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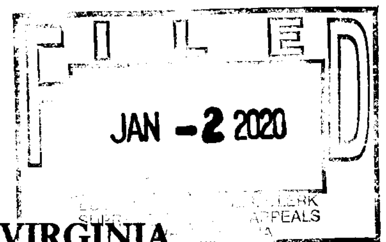

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0890

TESSA ANN JORDAN and LYNN JORDAN,
Defendants Below, Petitioners

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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

BRIEF OF THE PETITIONERS

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by permitting the Respondents to subpoena a corporate representative of the Petitioners' automobile insurance company at a trial that should have been limited to damages after the Respondents admitted liability for an automobile accident.

2. The Circuit Court erred by allowing the Petitioners to recover duplicative damages both for loss of use and annoyance and inconvenience.

3. The Circuit Court erred by denying the Petitioners request for a mitigation of damages instructions relative to the Respondents' loss of use claim.

4. The Circuit Court erred by permitting the Respondents to introduce an exhibit calculating the value of their alleged loss of use claim without any evidentiary predicate.

II. STATEMENT OF THE CASE

"On or about October 15, 2017," according to the complaint filed in this matter, "Plaintiff Joseph Jenkins was traveling on a public highway" when his vehicle "was violently struck broadside" by a vehicle "being operated by the Defendant Tessa Ann Jordan."[1]

From those humble beginnings, the Respondents, Joseph and Stephanie Jenkins, filed suit six months later on March 13, 2018, not only against the Petitioners, Tessa Ann and Lynn Jordan, but also against Safeco Insurance Company, Liberty Mutual Insurance Company, Sara Abell, Rhonda Rutledge,[2] and James B. Conrad dba Conrad Claim Service, LLC, turning what should

[1] App. 13.

[2] After suing Ms. Abell and Ms. Rutledge, the Jenkins eventually submitted a jury instruction, to which Safeco/Liberty objected, that would have falsely stated to the jury that Ms. Abell and Mr. Rutledge "are not the Defendants" even though the Jenkins sued both and they are defendants. App. 227.

have been a simple automobile accident case into some hybrid involving third-party bad faith that our Legislature abolished in 2005.

Relative to Safeco/Liberty, Abell and Rutledge, their claims representative, the Jenkins sued them complaining they "would not provide him with a rental vehicle or pay him the full value of his totaled automobile."[3] This disagreement according to Mr. Jenkins caused him "loss of use, aggravation and inconvenience . . . until his wrecked automobile was repaired or paid for."[4] Of course, if Ms. Jordan was ultimately determined to be liable for the accident, she would be responsible for Mr. Jenkins' damages, including the repair or replacement cost of the vehicle, and the rental value of a replacement vehicle for a reasonable period it took to replace the damaged vehicle, not Safeco/Liberty as its obligation was to defend and indemnify Ms. Jordan should she be held liable for Mr. Jenkins' damages.

The inclusion of Safeco/Liberty, Abell, and Rutledge was not because they were needed to determine Ms. Jordan's liability to Mr. Jenkins for the accident. It was to inject insurance into the case, obtain leverage later used to demand $100,000 relative to the loss of a $3,500 vehicle and $3,500 in lost wages and medical expenses, and hold parties owing no duties to Mr. Jenkins liable for damages for a third-party bad faith cause of action that has been legislatively-abolished.

As to Conrad, the Jenkins complained that he converted the totaled vehicle by "removing it without Joe Jenkins' knowledge to a location unknown" after it had been towed to a body shop.[5] In Conrad's pro se answer, he explained his conduct relative to the vehicle had been undertaken

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[3] App. 13.

[4] Id.

[5] App. 14.

with the permission of David Romano, Mr. Jenkins' lawyer: "On December 26, 2017 I called and spoke with Mr. Romano over the phone. He gave verbal permission and sent a follow up email . . . to inspect Mr. Jenkins vehicle without Mr. Jenkins being present during the inspection."[6] Conrad's pro se answer also indicated, contrary to the allegations of the complaint, that he never removed Mr. Jenkins' vehicle from the premises: "I do not have direct contact with the insurance companies. I do not take possession of or direct the removal of vehicles."[7] Eventually, on May 10, 2018, the Jenkins dismissed their claims against Conrad.[8]

Regarding the legal basis for suing Safeco/Liberty, Abell, Rutledge, and Conrad, the complaint alleged they "have individually and collectively acted in a negligent, grossly negligent and intentional manner by trespassing [not on the Jenkins' property] and converting Plaintiff Joseph Jenkins' vehicle [which according to him was a total loss]."[9]

Based on these allegations and an ill-defined legal theory, the Jenkins sought damages for emotional distress, aggravation, inconvenience, and other compensatory and punitive damages.[10]

On January 28, 2019, Safeco/Liberty, Abell, and Rutledge filed their motion for summary judgment.[11] It noted that a third-party vendor had been hired to store Mr. Jenkins' vehicle as a result of it being determined to be a total loss, and that the third-party vendor had been advised by the owner of the business at which it was being stored that it had been released by Mr. Jenkins.[12]

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[6] App. 20.

[7] App. 22.

[8] App. 33.

[9] App. 15-16.

[10] App. 17.

[11] App. 50.

[12] App. 55-56.

Because Safeco/Liberty, Abell, and Rutledge never took possession of or otherwise converted Mr. Jenkins' wrecked vehicle, they argued that there was no conversion, trespass, tort of outrage, negligence, or civil conspiracy.[13] Moreover, the third-party vendor paid the storage business all fees owed, thereby relieving Mr. Jenkins of any liability for those fees.[14] They also noted the abolition of third-party bad faith, which is the wolf which the Jenkins was hiding in the sheep's clothing of some other causes of action.[15]

The Jordans contemporaneously stipulated liability.[16] At that point, as of February 4, 2019, the case should have proceeded against the Jordans for damages. Instead, the Jenkins pressed forward with their third-party bad faith suit against Safeco/Liberty, Abell, and Rutledge, which precipitated the filing of a motion by Safeco/Liberty, Abell, and Rutledge to bifurcate the third-party bad faith claims against them, including a claim for punitive damages, from the suit against the Jordans for the automobile accident.[17]

As noted in the motion, "Rule 411 of the West Virginia Rules of Evidence," which states in pertinent part, "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully," is "'based on the assumption that jurors who are informed about the insurance status of a party * * * will increase the amount of damages in that only an insurance company will be adversely affected.'"

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[13] App. 58-59.

[14] App. 59.

[15] App. 62.

[16] App. 99.

[17] The Jordans joined in the bifurcation motion – filing both a motion to bifurcate the automobile accident case from the third-party bad faith case and to bifurcate punitive damages. App. 210 and 187.

Considerable authority was also provided indicating that claims against a tortfeasor's insurance company should be bifurcated from claims against the tortfeasor.[18]

Lest there be any doubt about the third-party bad faith nature of the Jenkins' claims against Safeco/Liberty, Abell, and Rutledge, the Jenkins had identified a local attorney, Gregory H. Schillace, as an insurance bad faith expert, necessitating the filing of a motion to exclude his testimony at trial.[19] Indeed, in a discovery disclosure, Mr. Schillace was identified as an expert "who has wide experience with insurance law, including common law bad faith and Unfair Trade Practices Act rules and regulations, and who is familiar with the standards required of insurance companies ... handling a claim such as the one at issue in this case."[20]

In response to the Safeco Defendants' summary judgment motion, the Jenkins argued (1) Safeco/Liberty refused to pay Mr. Jenkins was he thought it was worth; (2) Safeco/Liberty failed to provide him with a rental vehicle; (3) Safeco/Liberty was legally responsible for the moving of Mr. Jenkins to another location because it paid the third-party vendor and storage company; and (4) evidence supporting the summary judgment motion should be ignored.[21]

Incredibly, relative to the legal arguments in support of the summary judgment motion, the Jenkins' response stated, "Plaintiffs do not quibble regarding the Safeco Defendants' review of the

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[18] Additionally, Safeco/Liberty filed objections to the Jenkins' proposed jury instructions that would have instructed the jury on third-party bad faith even though, as the objections noted, "Because Plaintiffs are third-party claimants, they have no private cause of action against the Defendants for bad faith." App. 228.

