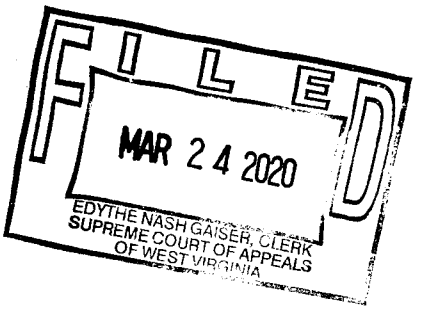
In the Supreme Court of Appeals of West Virginia

Docket No. 19-0890



TESSA ANN JORDAN *and* **LYNN JORDAN,**

Defendants Below / Petitioner,

v.

Appeal from a final order of the Circuit Court of Harrison County (No 18-C-65-1)

JOSEPH M. JENKINS *and* **STEPHANIE D. JENKINS,**

Plaintiffs Below / Respondents.

PETITIONERS' REPLY BRIEF

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I. 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.

Contrary to the Jenkinses' effort to obfuscate the issues in what should have been a simple automobile accident case in order to resurrect an abolished *de facto* third-party bad faith claim, there was only one thing that the jury needed to determine: the total amount of money needed to compensate them for their damages (*i.e.*, general damages for any pain and suffering and loss of consortium as a result of the accident, and special damages in the form of any lost wages, the cost of repair or replacement of their vehicle, and the value of the temporary loss of use of their vehicle until it was repaired or replaced).

Instead, what was tried were the Jenkinses' complaints that a non-party to the automobile accident, the Jordans' insurance company, was not as brisk as the Jenkins would have preferred in settling their third-party insurance claim.

If, as they claim, the Jenkinses were not trying to improperly inject insurance into this matter, then they would understand that neither the Jordans *nor the Jordans' insurer* owed the Jenkinses any duty to settle the Jenkinses' claim against the Jordans—for any particular amount, in any particular time frame, or including any particular terms (like a rental car).

Therefore, ***not*** at issue at trial were (1) the fact that the Jenkinses were insured, and (2) the specifics of the parties' interactions while trying to negotiate a settlement—specifically

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[1] The Rules of Appellate Procedure limit a respondent's brief to forty double-spaced pages. *See* R. APP. P. 38(a) ("The text shall be double-spaced ...") and (c) (respondent's briefs limited to 40 pages). The Jenkinses' brief does indeed contain exactly 40 pages. And §§ II through VI of their brief appear to be double-spaced. The entirety of § I—some 14½ pages—however, is plainly only 1.5*x*-spaced.

including that the Jordans' insurers on their behalf did not immediately capitulate to the Jenkinses' demands in the time or manner that the Jenkinses would have had them do so. As a matter of law, such evidence thus wholly lacked any tendency to make a fact that is *of consequence in determining the action* more or less probable than it would be without the evidence.[2]

The Jenkinses assert in their response that "[s]uch evidence was introduced to prove Respondents' damages and so that the Jury would understand *what [*sic*] and why Respondent Joe Jenkins never received payment for his work vehicle.*"[3] Similarly, they say that "the testimony about Safeco's role regarding the loss of use, aggravation, inconvenience and loss of consortium damages, would have been admitted into evidence under Rule 411 of the WVRE as it was relevant and necessary to explain *why Respondents had not received compensation* to replace the wrecked work vehicle for more than 500 days when 100% of the fault for the automobile collision was attributable to Tessa Jordan ...."[4] And again, they argue that "[s]uch evidence was ... admitted ... to accurately inform the Jury of *what happened and why and how* the damages were caused/exacerbated, and to prove the basis for such damages."[5]

As explained here and in the Jordans' opening brief, however, the "why" and "what" and "how" of the parties' settlement negotiations formed no proper part of any measure

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[2] *See* W. VA. R. EVID. 401 (defining relevance); *see also* W. VA. R. EVID. 402 (providing in pertinent part: "Irrelevant evidence is not admissible.").

[3] (Respondents' Br. at 3 (emphasis added).)

[4] (*Id.* (emphasis added).)

[5] (*Id.* (emphasis added); *see also id.* at 9 (asserting that "the Jury was entitled to know *why* Joe Jenkins was deprived of his property for so long") (emphasis added).)

of damages.[6] A plaintiff's run-of-mill efforts expended settling his claim with a defendant are simply not compensable.[7] Such evidence is precisely why W. VA. R. EVID. 401, 402, 403, and 411 were written: *i.e.*, to prevent the prejudice that necessarily results from introduction of such evidence.

