IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0899

SAFECO INSURANCE COMPANY OF AMERICA and
LIBERTY MUTUAL INSURANCE COMPANY,
Defendants Below, Petitioners

v.

JOSEPH M. JENKINS and **STEPHANIE D. JENKINS,**
Plaintiffs Below, Respondents

Hon. Christopher J. McCarthy
Circuit Court of Harrison County
Civil Action No. 18-C-65-1

RESPONSE BRIEF OF RESPONDENTS JOSEPH M. JENKINS AND STEPHANIE D. JENKINS

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BRIEF OF RESPONDENTS JOSEPH M. JENKINS AND STEPHANIE D. JENKINS

This Appeal emanates from the same incident as the companion Appeal No. 19-0890. Both Appeals stem from a motor vehicle collision involving Petitioners' insureds, Lynn and Tessa Jordan and the Respondents. The causes of action were split after the Trial Court ordered bifurcation and two separate Trials were conducted. This Appeal (No. 19-0899) involves Respondents' cause of actions resulting in Petitioners Safeco's[1] unlawfully converting Respondents' vehicle to their possession and control without Respondents' permission or consent. From this common nucleus of facts, two separate Appeals have been filed and docketed with this Honorable Court.

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[1] Safeco Insurance Company of America and Liberty Mutual Insurance Company [hereinafter "Safeco"].

I. Statement of the Case/Facts:

The case below which generated this Appeal by Petitioners Safeco and Liberty Mutual began when Respondent Joe Jenkins was hit head on when Ms. Tessa Jordan ran a red light at an intersection on October 15, 2017 in Weston, Lewis County, West Virginia. The vehicle was owned by Ms. Jordan and her father Lynn Jordan. Subsequently, the Jordans made their insurer Safeco aware of the collision and advised that Tessa was at fault by failing to stop for the signal.[2]

After the crash, Mr. Jenkins also contacted Safeco two days later on October 17, and provided all of his contact information including his cell phone number, location of his wrecked vehicle[3], details of how the crash occurred, the investigating police department and the fact that he needed a rental vehicle because his wrecked vehicle was his work car and he had significant travel in his work as a heavy equipment operator. [A.R. 113-16 & 505-06]. Joe Jenkins called Safeco twice on October 17, 2017 in an effort to get matters moving quickly due to his need for a work vehicle. *Id.* Safeco refused to provide a rental vehicle asserting that fault had not been determined, even though it had been determined near the time Joe Jenkins had called Safeco. However, at Trial Safeco's agent testified that the liability determination had been formally made on October 19, 2017 but that no one told Joe Jenkins. [A.R.181-82]. Safeco did not provide a rental vehicle or inspect Joe Jenkins' work vehicle for an appraisement until January 3, 2018. [A.R. 237]. By that time, almost three months had elapsed with Joe Jenkins receiving no compensation to replace his totaled

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[2] It is undetermined whether Ms. Jordan was a distracted driver as the Uniform Traffic Crash Report does not permit the Investigating Officer to indicate "unknown" and Mr. Jenkins advised the Officer at the scene that once Ms. Jordan his him "she took off up main street." Distracted driving is always a potential considering the proliferation of cell phone ownership and usage.

[3] Joe Jenkins vehicle had been towed by the Weston Police Department to Hitt's Garage in Weston as Mr. Jenkins had been transported to the Hospital by ambulance. [A.R. 126].

vehicle, no loss of use damages, and nothing for any of his other damages. Such circumstances caused significant stress, anger, aggravation and frustration to him and his Wife and two children. [A.R. 146 & 250]. Joe and his Wife, Stephanie had just had their second child shortly before the automobile collision which created significant financial strains to him and his Family. [A.R. 118, 148 & 254]. Eventually, the Jenkins retained counsel to determine why he wasn't being compensated when fault was all the Safeco's insureds and why Joe Jenkins was not being paid when all that Joe Jenkins requested was his medical bills to be paid, and to receive fair value for his work vehicle, which he was going to try and repair since his military training provided him some knowledge to do it himself. [4] [A.R. 126-27].

In January 2018, Joe Jenkins' Wife received a letter sent from Safeco by UPS delivery addressed to Joe Jenkins. [A.R. 508-15] At that time, Joe Jenkins was being trained on heavy equipment operations for the upcoming natural gas pipeline work being begun in Central West Virginia. [A.R. 119-20] The letter had been sent by Rhonda Rutledge,[5] an employee of Liberty Mutual who also handled matters for Safeco and who was a Defendant. [A.R. 522, 61, 162-63, 242-45]. Ms. Rutledge was the instigator to have Joe Jenkins' vehicle removed from Hitt's Garage in Weston, West Virginia to a Safeco vendor's property 120 miles south in Hurricane, West Virginia. [A.R. 508-18]. Her January 15, 2018 letter indicated it was sent from Los Angeles, California and

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[4] Mr. Jenkins, as a Member of the West Virginia Army National Guard's 821st Engineer Company, was trained as a combat engineer and helped build under fire, the Wall protecting the Green Zone in the Battle of Sadr City, Iraq in 2007-08, for which he earned his Combat Action Badge and was awarded the Bronze Star. [A.R. 503]

