

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-0774

WAYNE LEMASTERS AND MARY JOAN LEMASTERS

Appellants

v.

NATIONWIDE MUTUAL INSURANCE COMPANY

Appellee.

APPELLEE'S BRIEF

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APPELLEE'S RESPONSE TO ASSIGNMENTS OF ERRORS

- I. **The trial court correctly ruled that no legal authority allowed for fee shifting at the conclusion of bad faith litigation.**
- II. **The trial court did not abuse its discretion in awarding fees of \$30,108.71 to Appellants after the trial court concluded that Appellants substantially prevailed in their underinsured motorist claim for \$50,000 in policy limits.**
- III. **The trial court correctly ruled that Appellee was not vexatious, oppressive or malicious in defending Appellants' bad faith claims against Appellee.**
- IV. **The trial court properly rejected Appellants' novel and legally unsupported proposition that when a jury awards punitive damages, the trial court must also force the losing party to pay the winning party's attorney fees.**

STATEMENT OF THE CASE

Appellants are essentially moving this Honorable Court to make Nationwide Mutual Insurance Company ("Nationwide" or "Appellee") pay a punitive "enhanced" award of Appellants' attorney fees incurred in prosecuting a bad faith claim against Nationwide. The trial court properly ruled that no legal authority supported Appellants' fee-shifting proposition. That is not to say that Appellants received no attorney fees at all. Rather, once the trial court concluded that Appellants substantially prevailed in pursuing an underinsured motorist claim for \$50,000 in policy limits, the trial court awarded Appellants \$30,108.71 in attorney fees under *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986). This amount represents \$25,818.75 in attorney fees, \$639.56 in costs, and \$3,650.40 in post-judgment interest at an interest rate of seven percent (7%). App. R. 2-3 (May 16, 2012 Order).

In entering the Order awarding Appellants' attorney fees, the court rejected Appellants' request for \$953,087.44 in attorney fees for prosecuting the bad faith claim against Nationwide, which was tried and resulted in a \$600,000 verdict. Even though Appellants' counsel previously entered into a contingency fee agreement with Appellants that would pay

Appellants' counsel one-third (1/3) of the verdict, Appellants argued that the actions of Nationwide's trial counsel were vexatious, malicious and in bad faith, warranting a "contingency fee enhancement" in an amount totaling two (2) times Appellants' counsel's normal hourly rate of \$350.00 per hour. Calculating their hourly time at \$513,224.94 for prosecution of the bad faith case, Appellants sought twice that much, or \$953,087.44, which is more than \$450,000 higher than the actual verdict for damages. The trial court first properly held that no case law allowed for fee-shifting at the conclusion of an insurance bad faith case. The trial court then properly held that "the record is barren of facts or argument which would tend to support [Appellants'] entitlement to, increased costs and expenses, including increased attorney fees[.]" App. R. 5 (May 16, 2012 Order).¹ Finally, trial court acted well within its substantial discretion when it concluded that the conduct about which Appellants complained did "not rise to such a level that justice requires the extra-ordinary relief sought by Plaintiffs herein." App. R. 6 (May 16, 2012 Order).

As the trial court properly applied the well-established law in West Virginia on damages recoverable for litigating an insurance bad faith case, Nationwide moves this Honorable Court to uphold the trial court's ruling and Order dated May 16, 2012.

STATEMENT OF FACTS

This case is an appeal of a ruling on a motion for attorney fees presented at the conclusion of a bad faith case brought by Appellants against Nationwide. Appellant, Wayne Lemasters, was injured in an automobile accident on June 15, 2004. Mr. Lemasters recovered

¹ Appellants have not argued that it was error for the Court to conclude that the evidence introduced at trial did not support an award of increased costs and expenses resulting from the use of an unfair trade practice.

\$50,000 from the tortfeasor's liability insurance carrier.² Mr. Lemasters also made a claim for underinsured motorist ("UIM") coverage under his own auto policy with Nationwide. The UIM policy limits were also \$50,000. In the UIM claim, Nationwide and Mr. Lemasters disputed the extent of Mr. Lemasters' injuries. Mr. and Mrs. Lemasters filed a lawsuit against Nationwide to recover the full UIM benefits. The UIM lawsuit resolved via settlement when Nationwide paid Appellants \$50,000 in October of 2007.

Immediately after Nationwide settled the UIM lawsuit, Appellants filed a motion to amend the complaint to pursue a bad faith case against Nationwide. The bad faith case was tried in April of 2010. Appellants' position during the trial (which Nationwide disputed) was that Nationwide had justification early in the claim to pay the full underinsured motorist limits. However, the evidence regarding the extent of Mr. Lemasters' damages was far from clear and very much disputed. Mainly, Nationwide was not provided with evidence to support Mr. Lemasters' lost wage claim. Rather, Nationwide received a form completed by Mr. Lemasters' employer, AEP, where the employer answered "no" to the question: "was there any loss of salary wages due to absence from work because of this accident?" App. R. 1446; Trial Tr. 709. In addition, Jamie Bordas, the lawyer who handled Appellants' UIM claim, never provided

² Nationwide was also the tortfeasor's liability carrier. It is noteworthy that Appellants have no criticism of Nationwide's handling of the third-party claim under the liability policy. Indeed, Jamie Bordas, the lawyer who handled the bodily injury and underinsured motorist claim on Appellants' behalf testified as follows:

- Q. When you – well, first of all, you presented a bodily injury claim, a liability claim to Mrs. Brooks, who was also insured by Nationwide, correct?
- A. Correct.
- Q. And that claim was paid in a relatively timely fashion, is that not true?
- A. True.

App. R. 1383; Trial Tr. 646.

Nationwide with a wage authorization to enable Nationwide to collect the evidence of lost wages directly from the employer. App. R. 1452-53; Trial Tr. 715-16.

Despite (i) the conflicting evidence over Mr. Lemasters' lost wage claim; (ii) Mr. Lemasters' medical bills never exceeded \$10,000; and (iii) Nationwide had already paid Appellants \$50,000 of liability limits from the tortfeasor's insurance policy, Appellants asserted that Nationwide acted in bad faith by not paying the UIM policy limits sooner. In defense of Appellants' assertions at trial, Nationwide's position was that Mr. Bordas did not cooperate in Nationwide's investigation and had a financial incentive in delaying the UIM settlement. Nationwide elicited testimony from Mr. Bordas that he had a financial interest in the outcome of the bad faith litigation. App. R. 1455-56; Trial Tr. 718-19. Based on this evidence, Nationwide's counsel summarized in closing argument that "This is not a real controversy. It is one that was created by Mr. Bordas for the goal of bringing us here for the past week so that there can be another lawsuit that he and his firm take a contingent fee in." App. R. 2002; Trial Tr. 526. Appellants' counsel objected to Nationwide's counsel's use of the phrase "the Jamie Bordas suing insurance company's business plan," and counsel had a lengthy bench conference to discuss. App. R. 2002-05; Trial Tr. 528-39. The trial court directed Nationwide's counsel not to use the phrase again.³ App. R. 2005; Trial Tr. 539. The next day, the trial court gave a curative instruction to the jury finding that the comment was improper and would be stricken from the record. App. R. 2070; Trial Tr. 600. Appellants made no motion for a mistrial. At the

³ Interestingly, right after the court directed Nationwide's counsel to not use the phrase again, Appellants' counsel then chose to address this statement in his rebuttal closing, and the trial court interrupted without objection from Nationwide's counsel. Specifically, Appellants' counsel argued that Nationwide's counsel's statement is "not supported by the evidence, something that's outside the bounds of what the Judge will even permit. Something that has to be stricken from your memory it's so egregious and outrageous for them to say. They come up with that." App. R. 2013, Trial Tr. 572. The trial court asked counsel to approach and admonished Appellants' counsel: "Don't do that." *Id.*

conclusion of the bad faith trial, the jury awarded a verdict of \$400,000 in compensatory damages and \$200,000 in punitive damages against Nationwide.⁴

Appellants then moved the trial court for an enhanced attorney fee of \$953,087.44 for litigating the bad faith claim. Instead, the trial court awarded an attorney fee of \$30,108.71. App. R. 3 (May 16, 2012 Order). As explained below, this Court has long established the damages available in an insurance bad faith case and based on this precedent, the trial court properly concluded that Appellants' novel request to shift their attorney fee is not permissible. Further, the trial court also properly concluded that Nationwide's behavior throughout the litigation of the bad faith case did "not rise to such a level that justice requires the extra-ordinary relief sought by Plaintiffs herein." App. R. 6 (May 16, 2012 Order).

