IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0010

CHRISTOPHER MCKENZIE,

Petitioner,

v.

DONALD L. SEVIER
CASSANDRA SEVIER,

Respondents.

PETITIONER'S REPLY BRIEF

Samuel D. Madia (WVSB 10819)
Jonathan Wesley Prince (WVSB 13250)
Shaffer Madia Law, PLLC
1056A Maple Drive
Morgantown, WV 26505
P: 304-622-1100; F: 304-599-5859
sam@shaffermadialaw.com
wes@shaffermadialaw.com

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STATEMENT OF THE CASE

After hearing the testimony in this case, the jury made the explicit finding that Donald L. Sevier battered Petitioner on July 7, 2015.[1] Further, Respondents' Counsel admitted that Petitioner was injured as a result of Donald L. Sevier's intentional act of battery.[2] While there was a dispute as to which medical bills incurred by Petitioner were related to Donald L. Sevier's intentional act of battery, the testimony at trial provided undisputed evidence that Petitioner suffered a permanent severe traumatic brain injury as a result of being battered by Donald L. Sevier.[3] Although the jury found Donald L. Sevier battered Petitioner, the jury disregarded Petitioner's undisputed evidence of a permanent severe traumatic brain injury and awarded Petitioner zero dollars ($0) in damages.[4] Because the Jury failed to award at least some damages to Petitioner, the verdict was inadequate and inconsistent and the Circuit Court of Marion County erred in refusing to grant a new trial solely on the issue of damages.

Additionally, Respondents now complain they are entitled to recover their taxable costs from Petitioner because Respondents claim they were the substantially prevailing party. However, Respondents were not the substantially prevailing party because Respondents prevailed on one of their three claims whereas Petitioner prevailed on one of his two claims. Thus, while the jury awarded Petitioner zero dollars ($0) in damages, Petitioner prevailed on a greater percentage of his claims than Respondents.

Further, Respondents now complain the Circuit Court erred by awarding sanctions to Petitioner. The Circuit Court awarded Petitioner sanctions in the amount of four thousand dollars ($4,000.00) because of Respondents' failure to comply with Court orders. The Court was correct

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[1] P.A. 001080
[2] *See* P.A. 000797 and P.A. 001028
[3] *See* P.A. 000436 and P.A. 000441 - P.A. 000442.
[4] P.A. 001081.

in granting Petitioner's motion for sanctions because Respondents' discovery tactics and failure to follow Court orders throughout this case shocks the conscience.

ARGUMENT

Petitioner argues an order denying a new trial is subject to review under an abuse of discretion standard, to which Respondents agree that this is the applicable standard of review. Further, Petitioner agrees that the applicable standard of review for Respondents' cross-assignments of error are under an abuse of discretion standard.

I. The Circuit Court Abused Its Discretion In Refusing To Grant Petitioner A New Trial On Damages For Inadequate Damages When The Undisputed Evidence Established Causation and Substantial Damages.

Respondents are attempting to muddy the waters by asking this Court to interject the element of proximate cause into an intentional tort case. In support of his position, Respondents cite *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004); *Jackson v. Putnam County Board of Education*, 221 W. Va. 170, 653 S.E.2d. 632 (2006); *Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451 (2005); and *Tyree v. Bell*, 2018 W. Va. LEXIS 723 (W. Va. Sup. Ct. 2018). However, none of the aforementioned cases stand for the proposition that a plaintiff must prove proximate cause in an intentional tort case. As this Court stated in *Strahin*:

> An action in **negligence** is based in tort law and is brought to recover from a party whose acts or omissions constitute the proximate cause of a claimant's injury. To prevail in a **negligence** suit, the plaintiff must prove by a preponderance of the evidence that the defendant owed a legal duty to the plaintiff and that by breaching that duty the defendant proximately caused the injuries of the plaintiff.[5]

As is apparent, *Strahin* does not hold that a plaintiff in an intentional tort case must prove that plaintiff's injuries were the proximate cause of defendant's actions. Further, in *Jackson*, a case

