IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-0774

WAYNE LEMASTERS AND MARY JOAN LEMASTERS

Appellants

v.

NATIONWIDE MUTUAL INSURANCE COMPANY

Appellee.

APPELLANTS' BRIEF

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ASSIGNMENTS OF ERROR

I. The trial court erred in finding it was "without authority" to award attorney fees in this insurance bad faith case because *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996) allows fees in a bad faith case.

II. The trial court erred in failing to award attorney fees in this case, because, where an insurer refuses to pay *Hayseeds* damages, it must be responsible for its insured's fees incurred in pursing the *Hayseeds* award.

III. The trial court erred in failing to award attorney fees in this case because the vexatious, oppressive and malicious behavior demonstrated in this case required an award of fees under *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

IV. The trial court erred in failing to award attorney fees because a litigant found to have acted with "actual malice" should bear the opposing party's fees, absent extraordinary circumstances.

STATEMENT OF THE CASE

Following a jury verdict against Appellee, Nationwide Mutual Insurance Company ("Nationwide"), including a finding of actual malice, the Circuit Court of Marshall County refused the Appellants' application for attorney fees incurred in prosecuting the bad faith claims. The trial court entered an order stating that it was "without authority" to grant the Appellants, Wayne and Joan Lemasters ("the Lemasters"), attorney fees. App. R. 1-6. The Lemasters appeal and argue that the trial court erred in finding that it had no power to award the fees. *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996), and *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), not only permit, but require, an award of attorney fees in this situation. Furthermore, the trial court, under the erroneous

impression that it without authority to award what it characterized as the "extra-ordinary relief" of attorney fees, gave short shrift to the important doctrine of *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986), which also militated heavily in favor of an attorney fee award in this case. App. R. 5-6. Finally, the Lemasters submit that the "actual malice" finding warrants fees, should this Court find that *McCormick*, *Hayseeds* and *Sally-Mike* do not.

Accordingly, the Appellants ask that this Court REVERSE and REMAND this matter to the Circuit Court of Marshall County for a hearing on what constitutes a reasonable fee for the prosecution of Appellants' claims below under *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

STATEMENT OF FACTS

This case of insurance bad faith revealed Nationwide Mutual Insurance Company's intentional and malicious scheme to deny the Lemasters, among many other insured West Virginians, the benefits of their underinsured motorist policy benefits. Nationwide intentionally delayed, low-balled and mistreated the Lemasters for nearly three years over what should have been a straightforward policy limits claim, wherein the lost wages alone were far in excess of the available policy limit. App. R. 1073-1075; 1077-1078; 1082; 1085-1087; 1094-1095; 1100; 1369-1371; 1378-1380; 1408-1409.

The Lemasters' case involved a straightforward, admitted liability car wreck causing serious injuries that prevented Mr. Lemasters from working at his job where he had earned $27.00 per hour and averaged $70,000.00 per year with overtime. App. R. 1507-1508; 1948-1949. The extent of his damages quickly escalated and consumed the liability coverage available and he made a UIM claim. Nationwide then dragged out the claim for well over three years, making endless demands for redundant information, insisting on burdensome medical

examinations out-of-state and refusing to make fair and reasonable offers despite a low UIM limit of just $50,000.00. App. R. 1131; 1388-1389; 1392-1393; 1406-1407.

At trial, the Lemasters showed that Nationwide used illegal and unfair tactics against its policyholders as a general business practice. App. R. 1102-1103; 1112-1114; 1119-1121; 1771-1772; 1413-1418. Furthermore, Nationwide was shown to have actually *institutionalized* corrupt and illegitimate practices, by paying bonuses to adjusters based on claim payouts and carefully keeping adjusters apprised of claim-payout information in order to suppress payments to insured. App. R. 1119; 2148-21812798-2822. High level corporate managers, including Nationwide's Vice-President for Compensation confirmed the existence of these practices. App. R. 1882-1883; 1885-1886.