SUMMARY OF ARGUMENT

Notably absent from Appellants' brief is any reference to the standard of review this Court applies in evaluating the trial court's decision to deny Appellants' request for \$953,087.44 in attorney fees for prosecuting a bad faith claim after the underlying insurance claim was settled. It is well-established in West Virginia that a trial court's decision regarding an award of attorney fees will not be disturbed unless there is an abuse of discretion.⁵ As more

⁴ Appellants read too much into the Verdict Form (App. R. 18-20) when they state in their recitation of the facts that Appellants "showed that Nationwide used illegal and unfair tactics against its policyholder as a general business practice. Furthermore, Nationwide was shown to have actually institutionalized corrupt and illegitimate practices, by paying bonuses to adjusters based on claim payouts and carefully keeping adjusters apprised of claim-payout information in order to suppress payments to insured." Appellants' Brief, p. 3. The Verdict Form did not contain any special interrogatories referencing the bonuses paid to adjusters or asking whether this specific practice violated West Virginia Code § 33-11-4. Appellants argued that various actions/inactions of Nationwide violated West Virginia Code § 33-11-4. Thus, the jury's Verdict Form does not support Appellants' conclusion that Nationwide's bonus program was proven to be corrupt, illegal, unfair or illegitimate.

⁵ See e.g. *Miller v. Hare*, 227 W. Va. 337, 339, 708 S.E.2d 531, 533 (2011) (citing *Beto v. Stewart*, 213 W. Va. 355, 359, 582 S.E.2d 802, 806 (2003)); *Gainer v. Walker*, 226 W. Va. 434,439, 701 S.E.2d 837,842 (2009) (citing *Beto*, *supra*); *Alden v. The Harpers Ferry Police Civil Service Com'n*, 219 W. Va. 67, 69, 631 S.E.2d 625, 627 (2006) (citing *Beto*, *supra*); *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307, 310, 599 S.E.2d 730, 733

fully explained herein, the trial court did not abuse its discretion in this case and properly denied Appellants' request for attorney fees beyond those allowed under *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986).

Appellants' brief also misrepresents the trial court's clear and correct decision regarding its authority to issue the kinds of fees requested. Appellants state several times that the trial court erred by ruling that it was "without authority" to grant attorney fees. See Appellants' Brief, pp. 1, 6, 7. Actually, the trial court did grant an award of attorney fees under *Hayseeds* in the amount of \$30,108.71. Contrary to Appellants' misstatement of the trial court's May 16, 2012 Order, the trial court only concluded that it was "without authority" under the decision of *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996), to award additional attorney fees incurred in prosecuting a bad faith claim. See App. R. 4 (May 16, 2012 Order). Nor did the trial court rule that it was "without authority" to award fees under *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986). See App. R. 5-6. Instead, the trial court concluded, after "[h]aving presided over the pre-trial issues as well as the trial itself," that an award of fees under *Sally-Mike* was not warranted. *Id.*

Despite asserting four separate assignments of error below, Appellants really ask this Court to find that the trial court abused its discretion in reaching two conclusions. First, the trial court determined that it was without authority to award fees for an insurance bad faith action brought under *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W. Va. 597, 280 S.E.2d 252 (1981). In this appeal of the trial court's decision, Appellants assert that the *McCormick* decision expressly authorizes an award of attorney fees incurred in prosecuting a bad faith case.

(2004) (citing *Beto, supra*); Syl. Pt. 3, *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208 (1999) (citations omitted); Syl. Pt. 2, *Landmark Baptist Church v. Brotherhood Mut. Ins. Co.*, 199 W. Va. 312, 484 S.E.2d 195 (1997) (citations omitted).

That is not true. Over nearly three decades since *Jenkins* was decided, circuit courts have properly applied the *Jenkins* decision to allow an insured to recover attorney fees incurred only in the underlying tort action, not in the subsequent bad faith action. Even if *McCormick* created any doubt, this Court clarified the issue in *Dodrill v. Nationwide Mutual Insurance Company*, 201 W. Va. 1, 491 S.E.2d 1 (1996), which was decided later the same year as *McCormick*. In *Dodrill*, the Court specifically held that the damages recoverable in a *Jenkins*-type action were “attorney’s fees and costs incurred in the underlying action against a tortfeasor.” 201 W. Va. at 16, 491 S.E.2d at 16.

Alternatively, Appellants argue that in addition to recovering fees incurred in obtaining coverage, the *Hayseeds* decision allows them to recover fees incurred in pursuing *Hayseeds* damages. Appellants’ Brief, pp. 12-13. Nothing in *Hayseeds* or its progeny provides support for Appellants’ argument.

Second, the trial court determined that an award of fees under the *Sally-Mike* decision was not warranted in this case. Appellants ask this Court to find that the trial court abused its discretion, and to find that contrary to the trial court’s first-hand observations, Nationwide engaged in vexatious, oppressive and malicious behavior in this case. Appellants have not demonstrated that the trial court abused its discretion. Appellants assert that fees under *Sally-Mike* are warranted not only based on Nationwide’s conduct of its defense in this case, but also based on Nationwide’s conduct in handling the underlying insurance claim. Despite the lack of any legal authority and based solely on Appellants’ perception of good public policy, Appellants argue that this Court should strip trial courts of their discretion in determining whether to award attorney fees and adopt a “bright line” rule that in any case in which a litigant

is found to have acted in actual malice, the prevailing party should recover his or her fees. This Court has explicitly rejected such a rule.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Nationwide disagrees with Appellants' argument that this is a Rule 20 case. Contrary to Appellants' position, this case does not involve issues of first impression or of fundamental public importance. Rather, this is a case appropriate for Rule 19 oral argument as this case involves assignments of error in the application of the well-settled law regarding damages available to an insured in an insurance bad faith case. This case is also appropriate under Rule 19(a)(3) because Appellants' request for extreme magnification of their attorney's fees award is not supported by evidence and, in fact, is substantially against the weight of the evidence. Additionally, Rule 19(a)(4) applies to this case as it involves a narrow issue of law that has already been decided by this Court — the award of attorney fees at the conclusion of bad faith insurance litigation.

ARGUMENT

I. The trial court correctly ruled that no legal authority allowed for fee shifting at the conclusion of bad faith litigation.

