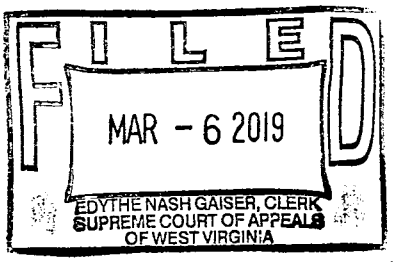
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



UNITED FINANCIAL CASUALTY COMPANY,

Defendant Below/Petitioner,

v.

CARL LONG,

Plaintiff Below/Respondent.

CASE NO. 18-1097

PETITIONER'S BRIEF

Appeal Arising from Orders Entered on
June 1, 2018, June 13, 2018, June 28, 2018, and
November 6, 2018 in Civil Action No. 16-C-116 in
the Circuit Court of Jefferson County, West Virginia

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ASSIGNMENTS OF ERROR

I. IN THIS PROPERTY DAMAGE CASE, THE CIRCUIT COURT ERRED BY ALLOWING RESPONDENT TO CLAIM SPECULATIVE LOST BUSINESS INCOME DAMAGES WHERE RESPONDENT ADMITTED HIS ESTIMATES WERE "SPECULATION" AND RESPONDENT'S EXPERT ACCOUNTANT ADMITTED HIS ESTIMATES DID NOT FOLLOW AN ACCEPTED METHODOLOGY OR DETERMINE CAUSATION.

II. IN THIS PROPERTY DAMAGE CASE, THE CIRCUIT COURT ERRED BY ALLOWING RESPONDENT TO PRESENT IRRELEVANT EVIDENCE AND INFLAMMATORY ARGUMENT CONCERNING THE SUBJECT ACCIDENT, INCLUDING "JANE DOE FLEEING" THE ACCIDENT SCENE, TO SUPPORT HIS ANNOYANCE AND INCONVENIENCE DAMAGES RELATED TO LOSS OF USE OF HIS DUMP TRUCK DURING THE REPAIR PERIOD.

STATEMENT OF THE CASE

On March 29, 2016, an automobile driven by an unknown "Jane Doe" driver struck a 2005 Freightliner dump truck owned and operated by Respondent, Carl Long. After the accident, the unknown "Jane Doe" driver fled the scene. [0018-0025] She has not been identified. Her liability for the accident is not disputed. Respondent was not injured in the subject accident. His dump truck was significantly damaged and deemed a total loss. [0018-0025, 1325, 2703]

On May 20, 2016 (less than two months after the subject accident), Respondent filed a law suit against Jane Doe alleging negligence which caused damage to his 2005 Freightliner dump truck and associated business losses. He did not allege personal injuries or claim associated damages. [0018-0025, 2703] Specifically, Respondent sought to recover the fair market value of his dump truck on the date of the accident and his lost business income associated with his "down time" while he replaced the dump truck. Petitioner, United Financial Casualty Company, insured Respondent under an insurance policy which provided uninsured motorist (UM) insurance benefits. Accordingly, Respondent served Petitioner with his law suit as a notice defendant under West Virginia Code § 33-6-31(d). [0018-0025, 1325]

On June 6, 2016, Respondent advised Petitioner that "the best course will be for [Respondent] to retain an accountant to help [Respondent] document what his losses are, both past and future, in light of his inadequate replacement truck which, while it helped him retain his client base, it has not been nearly as efficient and it costs more to run." Respondent further advised Petitioner that he "needs to get through his busy season, and not miss any more work, to minimize his damages under his UM policy. As a result, [Respondent] will not be forwarding [Petitioner] comps or a demand package until late summer or early Spring, once [Respondent has] gathered the necessary information." [2197]

On August 4, 2016, Respondent filed discovery responses disclosing he was without a dump truck from March 29, 2016 to April 22, 2016. He purchased a brand new 2016 Peterbilt replacement dump truck on April 13, 2016 for $164,138.82. [0055-0084] He claimed the fair market value of his 2005 Freightliner dump truck on March 29, 2016 was $75,000. He also claimed $16,245.21 in 2016 lost business income, $41,500 in future lost business income, and additional future damages associated with his choice of a brand new replacement truck, including the $49,138.82 cost of trading it for another customized dump truck (a 2017 Freightliner costing $147,554) and $12,652.75 in interest on the initial loan. [0057-0061]

On October 28, 2016, Respondent filed supplemental discovery responses to provide several documents omitted from his original responses. [0085-0098] In these supplemental discovery responses, Respondent alleged the fair market value of his 2005 Freightliner dump truck on March 29, 2016 was $80,000, exclusive of taxes and fees. He alleged he was without a dump truck for nineteen (19) days in April 2016 and claimed he lost $17,142.88 in business income during this time. He also alleged his total 2016 lost business income was $34,638.28. Respondent

further stated the future damages claimed in his August 4, 2016 discovery responses "were only projections." [0085-0087]

On February 10, 2017, Respondent gave deposition testimony concerning his lost business income claims. When questioned about the various factors which affect his dump truck business, Respondent testified:

Q: Do you have work for your truck every day of the week?
A: I . . . no, I do not have work for every day of the week.
Q: So how many days per week would you typically have work for your truck?
A: That's impossible to tell.
Q: Why?
A: Because, again, you're looking at every day of the week working. You have rain. I have office work. I have estimates. I have various jobs that I do that don't require the truck, that don't require me to haul; and you may go for a stretch where you run for a month straight every single day, and they you may go for two weeks where you're catching up on paperwork, you're catching up on maintenance, you're catching up on taxes and tags and every other issue that you have to deal with that you can't deal with when you're working.
Q: So, are you able to tell me whether you would have earned money on March 31, 2016?
A: No, I cannot tell you if the truck was going to or was not going to run.
Q: And is that true for April 1?
A: It's true for every day.
Q: Every day that your truck was out of service?
A: Every day of the year.

Respondent's Deposition, pg. 71, line 13 – pg. 72, line 15 (emphasis added) [4034-4035].

When questioned about how he determined the work he lost for his dump truck business and, thus, his lost gross receipts, Respondent testified:

Q: Now, can you tell me, from looking at the calendar, of those days, March 30, 2016 through April 27, 2016, which days you had work for your truck?
A: No, I cannot tell you that.
[. . .]
Q: Can you tell me, from any of the records that you have produced or any of the records that you have, what type of work you would have had for your truck between March 30. 2016 and April 27, 2016?

A: I could go back and figure that up, yes.
Q: How would you do that?
A: Well, some of the jobs that I did after the fact were jobs I could have done then, and I wouldn't have had to turn other work away that came later because I was catching up on what I didn't do in the spring.
Q: Have you tried to sit down and figure out what jobs you would have been expecting to do between March 30, 2016 and April 27, 2016?
A: No, because at that time, I was trying to get my business back up and running. That's what my focus was.

Respondent's Deposition, pg. 82, line 10 – pg. 83, line 10 (emphasis added) [4045-4046].

Finally, when questioned about how he determined his lost business income, Respondent admitted he could only speculate:

Q: Do you have a record of the jobs that you had lined up [March 29 to April 28, 2016]?
A: I told you no.
[. . .]
A: And how would you know what you're going to make off each job? What if you have a problem on the job and you get delayed and you can't go to the next job, or what if this job cancels, or what if, hey, I got gone early and I got two jobs in today and I made even more than last year. **There is absolutely no way to know that.**
Q: You could have made more or you could have made less in 2016.
A: Exactly. There is no way to verify that.
Q: There is no way to know without speculating.
Ms. Davis [Respondent's counsel]: Right.
Q: Right?
A: Exactly.

Respondent's Deposition, pg. 233, line 16 – pg. 234, line 10 (emphasis added) [4196-4197].

Q: So, you can only speculate about which of these days [March 30, 2016 to April 27, 2016] would have been conducive to spreading gravel?
A: Just like you, yes.
[. . .]
Q: And you don't know where you would have been working during that April 2016 time frame?
A: No, and I don't know what I would been doing. It could have been hauling to a drain field. It could have been putting in a new road that doesn't require rain.
Q: And some of those jobs would be more profitable than others?
A: Yeah.

Q: And there is no way to know how profitable the jobs you would have had during that time frame would have been?
A: No.

Respondent's Deposition, pg. 254, line 13 – pg. 256, line 22 (emphasis added) [4217-4219].