[19] App. 137. Similarly, the Jordans filed a motion that "Plaintiffs and their counsel be precluded from mentioning that the Defendants have liability insurance coverage" because "The mention of such insurance would unfairly prejudice the Defendants ..." App. 219.

[20] App. 141.

[21] App. 155-164.

law of conversion, trespass, gross negligence, intentional tort/outrageous conduct and conspiracy" and citing absolutely no contrary authority maintained, "but it is the Safeco Defendants' conduct which the jury will have to weigh and apply to each of those torts"[22] as if having not a single case in support of the imposition of liability on insurance companies and their representatives under the circumstances presented is unnecessary to surviving a summary judgment motion.

Relative to the bifurcation motions, the Jenkins, again without any specific legal authority, argued, "for the jury to understand what happened ... that Safeco took Plaintiffs' vehicle ... it would [be] confusing for a jury not to also hear the evidence regarding the crash"[23] as if a second jury would not be told about Safeco's status as the Jordans' insurer and adjusted a claim arising from an automobile accident. As to R. Evid. 411, the Jenkins summarily stated, "Here the Defendants merely presume that any mention of insurance is sufficiently prejudicial to automatically require separate trials. That is not the law under Rule 411."[24]

Relative to the motions to exclude evidence of insurance bad faith, the Jenkins argued, "While Safeco cannot be held liable for violations of the UTPA, violations of that Statute and its Regulations are relevant evidence to prove intent, deliberate conduct and ultimately actual malice."[25] Turning on its head relative to the Legislature's abolition of statutory third-party bad faith and this Court's rulings regarding the non-existence of common law third-party bad faith, the Jenkins further argued, "The UTPA and its Regulations still apply to every insurance company ... As an example ... Safeco delayed contacting Plaintiffs to determine if they needed a rental vehicle,

[22] App. 163.

[23] App. 265.

[24] App. 266.

[25] App. 277.

or to value Joe Jenkin's wrecked work vehicle, or to otherwise pay him for his damages."[26] The Jenkins further argued, "Also, Plaintiffs' expert can identify those areas of delay ..."[27]

On April 1, 2019, the trial court entered a four-page order summarily denying the motions for summary judgment and in limine motions without analysis.[28] As to the motions to excluded Mr. Schillace, the Jenkins withdrew him as a witness.[29] As to the bifurcation motions, the trial court entered an order on the same date bifurcating "the Trial involving the Jordan Defendants ... from the Plaintiffs' claims against the Safeco Defendants ..." [30]

In the face of the trial court's bifurcation order, however, the Jenkins subpoenaed for trial a Safeco corporate representative,[31] prompting a joint motion on the eve of trial to preclude reference to insurance or the Jenkins from calling Safeco's corporate representative as a witness in what should have been only a damages trial against the Jordans, but the trial court denied this motion.[32] Thereafter, from the opening statement forward, the Jenkins' counsel referenced that the case was about much more than a trial in an automobile accident on damages:

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[26] App. 278.

[27] App. 279.

[28] App. 319.

[29] App. 321.

[30] App. 323.

[31] App. 316. This trial subpoena was not only for the testimony of a "Rule 30(b)(7) DESIGNATED WITNESS OR WITNESSES OF DEFENDANTS, LIBERTY MUTUAL INSURANCE COMPANY AND SAFECO INSURANCE COMPANY OF AMERICA," but listed as topics for testimony and documents for production were (1) "Those matters contained in the Rule 30(b)(7) deposition of designated witness Aaron Ford;" (2) "All communications between or among any person including the Defendants;" (3) "All facts and information regarding the taking of Joseph Jenkins' vehicle;" (4) "Any and all facts or information that would explain any of these Defendants' actions or conduct in this claim;" and (5) "The net worth in dollar amount for each Defendant." Id. Regarding the question of the relevance of this to the Jenkins' damages as a result of the automobile accident, which was the only issue to be tried against the Jordans, the answer is "nothing."

[32] App. 455 (emphasis supplied).

> Sitting here today, the essence or the importance or the main part of this case, which we'll bring to you, **is that he has never been paid for any of his damages**.[33] And the liability is clear. As a matter of fact, **the Judge has already found that liability was clear**[34] based on the statements that the lawyers provided to the Court through what's called a Stipulation...
>
> And to top it off, **his car was taken from him by individuals and moved to a location without his permission because he wanted to repair that vehicle**[35] ...
>
> Now, to be honest about it, **I don't know that the Jury is going to know much about the delay, but we'll find out. But Mr. Jenkins sure knows about it, because he tried for months to get his damages paid**[36]...

Then, during the examination of Mr. Jordan, the Jenkins' counsel skillfully drove a wedge between him and his insurance company over what should have been the non-issue of the "delay" in providing Mr. Jenkins with a rental vehicle or adjusting his damage claim to his liking:

> Q. Did you --- did you try to fix your car or did it get totaled or what?
>
> A. It was totaled.
>
> Q. So you got paid for it?
>
> A. Yes.
>
> Q. Okay. Do you remember when that happened?
>
> A. It was probably six weeks after the accident...

---

[33] Of course, the fact that Mr. Jenkins had not been "paid for any of his damages" was irrelevant. The only relevant issue was the amount of his damages, not whether he had been paid for them.

[34] Indeed, the trial court had made no such finding; rather, the Jordans' entered into a stipulation regarding their liability for the Jenkins' damages. App. 99.

[35] App. 455 (emphasis supplied). Again, the Jenkins' lawyer knew the Jordans had nothing to do with the circumstances under which a vendor for their insurance company had been told by the storage company which initially had the vehicle that Mr. Jenkins had released it to be moved to another storage location.

[36] App. 457 (emphasis supplied). This portion of the opening statement is astounding when one realizes that the third-party bad faith claims had been bifurcated and all that should have been relevant to this trial was the amount of the Jenkins' damages, which had absolutely nothing to do with "delay" in being paid. Every suit for damages that goes to trial involves delay in a claimant being paid, but that doesn't turn every case into one for annoyance damages or, if there is insurance coverage, one for third-party bad faith.

Q. Now, did you know about Mr. Jenkins's damages?

A. No, sir.

Q. Did you have any idea that he hadn't been paid?

A. No, sir. I turned the information over to the insurance company and that is next day I presumed everything would be settled....

Q. And you didn't have anything to do with it after that?

A. Other than just --- no, no --- up until the filing of the suit, I didn't have any correspondence with Safeco representatives other than seeing that someone would come and appraise our car. I presumed Mr. Jenkins's insurance would be having someone with our company....

Q. And did you ever ask them, hey, did you pay the damages for Mr. Jenkins?

A. No. I kind of think sometimes that's crossing the line. You're asking --- you know, he's in an accident with my daughter. I mean, I don't want to get into his personal life. My insurance company has the right to, but I'm not --- not trying to see what's going on with that situation...

Q. Okay. Now, at some point, I think it was in March of last year, Mr. Jenkins had to file a civil action, which we're here about. Do you remember that?

A. Yes, sir, I remember it.

Q. What did you do when that occurred?

A. I contacted the --- my insurance company and they informed they would provide me an attorney, which is Mr. Cook here today...

Q. I don't want what you discussed with Mr. Cook. I'm just saying have you suggested or told anyone they need to pay Mr. Jenkins?

A. No, sir. I left that up to the insurance. I was not aware he had not been paid for his car, opportunity to pay for it.

Q. Do you think he should have been paid by now?

A. I'll not take opinion on that. I'm not a Judge.

Q. We got one right here, this one. I'm asking you, though. It's been 17 months.[37]

The purpose of this line of question is transparent. Where liability had been admitted and the only issue was the Jenkins' damages, their attorney was injecting the issue of insurance.

