IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0890

TESSA ANN JORDAN and **LYNN JORDAN**,
Defendants Below, Petitioners

v.

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

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

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

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

This Appeal emanates from the same incident as the companion Appeal No. 19-0899.

Both Appeals stem from a motor vehicle collision involving Petitioners while the companion Appeal concerns Petitioners' insurer unlawfully taking Respondents' vehicle into their possession and control without permission or consent. From this common nucleus of facts, two separate Appeals have been filed and docketed with this Honorable Court.

I. Statement of the Case/Facts:

Unfortunately, the Petitioners attempt to justify error in this Appeal and do so by ignoring significant jurisdictional and factual matters in the Record below.[1] Petitioners' Statement of the Case attempts to characterize the proceedings below as a third-party bad faith case under the

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[1] Respondents' counsel was counsel in the Trial below whereas Trial counsel for Petitioners was David Cook whose name appears on the Petitioners' Brief but Mr. Cook did not sign the Brief.

Uniform Trade Practices Act ("UTPA").[2] However, there are no facts which support such statements as no arguments were made, evidence introduced or instructions tendered which invoked a statutory cause of action for third party bad faith in the Trial Court below. Nor for that matter, was any similar conduct involved in the second Trial being appealed in the companion matter (Appeal No. 19-0899). The Complaint filed in this matter resulted in separate Trials because the Safeco Defendants, Safeco Insurance Company and Liberty Mutual Insurance Company (hereinafter "Safeco"), requested bifurcation right before the Trial was to begin, which request was granted, resulting in two separate Trials. Trial counsel for the Petitioners, Mr. Cook, had originally considered a unitary Trial, but later he requested bifurcation based on Safeco's insistence on separate Trials. The Trial involving Petitioners, Lynn and Tessa Jordan, related to the motor vehicle collision on October 15, 2017, when Tessa Jordan "ran a red light" and crashed into Respondent Joe Jenkins' vehicle as he was returning from work. Liability was absolutely clear as being the fault of Ms. Jordan.

Due to Respondent Joe Jenkins' critical need for a vehicle to go to and from his work as a heavy equipment operator, and his not receiving any payment for damages for three months, he was forced to file suit in March 2018. The Complaint alleged a negligence claim against the Petitioners and causes of action against Safeco[3] for conversion, trespass and intentional torts for unlawfully removing Joe Jenkins' vehicle from the tow garage in Weston, where the accident occurred, to Hurricane, knowing that Mr. Jenkins had advised Safeco not to remove his vehicle as he was going to repair it once he was paid fair value by Safeco. Joe Jenkins' request was ignored and his vehicle taken without his permission or knowledge and he was never paid for his vehicle until right before his automobile collision Trial in early 2019. There was never any attempt by Respondents to pursue a statutory third party bad faith claim and this will be further examined in the companion Appeal involving Safeco. There was evidence of Petitioners being insured by Safeco introduced at the Trial below, which such evidence was received without objection as Petitioners blamed Safeco for the loss

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[2] West Virginia Code §33-11-4.

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

of use damages by not paying Respondents for their totaled vehicle for more than a year. [4] Such evidence was introduced to prove Respondents' damages and so that the Jury would understand what and why Respondent Joe Jenkins never received payment for his work vehicle. Respondents had not received any payment for any of their damages[5] and still have not been paid, except for an unsolicited check being sent by Safeco, without any consultation or explanation right before the motor vehicle Trial which presumably was payment for Joe Jenkins' work vehicle, but the vehicle has still not been returned as of the filing of this Brief.

Petitioners Trial counsel acquiesced in admitting such testimony both as trial strategy and because his clients could offer no evidence why such damages had not been paid and the Jordans believed they should have been paid. [App. 1216-19 & 1226]. Even had there been an objection, 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, and such liability was determined immediately after the crash. [App. 1246-47]. Such evidence was not admitted to prove a non-existent third-party bad faith cause of action, but 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. A jury is entitled to know the facts and not return a verdict in a vacuum. Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979)[jury is entitle to know facts necessary not to be misled].

However and most important, counsel for the Jordans, Mr. Cook, also wanted the jury to be aware that Mr. Jenkins did not have his work vehicle replaced or repaired for more than 500 days due to the actions of Safeco and not his clients. He was unsure and believed that Safeco should bear the burden of a substantial part of the loss of use damages. [App.1109-11]. Of course this could not happen under current law so Petitioners' Trial strategy was clearly demonstrated by the Jordans'

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[4] Mr. Jenkins vehicle was not inspected for damage by Safeco until January 4, 2018, almost 3 months after the collision. [App. 1251-53].

[5] Joe Jenkins incurred $2,970 in medical expenses and 3 days of lost wages; [App. 329 & 1350]; he has since been sued in Magistrate Court by the healthcare provider for non-payment.

Trial counsel's deliberate decision not to object when Mr. Jordan testified that he was totally unaware that Mr. Jenkins had not had his work vehicle replaced or repaired for such a long period of time. Mr. Jordan then stated upon questioning by his counsel that he relied upon Safeco, who was his agent, to take care of that for him. [App. 1216-18]. [6] This was deliberate trial strategy by Trial counsel, Mr. Cook, as Mr. Cook had initially discussed having a unitary Trial with Safeco so that loss of use damages would be apportioned between his clients and Safeco. [7]

The Jordans were questioned, without objection, about their lack of knowledge or involvement regarding Joe Jenkins being deprived of his damaged work vehicle for many months and their own counsel examined both of them regarding their understanding of why that happened. [App. 1204-20 & 1221-29]. Even with much unobjected to testimony about Safeco's conduct related to the damages, Respondents' counsel asked for a Bench conference to advise the Trial Judge and opposing counsel that the next witness would be the subpoenaed Safeco representative. This was to allow any objections as set required by the Trial Court's pretrial Order. [App. 846-48], see also Paragraph 6, *infra*. At this Bench conference, which was after the Jordans had testified, their Trial counsel stated to the Court as follows:

> "ATTORNEY COOK: I'm not sure what he's trying to say. I just ---you know, I assumed by Mr. Ford being here that there was going to be questioning regarding, you know, Safeco's conduct related to the claim. ***My clients testified they don't know what happened after they turned the claim in to the insurance company.*** So I'm not sure where --- where you're going with it. I still think that a limiting instruction is appropriate, but I mean, the

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[6] The Jordans had also testified, without objection, that they had no idea of why Joe Jenkins' work vehicle was not replaced or repaired and relied upon Safeco to handle. [App.1210-14]; Jordans' counsel was directly asked by the Trial Judge if he had an objection during this questioning and Mr. Cook answered "No". *Id* at 1213.

[7] The Jordans could have filed a cross-claim against Safeco for failing to replace or repair Mr. Jenkins' work vehicle so that any loss of use damages would have been assessed against the responsible party, which in this case was Safeco; such cross-claim would have been a 1st party bad faith claim by Safeco's insureds and would have protected the Jordans from damages not caused by them; this was recognized by their Trial counsel and was the basis for his trial strategy by not objecting to the testimony exposing Safeco's conduct resulting in Joe Jenkins' loss of use damages; however, it is difficult for counsel regularly retained by an insurance carrier to assert a claim against the carrier that hires him as it likely would result in such counsel not receiving any more of that insurance carrier's business; it is a conundrum with no good answer, but most assuredly, an innocent victim like Joe Jenkins should not suffer because of it.

testimony is what it is .

I told --- 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." (emphasis added) [App. 1231-32].

All of the Jordans' testimony preceded the calling of Safeco's representative, Aaron Ford, as a witness. When Mr. Ford did take the witness stand there was no objection by the Jordans' counsel. [App. 1241-43]. Nor any motion to strike all or any part of his testimony. All of which was no doubt trial strategy.[8] Additionally, the issue of Mr. Ford being subpoenaed to testify was raised with the Court before Mr. Ford's testimony and no objection was asserted even though Safeco's counsel was present in the Courtroom and addressed by the Court if there was any objections. Before Mr. Ford took the stand and the Court inquired as follows:

"JUDGE:
Anything we need to put on the record before we move forward and bring the Jury in?
ATTORNEY ROMANO: I don't think so from us, Judge.
JUDGE: Mr. Cook?
ATTORNEY COOK: ***Not that I have any issues,*** but I was --- Counsel for Liberty Mutual's sitting in the back. And apparently there was a subpoena that was delivered to Mr. Ford. And I don't know if this kind of goes to the whole bifurcated thing, I'm just mentioning this because apparently they object --- I have not seen any of this, so I don't know. I haven't seen the subpoena. I haven't seen any objections to the subpoena. But if there's any issues with the subpoena, apparently Counsel is present to address those. I don't know that I can. And I don't know ---.
JUDGE: I don't think you can.
ATTORNEY ROMANO: Well, they didn't comply with the subpoena, but I'm not moving to hold them in contempt or anything at this point. For instance, I got last week, probably Friday, Thursday or Friday, two of Mr . Jenkins's recorded statements that were recorded on October --- let's see, October 17th, 19 --- yeah, 2017....
ATTORNEY COOK :I'm not trying to say — I'm just bringing it up, Dave.

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[8] There was a solid basis for such Trial strategy as had the Jury limited or awarded no loss of use damages, it would problematic whether Respondents could have received any such damages in their claims against Safeco as Safeco did not damage and therefore cause the loss of use damages directly; it was the negligently that damaged Respondents work vehicle so Respondents may have lost their opportunity to recover any loss of use damages at all.