On April 14, 2017, Respondent disclosed an accountant, Chad Lawyer, CPA, as an expert witness to estimate his damages. [1654-1657] After filing his 2016 tax returns in May 2017, Respondent disclosed Mr. Lawyer's damage calculations. Mr. Lawyer originally calculated three areas of "economic loss" totaling $104,686 for Respondent's business: 1) loss of net profit in 2016 ($18,428); 2) loss of net expenses on the 2016 Peterbilt ($64,064); and 3) loss on the sale of 2016 Peterbilt ($22,194). [1661-1666]

On July 18, 2017, Mr. Lawyer gave deposition testimony concerning Respondents' alleged damages. [4628] He significantly reduced his economic loss calculations from $104,686 to $82,945 by conceding his estimated depreciation on the 2016 Peterbilt replacement truck ($21,945) duplicated damages Respondent claimed for loan payments ($30,021) and the loan payoff ($25,880) on that truck. Thus, Mr. Lawyer revised his expert opinion to claim Respondent sustained $82,741 in economic loss, not $104,686 in economic loss, as a result of the subject accident. [4727-4743] Following Mr. Lawyer's deposition testimony, Respondent amended his Expert Witness Disclosure to indicate "Mr. Lawyer is expected to testify that [Respondent's] business losses from the loss of his truck were $82,493." [1753-1756]

On July 18, 2017, Mr. Lawyer also gave deposition testimony concerning the basis for his evaluation of Respondent's lost business income claims. When questioned about the various factors which affect Respondent's dump truck business, Mr. Lawyer testified:

Q: What other factors might impact [Respondent's] gross sales?
A: I would think in his business weather could certainly affect it. You know, the economy can affect anything. That's probably the – probably the two biggest ones that jump to mind.

Q: His ability to have time to work?
A: Yes, sir
Q: Who calls him? I mean, the number of customers who call him?
A: Yes, sir.

Chad Lawyer, CPA July 18, 2017 Deposition, pg. 29, line 24 – pg. 30, line 9 [4656-4657].

Q: [. . .] What factors influence a business' gross receipts?
A: I could be various factors, you know, amount of work, weather, you know, traffic even. In – in Mr. Long's case, road construction the economy, Mr. Long's health, I mean, any of those things.
Q: So, all those could, factors you've described, could make Mr. Long's gross receipts for his business go up or down in a given year?
A: Yes, sir.
Q: Would you agree with me that all those factors you've described have nothing to do with the motor vehicle accident on March 29 of 2016?
A: I would agree with that.

Chad Lawyer, CPA July 18, 2017 Deposition, pg. 67, line 17 – pg. 68, line 6 (emphasis added) [4694-4695].

Ultimately, Mr. Lawyer admitted he did not consider these factors and did not actually determine the cause of any lost business income, rather he simply assumed the cause without any analysis:

Q: So, if I understand what you're telling me here, you were asked to calculate Mr. Long's business losses attributable to the accident on March 29 of 2016?
A: As a result of the accident and then considering the fact that, you know, he was without a truck for a period of time, and according to Mr. Long, the – the truck that he had, replacement truck was not the identical, you know, truck that he had.
Q: Well, so I'm wondering how did you go about determining – So you determined certain business losses for the year 2016, is that correct?
A: Yes, sir, based on the average of prior years.
Q: How did you determine that all of those losses that you calculated were a result of the accident itself as opposed to some other factor?
A: The – I did not determine that, but what I did – what I did in my calculation was use a five-year average of gross sales and a five-year average of gross profit percentage. Again, all things being consistent, there was no, you know, no outside forces that I was aware of in 2016 that would've – that would've caused his business to decline. You know, there's

no terrorism, there's no, you know, anything like that, no – no environment issues that – that came up.

Q: Did you ask Mr. Long about what other factors might've impacted his income in 20 – or his gross receipts, or his business income in 2016?

A: We discussed – we discussed the – we discussed his business and – and his, you know, his history. You know, Mr. Long felt that his business would've been the same or greater. If you look at historical numbers his – his gross sales have actually, you know, with the exception of one year I think was done, the – the gross sales have slowly increased, which in my mind is consistent with what, you know, how our economy has grown. It's – it's not – not fast, but certainly things cost more, so I would expect if a load of gravel cost him $10.00 more in 2016 that his income would go up by that, you know, you're not going to take a loss, you're going to charge it and pass it through to the customer. So, I would expect numbers to – to continue to go up.

Q: So, if I understand what you said, you said **Mr. Long felt his business would have been the same or would've continued to do what it had done '15 to '16, is that what your understanding is?**

A: Yeah, that's –

Q: Okay. **Did you do anything to verify that information from Mr. Long?**

A: No, sir.

Chad Lawyer, CPA July 18, 2017 Deposition, pp. 57-59 (emphasis added) [4684-4686].

Q: And that $18,428.00 [reduction in gross profit] would also include factors that are unrelated to the accident?

A: Yes, sir.

Q: So how much of the $18,428.00 in business loss that you've calculated for 2016 would be related solely to the accident?

A: **I don't know the answer to that,** but my calculation is again, comparing to what a normal – what an average year was versus what actually happened, so the actually happened includes the 20 – 20-day period where there was no work or no revenues. So I – I'm simply doing the math, A minus B equals C, that's what I – determines losses.

Q: And you're assuming that there was a loss of revenue because the truck was out of service for that period of time in April?

A: Yes, sir.

Chad Lawyer, CPA July 18, 2017 Deposition, pp. 78-79 (emphasis added) [4705-4706].

Q: Why did Mr. Long earn less money in 2016 – or I should say why did he have less gross receipts in 2016 than 2015 when he worked one more day with his truck?

A: **I do not know the answer to that** except that Mr. Long also does work other than with his truck, so he would – he would have his own equipment to generate revenue.

Chad Lawyer, CPA July 18, 2017 Deposition, pp. 81-82 (emphasis added) [4708-4709].

Q: So, you can't assume that the loss is because of the number of days the work, the truck was worked, right?
A: I would agree with you on that point. [. . .]

Chad Lawyer, CPA July 18, 2017 Deposition, pg. 83 [4710].

Q: So, do you have any way of knowing if he had more than 104 days' worth of work to do for 2016?
A: I do not, no.
Q: Without speculating.
A: That's correct, I do not.
Q: So, in order to have an accurate calculation of Mr. Long's business loss for 2016 we'd have to know how much business he actually had?
A: That would allow us to, you know, we could historically look backwards and determine that, yes, if we knew – if we knew the business.
Q: And we'd have to know whether he had any business that he wasn't able to do –
A: I would agree.
Q: - during 2016?
A: I would agree.
Q: And we don't know that.
A: I do not know that.

Chad Lawyer, CPA July 18, 2017 Deposition, pp. 87-88 (emphasis added) [4714-4715].

Q: Do you have any way of projecting how many days of work Mr. Long could have had or should have had but for the accident?
A: No, sir.
Q: So, you can't tell us that he would have worked any more days in 2016?
A: I – No, I can't say that.

Chad Lawyer, CPA July 18, 2017 Deposition, pp. 89-90 [4716-4717].

On July 3, 2017, Petitioner filed its Motion *in Limine* to Preclude as Speculative Evidence of Lost Profits based on Respondent's admission that "[t]here is no way to know without speculating" what his business would have earned in 2016. [1701-1716]

On December 4, 2017, the Circuit Court denied Petitioner's Motion *in Limine* to Preclude as Speculative Evidence of Lost Profits finding that "whether evidence of lost profits is speculative goes to the weight of the evidence." The Circuit Court also granted Petitioner "leave to supplement

its Motion on the issue of whether [Respondent's] expert has a sufficient basis to state opinions regarding [Respondent's] alleged damages for lost profits and/or [Respondent's] alleged damages for costs associated with his replacement truck." [1871-1874]

On January 5, 2018, Petitioner filed its Supplemental Motion *in Limine* to Preclude Speculative Expert Testimony Regarding the Cause of [Respondent's] Alleged Damages based on Respondent's accountant's (Chad Lawyer, CPA's) admission that he did not determine whether any of the economic losses he calculated were "a result of the subject accident as opposed to some other factor." [1815-1849].

On June 1, 2018, the Circuit Court held a pretrial conference. During this pretrial conference, the Court considered Petitioner's Supplemental Motion *in Limine* to Preclude Speculative Expert Testimony Regarding the Cause of [Respondent's] Alleged Damages. After hearing argument on the Motion, the Court deferred a ruling to allow Petitioner an opportunity to reconvene Respondent's accountant's (Chad Lawyer, CPA's) deposition and investigate whether he followed the proper gross receipts methodology in forming his opinions on Respondent's lost business income. The Court indicated it would then determine "whether we need a Daubert hearing . . . or whether voir dire would suffice." [2334-2346]

During the June 1, 2018 pretrial conference, the parties also discussed the proper scope of the Respondent's annoyance and inconvenience claim. As part of this discussion, the Court summarized as follows:

> THE COURT: I mean, on the one hand, you're [Respondent's counsel] saying that your client [Respondent] suffered annoyance and inconvenience as a result of not having a truck that he wanted, having to go through the purchase of a truck that was not perfectly suited to what his needs were . . . .

Transcript of June 1, 2018 Pretrial Conference, pg. 14 [2308].

> THE COURT: Would you agree that he can still put on evidence of annoyance and inconvenience for those 17 days or so that he didn't have a truck and he had to search – I think he searched online records and shopped and did all that, could he still put on annoyance and inconvenience for that portion?

Transcript of June 1, 2018 Pretrial Conference, pg. 17 [2311].