[5] *Strahin v. Cleavenger*, 216 W. Va. 175,183, 603 S.E.2d 197, 205 (2004) (emphasis added).

where a mother acting as administratrix on behalf of her son's estate sued the Putnam County School Board for negligence, this Court stated "the breach of a duty owed, by itself, is not actionable, unless there is also sufficient evidence which the jury may find by a preponderance of the evidence that such **negligence** is a proximate cause of the injury."[6]

Further, in *Spencer*, this Court made abundantly clear that proximate cause is an element in a **negligence** cause of action. "The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was **negligent** and that such **negligence** was the proximate cause of the injury."[7] "The proximate cause of an injury is the last **negligent** act contributing to the injury and without which the injury would not have occurred."[8] "Proximate cause is a vital and an essential element of actionable **negligence** and must be proved to warrant a recovery in an action based on **negligence**."[9]

In *Tyree*, a motor vehicle accident case, this Court affirmed the granting of a new trial on damages even when the jury determined that plaintiff was not injured as a result of defendant's actions because the clear weight of the evidence suggested otherwise.[10] Respondents suggest that because the jury, in *Tyree*, was asked the question concerning whether or not plaintiff was injured as a result of defendant's actions and here no similar question was posed to the jury, the verdict of zero dollars ($0) in damages should stand. However, like *Strahin*, *Jackson*, and *Spencer*; *Tyree* was a case centered around a negligence cause of action where a determination of proximate cause is paramount.

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[6] *Jackson v. Putnam Cnty. Bd. of Educ.*, 221 W. Va. 170, 180, 653 S.E.2d. 632, 642 (2006) (emphasis added).
[7] Syl. pt. 2, *Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451 (2005) (emphasis added).
[8] Syl. pt. 3, *Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451 (2005) (emphasis added).
[9] Syl. pt. 6, *Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451 (2005) (emphasis added).
[10] *Tyree v. Bell*, 2018 W. Va. LEXIS 723, *18 (W. Va. Sup. Ct. 2018).

Never before has this Court held a plaintiff must prove proximate cause in an intentional tort case because proximate cause (i.e. foreseeability) is a fundamental legal maxim rooted in negligence. Further, it is a fundamental legal maxim "that a sane person is conclusively presumed to intend the natural consequences of the acts committed by him."[11] Additionally, this Court has adopted the Restatement (Second) of Torts and stated:

> [A]n actor is subject to liability to another for battery if (a) he acts *intending* to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results. The word intent in the Restatement denotes that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it.[12]

The jury found Donald. L. Sevier committed battery against Petitioner. In other words, the jury found that Donald L. Sevier, by punching Petitioner in the face, intentionally caused harmful or offensive contact with Petitioner and Donald L. Sevier desired to cause the consequences of his act, or that Donald L. Sevier believed that the consequences are substantially certain to result from it. As such, having the jury examine the negligence concept of proximate cause would be superfluous because the jury, by concluding Donald L. Sevier committed battery against Petitioner, concluded that Donald L. Sevier desired to cause the consequences of his act or that he believed that the consequences were substantially certain to result from his act. Therefore, the issue of proximate cause (i.e. foreseeability) was determined when the jury concluded the act was intentional.

Further, Respondents believe the verdict was not inadequate because Petitioner did not have any broken bones in his face and all of Petitioner's injuries were to the back of his head.

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[11] *French v. White*, 4 W. Va. 170 (1870).

[12] *Funeral Servs. by Gregory v. Bluefield Cmty. Hosp.*, 186 W. Va. 424, 427, 413 S.E.2d 79, 82 (1991) (internal citations omitted).