Okay. I'm not saying anything.
JUDGE: Is that --- is that what you're referring to?
ATTORNEY COOK: Yes, that there was a subpoena out there. I wasn't copied on the subpoena. There were apparently objections made. I wasn't copied on those. So Counsel 's here to address that subpoena if she can. That's all that I'm saying. I'm just bringing that up, Your Honor. There's nothing that's going to come from me.
JUDGE: Is it a non-issue now?
ATTORNEY ROMANO : Right. I mean, if it comes up, we'll bring it up later.
JUDGE: Okay.
ATTORNEY MCQUAIN: Your Honor, I'm just here in case there is anything that needs to be addressed.
JUDGE: Okay. And your name again, ma'am?
ATTORNEY MCQUAIN: Elise McQuain, Your Honor.
JUDGE: Elise McQuain?
ATTORNEY MCQUAIN: Yes.
ATTORNEY COOK: I just wanted to bring that up.
JUDGE: Okay. No problem.
Why don't we go ahead and bring the Jury in? (emphasis added) [App. 1238-41].

Accordingly, Petitioners' first Assigned Error that the Trial Court committed error by allowing a Safeco representative to be subpoenaed to Trial is a conglomeration of disjointed statements and citations that have no merit regarding the alleged error and grounds for relief. More importantly Petitioners' provide no reference in the Record to an objection or motion to strike to the Trial Court's ruling regarding the subpoena of Safeco's representative or the admission of his testimony. (Pet. Br. 20-24)[9]. **None, not even a *scintilla*.** There can be no error without a specific objection allowing the Trial Court to pass upon. West Virginia Rule of Evidence 103(a) requires a timely and specific objection regarding any ruling admitting evidence.[10] The Petitioners had many opportunities to object, but it is obvious that they deliberately chose not to do so. The Petitioners were represented by very able Trial counsel and his trial strategy cannot be second guessed on appeal. Petitioners' rendition of the "facts" in their Brief do more than just recount them, they selectively argue them without the full story. It is germane that when advising this Court about Respondents issuing a subpoena for a representative of Safeco, that Petitioners also disclose that the

[9] Petitioners Brief will be referred to as "Pet. Br.__"

[10] Rule 103 states: [see Respondents' Br. Section V. A) 1)].

Trial Court ruled it would entertain any objections to "the calling of Mr. Ford [Safeco representative] or any witness or object to any testimony that they believe is prejudicial and not permitted by Rule 411 and the case law, or take any other action to preserve the Record and provide the Court with an opportunity to rule on such matters." [App. 846-47]. Especially when no objection or motion to strike was ever interposed by Petitioners Trial counsel.

As for much of the other "facts" stated by Petitioners such are provided to this Court without any reference to the Record whether and where an objection was lodged by Petitioners Trial counsel as without such reference Petitioners 17 pages of their Statement of the Case is a mishmash of mostly irrelevant matters. This Court reviews preserved errors not unsuccessful trial strategy.

The Trial below proceeded with very few evidentiary issues for the Trial Court to resolve as the Trial lasted only 1 day. For instance, it was admitted at Trial, without objection, that Joe Jenkins was never furnished a rental car even though he was entitled to one, if Tessa Jordan was liable, which liability was confirmed on the day after the collision.[11] [App. 1246-47; 1249-51]. Petitioners acknowledged that Joe Jenkins needed his vehicle for work and that he was entitled to a rental vehicle to replace it until his work vehicle was repaired or replaced. [App. 1266; 1292-94].

Such testimony, ***which was adduced without objection***, was extremely relevant to the Jenkins' claims for loss of use, aggravation, inconvenience and loss of consortium and it enabled the Jury to understand circumstances that caused or contributed to these damages as well as proving there severity. How else could the Jury decide the extent of the Jenkins' aggravation, inconvenience and loss of consortium without hearing about how Joe Jenkins was constantly seeking replacement or payment for his work vehicle only to be ignored or repeatedly told that the value of his vehicle was "non negotiable." Juries do not determine damages in a vacuum.

The Jenkins' intangible damages and the significant loss of use damages were primarily due to the conduct of Safeco, and while Safeco was not a defendant, the individual Safeco employees' conduct was relevant and necessary for the jury to hear and evaluate. It would have been no different if the Jordans had repeatedly refused to replace or repair Joe Jenkins' work vehicle for more than a

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[11] Mr. Jenkins had provided comprehensive information regarding his contact information, location of his wrecked work vehicle and that he did not want it towed, two days after the crash which occurred on a Sunday; [App. 726-27].

year causing him and his Family the frustration, stress and anger as he and his Wife testified at the Trial. In this instance, it was employees of Safeco, but that does not render their testimony inadmissible even if there had been timely objections. The Jenkins' testimony was that such actions caused them to feel "trapped" and "confused" "it became a nightmare", and Joe became "frustrated" and "angry" because he was without his work vehicle and such conduct caused Joe Jenkins and his Family aggravation and inconvenience after waiting more than three months before hearing anything about his wrecked vehicle from anyone. [App. 1349;1550-54]. This testimony describing primarily Safeco's actions and how Joe Jenkins was affected was relevant under WVRE 401, and therefore, admissible under 402, because this testimony tended to prove the intangible damages suffered by Joe Jenkins and his Family more so than would have been before the Jury without such evidence. Also, direct testimony by the persons harmed is the best evidence to prove such damages. "Did you become angry? Yes". "Were you frustrated? Yes". "Were you stressed on a daily basis? Yes" and "Why". Both Joe Jenkins and his Wife adequately explained why they experienced such frustration and anger among other aggravations and inconveniences, all of which caused marital discord between them. [App. 1334-67 & 1367-75]. But regardless, the Jury had to hear more than the Jordans testify as they did not know why the Jenkins' vehicle was not replaced or repaired sooner than 534 days. To have restricted such evidence would have essentially emasculated the Jenkins' means of proving their full damages, which damages were awarded against the Jordans not Safeco. Importantly however there is no reference to the Record demonstrating objections to such testimony.[12]

The Trial Court had the discretion to admit all such evidence under WVRE 402 and 411. However, the Trial Court was not required to make any evidentiary ruling when no objections were asserted by Petitioners. If such evidence had not been admitted the Jury would have had to speculate as to what happened and why the Jenkins' had claims for loss of use, aggravation and inconvenience

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[12] Of course, under the law, Respondents had to seek all their damages from the Jordans but all of this could have been avoided for the Jordans including the resulting verdict, if Safeco had taken a different course of conduct; this Court has observed: "We certainly do not condone the mishandling of insurance claims. However, as petitioner is not a first-party claimant, under the law of this State she cannot pursue a private action for either common law bad faith or violation of the Unfair Trade Practices Act." Salmons v. State Farm, 2013 WL 2462190 (W.Va. 2013)[Memorandum Opinion].

and loss of consortium. The testimony supported the Jenkins' damage claims or all the Jury would have heard was that the Jordans didn't know what happened and they believed Joe Jenkins work vehicle should have been replaced or repaired and it had not been. [App. 1212-19; 1223-25]. Petitioners' statements in their Brief are exaggerations and without any legal basis whatsoever, most probably because there is no merit to their Appeal as there were no objections to which Petitioners can claim preserved any alleged errors. Error must be properly preserved to be appealable. *Id.* at fn. 5. For instance, Petitioners state that delay was not an element of damages and such should have been a "non-issue" and that all that was relevant was the amount of the Jenkins' damages "which had absolutely nothing to do with 'delay' in being paid". [Pet. Br. 8]. Such is a clever way of confusing legal concepts for one's benefit but without regard for common sense. Proof of tangible damages as the Jenkins' loss of use damages was predicated upon the time Joe Jenkins was deprived of his work vehicle and what it would cost him to rent a replacement vehicle or other value lost. This standard was embraced by the Petitioners own agent. [App. 1269-70; 1273-76], and the Jury was entitled to know why Joe Jenkins was deprived of his property for so long.

However, intangible damages like aggravation and inconvenience must be proved by testimony about the circumstances that cause such damages as it can rarely be finitely expressed. Aggravation and inconvenience and loss of consortium must be established by the testimony of those who suffer it. It is similar to proving pain-only to the person experiencing it can describe how it feels. And in this case it was necessary to tell the jury how those feelings of frustration, anger, confusion and stress were triggered. The same is true for marital discord. Something has to precipitate it and that needs to be heard by the Jury deciding the case. No competent attorney who ever tried cases before a jury would agree that the circumstances of being injured such as falling from a scaffold and the resulting medical treatment such as surgeries and convalescence is inadmissible to prove pain and suffering and emotional distress. The circumstances of the injury is relevant even when liability is not an issue. The same is true in proving aggravation, inconvenience and loss of consortium.

Petitioners' "facts" in their Statement of the Case are generally not sufficiently specific to inform this Court how such facts support Petitioners' assertions of error by the Trial Court. The facts of a case must be tied to an appellants claims of error and not just a review of those parts of the

Record that one finds unsavory or dislikes. The Record below is what it is and cannot be changed on Appeal no matter how much twisting or manipulation is exercised. The Respondents constant droning about a third party bad faith case is not buttressed by what actually happened in the Trial below. It does not help this Court reach the right decision by ignoring the facts that control the assigned errors that this Court must consider. Respondents believe it necessary to identify and discuss each incorrect or disputed fact contained in Petitioners Statement of the Case which unfortunately will be done herein.