In their Amended Complaint, Appellants assert that Nationwide acted in bad faith in handling Appellants' UIM claim by violating certain provisions of the West Virginia Unfair Trade Practices Act ("UTPA"), West Virginia Code § 33-11-1 *et seq.* App. R. 411. *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W. Va. 597, 280 S.E.2d 252 (1981) is the seminal case that established a private cause of action under the UTPA and West Virginia Code § 33-11-4(9). While the Court did "not attempt to delineate the entire damage issue on a statutory claim" in *Jenkins*, it expressed concern about "replicat[ing] the damages obtained in the

underlying claim.” *Jenkins*, n. 12. The court further stated that damages could include “attorney’s fees resulting from the failure to offer a prompt settlement... [and] in an appropriate case, punitive damages may be recovered.” *Id.* For over thirty years since *Jenkins* was decided, damages available to an insured who succeeds in litigating a statutory bad faith case against its insurer are “attorney’s fees resulting from the failure to offer a prompt fair settlement” and in some instances punitive damages.

If *Jenkins* left insurance bad faith litigants wondering about their available damages, this Court explained the damages recoverable in a *Jenkins*-type action in *Dodrill v. Nationwide Mutual Insurance Company*, 201 W. Va. 1, 491 S.E.2d 1 (1996). Specifically, the Court held:

In note twelve of our opinion in *Jenkins*, we addressed briefly some elements of damages recoverable in a claim of the nature before us, and we clearly sanctioned the recovery of attorney’s fees and costs ***incurred in the underlying action against a tortfeasor.***

Id. at 16, 16 [emphasis added]. The language of *Dodrill* is clear, and in following that precedent, courts in West Virginia have allowed insureds who succeed in a *Jenkins*-type action to recover attorney fees and costs *incurred in the underlying action against a tortfeasor.* Nationwide is aware of no case and Appellants have provided the Court with no legal precedent for awarding attorney fees and costs incurred in the subsequent insurance bad faith litigation.

Despite the well-established law to the contrary, Appellants urge this Court to drastically change thirty years of insurance bad faith jurisprudence with no precedential support. Appellants rely almost solely on *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 457 S.E.2d 507 (1996), which notably was decided earlier in the same year as *Dodrill*. However,

Appellants misinterpret and attempt to improperly broaden the *McCormick* holding. In *McCormick*, this Court was faced with evaluating the trial court's conclusion that the insured, Donald McCormick, had not substantially prevailed and could not pursue attorney fees and punitive damages. At trial, Mr. McCormick claimed that his insurer failed to offer him the proper amount of property damage to his vehicle. The jury returned a verdict for \$995.00 on Mr. McCormick's property damage claim. Mr. McCormick had sought damages well in excess of that amount so the trial court concluded that Mr. McCormick had not substantially prevailed and this Court agreed. This Court then moved on to the next phase of its analysis regarding whether Mr. McCormick could pursue attorney fees and punitive damages under the *Jenkins* case. The Court held that *Jenkins* is a "wholly distinct [action] from a *Hayseeds* action." 197 W. Va. at 427, 457 S.E.2d at 519. Thus, the conclusion that Mr. McCormick did not substantially prevail would not necessarily preclude Mr. McCormick from pursuing his *Jenkins*-type action under West Virginia Code § 33-11-4(9). As the Court held:

Whereas under *Hayseeds* it is necessary that a policyholder substantially prevail on an underlying contract action before he may recover enhanced damages, under *Jenkins* there is no requirement that one substantially prevail; it is required that liability and damages be settled previously or in the course of the *Jenkins* litigation.

McCormick, syl. pt. 9. The Court remanded the case for a determination on whether Mr. McCormick "should be awarded attorney's fees for vindicating his *Jenkins*-type claim and, if so, in what amount."⁶ *Id.* Appellants rely on this phrase to support their unusual argument that fee

⁶ Although Mr. McCormick was not entitled to attorney fees under *Hayseeds*, this Court held that he could still possibly recover attorney fees in the underlying action if he could prove the *Jenkins*-type action, *i.e.*, that his insurer violated the UTPA. Because the trial court had applied the substantially prevailed standard to both Mr. McCormick's *Hayseeds* claim and *Jenkins* claim, this Court's focus was on emphasizing that *Hayseeds* and *McCormick* are two separate causes of action, requiring two different types of proof.

shifting occurs at the conclusion of a bad faith case and an insurer is responsible for its insured's attorney fees incurred in litigating the bad faith case. Appellants state specifically in their brief: "by using the phrase 'for vindicating his *Jenkins*-type claim' this Court distinguished the attorney fees incurred in bringing the underlying action from those incurred in bringing a successful *Jenkins*-type/UTPA claim and indicated that attorney fees incurred in the second action are recoverable." Appellants' Brief, p. 11. Nothing could be further from the truth. First, Appellants' theory completely ignores the distinct holding in *Dodrill* that limits attorney fees to those "***incurred in the underlying action against a tortfeasor.***" *Id.* at 16, 16 [emphasis added].

Second, this Court used virtually the same language in describing damages available in an action under *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986). Specifically, in *Hayseeds*, this Court held that:

Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) ***the insured's reasonable attorneys' fees in vindicating its claim;*** (2) the insured's damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience.

Hayseeds, syl. pt. 1 [emphasis added]. The phrase "in vindicating its claim" in *Hayseeds* has always been interpreted as allowing attorney fees incurred in obtaining the insured's insurance limits. By using this same phrase, "in vindicating its claim" in *McCormick*, this Court simply meant that an insured in a *Jenkins*-type claim could recover the attorney fees incurred in a successful underlying claim. *See Dodrill*, 201 W. Va. at 16, 491 S.E.2d at 16. This is the way West Virginia courts, lawyers and litigants have interpreted the Court's language for the entire history of insurance bad faith litigation. As noted above, if *McCormick* created any confusion on this issue, *Dodrill*, which was decided later the same year as *McCormick*, cleared that up by

explicitly holding that the attorney fees recoverable in a *Jenkins*-type action are only those “*incurred in the underlying action against a tortfeasor.*” *Dodrill*, 201 W. Va. at 16, 491 S.E.2d at 16 [emphasis added].

Conversely, Appellants have cited no case law that provides valid support for their fee shifting proposition. As explained above, a logical reading of *McCormick* does not support this position. Further, any discussion in *McCormick* regarding fees certainly cannot be grounds to change the face of insurance bad faith litigation as no syllabus point in *McCormick* discusses fees.⁷ Moreover, no West Virginia reported decision since *Jenkins* or *McCormick* has held that such fee shifting is proper or that an insured can recover the attorney fees incurred in litigating a *Jenkins*-type/UTPA claim. Rather, the *Dodrill* decision makes it clear that an award of attorney fees is limited to those incurred in the underlying action against the tortfeasor. Thus, the trial court properly concluded that no legal authority in West Virginia authorized the court to grant Appellants’ motion for attorney fees.

II. The trial court did not abuse its discretion in awarding fees of \$30,108.71 to Appellants after the trial court concluded that Appellants substantially prevailed in their underinsured motorist claim for \$50,000 in policy limits.

Nationwide does not dispute that *Hayseeds* allows a policyholder who substantially prevailed to recover attorney fees “as long as the attorney services were necessary to obtain payment of the insurance proceeds.”⁸ However, Appellants are attempting without

⁷ The Constitution of West Virginia, Article 8, Section 4, requires new points of law to be articulated through syllabus points. *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).

