence was introduced to support the jury's verdict. (A.R. 383). The motion was denied and this appeal followed. (*Id.*).

SUMMARY OF ARGUMENT

First, the trial court's denial of Petitioners' motion for relief from judgment was not an abuse of discretion. Most importantly, Petitioners did not prove, by clear and distinct proof, that Respondent's testimony was fraudulent. At trial, Respondent testified that to the best of his recollection, he last received a citation in 2006 for speeding. When Petitioners confronted Respondent with an uncertified inadmissible document purporting to show a 2011 citation, Respondent was unable to recall the citation and asked for further information to aid in his recollection. Petitioners could not offer any. Petitioners waited until after trial and being denied the admission of their inadmissible evidence to investigate Respondent's driving history. Petitioners learned that Respondent had received a speeding citation in 2011 and was ticketed for reckless driving in 2002. The new evidence is not inconsistent with Respondent's testimony and fails to prove fraud. Furthermore, the new evidence is purely for impeachment purposes and was available to Petitioners prior to trial. In addition, not all the information Petitioners uncovered is admissible. Finally, though Petitioners argue otherwise, the verdict was not based entirely on Respondent's testimony, but the totality of the evidence, including the conflicting testimony of four witnesses.

Second, the trial court did not abuse its discretion when it instructed the jury on comparative fault. There was evidence available that Petitioner failed to maintain control of his vehicle in violation of West Virginia Code §17C-6-1(a). Because the jury found Respondent was

not responsible for the accident, however, comparative fault was not even considered. Therefore, any error would be harmless.

Third, Petitioners failed to object to the trial court's curative instruction to disregard the uncertified document Petitioners attempted to utilize during their redirect examination of Respondent, and the alleged error should not be considered on appeal. Even so, the document was not admissible as it was not certified, could not be substantiated, and was not a reliable record of Respondent's driving history. Petitioners did not present a conviction document at trial. Furthermore, even if the document had been allowed, it would not have effectively impeached Respondent's testimony. Again, Respondent testified that he last received a citation in 2006 unless one escaped him. When asked about the 2011 citation, Respondent was unable to recall it, and asked for more information. He did not deny that the citation had occurred.

Fourth, Petitioners also failed to timely object to Respondent's closing argument and waives the right to raise the issue on appeal. Should Petitioners' argument be considered, however, Respondent's closing argument was not improper given the evidence at trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rev. R.A.P. 18(a), oral argument is not necessary as the facts and legal arguments are adequately presented in the briefs and record on appeal unless the Court decides the decisional process would be significantly aided by oral argument. If the Court decides oral argument is necessary, this case is appropriate for Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED PETITIONERS' MOTION FOR RELIEF FROM JUDGMENT AS RESPONDENT'S 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.

A. STANDARD OF REVIEW

“A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.” Syl. Pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

B. FALSE TESTIMONY

- 1. Respondent's testimony at trial was not clearly and distinctly fraudulent, the new evidence is only for impeachment purposes, and the new evidence was available to Petitioners before trial.**

Following the trial in this matter, Petitioners moved the trial court to be relieved from the final judgment pursuant to Rule 60(b) of the WVRCP, arguing that the jury reached a verdict based entirely on Respondent's fraudulent testimony. Petitioners' contend that the trial court's refusal to grant their motion results in an abuse of discretion. Petitioners' argument is fatally flawed.

Rule 60(b) of the WVRCP provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party. . . from final judgment order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect or unavoidable cause; (2) newly discovered evidence. . . ; (3) fraud. . . ; (4) the judgment is void; (5) the judgment has been satisfied, released

or discharged. . .; or (6) any other reason justifying relief from the operation of the judgment.

This Court has recognized that “[f]raud is never presumed when alleged” and “it must be established by clear and distinct proof.” Syl. Pt. 5, *Bennett v. Neff*, 130 W.Va. 121, 42 S.E.2d 793 (1947); *See also* Syl. Pt. 5, *Calhoun County Bank v. Ellison*, 133 W.Va. 9, 54 S.E.2d 182 (1949). In fact, “...Rule 60(b)(3) requires proof of intentional deception or misrepresentation by clear and convincing evidence.” *Gerver v. Benavides*, 207 W.Va. 228, 530 S.E.2d 701 (2000).