However, Mrs. McKenzie testified about the bruising and abrasions which existed around Petitioner's eye during his initial hospital stay after the battery.[13] Also, a picture illustrating Petitioner's bruising and abrasions was introduced into evidence and said picture depicts Petitioner with a black left eye and an abrasion below the left eye which Petitioner received from Donald L. Sevier's fist.[14]

Additionally, Respondents fail to acknowledge or respond to this Court's precedent of *Payne v. Gundy*, 96 W. Va. 82, 468 S.E.2d 335 (1996), or *Godfrey v. Godfrey*, 193 W. Va. 407, 546 S.E.2d 488 (1995), which stand for the proposition that a jury that refuses to compensate a plaintiff for injuries, pain, and suffering and instead renders a verdict manifestly inadequate in amount, the verdict will be set aside. Respondents have not cited precedent which opposes Petitioner's position that an award of zero dollars ($0) in damages is manifestly inadequate and Petitioner should be awarded a new trial solely on the issue of damages.

Further, when Petitioner's unresponsive body had to be propped up by Cassandra Sevier while Donald L. Sevier called for police and an ambulance, this Court should have no doubt Petitioner was injured and endured pain and suffering at the fist of Donald L. Sevier which the jury failed to recognize.[15] Therefore, following the precedent of this Court, an award of zero dollars ($0) in damages is manifestly inadequate in amount when it is uncontroverted Petitioner was injured and sustained pain and suffering in the July 7, 2015, battery; as such, this Court should award Petitioner a new trial solely on the issue of damages.

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[13] P.A. 000569.
[14] P.A. 001034.
[15] *See* P.A. 000797, P.A. 000204, P.A. 000351 – P.A. 000352, P.A. 000415, and P.A. 000419.

II. The Circuit Court Abused Its Discretion In Refusing To Grant Petitioner A New Trial On Damages For An Inconsistent Verdict When The Undisputed Evidence Established Causation And Substantial Damages.

Respondents appear to rely solely on *Combs v. Hahn*, 205 W. Va. 102, 516 S.E.2d 506 (1999), in support of their position that the jury verdict which concluded Donald L. Sevier battered Petitioner and awarded Petitioner zero dollars ($0) in damages is not inconsistent. In *Combs*, this Court held "[a]bsent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharge, constitutes a waiver of the defect or irregularity in the verdict form."[16] However, this Court in *Combs* went on to state:

> [W]here a verdict is so uncertain, ambiguous, contradictory, or illogical that it cannot be clearly ascertained who it is for or against or what facts were found and the court cannot reasonably construe the language so as to give effect to what the jury unmistakably found as a basis of a judgment thereon, the vice in the verdict is more than formal. Such a condition is of the substance and affects the merits of the case. Where a verdict is of that character, the party against whom the judgment goes does not waive the defect by failing to ask that the jury clarify the verdict. He may raise the question on a motion for a new trial and the court should grant it.[17]

Therefore, solely because a party does not object to the inconsistency in the verdict form prior to the jury's discharge does not mean that party waives the inconsistency for the purposes of a motion for a new trial.

Further, Respondents fail to acknowledge this Court's holding in *Gunno v. McNair*, 2016 W. Va. LEXIS 895 (2016) (*memorandum decision*). In *Gunno*, this Court held "[t]he award of zero dollars in damages is inherently inconsistent with the finding that [plaintiff] was injured as a

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[16] Syl. pt. 2, *Combs v. Hahn*, 205 W. Va. 102, 516 S.E.2d 506 (1999).
[17] *Combs v. Hahn*, 205 W. Va. 102, 107, 516 S.E.2d 506, 511 (1999) (citing *Anderson's Executrix v. Hockensmith*, 322 S.W.2d 489, 490-491 (Ky. 1959).

proximate result of the accident" even when, as in *Gunno*, plaintiff's counsel did not object to the verdict form prior to the discharge of the jury.[18] Thus, in *Gunno*, this Court concluded plaintiff was entitled to a new trial on damages as a result of defendant's negligence.

Here, the jury concluded that Donald L. Sevier intentionally battered Petitioner and awarded Petitioner zero dollars ($0) in damages. Like *Gunno*, the award of zero dollars ($0) in damages is entirely inconsistent with the finding that Donald L. Sevier intentionally battered Petitioner. Therefore, like *Gunno*, this Court should hold that an award of zero dollars ($0) in damages is inconsistent with a finding that Petitioner was battered and award Petitioner a new trial solely on the issue of damages.

