IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-320

TAMMY S. WRATCHFORD AND MICHAEL W. WRATCHFORD,

Plaintiffs Below,
Petitioners,

vs.

ERIE INSURANCE PROPERTY & CASUALTY COMPANY,

Defendant Below,
Respondent.

APPEAL FROM THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA
THE HONORABLE H. CHARLES CARL
(CIVIL ACTION NO. 18-C-3)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The fire loss that was the subject of this case occurred on February 20, 2017 at the home of Petitioners Tammy S. Wratchford and Michael W. Wratchford (the "Wratchfords"), located in Moorefield, West Virginia. [J.A. 214, Vol. 2]. The fire was reported by Tammy Wratchford and was isolated to a set of stairs that led from the main floor of the home to the basement. While there was little fire damage to the home, there was smoke damage throughout the house. [J.A. 2206, Vol. 9].

At the time of the February 20, 2017 fire, Respondent Erie Insurance Property & Casualty Company ("Erie") had issued an Ultracover HomeProtector Insurance Policy, Policy No. Q536501730 (the "Erie Policy") to the Wratchfords, insuring the loss location. [J.A. 407, Vol. 2]. The Erie Policy provided guaranteed replacement cost coverage for the dwelling, which was estimated to be $221,500.00. [J.A. 408, Vol. 2]. The Erie Policy also provided personal property coverage in the amount of $166,125.00 as well as additional living expenses for a period not to exceed 12 months. [*Id.*].

Erie assigned Chad Tuttoilmondo as the adjuster for the claim. Mr. Tuttoilmondo completed contact with the Wratchfords on February 20, 2017 at 5:24 p.m., at which time he reviewed coverages and advised the Wratchfords to leave the area of the fire undisturbed. [J.A. 549, Vol. 3]. After Tuttoilmondo's communications with the Wratchfords and their agent, he then contacted Fire & Safety Investigating Consultants, LLC ("FSI") to coordinate a cause and origin investigation. [J.A. 550-552, Vol. 3].

On February 21, 2017, Mr. Tuttoilmondo inspected the loss location and secured recorded statements of both Mr. and Ms. Wratchford. [J.A. 453-464, Vol. 2]. In the recorded statement, Tammy Wratchford reported that she left the home at 7:30 a.m. to take a test in Martinsburg, West Virginia, after dropping her son off at school in Moorefield. [J.A. 458, Vol. 2]. After her test, Ms.

Wratchford stated that she spent some time in Winchester, Virginia, and then returned home around 3:00 p.m. to discover puffs of smoke coming out of the eaves of the house. [*Id.*]. The Wratchfords indicated their belief was the fire was likely electrical. They did not at that time give any indication to Mr. Tuttoilmondo that there had been electrical odors in the house in the days leading up to the fire. [J.A. 460-464, Vol. 2].

On February 23, 2017, Christopher Brent Harris with FSI did a scene investigation to determine the cause and origin of the fire. [J.A. 2777, Vol. 13]. Upon inspection of the area of origin, Mr. Harris reported that he was unable to identify any potential ignition sources in the area of the fire. [J.A. 2780, Vol. 13]. He indicated he observed steps of the stairs in the basement where the fire was located and observed heavy charring on the top of the steps, but partially uncharred areas on the underside of the steps. Accordingly, Mr. Harris opined that the fire was located on the top side of the stair treads. [*Id.*]. Based on his initial investigation, Brent Harris expressed concerns that the fire at the Wratchford home was incendiary. [J.A. 2783, Vol. 13].

Given this finding, Mr. Harris recommended that Erie retain an electrical engineer to examine the electrical system and to rule out electrical causes of the fire. [*Id.*]. Erie retained Dr. Bert N. Davis, Ph.D. for purposes of ruling out electrical causes of the fire.

Given the results of his investigation, Mr. Harris advised Erie that he was requesting that the West Virginia State Fire Marshal's Office investigate the fire because of its suspicious nature. [*Id.*] On February 23, 2017, Mr. Harris contacted the West Virginia State Fire Marshal's Office through the Arson Hotline. [J.A. 684, Vol. 3]. The Office's arson investigation was assigned to Assistant State Fire Marshal, Ronald C. "Mackey" Ayersman ("ASFM Ayersman"). [J.A. 2196, Vol. 9; J.A. 4809-4810, Vol. 15]. At the time, ASFM Ayersman was a part-time employee of FSI

and investigated fire losses for FSI outside of the state of West Virginia. [J.A. 4813, J.A. 5393, Vol. 15].

Erie utilized its Investigative Services Section, and specifically senior investigator Phillip Jones, to perform further investigation into the fire. [J.A. 5667-5669, Vol. 15]. Mr. Jones began by conducting database searches, including gathering credit reports of the Wratchfords. [J.A. 5672, Vol. 15]. Mr. Jones' inquiries revealed a number of delinquencies and high credit usage. [J.A. 4265 and 5678-5679, Vol. 15]. There were initial questions as to whether the correct Tammy Wratchford and Michael Wratchford had been identified on every report gathered by Erie in the early stages of its investigation. However, Mr. Jones promptly discussed the reports and their contents with the Wratchfords and re-gathered information based upon those discussions. [J.A. 5681-5682, Vol. 15]. At trial, Mr. Jones adamantly denied the allegations that he called either of the Wratchfords liars. [J.A. 5681-5683, Vol. 15].

On February 24, 2017, Mr. Jones performed a site inspection of the loss location and secured additional recorded statements of the Wratchfords. [J.A. 5679-5690 Vol. 15 and J.A. 693, Vol. 3 and J.A. 2227, Vol. 9]. It was during this recorded statement that the Wratchfords first advised that they had both smelled a burning, electrical smell in the home in the weeks leading up to the fire. [J.A. 704-706, Vol. 3 and J.A. 2237-2238, Vol. 9]. Mr. Wratchford indicated to Jones that the smell was located in a bathroom downstairs in the home and that it was first noticed the week before the fire. [*Id.*]. In fact, Mr. Wratchford indicated that he used a thermal imager to see if there were any hot spots behind the walls and did not find anything. [*Id.*].

On the same date of Mr. Jones' site inspection, ASFM Ayersman performed a cause and origin examination on behalf of the West Virginia State Fire Marshal's Office. [J.A. 2195, Vol. 9]. In addition to a visual inspection, ASFM Ayersman took samples to send to the West Virginia

State Police laboratory for testing. [J.A. 2207, Vol. 9]. Based on his investigation and inspection, ASFM Ayersman opined that the fire was incendiary in nature and that he could eliminate all accidental and electrical causes in the area.[1] [*Id.*; J.A. 2208, Vol. 9; J.A. 5000-5003, Vol. 15].

On March 3, 2017, Phillip Jones, ASFM Ayersman, Brent Harris of FSI[2] and Dr. Bert Davis returned to the home for further investigation and to specifically look at any potential electrical causes of the fire. As a result of that investigation, Dr. Davis advised that he could eliminate the electrical service as being involved in the initiation of the fire. [J.A. 787, Vol. 4].

On March 15, 2017, FSI issued a written report to Erie with the opinion that the fire at the Wratchford home was incendiary. [J.A. 2777, Vol. 13]. The report based its opinion on the fact that all accidental and electrical causes for the fire had been eliminated. [J.A. 2783, Vol. 13].

As Erie's investigation continued, the West Virginia State Fire Marshal's Office's investigation into the fire also continued. ASFM Ayersman conducted multiple telephone interviews of co-employees of the Wratchfords and fire officials. [J.A. 2196-2207, Vol. 9]. These interviews confirmed that the fire at the Wratchford home was isolated to the basement stairs, with the remainder of the damage being smoke-related with some water damage from fire suppression efforts. [*Id.*].

On March 9, 2017, at the request of ASFM Ayersman, Tammy Wratchford voluntarily submitted to a polygraph examination. [J.A. 4455, Vol. 15]. During the polygraph test, Tammy Wratchford denied any involvement or knowledge as to the cause of the fire. [J.A. 4458 and 4463,

[1] There was evidence presented to the jury also explaining that the absence of ignitable substances did not conclusively establish whether there was an ignitable liquid present, *e.g.* such liquid may have been consumed in the fire totally.

[2] The FSI Report indicates that this group of investigators went to the Wratchfords' home on February 27, 2017; however, Mr. Harris testified during trial that the reference to February 27, 2017 was in error and should have referenced the March 3, 2017 visit. [J.A. 2782, Vol. 13; J.A. 5547-5548, Vol. 15].

Vol. 15]. However, it was concluded that Tammy Wratchford had been deceptive during the polygraph. [J.A. 4460, Vol. 15]. Upon additional questioning that afternoon at the police barracks, Tammy Wratchford admitted to trying to set the house on fire a few weeks before the fire at issue by setting a candle underneath a tree located in the living room. [J.A. 4464, Vol. 15]. On the evening of March 9, 2017, Tammy Wratchford attempted suicide. [J.A. 3937, Vol. 14].

During his investigation, ASFM Ayersman also discovered that the Wratchfords had not paid personal property taxes, but that Tammy Wratchford had used her position as an employee of the Department of Motor Vehicles to renew her vehicle registrations without having paid them. [J.A. 2351, Vol. 10]. This information was disclosed to the West Virginia State Police and to the Department of Motor Vehicles, which led to a forced resignation of employment by Ms. Wratchford and a determination that she could not seek state-based employment in the future. [J.A. 2392, Vol. 10; J.A. 4000-4002, Vol. 14].

