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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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NO. 12-0774

WAYNE LEMASTERS AND MARY JOAN LEMASTERS

Appellants

v.

NATIONWIDE MUTUAL INSURANCE COMPANY

Appellee.

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**APPELLANTS' REPLY BRIEF**

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## ASSIGNMENTS OF ERROR

- I. The trial court erred in finding it was “without authority” to award attorney fees in this insurance bad faith case because *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996) allows fees in a bad faith case.
  
- II. The trial court erred in failing to award attorney fees in this case, because, where an insurer refuses to pay *Hayseeds* damages, it must be responsible for its insured’s fees incurred in pursuing the *Hayseeds* award.
  
- III. The trial court erred in failing to award attorney fees in this case because the vexatious, oppressive and malicious behavior demonstrated in this case required an award of fees under *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).
  
- IV. The trial court erred in failing to award attorney fees because a litigant found to have acted with “actual malice” should bear the opposing party’s fees, absent extraordinary circumstances.

## STATEMENT OF THE CASE

It has long been the law of the State of West Virginia that if an insured is forced to sue his or her own insurance company to obtain policy benefits and the insured substantially prevails in his or her claim for coverage, the insured is also entitled to collect from the insurer the attorney fees and costs incurred in securing the coverage to which he or she was entitled. *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996), and *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986). The insured is entitled to recover his or her attorney fees and costs whether or not the coverage denial was a good faith denial involving a legitimate coverage question. Accordingly, Nationwide Mutual Insurance Company’s [hereinafter “Nationwide’s”] attempt to justify, on appeal, its conduct in the underlying litigation by arguing that its claim handling was appropriate and

continuing its attempt to vilify Appellants' counsel is an inappropriate and misguided attempt to confuse the issues before this Court. The jury clearly rejected Nationwide's arguments when it found that Nationwide violated the West Virginia Unfair Trade Practices Act, breached the implied covenant of good faith and fair dealing and acted with actual malice and with a conscious disregard of Appellants' rights. Nationwide did not appeal the jury's verdict.

The Circuit Court of Marshall County erred, as a matter of law, when it concluded that it had no authority to award Appellants the attorney fees and costs they incurred in prosecuting their claim for substantially prevailing damages and for Nationwide's violation of the West Virginia Unfair Trade Practices Act and its breach of the implied covenant of good faith and fair dealing.<sup>1</sup> Instead of addressing the issues actually on appeal, Nationwide argues that the circuit court did not abuse its discretion in awarding \$30,108.71 in *substantially prevailing* or "*Hayseeds*" damages.<sup>2</sup> The amount awarded as substantially prevailing damages represents the attorney fees and costs incurred in prosecuting the underlying underinsured motorist coverage action and *is not on appeal*. The issue *on appeal* to this Court is whether the circuit court erred in holding it was "without authority" to award Appellants the attorney fees and costs they

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<sup>1</sup> Despite repeated argument that the circuit court's decision should be reviewed under an abuse of discretion standard, Nationwide acknowledges in its Statement Regarding Oral Argument and Decision, that the question before this Court is a "narrow issue of law". Accordingly, this Court is to conduct a *de novo* review of the circuit court's decision. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.").

<sup>2</sup> The record is clear. Two separate attorney fee awards were at issue before the circuit court: (1) the attorney fees and costs incurred in the underlying underinsured motorist coverage action which are recoverable by Appellants as substantially prevailing damages; and (2) the attorney fees and costs incurred by Appellants in successfully vindicating their UTPA claims and substantially prevailing damage claims. App. R. 1-6; 21-45; 321-343. Two separate itemized billing statements were presented – one for the bad faith/substantially prevailing claims (App. R. 68-121) and one for the underlying underinsured motorist coverage action (App. R. 207-213). While Nationwide goes to great lengths in its Response Brief to argue that the Lemasters delayed the substantially prevailing determination by arguing it should be determined by the jury, the fact remains that Nationwide argued that circuit court was to make the substantially prevailing determination based upon the evidence presented to the jury and for three years Nationwide illegitimately refused to admit Appellants substantially prevailed in their underinsured motorist claim. App. R. 703-704; 744.