[5] Ms. Rutledge was Safeco's adjuster in the claim and a Defendant in the case but she never appeared for Trial nor was her deposition taken by Safeco to provide her testimony for the Jury; she was an important witness for Safeco and Respondents believed she would be at Trial as she was a Party; her absence created a strong inference with the Jury that her testimony on critical issues relating to the conversion of Joe Jenkins vehicle would not be favorable to Safeco.

it included Safeco's determination of the value of Joe Jenkins' vehicle which was $2,584.00 which Joe Jenkins believed it was worth at least $3,500.00. [A.R. 501-02]. The discrepancy was due to Safeco arbitrarily deducting an additional $977.00 based upon Safeco's belief that there was "rust" on the vehicle body. [A.R. 540]. This had been accomplished by Safeco looking at photographs of the vehicle. [A.R. 501-02 & 241-43]. This was almost a 30% reduction. Joe Jenkins disagreed. In response to his request for $3,500.00 as fair value, Safeco replied in a January 26, 2018 email from Rhonda Rutledge that the offer for the value of his work vehicle was "not negotiable" [A.R. 139-140 & 516]. This caused Joe Jenkins much anxiety [6] because he believed "it wasn't right". [A.R. 140]. However, by that time, Safeco had taken Joe Jenkins' vehicle without his consent or permission from the Hitt's Garage Lot in Weston, West Virginia down to Hurricane, West Virginia. [A.R. 137-38, 162]. [7]

When Joe Jenkins learned that his vehicle, which still contained his personal belongings, had been taken without his permission, he requested that either it be paid for or returned to its original location. Safeco did neither. [A.R. 139]. Instead, Safeco maintained dominion and control of Joe Jenkins' vehicle for another full year until Trial and even to this day after the Trial where Safeco was found guilty of conversion they, still have unlawful possession of Joe Jenkins vehicle. [A.R.

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[6] Joe Jenkins testified that when he found out his vehicle and personal belongings had been taken by Safeco without his knowledge and consent, he was 'shock[ed]" and "angered"; [A.R. 120-21].

[7] When Joe Jenkins had returned from pipeline training, he drove past the Hitt's Garage Lot and noticed that his vehicle was missing. He then inquired and learned that his vehicle had been taken by Safeco without his knowledge. [A.R.120]; Mr. Jenkins became frustrated, angry and stressed by the unlawful removal of his vehicle without his permission because he had personal items still in the car and he was hoping to repair the vehicle for his and his Family's use.

565-67].[8] And Safeco still did not offer to pay his medical bills[9] or his other damages incurred from the collision, nor did Safeco provide any explanation for their continuing nasty conduct.

Getting nowhere with Safeco regarding either payment for his vehicle or its return, Joe Jenkins and his Wife had to file a civil action which was done in March 2018. There were three causes of action asserted against Safeco. They were trespass and conversion committed intentionally and with criminal indifference to the rights of Joe Jenkins and done deliberately with malice. [A.R. 526-28]. It was also alleged that Safeco acted in concert with others to accomplish their unlawful conduct.

At the Trial, the Respondents proved to the jury's satisfaction, that Safeco had committed the common law tort of conversion and did so "with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." [A.R. 610]. Some of the evidence presented to the Jury included the following:

1) Safeco unlawfully and knowingly removed Joe Jenkins' vehicle from his possession without his permission or consent and took it 120 miles away to their agent-CoPart-Salvage Lot;

2) Safeco was aware that it had no legal right to possess and remove Joe Jenkins' vehicle as they had not paid for it or received any consent from him and such conduct

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[8] Safeco "out of the blue" they sent a check to Joe Jenkins in the amount of $3,645.52, on January 5, 2019 right before the Trial, presumably for the value of his vehicle but there was no letter or other communication as to why it was sent; this strange event was no doubt recognized by the Jury and the Court as further evidence of guilt and malice; see, Order Denying Safeco's Judgement Not Withstanding Verdict at fn 1. [A.R. 604 at 609].

[9] Joe Jenkins incurred $2,970 in medical expenses and a 3 days of lost wages; he has since been sued in Magistrate Court by the healthcare provider for non-payment of his medical bills.

was unlawful;

3) That Safeco deliberately did not seek Joe Jenkins' permission or consent to remove his vehicle as at no time did they attempt to contact him even though they had his cell phone number since October 17, 2017 [A.R. 113-16 & 505-06] and that of his counsel, including both telephone and email information; [A.R. 507]; such failure to make contact with either Joe Jenkins or his counsel created the strong inference that the failure to do so was deliberate and intentional so that the car could be taken without any interference by Joe Jenkins as Joe Jenkins had indicated he wanted to maintain the vehicle for repair and did not want it moved; [A.R. 139];

4) During the Trial, instead of truthfully admitting to what they did, Safeco attempted to shift the blame for the unlawful removal of Joe Jenkins' vehicle to CoPart and Hitt's Garage; yet Safeco's evidence indicated that such was fabricated which significantly and seriously reduced Safeco's credibility; compare testimony of Aaron Ford, [A.R. 173-244] and Russ Edwards [A.R.289 -98]; Safeco tried to claim that Copart and/or Scrap and Trans were supposed to get permission from Joe Jenkins to take his vehicle but such was not credible as none of Safeco's witnesses, Russ Edwards, David Foster or Brandi Evans[10] supported Safeco's fabricated story; nor did Safeco's documents which indicated that Joe Jenkins had sold his damaged vehicle to Safeco and was insured by Safeco; [A.R. 558, 559, & 537] ;