> THE COURT: That would be your choice. You know, if you want to put on annoyance and inconvenience for the property damage portion for the 19 days, you can do that without going across the line into insurance and they you can save all the claim handling annoyance and inconvenience issues –

Transcript of June 1, 2018 Pretrial Conference, pp. 18-19. [2312-2313]

In response to the Court's suggestion, Respondent agreed his annoyance and inconvenience claim should be limited to the nineteen (19) days he was unable to use his dump truck in April 2016:

> **MS. DAVIS: Actually, that's – Your Honor is probably right. I think that it makes a lot of sense so we just do the 19 days of annoyance and inconvenience while he was without a truck** and then that way it makes the other annoyance and inconvenience claim purely about the bad faith case. I'm with you, Your Honor. I think that makes a lot of sense.
> [. . .]
> THE COURT: But I think you would keep this case tight, clean, and without getting into the insurance issues **if we deal with the annoyance and inconvenience from the facts of the loss of the property for 19 days** and then save the claim handling annoyance and inconvenience for whatever action may follow.
> **MS. DAVIS: I think that makes a lot of sense, Your Honor.**

Transcript of June 1, 2018 Pretrial Conference, pp. 19-20 (emphasis added) [2313-2314].

Following this discussion, Petitioner moved the Circuit Court to prohibit Respondent from presenting any evidence about the subject accident, including "Jane Doe fleeing," because Defendant Jane Doe's negligence and liability were stipulated. Specifically, Petitioner made the following motion *in limine*:

> MR. CALTRIDER: [. . .] But I do need to address [motion *in limine*] number 5. The Court should prohibit the plaintiff from suggesting any punitive conduct or claiming any punitive damages. Now, I know the plaintiff isn't claiming punitive damages, but in my discussions with [Respondent's counsel] Ms. Davis I've

> learned that despite the fact that liability is stipulated, she intends to put on evidence from a police officer by putting in the police report and basically all the evidence that you would put in to establish liability even though liability is stipulated, and essentially, **wants to suggest to the jury, that because this is a hit-and-run accident that [the Plaintiff] Mr. Long's annoyance and inconvenience damages related to replacing the truck were somehow greater. We disagree with that and so to the extent that she wants to do that we need to address that issue as part of Notice Defendant's motion *in limine* number 5.** [. . .] So that's the issue, Your Honor, whether or not we're going to have testimony to take the jury's time of proving up the accident and having the officer describe the damage to the truck when we stipulated that the accident was Jane Doe's fault, the truck was totaled, and the only issues for the jury are lost business income, additional expenses, and annoyance and inconvenience related to that 19-day period when Mr. Long didn't have his truck.

Transcript of June 1, 2018 Pretrial Conference, pp. 53-54 (emphasis added) [2347-2348]. In response, the Court asked Respondent's counsel:

> THE COURT: What is the relevancy because we have the unexpected loss which certainly goes to his need to mitigate it as quickly as he possibly can and do the best job he can, but other than by way of a little bit of background for the jury why do we need that?

Transcript of June 1, 2018 Pretrial Conference, pg. 54 [2348]. Respondent's counsel answered the Court as follows:

> MS. DAVIS: Well, I think the background is important, Your Honor, because, in fact Mr. Long is going to be the only eyewitness to what happened and he is considered a biased witness most likely, and I think that having an independent witness whose job it is to investigate the wreck who can determine the extent – he will be able to describe the extent of the damage to Mr. Long's truck and explain how the wreck happened. **I think the fact that Mr. Long was hit by a Jane Doe driver – a hit and run driver that that did impact his annoyance and inconvenience because there wasn't a clear person who was responsible and I think that it's important for the jury in order to understand how this happened and it affected Mr. Long.** I think they need to have all of that. I think that by taking out the officer who investigated the wreck it's going to truncate it and make it too and antiseptic and then the fact that this – the jury needs to have the whole story. I don't see any reason why – it's already going to be a short trial. I don't see any reason why Mr. Long should be forced to truncate his trial and not explain to the jury through additional witnesses what he saw, experienced and what was happening that day.

Transcript of June 1, 2018 Pretrial Conference, pp. 54-55 (emphasis added) [2348-2349].

The Court then denied Petitioner's motion *in limine* and overruled its objections as follows:

> THE COURT: The Court has the power to remove any duplicative testimony and so I think that you could either put on this evidence through the police officer or put it on through the plaintiff. I don't think we should spend a lot of time dwelling on uncontroverted facts from both witnesses and so I would ask you to truncate this as much as possible down to whichever the two witnesses you think is most useful to explain what happened.
> [. . .]
> THE COURT: Yeah, I see the only relevance of it practically as the exigency that he faced, and truly, it wouldn't matter if it was a Jane Doe or if it was some other vehicle that struck, it's simply the exigency of an unexpected business loss potentially being put out of business. If [Respondent's counsel] wants to explain that through the police officer who claimed the truck was totaled, we can explain that exigency, and likewise, if she wants to do it through the plaintiff we can do that. I just want to avoid duplication of the plaintiff. **But I think she is entitled to lay a foundation that he faced his busiest season and loss of his principle asset to performing his work and the exigency that put him under because that explains his annoyance and inconvenience.**

Transcript of June 1, 2018 Pretrial Conference, pg. 55-58 (emphasis added) [2349-2352]. After the Court made this ruling, Petitioner's counsel sought clarification:

> MR. CALTRIDER: Your Honor, I understand your ruling, I think, but what I don't understand is the connection between that testimony and the police officer who simply showed up on the scene and found a dump truck on the side and filled out a report about an accident. That doesn't address that – the officer isn't going to know anything about Mr. Long's business or his need to replace his truck. **The fact that it was a Jane Doe driver isn't relevant. In fact, what Ms. Davis is suggesting is that we would like the jury to consider something that shouldn't be considered, namely punishing somebody for the fact that they weren't responsible and didn't stay at the accident scene.** When the only elements of damages are what annoyance and inconvenience did Mr. Long have related to the loss of his truck, not the circumstances of the accident, that's not relevant to his annoyance and inconvenience. [. . .] **But, I guess, my point is none of that testimony bears on the three elements of damages at issue. That's our position. I don't think he was more – I don't think he was any more pressed because Joe Caltrider collided with his truck versus Jane Doe.**

Transcript of June 1, 2018 Pretrial Conference, pg. 57-58 (emphasis added) [2351-2352]. In response, the Circuit Court confirmed its denial of Petitioner's motion *in limine* to prevent

Respondent from claiming annoyance and inconvenience damages related to the circumstances of the accident, particularly the fact that it was caused by an unidentified, hit-and-run Jane Doe driver:

> THE COURT: I happen to agree with you on that particular (inaudible) but finding that his principle asset is laying over on its side and then having to stop working and deal with that, that do me does seem to go to his annoyance and inconvenience so I'm going to allow it. I understand your point on this, and I hope that [Respondent's] counsel doesn't dwell on this and take a lot of time on this issue given that it's stipulated that the truck was totaled. But to at least set the scene for why he was in an exigency he had to do what he had to do, I think that is relevant.

Transcript of June 1, 2018 Pretrial Conference, pg. 58 [2352].

On June 6, 2018, Petitioner reconvened Respondent's accountant's (Chad Lawyer, CPA's) deposition to investigate the methodology he used to determine Respondent's lost business income. [4925] In addition to admitting he did not address causation in his analysis, Mr. Lawyer testified he used the "gross receipts" method of evaluating Respondent's alleged lost business income, but conceded he did not perform the complete analysis required by this method:

> Q: Would you agree with this statement: When applying the gross receipts method, you use historical sales, project the loss period sales, typically, by adding a period-to-period trend analysis to ascertain any inherent growth or decline immediately prior to the loss?
> A: Yes.
> Q: Did you do that?
> A: I used historical – I used an average of a historical sales as the baseline for what the sales – what the sales would have been had the loss not occurred, compared that to actual in that given – in the loss year.
> Q: Did you do any type of period-to-period trend analysis?
> A: No, sir. I did an annual – mine was, my calculation was an annual basis, so annual revenues.
> Q: Were you able to ascertain an inherent growth or decline immediately prior to the loss in Mr. Long's business.
> A: Not ascertain that there has been an income or loss. [. . .]

Chad Lawyer, CPA June 6, 2018 Deposition, pg. 23, line 13 – pg. 24, line 9 [4947-4948].

> Q: Would you agree with this statement: The first step in determining business interruption loss is to build the foundation. This requires defining the financial performance that would have occurred, assuming the interruption

never occurred. Developing the foundation relies on assessing the historical trends of the business, market trends, and competitive trends?

A: I agree, and I felt like I used historical trends, which is Mr. Long's historical data, to, again, come up with what I feel is a reasonable average of what his revenue would have been.

Q: So, when you say you assessed the historical trends of Mr. Long's business up through 2017, that's based on his tax returns?

A: Yes, sir.

Q: Is it based on anything else?

A: No, sir.

Q: Did you do any analysis of market trends?

A: No, sir.

Q: Did you do any analysis of competitive trends?

A: No, sir.

Q: Did you do any analysis of the types of business that Mr. Long actually did year to year, 2011 through 2017?

A: No, sir. [. . .]

Chad Lawyer, CPA June 6, 2018 Deposition, pg. 24, line 24 – pg. 25, line 25 (emphasis added) [4948-4949].