incurred in vindicating their UTPA claims and litigating their clear entitlement to recover substantially prevailing damages. Ample legal authority exists under *McCormick*, *Hayseeds* and *Sally-Mike Properties* permitting an award of the attorney fees and costs incurred by the Lemasters in successfully prosecuting their bad faith and substantially prevailing claims against Nationwide. The jury's "actual malice" finding with respect to Nationwide's conduct provides yet another basis for the fee award at issue herein. Accordingly, the Appellants ask that this Court REVERSE and REMAND this matter to the Circuit Court of Marshall County for a hearing on what constitutes a reasonable fee for the prosecution of Appellants' bad faith and substantially prevailing claims below under *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

#### **STATEMENT OF FACTS**

Nationwide's recitation of "facts" in its Response Brief provides no facts relevant to the issue before this Court – whether Appellants are entitled to recover the attorney fees and costs they were forced, by Nationwide, to incur to recover the substantially prevailing damages to which they were entitled and to vindicate their *Jenkins*/UTPA claim. Rather, Nationwide again attempts to argue that it was justified in denying Mr. Lemasters' claim for underinsured motorist policy benefits and to blame and vilify Appellants' counsel.

The primary, undisputed facts relevant to this appeal are as follows:

- 1) Nationwide refused to admit that Appellants substantially prevailed in their underlying claim for underinsured motorist benefits and insisted that the circuit court hear all evidence presented to the jury before making the substantially prevailing determination.

- 2) Nationwide's counsel admitted that the issue of substantially prevailing is "no dispute we want to fight, ok? . . . I don't want to take any time arguing about substantially prevail." App. R. 699.
- 3) Nationwide did not contradict the circuit court or object when the circuit court stated, immediately before trial "and harkening back to the pre-trial and the impression is that it's [the substantially prevailing issue] not going to be contested all that much anyway." App. R. 746.
- 4) Nationwide has presented no evidence, because none exists, of a legitimate reason for refusing to admit that its insureds substantially prevailed in their underinsured motorist coverage claim.
- 5) The jury, after hearing all the evidence found: (a) "Nationwide violated the Unfair Claims Settlement Practices Act with such frequency as to indicate a general business practice in adjusting the underinsured motorists' claim of the Lemasters"; (b) "Nationwide violated the duty of good faith and fair dealing in adjusting the underinsured motorists' claim of the Lemasters"; and (c) "Nationwide actually knew that Plaintiffs' underinsured motorist claim was proper, and that Nationwide Mutual Insurance Company willfully, maliciously, and intentionally utilized an unfair business practice in settling, or failing to settle, the underinsured motorist claim of the Plaintiffs[.]" App. R. 18-19.
- 6) Nationwide did not make any attempt to challenge the jury verdict.

## SUMMARY OF THE ARGUMENT

Despite acknowledging that this appeal involves a “narrow issue of law”, Nationwide incorrectly maintains that appellate review in this case is governed under an abuse of discretion standard because the issues involve an attorney fee award. Each case relied upon by Nationwide for this proposition involved a lower court’s decision to award or not award attorney fees where the lower court recognized it had the legal authority to make a discretionary award of attorney fees. At issue in *this case* is the circuit court’s finding that it did not have *the authority* to make the requested attorney fee award. Because the issue herein involves whether *authority* exists, under West Virginia law, to make an award of attorney fees and costs incurred in successfully vindicating a UTPA claim, a common law bad faith claim and/or a substantially prevailing claim; the question is not one of an abuse of discretion. Rather, the question is a question of law subject to *de novo* review. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”). Where a prevailing party is entitled to an attorney fee award as an item of damages, a circuit court errs in failing to award such damages. *See, City Nat. Bank of Charleston v. Wells*, 181 W.Va. 763, 777, 384 S.E.2d 374, 388 (1989) (concluding trial court erred in rejecting claim for attorney fees); *Roehl Transport, Inc. v. Liberty Mut. Ins. Co.* 784 N.W.2d 542, 571-572 (2010) (attorney fees are recoverable, as a matter of law, as compensatory damages in a bad faith action).