Additionally, this Court has repeatedly stated that “[a] new trial on the basis of newly-discovered evidence will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.” Syl. Pt. 2, in part, *State v. Stewart*, 161 W.Va. 127, 239 S.E.2d 777 (1977) (emphasis added). Notwithstanding, this Court has held that:

[W]hen the newly-discovered impeachment evidence comes within the following rules, a new trial will be granted: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) The facts must appear in his affidavit that the party was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured before the verdict.⁵ (3) The evidence must be new and material, not merely cumulative. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits.

Id.

Here, Petitioners lack any clear and distinct proof that Respondent’s trial testimony constitutes fraud. Furthermore, Petitioners are incapable of meeting the requirements set forth in *Stewart*. First, although new evidence was discovered following the trial, an affidavit never

⁵It is well established that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available, but not offered at the original proceeding. *See Jividen v. Jividen*, 212 W.Va. 478, 575 S.E.2d 88 (2002).

explained its absence. Petitioners had over three years to discover Respondent's past driving history. In fact, Petitioners actually had some evidence in their possession regarding Respondent's 2011 citation but failed to obtain an admissible conviction record alleging that they did not expect the issue to come up at trial. (A.R. 198-199). This is not adequate under the case law. Second, due diligence would have secured the evidence before trial in a case of alleged road rage. It is unreasonable to suggest otherwise. Third, although the 2002 citation is new information, it is not material, and not inconsistent with Respondent's testimony at trial; Respondent only testified from the present back to 2006. (A.R. 197-198). Respondent was never specifically asked at trial regarding any driving history or citation prior to 2006. (A.R. 197-199). Finally, the evidence discovered would not likely produce an opposite result.

Furthermore, Respondent's testimony did not conflict with Petitioners' newly-discovered evidence. Respondent's testimony is fairly summarized that his last citation for speeding was in 2006 unless one escaped him. (A.R. 197-198). He could not recall a citation in 2011. (A.R. 198). Respondent asked Petitioners' counsel for a location, to help him remember it, but Petitioners' counsel did not know. (*Id.*). It is now known that the citation was in Ohio. (A.R. 345). Respondent did not deny that a 2011 citation existed. (A.R. 198). Respondent was never questioned about the 2002 citation which was twelve years old at the time of trial and occurred while he was in college. (A.R. 196-198). It is easy to see how Respondent could forget about this citation during discovery. Respondent's poor recollection is not proof of intentional deception or a misrepresentation of his past driving history as required by law. This is simply not clear and distinct evidence of intentional deception and the trial court's decision is not an abuse of discretion. The trial court, having heard all of the evidence, is in the best position to determine

whether Respondent's testimony was clearly and distinctly fraudulent. *See State v. Guthrie*, 173 W.Va. 290, 295, 315 S.E.2d 397, 402 (1984).

2. The new evidence is not likely admissible.

Petitioners new evidence relates to a citation Respondent received in 2002, as well as an affidavit Petitioners obtained from Respondent's ex-wife, Rachel Gregis, regarding Respondents' prior driving history (hereinafter referred to as the "Affidavit"). (A.R. 344-345, 377-378). While it is true that Ms. Gregis provided in the Affidavit that she had knowledge of Respondent engaging in an altercation with a commercial truck driver, attempting to evade a speeding ticket, and being ticketed four to five times, Petitioners wholly ignore Ms. Gregis' supplemental affidavit (hereinafter referred to as the "Supplemental Affidavit"). (*Id.*). The Supplemental Affidavit confirms that while Ms. Gregis purports to recall that Respondent was given citations for speeding, she does not know whether Respondent was convicted of such citations. (A.R. 391-392). Additionally, there is no confirmatory evidence that any convictions occurred from any other citation. Further, the Supplemental Affidavit confirms that the conduct Ms. Gregis recalled occurred between 2002 and 2004. (*Id.*). This is not inconsistent with Respondent's testimony, even if convicted for the citations, that he believed his last speeding citation to be in 2006.