III. The Circuit Court Did Not Abuse Its Discretion In Refusing To Grant Respondents Their Costs Pursuant To W. Va. Code § 59-2-8 Because Respondents Were Not The Prevailing Party.

Respondents now complain that the Circuit Court violated W. Va. Code § 59-2-8 when the Circuit Court held "each party shall be responsible for their own costs and attorney fees incurred as a result of this litigation."[19] W. Va. Code § 59-2-8 reads:

> Except where it is otherwise provided, the party for whom final judgment is given in any action, or in a motion for judgment for money, whether he be plaintiff or defendant, shall recover his costs against the opposite party; and when the action is against two or more, and there is judgment for or discontinuance as to some but not all of the defendants, those for whom there is judgment, or as to whom there is such discontinuance, shall recover their costs.[20]

Further, this Court has previously explained:

> [N]either Rule 54(d) nor W. Va. Code § 59-2-8, defines what are costs, but in this regard we are aided by W. Va. Code § 59-2-13, which directs the clerk of a court wherein a party recovers costs shall tax the same. This is followed by W. Va. Code § 59-2-14, which authorizes a statutory fee. There are also contained in W. Va. Code

[18] *Gunno v. McNair*, 2016 W. Va. LEXIS 895, *12 (2016) (*memorandum decision*).
[19] P.A. 001084.
[20] W. Va. Code § 59-2-8.

> § 59-2-15, additional costs that may be taxed. Finally, we note that W. Va. Code § 59-2-16, provides the right of a court to restrict the taxation of the cost for witnesses.[21]

In this case, Petitioner tried one cause of action against Donald L. Sevier (battery) and one cause of action against Donald L. Sevier and Cassandra Sevier (civil conspiracy).[22] Donald L. Sevier tried two causes of action against Petitioner (battery and violating W. Va. Code § 55-7-2) and Cassandra Sevier tried one cause of action against Petitioner (violating W. Va. Code § 55-7-2).[23] The jury found Donald L. Sevier battered Petitioner, however the jury did not find Donald L. Sevier and Cassandra Sevier committed civil conspiracy. [24] Additionally, the jury found Petitioner violated W. Va. Code § 55-7-2 against Cassandra Sevier, however the jury did not find Petitioner battered Donald L. Sevier or violated W. Va. Code § 55-7-2 against Donald L. Sevier.[25] Petitioner obtained a liability verdict in his favor on one of two causes of action and Respondents obtained a liability verdict on one of three causes of action.[26]

Thus, because Respondents obtained a liability verdict in their favor on thirty-three percent (33%) of their causes of action and Petitioner obtained a liability verdict in his favor on fifty percent (50%) of his causes of action this Court should not hold that Respondents are the party for whom final judgment is given. Moreover, because Petitioner obtained a liability verdict in his favor and Cassandra Sevier obtained a verdict in her favor, neither party substantially prevailed. Therefore, the Circuit Court did not abuse its discretion, in keeping with the American Rule,

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[21] *Carper v. Chad Watson & Burkharts, Inc.*, 226 W. Va. 50, 56, 697 S.E.2d 86, 92 (2010) (internal citations omitted).
[22] *See* P.A. 001074 – P.A. 001085.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

requiring each party to be responsible for their own costs and attorney fees incurred as a result of this litigation.[27]

Additionally, Respondents complain that the Circuit Court violated Article 3, Section 13 of the Constitution of West Virginia which reads:

> In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.[28]

However, Respondents have not cited a statute, rule, or West Virginia precedent in support of their position that a judge is barred from ordering a party bear all costs associated with a jury. Instead, Respondents point to a case from 1984 in the Louisiana Appellate Court as persuasive authority. In *Mack v. S. Farm Bureau Cas. Ins. Co.*, 447 So. 2d 32 (La. Ct. App. 1984), the Louisiana Appellate Court held "[j]ury costs cannot be assessed against a party not found liable on the sole ground that the party requested the jury trial."[29]