The circuit court erred, as a matter of law, when it found it had no authority to award the attorney fees and costs incurred by Appellants in successfully prosecuting their substantially prevailing and bad faith claims. Such authority exists under *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996), *Hayseeds, Inc. v. State Farm Fire &*

*Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), and *Marshall v. Saseen*, 192 W.Va. 94, 450 S.E.2d 791 (1994). The principles of *Hayseeds* and *Marshall* are thwarted if an insured is required to incur hundreds of thousands of dollars in legal fees and expenses to collect the substantially prevailing damages to which he or she is entitled. Simply put, Nationwide's characterization of West Virginia law is that Appellants (and similarly situated West Virginia insureds) are required to incur hundreds of thousands of dollars in legal fees, costs and expenses to recover the \$30,108.71 fees, costs and expenses they incurred to successfully prosecute their \$50,000.00 underinsured motorist coverage claim. Nationwide's argument is not only contrary to the express public policy of this State, as expressed in *Hayseeds* and *Marshall*, but is also contrary to common sense. No rational West Virginia policyholder would be willing to expend over \$500,000 in attorney fees and expenses to recover a mere \$30,108.71.

In addition to the authority, under *McCormick*, *Hayseeds*, and *Marshall*, to award Appellants the attorney fees and costs incurred in successfully prosecuting their bad faith and substantially prevailing claims, the circuit court also had equitable authority to make such an award under syllabus point 3 of *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986). Finally, Appellants respectfully submit that this Court should hold, as a matter of law, that a litigant against whom a finding of actual malice is made is required to pay the prevailing party's attorney fees absent extraordinary circumstances showing why it should not. Appellants submit that it would serve the interests of justice and judicial economy to adopt a bright line rule whereby a jury finding of "actual malice" is presumed to be sufficient to warrant fees under the *Sally-Mike* standard in all first party bad faith cases.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants do not waive oral argument in this matter. Appellants submit that oral argument would aid in the decisional process because this matter raises significant points of law impacting West Virginia citizens' ability to enforce their legal rights. This case is appropriate for Rule 20 Argument and Decision because it involves issues of first impression and of fundamental public importance.

### ARGUMENT

#### I. **The Circuit Court Erred By Failing Recognize Its Authority To Award Attorney Fees Pursuant To *McCormick***

*McCormick* specifically provides that a prevailing Plaintiff in a *Jenkins*/UTPA claim is entitled to recover the attorney fees incurred in “vindicating his *Jenkins*-type claim”. *McCormick*, 197 W.Va. at 428, 475 S.E.2d at 520. In *McCormick*, this Court carefully distinguished *Hayseeds* and *Jenkins* claims, including the ability to recover attorney fees. *McCormick*, 197 W.Va. at 427-28, 475 S.E.2d at 519-20. *McCormick* clearly states “The fundamental holding of *Jenkins* recognizes a private, implied cause of action for violations of W. Va. Code § 33-11-4(9) and **permits plaintiff to recover attorney fees** and, under the appropriate circumstances, punitive damages” and that “***Jenkins* does allow**, under certain conditions, a party to seek **reasonable attorney fees** and punitive damages.” *McCormick*, 197 W.Va. at 427, 475 S.E.2d at 519 (emphasis added). *See also, Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 598, 505 S.E.2d 654, 661 (1998) (quoting *McCormick*).