The Jenkinses also rely heavily on the theory that the Jordans cannot now argue that it was error to tell the jury about the details of the parties' negotiations because the Jordans' attorney was happy to have the jury hear that evidence since it might deflect blame from the Jordans onto their insurer for the Jenkinses' annoyance or loss of use.[8] But this argument, too, lacks merit as a matter of law: Under no circumstances could the Jordans' insurer's conduct have relieved them of whatever liability if any that they might have had for the Jenkinses' loss of use of the car.[9] And that insurer never owed the Jenkinses *any* duty, so they could not possibly have been in any way directly liable to the Jenkinses. This is just another baseless effort to cloud a simple issue with irrelevant smoke and mirrors.

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[6] As demonstrated in the Jordans' brief and further *infra*, the Jenkinses were also *not* entitled to loss of use of their vehicle—at all, or for 534 days—and they were *not* entitled to the amount per day that the jury awarded.

[7] (*See* § II *infra* at 3.)

[8] (*See, e.g.*, Respondents' Br. at 2 (arguing that this "evidence was received without objection [*sic*] as Petitioners blamed Safeco for the loss of use damages by not paying Respondents for their totaled vehicle for more than a year"); *id.* at 3 (asserting that "Petitioners [*sic*] trial counsel acquiesced in admitting such evidence both as trial strategy and because his clients could offer no evidence why such damages had not been paid and the Jordans believe they should have been paid").)

[9] ***If*** the Jordans had had some legal duty to the Jenkinses to settle the Jenkinses' claim in any particular manner, and ***if*** the Jordans were unhappy with their insurers' efforts in doing so on the Jordans' behalf, then ***the Jordans*** might possibly have been able to sue their insurers. But under West Virginia law, the first of these hypotheticals is, at least, wrong, and in any event, that is not what happened: the trial court allowed the Jenkinses to recover against the Jordans for the Jordans' insurers' handling of the claim.

The implications of what has occurred in this case are profound because it will permit almost every tort action to be converted into third-party bad faith action with the plaintiff complaining that his or her general and economic damages were exacerbated by the failure of the defendant's insurer to promptly settle the plaintiff's claims. The Legislature has abolished third-party bad faith for sound policy reasons and this backdoor method of resurrecting it should be rejected.

Finally, the Jordans and their insurer did object to the interjection of insurance into what should have been a simple trial determining the general and special damages suffered by the Jenkinses as a result of the automobile accident. The Jordans stipulated, before trial, that Ms. Jordan was "100% at fault for the automobile collision."[10] The Jordans' insurance company filed a motion to bifurcate the insurance issues from the automobile accident damages issues,[11] stating, "The only way to avoid this untenable, prejudicial situation is to separate these trials ... by first trying the Plaintiff's claims against the Jordans and then trying Plaintiffs' claims against the Safeco Defendants."[12] Similarly, the Jordans filed their own motion to bifurcate, making the same arguments.[13] In addition, the Jordans' insurance company filed a motion to exclude evidence and arguments of alleged insurance bad faith,[14] stating, "Evidence and arguments of insurance bad faith ... are not relevant under Rule of Evidence 401 to the claims before this Court. This action is not

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[10] App. 99-100.

[11] App. 103.

[12] App. 104.

[13] App. 210.

[14] App. 137.

a bad faith case ..."[15] Similarly, the Jordans filed their own motion in limine requesting that, "The Plaintiffs and their counsel be prohibited from mentioning that the Defendants have liability insurance coverage ... and that the Court instructs the Plaintiffs from mentioning such insurance coverage in the form of any question or in response to any question or any argument within the hearing of the jury."[16] In addition, the Jordans' motion requested that the trial court instruct that "the Plaintiffs and their counsel be instructed not to mention any conditions or offers of settlement in this matter."[17] In the Jordans' trial witness and exhibit disclosure, only witnesses and evidence relevant to the limited issue of tort damages were identified.[18]

Specifically, with reference to this assignment of error, the elicitation of testimony in the trial against the Jordans by the corporate representative of their insurance company, the Jordans and their insurer filed a joint motion in limine to exclude his testimony stating, "Plaintiffs have advised that they want to elicit insurance evidence and testimony from Safeco and Liberty Mutual's corporate representative during the trial of the Plaintiffs' claims against the Jordans. Such testimony would be improper during the trial against the Jordans."[19] The Jenkinses' arguments to the contrary notwithstanding, the trial court denied that motion:

> During that telephone conference, Plaintiffs' counsel indicated that, even though the claims were bifurcated, he nevertheless expected the corporate representative for Safeco and Liberty to appear and testify during the trial against the Jordans. Counsel for the Jordans and the Safeco Defendants objected to this, noting that such testimony would undermine the purpose for the bifurcation of the trials.