Mr. Lawyer even admitted he performed no analysis between his July 18, 2017 deposition and his June 6, 2018 deposition to validate his calculations or determine the cause of Respondent's alleged business losses:

Q: [. . .] I understood this to be your methodology. I want to make sure you have got the same methodology for your conclusions about 2017.

I asked the question: "How did you determine that all of those losses that you calculated were a result of the accident itself as opposed to some other factor?"

And your answer was: "I did not determine that, but what I did, what I did in my calculation was use a five-year average of gross sales and five-year average of gross profit percentage. Again, all things being consistent, there was no, you know, no outside forces that I was aware of in 2016 that would have – that would have caused his business to decline. You know, there is no terrorism. There is no anything like that, no environmental issues that came up."

A: Yes, sir.

Q: Is that still your assumption?

A: Yes, sir.

Q: Did you do any analysis to validate that assumption?

A: No.

Chad Lawyer, CPA June 6, 2018 Deposition, pg. 13, line 7 – pg. 14, line 5 (emphasis added) [4937-4938].

On June 8, 2018, Petitioner filed its Renewed Motion *in Limine* to Exclude [Respondent's] Proposed Expert Testimony following the reconvened deposition of Respondent's accountant, Chad Lawyer, CPA, on June 6, 2018. [2261-2283] The Circuit Court did not rule on this Motion.

The parties tried this case to a jury from June 12 to June 14, 2018. During trial, Respondent testified consistently with his deposition testimony. He claimed "right round $18,000" in lost business income for 2016 because he did not have a dump truck from March 30, 2016 to April 28, 2016 and did not have an equally efficient dump truck until December 22, 2016.[1] [2767-2770] However, at trial, Respondent admitted he could only have worked his truck, at most, nineteen (19) to twenty (20) of the days between March 30, 2016 and April 28, 2016 because quarries are closed on weekends. [2801, 2804] He also admitted he normally does not have work for his dump truck every day of the week. [2805] Respondent admitted he does not follow a Monday through Friday schedule and has no records or other method of determining how many jobs he had lined up, or how much work he had to do, in April 2016. [2777, 2780-2782, 2801, 2805] He acknowledged this was important because his "profit margin varies by the job and how [he bids] it," and thus, "there is absolutely no way to know" what he is going to make on each job as "each job has its own peculiar profit margin." [2777-2778, 2802, 2821] Respondent also acknowledged the weather impacts when he can work his dump truck; however, he did not consult any personal records or public weather data to determine how many of the nineteen (19) to twenty (20) days in April 2016 he could have worked his dump truck if he had suitable work. [2802-2803][2]

[1] Although he claimed he was "reasonably certain" of this number, Respondent also testified he calculated his lost business income for 2016 as $16,243.25. [2783-2784]

[2] Respondent further acknowledged the economy impacts his business. [2822]

Accordingly, Respondent admitted he "just can't predict the future"; does "not know how many days [he] would have work[ed]" in April 2016; and thus, could not testify about how many days or jobs he lost when he was without a dump truck. [2803-2804, 2806, 2807-2809[3]] **After admitting he "could have made more and [he] could have made less in 2016," Respondent acknowledged "there is no way to know without speculating."** [2778-2779] Adding to this admitted uncertainty about his 2016 lost business income, Respondent acknowledged he worked two (2) days between March 30, 2016 and April 28, 2016 and made up lost work after April 28, 2016. [2809]

During trial, Respondent again acknowledged that none of his lost business income calculations are based on jobs he had and could have performed in April 2016. [2780] Because he could not identify any specific work he lost on any specific day in April 2016, Respondent attempted to quantify lost business income by using averages from his 2011 through 2016 tax returns. He presented expert testimony from his accountant, Chad Lawyer, CPA, for this purpose. [2868]

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[3] Q: If I went through each one of those days between April 1 and April 27 of 2016, would you be able to tell the jury, what job you had that day?
A: Again, if I have those two jobs. I have two days work. Other than those two days I couldn't.
Q: And you couldn't tell us what the weather was.
A: I could not tell you, and I did not write it down, and I did not research.
Q: So you don't know if you could have worked that day.
A: I do not know if I could have worked.
Q: And you don't know what the job would have been so you don't know how profitable any particular job would have been, correct?
A: I don't know what the job was.
Q: Now, Mr. Long, I understand that you made some of the work up that you felt you weren't able to do in April 2016, is that right?
A: Correct.
[. . .]
Q: So you have an opportunity to reschedule work that may have come to you in April 2016, is that right?
A: Correct.

During trial, Mr. Lawyer testified consistently with his prior deposition testimony. After analyzing Respondent's 2011 through 2016 tax returns, Mr. Lawyer testified he was "reasonably certain" Respondent lost $18,428 in 2016 business income. [2847-2848, 2858, 2865] After including Respondent's 2017 tax return, Mr. Lawyer testified Respondent lost $22,010 in 2016 business income. [2857] However, on cross-examination, Mr. Lawyer admitted he did not verify any information provided by Respondent to develop his theory about lost income. [2875] He also admitted Respondent had the opportunity to earn income without his dump truck, but his calculations did not take this into consideration. [2891-2892]. Mr. Lawyer testified he used the "gross receipts method" to estimate Respondent's 2016 lost business income. However, on cross-examination, he admitted he did not follow the methodology closely. He relied solely on historical data, and performed no analysis of market trends or competitive trends or profitability or other factors which might impact income such as weather or the economy, as required by the methodology. [2876-2880] As a result of this flawed methodology, Mr. Lawyer could not determine why Respondent worked more days in one year than another between 2011 and 2016 or why his income fluctuated in those years. [2880] Although Respondent hired him to determine the specific amount **and cause** of 2016 lost business income, Mr. Lawyer ultimately admitted he only performed calculations based on 2011 through 2016 tax returns and **assumed the cause** of the calculated loss was the subject accident. [2868, 2886] Specifically, Mr. Lawyer testified before the jury on this assumption as follows:

Q: You just assume that there were no outside forces that you were aware of in 2016 that would have caused Mr. Long's business to decline.
A: That's correct.
Q: But you did no analysis to verify that.
A: That is correct.

[2886]

Q: You just assumed that Mr. Long's revenues went down because he didn't have a truck.
A: Yes.
Q: Your calculation assumes there was a loss of revenues because the truck was out of service for the period of time in April 2016.
A: Yes.

[2890]

Q: You did not determine that all of those losses you calculated were as a result of the accident itself as opposed to some other factor.
A: That's correct.
Q: And that's the truthful answer, is that true?
A: Yes, sir.
Q: And because you didn't make that determination of causation, Mr. [Lawyer], you do not know how much of the $18,428 in business losses you projected are related to the accident on March 29, 2016 as opposed to some other cause, is that true?
A: I would agree.

[2899] (emphasis added).

During trial, Respondent oriented his entire case around "the hit-and-run driver," "Jane Doe fleeing" the accident scene, and his emotional distress related to the accident itself, even though liability was stipulated. Respondent's counsel asked him questions such as: "What's the first moment that you realized that the other driver had fled the scene?" and "[H]ow did that make you feel when you realized the other driver [fled the scene]?" [2701-2702]. Respondent's counsel asked Corporal Vincent Tiong, the West Virginia State Police officer who investigated the subject accident, about his impressions of Respondent's emotional distress following the accident. [3829] (Q: What was Mr. Long's demeanor after the wreck if you recall? A: He was upset. He was really agitated. I could definitely tell, you know, this was significant to him.). She also asked Corporal Tiong about the circumstances of Jane Doe fleeing the accident scene. [3830] (Q: In your experience, is it unusual for a passenger to claim to not know the identity of the driver in whose car the passenger is travelling?). Finally, she asked Corporal Tiong to relate his conversation with

Respondent which occurred approximately fifteen (15) minutes after the subject accident. [3833] (Q: Corporal Tiong, would you please tell the jury about what your conversation was with Mr. Long at the time of the wreck? A: When I talked to Mr. Long he expressed that the dump truck was basically his sole income for him and was really upset because he didn't know, you know, how long before the insurance company paid for it. How long it would possibly be before he gets another dump truck. How he was going to make money when his dump truck was wrecked.) This testimony emphasized the fact that Defendant Jane Doe fled the accident scene and suggested there was no one available to be financially responsible for Respondent's damages. [2616]

At the close of Respondent's evidence, Petitioner moved the Court for judgment as a matter of law under Rule 50(a) of the West Virginia Rules of Civil Procedure. The Court denied this Motion observing: "[Y]ou do raise a question for me in my mind about causation, but I think the expert has testified that he knows of no other basis for it [Respondent's lost business income], although he can't opine specifically what was the cause other than his reliance upon [Respondent's] testimony." [3870-3872]

At the close of all evidence, the parties made their closing arguments. Respondent's counsel told the jury in closing argument:

> **When we started this case, I told you that the name of the trial story was the case of the hit-and-run driver**, but after listening to Mr. Caltrider the last couple of days, I think we should probably change the title to the tale of the Monday-morning quarterback.