5) Safeco relied on a entry into their computer record made by Copart employee, Pam Cole who entered a statement on January 15, 2018 at 1:50 p.m. "unsure if customer

[10] Safeco had called each of these witnesses in their case in chief and not as adverse witnesses.

has released the veh[icle]" [A.R. 562]; this entry was then used by Safeco Defendant Rhonda Rutledge to initiate the removal of Joe Jenkins' vehicle, but neither Cole or Rutledge appeared at Trial and both were in the control of Safeco, especially Rutledge who was a named Defendant and did not appear at Trial at any time for any purpose nor was her deposition taken to be read at Trial and no explanation was ever provided to the Court or the jury for her non-appearance; what damaged Safeco's credibility with the Jury and the Court [11] was their reliance on the entries into Copart's computer log by Copart employee Pam Cole that she was not sure Joe Jenkins had released his vehicle to be taken by Safeco yet Safeco could produce no witness, including Ms. Cole, or any document indicating that anyone from Safeco or Copart or anybody had spoken with Joe Jenkins or his attorney about taking his vehicle; such would have been a simple and easy thing to do if Safeco really wanted to get permission, but if you wanted to take the vehicle regardless and you knew Joe Jenkins had already said he wouldn't let it be moved without payment, Safeco conjured up a scheme to get it anyway; later in the same computer log there was an entry that sais Russ Edwards told Copart that the vehicle was released but he denied this and said that he only spoke with Safeco and released it based on Safeco's assurance they had authority; likely, Mr. Edwards spoke with Rhonda Rutledge who was the adjuster in charge but again she decided not to come to the Trial with no

[11] The Trial Court's lack of belief in the credibility of Safeco's defense and its witnesses is evident in its Order denying Safeco's motion for JNWV [A.R. 604], Paragraphs 10, 11, 14, 15, 16, 18, 19, 20, 21 and 22; see also Order denying Safeco's request to reduce the punitive damages [A.R. 617] Paragraphs 1, 2, 3 and 4.

explanation at all; Joe Jenkins denied ever being asked and the only other persons who could possible testify about any contact with Joe Jenkins did not appear under very suspicious circumstances; Safeco never provided any information to the Jury or the Court as to why Pam Cole or Rhonda Rutledge were not called to Trial as a witness;

6) Also on the Log, there was an entry indicating "per Russ at Shop, [Russell Edwards of Hitt's Garage] vehicle is released. not towable. keys. address"; this entry was also made by a non-appearing witness Pam Cole; [A.R. 217-25]; however, when Russell Edwards was called as a witness at Trial, his testimony did not confirm any of the entry notes by the missing witness Pam Cole; [A.R. 289-98]; this significantly and severely eroded the credibility of Safeco and its entire case as it was clear to the Jury and the Trial Court that Safeco was attempting to "pull a fast one" on the Jury and the Court as there were two witnesses who could have confirmed or disavowed this information for the jury, one a former Copart employee, the other, a current Safeco employee who was a named Defendant in the case; neither appeared;

7) Such incredible evidence and lack of evidence to support their position reinforced for the Jury the reasonable inferences that Safeco had concocted a plan to unlawfully convert Joe Jenkins' vehicle for several reasons; one, because they knew liability was absolutely clear and Safeco wanted to reduce their expenses for storage which they eventually were going to be required to pay; Safeco wanted to put pressure on the pending legal proceedings and to put pressure on Joe Jenkins to accept Safeco's demands; both would be improper and be sufficient to satisfy West Virginia Code

§55-7-29 to impose punitive damages for such unlawful conduct which was continued up to the time of Trial and continues to this day;[12]

The evidence presented at Trial clearly presented the classic jury question as to who was telling the truth and why Safeco did what it did or failed to do what any reasonable person would have done if they really wanted to know if Joe Jenkins was releasing his vehicle, that being to give him or his attorney a call. The Jury resolved these factual disputes against Safeco and determined that their conduct was done consciously as opposed to unconsciously, was reckless and with outrageous or criminal indifference to the Jenkins. [A.R. 566]. The evidence was more than clear and convincing, it was overwhelming.

II. Summary of Argument

The two post trial Orders [13] by the Trial Court are thorough and complete and more than sufficient to demonstrate that the Trial Court did not abuse its discretion in denying Safeco judgment as a matter of law or a new trial. Also, Safeco was not entitled to a reduction of the punitive damage award as based on Safeco's conduct. including what the Jury could easily find were deliberate falsehoods in their case, the wealth of Safeco, the need to curtail such conduct from repetition, how long Safeco has continued its unlawful conduct i.e. almost 2½ years and still continuing, attempted concealment of their wrongful conduct, fabrication of evidence in Trial, Safeco's profits from

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[12] Although Safeco had sent an unsolicited check in the amount of $3,645.52 to Joe Jenkins, Safeco did not enter it into evidence at the Trial or otherwise offer any testimony on what it was for or why it was sent unsolicited right before the Trial with the Jordans and Safeco. [A.R. 117-18].

[13] Order Denying Defendants Safeco & Liberty Mutual's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial Regarding Punitive Damages [A.R. 604-617] and Order Denying Defendants Safeco & Liberty Mutual's Motion to Reduce Punitive Damages Award [A.R. 617-625].

holding money that should be paid to an innocent victim of negligent conduct, and other Perrine [14] factors.