Not only did the Jenkins' lawyer inject insurance through his examination of Mr. Jordan, he inquired into the issue of the dispute over the issue of transfer of Mr. Jenkins' vehicle:

Q. You don't know anything about it being taken without his permission?

A. No, sir.

Q. You don't know anything about him not being furnished a rental car because his car was disabled?

A. I was informed of that by my insurance agent last summer. That's the first time.[38]

Then, after eliciting irrelevant testimony regarding the insurance company's adjusting of Mr. Jenkins' third-party claim, the Jenkins' attorney called a Safeco representative as a witness to elicit equally irrelevant testimony:

> Well, I want to raise with the Court because of Mr. Cook's objection at the beginning of this. I think now the issue has been opened up by the witnesses on their own and with no objections. So I'm in a position now I think I want to call Mr. Ford, but I don't think those same parameters apply. ... You noticed in voir dire or opening I didn't mention that,[39] but I think now it's fair game. I mean, the bag --- the cat's out of the bag. And I do think it would be probative to have Mr. Ford testify as to why there was delay, especially since there at least was some testimony by Mr.

[37] App. 466-470.

[38] App. 471.

[39] App. 488. Of course, this was inaccurate as the Jenkins' lawyer expressly mentioned there being a delay in payments to Mr. Jenkins despite liability being clear, which are insurance bad faith issues, not damages issues in an automobile accident case where liability is admitted.

Jordan and Ms. Jordan that perhaps, even though they didn't know the details, if it was reasonable.[40]

The Jordans' counsel disputed the relevance of testimony from a Safeco representative:

> I told the Court what they were going to say, that they don't know what happened to the vehicle after they turned it in to the insurance company. That's exactly what they testified to. Nothing's changed. So I'm not sure where Mr. Romano's coming from.[41]

Nevertheless, despite the irrelevancy of the testimony relative to the only issue before the jury, i.e., the damages suffered by the Jenkins as a result of an automobile accident, the trial court permitted them to call the Safeco representative as a witness subject to the following limiting instruction which only exacerbated the prejudice of the interjection of insurance in a damages trial:

> Ladies and gentlemen of the Jury, I'm going to give you a limited instruction. The Court will instruct you that there has been or there may be testimony and exhibits which identify Safeco Insurance Company or its parent, Liberty Mutual Insurance Company, as being involved in this case. Neither of those insurance companies are Defendants in this case, even though they insured the Jordans. The purpose of such evidence is not to prove the liability of the Jordans, as that has been admitted and liability has been found against them by the Court.
>
> Such evidence is to be considered by the Jury to weigh Plaintiffs' claims of loss of use damages by not being paid for the vehicle or being provided a rental vehicle while theirs was being repaired or until a spare value was paid by the allegedly negligent parties. You should not consider such evidence regarding insurance for other purposes other than as it relates to those aspects of the Plaintiffs' claims.[42]

Of course, the cause of Mr. Jenkins' loss of use was irrelevant as liability for it had been admitted and the jury's only role was to determine the value of that loss of use. Similarly, the cause

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[40] Id.

[41] App. 489.

[42] App. 500-501.

of any annoyance and inconvenience was irrelevant as liability had been admitted because the jury's only role was to determine the value of that loss of use.

What then proceeded for over fifty transcript pages of trial testimony was a third-party bad faith examination of Safeco's corporate representative challenging decisions that had been made during the processing of Mr. Jenkins' third-party claim.[43] On examination by the Jordans' counsel, the Safeco corporate representative explained how contact after contact after contact by Safeco with David Romano, on October 19, 2017, on October 23, 2017, on October 26, 2017, on November 20, 2017, on December 21, 2017, and on December 26, 2017, were met with no substantive responses regarding any claim or complaint by Mr. Jenkins.[44] Indeed, other than negotiations between the parties regarding the fair market value of Mr. Jenkins' vehicle,[45] none of the issues with the rental or delay were communicated by Mr. Romano until suit was filed in March 2018. Indeed, Safeco's representative confirmed that a rental receipt admitted by the Jenkins as evidence at trial had never been provided to Safeco before they filed suit.[46]

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[43] App. 499-555.

[44] App. 560.

[45] App. 561. Eventually, after the Jenkins' lawyer failed to respond to repeated inquiries regarding the claim, Safeco sent an email to him on January 26, 2018, about two months before suit was filed, stating, "I have attached the CCC one Market Valuation Report that was used to determine the value. On[] page one you will see the base vehicle value at $3561.00...The price is not negotiable, if Mr. Jenkins is still disputing the value, he will need to go through his insurance for the vehicle portion of the claim. The vehicle was picked and moved to our Copart lot." App. 170. Ironically, although the only extant dispute was over the car's true market value, the Jenkins never sought damages for destruction of the vehicle. Instead, they chose to file suit a couple of months later and then recover about $55,000 in damages for the loss of use of a vehicle their attorney was advised in January 2018 had been moved to a different lot until the claim could be settled.

[46] App. 562.

The Jenkins' lawyer was also permitted, over the objections of the Jordans, to cross-examine Safeco's representative **about the communications between the Jenkins' lawyer and Safeco** over Mr. Jenkins' claim and lawsuit in violation of the Rules of Professional Conduct:[47]

> ATTORNEY COOK: Thanks. Are you a witness? Are you a fact witness now? Because that's basically what you're making this letter out to be, Mr. Romano.
>
> ATTORNEY ROMANO: I don't think so.
>
> ATTORNEY COOK: Well, I object to publishing that to the Jury. He's not a witness. Otherwise, he can recuse himself and I'll put him on the witness stand.
>
> ATTORNEY ROMANO: And that's fine. If he wants to try to do that. But he cross examined him. He set that up about things and what they discussed and when he dates were. I'm entitled to put this in there. And it doesn't make me a witness. It's a letter. And if you want –
>
> ATTORNEY COOK: And I ---
>
> ATTORNEY ROMANO: Let me finish, please. I let you finish. And if he wants to attempt that, we can sure have a brief objection and I'll put mine on, he can --- you can make the call. I sure don't mind getting up there, if he wants me to. I don't think it's proper, but ---.
>
> JUDGE: I think that's going to be a problem.[48]

Ultimately, however, Mr. Romano persisted, the trial judge relented, and Mr. Romano's correspondence with Safeco was admitted as an exhibit[49] in what should have been a trial limited to the calculation of the Jenkins' damages suffered in an automobile accident in which liability had been admitted.

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[47] R. Prof. Cond. 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: the testimony relates to an uncontested issue; the testimony relates to the nature and value of legal services rendered in the case; or disqualification of the lawyer would work substantial hardship on the client.").

[48] App. 579-580.

[49] App. 1297.

Not only did the Jenkins' counsel interrogate Safeco's representative for over fifty pages of trial testimony about the irrelevant reasons for the delay,[50] he spent over ten pages interrogating him over the issue of Safeco's vendor paying the storage bill at the first storage facility[51] and, after being advised that Mr. Jenkins had released the vehicle, moving it to a second storage facility, the fees for which were paid by Safeco.[52]

Relative to the loss of use claim which the Jenkins and their lawyer were permitted to leverage into a third-party bad faith claim, Mr. Jenkins admitted on cross-examination that he owned a second vehicle that he used as a replacement vehicle.[53] He also admitted that his wife owed a separate vehicle so that neither of them, other than for a couple of weeks, had been without their own vehicle.[54] Mr. Jenkins explained how he had hired Mr. Romano shortly after the accident and had relied on Mr. Romano to deal with the Jordans' insurer.[55]

Relative to the calculation of Mr. Jenkins' damages, his attorney was permitted to essentially serve as his expert, using a summary with calculations prepared by the attorney, provided to defense counsel on the night before trial, over the objections of the Jordans' counsel.[56]

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[50] App. 499-555.

[51] App. 567-579.

[52] App. 90.

[53] App. 619.

[54] App. 620.

[55] App. 621. Indeed, Mr. Jenkins spoke with an adjuster on October 17, 2017, **two days after the accident**, and rejected Safeco's offer to reimburse him for a rental vehicle once liability was determined, instead stating that "he will not pay out of pocket because police found our customer at fault" and indicating "he might get an attorney involved..." App. 168. Importantly, it was Mr. Jenkins, not Safeco, who decided to wait until liability was determined before accepting Safeco's offer relative to a rental vehicle: "I offered to set ERAC [Enterprise Rent-A-Car] at cost to clmt until liability has been determined. He did not want to do that until liability has been determined." App. 169.