⁸ This Court has explicitly required that a policyholder show the attorney services were necessary to obtain payment of the insurance proceeds. See e.g., *Richardson v. Kentucky Nat’l Ins. Co.*, 216 W. Va. 464, 472, 607 S.E.2d 793, 801 (2004); *Slider v. State Farm Mut. Ins. Co.*, 210 W. Va. 476, 482, 557 S.E.2d 883, 889 (2001); *Paxton v. Municipal Mut. Ins. Co.*, 202 W. Va. 224, 226, 503 S.E.2d 537, 539 (1998); *Miller v. Fluharty*, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997); *Marshall v. Saseen*, 192 W. Va. 94, 100, 450 S.E.2d 791, 797 (1994); *Jordan v. Nat’l Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647, syl. pt. 1 (1990).

legal support to extend this obligation to “fees incurred pursuing them until it pays.” See Appellants’ Brief, p. 12. Appellants argue that “because Nationwide refused to pay the Lemasters their *Hayseeds* damages for the entire duration of the bad faith case – well over three years after the underlying claim settled,” Nationwide is responsible for Appellants’ attorney fees in litigating the bad faith case. *Id.* There is absolutely no legal authority that an insurer is responsible for the attorney fees incurred by the insured in a separate bad faith litigation. Throughout *Hayseeds* and its progeny, this Court explicitly defines the attorney fee award as the fees incurred in recovering the insured’s own policy limits.⁹ Courts in West Virginia have followed the clear precedent of *Hayseeds* for the past 26 years and directed insurers in appropriate circumstances to pay their insured’s attorney fee incurred in recovering the insured’s policy limits. Nationwide is aware of no court that has ordered, as Appellants request, the insurer to pay the attorney fees for subsequent bad faith litigation. Appellants’ essentially make the same argument with regard to a *Hayseeds* attorney fee award that they do with regard to *McCormick, supra*. Like Appellants’ argument regarding application of *McCormick*, Appellants have no precedential support for their argument extending the *Hayseeds* attorney fee award to fees incurred in the subsequent bad faith litigation.

Furthermore, Appellants completely ignore the prerequisite to a *Hayseeds* attorney fee award: proof that the attorney’s services were necessary to obtain payment of the

⁹ In *Hayseeds*, the insured was entitled to recover attorney fees incurred in recovering property damage insurance benefits after a fire loss. In *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791, this Court extended *Hayseeds* to underinsured and uninsured motorist benefits, holding that when a policyholder substantially prevails in an underinsured or uninsured motorist claim, the policyholder is entitled to reasonable attorney fees “*as long as the attorney’s services were necessary to obtain payment of the insurance proceeds.*” 192 W. Va. at 100, 450 S.E.2d at 797 [emphasis added]. Clearly, the attorney fee award is limited to the attorney’s efforts in obtaining payment of the insurance proceeds. In *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310, this Court further explained that when a policyholder substantially prevails, the policyholder “is entitled to damages for the net economic loss *caused by the delay in settlement.*” 201 W. Va. at 698, 500 S.E.2d at 323 [emphasis added]. Again, this language indicates that the attorney fee award is only for the attorney’s efforts in obtaining the settlement under the insurance policy.

insurance proceeds.¹⁰ Appellants seem to believe that every time an insurer pays policy limits, the insurer must also automatically pay at least an additional one-third (1/3) of the policy limits as attorney fees. This theory is contrary to the law. As this Court specifically held:

With respect to the necessity for the attorney's services, we mean that the insured must show more than *post hoc, ergo propter hoc*, that is, the insured must show more than the fact that a settlement for all or substantially all of the claim was reached after the action was brought against the insurer. Instead, the insured must show that but for his or her attorney's services such settlement would not have been reached, in light of the undue delay in investigating the claim.

Jordan v. Nat'l Grange Mut. Inc. Co., 183 W. Va. 9, 14, 393 S.E.2d 647, 652 (1990).

Throughout the litigation of this bad faith claim, Nationwide's defense was based in large part on Jamie Bordas' failure to cooperate in Nationwide's investigation and failure to provide evidence supporting Mr. Lemasters' damage claim.¹¹ Certainly, insurance carriers settle claims directly with insureds who are not represented. As noted below, whether Appellants substantially prevailed was an issue for the trial court to determine. Yet, Nationwide presented the trial court with evidence to question whether Mr. Bordas' services were actually necessary for Mr. Lemasters to recover his UIM limits. Specifically, Nationwide showed that Mr. Bordas had a financial incentive to prolong the litigation, and may have been the reason for the delay in settlement. Without Mr. Bordas causing delay, Nationwide might have settled the UIM claim much sooner with Mr. Lemasters. Obviously, Nationwide disputed that Mr. Bordas' services were necessary to obtain the \$50,000 in UIM benefits.

¹⁰ See cases cited in footnote 7, *supra*.

¹¹ See *e.g.*, opening statements, App. R. 953-1013, Trial Tr. 222-82; Tina Pritts' testimony, App. R. 1648-83; 1686-90; 1697-1706, Trial Tr. 54-89; 92-96; 103-112.

In their brief, Appellants incorrectly assert that Nationwide litigated the substantially prevailed issue without evidence or a “logical basis” to dispute it. Appellants’ Brief, p. 13. Appellants cite to a discussion during the pretrial hearing in which Mr. Parker, Nationwide’s counsel, stated “it’s not a dispute we want to fight, ok.”¹² App. R. 699; Pre-Trial Tr. 57. As explained further at the pre-trial conference (*id.*) and on the first day of trial (App. R. 743-45; Trial Tr. 12-14), Nationwide did not want to fight this dispute *before a jury*, because this Court has held that whether an insured substantially prevails and can receive attorney fees is an issue for the court to decide. *Richardson v. Kentucky Nat’l Ins. Co.*, 216 W. Va. 464, 607 S.E.2d 793 (2004). Indeed, although in this appeal, Appellants call Nationwide’s position “frivolous” (Appellants’ Brief, p. 12), even Appellants’ counsel agreed during this discussion with the court at trial that “this question is close and difficult enough.” App. R. 746; Trial Tr. 15. Appellants’ counsel had disputed throughout the litigation that the substantially prevailed issue was a legal issue. Yet, on the first day of trial, Appellants’ counsel conceded that the trial court and not the jury should decide.¹³

If Appellants felt that the issue was clear, Appellants could have asked the trial court to rule in their favor on the *Hayseeds* claim through a motion for summary judgment. However, Appellants filed no motions for summary judgment, nor did they make any oral

¹² A review of the entire record makes it clear that during this March 26, 2010 final pre-trial hearing, Mr. Parker was simply taking the position that the court should decide the issue, not a jury:

...when it comes down to it, the things that - - that are asked in a Hayseeds case really are for a judge to decide, not for a jury to decide.

And here whatever decision you make is the decision you make. We’re not - - we’re - - I don’t want to take any time arguing about substantially prevail. You’re going to make the decision you’re going to make.

App. R. 699; Pre-Trial Tr. 57.

¹³ Appellants’ counsel refused a suggestion from the trial court that the court rule and Appellants file a writ. App. R. 746. Instead, Appellants’ counsel stated “I prefer Nationwide got their way so that they can’t assign an error with regard to it. You know, let the court decide.” *Id.*

motions pursuant to Rule 50 of the West Virginia Rules of Civil Procedure on this issue. Rather, Appellants insisted throughout the litigation that a jury should decide this issue, not the court. Finally, on April 6, 2010, the first day of trial, Appellants' counsel conceded that the question was close and difficult, refused to file a writ and preferred to "let the court decide." App. R. 746; Trial Tr. 15. Likewise, on the first day of trial, the trial court stated "I'm going to decide it." *Id.* Ultimately, the trial court did determine that Appellants substantially prevailed on the underlying claim and awarded them more than one-third (1/3)¹⁴ of the \$50,000 UIM limits. Specifically, the trial court awarded an attorney fee of \$25,818.75 and added costs, expenses and interest for a total of \$30,108.71. As the question of whether an insured substantially prevailed is a legal question for the court, the trial court did not abuse its discretion in ruling on this issue.