(A) Incorrect or Disputed Facts:

Petitioners, in their "Statement of the Case" have made factual assertions which are not supported by the Record and are either incorrect or disputed. They are as follows:

1. Petitioners stated that Respondents filed "some hybrid [case] involving third-party bad faith that our Legislature abolished in 2005" [Pet. Br. 2]. The UTPA was never an issue in the Jordans' Trial and the Jury was never instructed by the Court regarding UTPA claims. The Petitioners insurance carrier Safeco, was not on the verdict form nor were any damages or relief sought against Safeco in the Jordans Trial; [13]

2. Although settlement negotiations have no place in an appellate brief, the Petitioners have seen fit to gratuitously include the following statement: "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....for a third-party bad faith cause of action that has been legislatively abolished." [Pet. Br. 2]; what really happened was that on March 27, 2019, a week before Trial, Respondents offered to settle all claims with all Defendants for $50,000.00 and the Jordan Defendants made no response or any additional offer other than the $9,500.00 offered in July 2018 and Safeco responded with the same offer of $5,000.00 previously tendered. The Jordans special damages caused by the Jordans alone were $7,500.00 without any damages for loss of use, aggravation, inconvenience, loss of consortium and damages for the conversion of their

[13] Of course insurance law, including the UTPA, still applies to an insurance carrier handling a third party claim, but such violations are just no longer actionable; Salmons, supra; Smith v. Scottsdale Ins. 40 F.Supp.3d 704, 714-15 (ND W.Va. 2014).

property by Safeco; by refusing to negotiate or respond to the Jenkins offer, Trial was inevitable; now that's the rest of the real story:

3. Petitioners included an unnecessary statement about James Conrad's early participation in the case. Mr. Conrad was voluntarily dismissed under Rule 41(a) by agreement with Mr. Conrad acting *pro se* as it became clear that he was not acting in concert with Safeco in unlawfully taking Respondents vehicle; [App. 33];

4. "The Jordans contemporaneously stipulated liability." [Pet. Br. 9]. The Jordan Defendants filed an answer on April 2, 2018 denying all liability as alleged in Paragraphs 18 and 19 of the Complaint and thereafter didn't admit liability until February 2, 2019, a month before Trial which is hardly "contemporaneously"; [App. 1, Line 10];[14]

5. Petitioners again misstate the Respondents' causes of action asserted against Safeco; Petitioners stated: "Lest there be any doubt about the third-party bad faith nature of the Jenkins' claims against Safeco...." [Pet. Br. 5]; both Safeco and the Respondents identified experts on insurance law in preparation for Trial before bifurcation occurred as it was contemplated that evidence of Safeco's conduct was violation of insurance law which may have been admissible to prove intent and actual malice for Respondents' claims of intentional tort and to prove punitive damages under the punitive damages Statute as a deliberate violation of the law relevant to the case can be proof of actual malice; [Dodrill v Nationwide Mut.][15]; the identified experts by both Respondents and Safeco did not testify in either Trial and had nothing to do with asserting a UTPA cause of action against the Jordans or Safeco as it dealt solely with the Safeco Trial and such is irrelevant to this Appeal as the Trials were bifurcated; [App. 186-89]; [16] however, the causes of action against the Safeco Defendants did not rely upon a violation of the UTPA or its Regulations; the Petitioners seem to posit that if you are an insurance company employee adjusting a claim and you committed the tort of battery against a third-party claimant, that the insurance employee and the

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[14] Although the Trial Court's Docket sheet indicates the Jordans' Answer was filed, it is not part of Petitioners' Appendix in this Appeal.

[15] 201 W.Va. 1; 491 S.E.2d 1(1996).

[16] Both experts were withdrawn as witnesses by agreement of the Parties in the Safeco Trial and no such expert testimony was introduced so this issue was and is moot; [App. 1084-91].

insurance carrier could not be sued and evidence of what they were doing i.e. claims handling, would render any cause of action a prohibited third-party bad faith claim! Of course, this is absurd just as if an insurance company employee took your property while adjusting a claim, whether your vehicle or your wallet, without your consent or authorization, and when the victim sought redress the insurance carrier's response would be "you can't touch me-- no third party bad faith"; insurance carriers and their employees are not immune from the duties imposed by common law torts just because third-party bad faith actions are no longer actionable in circuit court; a conversion and/or trespass and other such torts still are still actionable; thank goodness;

6. Petitioners assert that the Trial Court **"denied"** their joint motion to "preclude reference to insurance..." and to prevent the appearance at the Jordan Trial of the subpoenaed Safeco representative; the Court did not deny such Motion but instead took it under advisement and specifically invited "***Any Party may object to the calling of Mr. Ford or any witness...or take any other action to preserve the Record and provide the Court with an opportunity to rule on such matters.***"; (emphasis added) [App. 846-48]; instead of citing this Order, Petitioners extensively quoted and referenced a portion of Respondents' Opening statement; [Pet. Br. 7-8]; such failure to cite the Trial Court's determinative Order is misleading to this Court; the reason Petitioners did not cite the relevant Trial Court Order is that Petitioners did not avail themselves of the Trial Court's invitation for Petitioners to object at Trial to any witness, including Mr. Ford, if necessary so the Trial Court could rule at that time and counsel could to preserve the Record; ***no objection or motion to strike testimony was made by Petitioners at any time during Respondents' Opening statement, the testimony of Mr. Jordan or Tessa Jordan, or the calling of Mr. Ford as a witness and his subsequent testimony regarding why Joe Jenkins' work vehicle had not been replaced and other relevant matters relating to damages***; [App. 1241-96]. [17] Such evidence told the complete story for the Jury, but was also relevant evidence to prove aggravation, inconvenience and loss of consortium. See WVRE 106; see generally, State v. Gray, 204 W.Va. 248, 252, 511 S.E.2d 873, 877, (1998) ["We see no abuse of discretion in allowing the State to present a more complete and

[17] Applying WVRE 103(b) the Trial Judge could have denied the Motion offered as it would not have satisfied WVRE 103(b) as the Motion was "boilerplate"; see also Resp. Br. V(A)(1).

This is the reason trial courts defer ruling on such evidentiary matters to provide all parties an opportunity to present their case and the Trial Court can rule in the context of the case.

accurate picture of the police report once the defense opened the door and presented a partial and selective picture of what was in the report.]; US v. Hassan, 742 F.3d 104, 134 (4th Cir. 2014). In this instance, the testimony was not hearsay but direct evidence to prove the stress and frustration experienced by the Jenkins' as well as their loss of use; **but importantly there was no objection to introduction of such evidence.**

7. Not satisfied with failing to cite the Trial Court's Order taking the Rule 411 issue under advisement, Petitioners quoted various Trial testimony to which no objections were asserted by Petitioners and that's why none are identified in Petitioners Brief; [Pet. Br. 8-12]; what Petitioners do not understand is that Trial counsel for the Petitioners wanted to blame Safeco for Respondents' damages rather than his clients, the Jordans, and he did such as evidenced by the Petitioners' Trial counsel's examination of Safeco's representative Aaron Ford about the upcoming bifurcated Safeco Trial; [App. 1306-10]; one cannot invite error and then complain about it; it was Safeco, not the Jordans, who wanted to exclude the evidence about Safeco's conduct from the Jordans' bifurcated Trial in which Safeco was not involved; Safeco wanted to control both Trials for its benefit but the Jordans' counsel was resisting to the extent he could as his goal was to deflect the blame for damages to Safeco without angering his employer Safeco; the Trial Court was obviously use to such strategic maneuvering common in trials and therefore deferred rulings on certain evidentiary issues until Trial proceeded; [Resp. Br. Paragraph 6 *&* fn. 17. *supra*];

8. Interestingly, Petitioners assert without citing any legal authority or reference to the Appendix that the cautionary instruction given by the Trial Court "only exacerbated the prejudice of the interjection of insurance" **when in fact Petitioners asked for a cautionary instruction and approved the one given by the Trial Court!!** [App.1091]; Petitioners' Trial counsel in a Bench colloquy with the Trial Court stated: "I still think that a limiting instruction is appropriate...." [App.1232]; how can Petitioners now represent to this Court that such Trial conduct is error? Again one cannot invite error and then complain or execute a strategy and then regret it on Appeal;

9. Petitioners also assert that damage Exhibit 4 proffered by Respondents somehow triggered the Rules of Professional Conduct; such an argument is very disheartening as such statement is not only inaccurate it is meant to be inflammatory; [Pet. Br. 13-14]; Exhibit 4 was merely a compilation of Respondents' loss of use damages based on the *per diem* cost to replace Joe

Jenkins' work vehicle until it was replaced or fair value paid; [App. 333]; Exhibit 4 was supported by Joe Jenkins' rental invoice which was admitted into evidence without objection as Exhibit 5; [App. 334] and was buttressed by Joe Jenkins' testimony [App. 1351-55] and that of Mr. Ford; [App. 1273-76 & 1282-86]; nothing in Exhibit 4 was dependent on counsel's testimony as all of the information was extracted from Exhibit 5, the actual cost for a replacement work vehicle, and the testimony of Joe Jenkins and Mr. Ford; also, the objection by Petitioners' Trial counsel was lack of foundation which the foundation was more than adequate for the Trial Court to admit the Exhibit in its discretion; Petitioners also introduced testimony of their own regarding what they believed would be the appropriate rental cost but did not put it in an exhibit for the Jury which was their choice; [App. 1275-76]; therefore, the same information was presented to the Jury by both Parties; contrary to Petitioners' misstatement, Respondents' counsel did not "serve as (Joe Jenkins) expert"; and such a statement is misleading and nonsense; [Pet. Br. 14];