Furthermore, the Affidavit was based upon an ex-wife's memory and only a conviction for a citation would potentially be admissible at trial. Hence, even if Petitioners had done their homework prior to trial, as is required, and had Ms. Gregis been present to testify, her information would not have impeached Respondent's testimony nor would it have been admissible, as it does not comply with Rule 609 of the West Virginia Rules of Evidence

(hereinafter referred to as the “WVRE”).⁶ The conviction Petitioners learned of was not a conviction punishable by death or imprisonment in excess of one year, and any conviction between 2002 and 2004 likely exceeds the ten year prohibition of Rule 609(b) of the WVRE. Finally, had Petitioners presented this evidence, it would have been objectionable under Rules 402, 403, 404, 406, 410, 608, 609 of the WVRE and West Virginia Code §57-3-4.⁷

The only possible way a conviction for a speeding citation between 2002 and 2004 would be admissible would be for impeachment purposes related to Respondent’s Discovery Responses. The conviction would not be admissible to impeach Respondent’s trial testimony because he did not testify to any driving history prior to 2006. There are three reasons why the purported new evidence does not justify a new trial. Again, this Court in *Gerver* made it clear that a new trial should be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. *See also* Syl. Pt. 2, *Stewart*, *supra*. Second, before a court can consider introducing evidence of a conviction more than ten years old, the proponent must give to the adverse party, sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of said evidence. WVRE 609(b). Third, Petitioners would be attempting to impeach Respondent regarding his Discovery Responses, not trial testimony.

Respondent’s Discovery Responses were answered on September 14, 2011. (A.R. 27-39). Petitioners’ counsel then took Respondent’s deposition on December 7, 2011. (A.R. 43-

⁶Nor could Respondent have been impeached at trial by using Ms. Gregis’ testimony because Respondent did not testify to any driving history prior to 2006.

⁷W.Va. Code §57-3-4 prohibits a spouse or former spouse from testifying about confidential communications made while married.

57). At that time, Petitioners' counsel had the opportunity to fully question Respondent regarding his driving history or to make further inquiry into his Discovery Responses. Petitioners chose not to do so. An exchange took place as follows:

Q: Do you have any prior criminal record?

A: No Sir.

Q: Other than just minor traffic citations, no misdemeanor or felony convictions for anything?

A: No sir.

(A.R. 46).

Respondent was further asked as follows:

Q: Do you have any points on your driver's license?

A: Not to my knowledge.

(A.R. 56).

Neither Respondent's Discovery Responses nor his deposition were used at trial with regard to this issue. In addition, Petitioners have not cited a single case in support of their position that citations more than ten years old not disclosed in written Discovery Responses can form the basis for a new trial in a case that was fairly tried. Again, Petitioners have offered no reasonable explanation for why they failed to investigate Respondent's driving history prior to trial in a case of alleged road rage. Moreover, Petitioners have failed to offer an affidavit explaining that they were diligent in ascertaining and securing the evidence prior to trial and that the new evidence is such that due diligence would not have secured before the verdict. While Petitioners argue they did not anticipate needing this evidence prior to trial, they had obtained a Triple I CIB for this

very purpose.