III. The trial court correctly ruled that Appellee was not vexatious, oppressive or malicious in defending Appellants' bad faith claims against Appellee.

Appellants argued below that attorney fees of nearly one million dollars should be awarded in this case based on Nationwide's alleged bad faith litigation conduct. The trial court acted well within its substantial discretion when it concluded that the conduct about which Appellants complained did "not rise to such a level that justice requires the extra-ordinary relief sought by Plaintiffs herein." App. R. 6 (May 16, 2012 Order). The trial court further noted that its conclusion was based on the court "[h]aving presided over much of the pre-trial issues as well as the trial itself," and that the court was "particularly familiar with how the parties and counsel conducted themselves." The trial court had the opportunity to observe first-hand most of the

¹⁴ This Court held in *Hayseeds* that "[p]resumptively, reasonable attorney fees in this type of case are one-third of the face amount of the policy." 177 W. Va. at 329-30, 352 S.E.2d at 79-81. The trial court applied *Aetna Cas. & Surety Company v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), examined Appellants' counsel's billing records, and accepted as reasonable the hourly rates set forth by Appellants' counsel. Thus, instead of awarding one-third of the policy limits as an attorney fee, the trial court awarded more than half the policy limits, or \$25,818.75. Nationwide takes issue with the trial court awarding more than one-third of the policy limits as the attorney fee, but recognizes that this is within the trial court's discretion.

litigation as a whole, and concluded that the few discrete examples of alleged misconduct do not warrant an award of additional attorney fees. Contrary to Appellants, the trial court was certainly well within its discretion in concluding that Nationwide's litigation conduct was not in bad faith, vexatious, wanton or for oppressive reasons. See *Sally-Mike Properties v. Yokum*, syl. pt. 3, 179 W. Va. 48, 365 S.E.2d 246 (1986) ("There is 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.")

Appellants rely on a number of cases recognizing the authority of a trial court to award attorney fees under *Sally-Mike*. However, most of those cases do not approve an attorney fee award in the circumstances presented in the respective cases.¹⁵ Even the *Sally-Mike* case did

¹⁵ See e.g. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (recognizing court's inherent authority to award fees for bad faith litigation conduct, but noting those circumstances not presented); *F. D. Rich Co., Inc. v. U. S. for Use of Indus. Lumber Co., Inc.*, 417 U.S. 116 (1974) (acknowledging exception to American Rule regarding fees when losing party acts in bad faith, vexatiously, wantonly or for oppressive reasons, but holding claims presented under Miller Act do not bring case within exception); *Hall v. Cole*, 412 U.S. 1 (1973) (recognizing, without discussion of any specific misconduct, fees permitted when opponent acts in bad faith, and proceeding to award fees under common benefit theory only); *State ex rel. Richmond American Homes of W. Va. v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139 (2010) (sanctions including striking of defenses and default judgment as to liability approved based on litigation misconduct such as unauthorized and misrepresentative statements communicated by defendant's president directly to plaintiffs, discovery abuse, and defendant's in-house counsel making offer of employment to plaintiff's counsel during mediation); *Horkulic v. Galloway*, 222 W. Va. 450, 665 S.E.2d 284 (2008) (acknowledging authority to award fees, but remanding to determine whether case presented sufficient evidence of obduracy in enforcement of settlement agreement); *Daily Gazette Co., Inc. v. Canady*, 175 W. Va. 249, 332 S.E.2d 262 (1985) (reversing trial court's decision that it was without inherent authority to award fees without discussion of conduct giving rise to claim for fees, and remanding to determine if fees appropriate); *Kerin v. U.S. Postal Service*, 218 F.3d 185 (2nd Cir. 2000) (awarding fees under Equal Access to Justice Act, 28 U.S.C. §2412 and distinguishing EAJA to exception to American Rule regarding fees when litigant acts in bad faith); *Towerridge, Inc. v. T.A.A., Inc.*, 111 F.3d 758 (10th Cir. 1997) (reversing because fees under federal Miller Act only available for litigation misconduct, and trial court's fee award was based on pre-litigation conduct giving rise to substantive claim); *Lamb Engineering & Const. Co. v. Nebraska Public Power Dist.*, 103 F.3d 1422 (8th Cir. 1997) (acknowledging fees may be awarded for bad faith litigation conduct, but finding conduct at issue was pre-litigation conduct giving rise to substantive claim); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004 (11th Cir. 1985) (acknowledging bad faith exception to American Rule but reversing trial court's fee award because conduct relied on in awarding fees was based on defendants' liability in underlying claims, not on post-litigation misconduct); *Shimman v. Int'l Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984) (acknowledging exception to American Rule for bad faith, but only if alleged misconduct was not same conduct giving rise to underlying claim and finding no evidence of bad faith defense of lawsuit).

not result in an attorney fee award. *Id.* (affirming trial court's denial of fees). Indeed, the conduct about which Appellants complain is far less egregious than that presented in cases where attorney fee awards under *Sally-Mike* were approved in West Virginia.¹⁶ Finally, as more fully explained below, Nationwide's actions cited by Appellants in an attempt to justify an award of attorney fees under *Sally-Mike* are grossly mischaracterized.

First, 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 by the jury, and, (2) if the determination was made by the trial court, whether the jury would be advised of such determination.¹⁷ Those issues were argued extensively during the final pre-trial

¹⁶ See e.g. *Baldau v. Jonkers*, 229 W. Va. 1, 725 S.E.2d 170 (2011) (real estate developers found to have maliciously prosecuted removal proceedings against innocent member of planning commission for no purpose other than financial gain); *Gainer v. Walker*, 226 W. Va. 434, 701 S.E.2d 837 (2009) (increased fees under public employee grievance procedure warranted after public employer denied employee due process by failing to produce requested documents before grievance hearing, and then introduced same documents as evidence at hearing); *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208 (1999) (defendant breached fiduciary duty to her daughter by using benefits of life insurance policy of daughter's deceased father to purchase strip club, and otherwise misappropriating funds held in trust by defendant for her daughter's benefit); *Pritt v. Suzuki Motor Co., Ltd.*, 204 W. Va. 388, 513 S.E.2d 161 (1998) (fees awarded to defendant's counsel and plaintiff's own trial counsel after videotapes introduced at trial confirmed plaintiff committed fraud on court by significantly misrepresenting and concealing extent of physical injury); *Bowling v. Anstead Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 425 S.E.2d 144 (1992) (fraudulent scheme by automobile dealer in selling used rental cars as "demonstrators" shown by clear and convincing evidence); *Nelson v. W. Va. Pub. Emp'ee Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982) (public officers admitted they willfully disregarded mandatory provisions of statute directing them to promulgate rules for participation in group insurance plan by dependents of deceased public employees); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (losing party's conduct, including (1) fraudulent transfers of property intended to deprive court of jurisdiction over dispute, (2) concealment of material facts from trial court, (3) taking action in violation of preliminary injunction and other court orders, (4) filing meritless motions and scheduling unnecessary depositions, etc., was "part of [a] sordid scheme of deliberate misuse of the judicial process' designed 'to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." (quoting *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120 (1989)); *Local 285, Service Employees Intern. Union, AFL-CIO v. Nonotuck Resource Associates, Inc.*, 64 F.3d 735 (1st Cir. 1995) (company's reliance on position directly contradicted by relevant legal authority was frivolous and warranted award of fees).