10. Petitioners also provide only part of the facts when describing Respondents' acquiescence to their Motion for Directed Verdict regarding payment of Respondents' work vehicle; [App. 1379]; what Petitioners did not disclose is that as a matter of trial strategy, Safeco sent an unsolicited check right before the Trial began on April 2, 2019 to Joe Jenkins which was presumed to be for Respondents vehicle but no explanation or release accompanied the check so its actual purpose is still not yet finally determined; [App. 1555]; perhaps, but highly unlikely, Petitioners desired Respondents to receive "double damages"; see fn 1 [App. 980], of Order Denying Safeco's post trial Motions; [App. 975-86];

11. Finally, but not unexpectedly, Petitioners review of the second Trial involving Safeco, which is irrelevant to the Jordans' Trial at issue in this Appeal, clearly demonstrates that Safeco is driving the ship in both Appeals for its own benefit; Petitioners provide a gratuitous pseudo policy statement about why jury trials for third-party bad faith statutory actions have been relegated to administrative procedures which is pure speculation by Petitioners; there are many reasons such Legislation was enacted including vast sums of money which generate influence in our Legislative process; Petitioners' statements demonstrate an arrogance that is disdainful of West Virginia juries and our State Constitution's right to trial by jury, and the harm that is caused to our citizens when an insurance company ignores the law because they can do so without much

consequence; [18] Joe Jenkins' work vehicle was worth more than $2,500.00, he knew it and so didn't everyone else; but instead of compromising like Joe Jenkins did in requesting $3,500.00 instead of the $4,500.00 he had invested in the vehicle, his fair value was arbitrarily reduced by routinely claiming that it was due to extensive "wear and tear", which resulted to Joe Jenkins a reduction of his fair value by 1/3 or $977.00; [App.762; 729]; such insurance tactics are common and in this case such was accomplished by looking at photographs of Joe Jenkins' vehicle and when Joe Jenkins resisted and was able to find a lawyer to defend his interests, like he did ours in Iraq,[19] Safeco quickly "again reviewed" the photos and increased the value of Joe's vehicle purportedly because a "second look" revealed that the wear and tear was not as significant as first determined!! [App. 1647-50; 752]; of course, if one believes that then I have a bridge to sell you in Brooklyn;

What this Court must recognize is that the public policy of our State should protect hardworking consumers like Joe Jenkins who has few bargaining chips in such situations; what person can wait now almost 2½ years to recover damages that were no fault of his own while the insurance carrier earns 10 to 15% in the stock market with funds that should be paid to an innocent victim where the damages were caused by others; this is not just a case about a $3,500.00 car as Petitioners try to frame it; if it had been fairly valued at $3500.00 there would be no Appeal; Safeco not only told Joe Jenkins "take it or leave it" fair value "not negotiable" [App. 737], they let Joe Jenkins and his Family twist in the wind hoping they would capitulate or crumble from financial hardship; Joe Jenkins did neither; the law is clear in West Virginia that loss of use is a separate element of damage to property when a wrongdoer negligently destroys your property they have a duty to remediate by replacing your property or paying the fair value, and the time the innocent victim is deprived of his or her property is recoverable as when such property is restored or paid lies

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[18] Michael v Appalachian Heating, LLC, 226 W.Va. 394, 701 S.E. 2d 116 (2010)[Ketchum dissenting, "In place of these "bad faith" suits, the Legislature provided a new (but, by all reports, wholly unsatisfactory) remedy for discriminatory and unfair settlement practices. [which] .... what so far appears to be a largely ineffective administrative complaint with the virtually toothless insurance commissioner." *Id.* at 405, 127]

[19] Mr. Jenkins, as a Member of the West Virginia Army National Guard's 821st Engineer Company, was trained as a combat engineer and helped build under fire, the Wall protecting the Green Zone in the Battle of Sadr City, Iraq in 2007-08, for which he earned his Combat Action Badge and was awarded the Bronze Star. [App 332 & 1338].

with the person who destroyed it not the person who has lost it; if there is a public policy component to this case as Petitioners suggest, it lies in protecting West Virginia citizens when their loss is clear and the duty to rectify the wrong is undisputed; the Jordans and their agent Safeco had the knowledge and means to quickly replace Joe Jenkins work vehicle but chose not to; the burden was on the wrongdoer not Joe Jenkins; this Honorable Court needs only to apply settled law to prevent such conduct in the future.

II. Summary of Argument:

Petitioners have not identified any reversible error in the one day Trial which they now appeal. Even had Petitioners properly preserved any errors by making timely and specific objections to any of their four Assignments of Error, none are sufficient to reverse the Trial Judge's discretionary rulings. However, none of the Assignments of Error were properly preserved, primarily because Petitioners' Trial counsel had a strategy and theory and deliberately implemented it in an effort to persuade the jury in his clients favor. Petitioners put before the jury their theory that because the Jordans were unaware that the damages they caused had not been paid by their insurance carrier that they should not be held responsible as there would be a second Trial. Such comment may have been prejudicial error to the Respondents, no objection was made by Respondents Trial counsel, because in the dynamic of a trial, not every minute issue is worthy of an objection or it is trial strategy. Many times Trial counsel "goes with the flow" because they believe the jury "gets it." That's what happened in this Trial as both Trial counsel put forth their theories and the jury decided. The Jordans admitted that Joe Jenkins' work vehicle had not been replaced or its fair value paid and that he was entitled to have a rental vehicle until that was done. Respondents put their evidence in with regard to the cost of a rental vehicle and so didn't the Petitioners and the jury made its decision. The Jordans received a fair Trial.

This Court should summarily deny this Appeal and not waste anymore judicial resources than have already been consumed. Petitioners' nebulous claims of error in an almost 40 page Brief and a more than 2,000 page Appendix are nothing more than a blunder bluss to make something more than what it really is. You can put lipstick on a pig but it's still a pig. You can file thousands of pages of appellate documentation but it does not create reversible error. The Trial Judge in this case committed no error and judiciously followed the law of this State in what was a rather straight forward civil action regarding an automobile collision. This Court should not waste its time on making it something that it is not.

III. Statement Regarding Oral Argument and Decision:

Respondents do not believe oral argument is necessary in this case as the only issues raised by Petitioners, were not properly preserved for appellate review, and the one that may have been preserved, refusal of instruction, has been authoritatively decided by this Court and the facts and legal arguments are adequately presented in the Briefs sufficient for this Court to rule without oral argument pursuant to Rules of Appellate Proc. 18(a)(3) & (4).

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

IV. Standard of Review:

The standard of review in assessing the Trial Courts granting or denying a Rule 59 motion for new trial is deferential. In Sydenstricker v. Mohan,[20] this Court described such standard of review as follows:

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[20] 217 W.Va.552, 556-57, 618 S.E.2d 561, 565-66 (2005).

> "[a]s a general proposition, we review a circuit court's ruling on a motion for a new trial under an abuse of discretion standard. *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994) (Asbestos Litigation). Thus, in reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusions as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." *Id.* at 556-57, 565-66.

This Court also noted that "precedent favor[s] the support of jury verdicts and affirmation of such verdicts unless there are compelling reasons to set the verdict aside.[21]

However, the standard of review for denial of a Rule 59 motion is tempered if the right to make such motion was not properly preserved below. In that instance, this Court reviews a request for new trial pursuant to Rule 59 in a limited manner, if there was no Rule 50(a) challenge to the sufficiency of the evidence at Trial, then the Petitioner's assertion in this regard is limited by such failure. McInarnay v. Hall, 241 W.Va. 93, 818 S.E.2d, 919 (2018) [Syl. pt. 5].

This Court reviews the Trial Court's rulings on evidentiary matters under the abuse of discretion standard giving deference to the Trial Court on such matters. [22] Questions of law such as Petitioners' assertion that Respondents recovered double damages for both loss of use of personal

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[21] Tennant v. Marion Health Care Found., Inc., 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995).

[22] "Rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. *** The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. As the drafters of the rules appear to recognize, evidentiary and procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case. *** Thus, absent a few exceptions, this Court will review all aspects of the circuit court's determinations under an abuse of discretion standard." (internal citations omitted) McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995)

property and for annoyance and inconvenience, are reviewed *de novo* if properly preserved in the Record.

The standard of review regarding a Trial Court's denial of a tendered instruction is *de novo* regarding its legal propriety. However, the "formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving [or refusing] of an instruction is reviewed under an abuse of discretion standard." Sneberger v. Morrison, 235 W.Va. 654, 776 S.E.2d 156 (2015). If the Jury has been adequately instructed on the law then any refusal of an instruction is not error. McAllister v. Weirton Hosp. Co., 173 W.Va. 75, 312 S.E.2d 738 (1983).

V. Argument:

A. Petitioners Failed to Preserve their Alleged Trial Court Errors:

1) Petitioners Duty to Properly Preserve Error

Rule WVRE 103(b) states:

> "(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
> (1) if the ruling admits evidence, a party, on the record:
> (A) timely objects or moves to strike; and
> (B) states the specific ground, unless it was apparent from the context;..."