III. Statement Regarding Oral Argument and Decision:

Respondents do not believe oral argument is necessary in this case as the only issues raised by Petitioners, are controlled by a clear statutory provision and the facts and legal arguments are adequately presented in the Briefs sufficient for this Court to rule without oral argument pursuant to Rule 18(a)(3) & (4).

However, should this Court determine that it will consider establishing any new Syllabus Points regarding any claimed errors or other issues in this Appeal, especially regarding §55-7-29, then Respondents would request Rule 20 oral argument.

Respondents also reserve filing a sur-rebuttal Brief if new issues are raised in the Petitoners Reply Brief as that Brief should not address any new issues not raised in Petitioners initial Brief.

IV. Standard of Review:

This Court reviews the failure to make a Rule 50(a) motion based on insufficiency of the evidence *de novo.* As such motion must be made with specificity or such party waives any right to assert such grounds on appeal. McInarnay v. Hall, 241 W.Va. 93, 818 S.E.2d 919 (2018).

This Court's standard of review of the Trial Court's denial of a motion for judgment not withstanding the verdict pursuant to Rule 59 is as follows:

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[14] Perrine v. E.I. du Pont de Nemours and Co., 225 W.Va. 482, 552, 694 S.E. 2d 815, 885 (2010).

> "We must also examine the circuit court's overall decision to grant the motion for a new trial. "This Court reviews the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard[.]" "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." "[A] trial judge should *rarely* grant a new trial.... Indeed, a new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." McInarnay v. Hall, supra, at 98, 924.
>
> "Our cases have made clear that "[a]n appellate court will not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of the evidence." Sydenstricker v. Mohan, 217 W.Va. 552, 557, 618 S.E.2d 561, 566 (2005).

This Court reviews a punitive damage award sustained by the Trial Court to determine if such award is consistent with West Virginia Code §55-7-29. If it is consistent with the Statute and the evidence presented at Trial, then the jury's verdict should be affirmed. The review of the evidence is the abuse of discretion standard giving deference to the jury's weighing of the facts and credibility and Trial Court's exercise of discretion in upholding the verdict considering the trial court received the evidence and assessed the credibility of the witnesses. W.Va. Code §55-7-29. The Perrine factors reviewed by this Court is no longer required as the Statute is the Legislatures pronouncement regarding the limits on punitive damages including the permissible ratio, of "four times compensatory **or $500,000, whichever is greater.**" [15] (emphasis added).

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[15] Perrine, *supra.*

V. Argument:

A) Safeco Failed to Renew Its Motion for Judgment as a Matter of Law at the Close of All the Evidence Pursuant to Rule 50(b) and Thus Has Waived the Right to Seek Review Based on Insufficiency of the Evidence.

Safeco failed to move pursuant to Rule 50 for a judgment as a matter of law at the close of all the evidence, both after the first phase of the Trial [A.R. 391 & 397]. Similarly after the second phase of the Trial relating to punitive damages, Safeco made no request under Rule 50 for judgment as a matter of law regarding the sufficiency of the evidence to support a punitive damage award. [A.R. 481]. Such motions were mandatory prior to the Trial Court submitting the case to the Jury in order to preserve any alleged errors by the Trial Court. Such failure prohibits Safeco from challenging the verdict on appeal, including challenging the punitive damage award on sufficiency of the evidence grounds as the Trial Court was not given the opportunity to pass upon such matter before the Jury rendered its verdict. McInarnay , *supra*, at 99, 925. [16]

B) The Trial Court Acted Appropriately When it Denied Safeco's Motion for Judgment Not Withstanding the Verdict as There was More Than Ample Evidence That the Jury Could Find Safeco's Conduct Violated the Punitive Damage Statute.

Assuming *arguendo* that Safeco properly preserved its right to challenge the Jury's punitive

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[16] Safeco belatedly requested the Trial Court to decide, after the Jury had received the case on punitive damages, if there was sufficient evidence for jury to consider punitive damages under §55-7-29(b)(2) "If the jury finds ***during the first stage of a bifurcated trial*** that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages."; Safeco failed to make such request after the first stage of the Trial when the Jury found compensatory damages and tried to assert it at the end of the second stage after the punitive damage evidence had been presented to the Jury and the Jury had already started deliberating; therefore such request, albeit not a proper Rule 50 motion regarding insufficiency of the evidence, provides no cover for Safeco in failing to properly invoke Rule 50 as required at the close of all the evidence and before the case is given to the jury for deliberation as it was too late for Respondents to provide additional evidence if necessary to support their entitlement to punitive damages as that phase of the Trial had concluded without any such motion by Safeco asserting, with specificity, insufficiency of the evidence.

verdict,[17] the Trial Court acted appropriately within its discretion when it denied Safeco's Rule 59 Motion for Judgment Notwithstanding the Verdict as there was more than ample evidence for the Jury to find that Safeco's conduct was with "actual malice toward [the Jenkins] or a conscious, reckless and outrageous indifference to the health, safety and welfare of others" West Virginia Code §55-7-29(a). The weighing of the evidence including the determination of the witnesses credibility is the sole province of the Jury and such decisions will not be overturned unless manifestly unjust. Alkire v. First Nat. Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996). In Alkire, this Court in reviewing the trial court's granting of a judgment as a matter of law setting aside the jury's punitive damage award, stated:

> "Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the Bank to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could have reached a verdict against the Bank on the issue of punitive damages?"