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[15] *Id.*

[16] App. at 219.

[17] *Id.*

[18] App. 205.

[19] App. 311.

> [T]hat same day, the Jordan Defendants and the Safeco Defendants' filed a Joint Motion in Limine to exclude evidence of insurance, including the corporate representative's testimony, from the trial against the Jordan Defendants. The Plaintiffs opposed that Motion in Limine. ...
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> In a second telephone conference on April 1, the Court denied that Motion in Limine.[20]

Armed with this in limine ruling permitting the Jenkinses to officer evidence and argument regarding insurance, including the testimony of the representative of the Jordans' insurance company, they did so over the timely objections of the Jordans. Moreover, immediately before the testimony of the representative, the Jordans' counsel specifically brought the objections to his testimony to the trial court's attention and noting the presence of the insurer's counsel relative to those objections.[21]

Accordingly, this issue was well-preserved in the record and this Court should reverse and remand this case for a new trial.

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

The Jenkinses were allowed to recover money *both* for the "annoyance and inconvenience" that they supposedly suffered because the Jordans' insurers did not, the Jenkinses feel, promptly or adequately settle the Jenkinses' claim against the Jordans *and* for being without their car because, they say, the Jordans' insurers did not promptly or adequately settle the Jenkinses' claim against the Jordans.[22]

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[20] App. 430-431.

[21] App. 496-498.

[22] (*See, e.g.*, Respondents' Br. at 3-9.)

First, as demonstrated in the Jordans' opening brief, these are, plainly, the same thing, meaning that these "two" kinds of damages were just one kind of damages, and the Jenkinses were allowed to double-recover.

Second, even if the Jenkinses' annoyance and inconvenience in settling their claim did not overlap with their brief loss of use of their vehicle, any such claim would lack merit as a matter of law (and any evidence offered to "prove" it is irrelevant). As noted, the Jenkinses argue that the Jordans were responsible for the Jordans' insurers' "failure" to settle the Jenkinses' claim like the Jenkinses wanted them to. But they cite to no law for the proposition that a *tortfeasor* has any duty to settle a claim in some particular manner. Claiming that an alleged tortfeasor has a duty to settle a claim in some particular matter is even worse than the now-abolished third-party bad faith claim against insurers.[23] In fact, that a tortfeasor has absolutely no duty to, and is indeed adverse to, a tort claimant is the very basis for holding that a tortfeasor's insurer (as the tortfeasor's agent) likewise has no common-law duty to, and is thereby adverse to, the tort claimant:

> 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." "[T]he insurer stands in the shoes of the insured in dealing with the victim." 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.

Elmore v. State Farm Mut. Auto. Ins. Co., 202 W. Va. 430, 436, 504 S.E.2d 893, 899 (1998) (citations omitted).

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[23] *See, e.g.*, Syl. pts. 2 to 4, *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

If the Jenkinses' theory was adopted, literally every, single tort claim would give rise to two causes of action: one for the underlying tort, and one claiming that the alleged tortfeasor did not accede to the plaintiff's settlement demands soon enough or richly enough. Even if the Jenkinses were "forced to file suit" because the Jordans' insurers did not settle like the Jenkinses wanted them to,[24] that is nothing more than routine litigation under the American Rule.

Furthermore, because they were compensated for the *complete* loss of their vehicle, the Jenkinses were not *also* entitled to be compensated for the duplicative loss of *use* of the same vehicle (at all, and as demonstrated in the following section, certainly not for the time that they were compensated). For example,

> [t]he Ohio Supreme Court has held that when a motor vehicle has been completely destroyed by the negligent act of another, the proper measure of damages is the full value of the vehicle less wreckage or salvage value. By recovering "the full value of the vehicle, as of the date of its destruction, the owner has been made whole." Damages for loss of use are given only if the damage can be repaired within a reasonable amount of time. The reason for this rule is that when the car is damaged but can be repaired, "the owner does not recover the entire value of his car but only the depreciation caused by its damage, and while repairs are being made the greater portion of his capital investment lies idle."
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> This Court has addressed the potential for duplication if damages for both loss of use and total value are given. In doing so, it held that if full value has been given for property loss, loss of use damages may not be made unless the property involves real property and not personal property...[25]

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[24] (Respondents' Br. at 2.)

[25] *Webster v. Davis*, No. 10CA0021, 2011 WL 1196918, ¶¶ 17-18 (Ohio Ct. App. Mar. 31, 2011) (citations omitted); *see also Henry v. City of Akron*, 501 N.E.2d 659, 666 (Ohio Ct. App. 1985) (in allowing loss of use of destroyed *real* property, noting that real property is different from personal property in that "[p]ersonal property generally is replaceable relatively easily and quickly").