¹⁷ App. R. 597-602 (Defendant's Motion *In Limine* to Exclude Evidence of Determinations Regarding Whether Plaintiffs Substantially Prevailed), 603-13 (Defendant's Motion Regarding Who Makes the Determination of Whether Plaintiffs "Substantially Prevailed" and accompanying Memorandum), 623-37 (Plaintiff's Combined Response in Opposition to Defendant's Motion Regarding Who Makes the Determination of Whether Plaintiffs "Substantially Prevailed" and Defendant's Motion *In Limine* to Exclude Evidence of Determinations Regarding Whether Plaintiffs Substantially Prevailed).

conference and the first day of trial (App. R. 693-709, 728, 736-46, 778-88; Pre-Trial Tr. 51-67, 86; Trial Tr. 5-15, 47-57), and Appellants' counsel ultimately conceded that the trial court should decide whether Appellants substantially prevailed (App. R. 746; Trial Tr. 15). In that regard, Appellants' counsel acknowledged that Appellants could have presented the issue of whether Appellants substantially prevailed prior to trial as a motion for partial summary judgment. App. R. 694; Pre-Trial Tr. 52. Appellants chose not to file such a motion, leaving the issue of whether they substantially prevailed open for the trial court to determine at the conclusion of the trial.¹⁸ Thus, Nationwide did not force litigation of the substantially prevailed issue. Appellants themselves did.

As noted above, Nationwide did present evidence to support a conclusion that Appellants did not substantially prevail. Yet, Appellants argue that Nationwide asserted a "meritless defense against [their] substantially prevailing claims." Appellants' Brief, p. 18. This argument fails as explained in Section II, *supra*. In addition, even if the trial court had already ruled on the substantially prevailed issue before trial (which did not happen), Nationwide still would have presented similar evidence regarding the handling of the UIM claim in defense of the bad faith allegations. The trial court must look at this same evidence because whether an insured substantially prevails requires an examination of the negotiations as a whole, and recovery of attorney fees for substantially prevailing depends on whether the attorney's services were necessary. *See* Syl. Pts. 2, 4, *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Just because both theories rest on the same type of evidence does not mean that Nationwide

¹⁸ By Order entered April 1, 2010, the trial court ruled that it would determine the issue of whether Appellants substantially prevailed. App. R. 638-41. Further, if the trial court determined that the Appellants substantially prevailed, the jury would be advised of that determination only after the jury deliberated the issue of liability on the UTPA Claim. *Id.*

forced Appellants to litigate whether they substantially prevailed. Rather, the record before this Court demonstrates that Appellants chose that path themselves.

Next, in an effort to bolster their characterization of Nationwide's defense as abusive, Appellants cite a few discrete circumstances from the record below and argue that Nationwide engaged in a pattern of litigation misconduct. However, considering the complete circumstances of each instance of alleged misconduct cited — and considering the proceedings as a whole (as the trial court properly did) — it is clear that the alleged misconduct does not rise to the level of “vexatiousness” required to warrant an attorney fee award.

For instance, Appellants cite the fact that Nationwide was ordered to pay attorney fees in connection with a discovery dispute. According to Appellants, based on this isolated circumstance, Nationwide abused the discovery process by asserting a frivolous objection to a request for the complete personnel files of Nationwide employees.¹⁹ Nationwide's objection to production of the complete personnel files was based on its employees' reasonable expectation to privacy, which Nationwide argued should be evaluated on a case-by-case basis. App. R. 399-401.²⁰ Notably, the trial court did not grant Appellants' motion to compel the complete personnel files. App. R. 421-22. Instead, the trial court ordered production of limited information from the personnel files of Nationwide's employees, and further ordered that such information be kept confidential. *Id.* Thus, Nationwide's objection was not beyond all bounds

¹⁹ App. R. 396 (Nationwide's Response in Opposition to Motion to Compel); App. R. 421-23 (Order Granting Plaintiffs' Motion to Compel). Though the trial court addressed another discovery dispute regarding production of the third-party claims file, no sanctions were awarded with respect to that issue. App. R. 421-423.

²⁰ Even though the trial court awarded sanctions based on its conclusion that Nationwide's counsel “could not have a good faith belief that this Court would reverse its prior ruling” in *Fox v. Nationwide*, Civil Action No. 02-C-281 (Circuit Court of Marshall County, WV), it is clear from Nationwide's Response to the Motion to Compel that Nationwide's counsel was merely asking that the trial court evaluate the relevance of information in employee personnel files on a case-by-case basis. App. R. 400. Moreover, because Nationwide already paid attorney fees associated with Appellants' efforts to obtain personnel file information, that circumstance should not be considered as part of any alleged pattern of litigation misconduct to justify an award of additional attorney fees.

of legitimacy, and certainly was not frivolous in light of the privacy rights of Nationwide's employees.

Appellants next cite the testimony of Nationwide adjuster Tina Pritts to support their argument that Nationwide had no reasonable basis to assert any defenses to Appellants' UTPA claims. Specifically, Appellants misrepresent Ms. Pritts' testimony, stating that she admitted Nationwide's request for a medical examination was unreasonable, and that the lost wages information Nationwide requested was unnecessary. However, Ms. Pritts actually testified that she believed *Appellants' counsel* was being unreasonable by objecting to the medical examination requested by Nationwide.²¹ Appellants also conveniently omit from their brief the questions posed to Ms. Pritts immediately after her alleged admission that it was not necessary for Nationwide to gather information regarding why Mr. Lemasters was off work after

²¹ Tina Pritts testified as follows:

Q. A minute ago, Mr. Regan asked you whether it was reasonable to tie up the claim for two years based on fighting over the IME doctor. Do you remember that?

A. Yes.

Q. You said that it would not be reasonable. Do you remember that? I want you to explain your answer to the jury. Why would you say that?

A. I don't think it was reasonable to fight over the doctor. The reasons for not using Dr. Abraham, they didn't seem like they were good reasons.

Q. Whose reasons?

A. Mr. Bordas's reasons for not wanting Mr. Lemasters to go to Dr. Abraham. WE could not figure out why did you not want to use Dr. Abraham. It didn't seem like a big issue if he supposedly was rude to Mr. Bordas or he had high fees or whatever. It just didn't seem like those were good enough reasons that we would not be able to send somebody there for an examination.

Q. When you said it would not be reasonable, who did you think was being unreasonable in that fight.

A. Mr. Bordas.

Q. Did you think that you were being reasonable in that fight?

A. We felt that we were being reasonable. He had went to Pittsburgh before to see Dr. Maroon. We couldn't understand why there should be an issue for him to go to Pittsburgh to see another doctor. And we just felt that it was unreasonable to continue to not want to see Dr. Abraham just because he may not have a very good bedside manner.

App. R. 1872-73; Trial Tr. 160-61; *see also* App. R. 1874-77; Trial Tr. 165-73, 177-78.

January 12, 2005.²² Ms. Pritts did not waiver from her position that she needed information as to why Mr. Lemasters' was off work.