A review of the Wratchfords' financial situation also raised red flags and provided possible motive for burning the home. [J.A. 5679, Vol. 15]. Subpoenas served on Summit Community Bank by the West Virginia State Fire Marshal's Office resulted in the production of documents indicating that the home was in the process of being foreclosed upon in the weeks leading up to the fire. Specifically, the bank produced a letter dated September 21, 2016 indicating that, as of that date, the Wratchfords were $6,218.50 past due on their mortgage payments. [J.A. 4471, Vol. 15]. The September 21, 2016 letter outlines an agreement whereby the Wratchfords agreed to make double payments (once every two weeks) beginning September 30 through December 16 to bring the mortgage current. [*Id.*]. However, by e-mail dated December 28, 2016 produced by the bank, it was clear that the Wratchfords had failed to meet that payment obligation. [J.A. 4473, Vol. 15]. By e-mail dated December 28, Tammy Wratchford requested more time to bring the mortgage

current, which request was denied by the bank by e-mail dated January 26, 2017. [*Id.*; J.A. 1039, Vol. 5]. In an e-mail dated January 26, 2017, the bank director of debt management, Tina Martin, advised Ms. Wratchford that she had been instructed to send the account to the attorney for foreclosure. [*Id.*]. On February 13, 2017, just one week prior to the fire, Summit Community Bank contacted an attorney requesting the initiation of foreclosure proceedings. [J.A. 4466-4473, Vol. 15; *see also* J.A. 4263, Vol. 15 and J.A. 3940-3956, Vol. 14].

In light of the cause and origin findings, Erie elected to have Tammy Wratchford and Michael Wratchford undergo examinations under oath. The examinations under oath were completed on April 26, 2017. [J.A. 846, Vol. 4].

On June 16, 2017, ASFM Ayersman filed criminal complaints against Tammy Wratchford with the Magistrate Court of Hardy County, West Virginia. [J.A. 968-976, Vol. 4]. The Complaints included charges of attempt to burn property, attempt to commit arson, insurance fraud, first degree arson and burning of property. [*Id.*]. The attempt charges were based on Ms. Wratchford's admission to trying to burn the property two weeks earlier and the remaining charges were related to the February 20, 2017 fire. [J.A. 976, Vol. 4]. Tammy Wratchford was arrested on June 18, 2017. [J.A. 965, Vol. 4].

Coverage under the Erie Policy was denied by letter dated July 11, 2017. [J.A. 991-995, Vol. 4]. Erie's denial letter to the Wratchfords denied their claims arising from the February 20, 2017 fire based on various provisions of the Erie Policy, including the intentional acts exclusion, provisions regarding concealment, fraud and misrepresentation, and the failure to cooperate in Erie's investigation by providing incomplete and untruthful responses in an examination under oath. [*Id.*]. Although Erie denied the Wratchfords' claim for insurance benefits, it paid off the the mortgage held by Summit Community Bank in accordance with the terms of the Erie Policy. Erie

issued payment to Summit Community Bank on September 5, 2017 for $168,723.90, the amount of the mortgage as of the date of the February 20, 2017 fire. [J.A. 3389, Vol. 14].[3]

On February 6, 2018, a grand jury was convened to hear evidence concerning the criminal charges against Ms. Wratchford. [J.A. 2818, Vol. 13]. Three witnesses were presented during the grand jury proceeding: Paul Alloway, Lawrence Rine and Tammy Wratchford. [J.A. 2819, Vol. 13]. Mr. Alloway, with the West Virginia State Fire Marshal's Office, was questioned by the prosecuting attorney as to the relationship between ASFM Ayersman and FSI. [J.A. 2826-2827, Vol. 13]. Lawrence Rine was a retained expert by the Wratchfords and expressed the opinion that the fire was caused by electrical issues, specifically arcing that occurred due to a staple having perforated the sheathing around the wiring. [J.A. 2845-2861, Vol. 13]. Tammy Wratchford also called to testify in the case against her and denied any involvement in the fire and further denied that she ever admitted to trying to start a fire at the home two weeks earlier. [J.A. 2861-2876, Vol. 13]. The grand jury issued a no true bill. [J.A. 2818, Vol. 13].

One week later, on February 13, 2018, the Wratchfords initiated this lawsuit by Complaint against Erie, Chad Tuttoilmondo, Phillip Jones, FSI, Christopher Brent Harris, Forensic Consultants & Engineers, Inc. d/b/a Romualdi Davidson & Associates, Inc., Bert N. Davis, and Assistant State Fire Marshal Ayersman.[4] [J.A. 124, Vol. 2]. On July 5, 2018, the Wratchfords filed their Amended Complaint and added the West Virginia State Fire Marshal's Office as defendant. [J.A. 209-289, Vol. 2]. The Amended Complaint asserted the following claims against Erie: (1)

[3] Also pending before this Court is Erie's appeal of the Circuit Court's denial of its request for a credit to the judgment for the $168,723.90 prior payment made in satisfaction of the Wratchfords' mortgage, 24-ICA-331.

[4] The original Complaint also asserted claims against BDA Engineering, Inc. BDA Engineering, Inc. was voluntarily dismissed from the case prior to the filing of the Amended Complaint.

Breach of Contract, (2) Negligence, (3) Intentional Violations with Malice, (4) Tortious Interference with Employment, (5) Intentional Infliction of Emotional Distress, (6) Civil Conspiracy, (7) Malicious Prosecution and Abuse of Process, (8) Respondeat Superior, (9) Unfair Trade Practices Act, and (10) Punitive Damages. [5] [*Id.*]. Erie filed its Answer to the Amended Complaint on July 10, 2018. [J.A. 290, Vol. 2].

Over the course of the case, no settlement demands were made to Erie until mediation. [J.A. 4580, Vol. 15]. Through the mediator, retired circuit court judge Christopher Wilkes, the Wratchfords made a singular demand upon all of the defendants, in the amount of $7,000,000. [*Id.*]. The defendants thereafter made a collective response in the amount of $400,000, of which the Erie group[6] agreed to contribute $150,000. [J.A. 4581, Vol. 15]. The Wratchfords rejected the defendants' counter-offer outright, refused to reduce their $7,000,000 demand, and mediation ended. [*Id.*]. Thereafter, the Wratchfords refused to negotiate and never made a reduced settlement demand to Erie prior to trial. [*Id.*].

This case was tried before a jury from May 4, 2023 through May 25, 2023, when the jury returned its verdict. Over the course of the sixteen-day trial, the Wratchfords put forth their case-in-chief for eight of days. Tammy Wratchford testified during four, separate trial days. [J.A. 3585, 3691, 3989, 4080, Vol. 14]. In total, nineteen witnesses took the stand—twelve of which were called by the Wratchfords. Of the nineteen witnesses, the only representative of Erie called to testify was Phillip Jones. Mr. Jones was called to testify during Erie's case-in-chief, and the

[5] The claim of Intentional Violations with Malice and the stand-alone claim for punitive damages were dismissed by Order dated May 18, 2018. [J.A. 9, Vol. 1]. The claim of Tortious Inference with Employment was dismissed by Order dated February 9, 2021. [J.A. 92, Vol. 1]. The remainder of the claims were tried and decided by the jury.

[6] The Erie group of defendants included Erie, adjuster Chad Tuttoilmondo, and investigator Phillip Jones.

Wratchfords' counsel had the opportunity to fully cross-examine him. Erie's adjuster, Chad Tuttoilmondo was not called to testify. [J.A. 5661, Vol. 15].

Thousands of pages of exhibits were entered into evidence for the jury's consideration. At the conclusion of evidence, the parties made their closing arguments to the jury. The Wratchfords' counsel was allotted 80 minutes for this purpose. [J.A. 3208-3209, Vol. 14]. Thereafter, the jury deliberated over the course of two days. The jury returned defense verdicts in favor of Erie's adjuster Chad Tuttoilmondo, Erie's investigator, Phillip Jones, FSI, Christopher Brent Harris, Assistant State Fire Marshal Ayersman and the WV State Fire Marshal's Office on all claims asserted against them by the Wratchfords. [J.A. 3057-3073, Vol. 14]. The jury did find that Erie was liable for breach of contract, and awarded total contractual damages in the amount of $687,742.57 for replacement of the dwelling, personal property loss and loss of use. [J.A. 3071-3072, Vol. 14]. The jury also awarded $99,791.50 for additional rental expenses in excess of twelve months as allowed by the insurance policy and attorney's fees and costs incurred in defense of a criminal prosecution of Tammy Wratchford for arson and attempted arson. [*Id*.].

SUMMARY OF THE ARGUMENT

By way of this appeal, the Wratchfords assert six assignments of error by the Circuit Court of Hardy County. The Wratchfords contend in their first three assignments of error that the Circuit Court erred in failing to find that the they (1) substantially prevailed in their claims against Erie pursuant to *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986), (2) are entitled to a new trial for purposes of seeking damages for aggravation and inconvenience and net economic loss in accordance with *Hayseeds*, and (3) are entitled to an award of attorney's fees and litigation expenses in accordance with *Hayseeds*. *See generally*, Petitioners' Brief at p. 11-25. The Wratchfords' arguments on these points fail because the evidence before the Circuit Court fully supported its finding that the Wratchfords did not substantially prevail in their claims

against Erie. In sum, the jury verdict in this matter was approximately 11.2% of the final, $7,000,000 demand that was made prior to the trial. That finding alone is a basis for finding that the Wratchfords are not entitled to a new trial and are not entitled to an award of attorney's fees.