Nationwide dismisses these clear pronouncements by stating they are not “holdings” articulated in syllabus points as required by our state constitution and *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001). Nationwide Response, p. 12. Nationwide then goes on to argue

that this Court's "distinct holding" in *Dodrill v. Nationwide Mutual Insurance Company*, 201 W.Va. 1, 491 S.E.2d 1 (1996), limited the attorney fees recoverable for prevailing in an *Jenkins* action to those incurred in the underlying action. Nationwide Response, p. 11. This "distinct holding" relied upon by Nationwide is not set forth in a syllabus point. Instead, the passage from *Dodrill* relied upon by Nationwide was rejecting a duplicative damages argument made by *Nationwide* in *Dodrill* and stating that attorney fees and costs incurred in the underlying action were "some elements" of damages sanctioned in footnote 12 of *Jenkins* as recoverable items of damage. *Dodrill*, 201 W.Va. at 16, 491 S.E.2d at 16. Fair reading of *Dodrill* does not support Nationwide's "distinct holding" representation.

Nationwide's arguments and construction of *Jenkins* and *Dodrill* also ignore the fact that each of those cases involved UTPA claims made by third-party insureds. West Virginia law places a higher duty upon insurance companies to act fairly and in good faith when dealing with first-party insureds than it does when the insurance company is dealing with a third-party making a claim against one of its insureds. *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 433-4, 504 S.E.2d 893, 896-7 (1998); *Loudin v. National Liability & Fire Ins. Co.*, 228 W.Va. 34, 716 S.E.2d 696 (2011). *McCormick*, however, was a first-party claim. This Court's statement, in *McCormick*, that the insured was entitled to recover the attorney fees and costs incurred in *vindicating* his *Jenkins*/UTPA claim is consistent with the long-standing law of this State which expressly provides that that where an insured is forced to sue his or her own insurer to obtain the coverage to which he or she is entitled, the insured is also entitled to recover his or her attorney fees and costs incurred in the pursuit thereof. Similarly, where an insured is required to sue his or her own insurer because the insurer violated the law in handling the insured's claim and failed to treat the insured in good faith as required by West Virginia law, the

insured is entitled to recover the attorney fees and costs incurred in successfully vindicating his or her legal rights.

Other courts have recognized that when an insured prevails in a statutory bad faith claim, the insured is entitled to recover the attorney fees and costs incurred in successfully pursuing such claim. *See Polselli v. Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524, 531-32 (3d Cir. 1997) (finding fees recoverable and stating “Nationwide’s bad faith conduct forced Polselli to incur attorney’s fees to obtain the benefits due under the insurance policy. To be made ‘completely whole,’ therefore, Polselli needed to obtain those fees from Nationwide. To obtain those fees, however, Polselli was required to incur additional attorney’s fees to prove, by clear and convincing evidence, that Nationwide acted in bad faith. In other words, to obtain the fees necessary to make Polselli whole, Polselli was required to incur additional fees.”); *Thompson v. Shelter Mut. Ins.*, 875 F.2d 1460, 1464 (10th Cir. 1989) (allowing fees and finding “no indication in the statute that an insured who otherwise qualifies as a “prevailing party” should not be allowed fees for attorney time spent successfully prosecuting a claim of bad faith. Indeed, it would be anomalous to read § 3629(B) to allow fees for the prosecution of a suit when the insurer had acted reasonably, albeit erroneously-with the insured obtaining a judgment greater than the largest settlement offer-while denying fees to a plaintiff who successfully sued an insurer to redress unreasonable or oppressive conduct and obtained a judgment greater than any settlement offer.”). The same logic is applicable here and was stated in *McCormick*. Where an insured is forced to incur attorney fees and costs to enforce his or her statutory rights with respect to his or her own insurer, the insurer is responsible for payment of the reasonable attorney fees and costs incurred. Accordingly, the circuit court erred in finding that it was

without authority to direct Nationwide to pay the attorney fees and costs incurred by Appellants in successfully prosecuting their bad faith claims.