Not only do Appellants misrepresent the testimony of Ms. Pritts as admissions of liability, but Appellants further misrepresent the testimony of Nationwide's expert, Peter Kensicki, and Nationwide employees Sharen Robinson and Gabriella Martin, by stating that those witnesses agreed with the purported admissions of Ms. Pritts. Notably, the testimony cited by Appellants involve a hypothetical situation proposed by Appellants' counsel in which the witnesses were asked to assume that the UIM adjusters had established that Mr. Lemasters' damages were related to the accident.²³ A careful reading of the complete testimony of these witnesses more than discredits Appellants' reliance on selected portions of their testimony.

Moreover, the limited portions of testimony cited by Appellants do not represent Nationwide's entire defense in this case. It simply is not reasonable to characterize Nationwide's entire defense as a sham based on limited, selective parts of testimony provided during the course of seven-day trial. The trial court concluded that at least part of Nationwide's defense

²² Tina Pritts testified as follows:

Q. So all that type of information going beyond this time frame would have been redundant information over and above what he needed to get both his policies paid, correct?

A. Not necessarily, because that information where he was receiving treatment in 2005 or 2006 would have a history of why he had been disabled or been off work since June 2004 and present and continuing. So we were looking for information that showed the history of why he was off, what started his disability, was the disability related to the accident.

App. R. 1863; Trial Tr. 124.

²³ Ms. Pritt testified that the UIM adjusters may not have the same information as the adjusters handling the underlying bodily injury claim. App. R. 1869; Trial Tr. 148. Moreover, contrary to Appellants' mischaracterization, Dr. Kensicki actually testified that "...if you're asking me to assume the one critical issue that was absolutely missing from this, and that was an objective relationship between the injury and this long-term disability, yes, I'm paying the other 50." App. R. 1741; Trial Tr. 147. Ms. Martin actually testified that if there had been documentation relating Mr. Lemasters' time of work and medical treatment to the accident, the UIM money would have been paid. App. R. 1947; Trial Tr. 308. Ms. Robinson testified only that she recalled Ms. Pritts agreeing with the loaded question posed to her by Appellants' counsel which, as stated above, was later clarified by Ms. Pritts. App. R. 1966; Trial Tr. 385.

had a great deal of merit when it indicated it would grant Nationwide's partial summary judgment motion.²⁴ The jury rendered a verdict against Nationwide for damages after having every opportunity to consider the specific testimony cited by Appellants and make the same inferences that Appellants now ask this Court to make. An attorney fee award based on alleged "witness admissions" would be unreasonably duplicative of the damages already awarded.

Finally, Appellants argue that selected portions of Nationwide's counsel's closing argument are evidence of vexatious litigation conduct warranting an attorney fee award. Appellants take issue with Nationwide's theory that Mr. Bordas had a financial incentive in delaying settlement of the underinsured motorist claim. The trial court in this case directed the jury to disregard only one phrase in the entirety of Nationwide's counsel's closing argument — "the Jamie Bordas suing insurance companys business plan" — and did not rule that the argument was without evidentiary foundation.²⁵ App. R. 2010-2012; Trial Tr. 560-66.

²⁴ By letter dated December 7, 2009, the trial court notified the parties' counsel that Nationwide's Motion for Partial Summary Judgment regarding Appellants' non-economic damages would be granted. App. R. 593-594. Nationwide sought partial summary judgment based on Appellants' inability to relate their non-economic damages to Nationwide's handling of their UIM claim. App. R. 434-592. Instead, as evident from Appellants' deposition testimony, the non-economic damages claimed by Appellants were caused by the motor vehicle accident giving rise to Appellants' UIM claim, not the handling of the UIM claim. *Id.* See also video recording of Appellants' depositions. As noted in the trial court's February 16, 2010 letter, Appellants requested that the trial court reconsider its ruling on Nationwide's Motion for Partial Summary Judgment. App. R. 595-596. However, the trial court made a point to note that the record contained only "scant (with a little "s") direct evidence" regarding Appellants' alleged non-economic damages. *Id.* Therefore, the trial court issued an Order Granting Plaintiffs' Motion for Reconsideration and Denying Defendant Nationwide Mutual Insurance Company's Motion for Partial Summary Judgment. App. R. 614-22.

²⁵ A review of the trial transcript reveals that the trial court struggled with this issue and it was far from clear that Nationwide's counsel's comment during closing was improper. Appellants objected at trial when Nationwide's counsel referred to "the Jamie Bordas suing insurance company's business plan." However, Appellants themselves elicited testimony from Mr. Bordas that he was very experienced in handling cases against insurance companies, "had participated in hundreds of such cases," and even moved to have Mr. Bordas admitted as an expert in "the handling of automobile and UIM claims, as well as the handling of insurance bad faith claims," but later withdrew the motion. App. R. 1398; Trial Tr. 661. The trial court also allowed Mr. Bordas to testify that Nationwide had a general business practice of delay and provide examples from other cases that he had personally handled. App. R. 1413-17; Trial Tr. 676-680. Such testimony is typically reserved for a witness recognized by the trial court as an expert in the insurance industry. Certainly, the evidence at trial supported Nationwide's counsel's position that Mr. Bordas made it his business to sue insurance companies.

Considering the entirety of the closing argument,²⁶ it is clear that the statements about which Appellants complain were not unfounded attacks on Appellants' counsel. Rather, Nationwide's theory, which was articulated at the beginning of the trial in Nationwide's opening statement (App. R. 966, 982; Trial Tr. 235, 251), was consistent with Mr. Bordas' own testimony (App. R. 1455-56; Trial Tr. 718-19).

At trial, much of the testimony and evidence dealt with whether it was reasonable to request or withhold information related to Appellants' injury (*i.e.*, Appellants' counsel's objection to the medical examination, and Nationwide's request for lost wage information). Mr. Lemasters testified that he expected his counsel to provide Nationwide with all information requested (App. R. 1495-96, Trial Tr. 758-59),²⁷ and Mr. Bordas admitted under oath that he had a financial interest in the outcome of a bad faith suit (App. R. 1455-56; Trial Tr. 718-19). Given this evidence, it was entirely appropriate for Nationwide to ask the jury to consider why information regarding the UIM claim was not forthcoming. "[A]dvocates are given great latitude in arguing their cases..." and trial courts are afforded "considerable latitude in determining the

²⁶ See *Smith v. Andreini*, 223 W. Va. 605, 616, 678 S.E.2d 858, 869 (2009) ("In considering the propriety of the remarks made by Dr. Andreini's counsel during his closing argument...common sense dictates that such remarks be reviewed not in isolation but in the context in which they were made...") The appellant in *Smith* challenged the trial court's order granting a new trial based on remarks made by defendant's counsel. In this case, Appellants did not ask for a mistrial (App. R. 2003; Trial Tr. 531), and Appellants have not appealed the trial court's handling of the alleged improper statements. Instead, Appellants only ask this Court to consider those statements as evidence of litigation misconduct. Still, for this Court to fully evaluate whether Nationwide's counsel's closing argument was vexatious and in bad faith, the Court must consider the argument as a whole. *Id.*

²⁷ Although Mr. Lemasters expected Mr. Bordas to provide all the information Nationwide requested, Mr. Bordas neglected to do that. For example, despite the fact that Nationwide disputed the lost wage claim and Nationwide adjuster Tina Pritts asked Mr. Bordas repeatedly for documentation of Mr. Lemasters long term disability, Mr. Bordas failed to provide the information requested. App. R. 1848-1853; Trial Tr. 64-82. He also continually battled Nationwide's request for an independent medical examination. App. R.1850-1851; Trial Tr. 71-74; 79-83. Mr. Bordas' excuse was that Nationwide "consistently, no matter what you give them, ask for something else." App. R. 1413; Trial Tr. 676. He further opined that Nationwide was "always looking for something else that can justify why they're not paying." App. R. 1414; Trial Tr. 677. Tina Pritts emphatically denied this at trial and made it clear that she wanted to pay this claim. App. R. 1860; Trial Tr. 112. Essentially, Nationwide's defense was that Mr. Bordas delayed the claim; and Mr. Bordas response was that Nationwide's requests were unreasonable.

propriety of argument by trial counsel.” *Smith*, 223 W. Va. at 616, 678 S.E.2d at 869 (citations omitted).