[56] "I'm not certain what the foundation is for the cost of the rental car. That's obviously something Mr. Romano prepared ... I don't know where that number's coming out of." App. 528. The Jenkins'

At the close of all the evidence, the Jordans moved for judgment relative to the value of the loss of Mr. Jenkins' vehicle as the Jenkins never admitted any evidence regarding its value, even though a dispute over the same was one of the reasons for the delays.[57] The trial court granted this motion and the issue of the value of the loss of Mr. Jenkins' vehicle was not presented to the jury.[58] The reason the Jenkins never presented evidence of the value of Mr. Jenkins' vehicle is explained by the Jordans' motion for judgment as a matter of law on loss of use:

> ATTORNEY COOK: I --- I know what motion I want to make on the directed verdict. I mean, Plaintiff obtained a new vehicle in December of 2017. To me, that caps the loss-of-use damages in the case. I understand what Mr. Romano's testimony is going to be. This is a \$3,500 car --- \$3,500 vehicle and they're claiming \$33,000 in loss-of-use damages. And the fact of the matter is there was no loss of use after he got that vehicle. There was no loss of use after the rental vehicle was released...
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> ATTORNEY ROMANO: My response is that is not the law. And that's what's important. Read the Sibello case and Hildebrand case. The duty is on the wrongdoer to pay the damages. Not on the victim to satisfy their own damages caused by someone else...[59]

The trial court, however, denied the motion and permitted the Jenkins to argue to the jury that not only were they entitled to about \$33,000 in loss of use damages based on the loss of a vehicle worth about \$3,500 that they did not seek reimbursement for its loss and which they effectively replaced by purchasing another vehicle within a few weeks of the accident. Moreover,

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counsel defended using an exhibit he prepared by questioning Safeco's corporate representative regarding the manner in which the Jenkins' counsel had performed his calculations, App. 528-529, but after Safeco's corporate representative disputed that counsel's calculations represented the fair rental value of a replacement vehicle (indeed, the corporate representative testified that the fair rental value of a replacement vehicle was about one-third of the amount in counsel's exhibit), counsel simply ignored it and the trial court permitted the introduction of counsel's exhibit, which the jury then used to award the same amount on the verdict form.

[57] App. 636.

[58] Id.

[59] App. 637.

the trial court permitted them to recover not only "loss of use" in the form of the rental value of a replacement vehicle they replaced with a new one, but for "annoyance and inconvenience" which is duplicative of loss of use in a tort action.[60]

During their deliberations in a trial in which evidence of insurance should never have been admitted, the jury sent the following question to the trial court: "**We the jurors have one question prior to reaching a verdict. Why are the defendants on trial for a lawsuit when we feel it should be the insurance company**[?]"[61] Not much more needs to be said about the impact evidence of insurance had on the jury during the trial of what should have been a simple one of damages arising from an automobile accident.

At the conclusion of the first phase of the trial, the jury returned a verdict against the Jordans for $2,970.00 in medical expenses, $600.00 in lost wages, $12,000 for aggravation and inconvenience, $6,000 for loss of consortium, and $33,358.98 for loss of use of Mr. Jenkins' vehicle between the date of the accident and trial.[62]

Following the first phase of the trial, Safeco/Liberty, Abell, and Rutledge filed a motion to continue the second phase because, as a result of the verdict against the Jordans, the Jenkins had been fully compensated for all their economic and non-economic damages.[63] They also filed a corresponding motion seeking to preclude the Jenkins from a double recovery of damages.[64] Finally, they filed objections to the Jenkins' proposed jury instructions which misrepresented the

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[60] App. 339.

[61] App. 364 (emphasis supplied).

[62] App. 339.

[63] App. 387.

[64] App. 405.

status of Abell and Rutledge as defendants, improperly interjected claims-handling issues including references to the UTPA and accompanying regulations, permitted a double recovery of annoyance and inconvenience damages, omitted the "wrongful" element from a claim of conversion, omitted the "intentional" element from a trespass claim, included a non-party relative to the civil conspiracy claim, misstated the elements of a tort of outrage claim, and permitted the recovery of damages which are not recoverable.[65]

Nevertheless, the Jenkins' case against the Safeco Defendants proceeded to trial with the jury rejecting their trespass, civil conspiracy, and tort of outrage claims, but finding on their conversion claim, and awarding $1,000 compensatory damages and $60,000 in punitive damages.[66]

Accordingly, based on an auto accident in which Mr. Jenkins' medical bills and lost wages were about $3,500 and he was fully reimbursed for the value of his vehicle, which he replaced with another vehicle within a few weeks of the accident, he and his wife have been awarded $115,928.98 in compensatory and punitive damages, which explains why the Legislature elected to abolish third-party bad faith in 2005, and why this Court has held that there is no such cause of action as common-law third-party bad faith.

III. SUMMARY OF ARGUMENT

This is an appeal from a judgment on a verdict in what should have been a garden-variety automobile accident case in which the trial court permitted the Respondents, over the Petitioners' multiple objections, to litigate third-party bad faith claims against the Petitioners' automobile

[65] App. 227-237.

[66] App. 840-842.

liability insurance company. Before trial, the Petitioners conceded liability for the accident and all that should have been tried were the Respondents' economic and non-economic damages. Instead, the trial court permitted the Respondents to embark on an inquisition of the reasons the Petitioners' insurance company did not settle their vehicle damage and loss of use claim before trial. Of course, once the Petitioners conceded liability for the accident, but could not come to terms with the Respondents on their damages claims, the reasons they were unable to come to settlement terms, like every other civil case that goes to trial, were irrelevant. Once liability was stipulated, the only relevant evidence was (1) the Respondents' valuation of their vehicle, which they did not even bother presented to the jury as it was only about $3,500; (2) the Respondents' valuation of their loss of use; (3) the Respondents' valuation of their medical bills and lost wages; and (4) evidence regarding their pain, suffering, and loss of consortium. Instead, the Respondents were permitted to prosecute a duplicative loss of use claim under the banner of annoyance and inconvenience, and to interject frustration with the Petitioners' insurance company, prompting the jury to ask, "Why are the defendants on trial for a lawsuit when we feel it should be the insurance company?"

At the conclusion of a hybrid damages/third-party bad faith trial having no precedent in the annals of West Virginia judicial history, the jury returned a verdict against the Petitioners awarding $2,970.00 in medical expenses, $600.00 in lost wages, $33,353.98 for loss of use of the Respondents' automobile, $12,000.00 for aggravation and inconvenience, and $8,000.00 for loss of consortium, for a total verdict of $56,928.98.

The Petitioners filed a timely motion for new trial, which were denied by the trial court, and it is from the denial of the motion for new trial that the petitioners are prosecuting their appeal.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners request oral argument under R. App. P. 20 where the trial in this case was unprecedent after the legislative abolition of third-party bad faith in 2005 and issues of first impression and fundamental public importance are presented.

V. ARGUMENT

A. STANDARD OF REVIEW

As the Circuit Court should have granted judgment as a matter of law relative to the Respondents' successful efforts to convert what should have been a trial limited to damages after the admission of liability in a tort action into a third-party bad faith case in which evidence of alleged delays in settling an insurance claim was admitted, the appropriate standard of review in this case relative to those issues is *de novo*.[67] Similarly, the legal issue of whether an automobile accident plaintiff can recover both the fair rental value of a damaged motor vehicle and separate damages for annoyance and inconvenience is subject to *de novo* review.[68] Relative to the issue of whether the trial court erred by denying the Jordans' mitigation of damages instruction, as it was rejected based on the Jenkins' argument that they had no obligation to mitigate their damages relative to the damaged vehicle, the appropriate standard of review is *de novo*.[69] Finally, relative to the issue

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[67] Syl. pt. 1, *Findley v. State Farm Mutual Automobile Insurance Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.").