Separately, the Wratchfords request for a new trial on *Hayseeds* damages ignores the fact that the *Hayseeds* claims were not bifurcated, that they did not seek bifurcation of those claims, that the jury was instructed on *Hayseeds*, and that they presented substantial evidence and argument on claimed damages for aggravation and inconvenience and net economic loss in accordance with the instructions of law that were provided to the jury. At trial, the jury was given the opportunity to award damages to the Wratchfords for aggravation and inconvenience and net economic losses resulting from Erie's handling of the Wratchfords' fire loss claim. The jury's verdict on this issue should be upheld. The trial court's determination that the Wratchfords did not substantially prevail should be affirmed and the Wratchfords' request for a new trial on these issues should be denied.

The Wratchfords' fourth assignment of error asserts that the Circuit Court committed error in denying them prejudgment interest in accordance with *Miller v. Wesbanco Bank, Inc.*, 245 W. Va. 363, 859 S.E.2d 306 (2021). *See generally*, Petitioner's Brief at p. 26-30. The Wratchfords raise two arguments for the award of prejudgment interest. First, the Wratchfords argue that this Court should simply apply the general prejudgment interest statute, codified at W. Va. Code § 56-6-31, and ignore the more specific prejudgment interest statute for actions founded on contract, codified at W. Va. Code § 56-6-27. Second, the Wratchfords argue that they should be entitled to recover prejudgment interest as a component of damages for net economic loss pursuant to *Hayseeds,* 177 W. Va. 323, 352 S.E.2d 73. Both of these arguments fail as a matter of law.

The West Virginia Supreme Court of Appeals has expressly rejected the notion that application of W. Va. Code § 56-6-27, relating to the award of prejudgment interest on actions founded on contract, is optional. Rather, as the Court expressly held in *Miller*, WV Code § 56-6-27 is the exclusive method by which prejudgment interest is awarded on contract claims. Plaintiffs' failure to present the question of prejudgment interest to the jury constitutes a waiver of that issue.

The Wratchfords' second assertion that they can alternatively seek an award of prejudgment interest as a component of net economic loss pursuant to *Hayseeds* also has no support under West Virginia law. The Wratchfords do not cite to a single case where prejudgment interest was awarded as a component of net economic loss under *Hayseeds.* The *Hayseeds* case does not provide a method by which prejudgment interest can be awarded.

The fifth assignment of error by the Wratchfords asserts that the Circuit Court erred in denying their Motions for Judgment Notwithstanding the Verdict or alternative request for a new trial on damages reduced or denied by the jury. *See generally*, Petitioner's Brief at p. 30-35. Similarly, the sixth and final assignment of error by the Wratchfords asserts that the Circuit Court erred by upholding the jury's defense verdict on the Wratchfords' claim for violations of the West Virginia Unfair Trade Practices Act. *See generally*, Petitioner's Brief at p. 35-39 The Circuit Court's denial of the Wratchfords' requests to alter the jury's verdicts or to award them a new trial on these areas was wholly appropriate in accordance with well-established precedent recognizing the sanctity of jury verdicts in this State. Further, the Wratchfords' failure to make a motion under Rule 50 of the West Virginia Rules of Civil Procedure at the close of evidence constitutes waiver.

There was no error by the Circuit Court on these issues. The Circuit Court's Order Denying Plaintiffs' Motion and Supplemental Motion to Find that Plaintiffs' "Substantially Prevailed" in the Property Damage Suit Against Erie and for Second *Hayseeds* Trial [J.A. 4235, Vol. 14] and

Order Denying Plaintiffs' Supplemental Motion for Judgment Notwithstanding Verdict; Motion for Notwithstanding Verdict on Damages; Motion for New Trial/Second Trial on Failure to Provide Non-Economic Damages Including Aggravation and Inconvenience Under *Hayseeds;* Motion for New Trial on Pre-Judgment Interest and Economic Losses Resulting from Delay in Payment; Motion to Hold Pre-Judgment Interest as Non-Final Adjudication (Interlocutory) of Damages and to DelayAppeal Time Pending Second Trial and Motion for Post-Judgment Interest from Date of Jury Verdict May 25, 2023 at 8% on March 27, 2024 filed on July 22, 2024 [J.A 4242, Vol. 14] should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Erie submits that this case is appropriate for oral argument in accordance with Rule 19 of the West Virginia Rules of Appellate Procedure, as it involves assignments of error in the application of settled law.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review for a Circuit Court's determination as to whether a party has "substantially prevailed" pursuant to *Hayseeds, supra,* is under an abuse of discretion standard. *See Jones v. Sanger*, 217 W. Va. 564, 568-569 618 S.E.2d 573, 577-578 (2005).

The standard of review for the denial of a motion for new trial is an abuse of discretion standard. *McClure Management, LLC v. Taylor*, 243 W. Va. 604, 614, 849 S.E.2d 604, 614 (2020).

The standard of review of a circuit court's award of prejudgment interest is, generally, abuse of discretion. However, when the prejudgment interest award, "hinges . . . on an interpretation of [] decisional or statutory law" that portion of the analysis is reviewed *de novo*. Syl. Pt. 2, *Hensley v. West Virginia Dep't of Health and Human Resources*, 203 W. Va.456, 508 S.E.2d 616 (1998).

The standard of review for the denial of a motion for judgment as a matter of law is *de novo.* Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

B. THE CIRCUIT COURT'S FINDINGS IN ACCORDANCE WITH *HAYSEEDS* WERE WELL SUPPORTED BY WEST VIRGINIA LAW AND THE EVIDENCE

1. The Circuit Court Correctly Determined The Wratchfords Did Not Substantially Prevail

Whether a party "substantially prevails" pursuant to *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986) is a determination that is made by the trial court after the underlying first party claim has been resolved and involves the evaluation of whether the jury verdict or settlement was for an amount "approximating the amount claimed by the insured". *See e.g.* Syl. Pt. 4, *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997) ("When examining whether a policyholder has substantially prevailed against an insurance carrier, a court should look at the negotiations as a whole from the time of the insured event to the final payment of the insurance proceeds."). A trial court's determination on this issue should not be disturbed unless an appellate court finds an abuse of discretion. *See Jones v. Sanger*, 217 W. Va. 564, 568-569 618 S.E.2d 573, 577-578 (2005). ("This Court has indicated that it will review a trial court's determination of whether a plaintiff as 'substantially prevailed' in an insurance claim, such as the one presently before the Court, under an abuse of discretion standard.")

In *Hayseeds*, the West Virginia Supreme Court of Appeals first held that an insured could recover damages in the form of attorney's fees, aggravation and inconvenience and net economic loss when it substantially prevailed on a first party property damage claim:

> Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured's reasonable attorneys' fees in vindicating its claim; (2) the insured's damages for net economic delay caused by the delay in settlement, and damages for aggravation and inconvenience.

Syl. Pt. 1, *Hayseeds*, 177 W. Va. 323, 352 S.E.2d 73. The trigger for recovery under *Hayseeds* is the determination of whether the insured has "substantially prevailed" on its first party claim against the insurer. Although the determination of whether a party substantially prevails was initially based on the assessment of the status of negotiations *prior to the institution of the lawsuit against the insurer*, case law has since developed expanding the analysis to include not only the status of negotiations prior to the filing of the lawsuit, but also the negotiations as a whole from the time of the loss to the final payment of the insurance proceeds. *Compare* Syl. Pt. 2, *Thomas v. State Farm Mut. Auto. Ins. Co.*, 181 W. Va. 604, 383 S.E.2d 786 (1989) to Syl. Pt. 4, *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). In *Miller*, the West Virginia Supreme Court of Appeals held that "[w]hether a policyholder has substantially prevailed is determined by looking at the *totality of the policyholder's negotiations with the insurance carrier, not merely the status of negotiations before and after a lawsuit is filed.*" *Miller v. Fluharty*, 201 W. Va. 685, 696, 500 S.E.2d 310, 321 (emphasis added); *see also* Syl. Pt. 1, *Jordan v. National Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990).

While the status of the negotiations, as a whole, is a primary factor in determining whether a party has substantially prevailed, this determination is not simply an evaluation of settlement offers and demands, but includes what interest the insured has in settling the claim before trial. In *Hadorn v. Shea*, 193 W. Va. 350, 456 S.E.2d 194 (1995), the West Virginia Supreme Court of Appeals held, in affirming the denial of an insured's request for *Hayseeds* damages:

> We are not basing this decision on a purely mathematical calculation as to whether Ms. Hadorn substantially prevailed. We considered the status of the claim at the time negotiations broke down, which included consideration of the insured's interest in attempting settlement before trial. If, then, an insurer offers a nominal amount that ends up being closer to the amount awarded by the jury than that demanded by the plaintiff, the insurer does not *automatically* prevail, but such circumstance highly favors the insurer and the

> insured must show other circumstances justifying a contrary result. We reiterate that it is the status of the claim as a *whole*, at the time negotiations broke down, that determines whether an insured substantially prevails.