This Court held "NO" that "the facts and inferences do not point so strongly and overwhelmingly in favor of the Bank to the extent that no reasonable jury could have reached a verdict against the Bank." *Id.* at 129, 129. Coincidentally, the Alkire case centered around the concealment and subterfuge by the Defendant Bank much the same as in this case with Safeco. In Alkire, credibility was a significant factor as it was in this case with Safeco all of which was the province of the Jury to reconcile. That is why this Court stated in Alkire that the "credibility of witnesses will not be considered, conflicts in testimony will not be resolved, and weight of evidence will not be evaluated." The decisions are best left to the Jury to resolve as they viewed the testimony and as a collective group sworn to do justice, the Jury's decision is or should be sacrosanct. *Id.* at

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[17] Respondents challenge such preservation of error as set forth in Argument V.(A).

128. 128. The same is true in this case at Bar. The Jury found that Safeco had acted with the requisite actual malice or a conscious, reckless and outrageous indifference. Such matters are very difficult to be gleaned from a cold record on appeal.

As the Trial Court determined in its Order[18] there was no dispute in the evidence that Safeco was guilty of conversion which the jury found against them. Conversion is:

> "Any distinct act of dominion wrongfully exerted over the property of another, and in denial of his rights, or inconsistent therewith, may be treated as a conversion and it is not necessary that the wrongdoer apply the property to his own use." Rodgers v. Rodgers, 184 W.Va. 82, 399 S.E.2d 664 (1990) [Syl. pt. 17].

Safeco has not appealed the jury's determination that it was guilty of conversion.[19] Importantly, the Trial Court made a thorough analysis of the evidence adduced at Trial and the Trial Court's evaluation of the evidence is given great weight as the Trial Judge actually heard the testimony and observed the demeanor of the witnesses. A trial court's ruling in denying a motion for new trial "is entitled to great respect and weight". McInarnay, supra, at 98, 924. The Trial Court found that there were numerous facts, some of which were uncontested, and others which required the Jury to determine as to which witnesses they believed and those they did not. That included the uncontroverted facts of Mr. Jenkins who advised Safeco that he wanted to retain his vehicle and did not want it towed or moved. [A.R. 608-09]. Also, he did not want it moved until he was paid for it. *Id.* The Trial Court also identified various evidence that the jury decided adversely to Safeco such as:

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[18] "Order Denying Defendants Safeco & Liberty Mutual's Motion of Judgment Not Withstanding the Verdict and Motion for New Trial Regarding Punitive Damages"

[19] It is likely that had a motion been made the finding of conversion against Safeco likely would have been found as a matter of law by the Trial Court.

1) Why Safeco unlawfully took possession of Joe Jenkins' vehicle without contacting him or his counsel when they had been communicating with both for some time and possessed the contact information for both, including Joe Jenkins' cell number?

2) Whether Safeco's motive for removing the vehicle without seeking permission was to pressure Joe Jenkins to sign documents permitting Safeco to resolve his property damage claim for less than what he believed was the fair market value?

3) Whether Safeco's witnesses were credible and whether the notations made in Safeco's files were accurate and credible?

4) Whether Safeco failed to call material witnesses that were within their control including Defendant Rutledge who never appeared for Trial and no explanation was give why she did not appear for Trial and testify or testify by way of deposition?

5) Finally, the Trial Court indicated that the "overall credibility of witnesses and Safeco's defense itself" was at issue for the Jury to determine whether it was bonafide. *Id.*

The Trial Court recognized that the determination of such issues were "extremely important" especially with regard to whether the "witnesses were deliberately not telling the truth." *Id.* These are powerful statements for a Trial Judge to make in an order denying post trial motions, but such was very apparent from the evidence before the Jury. Such evidence and the reasonable inferences to be drawn therefrom, lead the Jury in this case to the following:

(1) that Safeco's motive in unlawfully removing Joe Jenkins' vehicle without permission was improper and was an effort to pressure Joe Jenkins into doing what Safeco had demanded; and,

(2) such a finding would clearly result in the Jury determining that Safeco acted maliciously and consciously for an unlawful purpose buttressed by the actual unlawful conversion of Joe Jenkins' vehicle. The intentional and reckless conduct of Safeco was very obvious to the Jury, as even after Joe Jenkins requested that his vehicle be returned, Safeco refused, and has continued to refuse up until the present time. Such conduct can easily be found by a jury

> to be worthy of punitive damages, as such conduct is far more egregious than that in the Alkire[20] case which was cited by Safeco in its Brief, and where this Court upheld the jury's assessment of over $1,000,000.00 in punitive damages against the First National Bank of Parsons when it deliberately failed to tell a former customer that the deposit, which initially was believed to be stolen by him, had been found in the mail slot several years later. Alkire *supra* at 126,126.

Unfortunately for Safeco, each day they continue to keep Joe Jenkins' vehicle in their possession without returning it and with no legal right to maintain or keep it, is a separate conversion and Safeco is liable for further action for its continued conversion from the date of the jury's verdict until the car is returned or another acceptable resolution is consummated.