[68] Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."); see also *Riggs v. West Virginia University Hospitals, Inc.*, 221 W. Va. 646, 653, 656 S.E.2d 91, 98 (2007) ("As the issue raised directly challenges the trial court's application of the MPLA's non-economic damages cap to the jury verdict, our review is *de novo*.").

[69] *State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995) ("if an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise de novo review.") (footnote omitted).

of permitting the Jenkins' lawyer to serve as his own damages expert, preparing and admitting a document with the lawyer's calculation of the Jenkins' damages for loss of use, "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard."[70]

Applying these standards of review to the record, it is clear that (1) the trial court erred as a matter of law by allowing the Jenkins' to subpoena a representative of the Jordans' automobile liability insurance company to testify at a trial that should have been limited to damages once liability was admitted; (2) the trial court erred as a matter of law by allowing the Jenkins to recover damages both for loss of use and for annoyance and inconvenience; (3) the trial court erred as a matter of law by refusing to instruct the jury on the Jenkins' obligation to mitigate their damages; and (4) the trial court abused its discretion by admitting into evidence an exhibit prepared by the Jenkins' lawyer with the lawyer's calculations of the Jenkins' damages for loss of use.

B. THE CIRCUIT COURT ERRED BY PERMITTING THE RESPONDENTS TO SUBPOENA A CORPORATE REPRESENTATIVE OF THE PETITIONERS' AUTOMOBILE INSURANCE COMPANY AT A TRIAL THAT SHOULD HAVE BEEN LIMITED TO DAMAGES AFTER THE RESPONDENTS ADMITTED LIABILITY FOR AN AUTOMOBILE ACCIDENT.

This Court has recognized that actions for statutory third-party bad faith have been "barred pursuant to W.Va. Code, 33-11-4a(a) [2005], which states: 'A third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice.'"[71] Similarly, this Court has noted:

> Prior to the enactment of W.Va. Code, 33-11-4a(a) [2005], this Court held in the syllabus of *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893 (1998):

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[70] Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).

[71] *State ex rel. State Auto Property Insurance Companies v. Stucky*, 239 W. Va. 729, 733, 806 S.E.2d 160, 164 (2017).

> A third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty.[72]

Accordingly, the Jordans' insurer owed no common law or statutory duties to provide a rental vehicle to the Jenkins while this lawsuit was pending. As this Court explained in *Elmore*:

> First, **the relationship between an insurer and a third-party claimant in a settlement process is adversarial**. "[T]hat the insurer is the representative of the insured logically imports that the third-party tort claimant's status as the adversary of the insured renders him, ipso facto, the adversary of the insured's agent." *Linscott v. State Farm Mutual Auto. Ins. Co.*, 368 A.2d 1161, 1163-64 (Me.1977). "[T]he insurer stands in the shoes of the insured in dealing with the victim." *Long v. McAllister*, 319 N.W.2d 256, 262 (Iowa 1982). **Because the insurer is an adversary of a third-party claimant in the settlement process, the law cannot expect the insurer to subordinate its interests to those of the third party**...
>
> Further, other states have uniformly rejected the notion that an insurer could have a fiduciary obligation to a third party. The reasons for this were stated concisely by the Supreme Judicial Court of Maine in *Linscott v. State Farm Mutual Auto. Ins. Co.,* supra:
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>> The pre-trial negotiations which may be conducted between a tort claimant and a defending insurance company are adversary in nature and, hence, will not give rise to a duty to bargain in good faith, as claimed by plaintiff. A "duty of good faith and fair dealing" in the handling of claims runs only to an insurance company's insured, it derives from a covenant implicit in the provisions of the insurance contract establishing the insurer as the authorized representative of the insured and is, therefore, without application for the benefit of the adversary third party tort claimant. Indeed, that the insurer is the representative of the insured logically imports that the third party tort claimant's status as the adversary of the insured renders him, ipso facto, the adversary of the insured's agent. Thus, **prior to the establishment of legal liability, as the tort claimant has no legal right to require the tortfeasor to negotiate or settle, it likewise lacks right to require such action by his representative. This is true even if it is the insurer which voluntarily initiates the pre-litigation negotiations with the injured tort claimant**.

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[72] Id.

> *Linscott*, 368 A.2d at 1163–64...
>
> In addition, it is instructive here that this Court has never recognized that the relationship between an insurer ***and its insured*** is in the nature of a fiduciary relationship... If this Court has not recognized a fiduciary relationship between insurers and insureds, we are not disposed to recognize such a relationship between insurers and third parties whose interests are adversarial.[73]

As this Court discussed in *Elmore*, there is a remedy for an insured if an insurer refuses to settle within policy limits and exposes the insured to liability:

> Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured's best interest and such failure to so settle prima facie constitutes bad faith toward its insured.[74]

Thus, it was entirely within the insurer's prerogative not to capitulate to the settlement demands of the Jenkins and their lawyer, subject only to the insurer's potential liability to the Jordans for any verdict in excess of the Jordans' policy limits. Otherwise, in every case in which a tortfeasor's insurer refuses to cave to a claimant's settlement demands, the claimant can file suit and then present evidence that the claimant's damages were somehow exacerbated by what is the insurer's right to have issues of liability and/or damages determined by a jury in a civil action.

In Syllabus Point 2 of *Murthy v. Karpacs-Brown*,[75] this Court rejected a similar effort to resurrect third-party bad faith in the form of a claim for attorney fees and litigation costs attendant to an insurer's choice to take a claim to trial resulting in a verdict in excess of policy limits, which the insurer then satisfied, reiterating:

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[73] *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 436-437, 504 S.E.2d 893, 899-900 (1998) (emphasis supplied).

[74] Syl. pt. 2, *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990).

[75] 237 W. Va. 490, 788 S.E.2d 18 (2016).

"Bringing or defending an action to promote or protect one's economic or property interests does not per se constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as 'costs' of the action. Syl. pt. 4, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986).

Likewise, in the instant case, the Jordans' insurer had the right to choose to defend the Jenkins' action to promote its own economic and property interests, and not to capitulate to the Jenkins' settlement demands, particularly relative to their valuation of the Mr. Jenkins' vehicle for which they elected, likely for strategic reasons, not to seek damages from the jury for its loss.

In addition to its conflict with the law relative to statutory and common-law third-party bad faith, allowing the Jenkins to call a representative of the Jordans' insurer also violated R. Evid. 411 which provides, in relevant part, "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully."

Here, of course, the Jordans never placed in controversy their poverty, inability to pay, or financial status. Moreover, the testimony of the insurer's representative was irrelevant to the Jordans' bias or prejudice, or to prove agency, ownership, or control issue relative to the Jordans. Instead, the trial court was persuaded by the Jenkins' argument that because their loss of use claim was not settled, the Jenkins should be permitted to present evidence pointing the finger at the insurer. Of course, this was irrelevant because once liability was admitted, the only issue for the jury was the calculation of the Jenkins' damages, not how those damages were allegedly exacerbated by the insurer's settlement of the Jenkins' third-party insurance claim.

In Syllabus Point 3 of *Reed v. Wimmer*,[76] this Court held:

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[76] 195 W. Va. 199, 465 S.E.2d 199 (1995).

> Where evidence of insurance is wrongfully injected at a trial, its prejudicial effect will be determined by applying the standard set out in Rule 103(a) of the West Virginia Rules of Evidence. In addition to the possibility that the jurors are already aware of the existence of insurance, the trial court should consider the relative strength of each of the parties case or the lack of it, whether the jury was urged by counsel or the witness to consider insurance in deciding the issue of negligence or damages, whether the injection of insurance was designed to prejudice the jury, whether the mention of insurance was in disregard of a previous order, and whether a curative instruction can effectively dissipate any resulting prejudice

In this case, where the Jenkins issued a trial subpoena for a representative of the Jordans' insurer in the face of a bifurcation order; where the only issue for trial was the Jenkins' damages; and where the jury ultimately asked, "Why are the defendants on trial for a lawsuit when we feel it should be the insurance company[?]," it is clear that the error in allowing the Jenkins to call the insurer's representative was so prejudicial that a remand is warranted for a new trial in which all the jury hears is evidence of the Jenkins' damages.