**II. Where An Insurance Carrier Refuses To Pay *Hayseeds* Damages, It Is Responsible For The Fees Incurred Pursuing The *Hayseeds* Damages.**

Nationwide completely mischaracterizes the Appellants' *Hayseeds* argument. The amount of *Hayseeds* damages awarded by the circuit court, \$30,108.71, is not on appeal. What is on appeal is the circuit court's failure to uphold the principles of *Hayseeds* and its progeny and direct Nationwide to pay the attorney fees and costs incurred by Appellants in successfully prosecuting their claims for attorney fees and costs incurred in the underlying underinsured motorist coverage litigation (\$30,108.71). Appellants were unquestionably entitled to these fees and costs immediately upon the conclusion of the underlying underinsured motorist claim as there was no legitimate dispute that they substantially prevailed in obtaining their underinsured motorist coverage benefits. *Hayseeds*, *Marshall* and their progeny would have no meaning if an insured is forced to incur \$500,000.00 in attorney fees and costs to recover \$30,108.71 in attorney fees and costs incurred in successfully obtaining the policy benefits to which the insured was entitled simply because an insurer refuses to acknowledge that the insured substantially prevailed.

In *Loudin v. National Liability & Fire Insurance Company*, 228 W. Va. 34, 716 S.E.2d 696, 702-03 (2011), this Court recently

made clear that, with respect to purchasers of insurance,

A policyholder buys an insurance contract for peace of mind and security, not financial gain, and certainly not to be embroiled in litigation. The goal is for all policyholders to get the benefit of their contractual bargain: they should get their policy proceeds

promptly without having to pay litigation fees to vindicate their rights.

*Miller v. Fluharty*, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997) (footnote omitted). “We adopted this rule in recognition of the fact that, when an insured purchases a contract of insurance, he buys insurance-not a lot of vexatious, time-consuming, expensive litigation with his insurer.” *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 329, 352 S.E.2d 73, 89 (1986).

The observations expressed in *Miller* and *Hayseeds* echo a firm public policy of this State to hold insurers accountable in a court of law when they wrongfully deny coverage to premium-paying insureds. See *Taddei v. State Farm Indem. Co.*, 951 A.2d 1041, 1047 (N.J.Super.Ct.App.Div.2008) (noting that “insureds should have a remedy under first-party policies in which the insurer breaches its duty to its insured by acting in bad faith”).

The issue before this Court is simple. The issue is whether the principles set forth in *Hayseeds* and *Marshall* and reiterated in *Loudin* are served where an insurer illegitimately refuses to admit that an insured substantially prevailed in his/her underlying claim and requires the insured to litigate the insured’s entitlement to substantially prevailing damages. The question of whether the initial coverage denial was in good faith or in bad faith is not at issue in determining whether an insured is entitled to recover damages for substantially prevailing in the coverage action. As acknowledged by Nationwide below, the question of whether an insured substantially prevailed is essentially a strict liability standard determined by whether the insured recovered an amount equal to or approximating the amount claimed. App. R. 706 (by counsel for Nationwide “*Hayseeds* damages is a strict liability standard”; “The fact is that the standard whether the insured substantially prevailed is indeed strict liability”); App. R. 599 (Defendants’ Motion *in Limine* to Exclude Evidence of Determinations Regarding Whether Plaintiffs Substantially Prevailed “In the context of the instant action, ‘substantially prevail’ means that Plaintiffs received a judgment or settlement for an amount equal to or approximating the amount claimed by the insured”). Despite these clear admissions, Nationwide refused to concede that

Appellants substantially prevailed in the underlying action and forced Appellants to engage in years of litigation to recover their strict liability, substantially prevailing damages knowing from the start that it had voluntarily agreed to pay Appellants their full underinsured motorist coverage limits in the underlying lawsuit only after years of admittedly unreasonable delay<sup>3</sup> and litigation.<sup>4</sup>