The West Virginia Constitution is silent as to how a judge can distribute the cost for the jury and Respondents cite no statute, rule, or West Virginia precedent in support of their argument. Additionally, the Louisiana Appellate Court holding in *Mack* is differentiated from the case at bar because here the Circuit Court is requiring Respondents to pay the cost of the jury when Donald L. Sevier was found liable for the battery of Petitioner and Respondents demanded a jury trial whereas, in keeping with the custom of the Circuit Court of Marion County, Petitioner called the case for a bench trial. Therefore, because the Constitution of West Virginia is silent regarding the

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[27] The American Rule is designed to achieve equal access to the courts for the resolution of *bona fide* disputes and requires each litigant bear his or her own attorney fees absent a contrary rule or express statutory authority. *See Horkulic v. Galloway*, 222 W. Va. 450, 463, 665 S.E.2d 284, 297 (2008).
[28] W. Va. Const. Art. III, § 13.
[29] *Mack v. S. Farm Bureau Cas. Ins. Co.*, 447 So. 2d 32, 35 (La. Ct. App. 1984).

payment for a jury and Respondents can cite to no statute, rule, or West Virginia precedent analogous to the case at bar, this Court should hold the Circuit Court did not abuse its discretion by requiring Respondents to bear the cost associated with the jury.

IV. The Circuit Court Did Not Abuse Its Discretion In Awarding Sanctions Against Respondents Based Upon The Conduct Of Discovery.

Further, Respondents now complain that the Circuit Court abused its discretion by granting Petitioner's Motion for Sanctions which the Circuit Court originally held in abeyance.[30] In support of their position, Respondents cite *Smith v. Gebhart*, 240 W. Va. 426, 813 S.E.2d 79 (2018) and *Prager v. Meckling*, 172 W. Va. 785, 310 S.E.2d 852 (1983). In *Smith*, this Court held:

> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.[31]

Further, in *Prager*, this Court held "under Rule 37 of the Rules of Civil Procedure to trigger the imposition of sanctions where a party refuses to comply with a discovery request, the other party must file a motion to have the court order discovery. If the discovery order is issued and not obeyed, then the party may seek sanctions under Rule 37(b) of the Rules of Civil Procedure."[32] Additionally in *Prager*, this Court held "a trial court has inherent power to impose sanctions as a part of its obligation to conduct a fair and orderly trial."[33]

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[30] *See* P.A. 000077 – P.A. 000084, P.A. 000067 – P.A. 000076, and P.A. 001121.
[31] Syl. pt. 1, *Smith v. Gebhart*, 240 W. Va. 426, 813 S.E.2d 79 (2018).
[32] Syl. pt. 1, *Prager v. Meckling*, 172 W. Va. 785, 310 S.E.2d 852 (1983).
[33] Syl. pt. 4, *Prager v. Meckling*, 172 W. Va. 785, 310 S.E.2d 852 (1983).

Throughout the litigation of the underlying case, Respondents and Respondents' Counsel exhibited a pattern and practice of willfully violating the West Virginia Rules of Civil Procedure and Orders of the Circuit Court.[34] On January 9, 2018, the Circuit Court granted Petitioner's initial motion for sanctions. [35] In the January 9, 2018, Order the Circuit Court Ordered Respondents be responsible for four thousand dollars ($4,000.00) of Petitioner's attorney's fees for failing to follow a court order, filing evasive discovery responses, failing to produce a privilege log, and failing to produce cell phone records.[36]

On June 13, 2018, the Circuit Court granted Petitioner's Motion to Compel and Ordered Respondents to produce their insurance policy and required Respondents to answer Request number 10 of Petitioner's First Set of Combined Discovery.[37] Further, due to representations made by Respondents' Counsel at the hearing on Petitioner's Motion to Compel, the Circuit Court Ordered Respondents' Counsel subpoena the cell phone records of Respondents and, upon their receipt, provide Respondents' cell phone records to Petitioner's Counsel.[38] Unfortunately, Respondents' Counsel never subpoenaed Respondents' cell phone records.