C. THE CIRCUIT COURT ERRED BY ALLOWING THE PETITIONERS TO RECOVER DUPLICATIVE DAMAGES BOTH FOR LOSS OF USE AND ANNOYANCE AND INCONVENIENCE.

Damages for loss of use and annoyance and inconvenience are synonymous as damages for "loss of use" arise from the "annoyance and inconvenience" caused, in this case, by the total loss of Mr. Jenkins' vehicle.[77] Where claimants, like the Jenkins, seek damages for loss of use in the

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[77] Syl. pt. 3, *Kirk v. Pineville Mobile Homes, Inc.*, 172 W. Va. 693, 310 S.E.2d 210 (1983) (Where a general verdict is returned for loss or damage to real and personal property which **includes an amount for loss of use arising from annoyance and inconvenience**, the plaintiff is entitled to prejudgment interest on the entire amount of the general verdict unless the jury has by separate finding established an amount for such loss of use.") (emphasis supplied); see also *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 504, 694 S.E.2d 815, 837 (2010) ("the jury returned no damages for '**annoyance and inconvenience associated with loss of use during the repair period'**") (emphasis supplied); Evans v. Mutual Min., 99 W. Va. 526, 529, 485 S.E.2d 695, 698 (1997) ("The issue of Mutual's liability was submitted to the jury, which found Mutual liable and returned the following awards for the Evanses: '$1000.00 Damages to Personal property[,] $3000.00 Damages to Real property [and] **$1000.00 Loss of use and annoyance and inconvenience**.") (emphasis supplied); *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**.") (emphasis supplied).

form of the fair rental value of replacement property, "lost rental value includes the annoyance and discomfort experienced."[78] "Thus, the lost rental value measures the monetary value of the harm to the property interest. Furthermore, because lost rental value includes damages caused by annoyance or discomfort, to permit a plaintiff to recover both the lost rental value plus an additional sum for annoyance and discomfort would be to permit a double recovery."[79]

In *Hardman Trucking, Inc. v. Poling Trucking Co., Inc.*,[80] for example, this Court affirmed a trial court's decision to set aside a verdict of $2,000 for annoyance and inconvenience damages where the owner of a truck that was damaged in an accident was full compensated by economic damages for its loss of use.[81] Likewise, in the instant case, where the jury awarded the Jenkins $33,353.98 for loss of use based on evidence that such amount was the fair rental value of a replacement vehicle, the trial court should not have permitted the jury to also award damages for annoyance and inconvenience in the amount of $12,000, which were duplicative and, once it was awarded, should have set aside the award, as in *Hardman Trucking*, on post-trial motions.

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[78] *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 142, 747 S.E.2d 468, 475 (2013).

[79] Id. The jury instruction offered by the Jordans on this issue accurately reflects the law: "The proper measure of damages for temporary loss of use of personal property is rental value while the personal property is being repaired." App. 200.

[80] 176 W. Va. 575, 346 S.E.2d 551 (1986).

[81] See also *Somerville v. Dellosa*, 133 W. Va. 435, 445, 56 S.E.2d 756, 763 (1949) ("The plaintiff was permitted to recover for the use of a commercial vehicle during the time his truck was being repaired. This testimony was to the effect that plaintiff had earned $150.00 a week for hauling with the truck. If this item included his personal services and the use of the truck it was partly duplicated by his claim for loss of time. Furthermore, the plaintiff would not be entitled to recover the vehicle's earnings, but only the amount it would have cost him to replace the vehicle by renting one in its stead."); *Chesapeake & O. Ry. Co. v. Elk Refining Co.*, 186 F.2d 30, 32 (4th Cir. 1950) (applying West Virginia law) ("We think that the expense to which the refining company was put in hiring another tractor-trailer unit to take the place of that which had been damaged until the tractor could be repaired and another trailer obtained should have been allowed as an element of damages. It was certainly damage which the Elk Refining Company sustained resulting from the wrecking of its tractor-trailer and recovery therefor must be allowed if that plaintiff is to be made whole for the injury it has sustained.").

In addition to the duplicative nature of an award of damages for "loss of use" and for "annoyance and inconvenience" under the circumstances of this case, "courts in numerous jurisdictions have held or recognized that there may be no recovery for loss of use of a vehicle which has been substantially destroyed or is not substantially repairable."[82] As one court explained, where the goal of compensatory damages is to make the injured party "whole by reimbursing him or her for the loss or harm suffered," which is the same as under West Virginia law, an injured party is made who by allowing "the recovery of reasonable loss-of-use damages during the time reasonably required to procure a suitable replacement vehicle,"[83] but no more.

This case is a perfect example of the wisdom of this rule. Mr. Jenkins' vehicle was valued only at about $3,500. He almost immediately replaced it by purchasing another vehicle after having rented a replacement vehicle for only seventeen days. Yet, he has now been awarded nothing for his totaled vehicle, but over $55,000 in damages for "loss of use" and "annoyance and inconvenience" based on the loss of a $3,500 vehicle.

This Court somewhat addressed these issues in *McCormick v. Allstate Ins. Co.*,[84] a first-party bad faith case in which this Court overturned a jury award of $400.00 for the loss of use of the insured's vehicle where, as here other than for a seventeen-day period, there was no loss of use because Mr. McCormick replaced his damaged vehicle by purchasing another:

> The Court notes that, among other points, Allstate in the present case assigns as error the fact that the jury's verdict awarded the appellant $400.00 for the loss of use of his vehicle, and Allstate claims that there was no evidence to support such an award.

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[82] C.C. Marvel, *Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed*, 18 A.L.R.3d 497 at § 8 (1968).

[83] *Ex parte S & M, LLC*, 120 So.3d 509, 515 (Ala. 2012).

[84] 197 W. Va. 415, 428, 475 S.E.2d 507, 520 (1996).

> The evidence which the appellant did adduce to support this was are the fact that he had bought a used car for $300.00 and paid $100.00 to fix it up.
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> This Court agrees with Allstate that this evidence does not demonstrate loss of use or support the loss of use award. The basic measure of damages for loss of use of personal property is rental value, *O'Dell v. McKenzie*, 150 W. Va. 346, 145 S.E.2d 388 (1965), although as we have indicated above, other factors may be relevant. The cost of a replacement car is not one of those factors. Accordingly, the Court concludes that the $400.00 loss of use award contained in the jury verdict must be set aside.

Likewise, in the present case, once Mr. Jenkins elected, after seventeen days, to purchase a replacement vehicle instead of renting one, he was not entitled to damages for loss of use beyond that seventeen-day period.

Thus, the Petitioners respectfully request that this Court either set aside the $12,000 awarded for annoyance and inconvenience, and reduce the $33,353.98 awarded for loss of use to Mr. Jenkins' actual expenses in renting a replacement vehicle for seventeen days, or to remand this case for a new trial on damages, including for loss of use, with directions to limit recoverable damages to only loss of use, i.e., the "rental value" of a replacement vehicle for seventeen days.

D. THE CIRCUIT COURT ERRED BY DENYING THE PETITIONERS REQUEST FOR A MITIGATION OF DAMAGES INSTRUCTIONS RELATIVE TO THE RESPONDENTS' LOSS OF USE CLAIM.

In Syllabus Point 4 of *Guthrie*, supra, this Court held:

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

In Syllabus Point 11 of *State v. Derr*,[85] this Court held

> A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

Where the issue is whether there was enough evidence to support a proposed jury instruction, there is a somewhat deferential standard of review: "Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard."[86] Where, as here, however, the issue involves whether a party is legally entitled to a jury instruction, the standard of review is *de novo*.[87]

The Jordans offered the following jury instruction, citing this Court's cases supporting it, which was rejected by the trial court:

> The Court instructs the jury that the law requires a party to use ordinary care and to make reasonable efforts and reasonable expense to lessen the damages he or she would otherwise sustain as a result of another's breach of contract/negligence. In other words, an injured party is responsible for doing only those things which can be accomplished at a reasonable expense and by reasonable efforts.[88]

The Jenkins opposed this instruction claiming that there is no duty mitigate claims of loss of use citing Syllabus Point 1 of *Checker Leasing, Inc. v. Sorbello*,[89] which has nothing to do with mitigation, but merely provides:

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[85] 192 W. Va. 165, 451 S.E.2d 731 (1994).