The purpose of this Rule is obvious. The trial court in the heat of a trial must be specifically informed of exactly what a litigant seeks to prohibit by way of a timely objection. The objection must also be specific so that the trial court can easily determine whether it is valid. A general or "boilerplate" objection is insufficient to preserve a trial court error. The 2014 Comment to Rule 103 explains that such boilerplate, generalized objections are "frivolous" and are "tantamount to not making any objection at all and will not preserve error." The Comment specifically states that asking

the trial court to prohibit the mention of insurance is a "waste of judicial resources'.

Even before Rule 103 was adopted, the case law in our State was clear that to preserve a trial court error it must be specifically brought to the attention of the trial court for a ruling. It is well-settled law, a party who fails to object to evidence or argument that violates a trial court's pretrial ruling is waived. See Waldron v. Waldron, 73 W. Va. 311, 317, 80 S.E. 811, 814 (1913) ("If a party who has made an objection permits it to be forgotten, a waiver should be chargeable to the party".); [Syl. pt. 1]; Maples v. West Virginia Dept. of Commerce, 197 W. Va. 318, 475 S.E.2d 410 (1996) ("A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal".); [Syl. pt. 3], In Interest of S.C., 168 W. Va. 366, 374, 284 S.E.2d 867, 872 (1981)("An order . . . which was actually approved by counsel, will not be reviewed on appeal."); [Syl. pt. 2]; State v. Adkins, 209 W. Va. 212, 544 S.E.2d 914 (2001)("Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.").[23]

This Court has not hesitated to reject claimed errors on appeal when the Record below reveals different grounds were stated for the objection than the error claimed on appeal. State v. Meadows, 231 W.Va. 10, 743 S.E.2d 318 (2013). In Meadows, which was a murder conviction, this Court refused to consider asserted evidentiary errors by the trial court when the Record demonstrated that the basis given for the objection was not the same as identified on appeal. This Court opined in Meadows that Rule 103(a)(1) "precluded...appellate review due to the failure to raise these

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[23] WVRE 103(b) is not implicated in this Appeal as no pretrial Oder was "definitely [set forth] on the record" by the Trial court.

matters [the same grounds for objection] before the trial court." even though there had been an objection made at the time of the alleged improper testimony but it was on different grounds than the error asserted on appeal. *Id.* at 21, 329. Such just did not preserve the Record sufficiently for this Court to consider the alleged error as the Trial Court in Meadows had no opportunity to consider the newly asserted grounds being claimed on appeal.

Petitioners have failed to identify where in the Record, any of their claimed errors were properly preserved for appellate review by a specific and timely objection or other appropriate procedural mechanism.[24] The Trial Court properly deferred final evidentiary rulings until Trial and advised counsel to object at the appropriate time to allow the Trial Court to consider the grounds in the context of the Trial proceedings. [Resp. Br. Paragraph 6, *supra*] At the Trial no objection or motion to strike was made by Petitioners regarding any of the claimed errors whether designated as Assigned Errors or errors randomly alleged in their Brief. Bottom line, if Rule 103 is not scrupulously followed, then any error, including admission of otherwise inadmissible evidence is waived.[25] Trial judges cannot be expected to anticipate such errors or to object for the litigants. The Trial Court committed no error in this case as the Assigned Errors were not properly preserved by Petitioners at the Trial. Each such claimed Error will be discussed herein.

B) The Trial Court Did Not Error in Failing to Grant Judgment as a Matter of Law or Summary Judgment:

The Petitioners mistakenly argue in the "Standard of Review" portion of their Brief that "the

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[24] Petitioners' mitigation instruction was refused but they did not place a specific objection on the Record; that will be discussed *infra*.

[25] Respondents do not infer there was any inadmissible evidence introduced into evidence because there was not; all of the evidence introduced at Trial was relevant and probative and was consented to by opposing counsel as trial strategy.

Circuit Court should have granted *judgment as a matter of law* relative to the Respondents' successful efforts" to pursue a third-party bad faith case (emphasis added). [Pet. Br. 19]. Yet in Footnote 67 to support such statement, Petitioners cited the Findley case.[26] However, Findley involved the granting of summary judgment by the Trial Court in that matter. Findley also noted that "Similarly, we previously have stated, and now so hold, that this Court "review [s] de novo ... the denial of [a] motion for summary judgment," ... *where such a ruling is properly reviewable by this Court.*" (emphasis added) (internal citations omitted) *Id.* at 89, 816.

In this Appeal, Petitioners have not identified in the Record where Petitioners requested, with the required specificity, for judgment as a matter of law (WVRCP 50 and 59), or a motion for summary judgment pursuant to WVRCP 56, on this issue of third party bad faith. Nor have Petitioners cited to the Record where the Trial Court denied any motion purportedly based on "convert[ing]" the case "into a third party bad faith" action.[27] Such never occurred. Petitioners did make a Rule 50 motion at the close of Respondents' evidence but it had absolutely nothing to do, or objecting to, a so called third-party bad faith claim being alleged by Respondents, but that Rule 50 motion was not renewed before the case was submitted to the Jury.[28] There was no summary

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[26] Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002).

[27] "[a] skeletal "argument," really nothing more than an assertion, does not preserve a claim.... Judges are not **like pigs**, hunting for **truffles** buried in briefs. " State Dept. of Health v. Robert Morris N., 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995) (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir.1991).

[28] Respondents rested at the close of their case [App. 1375], the Petitioners made their motion under Rule 50 [App. 1379] and then the Petitioners rested and the case was ready to be presented to the Jury but the Rule 50 motion was not renewed [App. 1383]; Respondents recognize that Petitioners did not tender any evidence in their case in chief before they rested, but do not believe such negates Petitioners obligation to renew a Rule 50 motion at the close of all the evidence in a distinct and specific manner to alert the trial court of the claimed defect so the court might remedy such alleged defect before the Jury received the case. [App. 1383]; McInaray v. Hall, *supra.* at 99, 925.

judgment made by Petitioners in this case, only by Safeco. [App. 54]. Petitioners did move for directed verdict asserting that any loss of use damages ended "after the rental vehicle was released." The Trial Judge correctly denied the motion stating that the amount of damages for loss of use was a Jury question based on the evidence presented as to such loss.[29]

Also, Petitioners failed to renew either of their requests for judgment as a matter of law after the Petitioners rested their case at the end of all the evidence in the case. [App. 1384]. Such failure waives any motions or objections that were made or could have been made for judgment as a matter of law, i.e. directed verdict.

C) There Was No Motion or Objection Seeking to Quash the Trial Subpoena to Aaron Ford, the Safeco Representative, So There Can be No Claim of Error:

Again, Petitioners spend most of their Argument citing cases holding that there is no longer an actionable third-party bad faith cause of action in West Virginia. Respondents agree and did not allege any such cause of action or assert such to the Trial Court in Petitioners' Trial. The term bad faith was never mentioned anywhere in that Trial. [App. 1182-1430]. Testimony that was elicited at Trial was that the Jordans had no knowledge that Respondents had not been paid for their wrecked vehicle or any other damages. Both Lynn and Tessa Jordan testified, **without objection or motion**

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[29] Joe Jenkins' rental vehicle, which was rented for him by his father Mike Jenkins, ended on November 2, 2017 [App. 1362 & 334], which required him to obtain a loan to procure another vehicle in December 2017; [App. 1362-63]; however Petitioners erroneously repeated continuously in their Brief that Joe Jenkins had replaced his wrecked vehicle after 17 days; [Pet. Br. 26, 27, 29, 31& 32]: also it is unclear whether Petitioners' Trial counsel was requested the Trial Court to terminate Respondents' loss of use damages when the rental vehicle was returned on November 2, or when Joe Jenkins acquired another vehicle in December 2017; based on such discrepancy such a motion was properly denied for that reason alone but also as West Virginia law places the duty on the wrongdoer, not the innocent victim, to pay the fair value of a totaled vehicle, including loss of use damages and other damages incurred during the time of deprivation and the reasonableness of such damages is for the jury to determine based on the evidence; such was done in this case; Checker Leasing, Inc., v. Sorbello, 181 W.Va. 199, 382 S.E.2d 36 (1989)[Syl. pt. 1]; see also, Hellenbrand v. Hilliard, *infra*.

to strike, that they were unaware because they had turned the matter over to Safeco, their insurance carrier, and did not know what had happened as Safeco never told them. [App. 1210-14 & 1223-26]. Such evidence was not the assertion of a bad faith claim but was a routine application of the Rules of Evidence, including Rule 411. However, that issue is moot as it is clear that Petitioners' Trial counsel wanted such insurance information in evidence as a matter of trial strategy. [Resp. Br. 2-7 *supra*]. This alleged error does not exist, it is made up, but if it had been properly preserved, it would be reviewed under the abuse of discretion standard and the Trial Court was well within it's discretion to defer ruling until Trial at which time no objection was interposed. See Paragraph 6 & fn. 17. *supra*.

Similarly, there was no Rule 103(a) objection or motion to strike the testimony of Safeco' representative Aaron Ford when he was called as a witness nor during or after his testimony. [App. 1242-85]. This was deliberate by Petitioners' counsel as it was through Mr. Ford that the Jordans introduced their evidence regarding the amount of loss of use damages that they believed were reasonable under the circumstances. [App. 1275-79]. However, after this issue was squarely presented, the Jury rejected this evidence in their verdict. [App. 339]. The only objection to Mr. Ford's content testimony was when Petitioners' counsel inquired of Mr. Ford about the upcoming bifurcated Trial with Safeco and whether Respondents would get their damages from Safeco. [App. 1306-10]. Respondents' counsel promptly objected that such statements were incorrect, and thus irrelevant, as the bifurcated Safeco Trial related to trespass, conversion and other intentional torts and not the loss of use damages which was before the Jury in the Jordans' Trial. [App. 1306-08].