Safeco seems to place significant reliance on their setting in motion the unlawful taking of Joe Jenkins' vehicle with the actual taking being done by their agents, CoPart and Scrap & Trans. Such gives Safeco no safe harbor. Respondents alleged civil conspiracy in this case by the concerted action and conduct of Safeco with its agents, who without Safeco having directed them to remove Joe Jenkins' vehicle, the unlawful act would not have occurred. Moreover, the jury was well within its province under the evidence produced to have rejected Safeco's argument that it did not contact Hitt's Garage and advise them that they had authority and permission to remove the vehicle. Such was confirmed by the documents produced in evidence where it indicated that Joe Jenkins was Safeco's insured which was false, and that Safeco was the owner/seller of the vehicle, which was false, and that Joe Jenkins was also a customer indicating he had sold the vehicle to Safeco, which was false. [A.R. 559, 558 & 537]. These were characterized as "clerical errors" by Safeco witness Aaron Ford, but the Jury did not have to accept such explanation after the fact excuse and they did not accept it as it was incredible. The Jury could easily conclude that such was done intentionally

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[20] Alkire, *supra*.

to deceive Hitt's Garage when Safeco's agents came to remove the vehicle, especially considering the lack of credibility of Safeco's witnesses, documents and their failure to call material witnesses within their control.[21]

The evidence supporting the Jury's punitive damage verdict was overwhelming. The Trial Court understood and expressed such in his Orders denying judgment as a matter of law and for a new trial. This Court should rely on the findings of the Jury and the Trial Court and reject Safeco's request assuming that such asserted error was properly preserved below, which it was not.

C) Safeco Confuses Admission of Relevant Evidence Pursuant to the Rules of Evidence with the Elimination of a Statutory Cause of Action by West Virginia Code §33-11-4a.

Safeco confuses Respondents' introduction of relevant evidence of Safeco's conduct with asserting a statutory cause of action for third-party bad faith under the UTPA[22] which has been eliminated by the Legislature in West Virginia Code §33-11-4a. In the case before this Court, Safeco was not alleged to have committed bad faith conduct under the UTPA, but rather, was accused of committing long standing torts permitted under the common law of this State to wit: trespass, conversion and intentional infliction of emotional distress. [A.R. 526]. Safeco seems to miss this important distinction regarding the abolishment of third-party bad faith with the law governing the conduct of insurers doing business in this State as relating to third party claims. While there is no longer a cause of action in circuit court for violation of the UTPA in third party cases (non insureds),

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[21] Respondents did not seek a missing witness instruction McGlone v. Superior Trucking Co., 178 W.Va. 659, 363 S.E.2d 736 (1987), but one would have been warranted under these circumstances as Rhonda Rutledge was not a resident of West Virginia and she was a Safeco employee; she was under the control of Safeco so here non appearance as an involved material witness and a named Defendant with no explanation was very telling to the Jury.

[22] West Virginia Unfair Trade Practice Act, §33-11-4, as amended.

the insurance carrier must still follow the law and violating such laws with perceived impunity may make such conduct admissible in a civil action for other torts. Smith v. Scottsdale Ins. Co., 40 F.Supp.3d 704, 714 (ND W.Va. 2014)["Unfair claim settlement practices ***715** by insurers are still illegal; it was simply the forum for relief that was changed."].

Safeco was required to follow the UTPA when adjusting any claim in this State including the Jenkins' claim, but the Jenkins could not file a civil action based on such violations of the UTPA which their Complaint did not allege. The causes of action alleged against Safeco were legitimate common law torts, which if Safeco had not committed, there would have been no civil action. However, the Statute changing the remedy does not eviscerate the Rules of Evidence as to admissibility of relevant evidence.

However, there are several cases that Safeco should have considered, both by this Court and Federal District Courts sitting in the State of West Virginia that have recognized this distinction. Probably the most important case in this regard is Michael v. Appalachian Heating, LLC, 226 W.Va. 394, 701 S.E.2d 116 (2010). In Michael this Court held that the State Human Rights Act ("HRA") permits a direct action by a non-insured against an insurance company if that insurance company's claims handling practices are discriminatory, and therefore, a violation of the HRA, irrespective of §33-11-4a. *Id.* at 402-03, 126-25. This Court found that the two Statutes, the HRA and the UTPA were not mutually exclusive, but rather, the HRA did permit a third-party action for insurance claim handling matters if the offending conduct fell within the broad scope of discrimination. Likewise, in the case at Bar the Statute, §33-11-4a, does not alter or restrict the Rules of Evidence or other recognized torts. The Statute most definitely does not confer immunity as to do so would have significant Constitutional issues.

For example, there would be a separate permissible tort action for assault and battery involving an insurance carrier's employee. Any of the common law torts perpetrated by a person while handling a claim are not excluded or barred by the 2005 Statute abolishing the statutory UTPA cause of action. If as Safeco argues in this matter, all such torts were barred by the adoption of §33-11-4(a), such would be a grant of immunity against all common law and statutory causes of action, which the Michaels case demonstrates is not correct, and when this Court looks at the bigger picture, it is clear that abolishing the statutory right to a third-party claim could not possibly extinguish all other statutory or common law claims that could arise during the claims process. Would defrauding a third-party claimant not be actionable? Would stealing property from a third-party claimant during a claims adjustment not be actionable? The issue that must be focused is whether the cause of action is for violating the UTPA, or is the cause of action separate and distinct from the UTPA.