[86] Syl. pt. 12, in part, *Derr*, supra.

[87] *Guthrie*, supra at 671, 461 S.E.2d at 177 ("if an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise de novo review.") (footnote omitted).

[88] App. 341.

[89] 181 W. Va. 199, 382 S.E.2d 36 (1989).

> When personal property is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then 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.

Indeed, the language, "If the injury cannot be repaired or the cost of repair would exceed the property's market value, then 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" is directly contrary to the Jenkins' theory of their case because (1) the cost of repairing Mr. Jenkins' vehicle exceed its fair market value; (2) Mr. Jenkins chose not to pursue his vehicle's fair market value; and (3) Mr. Jenkins rented a replacement vehicle for only seventeen days before buying a new one. In that sense, he mitigated, and the jury should have been instructed and the Jordans permitted to argue that the only loss of use damages to which Mr. Jenkins was entitled was what he paid to rent a replacement vehicle for those seventeen days because (1) Mr. Jenkins had a duty to mitigate and (2) Mr. Jenkins did mitigate his damages when he bought a replacement vehicle.[90]

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[90] As courts have held, "a party cannot recover the reasonable rental value of substitute property if the party does not rent such property because it is able to use its own property to mitigate damages." *MCI Commc'ns, Inc. v. Maverick Cutting & Breaking LLC*, 374 F. Supp. 3d 789, 803–04 (D. Minn. 2019); see also *Breitman v. National Surety Corporation*, 2018 WL 1542151 (D. N.J.) ("The Court agrees that there is no genuine dispute of material fact from which a reasonable fact finder could conclude that Plaintiff took reasonable steps to mitigate consequential damages stemming from loss of use of the premises. For that reason, the Court will grant Defendant's motion for summary judgment as to claims for consequential damages for loss of use, finding as a matter of law that Plaintiff undertook no efforts to mitigate his loss and avoid further damages despite clear ability and incentive to do so."); *Balderas-Ramirez v. Felder*, 537 S.W.3d 625, 637 (Tex. Ct. App.) ("Moreover, the damages may not be awarded for an unreasonably long period of lost use. Whether framed as a duty of mitigation or a doctrine of avoidable consequences, the principle is the same: A plaintiff may not recover loss-of-use damages for a period longer than that reasonably needed to replace the personal property. That principle compels a plaintiff's diligence in remedying his loss and deters an opportunistic plaintiff from dilly-dallying at the expense of the defendant. After all, the role of actual damages is to place the plaintiff in his rightful position, not the position he wishes to acquire."); *Sherman v. Tennessee*, 2017 WL 2589410 at *19 (W.D. Tenn.) ("Had the Shermans availed themselves of the remedial provisions provided by Tennessee's forfeiture laws, the Shermans might have secured the return of their horses more expeditiously, mitigating any decline in value of their horses and the loss of use

Instead, the trial court instructed the jury, over the Jordan's objections, as follows:

Loss of use of Plaintiffs' vehicle from the time of the crash until Plaintiffs were paid the fair value of such vehicle;[91] the evidence is undisputed that Joe Jenkins did not receive any compensation for the fair value of his vehicle for a significant amount of time and he is entitled to damages for the value of the loss of use of his vehicle;[92] ... it is no defense that Joe Jenkins may have had another vehicle to use during this time or that he bought a replacement vehicle and replaced his damaged vehicle in some other manner; those facts may reduce Joe Jenkins' aggravation and inconvenience but they do not reduce the lost value of his damaged vehicle...; the evidence is undisputed that the collision occurred on October 15, 2017, and that Joe Jenkins has been without the use of his vehicle since that time, until you find he is paid;[93] the jury must determine the amount of money that will fully compensate Joe Jenkins for not having his vehicle to drive or use during the time he was without use...

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about which they now complain."); *J & D Towing, LLC v. American Alternative Insurance Corporation*, 478 S.W.3d 649, 677 (Tex. 2016) ("Permitting loss-of-use damages in total-destruction cases, however, is not a license for unrestrained raids on defendants' coffers. As with all consequential damages, the availability of loss-of-use damages is necessarily circumscribed by commonsense rules... Moreover, the damages may not be awarded for an unreasonably long period of lost use. Whether framed as a duty of mitigation or a doctrine of avoidable consequences, the principle is the same: A plaintiff may not recover loss-of-use damages for a period longer than that reasonably needed to replace the personal property.") (footnotes omitted); *Hutson v. Cummins Carolinas, Inc.,* 280 S.C. 552, 560, 314 S.E.2d 19, 24 (1984) ("To permit respondent to recover for the loss of use of the truck for an extended period of three years would be unreasonable and contrary to his duty to minimize his damages... Clearly, after February, 1978, Hutson had no reason to believe that Cummins would remedy the defective repairs and was therefore under a duty to mitigate his damages by having the motor repaired or replaced somewhere else."). Even where a motor vehicle is converted, "the plaintiff may be entitled to loss of use damages [only] if the plaintiff can show that he or she reasonably mitigated his or her damages." *Parker v. Clayton*, 2019 WL 4273913 at *10 (Tenn. Ct. App.) (citation omitted).

[91] This cannot be more wrong. More significantly, it raises the specter that in every tort case in which there is insurance coverage, plaintiffs will be able to recover "annoyance and inconvenience" damages because the tortfeasor "did not pay them" the damages plaintiffs assert they were owed before trial.

[92] Again, this is wrong. In every case in which parties are unable to settle a third-party claim, the claimant may suffer some annoyance and inconvenience in hiring counsel and going to trial, but such "annoyance and inconvenience" are not recoverable as damages.

[93] If course, this is true in every tort case that goes to trial, i.e., the claimant is not "paid" until a final, non-appealable judgment is entered after a favorable jury verdict, but that fact is irrelevant to a trial of liability and damages.

> Plaintiffs are also entitled to damages for aggravation and inconvenience caused or contributed by the Defendants,[94] which you find caused such damages; these types of damages are in the judgment of the jury using reason and everyday understanding of such matters which will compensate Plaintiffs for what the jury finds reasonable compensation for the Plaintiffs having gone through or experienced under the circumstances from the date of the collision on October 15, 2017, until your verdict is rendered; such amount must be reasonable and based on the evidence presented to you in this case.[95]

The trial court might as well have entered judgment for the Jenkins on the issue which explains why Mr. Jenkins has been awarded more than $55,000 for a $3,500 vehicle that he replaced in seventeen days. Thus, the failure to give the Jordans' jury instruction constituted legal error and warrants the award of a new trial.

E. THE CIRCUIT COURT ERRED BY PERMITTING THE RESPONDENTS TO INTRODUCE AN EXHIBIT CALCULATING THE VALUE OF THEIR ALLEGED LOSS OF USE CLAIM WITHOUT ANY EVIDENTIARY PREDICATE.

Before trial, the Jenkins disclosed only their intent to use a "damages summary" at the trial. They did not disclose, however, that "summary" and before trial, the Jordans moved that the Jenkins be "precluded from offering into evidence any exhibits that have not been previously disclosed during discovery."[96]

During the trial, however, the Jenkins produced to the Jordans a one-page document, not previously disclosed, entitled "Joe Jenkins Loss of Use Damages."[97] The document provided the following calculations of the Jenkins' lawyer:

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[94] It should come as no surprise that the Jenkins offered absolutely no legal authority for this portion of their instruction given to the jury.

[95] App. 419.

[96] App. 219. Moreover, the Jordans noted in their pretrial memorandum that the only information provided by the Jenkins relative to their damages claims in discovery was about $3,000 in medical bills. App. 285.