(Emphasis in original). The West Virginia Supreme Court of Appeals has also recognized that scope and timing of an insurer's investigation and whether liability is reasonably clear are factors that a trial court can consider under *Hayseeds*. In *Miller*, the Court held

> We therefore hold that an insurance carrier has a duty, once a first-party policyholder has submitted a proof of loss, to promptly conduct a reasonable investigation of the policyholder's loss based upon all available information. On the basis of that investigation, ***if liability has become reasonably clear***, the insurance carrier must make a prompt, fair and equitable settlement offer. If the circuit court finds evidence that the insurance carrier has failed to properly or promptly investigate the policyholder's claim, then the circuit court may consider that evidence in determining whether the policyholder has substantially prevailed in an action to enforce the insurance contract.

Miller, at 695, 320 (emphasis added).

Here, comparing the jury verdict to the totality of settlement negotiations makes clear that the Wratchfords did not "substantially prevail" against Erie within the meaning of *Hayseeds*. First, while the Wratchfords seek to focus on pre-suit demands for settlement of the claim, the evidence in this case establishes that liability was anything but "reasonably clear."

After the Wratchfords filed their claim with Erie on the afternoon of the fire, February 20, 2017, Erie retained an expert to determine the origin and cause of the fire. That expert, Fire & Safety Investigation Consultants, LLC, concluded that the fire was incendiary and reported the fire to the West Virginia State Fire Marshal's Office. [J.A. 2783, Vol. 13]. While the West Virginia State Fire Marshal's Office began its own independent investigation into the fire, Erie separately retained an electrical engineer to determine whether there was an electrical cause to the fire. Dr. Bert Davis concluded that there was no electrical cause to the fire. [J.A. 787, Vol. 4]. Further

investigation revealed that the Wratchfords were facing imminent foreclosure on their home, suggestive of a significant motive for causing the fire. [J.A. 4466-4473, Vol. 15; *see also* J.A. 4263, Vol. 15 and J.A. 3940-3956, Vol. 14].

Coupled with information from its own investigation, Erie learned during the course of its investigation that the West Virginia State Fire Marshal's Office had investigated the fire and had also determined that the fire was intentionally set. [J.A. 2207, Vol. 9; J.A. 2208, Vol. 9; J.A. 5000-5003, Vol. 15]. Erie was *also* advised that Tammy Wratchford had been found to be deceptive during a polygraph conducted by the West Virginia State Fire Marshal and that *she admitted to attempting to set the house on fire two weeks earlier*. [J.A. 4460, 4464, Vol. 15].. At the time that Erie concluded that the claim would be denied, Ms. Wratchford had been criminally charged with arson, attempted arson, and insurance fraud [J.A. 968-976, Vol. 4]. Liability was far from "reasonably clear" based on the information Erie obtained during the course of its investigation and that is a factor that is relevant to the determination of whether the Wratchfords substantially prevailed in this case.

Separately, the history of settlement negotiations in this case further establishes that the Wratchfords did not substantially prevail on their claims. Once the Wratchfords filed their lawsuit against Erie, no settlement demands were made to Erie and the Wratchfords made no attempts to resolve their claims until mediation that occurred on January 24, 2020. *See* Affidavit of Keith Doak, [J.A. 3425–3426, Vol. 14]. At that time, the Wratchfords made a single, collective settlement demand to all defendants in the amount of *$7,000,000.* [*Id*.]. During mediation, the defendants made a collective response to the $7,000,000 demand in the amount of $400,000, of which the Erie group agreed to contribute $150,000. [*Id*.]. The Wratchfords rejected the defendants' counter-offer outright, refused to reduce their demand, and mediation ended.

Thereafter, the Wratchfords refused to further negotiate and never made a reduced settlement demand to Erie prior to trial. [*Id.*].

While the jury found in favor of the Wratchfords against Erie for breach of insurance contract, the amount awarded was far less than the Wratchfords' demand during the course of litigation. Further, the jury returned a defense verdict as to all other counts in favor of Erie and as to each of the remaining defendants, including Erie's employees, Chad Tuttoilmondo and Phillip Jones.[7] As a result of the jury's finding against Erie for breach of insurance contract, it awarded the Wratchfords damages in the total amount of $687,742.57. [J.A., Vol. 14, 3057 – 3073]. The awarded damages outside of the contract in the amount of $99,791.50. [*Id.*].[8] Exclusive of prejudgment and post-judgment interest, the award of contractual damages and separate award of non-contractual damages against Erie total $787,534.07, far below the $7,000,000 demand leading up to trial. [*Id.*] In fact, the jury's verdict was approximately 11.2% of the Wratchfords' singular demand during the litigation.

The fact that the Wratchfords ultimately prevailed on the breach of contract claim does not equate to having *substantially* prevailed on the demands they made of Erie. *See e.g., Jones v. Sanger*, 217 W. Va. 564, 570, 618 S.E.2d 573, 579 (finding that insured did not substantially prevail when case settled for $76,500 after insured made a demand for $89,000); *see also Bryan v. Westfield Ins. Co*, 207 W. Va. 466, 534 S.E.2d 20 (2000) (finding that insured did not substantially prevail when the insured settled the claim for 66.25 percent of what was initially

[7] The jury found in favor of Erie on the Wratchfords' claims for 1) negligence, 2) intentional infliction of emotional distress, 3) civil conspiracy, 4) malicious prosecution and abuse of process, 5) respondeat superior liability, and 6) Unfair Trade Practice Act claims. [J.A. 3057 – 3073, Vol. 14].

[8] Because there was no predicate finding of liability against Erie for an award of these claims, this award is conceivably a jury's determination as to net economic loss damages encompassed within the Wratchfords' *Hayseeds* claim.

demanded.); *Hadorn v. Shea*, 193 W. Va. 350, 456 S.E.2d 194 (finding that insured did not substantially prevail when verdict was for $90,000 and insured had made a non-negotiable demand of $300,000). The Wratchfords must show more. They must show that the recovery was equal to or approximated the amount that it sought prior to trial. The Wratchfords simply cannot do that in this case.

The totality of the evidence in this case fully supports the conclusion by the Circuit Court that the Wratchfords did not substantially prevail and that its denial of *Hayseeds* damages was wholly appropriate. To warrant reversal, this Court should not substitute its discretion and opinion for that of the trial court, but rather only upon a finding that the trial court was clearly wrong in its conclusions. *See Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 473, 513 S.E.2d 692, 700 (1998), *citing Intercity Realty Company v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1970) ("Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed."). There is no abuse of discretion in this case and, for that reason, the trial court's conclusion that the Wratchfords did not substantially prevail should be affirmed.

2. The Wratchfords Presented Evidence And Argument In Support Of A *Hayseeds* Claim

Through their second assignment of error, the Wratchfords seek a new trial on damages pursuant to *Hayseeds*. However, for the reasons set forth in the prior section, the trial court correctly concluded that the Wratchfords did not substantially prevail and the request for new trial should be denied. Aside from that fact, it is equally clear that the Wratchfords had a full opportunity to present evidence and argument for an award of damages for aggravation and

inconvenience in accordance with *Hayseeds.* Simply because the jury concluded that the Wratchfords were not entitled to those damages does not provide a basis for the award of a new trial.

As with this Court's review of the Circuit Court's determination of whether the Wratchfords' substantially prevailed at trial, the standard of review for the denial of a motion for new trial is an abuse of discretion standard. *See McClure Management, LLC v. Taylor*, 243 W. Va. 604, 614, 849 S.E.2d 604, 614 (2020) ("This Court employs an abuse of discretion standard of review when considering a circuit court's ruling on a motion for new trial.").

i. <u>The Jury Was Specifically Instructed As To *Hayseeds* Damages</u>

As the Wratchfords concede in their brief, the jury was instructed on its ability to award damages for aggravation and inconvenience and net economic loss pursuant to *Hayseeds*. *See* Petitioners' Brief, p. 18. Specifically, Jury Instruction No. 8 provided the following instruction to the jury:

> In the event that you find in favor of the Plaintiffs against Erie in the enforcement of the Homeowner's Policy of Insurance in effect on their home at the time of the fire on February 20, 2017, you may direct, in addition to other damages that the insurer, Erie, is liable for (1) **any damages provide by the Plaintiffs, by preponderance of evidence, for net economic loss caused by the delay in settlement**, and (2) **damages for aggravation and inconvenience**. In considering whether the Plaintiffs have substantially prevailed for the property damages claimed in this action against Erie, it is not necessary for the Plaintiffs to prove that the insurance company acted in bad faith, without good faith, or with any intent to injure. I tis necessary only that the Plaintiffs substantially prevailed in obtaining insurance coverage for their property loss under the Erie Homeowner's Insurance policy in the jury verdict form an amount equal to or approximating the amount claimed by the insureds within their proof of loss forms submitted to Erie prior to the commencement of this legal action. In other words, if you as a jury have found property damage losses of the dwelling and/or the personal property of the Plaintiffs which are approximately equal to or exceed the amount claimed by the Plaintiffs on their proof of loss form submitted to Erie for payment following the fire loss, the

> Plaintiffs have "substantially prevailed", and the insurer is liable for the Plaintiffs' damages for net economic loss caused by the delay in settlement as well as damages for aggravation and inconvenience to the Plaintiffs resulting from the failure of Erie to timely pay for the losses claimed by the Plaintiffs.