Nationwide refused to acknowledge Appellants entitlement to *Hayseeds* damages for the entire three years the bad faith case was litigated. The principles of *Hayseeds* dictate that Nationwide be held responsible for the consequences of its refusal. When an insurance carrier refuses to pay substantially prevailing damages, the insured is forced to incur additional fees and costs to pursue the same. “[W]e consider it of little importance whether an insurer contests an insured’s claim in good or bad faith. In either case, the insured is out his consequential damages and attorney’s fees.” *Hayseeds* at 177 W.Va. at 329, 352 S.E.2d at 79. Recognizing that the insurer is responsible for payment of the insured’s attorney fees and costs incurred in obtaining the substantially prevailing damages to which the insured is entitled is consistent with the principles of *Hayseeds* and the purpose of common law bad faith claims.

This Court previously recognized in *Hayseeds*, *Marshall* and their progeny that the principle, known as the American Rule, that each party must bear its own litigation costs does not apply when an insured is substantially prevails in an action to obtain policy benefits. As stated in *Miller v. Fluharty*, 201 W.Va. 685, 698-99, 500 S.E.2d 310, 323-24 (1997):

Our “bright-line” standard is clear: once a demand is unmet by an insurance carrier, a policyholder need only prove he or she has substantially prevailed. Once that is proven, the policyholder is entitled to recover his or her attorney’s

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<sup>3</sup> App. R. 1073-1075; 1077-1078; 1082; 1085-1087; 1094-1095; 1100; 1131; 1369-1371; 1378-1380; 388-1389; 1392-1393; 1406-1409; 1741; 1863-64 (Trial Tr. 123-124; 127); 1947 (Trial Tr. 308-311); 1965-1966 (Trial Tr. 384-386).

<sup>4</sup> Indeed, Nationwide continues to attempt to litigate Appellants entitlement to recover substantially prevailing damages (an issue Nationwide did not appeal) by arguing once again, a position rejected by the circuit court and jury, that Appellants’ counsel, not Nationwide, was responsible for the delay in Appellants obtaining their policy benefits.

fees, consequential damages and other net economic losses caused by the delay in settlement, as well as damages for aggravation and inconvenience...

An insured is not required to prove bad faith or other misconduct on the part of insurer, only that the insured substantially prevailed. *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476, 482, 557 S.E.2d 889 (2001). If the American Rule does not apply when an insurer denies a claim wrongly, but in good faith, it certainly should not apply when an insurer causes additional damage to its insured by wrongly denying a claim in bad faith and with actual malice.

The Circuit Court of Marshall County erred, as a matter of law, in refusing to enforce the principles of *Hayseeds* and its progeny and direct Nationwide to pay the attorney fees and costs incurred by Appellants in obtaining the substantially prevailing damages to which they were entitled from Nationwide.

**III. The Vexatious, Oppressive And Malicious Behavior Demonstrated In This Case Required An Award Of Fees Under *Sally-Mike***

Nationwide's pattern of vexations, oppressive and malicious behavior has continued on appeal. Nationwide continues to make contradictory arguments regarding whether Plaintiffs' substantially prevailed. Nationwide argues "Appellants inaccurately assert that Nationwide forced them to litigate whether they substantially prevailed. What the parties really disagreed about was (1) should the determination of whether Appellants substantially prevailed be made by the trial court or the jury, and, (2) if the determination was made by the trial court, whether the jury would be advised of such determination." What Nationwide's argument in this regard completely ignores is that if Nationwide had promptly acknowledged Appellants had substantially prevailed, there would be no litigation over the substantially prevailing issue and these two discrete questions would never have arisen. Instead, Nationwide's Brief is replete with

arguments that the evidence presented at trial (and rejected by the jury and circuit court) demonstrated that Nationwide's conduct in handling the underlying claim was justified and Appellants did not substantially prevail. Nowhere does Nationwide acknowledge its admissions before the circuit court that the question of whether Appellants substantially prevailed was a strict liability standard determined in light of the amount recovered. App. R. 599; 706.