In this instant case, it was not different grounds for the objection as in Meadows, but rather there were no specific, contemporaneous objections at all by Petitioners. There is no West Virginia

case cited by Petitioners which would allow appeal of alleged errors with no objection or other action below. **There clearly were no valid objections or motions to strike as required by Rule 103(a) regarding the subpoena issued to Safeco, or the testimony at Trial of the Safeco representative Aaron Ford .** Thus, there can be no actionable error as such claimed errors were not properly preserved.

D) The Trial Court Properly Admitted Evidence that Petitioners Were Insured:

Additionally, and although not specifically designated as an Assignment of Error, the Petitioners awkwardly assert that evidence of Petitioners being insured was improperly introduced at the Trial which would implicate Rule 411. This alleged error, inartfully asserted, was not properly preserved just as the subpoena issue discussed above. The testimony regarding Petitioners being insured by Safeco was voluntarily provided by the Petitioners **without objection or motion to strike** as required by Rule 103. [App. 1210-14 & 1223-26]. It was in fact desired by Petitioners as part of their trial strategy. It cannot now be claimed as error as to do so would be tantamount to ambush of the Trial Judge. However, the Trial Court, at the request of Respondents, did consider Rule 411 and before the testimony of Aaron Ford, Respondents counsel requested the Trial Court to read a cautionary instruction to the Jury previously agreed to by the Parties. [App. 1231-37]. At that Bench colloquy, Petitioners made no objection and instead advised the Trial Court that Petitioners "assumed" that such testimony would be presented. *Id.* at 1232. Petitioners' counsel explained to the Trial Court that such testimony was expected and invited by the Petitioners. Petitioners counsel stated:

> "I told – - 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." *Id.*

Accordingly, this Court should reject these claimed errors as they were either deliberately invited, or the Trial Court in its broad discretion properly admitted such evidence under Rule 411 and the case law[30] and/or such alleged errors were not properly preserved on the Record below. One could take their pick!

E) Petitioners' Claim of Trial Court Error Regarding Recovery of Duplicate Damages Is Totally Without Merit As There Was No Objection Below:

Once again, Petitioners argue an alleged error without indicating where in the Record it was brought to the attention of the Trial Court by a timely and specific objection. There was **no objection** to Plaintiffs seeking both aggravation and inconvenience damages and loss of use damages, and therefore, there is nothing for this Court to review. It is not Respondents' burden to demonstrate the failure to preserve an error claimed on appeal, but rather, it is the burden of the appellant, here the Petitioners, to demonstrate to this Court that the claimed error is reviewable because it was properly preserved by a timely and specific objection. The Petitioners have failed to do this because no proper objection was ever interposed. However, Petitioners are duty bound to advise this Court that there was no valid objection and provide an explanation if any, rather than leave it to the Court to

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[30] The Trial Court reviewed and applied both the seminal case of Reed v. Wimmer, 195 W.Va. 199, 465 S.E.2d 199 (1995) and Barrett v. Retton, 2014 WL 6676540 (W.Va. 2014)[Memorandum Decision]; the Reed case in Syl. pt 3 astutely noted that "jurors are already aware of the existence of insurance..." which is abundantly clear as liability insurance is mandatory in our State since at least 1979; W.Va. Code §17D-4-2; it is rather absurd in 2020 that any juror would not be aware that every vehicle has to have liability insurance as it is necessary to provide such proof of coverage to obtain the vehicle's registration/license plate; additionally Rule 411 was drafted to prohibit introduction of insurance "to prove whether the person acted negligently or otherwise wrongfully." whereas here Petitioners were adjudicated liable based on their admissions and the irrefutable evidence; the Trial Court's admitting the evidence of insurance was entirely within its sound discretion regarding evidentiary rulings; McDougal v. McCammon, *supra*, [trial court granted "significant discretion" and only in "few exceptions" will "this [Supreme] Court review evidentiary ...rulings ...under an abuse of discretion standard."

find it on its own. see fn 27, *infra.*

There are two places in the Record below where such objections would normally be lodged. The first would be the instruction regarding aggravation, inconvenience and loss of use damages. The only instruction given by the Court regarding these damages was Plaintiffs' Instruction No. 2 AB. This Instruction was significantly amended by agreement of counsel and the Court placed in its handwriting at the end of each page "Given-April 2, 2019, CJM, Judge" [App. 358-60].

There was no objection noted on Instruction 2 AB nor was any objection lodged anywhere in the Record. There are several ways for a party to note objections to instructions, one is to write your objection on the instruction itself, but more recently, most counsel place their objections verbally placing them on the Record with the official court reporter. Neither procedural mechanism was utilized by Petitioners. The other logical place for any objection to instructions might be in a post trial Rule 59 motion for new trial or amendment of the judgment, if the alleged instructional error had been properly preserved. Where in Petitioners' Rule 59 Motion is there any objection or claim that Respondents improperly recovered duplicate damages? There is no such reference in that Motion. [App. 878-883]. The only mention of the loss of use and annoyance and inconvenience damages is in Paragraph No. 3 which was unrelated to double recovery. [App. 879]. Again **there was never any valid objection or other timely notice to the Trial Court** of any problem regarding so called "duplicate damages", and therefore, this alleged claim of error is not reviewable on appeal. Respondents will refrain from repeating Rule 103 and the case law regarding the necessity of a timely and specific objection necessary to preserve a claimed error to be reviewable by this Court as it's amply stated throughout Respondents' Brief.

Although this alleged error is not reviewable, Respondents believe it appropriate to set forth

the current West Virginia law with regard to recovery of loss of use damages, and aggravation and inconvenience damages. Petitioners' Trial counsel likely did not object to Respondents' recovery of both loss of use damages and aggravation and inconvenience, because our law squarely permits recovery of each as they are separate damages with different elements under the facts of this case.

The cases cited by Petitioners are not on point. Most deal with damage to real property relying on the seminal case of Jarrett v. E.L. Harper & Son, Inc., 160 W.Va. 399, 235 S.E.2d 362 (1977). The Hardman Trucking[31] case cited by Petitioners provides no comfort to them as the Hardman was a case involving two corporations, not individuals, and there was a question whether corporations could actually recover aggravation and inconvenience damages.[32] However, the Trial Court in Hardman ultimately set aside the award of inconvenience and annoyance damages on the basis that there was "no evidence of being inconvenienced." Hardman at 556.

The more relevant cases regarding recovery of aggravation, inconvenience and loss of use damages are Checker Leasing, Inc., v. Sorbello and Brooks v. City of Huntington.[33] In Checker Leasing this Court held in Syl. pt. 1 that:

> "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 recovery its***

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[31] Hardman Trucking, Inc. v. Poling Trucking Co., Inc., 176 W.Va. 575, 346 S.E.2d 551 (1986). [Per Curium Opinion].

[32] The case of AIG Domestic Claims, Inc. v. Hess Oil Co., Inc., 232 W.Va. 145, 751 S.E.2d 31 (2014) may very well may have answered the question posited in the Hardman case where this Court in Syl. pt. 5 held that a corporation could not recover damages for personal aggravation, annoyance and inconvenience of its non-party former shareholders.

[33] Checker Leasing, *supra* and Brooks v. City of Huntington, 234 W.Va. 607, 768 S.E.2d 97 (2014).

> ***lost value, plus his expenses stemming from the injury, including loss of use during the time he has been deprived of his property.***" (emphasis added)

In Brooks v. City of Huntington, a case involving damage to real property, this Court stated that the owner of real property "may recover the fair market value of the property before it was damaged, plus the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the time he has been deprived of his property." *Id.* Syl. pt. 4. Brooks extended the holding in Jarrett and made clear that "annoyance, inconvenience, and aggravation, ***and*** loss of use during the time" of deprivation of the property, were all recoverable damages to real property. *Id.* at 615 & 105. The primary issue in Brooks was whether the victim, the owner of a personal home, could recover repair damages that exceeded the fair market value of the property before it was damaged. *Id.* This Court also held that such damages were permissible in addition to recovery of "related expenses stemming from the injury, annoyance, inconvenience, and aggravation and loss of use during the repair period." *Id.* This Court *in dicta* stated that such holding is the majority rule with regard to damage to personal property, and also noted that the damages must be reasonable and not duplicative, which in the proceedings below they were not duplicated, nor was it ever asserted that they were by the Petitioners until this Appeal. *Id.* 616, 106.