In addition, Nationwide’s theory that Mr. Bordas had a financial reason for delaying the underinsured motorist claim is appropriate rebuttal to Appellants’ theory that Nationwide’s employees wrongfully delayed the claim so that they could participate in a goal sharing financial program. App. R. 920-28, 946-47; Trial Tr. 189-97, 215-16. As the dissent recognized in *Miller v. Fluharty*, 201 W. Va. 685, 701, 500 S.E.2d 310, 326 (1997) (Maynard, dissenting), there is an incentive for plaintiffs “to obstruct settlement negotiations with his or her insurance carrier, to intentionally delay settlement, then to later demand the payment of the limits of the first-party policy, plus attorney’s fees and costs.”

Ultimately, the trial court correctly determined that Nationwide and its counsel did not abuse the judicial process and acted appropriately in defending against Appellants’ claims. Though not expressly stated in the trial court’s May 16, 2012 Order, the trial court’s conclusion embodies the understanding that insurance bad faith cases are prosecuted and defended aggressively on both sides. Indeed, Appellants’ counsel also was admonished by the trial court for exceeding the appropriate bounds of litigation conduct. App. R. 265 (Defendant’s Response in Opposition to Plaintiffs’ Brief in Support of Attorney Fee Award, p. 20); App. R. 906-07, 1098-99, 1121-22, 2013, 2079-80; Trial Tr. 174-75, 364-65, 387-88, 571-72, 639-40. If the conduct cited by Appellants in this case rises to the level of “vexatiousness” contemplated by *Sally-Mike*, then insurance companies will be denied equal access to the courts, because their

willingness to assert defenses will be chilled by the threat and fear that fees are awarded *carte blanche* against insurance companies that lose bad faith cases in West Virginia.²⁸

IV. The trial court properly rejected Appellants' novel and legally unsupported proposition that when a jury awards punitive damages, the trial court must also force the losing party to pay the winning party's attorney fees.

Despite the lack of any legal precedent, Appellants ask this Court to adopt a “bright line” rule that requires any party who is found to have acted with actual malice to pay the plaintiff's attorney fees. This proposition was expressly rejected by this Court in *Midkiff v. Huntington National Bank West Virginia*, 204 W. Va. 18, 511 S.E.2d 129 (1998). In *Midkiff*, the jury awarded punitive damages against defendant, but the trial court refused to grant fees under *Sally-Mike*, *supra*. On appeal to this Court, Mr. Midkiff argued that because the standard for an award of punitive damages is the same as the standard for awarding fees under *Sally-Mike*, the lower court abused its discretion in denying the motion for fees. This Court addressed Mr. Midkiff's argument as follows:

Were we to agree with the argument of the appellant Midkiff, we would be well on our way to erasing the distinction between attorney's fees and punitive damages. We would in essence be finding that every time a jury awarded punitive damages, attorney's fees should be awarded without further examination. We do not agree with this approach.

Id. at 20, 131, n. 5.

²⁸ A similar concern was articulated by Justice Maynard in the dissent to *Miller v. Fluharty*, *supra*. (“I strenuously dissent in this case because I believe that if a policyholder is not required to prove the insurance carrier's actions were wrongful or unreasonable, as this decision provides, every insurance carrier might as well pay the policyholder the limits of the policy the moment the demand is made. That is simply unfair and will cause insurance costs to skyrocket. The only other option for defendants such as these is to gamble and go to trial with every claim made.”).

Moreover, the “bright line” rule Appellants propose completely strips trial courts of their discretion to determine if fees are warranted. Indeed, this Court refused to interfere with a trial court’s decision not to award attorney fees in a fraud case, because the trial court believed the award of punitive damages sufficiently punished the defendant. *See Boyd et al. v. Goffoli et al.*, 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004).

If plaintiffs are able to recover attorney fees for conduct giving rise to their punitive damage claims, they will be allowed a duplicative recovery. This Court has recognized “that punitive damages are often awarded to off-set litigation expenses....[B]ecause punitive damages are designed in part to subsidize litigation costs, a court's refusal to award attorneys fees where work had been done to support the theories justifying punitive damages was appropriate.” *State ex rel. Harper-Adams v. Murray*, 224 W. Va. 86, 94, 680 S.E.2d 101, 109 (2009) (citations and footnote omitted). There, the Court sent a clear message to trial courts that punitive damages awards and attorney fee awards are “separate and distinct issues that must be addressed separately.” *Id.* (citing *Midkiff, supra*). In other words, a punitive damages award does not automatically justify an award of attorney fees.

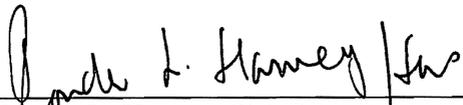
CONCLUSION

Through this appeal, Appellants are attempting to change the face of insurance bad faith litigation by seeking an enhanced attorney fee of \$953,087.44 for litigating an insurance bad faith case to a \$600,000 verdict. The standard for attorney fee awards are well-established in West Virginia. Appellants attempt to convince this Court to change this well-known precedent. Rather, this Court should uphold the trial court’s May 16, 2012 Order (App. R. 1-6), for the following reasons. First, the trial court properly determined that no legal

authority supported Appellants' motion for an attorney fee award at the conclusion of an insurance bad faith case. Even though West Virginia does not allow fee-shifting at the end of an insurance bad faith case, the trial court used its discretion and awarded Appellants \$30,108.71 under *Hayseeds* after the trial court concluded that Appellants substantially prevailed in their underinsured motorist claim for \$50,000 policy limits. Third, based on the trial court's first-hand observations of this insurance bad faith litigation, the trial court correctly ruled that Appellants were not entitled to an enhanced attorney fee of \$953,087.44 because the conduct of Nationwide and its counsel did "not rise to such a level that justice requires the extra-ordinary relief sought by Plaintiffs herein." App. R. 6 (May 16, 2012 Order). Finally, Appellants offer no legal support for their policy argument that once punitive damages are awarded, the losing party must also pay the prevailing party's reasonable attorney fees. Indeed, this Court expressly rejected this notion. For all the foregoing reasons, this Court should uphold the trial court's May 16, 2012 Order.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-0774

WAYNE LEMASTERS AND MARY JOAN LEMASTERS

Appellants

v.

NATIONWIDE MUTUAL INSURANCE COMPANY

Appellee

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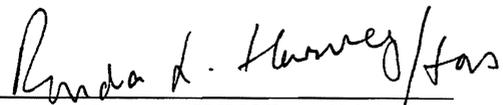
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CERTIFICATE OF SERVICE

The undersigned counsel for Nationwide Mutual Insurance Company does hereby certify that service of the foregoing “**Appellee’s Brief**” was made upon all parties by sending a true and exact copy via U.S. Mail, postage prepaid, addressed to the following:

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