Nationwide continues, in its Response Brief, to vilify Appellants' counsel, to argue that Appellants' counsel somehow fabricated Nationwide's misconduct for financial gain and to place its own spin on testimony. Nationwide's arguments notwithstanding, each of these tactics were *expressly and clearly* rejected by the jury which found not only that Nationwide committed bad faith and violated the UTPA in the handling of Appellants underlying underinsured motorist claim, but that it did so with actual malice.

West Virginia has long recognized a trial court's "authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. pt. 3, in part, *Sally-Mike*; see also, *Nelson v. Public Employees Retirement Bd.*, 171 W.Va. 445, 451, 300 S.E.2d 86, 92 (1983) ("A well-established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."). This includes asserting a meritless defense. Syl., *Daily Gazette Company, Inc. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985). Nationwide's admissions before the circuit court clearly demonstrate that the defense it presented to Appellants' substantially prevailing claims was meritless. The testimony and argument of Nationwide's counsel and witnesses are set forth clearly on the record and demonstrate, despite

the spin placed upon them by Nationwide before this Court, that Nationwide's defense to the substantially prevailing claim was meritless. Moreover the record demonstrates that Nationwide overtly attempted to cause a mistrial when it became clear that its witnesses' admitted their misconduct and the jury would find in favor of Appellants. (App. R. 1998-2005; 2010-2012; 2065-2070. Such conduct justifies an equitable award of attorney fees and costs and the circuit court erred in failing to award the same.

**IV. A Party Found To Have Acted With Actual Malice Should Bear The Opposing Party's Fees Absent Extraordinary Circumstances.**

This Court has repeatedly held that to obtain punitive damages in an insurance bad faith case, a high bar of "actual malice" must be cleared by the plaintiff. Syl. pt. 2, *McCormick v. Allstate Ins. Co.* 202 W.Va. 535, 505 S.E.2d 454 (1998). Contrary to Nationwide's arguments, an award of attorney fees which coincides with an "actual malice" finding would neither constitute a double recovery nor strip the trial court of its discretion to award attorney fees in a case permitting a discretionary award of attorney fees. According to Nationwide's arguments before the circuit court, the "actual malice" punitive damage standard in a UTPA case is higher than the common law punitive damage standard. App. R. 711-715. An award of attorney fees when this higher "actual malice" standard is met is not only justified by the malice finding, but it also reinforces the principles of *McCormick*.

The purpose of bad faith claims is to place an insured in the same place the insured would have been in but for the insurer's misconduct. Recognizing that the attorney fees and costs incurred in successfully pursuing such claims fulfills this purpose. As stated by the Wisconsin court in *Stewart v. Farmers Ins. Group*, 773 N.W.2d 513, 518 (Wis. Ct. App. 2009),

as damages resulting from the tort of bad faith, attorney fees do not remain attorney fees but are transformed into damages. . . . Actual attorney fees in the context of a bad faith claim are not a necessary cost of litigation to which a prevailing party is entitled-instead, they are an item of damages intended to compensate the victims.

As explained by the Wisconsin Supreme Court in *Roehl Transportation, Inc. v. Liberty Mutual Insurance Company*, 784 N.W.2d 542, 573 (Wis. 2010);

In order to avoid “uncompensable harms,” . . . legal expenses resulting from the insurance company’s bad faith should be affirmed as a proper award of damages. . . . Had [the insurer] Mutual properly fulfilled its responsibilities in handling the [underlying] claim, [the insured] would not have had to hire an attorney to recover its losses in this bad faith claim.

Accordingly, the Wisconsin court in *Roehl* specifically held that the insured “was entitled to attorney fees as a matter of law as a result of the jury’s finding of bad faith.” *Roehl*, 784 N.W.2d at 572.