On July 27, 2018, the Circuit Court further granted Petitioner's Motion to Compel and Ordered Respondents to fully and completely respond to numerous requests for production and interrogatories.[39] In its July 27, 2018, Order, the Circuit Court held in abeyance Petitioner's Motion for Sanctions for Failing to Follow Court Order.[40]

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[34] *See* P.A. 000061 – P.A. 000066, P.A. 000077 – P.A. 000084, and P.A. 000067 – P.A. 000076.
[35] P.A. 000061 – P.A. 000066.
[36] *Id.*
[37] P.A. 00079 – P.A. 00080.
[38] P.A. 00080.
[39] P.A. 00067 – P.A. 00076.
[40] *Id.*

During the trial, Donald L. Sevier admitted that he was aware Petitioner requested his cell phone bill and Donald L. Sevier admitted he had his cell phone bill.[41] Unfortunately, neither Donald L. Sevier's nor Respondents' Counsel ever produced Donald L. Sevier's cell phone bill. Further, Cassandra Sevier admitted she knew Petitioner had requested her cell phone records and she didn't attempt to obtain them until approximately January or February of 2018.[42]

On December 11, 2018, the Circuit Court granted Petitioner's Motion for Sanctions which the Circuit Court originally held in abeyance in its July 27, 2018, Order.[43] The Circuit Court granted Petitioner's Motion for Sanctions because Respondents failed to comply with Court Orders requiring production and supplementation of certain discovery responses including cell phone records, insurance policies, and discovery responses.[44] The Court incorporated by reference its reasons for granting Petitioner's Motion for Sanctions in its December 11, 2018, Order. Further, the Court placed those reasons on the record by incorporating the reasoning behind Petitioner's Motion for Sanctions into its December 11, 2018, Order.

The Circuit Court provided Respondents with numerous opportunities to comply with its Court Orders. Respondents were aware Petitioner had requested their cell phone records, however Respondents willingly ignored Petitioner's discovery request and Court Orders and never produced their cell phone records. Further, Respondents' Counsel represented to the Court he would subpoena Respondents' cell phone records and in response the Court Ordered Respondents' Counsel to subpoena Respondents' cell phone records. However Respondents' Counsel never followed through on his representation to the Circuit Court and willfully ignored a Court order to subpoena Respondents' cell phone records. Therefore, based on the aforementioned failures of

[41] P.A. 000213 – P.A. 0000214.
[42] P.A. 000306 – P.A. 000311.
[43] P.A. 001121.
[44] *Id.*

Respondents and Respondents' Counsel this Court should hold the Circuit Court did not abuse its discretion by granting Petitioner's Motion for Sanctions and awarding sanctions against Respondents and Respondents' Counsel in the amount of four thousand dollars ($4,000.00).

CONCLUSION

For the reasons stated above and in Petitioner's Brief, the decision of the Circuit Court denying the motion for a new trial on damages was an abuse of discretion and should be reversed. This Court should award a new trial on the issue of harms and losses sustained in the July 7, 2015, battery, including but not limited to, past and/or future physical pain and mental pain and suffering, and reduced ability to enjoy life.

Further, for the reasons stated above, the decision of the Circuit Court not awarding Respondents their costs and awarding Petitioner four thousand dollars ($4,000.00) in sanctions should be affirmed.

Respectfully Submitted,

Christopher McKenzie, *Petitioner*
By Counsel:

Samuel D. Madia (WV Bar No. 10819)
Jonathan Wesley Prince (WV Bar No. 13250)
SHAFFER MADIA LAW, PLLC
1056A Maple Drive
Morgantown, WV 26505
P: 304-622-1100; F: 304-599-5859
sam@shaffermadialaw.com
wes@shaffermadialaw.com