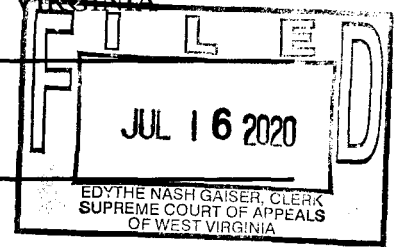


JUL 16 2020

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0065



ERIC PARKS,

Defendant Below/Petitioner

v.

MUTUAL BENEFIT GROUP a/s/o RENEE DILLOW,

Plaintiff Below/Respondent

BRIEF FOR RESPONDENT

Appeal from the Order, entered December 31, 2019, in the Circuit Court of Monongalia County, at No. 19-CAP-31

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	ii
Counter-Statement of the Case	1
Summary of the Argument	3
Statement regarding Oral Argument and Decision.....	4
Argument	5
A. Standard of Review.....	5
B. The circuit court’s entry of judgment in favor of Mutual Benefit was based not only upon the request for admissions but also upon its assessment of the credibility of the testimony provided by Renee Dillow and Tatum Miller	5
Conclusion	8
Certificate of Service	9

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Weikle v. Bolling</i> , 2013 W. Va. LEXIS 746 (WV June 24, 2013)(memodandum decision)	5,7
Rules	
W.V. R. Civ. P. 52(a).....	5

COUNTER-STATEMENT OF THE CASE

This matter arises out of an incident that occurred at the West Virginia University Research Park on October 23, 2017. (Supp. App. 1).¹ On that date, Renee Dillow was driving through the parking lot when an automobile operated by Eric Parks pulled out of a parking space and struck her vehicle. (Supp. App. 1). At the time of the accident, Ms. Dillow's car was covered by an insurance policy that was issued by Mutual Benefit Insurance Company ("Mutual Benefit"). (Supp. App. 1). Mutual Benefit paid \$5,089.11 to repair the damage to Ms. Dillow's car while Ms. Dillow paid a \$500.00 deductible on her policy. (Supp. App. 1).

In May of 2018, this subrogation action was initiated to recover the amounts that had been paid for the damages to Ms. Dillow's automobile. (App. 2-3).² A hearing was held before the magistrate judge on May 17, 2019 following which judgment was entered in favor of Mutual Benefit Insurance Group. (Supp. App. 2, App. 5). Mr. Parks then appealed to the Circuit Court of Monongalia County. (App. 6-9).

A non-jury trial was held before the circuit court on December 18, 2019. (Supp. App. 1). By order dated December 31, 2019, the circuit court found that Ms. Dillow and an eyewitness to the accident, Tatum Miller, had testified credibly when they stated that Mr. Parks struck Ms.

¹ The circuit court's December 31, 2019 order which forms the basis of this appeal is not included in the appendix. A copy of same is located in the supplemental appendix that is being submitted contemporaneously with this brief.

² Contrary to the assertion contained in the certification attached to Mr. Parks' appendix, his counsel did not confer with undersigned counsel regarding the contents of the appendix nor did he file a rule 7(e) list. Moreover, many of the page numbers on the appendix are illegible.

Dillow's car while he was pulling out of a parking space. (Supp. App. 1-2). It also accepted as credible Ms. Dillow's statements to the effect that a total of \$5,589.11 had been paid in connection with repairing the damages that were suffered to her car in the accident. (Supp. App. 1). The circuit court concluded that judgment would be entered in favor of Mutual Benefit for \$5,589.11 plus interest at the rate of 5.50% per year. (Supp. App. 3).

SUMMARY OF THE ARGUMENT

Mr. Parks would have this Court believe that the circuit court's decision was based solely on the deemed admissions it determined came into effect due to his failure to respond to Mutual Benefit's request for admissions. However, this was not the case. To the contrary, the circuit court's entry of judgment in favor of Mutual Benefit was also based upon its assessment of the credibility of Ms. Dillow and Ms. Miller's testimony. As the finder of fact, it was in the sole province of the circuit court to determine who to believe. The December 31, 2019 order was fully supported by the evidence in the record as Ms. Dillow and Ms. Miller both stated that Mr. Parks struck Ms. Dillow's car and Ms. Dillow testified that a total of \$5,589.11 was paid to repair her automobile. As a result, the circuit court's finding in favor of Mutual Benefit should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mutual Benefit respectfully submits that oral argument is unnecessary in this case because the deference owed to the circuit court's assessment of the credibility of witnesses and findings of fact have been authoritatively decided.