Similarly, the ability to recover attorney fees as an element of compensatory damages where a jury finds a punitive damage award is appropriate has long been recognized in our neighboring state, Ohio. *See, Galmish v. Cicchini*, 90 Ohio St.3d 22, 35, 734 N.E.2d 782, 795 (Ohio 2000) (“attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted.”); *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178, 183, 327 N.E.2d 654, 658 (Ohio 1975) (“Attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted.”). “Although an award of attorney fees may stem from an award of punitive damages, the attorney-fee award itself is not an element of the punitive-damages award.” *Neal-Pettit v. Lahman*, 125 Ohio St. 3d 327, 329, 928 N.E.2d 421, 424 (Ohio 2010). The ability to recover attorney fees from an insurer who acts with actual malice is specifically recognized in Ohio:

Punitive damages may be recovered against an insurer that breaches its duty of good faith in refusing to pay a claim of its insured upon proof of actual malice,

fraud or insult on the part of the insurer. In this case, since [the insurer] did not act fraudulently in denying Zoppo's claim, the question becomes whether [the insurer] acted with actual malice. "Actual malice" is defined as (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

*Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 557-58, 644 N.E.2d 397, 402 (Ohio 1994)

(internal citations omitted).

In this case, the jury was instructed to only find Nationwide acted with "actual malice" in the handling of Appellants' underinsured motorist claims if it found that "Nationwide actually knew that Plaintiffs' underinsured motorist claim was proper, and that Nationwide Mutual Insurance Company willfully, maliciously, and intentionally utilized an unfair business practice in settling, or failing to settle, the underinsured motorist claim of the Plaintiffs[.]" App. R. 18-19. The standard under which the jury found punitive damages to be proper herein is *more stringent* than the actual malice standard in *Ohio* under which an actual malice finding may be made if the insurer is found to have acted in conscious disregard for the rights of the insured. Certainly, if attorney's fees may be awarded as compensatory damages under such lower threshold punitive damage findings, they should be deemed to be recoverable compensatory damages awarded upon the higher actual malice finding proven by Appellants herein.

Had Nationwide fulfilled its responsibilities in handling Appellants' first-party underinsured motorist coverage claim, Appellants would not have had to hire an attorney and incurred costs to recover the bad faith and substantially prevailing damages to which they were entitled. Nationwide's bad faith conduct forced Appellants to incur attorney fees in costs to not only obtain their policy benefits but also to obtain the substantially prevailing damages to which they were entitled for successfully obtaining their full policy benefits.

## CONCLUSION

The trial court erred in finding it was without authority to award Appellants the attorney fees and costs incurred in prosecuting their bad faith claims. *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996), directs an award of attorney fees in this situation. Additionally, the principles of *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), *Marshall v. Saseen*, 192 W.Va. 94, 450 S.E.2d 791 (1994), and their progeny are violated where an insured is forced to incur hundreds of thousands of additional dollars in attorney fees and costs simply to recover the substantially prevailing damages to which the insured is entitled under the clear law, strict liability standard as articulated by Nationwide itself. The circuit court further erred in failing to make an equitable award of attorney fees and/or as a result of the jury's actual malice finding. Accordingly, Appellants submit that the circuit court's order denying attorney fees and costs for the successful prosecution of the bad faith, substantially prevailing and UTPA claims should be REVERSED and the case REMANDED with directions to the trial court to hold a *Pitrolo* hearing on the reasonable fees incurred by the Lemasters in this case and then to award those fees to the Lemasters.

Very Respectfully submitted,  
Wayne and Joan Lemasters, Appellants,



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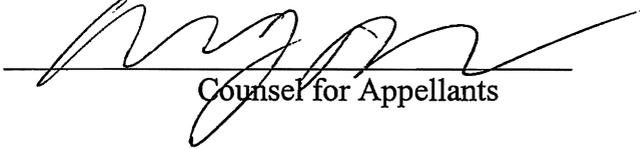
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**CERTIFICATE OF SERVICE**

Service of the foregoing APPELLANTS' REPLY BRIEF was had upon the parties herein by forwarding a true and correct copy of the same by Federal Express, Overnight Mail, this 8<sup>th</sup> day of November, 2012 as follows:

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