[J.A. 2996, Vol. 14].[9] The jury instruction on *Hayseeds* was requested by the Wratchfords and included within the proposed instructions without objection by Erie. Clearly, it was the intent of the Wratchfords to seek *Hayseeds* damages through the trial of this matter and they had full and ample opportunity to present their evidence at trial and did so. The jury was appropriately instructed on its ability to award those damages and the jury verdict clearly establishes that the jury concluded that the Wratchfords were not entitled to any award for non-economic damages. [J.A. 3057-3074, Vol. 14].

ii. The Wratchfords Presented Evidence Of Aggravation And Inconvenience And Net Economic Loss During Trial

Consistent with the jury instructions, the Wratchfords presented evidence through the testimony of Tammy Wratchford, to support an award of damages against Erie for net economic loss and damages against Erie for aggravation and inconvenience. Specifically, Ms. Wratchford was asked about the impact on her family from having to bounce from rental property to rental property after the fire, the inability for the Wratchfords to take their pet dog with them when they moved into those rental properties, and the forced resignation from her job with the DMV due to information obtained during the State Fire Marshal's investigation that Ms. Wratchford renewed her licenses without paying property taxes. [J.A. 3826 – 3828, Vol. 14]. The Wratchfords offered testimony that Ms. Wratchford suffered humiliation and embarrassment as a result of the public media posts concerning her arrest for arson, attempted arson and insurance fraud. [J.A. 3841 –

[9] While attorney's fees are recoverable under *Hayseeds*, those fees are determined by the trial court and not the jury, so the jury was not instructed on attorney's fees. Syl. Pt. 3*, Richardson v. Kentucky Nat. Ins. Co.*, 216 W. Va. 464, 607 S.E.2d 793 (2004).

3843, Vol. 14]. The Wratchfords offered testimony about the impacts of the loss of her job with the Moorefield Volunteer Fire Department because of the pending criminal charges. [J.A. 3845-3847, Vol. 14]. Specific to claims related to Erie's denial and failure to pay the claim, Tammy Wratchford provided the following testimony:

> Q. What do you attribute – well, how has this affected you and Michael in the house not being paid for, the expenses not being paid for? How has that affected you?
>
> A. Well, I ended up having to take what I had that I had paid into my retirement. I had to withdraw it to buy our furniture because when we moved into our apartment, we had nothing. We had no beds, no furniture, not pots and pans, nothing when we started out except for the clothes and minor things that we had accumulated; so we had to purchase all of that out of our – on our own from that.
>
> Q. I want to ask you, other than the issues at the interrogation on March 9th, 2017, what intervening cause, if any, was there until you attempted suicide?
>
> A. There was nothing from the time I left that interrogation until I attempted suicide within hours.
>
> Q. Looking back on that, why did you attempt to commit suicide?
>
> A. At some point during that, I had never been treated that way, and I mentally shut down because I was being told I was a horrible person, that I was going to lose anything and everything I had ever worked for in my entire life. And at that point, I had already lost my house, so you're going to take my job and you're going to take away everything else that I have ever worked for at that point? I wasn't thinking correctly, but at that time, I thought there was no hope.
>
> [J.A. 3937-3938, Vol. 14].

Ms. Wratchford was further asked to describe the impact on her and her family as a result of Erie's alleged actions:

> Q. What effect has this whole process of Erie refusing to pay and the findings of these experts, these people working for Erie, what effect has that had on you and your family?
>
> A. Our whole family has been uprooted. We can't have our family get-togethers at our home that we used to have. I live in a two-bedroom townhouse that the kitchen is not big enough to have more than three people come eat with us. I can't have my kids over to have family get-togethers. My son is leaving next week for the military, and I had to hose his goodbye party at his grandparents because I don't have even room enough for my kids and their families to all fit into the house right now.

[J.A. 3939, Vol. 14]. This testimony was elicited solely for the purpose of developing evidence from which the jury could evaluate damages related to aggravation and inconvenience and net economic loss. The Wratchfords had every opportunity to present evidence to support their *Hayseeds* claim and did so throughout the trial.

iii. <u>The Wratchfords Made Closing Arguments Requesting *Hayseeds* Damages</u>

At the close of the evidence in this case, the Wratchfords' counsel repeatedly argued for *Hayseeds* damages to the jury. Counsel provided the following arguments to the jury:

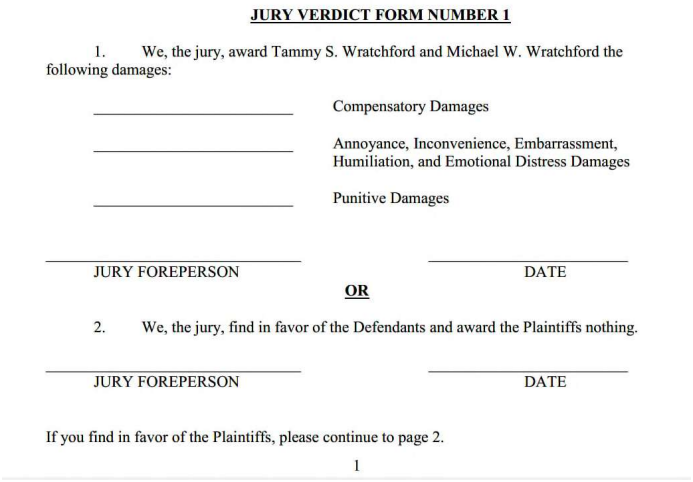
> It is incestuous. It is outrageous what they did, and when we looked at this, at the facts of this case what has been done to this family, it is the worst abuse I have seen in my office in 40 years. I have seen people get killed. I have seen people do things in cases, but this is intentional and continuous, and it's done over a period of time to intentionally beat these people down, to cause her to lose her job, to cause her to lose everything she had in her life. After a fire, they caused her to lose everything. They beat her down, so she wouldn't have any money to pay anybody to help her. Well, it didn't work, I helped her, and they ought to pay for that, and they made her throw up during that interrogation.
>
> When your verdict comes back, if they are not throwing up by the amount of it, we probably didn't get enough money. They have to be taught they can't do this. The damages have to show, have to give the amount of damages that they have suffered, in all this emotional distress, the shame, embarrassment, humiliation, everything they put up with in the community, not having – they lost their animals

> because they couldn't have them in rental houses. All of the things that they have suffered go into that non-economic loss, all of it.
>
> The economic loss, it's not that great. We got 500 – well, about 600,000 in the house. We got 200,000, a little less than that, in the personal property, and we got some – the other little incidentals there, but the real damage that Erie is going to have to sit up and take is the damage they have done to them in creating the shame, the embarrassment, the humiliation, the aggravation, the annoyance and inconvenience that you will see within these instructions, and that's what it gives damages for.
>
> I ask you to find each one of these in the positive. I ask you to find them, these people, these defendants named in this action, as responsible for these terrible damages that these people suffered, injuries. She was put to the point that she almost killed herself, and then that little girl gets on there and said, "all she needed was her stomach pumped."
>
> [J.A. 4549-4550, Vol. 15].
>
> ---
>
> And then under the "Non-Economic Damages," that's where it talks about loss of dignity, emotional distress, mental attack – anguish, upset, good name and reputation in the community, the shame, the mental anguish, and the things these people have suffered in this case because of the acts of the Erie Insurance Company in putting these people against my clients.
>
> [J.A. 4553, Vol. 15].

iv. The Verdict Form Appropriately Allowed For The Award Of *Hayseeds* Damages

Because the evidence in this case fully establishes that the jury was instructed on *Hayseeds* damages, the Wratchfords presented evidence of *Hayseeds* damages, and argued to the jury for an award of those damages, the Wratchfords are left to argue on appeal that the Verdict Form was insufficient. As an initial matter, the Wratchfords' proposed verdict form disproves this point. The verdict form proposed by the Wratchfords, while containing a series of special interrogatories only contained a single question concerning the award of damages, contained in Jury Verdict Form

Number 1. [J.A. 3057-3074, Vol. 14]. That section of the proposed Verdict Form provided as follows:



JURY VERDICT FORM NUMBER 1

1. We, the jury, award Tammy S. Wratchford and Michael W. Wratchford the following damages:

_____ Compensatory Damages

_____ Annoyance, Inconvenience, Embarrassment, Humiliation, and Emotional Distress Damages

_____ Punitive Damages

_____ _____
JURY FOREPERSON DATE

OR

2. We, the jury, find in favor of the Defendants and award the Plaintiffs nothing.

_____ _____
JURY FOREPERSON DATE

If you find in favor of the Plaintiffs, please continue to page 2.

1

Despite the Wratchfords' claims now to the contrary, there was no specific reference or line item for *Hayseeds* damages or for net economic loss caused by the delay in settlement and damages for aggravation and inconvenience.

Moreover, the final Verdict Form actually included more categories of non-economic damages at Question 16 than the Wratchfords' proposed verdict form. [J.A. 3057-3074, Vol. 14]. During a conference on the Verdict Form on day 15 of trial, May 24, 2023, the Wratchfords' counsel agreed to amend the draft verdict form to include additional categories and descriptors for the non-economic damages that the Wratchfords could recover, with the trial court suggesting that the Wratchfords' counsel had "taken Roget's Thesaurus and described the same" damages. [J.A. 3200, Vol. 14]. Clearly, the trial court provided the Wratchfords with broad discretion to add all categories of non-economic damages as they deemed necessary. Relevant portions of arguments on the Verdict Form from day 15 of trial included, the following:

> THE COURT: So just make sure you get all the categories in there that are allowed by law. So shame, mental and physical damage, damages.

> All right. So does that cover everything?
>
> MR. JUDY: Embarrassment, shame, mental anguish, upset, annoyance, inconvenience, damage to good name and reputation of the plaintiffs in the community, as well as mental and physical damages. **As long as we got those, yes, I think we got them**.