3. The verdict was based on the entirety of evidence presented at trial.

Although Petitioners argue otherwise, the jury's determination at trial was based on the entirety of the evidence offered, and not Respondent's testimony alone. Sufficient evidence was introduced, from both direct and cross-examination of witnesses other than the Respondent, to support the verdict. Not only did the jury hear Respondent's testimony, but it also heard the testimony of three other eye witnesses. All three had conflicting testimony regarding the description of the car which caused the accident. Dr. Hebb testified that she witnessed a maroon Chevrolet Malibu slam on its brakes, and later watched Petitioner's truck flip onto its side and skid down the interstate. (A.R. 88, 90). She also admitted she and her husband had to catch up with the vehicle, in traffic, before she could read the license plate number. (A.R. 89). Dr. Hebb believed the car was being operated by a man on account of the driver's short hair. (A.R. 90). Mr. Garrett, on the other hand, testified that he witnessed a small reddish or maroon car cause the accident. (A.R. 229). Mr. Garrett described the small car as either a Cavalier or Cobalt and observed passengers in the back seat. (A.R. 229, 230, 232). When pressed, Mr. Garrett admitted that although he believed the small car was manufactured by General Motors, he could not be certain. (A.R. 229). Finally, although Petitioner identified the car as a later-model maroon Chevrolet, he admitted that he failed to identify the car as such to anyone else prior to trial, and he only recently remembered that it was a Chevrolet. (A.R. 216-217).

In all, Petitioners were unable to prove by clear and distinct proof that Respondent's testimony was fraudulent. The new evidence is simply for impeachment purposes, and is not inconsistent with Respondent's testimony at trial. Furthermore, Petitioners failed to conduct a

thorough investigation into Respondent's past driving history prior to trial. Respondent should not be punished for his inability to recall prior citations, and Petitioners should not be rewarded for completing a post-trial investigation that should have been done sooner. Additionally, the evidence is not likely admissible at trial. Finally, the jury reached its verdict based upon the totality of evidence available to it and not only on Respondent's testimony.

II. THE JURY WAS PROPERLY INSTRUCTED ON COMPARATIVE FAULT.

A. STANDARD OF REVIEW

"A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence." Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). "Jury instructions are reviewed by determining whether a charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law." *Id.* "A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy." *Id.* "A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law." *Id.* Therefore, a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. *West Virginia Dep't of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 222 W.Va. 688, 671 S.E.2d 693 (2008).

B. COMPARATIVE FAULT

Failure to maintain control is prohibited by West Virginia Code §17C-6-1(a). The code section provides that:

No person may drive a vehicle on a highway at a speed greater than is reasonable and prudent under the existing conditions and the actual and potential hazards. In every event speed shall be so controlled as

may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highways in compliance with legal requirements and the duty of all persons to use due care.

The jury was instructed regarding the statute. In fact, this was Petitioners' Instruction No. 21. Furthermore, violation of a statute is prima facie evidence of negligence. *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990). Therefore, should a driver be in violation of a statute, the driver may also have comparative fault for an accident.

Here, Petitioner crashed without being struck by any other vehicle. Petitioner testified that the car that caused him to lose control slammed on its brakes twice. (A.R. 217-218). The first time the car slammed on its brakes, Petitioner did not utilize his brakes. Petitioner's testimony was that he let off the gas and allowed his truck's Jake brake to kick in. (A.R. 217). Apparently this did not create enough space between his vehicle and the tortfeasor vehicle, and when the tortfeasor hit his brakes a second time, Petitioner lost control of his vehicle. (A.R. 218). Therefore, there was evidence before the jury that Petitioner had failed to maintain control of his vehicle in violation of West Virginia Code §17C-6-1(a). If the jury determined that Petitioner was in violation of the statute, it could have apportioned some fault for the accident to him as well. The instruction on comparative fault was not an abuse of discretion as it was supported by the evidence.

However, should the instruction on comparative fault somehow constitute error, the error is harmless. The jury did not attribute any fault to Petitioner. Rather the jury concluded, based upon conflicting evidence, that the Respondent did not cause or contribute to the accident, rendering the comparative fault instruction moot or harmless. Finally, whether Respondent's counsel chose to argue comparative fault in closing is irrelevant.

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.

This Court has found that:

When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs.

State v. Whittaker, 221 W.Va. 117, 131-132, 650 S.E.2d 216, 230-231 (2007). Furthermore, the "raise or waive" rule has been explained to prevent a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error. *Id.* at 132, 231. Petitioners failed to object to the trial court's instruction and therefore waived the right to argue its prejudicial effect on appeal. (A.R. 198-199).