(emphasis added). [2606] She continued this argument as follows:

> The Judge just told you that a plaintiff is entitled to be made whole for all of his losses. Although we know some of Mr. Long's losses because we provided you expert testimony on it from Chad Lawyer, let me go ahead and write those on here, okay. Chad Lawyer testified that in total Mr. Long suffered lost business profits and lost and losses on the Peterbilt in the amount of $82,493, but ladies and gentlemen, in order for Mr. Long to be made whole, this is only half the story.

> As the Judge explained to you, he also has a – well, he didn't say he had a substantial claim. **I say he has a substantial claim for annoyance and inconvenience for what Jane Doe put him through.** That is going to be an element on the verdict form that we can't provide you the number for. **You all are going to be the ones who figure out what Mr. Long lost during the month without his truck and what he went through because of Jane Doe.**
>
> [. . .] Think about Carl's testimony that when his truck had just been smashed into and it was rolled over on its side he was hanging there by his seat belt upside down and the only thing he could think of was his engine running; oh my God, that brand new engine I just put in my truck, how can I get to the ignition to turn it off. He's worried about protecting his engine. That is what that truck meant to him and how he took care of his equipment. That's his annoyance and inconvenience. That's something you can consider.

(emphasis added). [2614-2615] During her closing argument, Respondent's counsel specifically encouraged the jury to award Respondent annoyance and inconvenience damages **because** Defendant Jane Doe fled the accident scene:

> **Jane Doe fleeing, that's something you can consider when you decide what he should be awarded for annoyance and inconvenience.** When he realized there was nobody there to pay for his truck, that he was going to have to figure out what to do, that was incredibly frightening to him.

(emphasis added). [2616] Then, she concluded closing argument as follows:

> Ladies and gentlemen, after hearing Mr. Caltrider's closing statement, I think we need to change the title of our story again. **It started off as the case of the hit and run. It went to the tale of the Monday-morning quarterback, and now we have a trilogy. It is the tragedy of the unrepentant hit-and-run driver.**

(emphasis added). [2619]

On June 14, 2018, following these arguments, the jury deliberated and returned a verdict for Respondent which included $64,065 for additional expenses related to the subject accident, $40,000 for lost business profits in 2016, and $75,935 for annoyance and inconvenience. [2379-2380].

On June 22, 2018, Petitioner filed a Renewed Motion for Judgment as a Matter of Law under Rule 50(b) of the West Virginia Rules of Civil Procedure and a Motion for New Trial under

Rule 59(a) of the West Virginia Rules of Civil Procedure. Petitioner's Rule 50(b) Motion focused on the Circuit Court's rulings allowing Respondent's speculative evidence regarding lost business income and the jury's $40,000 lost business income verdict in comparison to Respondent's "reasonable certainty" that his lost business income was "right around" $18,000. [2466-2499] Petitioner's Rule 59(a) Motion focused on the Court's rulings allowing Respondent to present evidence about the circumstances of the subject accident and essentially claim emotional distress, mental anguish, and punitive damages as annoyance and inconvenience related to "the unrepentant hit-and-run driver" and "Jane Doe fleeing" the accident scene. [2500-2622]

On June 28, 2018, the Circuit Court entered a Judgment Order on the jury's verdict. [2625-2629] This Judgment Order awarded Respondent a $180,000 judgment against Petitioner ($64,065 expenses; $75,935 annoyance and inconvenience; and $40,000 lost profits in 2016). [2626]

On November 6, 2018, the Circuit Court entered an Order Denying [Petitioner's] Renewed Motion for Judgment as a Matter of Law. [3627-3642] This Order specifically found "[t]he jury's lost profit verdict does not appear to be supported by the evidence," but nonetheless determined "[Petitioner] is not entitled to a new trial on lost profits." [3639]

On November 6, 2018, the Circuit Court also entered an Order Denying [Petitioner's] Motion for New Trial. [3643-3670] This Order specifically found "the jury's independent assessment of [Respondent's] losses was not sufficiently supported by the evidence," and reduced the jury's lost income award to $18,428, but nonetheless allowed the remainder of the jury's verdict to stand. [3669] This Order also found Petitioner "failed to object" to evidence and argument about "Jane Doe fleeing" and how this impacted Respondent. [3649]

Petitioner now appeals these Orders and the Circuit Court's rulings allowing Respondent to present speculative evidence of lost business income and irrelevant evidence to support his annoyance and inconvenience claims for loss of use of his dump truck during the repair period.

SUMMARY OF ARGUMENT

The Circuit Court committed two main errors in this case. First, the Circuit Court allowed Respondent to present conjectural and speculative evidence in support of his lost business income claim. There is no dispute on this point. Respondent himself admitted "[t]here is no way to know [how much he would have earned in 2016] without speculating." And, Respondent's accountant admitted he calculated 2016 lost business income, but did not, and could not, determine how much of that lost income was caused by the subject accident. Second, the Circuit Court allowed Respondent to present irrelevant evidence and inflammatory argument about the circumstances of the subject accident, including "Jane Doe fleeing" the accident scene, to support annoyance and inconvenience damages. There is no dispute on this point either. Under West Virginia law, annoyance and inconvenience damages only relate to the loss of use of damaged property during the repair period. It simply does not matter how the property was damaged. Annoyance and inconvenience damages relate to loss use, not the circumstances leading to loss of use.

The cumulative effect of the Circuit Court's errors was a jury verdict so tainted by improper testimony and argument that the jury awarded Respondent $40,000 in lost business income when he and his accountant were "reasonably certain" the loss was $18,428 and the jury also awarded Respondent $75,935 as emotional distress, mental anguish, and punitive damages related to "Jane Doe fleeing," instead of annoyance and inconvenience damages related to Respondent's loss of use of his dump truck during the repair period. Although the Circuit Court recognized these errors – it specifically found "[t]he jury's lost profit verdict does not appear to be supported by the evidence" and "the jury's independent assessment of [Respondent's] losses was not sufficiently

supported by the evidence" – it nonetheless compounded the errors by denying Petitioner's Motion for Judgment as a Matter of Law and Motion for New Trial. Given the cumulative effect of Respondent's improper evidence and inflammatory argument in this trial, this Honorable Court should grant Petitioner judgment as a matter of law under Rule 50 of the West Virginia Rules of Civil Procedure on Respondent's speculative lost business income claims and a new trial on Respondent's remaining damage claims under Rule 59(a) of the West Virginia Rules of Civil Procedure.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure because: 1) all parties have not waived oral argument; 2) this appeal is not frivolous; 3) the dispositive issues have not been authoritatively decided; 4) the facts and legal arguments are not adequately presented in the briefs; and 5) the decisional process should be significantly aided by oral argument. W. Va. R. App. P. 18(a).

Oral argument is appropriate under Rule 19(a) of the West Virginia Rules of Appellate Procedure because this case: 1) involves assignments of error in the application of settled law; 2) involves an unsustainable exercise of discretion where the law governing that discretion is settled; 3) involves a jury award of damages for which there was insufficient evidence and/or a jury award of damages which was against the weight of the evidence; and 4) involves narrow issues of law. W. Va. R. App. P. 19(a).

A full opinion of the Court, rather than a memorandum decision, is most appropriate in this case to: 1) provide clearer guidance to circuit courts regarding when to exclude speculative evidence of lost business income damages; and 2) provide clearer guidance to circuit courts and litigants regarding the types of evidence relevant to annoyance and inconvenience damages in property damage cases.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY ALLOWING RESPONDENT TO CLAIM SPECULATIVE LOST BUSINESS INCOME DAMAGES WHERE RESPONDENT ADMITTED HIS ESTIMATES WERE "SPECULATION" AND RESPONDENT'S EXPERT ACCOUNTANT ADMITTED HIS ESTIMATES DID NOT FOLLOW AN ACCEPTED METHODOLOGY OR DETERMINE CAUSATION.

"The verdict of a jury in favor of a plaintiff, based on testimony which does nothing more than furnish ground for conjecture or speculation, as to the proper verdict to be returned, cannot be justified and will be set aside by this Court." Syllabus Point 6, Addair v. Motors Ins. Corp., 157 W. Va. 1013, 1014, 207 S.E.2d 163, 165 (1974) *citing* Syllabus Point 6, State ex rel. Shatzer v. Freeport Coal Company, 144 W. Va. 178, 107 S.E.2d 503 (1959).

This case is strikingly similar to the Addair case. In Addair, the plaintiff claimed lost business income resulting from physical damage to his coal truck and "down time" while it was repaired. At trial, the plaintiff testified about the number of days he expected to work while he was without a truck, the number of loads of coal he expected to haul each day, and the money he expected to earn by hauling each load of coal. The plaintiff then deducted certain business expenses from his gross receipts to determine his lost business income. The plaintiff also presented testimony from his accountant to justify his calculations. Based on this evidence, the jury awarded the plaintiff $8,315 in lost business income ($26.50 less than he calculated). Id at 1020-1021, 168.