In the examples provided by Respondents in this Brief and the conduct by Safeco that resulted in conversion, such conduct is clearly distinct even though it occurred during the adjustment of a claim. If Safeco had not converted the property of Joe Jenkins under the common law, there would have been no viable cause of action against Safeco. However, once Safeco committed that common law tort, how they did it and why they did it, including conduct that may be characterized as claims handling, is relevant to prove the case, especially when scienter and state of mind for punitive damages purposes was a necessary and relevant requirement for Respondents to prove for entitlement to punitive damages; and the Rules of Evidence control what evidence is relevant and probative for admission purposes not §33-11-4a. Safeco was entitled to a cautionary instruction if it desired, advising the Jury that evidence relating to Safeco's claims conduct could only be considered for purposes of state of mind, motive, whether Safeco's conduct was reckless, intentional

or malicious and other issues necessary to prove Respondents' case. However, Safeco made no such request to the Trial Court.

Accordingly, the Trial Court's Order Denying Safeco's Judgment not Withstanding the Verdict and For a New Trial Regarding Punitive Damages was detailed and complete and did not constitute an abuse of discretion or violation of any clear legal standard.[23]

Finally, if Petitioners' argument that §33-11-4(a) impliedly prohibits evidence of claims handling conduct in any matter where the cause of action is separate and distinct from the UTPA, then such statutory action would likely be unconstitutional under the separation of powers constitutional provision as it is this Court's province to determine the admissibility of evidence in trials pursuant to its Rule Making authority such as the Rules of Evidence promulgated by this Court. Mayhorn v. Logan Medical Foundation, 193 W.Va. 42, 454 S.E.2d 87 (1994), [Syl. pt. 6["...[t]he rules of evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion. Therefore, to the extent that [MPLA}...indicates that the legislature may by statute determine when an expert is qualified to state an opinion, it is overruled."].

For all of the above reasons, this Court should reject Safeco's assertion that the Trial Court's denial of their Motion for Judgment Not Withstanding the Verdict and for New Trial be reversed, assuming that such error was properly preserved.

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[23] Another case construing the abolishing of the third-party bad faith statutory cause of action is Salmons v. State Farm Mutual Automobile Insurance Company, 2013 WL 2462190 (W.Va. 2013) where this Court held that §33-11-4(a) prevented a UTPA claim against State Farm where the third-party claimant happened to be insured by State Farm as was the tortfeasor; this Court stated that merely being insured by the same insurance carrier is not the same as being a first party claimant; the Court implicitly recognized that the only causes of action prohibited by the Statute were those premised upon the UTPA as authorized in Jenkins v. J.C. Penney Cas. Ins. Co., 167 W.Va. 597, 280 S.E.2d 252 (1981) granting an implied cause of action under the UTPA.

D) The Trial Court Properly Denied Petitioner's Request for a Reduction of the Punitive Damages As It Was Sanctioned by the Clear Language of the Statute; Alternatively the Punitive Damage Verdict Was Not 60 Times Greater Than Respondents Compensatory Damages.

This Assigned Error should be summarily rejected as it has no support, legally or factually. The Petitioners failed to even cite the recently enacted Statute regarding punitive damages which controls this issue assigned as error by Petitioners.[24] The new Statute, assuming its constitutional,[25] provides when and how punitive damages may be awarded in trials in this State. It also provides in subsection (a) the level of proof, i.e. clear and convincing evidence, necessary for a jury to consider in awarding punitive damages. The Statute also designates the standard of conduct that must be found by the jury for an award of punitive damages to be granted. The standard of conduct required is "actual malice toward the plaintiff **or** a conscious, reckless and outrageous indifference to the health, safety and welfare of others." (emphasis added).

In this case, the Jury was properly instructed on the necessary level of proof and standard of conduct to award punitive damages and they clearly determined by separate interrogatories, i.e. questions, that Safeco by clear and convincing evidence, had either acted with actual malice towards the Respondents, or demonstrated a conscious, reckless and outrageous indifference to their health, safety and welfare. [A.R. 610]. The Trial Court's Order denying a reduction in the amount of punitive damages stated that the evidence "clearly supported the Jury's findings regarding the assessment of punitive damages against Safeco" and that it complied with the new Statute. [A.R. 622]. The Court also addressed Safeco's reliance upon various cases predating the new Statute such

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[24] West Virginia Code §55-7-29, Limitations on Punitive Damages, was enacted by the Legislature to take effect June 8, 2015.

[25] Petitioners made no arguments assailing the constitutionality of the punitive damage statute.

as Garnes, TXO [26] and Alkire, *supra*. The Trial Court even cited a recent Federal District Court case interpreting the new Statute, Figaniak v. Fraternal Order of Owl's Home Nest, 2017 WL 4767168 (N.D. W.Va. 2017), but there is also a more recent and focused interpretation of §55-7-29 by Federal District Court Judge Kleeh in the case of Jersey Subs, Inc. v. Sodexo America, LLC, 2019 WL 208882 (N.D. W.Va. 2019) where Judge Kleeh was required to determine whether a punitive damages claim by a litigant would likely exceed $75,000.00 for purposes of diversity jurisdiction and he held as follows:

> "Considering the ***minimum cap*** on claims for punitive damages [in West Virginia] is $500,000.00 and plaintiff's demand for reputational harm of $20,000.00..., the amount in controversy is satisfied. *Id.* at *3

In essence, Judge Kleeh interpreted our recent punitive damages Statute and determined that the language in subsection 55-7-29(c) stating that the award "may not exceed the greater of four (4) times the amount of compensatory damages **or** $500,000.00 ***which ever is greater.***" (emphasis added) established a floor that an award of $500,000 is authorized by the Statute regardless of the amount awarded for compensatory damages. In other words the statutory phrase ***"which ever is greater"*** establishes the amount that is both Constitutional and statutorily available in any case where punitive damages are returned. (emphasis added). The language "which ever is greater" is clear and unambiguous and must be applied not construed.