[J.A. 3201, Vol. 14, (emphasis added)]. The record shows that the Wratchfords had an active role in preparing the Verdict Form ultimately executed by the jury in the matter. In light of the fact that the Wratchfords' proposed verdict form also did not include a specific reference or line item for *Hayseeds* damages and that the Wratchfords had ample input into the final version of the Verdict Form, demonstrates that there was no error to use the Verdict Form ultimately submitted to the jury.

In actuality, the discussions raised by the Wratchfords' counsel concerning the Verdict Form was concern that the jury would not understand that the Non-Economic Damages (Question 16) would be inclusive of potential damages related to claims for *Hayseeds*, as well as potential non-economic damages for intentional infliction of emotional distress and malicious prosecution. As a result, the Wratchfords' counsel sought to add three separate line items for non-economic damages rather than including them all in a single line item: one for the insurance claims, one for intentional infliction of emotional distress, and one for malicious prosecution. [J.A. 3170, lines 10 – 21, Vol. 14]. However, the defendants in the case agreed that whatever non-economic damages awarded by the jury would be allocated based on the section of the Jury Verdict Form that allowed the jury to allocate percentages of fault among each party.[10] Further, at the Wratchfords' counsel's request, the Verdict Form was modified so that it was clear to the jury that the non-economic

[10] The Verdict Form in this case was complicated by the fact that there were a multitude of claims and a multitude of defendants. So, the Verdict Form was crafted in a way to allow the Jury to find liability for each claim, award non-contractual damages (both economic and non-economic) and allocate a percentage of fault to each liable defendant.

damage awards consisted of all three claims. The Jury Verdict Form submitted the jury provided as follows:

> Non-Economic Damages: *(This amount includes an Damages awarded for annoyance, inconvenience, embarrassment, humiliation, loss of dignity, emotional distress, mental anguish, upset, damage to good name and reputation in the community, shame, mental and physical damages as allowed for Violations of Unfair Trade Practices/Unfair Claims Settlement Practices, Negligence, Intentional Infliction of Emotional Distress, Malicious Prosecution, Abuse of Process, Civil Conspiracy, Respondeat Superior).*

[J.A. 3383, Vol. 14].[11]

As the West Virginia Supreme Court of Appeals has held, "[g]enerally, in reviewing the adequacy of a verdict form we have held that the determinative factor is 'whether the verdict form, together with any instruction relating to it, allows the jury to render a verdict on the issues framed consistent with the law, with the evidence, and with the jury's own convictions.'" *Blackrock Enterprises, LLC v. BB Land, LLC*, 250 W. Va. 123, 902 S.E.2d 455, 471 (2024), citing *Adkins v. Foster*, 195 W. Va. 566, 572, 466 S.E.2d 417, 423 (1995). Clearly, the record in this case establishes that the jury was instructed on the law related to *Hayseeds* (using an instruction proposed by the Wratchfords), the Wratchfords were permitted to introduce evidence and argue for an award of *Hayseeds* damages, and the Verdict Form provided the jury an opportunity to award those damages.

This case involved a sixteen-day jury trial wherein the Wratchfords were permitted to put forth their case in chief for eight of those days. Tammy Wratchford testified during four, separate trial days. In total, nineteen witnesses took the stand—twelve of which were called by the Wratchfords. Thousands of pages of exhibits were entered into evidence for the jury's

[11] Inclusive in the discussion, as acknowledged by the Wratchfords' counsel was damage for aggravation and inconvenience in accordance with *Hayseeds*. [J.A. 3194, Vol. 14].

consideration. The jury deliberated over the course of two days. There is no further evidence that could be presented in a new trial on *Hayseeds* damages that was not already presented during the trial in May 2023. The jury's award of zero dollars in non-economic damages makes clear that the jurors did consider the overwhelming amount of evidence available to them and decided that the Wratchfords were not entitled to *Hayseeds* damages ornon-economic damages, of any sort. The Wratchfords' request for a new trial is neither warranted nor supported by the voluminous record in this case.

C. THERE WAS NO ERROR IN THE CIRCUIT COURT'S DENIAL OF PREJUDGMENT INTEREST

The Wratchfords' fourth assignment of error asserts that the Circuit Court improperly denied them prejudgment interest to the Wratchfords following trial. On this point, the Wratchfords raise two separate arguments. First, they argue that this Court should simply apply the general prejudgment interest statute, codified at W. Va. Code § 56-6-31, and ignore the more specific prejudgment interest statute for actions founded on contract, codified at W. Va. Code § 56-6-27. Second, the Wratchfords argue that they should be entitled to recover prejudgment interest as a component of damages for net economic loss pursuant to *Hayseeds*. Both of these arguments fail as a matter of law.

1. The Wratchfords' Claims Were Contractual

There can be no dispute that the Wratchfords pursued and ultimately received a jury verdict in their favor for breach of contract. Count I of the Amended Complaint asserted a breach of contract claim against Erie, alleging that Erie had denied payment of contractual damages due to the Wratchfords. [J.A. 227, Vol. 2]. At trial, the jury was specifically instructed as to the elements for breach of contract and the contractual duties owed by an insurer. *See Jury Instructions*, Nos. 2 – 6 [J.A. 2990-2994, Vol. 14]. The Verdict Form included a section entitled: **Claim: Breach of**

Contract. [J.A. 3060, Vol. 14]. The jury was asked to determine what *contractual* damages to which the Wratchfords were entitled and awarded contractual damages totaling $687,742.57. *Id.* Without question, this portion of the Wratchfords' claims and ultimate recovery was founded on the existence of the insurance contract between Erie and the Plaintiffs. In fact, the jury's verdict in this case reflects the fact that the jury found in favor of Erie on every claim aside from the breach of contract claim.

Moroever, case law unequivocally establishes that claims for first party insurance coverage are contractual in nature. Courts in West Virginia have applied the ten-year statute of limitations for contracts to claims for first party coverage under insurance policies. *See e.g. State ex. rel Erie Insurance Property & Casualty Company v. Beane*, 2016 WL 3392560 (W. Va.2016) (finding that the plaintiffs' contractual claims under the policy were subject to the 10 year statute of limitations applicable to written contracts under W. Va. Code § 55-2-6); *Beasley v. Allstate Insurance Company*, 184 F.Supp.2d 523 (S.D. W. Va. 2002) (applying a 10 year statute of limitations for contracts on plaintiffs' claims for recovery under an insurance policy for roof damage). The West Virginia Supreme Court of Appeals also has held that the duty of good faith and fair dealing between insurance companies and its insureds arises from a contractual relationship. *See Elmore v. State Farm Mut. Auto Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998) ("The foregoing summary makes it clear that the common law duty of good faith and fair dealing in insurance cases under our law runs between insurers and insureds and is based on the existence of a *contractual* relationship.").

2. The Award Of Prejudgment Interest Is Governed By W. Va. Code § 56-6-27

W. Va. Code § 56-6-27 provides as follows:

> The jury, ***in any action founded on contract***, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial,

> after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict.

(Emphasis added). By its express terms, W. Va.Code § 56-6-27 applies to any action founded on a contract. The statute creates no exception to this rule. Rather, the statute's application is triggered when a jury makes an award in *any* action founded on contract. *See id.* The statute is clear that it encompasses all claims founded on contract, including insurance contracts.

On that basis, W. Va. Code § 56-6-27 necessarily applies to the contractual claims in this case. In *Thompson v. Stucky*, 171 W. Va. 483, 300 S.E.2d 295 (1983) the West Virginia Supreme Court of Appeals applied W. Va. Code § 56-6-27 as the exclusive means for prejudgment interest on contracts for claims involving an oral agreement. In *Ringer v. John*, 230 W. Va. 687, 742 S.E.2d 103 (2013), the West Virginia Supreme Court of Appeals likewise held that W. Va. Code 56-6-27 is the exclusive means for prejudgment interest on an equitable claim of unjust enrichment. In so holding, the Supreme Court held that an unjust enrichment claim was an action founded on contract, despite recognition that unjust enrichment was based on an implied contract or quasi-contract. In the present case, there was a clear and definite contract between the Wratchfords and Erie, and any award founded on that contract must be governed by the terms of W. Va. Code § 56-6-27.

Further, the application of W. Va. Code § 56-6-27 is the sole and exclusive basis by which prejudgment interest may be awarded. "West Virginia Code section 56-6-27 (eff. 1923) provides the **exclusive** means by which to obtain prejudgment interest in any action founded upon contract. Failure to submit the question of prejudgment interest to the jury results in waiver of the same. Syl. Pt. 1, *Miller v. Wesbanco Bank, Inc.*, 245 W. Va. 363, 859 S.E.2d 306 (emphasis added).

Nonetheless, the Wratchfords disregard the mandate of W. Va. Code § 56-6-27 and assert that they are entitled to have the Circuit Court and award prejudgment interest in accordance with the more generalized statute, W. Va. Code § 56-6-31. The West Virginia Supreme Court of Appeals expressly rejected this notion in *Miller*. In assessing the applicability of these two statutes related to claims founded on a contract, the *Miller* Court noted,

> [i]n an action founded on contract, a claimant is entitled to have the jury instructed that interest may be allowed on the principal due, *W. Va. Code,* 56-6-27, **but is not entitled to the mandatory award of interest contemplated by *W. Va. Code,* 56-6-31**, since this statute does not apply where the rule concerning interest is otherwise provided by law.