This Court should expressly adopt this same common-sense rule. If the law wants to compensate one whose chattel has been destroyed for the loss thereof *and* for the "loss of use" thereof, it can award pre-judgment interest.[26] But it does not allow recovery for the value of the destroyed item *and* recovery for the loss of its use.

Relative to the Jenkinses' argument that this issue is not adequately preserved in the record, as noted in the Jordans' earlier brief, a motion was made during trial to limit the Jenkinses' damages for the loss of use of their vehicle to the reasonable rental value for a temporary replacement vehicle, which was denied by the trial court.[27] Accordingly, the issue is well-preserved and this Court should set aside the judgment and remand for a new trial where the Jenkinses' loss of use damages are limited to the reasonable rental value for a temporary replacement vehicle they actually leased for a short time.

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

The Jenkinses obtained replacement transportation about seventeen days after their crash. Nevertheless, they were allowed to recover for *five hundred thirty-four* days of loss of use of the car in the wreck (the time between the accident and judgment). That is, they were given more than $33,000 to make up for their loss of the use of a $3,500 car that only caused them to need to spend about $1,000 renting a car. This was preposterous, but more importantly here, contrary to the law.

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[26] *See, e.g.*, W. VA. CODE § 56-6-31.

[27] App. 637.

This issue is closely related to a part of the issue addressed in the previous section: *i.e.*, the fact that a person who is compensated for the complete loss of a chattel is not also entitled to be compensated for the loss of use of the very same chattel, as was allowed to happen here. As demonstrated *supra*, the Jenkinses should therefore not have been compensated *at all* for the loss of use of the very same car the destruction of which they were also fully compensated.

But even if that were not so—*i.e.*, even if the Jenkinses were entitled to some loss-of-use compensation—they were at most entitled to such compensation for the brief period that it took them to obtain substitute transportation, capped by however long it would have taken a reasonable person to have done so. Here, it took the Jenkinses just a couple of weeks (seventeen days) to obtain substitute transportation, a period the reasonableness of which the Jordans did not dispute. Thus, the Jenkinses had *and satisfied* a duty to mitigate their loss of use of their vehicle, so they should have been compensated if at all (*but see supra*) for that seventeen-day period.

They were, however, awarded more than $33,000 compensation for the loss of use of a $3,500 vehicle. That is, on its face, excessive and uncalled for.

Two analogous areas of the law have been developed to address similar questions: future lost wages in wrongful termination cases, and limits on remedies in damage-to-chattel cases. Both adopted reasonableness and actual-loss limits on how much a plaintiff is entitled to receive to address the loss of his use of a job or of a chattel, respectively.

In the former case, a wrongful termination plaintiff has a duty to mitigate his loss of employment and consequent lost wages by securing replacement employment.[28] The law

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[28] *See* Syl. pt. 2, *Mason Cty. Bd. of Educ. v. State Superintendent of Sch.*, 170 W. Va. 632, 295 S.E.2d 719 (1982) (holding in currently valid part both that "the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area" and that "the actual wages received, or the wages the employee could have

recognizes that a job might not be replaced immediately (unlike a car, which can be almost immediately replaced), but it also refuses to award a plaintiff the windfall of never having to look for another job. Thus, a plaintiff who does not secure substitute employment has his lost wages remedy capped to the time that a reasonable person could have secured such substitute employment. And a plaintiff who does secure substitute employment is awarded only the wages that he actually lost. To allow otherwise would allow an undeserved windfall.

Here, though, the Jenkinses were awarded what an undeserved windfall when they were compensated not just for a wholly unreasonable number of days of lost use of their car, but *well* after they had in fact already obtained substitute transportation.

Analogously, the law does not allow a plaintiff to seek compensation to repair a damaged chattel where the repair costs exceed the total value of the chattel itself.[29] To allow otherwise would be to work a waste.

Here, though, the Jenkinses were awarded more than $33,000 for the "loss of use" of a $3,500 car that actually only cost them about $1,000. This was akin to allowing them $33,000

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received at comparable employment where it is locally available, will be deducted from any back pay award"); *cf.* W. VA. CODE § 55-7E-3; Syl. pt. 6, *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017).