[97] App. 333. Similarly, the Safeco Defendants moved to exclude any "Compilations, abstracts and summaries of documents produced in discovery" to prevent trial by ambush with an exhibit not previously

JOE JENKINS LOSS OF USE DAMAGES

Days Without Vehicle or Rental Car:	
(10/15/17 to 4/2/19)	**534 Days**
Cost of Rental Car (Per Day)	**$ 62.47**
TOTAL LOSS OF USE DAMAGES:	
(534 Days @ $62.47/day)	**$ 33,368.98**

The theory behind this exhibit was that Mr. Jenkins had rented a replacement vehicle for seventeen days until he purchased a replacement vehicle, but because he refused to accept Safeco's offer to settle his vehicle damage claim for the amount offered, but instead chose to hire a lawyer and file suit, he was entitled to more than $1,061.99, which represented his out-of-pocket costs for replacing his damaged vehicle until he replaced it with a new one. Instead, he was entitled to $33,368.98 even though he had only spent about $1,000 out-of-pocket until he replaced his $3,500 damaged vehicle with a new one. Moreover, he was entitled to another $12,000 for "annoyance and inconvenience" attendant to the loss of a vehicle he replaced but the purchase of a new one after renting a replacement for seventeen days.

The exhibit, prepared by the Jenkins' lawyer, was first mentioned during his cross-examination of the insurer's representative:

Q. Let me ask you to turn to Exhibit 4.

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disclosed. App. 251. Finally, the Jenkins affirmatively represented in their final pretrial memorandum that, "All of the Trial Exhibits have been disclosed as they were exchanged in discovery ... Exhibits not yet prepared, bud derived from the discovery documents already exchanged ... have not been determined or exchanged but will be **prior to trial** . . ." App. 302 (emphasis supplied). Despite all the foregoing, the exhibit "Joe Jenkins Loss of Use Damages" was not provided "prior to trial."

ATTORNEY COOK: I just — we need to approach, your Honor... I'm not sure what the foundation is for the cost of that rental car. That's obviously something that Mr. Romano prepared. I mean, that's not an official document. I don't know where that number's coming out of... You're just throwing a number out of the air...

JUDGE: Mr. Romano?

ATTORNEY ROMANO: I'm going to ask him that. That's what the average loss of Mr. Jenkins is for his rental for 17 days.

ATTORNEY COOK: Well, what's the foundation of that?

ATTORNEY ROMANO: Well, Mr. Jenkins will provide the foundation, but I want to ask this witness...

ATTORNEY COOK: But there's no foundation for the numbers...

ATTORNEY ROMANO: There will be if I can get my questions out. And if I don't, you can strike it.

JUDGE: Okay. I'm going to overrule the objection...[98]

Then, using his own exhibit, the Jenkins' lawyer questioned the Safeco representative saying, "just look on Exhibit 4 **because I've already figured it out**."[99] Perhaps this error in allowing a lawyer to serve as his clients' expert witness if the matter was undisputed, but it was not undisputed as evidenced by the testimony of Safeco's representative:

A. Yes, I see it says $62.47. When we – when we first spoke with Mr. Jenkins, we did advise that we could set up a rental for him. And yes, he would be paid out of pocket, **but the rate would have been much less than $62.47**.

Q. Well, but you didn't set it up?

A. We offered. He declined.

Q. Well, you offered, but he had to pay out of his own pocket?

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[98] App. 530.

[99] App. 532 (emphasis supplied).

A. But it would have been much less. It actually would have been $21 or so.

Q. Okay.

A. Because when we set up the rental, we're able to set it up for a discounted rate, and we offered to do so.

Q. So you're saying you could have discounted it by 300 percent?

A. Yes, sir.[100]

Of course, had Mr. Jenkins accepted the offer of a rental at $21 per day to be paid by Safeco once liability was established, he would be able to recover $55,000 for loss of use and annoyance and inconvenience for a $3,500 vehicle he replaced in less than three weeks with a new one.

When the Jenkins moved the admission of their attorney/expert's damages exhibit into evidence, the Jordans objected properly saying, "This is not evidence,"[101] to which the Jenkins' lawyer retorted, "It is evidence... It's evidence of what he paid times the number of days he's been out of his vehicle. And this gentleman just testified that is reasonable and disputes the amount. But that's a matter of weighing the evidence for the Jury."[102] In addition to mischaracterizing the testimony of the Safeco representative discussed above, stating that a document prepared by a lawyer is evidence does not make it evidence.

Moreover, as the Jordans' attorney argued at trial, "It's up to the Jury to decide what the value of the loss of use claim is. And I'm going to make an argument that that's not the value of the loss of use claim."[103] Ultimately, the trial court stated, "I'll overrule the object and allow it."[104]

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[100] App. 532-533 (emphasis supplied).

[101] App. 544.

[102] App. 544.

[103] App. 547.

[104] App. 548.

The proper way to secure the admission of a damages exhibit prepared by counsel is through a stipulation.[105] In the absence of a stipulation, however, a document prepared by counsel regarding the calculation of disputed damages is inadmissible.

In *Adkins v. Foster*,[106] for example, this Court reversed a verdict where the plaintiff's attorney effectively served as a damage expert much like in this case:

> The appellee's evidence at trial regarding diminished earning capacity consisted of statements presented by the appellee with regard to her hourly rate when she had been working and the number of hours worked per day. The appellee's counsel also addressed the diminished earning capacity issue in closing argument, explaining that considering the appellee's age, life expectancy, and normal rate of pay, she had suffered diminished earning capacity in the amount of $447,825. Counsel for the appellee also explained that the figure should be reduced to its present value by dividing it in half. The jury verdict returned on May 8, 1991, was in favor of the appellee for $222,133.

As this Court explained, "Due to the lack of proof of diminished earning capacity to a reasonable degree of certainty, the issue of diminished earning capacity should not have been submitted to the jury."[107]

Moreover, to the extent that a lawyer's exhibit constitutes a "summary," R. Evid. 1006 provides, "The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Here, of course, the only thing being "summarized" was what Mr. Jenkins paid for a rental vehicle

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[105] See, e.g., *Beard v. Lim*, 185 W. Va. 749, 751-752, 408 S.E.2d 772, 774-775 (1991) ("As a result of these hospitalizations, as well as medical and hospitalization expenses resulting from the surgery to remove the needle, appellee Boyd Beard sought special damages based on his medical bills which totaled $22,435.77 and lost wages which totaled $6,400.75. These special damages were listed on two exhibits prepared by plaintiffs' counsel and stipulated to by the parties as to authenticity and admissibility. These exhibits were admitted into evidence and were taken by the jury into their deliberations.") (footnotes omitted).

[106] 187 W.Va. 730, 732, 421 S.E.2d 271, 273 (1992).

[107] Id. at 735, 421 S.E.2d at 276. Upon retrial, the jury awarded the plaintiff zero damages. See *Adkins v. Foster*, 195 W. Va. 566, 466 S.E.2d 417 (1995).

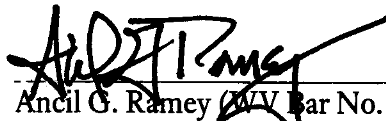
for seventeen days, which was reflected on another exhibit properly admitted at trial without objection. What was objectionable, however, was an exhibit containing the damages calculations of the Jenkins' lawyer and, as in *Adkins v. Foster*, admitting that exhibit over the Jordans' objections constituted reversible error.

VI. CONCLUSION

WHEREFORE, the Petitioners, Tessa Ann Jordan and Lynn Jordan, respectfully request that this Court set aside the judgment of the Circuit Court of Harrison County, and remand for a new trial limited to the issue of the recoverable economic and non-economic damages in an automobile accident case in which liability has been admitted.

TESSA ANN JORDAN AND LYNN JORDAN

By Counsel



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CERTIFICATE OF SERVICE

I certify that on January 2, 2020, I served the foregoing "BRIEF OF THE PETITIONERS" on counsel of record by having a true copy thereof deposited in the United States mail, postage prepaid, addressed as follows:

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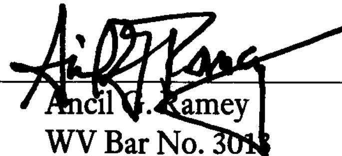

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