On appeal, the Supreme Court of Appeals found the plaintiff's evidence of lost business income was too speculative and set aside the jury's verdict. The plaintiff assumed he would haul the same amount of coal each working day his truck was unavailable, despite his accountant's testimony he typically worked only eighty-percent (80%) of available shifts. The plaintiff also assumed he would not experience any interruption in work due to a truck breakdown, weather, or some other reason. Ultimately, the Supreme Court of Appeals concluded "[t]hese computations

by which plaintiff arrived at a gross profit figure are based on conjecture and speculation." Id at 1021, 168.

The same is true in this case. Like the Addair plaintiff, Respondent attempted a similar "gross receipts" method of calculating his lost business income. However, neither Respondent, nor his accountant, could identify any specific days he would have worked his dump truck, any specific jobs or contracts he lost for his dump truck, or any specific amounts of money he lost due to lack of work for his dump truck. Respondent admitted it was "impossible to tell" how many days per week he typically has work for his dump truck or whether his dump truck was "going to run" on any day of the year. [4034-4035] Respondent also admitted he never tried to "figure out what jobs [he] would have been expecting to do between March 30, 2016 and April 27, 2016 [when he was without a dump truck]." [4045-4046] Respondent even candidly admitted "there is no way to know [what you're going to make off each job] without speculating." [2778, 4196-4197]

Like the Addair plaintiff, Respondent also attempted to bolster his speculative lost income evidence with testimony from his accountant. Respondent's accountant did not eliminate the conjecture and speculation. Instead, he simply built upon the conjecture and speculation with his own calculations. Although he was "reasonably certain" Respondent lost $18,428 in 2016 business income, Respondent's accountant admitted he did not take into account the various factors which might impact business income; he did not verify any information Respondent provided him about the cause of any lost income; and, ultimately, he did not actually determine the cause of Respondent's 2016 income shortfall, only the amount. [2890, 2899] Respondent suggested his accountant's methodology eliminated all other causes but the subject accident; however, Respondent's accountant admitted he did not actually follow the standard "gross receipts" methodology to consider other causative factors. Respondent's accountant even candidly admitted

that, "because [he did not] make [a] determination of causation . . . he [did] not know how much of the $18,428 in business losses [he] projected [were] related to the accident on March 29, 2016 as opposed to some other cause." [2899]

"Loss of profits cannot be based on estimates which amount to mere speculation and conjecture but must be proved with reasonable certainty." Id at 1021, 168 *citing* State ex rel. Shatzer v. Freeport Coal Company, 144 W. Va. 178, 107 S.E.2d 503 (1959). "Mere speculative and conjectural estimates of profits which might have been made, or of the loss of gains and profits which might have been made, are not a legitimate basis upon which to fix damages." Id at 1021, 168-169 *citing* Syllabus Point 5, Douglass v. Ohio River Railroad Company, 51 W. Va. 523, 41 S.E. 911 (1902). Accordingly, "[t]he proof [of lost profits] must not consist of mere conjecture, speculation, or opinion not founded on facts, but must consist of actual facts from which a reasonably accurate conclusion regarding **the cause and the amount** of the loss can be logically and rationally drawn." Id at 185, 508 (emphasis added).

Respondent did not present proof consisting of "actual facts from which a reasonably accurate conclusion regarding the cause and the amount of [his lost business income could] logically and rationally [be] drawn" by the jury. Instead, the jury in this case was left to speculate about an amount of lost business income which might be attributed to the March 29, 2016 accident and Respondent's ensuing "down time." Was it $16,000 or $18,000 or $22,000? How much of these "reasonably certain" amounts could be attributed to the subject accident as opposed to the weather or the economy or other business conditions? Undeniable proof of the jury's speculation is found in their $40,000 lost income verdict – a verdict which does not approximate any of the evidence presented a trial and even the Circuit Court found was "not sufficiently supported by the evidence." [3639, 3669] The Circuit Court's reduction of the jury's speculative lost income verdict

to $18,428 was not, however, a sufficient remedy in this case. The Court and the jury were still left to speculate about what portion of the $18,428 verdict could be attributed to the subject accident as opposed to other unrelated causes. Here, the jury's verdict for Respondent was based on evidence "which [did] nothing more than furnish ground for [additional] conjecture and speculation." Therefore, no part of the jury's lost business income verdict can be justified and, as Addair demonstrates, should be set aside by this Honorable Court in its entirety.

A. The Circuit Court Erred by Denying Petitioner's Motion *in Limine* to Preclude as Speculative Evidence of Lost Profits, Petitioner's Supplemental Motion *in Limine* to Preclude Speculative Expert Testimony Regarding the Cause of Petitioner's Alleged Damages, and Petitioner's Renewed Motion to Exclude Petitioner's Proposed Expert Testimony.

"A trial court's ruling on a motion *in limine* is reviewed on appeal for an abuse of discretion." McKenzie v. Carroll Int'l Corp., 216 W. Va. 686, 687, 610 S.E.2d 341, 342 (2004). Accordingly, the Court of Appeals' "function on ... appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion." Id at 692, 347 *citing* State v. McGinnis, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994).

The Circuit Court abused its discretion in this case by allowing both Respondent and his accountant to present admitted conjecture and speculation about lost business income to the jury. Respondent admitted outright: "There is no way to know [how much he would have earned in 2016] without speculating." [4196-4197]. Meanwhile, Respondent's accountant admitted he did not determine the "losses [he] calculated were a result of the accident itself as opposed to some other factor" and, therefore, he could not determine "how much of the $18,428.00 in business loss [he] calculated for 2016 would be related solely to the accident." [4684-4686, 4705-4706] Without reasonable certainty and causation, Respondents' testimony and his accountant's expert testimony were both inadmissible and misleading to the jury. As discussed in Addair and Shatzer, *supra*,

this testimony was precisely the type of conjecture and speculation which cannot support a lost business income claim. Petitioner made the Court aware of this conjecture and speculation before trial through multiple motions *in limine*. Nevertheless, the Circuit Court denied the motions *in limine* and allowed the jury to consider it as evidence at trial. This was an abuse of discretion which tainted the jury's entire verdict. Therefore, this Honorable Court should order a new trial.

B. The Circuit Court Erred by Finding "The Jury's Lost Profit Verdict Does Not Appear to be Supported by the Evidence", But Nevertheless Denying Petitioner's Motion for Judgment as a Matter of Law under Rule 50(a) and Renewed Motion for Judgment as a Matter of Law under Rule 50(b).

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure is *de novo.*" Syllabus Point 1, Fredeking v. Tyler, 224 W. Va. 1, 680 S.E.2d 16, 17 (2009). "When [the Supreme Court of Appeals] reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the West Virginia Rules of Civil Procedure, it is not the task of [the] Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party." Id at Syllabus Point 2. Accordingly, [i]In determining whether there is sufficient evidence to support a jury verdict the Court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Id at Syllabus Point 3 *citing* Syllabus Point 5, Orr v. Crowder, 173 W. Va. 335, 315

S.E.2d 593 (1983). Even when the evidence is viewed in the light most favorable to Respondent under these standards, Respondent's own admissions, and those of his accountant, demonstrate a reasonable trier of fact could not have reached the jury's verdict in this case.

At trial, the Circuit Court correctly instructed the jury on Respondent's burden of proof for lost business income as follows:

> Lost Profits: Long also claims that he lost profits in 2016 because of Doe's negligence. In order to recover for loss of profits as the result of a negligent act, they must be such as would be expected to follow naturally the wrongful act, and are certain in both their nature and the cause from which they proceed. Loss of profits cannot be based on estimates which amount to mere speculation and conjecture, but must be proved with reasonable certainty.

Court's Jury Instructions, pg. 8, lines 4-8. [3912-3913] *See* Syllabus Point 2, Hardman Trucking, Inc. v. Poling Trucking Co., Inc., 176 W. Va. 575, 346 S.E.2d 551 (1986) ("In order to recover for loss of profits as the result of a [negligent act], they must be such as would be expected to follow naturally the wrongful act, and are certain both in their nature and the cause from which they proceed."); Syllabus Point 5, State ex rel. Shatzer v. Freeport Coal Company, 144 W. Va. 178, 107 S.E.2d 503 (1959); Syllabus Point 1, Cell, Inc. v. Ranson Investors, 189 W. Va. 13, 427 S.E.2d 447 (1992); Syllabus Point 3, Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc., 186 W. Va. 613, 413 S.E.2d 670 (1991) ("Loss of profits cannot be based on estimates which amount to mere speculation and conjecture but must be proved with reasonable certainty.") Based upon Respondent's and his accountant's admissions at trial, as detailed above, it is clear Respondent could not, and did not, meet this evidentiary burden. Even when the evidence is viewed in the light most favorable to him, Respondent simply did not prove either the cause or the amount of his alleged lost business income with "reasonable certainty,' especially when he admitted his evidence was "speculation" and his accountant did not determine causation.