This Court adopted new rule of recovery in Brooks because prior formulas for the recovery of damage to real property often left the innocent victim without full compensation through no fault of their own. This Court quoting the Montana Supreme Court[34] described such policy as "unsatisfying" as the goal of full compensation would be defeated if there was a cap on such damages. Brooks at 614-15, 104-05. The Petitioners off handedly suggested to the Trial Court that

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[34] Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079 (2007).

any loss of use damages were capped and unavailable once Respondent Joe Jenkins obtained another work vehicle. Petitioners provided no case law or any support for such assertion. [App. 1380-81]. This Court rejected a similar claim in Brooks that a damage rule allowing the tortfeasor to benefit by harming their property but only having to compensate for damages less than the victims harm would be tantamount to condemnation power as the tortfeasors damages would be capped, making them ripe for exploitation. *Id.* 614-16, 104-06. This Court then noted that the Montana Supreme Court considered such damage restrictions in property damage cases to be "abhorrent to the public policy of the State ... [as it] would place its citizens in a 'take it or leave it' proposition...." *Id.* It would essentially allow what Petitioners seek in this Appeal. That being the absolute limitation on loss of use damages once an innocent victim, like Joe Jenkins, had to replace their vehicle or lose his job, even though such vehicle had been wrongfully destroyed by a tortfeasor. In that instance a "take it or leave it" proposition" is tantamount to exploitation and manipulation. Such would grant undo leverage to the tortfeasor, whether the Jordans or Safeco, for no good reason other than turning a blind eye to the facts. Regardless of how many vehicles a person my have, if one of the vehicles is wrongfully destroyed the duty to remediate harm is upon the tortfeasor not the victim. Merely because a person has two vehicles does not conclusively determine that such person does not suffer loss of use damages when one of the two are destroyed. Such a rule of recovery would discriminate against those who have multiple vehicles or those with the means to cure a tortfeasors damage easier than a less wealthy victim. Such a rule would be to adopt "a legal principle without a valid reason."[35] Such a rule would be incentive for a tortfeasor to not act promptly or reasonably in replacing that which they have destroyed and it would concomitantly grant the tortfeasor undo

[35] Kim v. American Family Mut. Ins. Co., 501 N.W.2d 24, 27 (Wis. App. 1993)

leverage to force the victim to take less than full damages benefitting only the wrongdoer. Such a rule of recovery would be grievously unfair to the innocent victim and against the public policy of this State as recognized by Justice Benjamin in his concurrence in Brooks where he stated that the homeowners damages in that case may have been the result of the restrictive rule of recovery. He commented that:

> "I trust the Court's decision will provide adequate notice to those who might be similarly predisposed and let them know that the cost for such callousness has gone up. And, of course, punitive damages continue to be available in an appropriate case whenever a tortfeasor progresses beyond run-of-the-mill callousness to evidence " 'gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others.' " *Id.* at 618, 108.

Wisconsin, among other jurisdictions, have soundly rejected the archaic proposition as advanced by Petitioners except for failing to have preserved their legal position. The Wisconsin case of Hellenbrand v. Hilliard [36] rejected the skewed proposition that a tortfeasor after totally destroying a victim's vehicle, would not be responsible for loss of use damages if the victim, him or herself, replaced their destroyed vehicle with their own funds. *Id.* at 46-7. And such loss of use damages would also be recoverable if the victim decided not replace the wrecked vehicle with his or her own funds, or was unable. Hellenbrand. at 47-49. Only when the tortfeasor replaced that which he damaged would the loss of use damages cease to be recoverable. Of course, the determination of the amount of loss of use damages was a jury question based on all the evidence and the application of reasonableness under the circumstances. *Id.*

Again, even though no error was preserved by Petitioners on this issue, a review of the

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[36] Hellenbrand v. Hilliard 687 N.W.2d 37 (Wis. App. 2004); see also Camaraza v. Bellavia Buick Corp., 523 A.2d 669 (1987).

Court's Instruction 2 AB [App. 358-59], discloses that the Court adequately instructed the jury that Joe Jenkins by acquiring another vehicle could be considered by the jury to "reduce Joe Jenkins' aggravation and inconvenience" but would not artificially terminate as a matter of law his loss of use damages. *Id.* That would depend on the evidence and the Petitioners did introduce their value evidence through witness Aaron Ford who testified that $21 per day was a reasonable value for loss of use. [App. 1275-79]. The Trial Court also instructed the jury that damages for aggravation and inconvenience were "in the judgment of the jury using reason and everyday understanding of such matters to compensate Plaintiffs for what the jury finds would be reasonable compensation for Plaintiffs having gone through or experienced under the circumstances...[and] "such amount must be reasonable and based on the evidence presented to you in this case." [App. 359]. Thus, there was no double recovery by the Respondents and there is no basis to infer such as a jury is presumed to have followed the Instructions of the Trial Court. Smith v. Clark, 241 W.Va. 838, 828 S.E.2d 900 (2019) ["....the jury is presumed to follow the instructions of the court."] (internal citations omitted). Hutchison J. dissenting.

Had the Petitioners believed there were duplicate recoveries, the appropriate request would have been for the Trial Court to strike or remit that portion of the verdict that was duplicated. **No such request was made.**

Accordingly, this claimed error of duplicate recovery is without merit as it was not preserved, and would not be accurate, and therefore, should be summarily rejected.

F) The Trial Court's Refusal of Petitioners' Mitigation Instruction Was Correct as it Was Not an Applicable Statement of the Law and Petitioners Did Not Object to Respondents' Loss of Use Instruction Which Properly Instructed the Jury:

The Trial Court adequately instructed the Jury with regard to loss of use damages with its Instruction 2 AB to which no objection was lodged by Petitioners. [App.358-60]. Significantly, that Instruction was given with the consent of Petitioners. By not objecting/consenting to Instruction 2 AB, Respondents waived any error for the refusal of Instruction 14 [App. 341], as it did not provide any more guidance to the Jury than Instruction 2 AB. Instruction 2 AB stated in part that Joe Jenkins "is entitled to damages for the value of the loss of use of his vehicle: loss of use generally means the reasonable cost of a substitute rental car until the damaged vehicle, here Joe Jenkins' Chevrolet Avco, was either repaired or its fair value paid to him:" [App. 358]. This measure of value for loss of use damages was proper as it had been stated by several witnesses at Trial without objection. [App.1270, 1273-76 & 1351-53]. Instruction 2 AB also informed the Jury that Respondents' purchase or use of another vehicle provided to him or obtained by him, did not completely eliminate the loss of use damages but "those facts may reduce Joe Jenkins' aggravation and inconvenience" and that "the jury must determine the amount of money that will fully compensate Joe Jenkins for the time that he was deprived of his work vehicle. *Id.*

The loss of use Instruction 2 AB given by agreement and without objection was a correct statement of the law and it included informing the jury that Joe Jenkins' loss of use damages and aggravation and inconvenience damages could be reduced based on the facts as determined by the jury based on all the evidence. The Petitioners' Instruction No. 14 [App 341] tendered to the Court was not a correct statement of the law [37] as it was not relevant to the facts in this case, but it was a

[37] Although not determinative, the West Virginia Pattern Jury Instructions for Civil Cases 2016 Ed. at Section 806 "Damage to Personal Property" provides an instruction regarding loss of use for damaged personal property almost identical to the Instruction given by the Trial Court in this case. That Pattern Jury Instruction in Paragraph No. 3 states: "reasonable compensation for loss of use of the property during the time [name of plaintiff] was deprived of [his/her] property." There is also no

mere abstract statement which provided the jury with no guidance regarding what to consider in determining the amount of damages incurred for Respondents being deprived of the work vehicle for over 500 days. The Jury was clearly aware of Joe Jenkins obtaining a replacement vehicle and other facts necessary for the Jury to consider and arrive at their verdict. However, there was no preserved error as asserted by Petitioners including putting nothing on the Record to support the proffered Instruction 14.

The Petitioners in failing to object to the Court's Instruction on loss of use damages [App. 358-60], have waived any alleged errors that may have derived therefrom. Also, Petitioners' Trial counsel argued to the Jury vigorously that any damages for loss of use and aggravation and inconvenience was caused by Petitioners' insurance carrier Safeco and not them. [App. 1408-12]. Petitioners got to put into evidence their defense, i.e. the rental value was $21/day and that such damages were the fault of Petitioners' insurer, but the Jury just didn't agree with it. [1275-76].[38] Petitioners didn't object not because they were unaware or asleep, it was deliberately done as their trial strategy was to deflect the damages from the Jordans to their insurer Safeco. [App. 1408-12].

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paragraph regarding the plaintiff's duty to mitigate damages nor is there any such pattern instruction under that segment beginning with Section 804. However, such was incorporated in the Trial Court's Instruction in this case.

[38] Petitioners were not precluded from asserting in closing argument that Respondents' loss of use damages was less than $62.47 per day and instead was $21.00 as testified by Aaron Ford, and that the use of the replacement vehicle purchased by Joe Jenkins in December 2017 greatly reduced the aggravation and inconvenience damages to that time; however, no such arguments were proffered by Petitioners; such could have reduced such damages to $11,000 instead of $45,000; however, such failure is not grounds for review or other action by this Court unless the verdict is "monstrous"; "We have long held that "[c]ourts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption."; Miller v. Allman, 240 W.Va. 438, 454, 813 S.E.2d 91, 107 (2018)[internal citations omitted]; however in Miller, unlike this case at Bar, a proper post trial was made by Defendant. *Id.* fn 5.

When deliberate trial strategy goes awry one cannot seek appellate relief as it was an invited risk that didn't work. That's why there are relatively few objections or other protections on the Record in this Trial transcript, and that is why this Court should not second guess such trial tactics by reviewing belated alleged errors not initially and specifically called to the attention of the Trial Court. Such would be unfair to the Trial Judge.