ARGUMENT

A. Standard of Review

A two-pronged deferential standard of review is applied when reviewing challenges to the findings and conclusions of the circuit court that are made after a bench trial. *Weikle v. Bolling*, 2013 W. Va. LEXIS 746 *3 (WV June 24, 2013)(memorandum decision). The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the trial court's underlying factual findings are reviewed under a clearly erroneous standard. *Id.*

B. **The circuit court's entry of judgment in favor of Mutual Benefit was based not only upon the request for admissions but also upon its assessment of the credibility of the testimony provided by Renee Dillow and Tatum Miller.**

The findings of a trial court upon facts submitted to it during a bench trial are to be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such finding. *Weikle*, 2013 W. Va. LEXIS 746 at *4. Furthermore, rule of civil procedure 52(a) provides that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Weikle*, 2013 W. Va. LEXIS at *5. In this respect, a trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such decisions. *Weikle*, 2013 W. Va. LEXIS at *6.

The sole assignment of error set out in Mr. Parks' brief is that the circuit court erred in allowing Mutual Benefit to utilize the request for admissions it had served during the proceedings before the magistrate judge and deeming those requests to have been admitted due to his failure to respond to same in a timely manner. See Petitioner's Brief, p. 4. However, this was not the only reason that the circuit court found in favor of Mutual Benefit. To the contrary, the circuit court's decision was also based upon its assessment of the credibility of Ms. Dillow and Ms. Miller. In this regard, the circuit court found that Ms. Dillow and Ms. Miller credibly testified that on October 23, 2017 they were "driving through the parking lot of the West Virginia University Research Park when Mr. Parks pulled out of a parking space and struck [Ms. Dillow's car]." (Supp. App. 1-2). The circuit court also found Ms. Dillow to have been credible when she stated that: a) on the date of the accident, her automobile was insured by Mutual Benefit; b) Mutual Benefit paid \$5,089.11 to have her car repaired; and c) she paid the \$500.00 deductible on her policy in connection with the repairs that were made to her car. (Supp. App. 1). Notably, counsel for Mr. Parks did not object to these credibility determinations when he responded to the proposed order that was submitted on behalf of Mutual Benefit. (App. 19-21).

The circuit court's finding that Mr. Parks struck Ms. Dillow's automobile is supported by the evidence as this is what both Ms. Dillow and Ms. Miller said happened. (Trial Transcript, pp. 6, 10-11). Ms. Dillow also testified that her car was insured by Mutual Benefit at the time and that Mutual Benefit paid \$5,809.11 to have her car repaired and that she paid the \$500.00 deductible. (Trial Transcript, pp. 13-16, 32-34, 37-38). Notably, Mr. Parks cross-examined both individuals regarding their testimony. (Trial Transcript, pp. 16-24, 26-30, 37-39).


Even if the circuit court erred in giving effect to the request for admissions, its entry of judgment in favor of Mutual Benefit was nevertheless proper in light of its assessment of the credibility of the testimony that was provided at trial and this Court cannot substitute its judgment for that of the circuit court. *Weikle*, 2013 W. Va. LEXIS at *6. Moreover, the circuit court's findings of fact regarding how the accident occurred and the money that was paid to repair Ms. Dillow's vehicle cannot be disturbed on appeal as they are supported by the testimony provided by Ms. Dillow and Ms. Miller. *Weikle*, 2013 W. Va. LEXIS 746 at *4. Thus, any error the circuit court may have committed with respect to its handling of the request for admissions was harmless as its conclusion that Mutual Benefit was entitled to judgment in its favor is amply supported by the other evidence in the record.

CONCLUSION

Therefore, respondent, Mutual Benefit Group, a/s/o Renee Dillow, respectfully requests that the December 31, 2019 order entering judgment in its favor in the amount of \$5,589.11 plus interest at the rate of 5.50% per year be affirmed.

Respectfully submitted,

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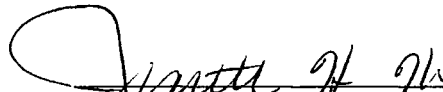
*Counsel for Respondent Mutual Benefit Group a/s/o
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within **Brief for Respondent** has been served via first class mail, postage prepaid on this 14th day of July, 2020 upon the following:

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