Under Rule 50, after a party has been fully heard on an issue, a trial court may "determine the issue against the party and may grant a motion for judgment as a matter of law against that party" when "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." W.Va. R. Civ. P. 50(a). A trial court should grant judgment as a matter of law to a defendant when the plaintiff's evidence, considered in the light most favorable to him, fails to establish a *prima facie* right to recovery. *See* Sexton v. Greico, 216 W. Va. 714, 613 W. Va. 81 (2005); Stewart v. Johnson, 209 W. Va. 476, 549 S.E.2d 670 (2001). This is true at the close of plaintiff's evidence and at the post-trial stage. Morgan v. Bottome, 170 W. Va. 23, 23, 289 S.E.2d 469, 470 (1982). In this case, the Circuit Court erred because, although it actually found **"[t]he jury's lost profit verdict does not appear to be supported by the evidence,"** it still denied Petitioners' Rule 50(a) Motion and Petitioners' Rule 50(b) Motion. Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law, pg. 13 (emphasis added) [3639].

In light of Respondent's and his accountant's admissions, even when viewed in the light most favorable to Respondent, a jury could not have found evidence of lost business income or determined the cause of any 2016 lost income without conjecture and speculation as specifically prohibited by Addair and Shatzer, *supra*. The Circuit Court correctly recognized there was no evidence beyond speculation to support a jury award of any lost business income **caused by** the subject accident, let alone the jury's award of $40,000 in lost business income and, thus, correctly found "[t]he jury's lost profit verdict does not appear to be supported by the evidence." This finding is inconsistent with the Circuit Court's erroneous denial of Petitioners' Rule 50(a) Motion at the close of Respondent's evidence and Petitioners' Rule 50(b) Motion after the jury's verdict. Therefore, this Honorable Court should uphold the Circuit Court's finding, but reverse its

inconsistent conclusion, and grant Petitioner judgment as a matter of law on Respondent's entire lost business income claim.

II. THE CIRCUIT COURT ERRED BY ALLOWING RESPONDENT TO PRESENT IRRELEVANT EVIDENCE AND INFLAMMATORY ARGUMENT CONCERNING THE SUBJECT ACCIDENT, INCLUDING "JANE DOE FLEEING" THE ACCIDENT SCENE, TO SUPPORT HIS ANNOYANCE AND INCONVENIENCE DAMAGES RELATED TO LOSS OF USE OF HIS DUMP TRUCK DURING THE REPAIR PERIOD.

Annoyance and inconvenience damages are an element of loss of use damages in a property damage case. McCormick v. Allstate Ins. Co., 197 W. Va. 415, 421, 475 S.E.2d 507, 513 (1996) *citing* Ellis v. King, 184 W. Va. 227, 229, 400 S.E.2d 235, 237 (1990) ("Damages for annoyance and inconvenience may also be recovered when measuring damages for loss of use to the property," which is an element of loss of use."). Annoyance and inconvenience damages do not include mental anguish or emotional distress associated with the accident or the property damage. West Virginia law strictly limits annoyance and inconvenience claims to loss of use during the property's repair period.

> When personal property is injured [and cannot be repaired], . . . the owner may recover its lost value, plus his expenses stemming from the injury, including **loss of use** during the time he has been deprived of his property.

Syllabus Point 1, Ellis v. King, *supra.* The Supreme Court of Appeals has even specifically rejected a plaintiff's attempt to claim mental anguish and pain and suffering associated with property damage. *See* Jarrett v. E. L. Harper & Son, Inc., 160 W. Va. 399, 235 S.E.2d 362 (1977), *holding modified by* Brooks v. City of Huntington, 234 W. Va. 607, 768 S.E.2d 97 (2014).[4]

[4] "The record reveals certain evidence aimed at establishing that the Jarretts suffered mental anguish, although their complaint does not specify mental anguish as part of their injuries. **We are not prepared in this case to allow recovery for mental pain and suffering.**" Id at 405, 365 (emphasis added). Respondent's Complaint also does not specify mental anguish as part of his injuries. Indeed, Respondent made a point of telling the jury on direct examination that he was not making any claims for physical injury. ("Q: So, you've not sued Jane Doe for any physical injuries? A: No.") [2703].

In light of these authorities, it was clear and prejudicial error for the Circuit Court to deny Petitioner's motion *in limine* and allow Respondent to present irrelevant evidence about when he realized "the other driver had fled the scene"; how he felt when he "realized the other driver had fled the scene"; and "whether it was unusual for a passenger to claim to not know the identity of the driver in whose car the passenger is travelling." It was likewise clear and prejudicial error for the Circuit Court to deny Petitioners' motion *in limine* and allow Respondent to present inflammatory argument suggesting "Jane Doe fleeing, that's something you can consider when you decide what he should be awarded for annoyance and inconvenience" damages related to Respondent's loss of use of his dump truck during the repair period. In essence, the Circuit Court incorrectly permitted Respondent to convert annoyance and inconvenience damages into emotional distress, mental anguish, and punitive damages. This improper evidence and argument, in conjunction with speculative evidence of lost business income damages, tainted the entire jury verdict and warrant a new trial.

A. The Circuit Court Erred by Denying Petitioner's Motion *in Limine* to Exclude Irrelevant Evidence and Inflammatory Argument Concerning the Subject Accident, Including "Jane Doe Fleeing."

"A trial court's ruling on a motion *in limine* is reviewed on appeal for an abuse of discretion." McKenzie v. Carroll Int'l Corp., 216 W. Va. 686, 687, 610 S.E.2d 341, 342 (2004). Accordingly, the Court of Appeals' "function on ... appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion." Id at 692, 347 *citing* State v. McGinnis, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994).

The Circuit Court abused its discretion in this case by denying Petitioner's motion *in limine* and allowing irrelevant evidence and inflammatory argument about the circumstances of the subject accident (i.e. how Respondent felt when he learned Jane Doe fled the accident scene; the

mere fact of "Jane Doe fleeing" as related to loss of use during the repair period). As demonstrated by McCormick, Ellis, and Jarrett, this evidence and argument had no legitimate connection to Respondent's annoyance and inconvenience related for the loss of use of his dump truck during the repair period. It was only intended to impassion, inflame, and prejudice the jury and, thus should have been excluded at trial. The cumulative effect of this evidence warrants a new trial.

"The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Id at Syllabus Point 2 *citing* Syllabus Point 3, State v. Boggs, 103 W. Va. 641, 138 S.E. 321 (1927). In this case, Petitioner's rights have been prejudiced and manifest injustice has resulted. By allowing Respondent to present irrelevant evidence and inflammatory argument, the Circuit Court essentially allowed Respondent to convert limited annoyance and inconvenience damages related to loss of use of his dump truck during the repair period into broader emotional distress, mental anguish, and even punitive damages. The unbalanced nature of the jury's overall verdict demonstrates this prejudice and injustice. This Honorable Court should order a new trial simply due to the erroneous evidentiary ruling, its injection of improper evidence and inflammatory argument into the trial, and its distortion of the true measure of annoyance and inconvenience damages in a property damage case.

B. The Circuit Court Erred by Denying Petitioner's Motion for New Trial under Rule 59(a) Given the Cumulative Effect of Respondent's Speculative Lost Income Evidence and Respondent's Irrelevant Accident Evidence.

Generally, the Supreme Court of Appeals reviews a circuit court's rulings on a motion for a new trial under an abuse of discretion standard. Tennant v. Marion Health Care Found., Inc., 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995) *citing* In re State Public Building Asbestos Litigation, 193 W. Va. 119, 454 S.E.2d 413 (1994). Accordingly, "in reviewing challenges to

findings and rulings made by a circuit court, [it] appl[ies] a two-pronged deferential standard of review. [It] review[s] 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, and [it] reviews the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Id.

A new trial is warranted in this case. *See* W.Va. R. Civ. P. 59(a). The Circuit Court abused its discretion by: 1) allowing Respondent to present conjecture and speculation as evidence in support of his lost business income claim in violation of Addair and Shatzer, *supra*; and 2) allowing Respondent to present irrelevant evidence and inflammatory argument about the circumstances of the subject accident in violation of McCormick, Ellis, and Jarrett, *supra*. The Circuit Court also committed clear error by finding Petitioner failed to object to Respondent's irrelevant evidence and inflammatory argument.

Petitioner's counsel specifically requested exclusion of this evidence and argument before trial as follows:

> [Respondent] wants to suggest to the jury, that because this is a hit-and-run accident that [his] annoyance and inconvenience damages related to replacing the truck were somehow greater. We disagree with that and so to the extent that [Respondent's counsel] wants to do that we need to address that issue as part of [Petitioner's] motion *in limine* number 5. [. . .] So that's the issue, Your Honor, whether or not we're going to have testimony to take the jury's time of proving up the accident and having the officer describe the damage to the truck when we stipulated that the accident was Jane Doe's fault, the truck was totaled, and the only issues for the jury are lost business income, additional expenses, and annoyance and inconvenience related to that 19-day period when Mr. Long didn't have his truck.

Transcript of June 1, 2018 Pretrial Conference, pp. 53-54 [2564-2565].