Miller, 245 W. Va. at 378, 859 S.E.2d at 321, citing Syl. Pt. 4, *Thompson v. Stuckey*, 171 W. Va. 483, 300 S.E.2d 295 (1983) (emphasis added). In *Miller*, the West Virginia Supreme Court of Appeals upheld its prior rulings as to the application of the statute to contract claims, based in large part on a finding that the more specific statute applied over the generalized statute. This important distinction of statutory construction was, in part, the basis of the *Miller* decision as that opinion cited, "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 1, *UMWA by Trumka v. Kingdon,* 174 W. Va.330, 325 S.E.2d 120 (1984).

Decisions interpreting W. Va.Code § 56-6-27 further reflect a separate, important point: prejudgment interest on claims founded on a contract is discretionary, as compared to the mandatory nature of prejudgment interest awarded under W. Va. Code § 56-6-31. *See Miller*. For that reason, the award prejudgment interest is a function of the jury. As the Court held in *Miller*, the award of prejudgment interest ***by a jury*** is the ***exclusive*** means by which a claimant can recover prejudgment interest on a claim founded upon a contract. The claims in this case arising from the contract of insurance between Erie and the Wratchfords very clearly fall within this statutory

framework, and the failure to present the issue of prejudgment interest to the jury constitutes a waiver of the same. [12]

The Wratchfords never requested the inclusion of prejudgment interest on the Verdict Form and made no objection on the record relative to its exclusion. *See generally, Excerpt of Arguments and Rulings Regarding Verdict Form* [J.A. 4112-4188, Vol. 14]. As the Court held in *Miller*, "the failure to submit the question of prejudgment interest to the jury results in a waiver of the same." *Miller* at 379, 859 S.E.2d at 322. The Wratchfords did not raise this issue before the jury returned its verdict and thus, under *Miller*, waived the right to have the jury consider it.

3. The Wratchfords Cannot Recover Prejudgment Interest Through *Hayseeds* Damages

The Wratchfords also argue that prejudgment interest can be awarded as damages for net economic loss under *Hayseeds*, supra. As an initial matter, this position completely ignores the prior holdings in *Stuckey*, *Ringer*, and *Miller* that W. Va. Code § 56-6-27 is the exclusive means by which prejudgment interest can be awarded on claims founded on contract. If prejudgment interest could be awarded through *Hayseeds*, W. Va. Code § 56-6-27 would not constitute the exclusive means by which prejudgment interest could be recovered.

Separately, *Hayseeds* and its progeny clearly demonstrate that net economic loss is not intended to encompass prejudgment interest. In *Hayseeds*, the West Virginia Supreme Court of Appeals discussed the distinction between damages for aggravation and inconvenience and net economic loss, both of which are potential components of recovery under *Hayseeds*:

[12] W. Va. Code § 56-6-31 was amended in 2017, and the amendments separated the statute into multiple paragraphs. In interpreting the amendments, the Supreme Court of Appeals concluded that the reference to actions in contract in W. Va. Code § 56-6-31 referred only to the requirement that the interest be calculated as simple interest, not compounding interest. The Court maintained its longstanding holding that, in actions founded on contract, prejudgment interest was an issue solely within the province of the jury. *See Miller*, 379, 322.

> However, in allowing an award for aggravation and inconvenience, we do not intend that punitive damages be awarded under another sobriquet. For example, a large corporation with an in-place, organized collective intelligence that must litigate a claim for several years may suffer substantial net economic loss but little aggravation and inconvenience. On the other hand, a family of five that is required to live for four years in a trailer because an insurance company has declined to pay the fire policy on their $200,000 house suffers little net economic loss but an enormous degree of aggravation and inconvenience.

Hayseeds, 177 W. Va. at 330, 352 S.E.2d at 80, modified by *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). It is apparent from the *Hayseeds* Court's analysis of aggravation and inconvenience and net economic loss that such damages would not encompass prejudgment interest. If prejudgment interest were a component of net economic loss, there would be no basis for the Court to find that a family of five living in a trailer for four years would suffer "little net economic loss". Instead, the Court found that it would be more likely that a "large corporation" would suffer net economic loss. That distinction clearly signifies that prejudgment interest is an issue to be addressed outside of *Hayseeds*.

D. THE CIRCUIT COURT CORRECTLY MAINTAINED THE JURY'S VERDICT AND A NEW TRIAL IS UNWARRANTED

1. Motions Notwithstanding the Verdict on Damages

The Wratchfords' fifth assignment of error asserts that the Circuit Court erred by refusing to increase the jury's award of damages in their favor for personal property, trees, shrubs, plants and lawn coverage, and unreimbursed mortgage expense and by denying them a new trial on the same items. The Circuit Court's decision was well-supported and should be affirmed.

The Circuit Court's denial of the Wratchfords' request to increase the jury's damages award or to award a new trial on these damages was appropriate in accordance with precedent recognizing the sanctity of jury verdicts in this State. It is well-established that jury verdicts are "sacred" and should not be overturned except in "rare circumstances." *See Huntington Eye*

Associates, Inc. v. LoCascio, 210 W. Va. 76, 78, 553 S.E.2d 773, 775 (2001) (quoting Syl. pt. 1, *Young v. West Virginia & P.R. Co*., 44 W. Va.218, 28 S.E. 932 (1897)) ("The verdict of a jury will be held sacred by this Court, unless there is a plain preponderance of credible evidence against it, evincing a miscarriage of justice from some cause, such as prejudice, bias, undue influence, misconduct, oversight, or some misconception of the facts or law."); *see also United States v. Gutierrez*, 963 F.3d 320, 339-340 (4th Cir. 2020) citing *United States v. Wilson*, 624 F.3d 640, 660 (4th Cir. 2010) (While the ability to grant or deny a motion for a new trial is within the broad discretion of the court, "Such motions should be awarded [] sparingly, as a jury verdict is not to be overturned except in the rare circumstance when the evidence weighs heavily against it.") "Although a trial court does have some role in determining whether there is sufficient evidence to support a jury's verdict, it is not the role of the trial court to substitute its credibility for those of the jury." *Fredeking v. Tyler*, 224 W. Va.1, 6, 680 S.E.2d 16, 21 (2009).

Given the sanctity of jury verdicts, the West Virginia Supreme Court of Appeals has made clear that they are not be overturned absent a miscarriage of justice. "The right to trial by jury before deprivation of property is constitutionally required. W. Va. Const., art. III § 13.Considering our high regard for the sanctity of jury verdicts, and the right of every citizen to be judged by his or her peers, this Court would be the very last to erode this constitutional guarantee." *Bishop Coal Co. v. Salyers*, 181 W. Va.71, 74, 380 S.E.2d 238, 241 (1989) (internal quotations, omitted, emphasis added). "We will not find a jury verdict to be inadequate *unless it is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy*." Syl. Pt. 2 *Fullmer v. Swift Energy Co., Inc.*, 185 W. Va.45, 404 S.E.2d 534 (1991) (emphasis added). "This Court will only overturn a jury verdict where 'the evidence is shown to be legally insufficient to sustain

the verdict.'" *Walls v. Click*, 209 W. Va.627, 637, 550 S.E.2d 605, 615 (2001) quoting *Alkire v. First Nat. Bank of Parsons*, 197 W. Va.122, 128, 475 S.E.2d 122, 128.

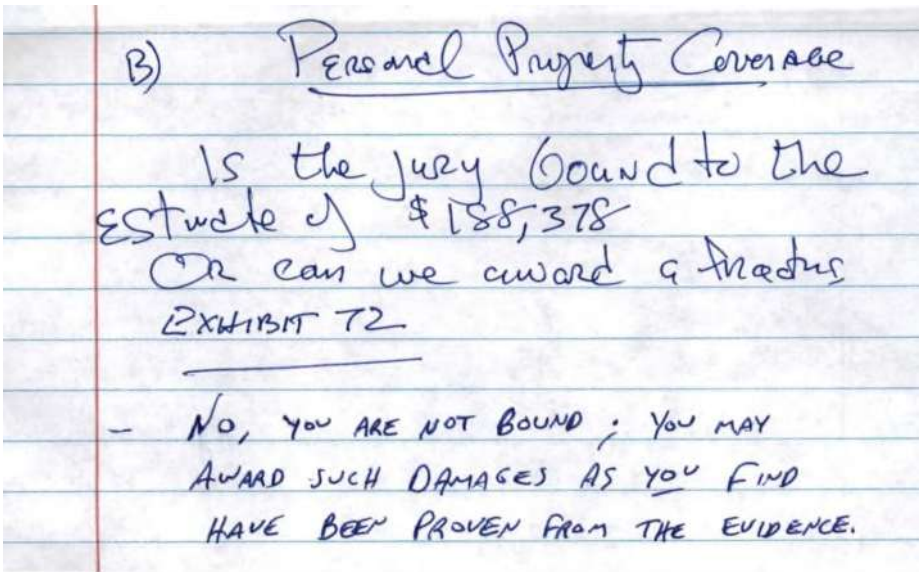
The trial court's role in determining whether sufficient evidence exists to support a jury's verdict was explained by the West Virginia Supreme Court of Appeals in Syl. Pt. 5 of *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983). Therein, the Supreme Court of Appeals held,

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give rise to the prevailing party the benefit of all favorable inferences which reasonable may be drawn from the facts proved.