[29] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 928 comment on clause (a) in pertinent part ("If it does not appear to a reasonable person to be prudent to repair or replace the damaged part, the damages are the full value of the subject matter at the time of the tort, less the junk value of the remains. Ordinarily, when the cost of repairs would be materially greater than the exchange value of the chattel before the harm, it would not be prudent to make the repairs."). The law only allows repair costs to exceed a property's or a chattel's fair market value in "an appropriate case," like where the item at issue is a homestead or a family heirloom with personal significance. *See, e.g.*, *Brooks v. City of Huntington*, 234 W. Va. 607, 613, 768 S.E.2d 97, 103 (2014); RESTATEMENT (SECOND) OF TORTS § 928 comment on clause (a) in pertinent part ("If, however, the chattel has peculiar value to the owner, as when a family portrait having substantially no exchange value has been harmed or when there would be serious delay or inconvenience in obtaining another chattel, it may be reasonable to make repairs at an expense greater than the cost of another chattel."). Here, the Jenkinses put on absolutely no evidence that they needed to spend more than $33,000 renting some specific car in order to make up for their loss of use of a $3,500 car.

to repair a $3,500 (or even a $1,000) car. Worse still, as already discussed, ***they were also awarded the total value of that same car***. This created a terrible waste of resources of the very kind that the law abhors and does not allow.

Finally, regarding the Jenkinses' waiver argument, as noted in the Jordans' original brief, they tendered a proper instruction[30] which the trial court rejected in favor of the Jenkinses' to which the Jordans objected. [31] Accordingly, this Court should set aside the verdict and remand for a new trial directing that the jury be properly instructed regarding mitigation of damages in a tort loss of use case.

IV. 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.

The Jenkinses defend their use of their attorney as an expert witness to introduce their loss-of-use damages calculations (Exhibit 4) by saying that the evidence was merely "demonstrative" or a "composite." This argument is entirely disingenuous, however, because the Jenkinses did not use the evidence as a mere demonstrative exhibit, and it was not merely a composite of other, properly introduced evidence. Demonstrative evidence "does not play a direct part in the incident in question."[32] But that is exactly how the Jenkinses used Exhibit 4. They

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[30] App. 341 ("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.").

[31] App. 419.

[32] *Demonstrative evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also State v. Hardesty*, 194 W. Va. 732, 737, 461 S.E.2d 478, 483 (1995) (stating that demonstrative exhibits "are not themselves evidence, should not be admitted into evidence, and should not be furnished to the jury during deliberations" and "should be so marked and identified"); 194 W. Va. at 740, 461 S.E.2d at 486 (Cleckley, J., concurring) (recognizing that "written demonstrative evidence . . . should not be permitted to go to the jury room in order to avoid giving it undue emphasis").

offered their attorney's calculations into evidence, the calculations were assigned an exhibit number (Exhibit 4), and they were published to the jury just like an exhibit properly propounded through a witness. The circuit court abused in discretion in allowing the Jenkinses to put this "evidence" to the jury.[33]

Accordingly, this Court should set aside the verdict, as it did in *Adkins v. Foster*[34] and remand for a new trial precluding the Jenkinses' counsel from serving as their damages expert and creating and introducing as substantive evidence his calculation of the Jenkinses' loss of use damages.

CONCLUSION

Nothing in the Jenkinses' response undercuts the fact that they were allowed to put on wholly irrelevant, prejudicial, and specifically prohibited evidence of the fact that the Jordans were insured and of the Jordans' insurers' conduct negotiating a possible settlement of the Jenkinses' claim against the Jordans, in violation of at least three of the West Virginia Rules of Evidence.[35] Nothing in their reply excuses the fact that they were allowed to recover, in total, well over $100,000 for the loss of a $3,500 car, including duplicate "annoyance and inconvenience" and "loss of use" damages, plus the fair market value of the whole car. Nor have they defended that they were allowed to recover for the loss of use of their car for a year and a half after they actually obtained substitute transportation. Their argument that their use of their attorney as an

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[33] As noted, Exhibit 4 was not properly admitted into evidence. It should, therefore, not have been given to the jury. *See* syl. pt., *Runner v. Cadle Co.*, 204 W. Va. 21, 511 S.E.2d 132 (1998) ("A trial court may not allow a jury to take exhibits not admitted in evidence to the jury room. Allowing a jury to take exhibits to the jury room not admitted in evidence or those offered but excluded from evidence may constitute reversible error where prejudice results therefrom.").

[34] 187 W.Va. 730, 732, 421 S.E.2d 271, 273 (1992).

[35] *See* W. VA. R. EVID. 402, 403, and 411.

expert was merely "demonstrative" is factually false and legally incorrect. Finally, their argument that all the issues raised by the Jordans were waived is inconsistent with the record on appeal.

Accordingly, the Jordans respectfully request that the Court **SET ASIDE** the judgment of the Circuit Court of Harrison County, and **REMAND** this case 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.

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2020, true and accurate copies of the foregoing *Petitioners' Reply Brief* were hand delivered or deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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