> The fact that it was a Jane Doe driver isn't relevant. In fact, what [Respondent's counsel] is suggesting is that we would like the jury to consider something that shouldn't be considered, namely punishing somebody for the fact that they weren't responsible and didn't stay at the accident scene. When the only elements of damages are what annoyance and inconvenience did [Respondent] have related to

> the loss of his truck, not the circumstances of the accident, that's not relevant to his annoyance and inconvenience. [. . .] But, I guess, my point is none of that testimony bears on the three elements of damages at issue. That's our position. I don't think he was more – I don't think he was any more pressed because Joe Caltrider collided with his truck versus Jane Doe.

Transcript of June 1, 2018 Pretrial Conference, pg. 57-58 [2569-2569].

The Circuit Court specifically denied this motion *in limine* before trial as follows:

> THE COURT: I happen to agree with you on that particular (inaudible) but finding that his principle asset is laying over on its side and then having to stop working and deal with that, that do me does seem to go to his annoyance and inconvenience so I'm going to allow it. I understand your point on this, and I hope that [Respondent's] counsel doesn't dwell on this and take a lot of time on this issue given that it's stipulated that the truck was totaled. But to at least set the scene for why he was in an exigency he had to do what he had to do, I think that is relevant.

Transcript of June 1, 2018 Pretrial Conference, pg. 58 [2569]. This erroneous decision opened the door for a great deal of irrelevant evidence and inflammatory argument which inevitably tainted the entire jury verdict.[5]

The Circuit Court's explicit denial of Petitioner's pretrial motion *in limine* is significant because Respondent has argued, and the Circuit Court specifically found as a basis for denying Petitioner's Motion for New trial: 1) "[Petitioner's] counsel failed to object at trial that this line of questioning allegedly violated [Petitioner's] motion *in limine* 5 or any 'limiting instruction.'"; and 2) "[Petitioner's] counsel failed to object that [Respondent's] argument allegedly violated

[5] The Circuit Court actually recognized this in its Order Denying [Petitioner's] Motion for New Trial when it observed: "The Court's ruling allowed [Respondent] to present evidence of his annoyance and inconvenience beginning on the date of the wreck, or March 29, 2018, including the moments immediately following the hit-and-run wreck and ending on April 27, 2016. This ruling did not limit the *type* of evidence that [Respondent] could present concerning the annoyance and inconvenience that he suffered immediately after the wreck through the end of April 2016." Order Denying [Petitioner's] Motion for New Trial, pg. 4 (emphasis in original) [3646]. Later in its Order, the Circuit Court acknowledged it "never ruled that [Respondent] could not elicit testimony or refer during argument to the fact that Jane Doe fled the scene of the wreck." Order Denying [Petitioner's] Motion for New Trial, pg. 6 [3648]. The Circuit Court even quoted some of the irrelevant and inflammatory evidence in its Order. Order Denying [Petitioner's] Motion for New Trial, pp. 6-7 [3648-3649].

[Petitioner's] motion *in limine* 5 or any 'limiting instruction.'" Order Denying [Petitioner's] Motion for New Trial, pg. 7 [3649]. This is clear error because, once the Circuit Court denied Petitioners' motion *in limine*, it was not necessary for Petitioner to renew its objections at trial.

Recently, in Syllabus Point 7 of Miller v. Allman, 240 W. Va. 438, 813 S.E.2d 91, 94 (2018), the Supreme Court of Appeals held:

> Rule 103(b) of the West Virginia Rules of Evidence provides that **when a "court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."** This provision applies to preserving a claim of error by the party who opposed the ruling, not a claim of error by the party who prevailed on the ruling. Thus, a party who obtained a favorable definitive ruling on an issue must timely object if the opposing party violates the ruling.

Id (emphasis added). Likewise, the Supreme Court of Appeals previously held in Syllabus Point 1 of Wimer v. Hinkle, 180 W. Va. 660, 379 S.E.2d 383 (1989), that "[a]n objection to an adverse ruling on a motion *in limine* to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered, unless there has been a significant change in the basis for admitting the evidence." It extended this holding from presentation of evidence to arguments of counsel in Syllabus Point 3 of Lacy v. CSX Transp. Inc., 205 W. Va. 630, 639, 520 S.E.2d 418, 427 (1999). The Lacy Court's explanation is particularly applicable to this case:

> While the present case involves the arguments of counsel rather than the introduction of evidence, the underlying principle is equally applicable such that to preserve error with respect to closing arguments by an opponent, a party need not contemporaneously object where the party previously objected to the trial court's *in limine* ruling permitting such argument, and the argument subsequently pursued by the opponent reasonably falls within the scope afforded by the court's ruling. **This conclusion is bolstered by West Virginia Trial Court Rule 23.04, which disfavors objections by counsel during closing arguments: "Counsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection."**

Id (emphasis added). The same is true in this case. Petitioner objected to Respondent's improper evidence and inflammatory argument before trial and, thus, preserved those objections through trial. Accordingly, Petitioner's counsel was constrained from objecting again during Respondent's presentation of evidence and closing argument under Trial Court Rule 23.04. *See* W. Va. TCR 23.04.[6] Under these circumstances, the Circuit Court erroneously denied Petitioner's motion *in limine* and also erroneously denied Petitioners' Motion for New Trial by finding Petitioner failed to preserve the error.

A motion for a new trial should be granted "where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." Morrison v. Sharma, 200 W. Va. 192, 488 S.E.2d 467 (1997). Furthermore, "'[i]n an action wherein the compensation which the plaintiff is entitled to recover is indeterminate in character, the verdict of the jury may not be set aside as excessive unless it is not supported by evidence or is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice or corruption, or entertained a mistaken view of the case." Syllabus Point 7, Poe v. Pittman, 150 W. Va. 179, 180, 144 S.E.2d 671, 674 (1965), holding modified by Moran v. Atha Trucking, Inc., 208 W. Va. 379, 540 S.E.2d 903 (1997) (internal citation omitted). Finally, while "[g]reat latitude is allowed counsel in [the] argument of cases," counsel must nevertheless "keep within the evidence, [and] not make statements calculated to inflame, prejudice or mislead the jury[.]" Syllabus Point 8, Farmer v. Knight, 207 W. Va. 716, 718, 536 S.E.2d 140, 142 (2000) (internal citations omitted).

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[6] "Once a trial judge rules on a motion *in limine,* that ruling becomes the law of the case unless modified by a subsequent ruling of the court. Like any other order of a trial court, *in limine* orders are to be scrupulously honored and obeyed by the litigants, witnesses, and counsel. It would entirely defeat the purpose of the motion and impede the administration of justice to suggest that a party unilaterally may assume for himself the authority to determine when and under what circumstances an order is no longer effective." Tennant v. Marion Health Care Found., Inc., 194 W. Va. 97, 113, 459 S.E.2d 374, 390 (1995).

In this case, Respondent's irrelevant evidence and inflammatory argument about the circumstances of the subject accident, and particularly his emphasis on the "hit-and-run driver" and "Jane Doe fleeing," were only designed to inflame, prejudice, and mislead the jury by encouraging the jury to award emotional distress, mental anguish, and punitive damages as annoyance and inconvenience damages. None of this evidence had any bearing on the actual issues in the case: Respondent's damage claims for 1) lost business income in April 2016; 2) additional expenses incurred due to the loss of his dump truck; and 3) annoyance and inconvenience associated with the nineteen (19) days he was unable to work his dump truck in April 2016. It is impossible for this Honorable Court to determine how much of the jury's $75,935 general damages award is annoyance and inconvenience associated with Respondent's loss of use of his dump truck during the repair period, as opposed to emotional distress, mental anguish, and/or punitive damages associated with "Jane Doe fleeing." Therefore, this Honorable Court should set aside the entire jury verdict and grant Petitioner a new trial.

CONCLUSION

The Circuit Court abused its discretion and committed clear error by overlooking Respondent's admitted speculation, and his accountant's admitted failure to determine causation, regarding Respondent's lost business income claim. This led to the jury's completely unsupported $40,000 lost business income award – an award which was more than double the amount both Respondent and his accountant swore was "reasonably certain" (i.e. $18,428 vs. $40,000). The Circuit Court also abused its discretion and committed clear error by overlooking Respondent's irrelevant testimony and inflammatory arguments about "Jane Doe fleeing," made in direct contravention of West Virginia law and made only to inflame, prejudice, and mislead the jury. This led to the jury's excessive $75,935 annoyance and inconvenience award, an award which was inevitably inflated and tainted by Respondent's improper arguments designed to recover

impermissible emotional distress, mental anguish, and punitive damages. The cumulative effect of Respondent's improper evidence and inflammatory argument, and the Circuit Court's errors allowing this improper evidence and argument, was a jury verdict which cannot reflect a proper evaluation of admissible evidence. Therefore, when this Honorable Court considers the Morrison v. Sharma standard, it is "reasonably clear that prejudicial error has crept into the record [and] that substantial justice has not been done" with the jury's verdict in this case.

WHEREFORE Petitioner respectfully requests this Honorable Court to: 1) grant it judgment as a matter of law under Rule 50 of the West Virginia Rules of Civil Procedure on Respondent's speculative lost business income claims; and 2) grant it a new trial on Respondent's remaining damage claims under Rule 59(a) of the West Virginia Rules of Civil Procedure.

DATED the 6th day of March 2019.

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