In addition to Petitioners' failure to object at trial, the document simply was not admissible evidence. The document was not certified, could not be authenticated by any witness, and was inadmissible hearsay. Rule 802 of the WVRE provides, in pertinent part, that "[h]earsay is not admissible" unless otherwise excepted under Rule 803. Here, the record that Petitioners attempted to introduce was a Triple I CIB. The document was not a certified record of a conviction or driving history and Petitioners could offer no witness to authenticate the document. In fact, Petitioners were not even able to explain how they obtained the document when asked by the trial court. Most importantly, the document was not excepted or exempted from the general bar from admissibility contained in Rule 802.

Moreover, even if the document had been admissible, it would not have effectively

impeached Respondent. Respondent's only testimony was that to the best of his knowledge, his last speeding ticket was in 2006. (A.R. 197-198). When Petitioners' counsel attempted to confront Respondent with the 2011 speeding conviction supposedly memorialized within the Triple I CIB, Respondent indicated that he could not recall the conviction, and Petitioners could not provide any additional information. (A.R. 198). Respondent neither admitted nor denied that the conviction had occurred. (*Id.*). Finally, it was the Petitioners who attempted to utilize an inadmissible document thereby inviting the trial court to offer the curative instruction of which Petitioners now complain. Petitioners now want to blame the trial court for their failure to properly prepare for trial and their failure should not be awarded on appeal.

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

Respondent's closing argument was not improper. This Court has long provided great latitude to counsel in arguments before a jury, provided such arguments are founded in evidence or can be inferred from facts before the jury. Syl. Pt. 3, *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 (1961). Here, Respondent's closing argument regarding Dr. Hebb's absence served two purposes. First, the argument served to emphasize to the jury that Petitioners carry the burden of proof in a civil action. Second, the argument also served to emphasize that Dr. Hebb's testimony was internally inconsistent, lacked reliable detail, and conflicted with that of two other eye witnesses. Therefore, based upon the available evidence, it could be inferred that Dr. Hebb's testimony was false and Respondent's closing argument was not improper.

Although Respondent's argument was proper, Petitioners again failed to object to this

alleged wrong both during trial and in any post-trial motions and now want this Court to correct their mistake. This Court has consistently held that:

Failure to make timely and proper objection to remarks of counsel made in presence of jury, during trial of case, constitutes waiver of right to raise question thereafter either in trial court or in appeal court.

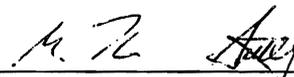
Syl. Pt. 6, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945); Syl. Pt. 7, *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956); Syl. Pt. 5, *State v. Davis*, 180 W.Va. 357, 376 S.E.2d 563 (1988). This Court has further maintained that failure to make a timely objection seriously impairs the right to subsequently raise the objection. *Johnson v. Garlow*, 197 W.Va. 674, 478 S.E.2d 347 (1996).

CONCLUSION

The trial court did not abuse its discretion and appropriately denied Petitioners' request for a relief from judgment. Petitioners did not prove the verdict was obtained by fraud. Furthermore, the new evidence Petitioners discovered would only be introduced for impeachment purposes. A new trial on the basis of newly-discovered evidence will generally be refused when the sole object of the new evidence is to discredit or impeach a witness. The new evidence was also available to Petitioners prior to trial, and they should not be rewarded for their failure to adequately prepare for trial. Finally, the verdict was based on all the evidence available, not Respondent's testimony alone. Eye witness accounts were conflicting and permitted the jury to reach a verdict that Petitioners now find dissatisfying. The trial court's instruction on comparative fault was also appropriate as there was evidence that Petitioner failed to maintain control of his vehicle. Finally, Petitioners failed to object not only to the trial court's instruction to disregard Petitioners' reference to an uncertified document, but also to Respondent's closing

argument. As such, Petitioners waived their right to raise the issues on appeal. Ultimately, the trial court did not err in refusing to grant Petitioners' motion for relief from judgment and motion for a new trial. The trial court's ruling should be affirmed and Petitioners' Appeal dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2015, I served the foregoing “**Respondent’s Brief**” upon the following by depositing a true copy thereof in the United States mail, postage prepaid, in a sealed envelope addressed as follows:

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