There can be no other interpretation of §55-7-29(c) that whether the compensatory damages are $1.00 or $124,999.99, the punitive damages can be up to $500,000.00 without violating the Statute. Of course, if four times the compensatory damages are greater than $500,000.00, then it can

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[26] Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991); TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992).

exceed that minimum cap as found by the District Court as it is the floor or minimum as Judge Kleeh found and not a ceiling. Any other interpretation by a court would be legislating and not following the clear intent of the Statute. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the Courts, and in such case it is the duty of the courts not to construe but to apply the statute." State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W.Va. 137, 107 S.E.2d 353 (1959) [Syl. pt. 5]. §59-7-29 is a plainly worded statute that clearly evidences the Legislatures intention, and therefore, should not be interpreted by this Court. Huffman v. Goals Coal Co., 222 W.Va. 724, 729, 679 S.E.2d 323, 328 (2009) (internal citations omitted).

Only if this Court would find the Statute unconstitutional should it attempt to give it an interpretation that would avoid striking the Statute as being violative of the Constitution. However, no such argument or claim was proffered by Safeco and this Court should not undertake to review such a weighty matter without an appropriate argument being presented and notice given to all necessary parties. Clearly, the Trial Court was correct in its determination that the verdict of the Jury complied with the Trial Court's instructions which followed the new Statute, including subsection 29(c), considering the clear language of that subsection. Perhaps this is why Petitioners totally ignored an analysis of §55-7-29, even though that is exactly how the Trial Court instructed the Jury as required, and it was discussed *ad nauseam* at Trial by the Parties with regard to the Instructions and the Verdict Forms.

Alternatively, it is clear that Safeco itself believed that the compensatory damages of $56,928.98 awarded to the Jenkins in the first Trial against the Jordans, were to be considered by the Safeco Jury in determining their punitive damage. This is obvious as Safeco's Trial counsel advised

the Jury several times that the Jenkins had already received their compensatory damages in the first Trial. [A.R. 107-09 & 448-450]. Safeco detailed each item of compensatory damages the Jordans received in the first Trial totaling almost $60,000. *Id.* The Trial Court noted this in both of its Orders in detailed footnotes. [A.R. 612 & 623 at fn 2]. The Trial Court actually went back and listened to the Court reporter tape recording to support its footnote in its Orders, probably because it was so important to the issue raised herein.

Also, such statements were impactful on the Jury and was a means by Safeco to reduce the Jury's award of compensatory damages, which it did, but such invited error should not be used to argue that the Jury's punitive award was 60 times the compensatory damages when Safeco itself asked the Jury to use the prior award of compensatory damages as a guide. To allow such tactics would be blatantly unfair to Respondents.

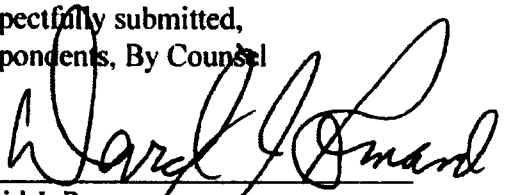
Accordingly, this Court may decide to affirm the Jury's punitive damage award as did the Trial Court based on the Jury being aware and considering the prior award of compensatory damages equal to the awarded punitive damages in the second Trial as truly the Jury got it right. By alternatively deciding the validity of the punitive damage award on this basis allows this Court to avoid construing the Statute as was necessary in the Jersey Subs case decided by Judge Kleeh.

There was no error by the Trial Court in denying Safeco's request to reduce the punitive award as such award was clearly within the mandate of the Statute and otherwise proper considering the compensatory award in the first Trial.

VI. Conclusion

For all of the above reasons the Orders of the Trial Court Denying Defendants Safeco & Liberty Mutual's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial Regarding Punitive Damages and Order Denying Defendants Safeco & Liberty Mutual's Motion to Reduce Punitive Damages Award should be affirmed by this Court.

Respectfully submitted,
Respondents, By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 19-0899

SAFECO INSURANCE COMPANY OF AMERICA and
LIBERTY MUTUAL INSURANCE COMPANY.
Defendants Below, Petitioners

v.

JOSEPH M. JENKINS and STEPHANIE D. JENKINS,
Plaintiffs Below, Respondents

CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 18th day of February, 2020, I served the foregoing "RESPONSE BRIEF OF RESPONDENTS JOSEPH M. JENKINS AND STEPHANIE D. JENKINS" upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to them at their office addresses:

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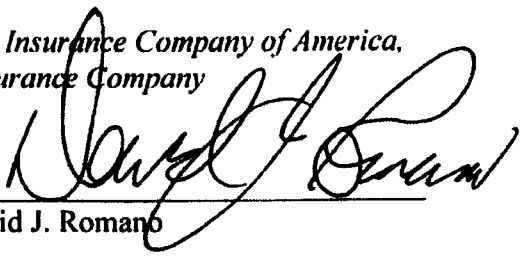

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