Id. "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." *Walls* at 633, 550 S.E.2d at 611. "The action of the trial court in setting aside a verdict for the plaintiff and awarding the defendant a new trial will be reversed by this Court where it appears that the case, as a whole, was fairly tried and no error prejudicial to the defendant was committed therein." *See also* syl. pt. 6, *Gault v. Monongahela Power,* 159 W. Va.318, 223 S.E.2d 421 (1976); syl. pt. 6, *Western Auto Supply v. Dillard,* 153 W. Va.678, 172 S.E.2d 388 (1970); syl. pt. 7, *Brace v. Salem Cold Storage,* 146 W. Va.180, 118 S.E.2d 799 (1961); syl. pt. 2, *City of McMechen v. Fidelity and Casualty,* 145 W. Va.660, 116 S.E.2d 388 (1960); syl., *Ward v. Raleigh County Park Board,* 143 W. Va.931, 105 S.E.2d 881 (1958); syl. pt. 3, *Ware v. Hays,* 119 W. Va.585, 195 S.E. 265 (1938). *Neely v. Belk*, 222 W. Va.560, 567, 668 S.E.2d 189, 197 (2008).

Likewise, the West Virginia Supreme Court of Appeals has cautioned that new trials should be awarded rarely. "[A] new trial should rarely be granted and then granted only where it is 'reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.'" *Neely* at 566, 668 S.E.2d at 196 quoting *In re State Public Building Asbestos Litigation*, 193 W. Va.119, 124, 454 S.E.2d 413, 418 (1994) (internal citations omitted). "[U]nless error affected the outcome of the trial, a new trial should not usually be granted. In other words, when a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on error that has no appreciable effect on the outcome, it is [the West Virginia Supreme Court of Appeals'] duty to reverse." *Neely v. Belk Inc*., 222 W. Va. 560, 567, 668 S.E.2d 189, 196 (2008).

Here, the Wratchfords take issue with the fact that they jury did not award the full amount of above-listed damages as claimed by them at trial. They claim the amounts awarded are "contrary" to the evidence. However, the jury was well within its purview in discounting the Wratchfords' valuations. During trial, the Wratchfords entered into evidence photographs, valuations, or estimates in support of each of the above-claimed damages. The jury thereafter reviewed the photographs, valuations, or estimates and discounted their claimed damages. Specifically relevant to its award of personal property coverage under the Erie Policy, the jury specifically asked a question of the Court. The jury's question posed to the Court was, as follows:


B) Personal Property Coverage

Is the jury bound to the estimate of $188,378 OR can we award a figure EXHIBIT 72

– NO, YOU ARE NOT BOUND; YOU MAY AWARD SUCH DAMAGES AS YOU FIND HAVE BEEN PROVEN FROM THE EVIDENCE.

See Jury Questions from May 25, 2023 [J.A. 4555, Vol. 15].

The question to the Court and overall verdict makes clear that the jury found the Wratchfords' evidence and testimony concerning their claimed damages lacking in credibility. There was no error by the Circuit Court in denying their "Motion for Judgment Notwithstanding the Verdict" and request for a new trial on these issues. The Circuit Court's ruling should be affirmed.

E. THE CIRCUIT COURT CORRECTLY MAINTAINED THE JURY'S VERDICT ON THE WRATCHFORDS' UTPA CLAIMS AND A NEW TRIAL IS UNWARRANTED

The Wratchfords' sixth and final assignment of error asserts that the Circuit Court erred by refusing to overturn the jury's defense verdict and find Erie liable for violations of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4 ("UTPA") or to, alternatively, grant them a new trial on that claim. Initially, the Wratchfords' waived the arguments made on these points by failing to bring their Rule 50 Motions after the close of evidence and prior to submission of the case to the jury. On this procedural basis alone, the Circuit Court's denial of the Wratchfords' motion requesting that the Court find, as a matter of law, that Erie violated the West

Virginia Unfair Trade Practices Act and accompanying request for a new trial on damages should be affirmed.

Post-trial, the Wratchfords made their motion as a "Motion for Judgment Notwithstanding the Verdict," presumably under Rule 50 of the West Virginia Rules of Civil Procedure. Because of amendment to Rule 50 of the West Virginia Rules of Civil Procedure the West Virginia Supreme Court of Appeals has cautioned, "Today litigants should employ the phrase 'judgment as a matter of law' in place of the phrases 'directed verdict' and 'judgment notwithstanding the verdict.' *Robertson v. Opequon Motors, Inc*., 205 W. Va.560, 563, 519 S.E.2d 843, 846 (1999)). Rule 50 sets forth that a party may make a motion for judgment as a matter of law "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." WVRCP 50(a)(1). Rule 50(b) further provides that, "[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of evidence . . .[t]he movant may renew the request for judgment as a matter of law. . ."

Motions made under Rule 50(a) "may be made at any time before submission of the case to the jury." WVRCP 50(a)(2). As shown in Jury Trial Order from Day Fourteen-May 23, 2023, the Wratchfords failed to move for judgment as a matter of law relative to any of their claims during the trial of this matter. *See* Jury Trial Order Day Fourteen-May 23, 2023 at ¶ 14 ("14. At this time, all Defendants' counsel renewed their Motions for judgment as a matter of law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure.") [J.A. 3051, Vol. 14]. Because the Wratchfords failed to bring their Rule 50 Motions after the close of evidence and prior to

submission of the case to the jury, they waived the arguments addressed by way of their fifth assignment of error. On this procedural basis alone, the Circuit Court's denial of the Wratchfords' motions should be affirmed. *See McInarnay v. Hall*, 241 W. Va.93, 99-100, 818 S.E.2d 919, 925-926 (2018) ("[A] party's failure to make a preverdict motion challenging the sufficiency of the evidence, as required by Rule 50(a), completely waives the party's right to make the same challenge to the sufficiency of the evidence after the trial under Rule 50(b). The failure to make the preverdict motion also forecloses the right to raise an insufficient evidence challenge on appeal.")

Separately, the Circuit Court appropriately upheld the jury's finding of no UTPA violations on the part of Erie for the simple reason that the evidence in the case supported the jury's finding that Erie's claim handling in the case was proper. In support of their arguments here, the Wratchfords re-assert the positions taken throughout the entirety of this case that were unequivocally disproven at trial. At the very minimum, the jury was presented with contrary evidence to rebut the claims for alleged violations of the UTPA. The Wratchfords simply re-iterate their allegations that Erie's claim handling was not reasonable, without citing to any testimony or evidence established at trial of a specific violation of W. Va.Code § 33-11-4.

At trial, the only representative of Erie called to testify was Phillip Jones. The Wratchfords had the opportunity to fully cross-examine Mr. Jones and develop evidence in support of their UTPA claim and clearly failed. The Wratchfords can cite to no specific testimony or evidence establishing a UTPA violation from Mr. Jones' testimony. Chad Tuttoilmondo, the adjuster on the Wratchfords' claim, was not called to testify. The jury was instructed on the UTPA and the Wratchfords' counsel made closing arguments requesting that the jury find in their favor. Instead, the jury rendered total defense verdicts on behalf of Mr. Tuttoilmondo and Mr. Jones. There was

more than enough evidence established in the case to support the jury's finding that Erie's handling of the Wratchfords' claim was proper, even in light of its breach of contract finding.

"[I]t is not the role of the circuit court to substitute its credibility judgments for those of the jury or to assume the jury made certain findings because they did not believe evidence presented on other issues." *Neely* at 570. A jury's verdict should not be overturned "unless there is a plain preponderance of credible evidence against it, evincing a miscarriage of justice from some cause, such as prejudice, bias, undue influence, misconduct, oversight, or some misconception of the facts or law." *See Huntington Eye Associates, Inc.*, 210 W. Va. 76, 553 S.E.2d 773. The Wratchfords have shown no prejudice, bias, undue influence, misconduct, oversight, or some misconception of the facts or law that occurred during trial. Moreover, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered. Here, those facts which the jury properly found under the evidence are to be assumed true in Erie's favor. There was no miscarriage of justice, and the jury's defense verdict on the Wratchfords' claim of violations of the UTPA should be upheld.

CONCLUSION

For the reasons set forth herein, there was no error by the Circuit Court on the issues presented in this appeal. The Circuit Court's Order Denying Plaintiffs' Motion and Supplemental Motion to Find that Plaintiffs' "Substantially Prevailed" in the Property Damage Suit Against Erie and for Second *Hayseeds* Trial [J.A. 4235, Vol. 14] and Order Denying Plaintiffs' Supplemental Motion for Judgment Notwithstanding Verdict; Motion for Notwithstanding Verdict on Damages; Motion for New Trial/Second Trial on Failure to Provide Non-Economic Damages Including Aggravation and Inconvenience Under *Hayseeds;* Motion for New Trial on Pre-Judgment Interest and Economic Losses Resulting from Delay in Payment; Motion to Hold Pre-Judgment Interest as Non-Final Adjudication (Interlocutory) of Damages and to DelayAppeal Time Pending Second

Trial and Motion for Post-Judgment Interest from Date of Jury Verdict May 25, 2023 at 8% on March 27, 2024 filed on July 22, 2024 [J.A 4242, Vol. 14] should be affirmed.

/s/ Matthew J. Perry
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CERTIFICATE OF SERVICE

The undersigned, counsel for the Respondent, Erie Insurance Property & Casualty Company, does hereby certify that on the 16th day of January, 2025, the foregoing Respondent's Brief was filed electronically with the Court via West Virginia's File & ServeXpress which will provide an electronic copy upon counsel of record.

/s/ Matthew J. Perry
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