Also and quite important, at no time was there any assertion or request by the Petitioners of the Trial Court, that the damages were excessive or against the weight of the evidence. Thus, there can be no claim of error in that regard. see fn. 30, *infra*. There are two competing duties in loss of use damages of a vehicle as presented here. First and most important, is the duty of the tortfeasor to promptly remediate the damages he has caused. The other is the victims duty not to do anything to exacerbate his damages or fail to take reasonable actions to lessen them. If a wrongdoer burns your house to the ground, the victim has no duty to undertake unexpected financial debt to rebuild it because the tortfeasor without cause refuses to do so and forces a judicial proceeding to force such action. Such a rule would encourage "dilly dalling" by the wrongdoer to hold there money until forces by a court to pay. Each case must be considered on the facts as was done here. Hard and fast rules are not appropriate and that is why the law keeps changing. Brooks, *supra*.

Even after the jury returned with its verdict and it was displayed to the Trial Court and counsel, the Court again inquired if there were any objections and Petitioners indicated "No" [App. 1426-27] which was reiterated by both Petitioners' and Respondents' counsel after the verdict was read aloud. [App. 1429]. Subsequently, when Petitioners filed their Rule 59 Post Trial Motion to Set Aside the Verdict and for a New Trial, there was no assertion in that Motion that the verdict was excessive, including that the damages awarded for loss of use, aggravation and inconvenience or any

other damages, [App. 878-83], or that Respondents loss of use instruction was not consistent with the law. Thus, any issue regarding the amount of the verdict or Instruction 2 AB is not before this Court as no such contention has ever been specifically asserted by Petitioners to the Trial Court.

The formulation of jury instructions is within the broad discretion of the trial court and the trial court's giving of an instruction is reviewed by the abuse of discretion standard. Sneberger, *supra* at 671, 173. Instructions must be based on the evidence as was done in this case, *Id.* and while this Court reviews the legal propriety of an instruction under a *de novo* standard, because there was no objection to any of the Instructions given by the Trial Court in this case, this standard of review is not applicable.

Based upon the evidence adduced at Trial, the Trial Court's Instructions were appropriate and the presumption that the Trial Court acts correctly in giving or refusing to give instructions, such presumption is sufficient to avoid adverse action by this Court as deference is always given to the Trial Court in such matters. *Id.* The Petitioners were entitled to a fair trial, but not a perfect one as there is no such animal.

Accordingly, this Court should reject the alleged errors Petitioners assert regarding their mitigation Instruction as the Jury was properly instructed as to the elements of damage available in this case. Petitioners had an opportunity, and did present evidence to the Jury through testimony and exhibits regarding their position as to the reasonable amount of loss of use damages that should be awarded and the Trial Court adequately instructed the jury to consider such evidence and that's what the Jury did, but in doing so rejected Petitioners evidence. The refusal of Petitioners Instruction 14 [App. 341] did not create reversible error in this case. A more proper instruction may have been crafted that included other factors the Jury could consider in assessing loss of use damages but

Petitioners did not offer one. The absence of Petitioners Instruction 14 did not result in an unfair trial as the Jury's rejection of Petitioners trial strategy was a risk present in every trial.

G) The Trial Court's Admission of Exhibits 4 and 5 Was Proper as Those Exhibits Were Relevant and Assisted the Jury in Understanding the Testimony:

The Petitioners assigned as error the Trial Court's admission of Respondents' Exhibit 4. Such assigned error is without any merit whatsoever. The only objection made to the Trial Court regarding the admission of Exhibit 4 was lack of foundation. Yet the Petitioners ramble for almost five pages without ever once addressing whether such objection was valid. In fact, the word foundation is not even mentioned in Petitioners' Brief except in quoting the Trial Transcript. [App. 527-30, Pet. Br. 31-36]. Thus, this Court should summarily reject this asserted claim of error as Petitioners have abandoned it by not arguing the only ground advanced to the Trial Court to not admit Exhibit 4. **Consequently, such alleged error has been abandoned.** Addair v. Bryant, 168 W.Va. 306, 284 S.E 2d. 374 (1981)[Syl. pt. 6] "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived."]; see also, Bluestem Brands, Inc., v. Shade, 239 W.Va. 694, 805 S.E.2d 805 (2017)[fn. 5 "It is ... well settled ... that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal."]

Should this Court decide to consider this alleged Error, Respondents assert that Exhibit 4 was properly admitted by the Trial Court pursuant to West Virginia Rules of Evidence 401 and 402 as the Exhibit was relevant as it had a tendency to make a fact, loss of use damages, more or less probable than it would without the evidence and the fact was a consequential matter in the case, and there was no objection to Exhibit 4's relevancy, only its foundation. The foundation was absolutely solid and Petitioners have not provided any authority challenging Exhibit 4's foundational basis.

Exhibit 4 was a damage compilation [App. 333] based on Trial testimony and Exhibit 5 which was Joe Jenkins' rental agreement charges [App. 334], and Exhibit 5 was admitted without objection along with Exhibit 4.[39] [App. 1297]. The foundation for Exhibit 4 was provided by the witnesses and documents admitted into evidence. The number of days Joe Jenkins had been deprived of his work vehicle was from the date of the crash until Trial-534 days. [App. 1205 & 1354]. The rental charge incurred by Joe Jenkins was established in Exhibit 5 [40] and the rest was math confirmed by witnesses Aaron Ford who had already testified to these matters in his deposition. [App. 1242, 1274-78, 1283]. Respondent Joe Jenkins also supported the foundation for Exhibit 4 with his testimony about having his Dad help him rent a vehicle including the stress of returning it when it looked like he was not going to get reimbursed by the wrongdoer who caused the crash. [App. 1351-55].

Aaron Ford also provided the Petitioners' theory regarding loss of use damages that the rental value of Mr. Jenkins' work vehicle was $21.00 per day. [App. 1276]. The purpose being to persuade the Jury that Respondents' damages should be much less than what was depicted in Exhibit 4. [App. 1277-78]. The witness verified the computations in Exhibit 4. [App. 1284-85]. Mr. Ford also admitted that loss of use damages for a vehicle rendered inoperable would be the per day rental value. [App. 1269-70]. He then used Exhibit 4 to explain why Respondents loss of use damages were $62.47 per day for the length of time Joe Jenkins and his Family was deprived of his work vehicle. [App.1270 & 1273-76]. **All of this testimony was elicited without any objection or**

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[39] Petitioners did not object the admission of either Exhibit 4 or 5 when actually moved for admission and stated "I don't have any objection.", but that may have been due to the Trial Court having already overruled the foundation objection lodged earlier; however Petitioners should have objected to clearly protect their Record. [App. 1296-97].

[40] Both Exhibit 4 and Exhibit 5 were marked for identification simultaneously as they complimented each other.[App. 1274]; they both were later admitted without objection.

motion to strike by Petitioners.

The test of whether to admit a demonstrative exhibit or composite exhibit is "whether the probative value of evidence is greater or less than the inflammatory effect." The Court is guided by three elements, which if any are present, indicates probative value. It is well recognized law that the Trial Judge has broad discretion in admitting such exhibits. Such "evidence must 1) constitute proof of a real issue, 2) tend to refute a claim of the defense, **or** 3) provide assistance in explaining or illustrating testimony." (emphasis added) [Cleckley, Handbook on West Virginia Evidence, §1201.01 pg. 515-16, 6th Ed. 2015] Every item in Exhibit 4 was derived from Exhibit 5, which was real evidence, i.e. the receipt for the rental vehicle, and supported by the testimony of Joe Jenkins or Aaron Ford to support Respondent Joe Jenkins' claim for loss of use damages. It is no different then the testimony of Mr. Ford that Respondents rental value was $21.00 per day instead of $62.47 per day. Petitioners could have prepared a similar composite exhibit and introduced it into evidence had they so chosen. "All courts allow the use of tangible demonstrative evidence, such as photographs, mock-ups, or charts." [Cleckley at §1201.02 pg. 516] The decision as to which rental value reflected what was reasonable was left to the Jury to decide in their deliberations based on all the evidence. The Jury chose not to credit Petitioners' evidence regarding the $21.00 per day value. That was within Jury's province. **But of course, that has nothing to do with an objection regarding lack of foundation.** This Court should summarily reject Petitioners' claimed error on multiple grounds as it is totally without any merit and should not have been asserted in the first instance. Petitioners' claim of Respondents' counsel being an "expert" witness is likewise total "poppycock."

VI. Conclusion:

The Petitioners' appeal should be denied as the case below was tried based on trial strategies that the Parties desired to put before the Jury. The Jury made their decision and each side has to live with the results. **That is why the Record is totally unprotected.** There are relatively few objections, and no motions to strike as required by Rule 103, because both counsel desired to let the Jury hear all the evidence without interference and such is a valid trial tactic. Petitioners themselves elicited more testimony about their insurance and interjected insurance in closing, all in an effort to deflect the causation and damages from the Jordans to their carrier.[41] Such was a deliberate trial tactic and in an effort to reduce the Jordans damages.[42] It may not have worked but that is not grounds for Appeal.

Respectfully submitted,
Respondents, By Counsel

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[41] App. 1409-12.

[42] Should this Court be of a mind to restate or modify the law regarding recovery of loss of use damages for personal property, this case with its dearth of specific objections and Petitioners' trial tactics likely make such endeavor better saved for another day and a more clear Record with the Trial Court first considering such issues.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 19-0890

TESSA ANN JORDAN and **LYNN JORDAN**,
Defendants Below, Petitioners

v.

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

CERTIFICATE OF SERVICE

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

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