At trial, the Lemasters prevailed on every issue. The jury made specific findings that Nationwide had violated the West Virginia Unfair Trade Practices Act with such frequency as to indicate a general business practice, that Nationwide had breached the implied covenant of good faith and fair dealing and that Nationwide had acted with actual malice. App. R. 12-13; 18-20. Nationwide, recognizing the utter futility of its position, has not challenged any of those findings via post-trial motion or appeal. At the behest of Nationwide, the trial judge decided the question of whether the Lemasters "substantially prevailed" and he determined that they had. App. R. 1-3; 14.

The Lemasters made an amply supported policy limits demand before filing suit and never wavered from that position while Nationwide low-balled them and mistreated them for years. Nationwide made no offers over the years but ultimately, as trial in the underlying case approached, capitulated and finally offered the policy limit. Despite these undisputed facts, Nationwide denied that the Lemasters had substantially prevailed so as to be entitled to *Hayseeds*

damages. Nationwide compelled the Lemasters to fight the *Hayseeds* issue all the way through trial, where, as described below, Nationwide ultimately revealed that it had neither any evidence, nor any arguments to suggest the Lemasters had not substantially prevailed. App. R. 699; 744-745.

Nationwide's vexatious and illegitimate position that the Lemasters had not substantially prevailed was part of a pattern of litigation misconduct exhibited by Nationwide in the case. Despite there being no reasonable way to dispute that the Lemasters had "substantially prevailed," Nationwide refused to pay *Hayseeds* damages, denied that the Lemasters had substantially prevailed in its Answer and required that the issue be litigated all the way through trial despite *ultimately just admitting* that it had no defense to the Lemasters' *Hayseeds* claim at the pretrial conference, while still insisting that the trial court try the issue. App. R. 385-392; 699.[1]

Additionally, Nationwide engaged in discovery abuses, vexatiously and unreasonably re-litigating issues it had contemporaneously lost in Marshall County before the same Circuit Court Judge in another case. Nationwide had already litigated, and lost, in Marshall County, its position that no personnel file material of its employees was discoverable. With a recent order rejecting that position in hand, Nationwide nonetheless advanced the very same arguments in front of the same judge in this case, creating undue delay and added expense. App. R. 421-423. A small award of attorney fees associated with those motions was made below – a sanction

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[1] Nationwide's counsel addressed the Court as follows:

> "It's no dispute we want to fight, ok? . . . I don't want to take any time arguing about substantially prevail. You're going to make the decision you're going to make."

App. R. 699.

Nationwide has not appealed – but is relevant here as context for Nationwide's other acts of litigation misconduct. App. R. 424-425.

Finally, Nationwide capped its defense with what can only be described as a grossly abusive and illegitimate closing argument in clear violation of this Court's decision in *Jones v. Setser*, 224 W.Va. 483, 686 S.E.2d 623 (2009), as well as principles of basic fairness and attention to the evidence. Nationwide's closing argument personally attacked the Lemasters' counsel throughout and deliberately impugned the integrity of Appellants' law firm in a patently false, and frankly defamatory, manner. The argument included such offensive and improper statements to the jury as these:

--"This is not a real controversy. It is one that was created by Mr. Bordas for the goal of bringing us here for the past week so there can be another lawsuit that he and his firm take a contingent fee in." App. R. 2002 (Trial Tr. 526).

--"I'm here to tell you it is the suing insurance companies business plan of Jamie Bordas" App. R. 2000-2001 (Trial Tr. 520 and 521 and 523).

--"That's why we've been here for the last week. Brought to you by the law firm of Bordas & Bordas." App. R. 2000 (Trial Tr. 520).[2]

--"How much money is Mr. Bordas expecting to make off this lawsuit? We don't know the answer to that question." App. R. 2000 (Trial Tr. 519)[3]

[2] The reference to the entire firm specifically includes of course, trial counsel, Christopher Regan and Michelle Marinacci, Bordas & Bordas attorneys who tried the case for the Lemasters family.

[3] This is not only improper closing argument at any time; it also violated a motion *in limine* on that topic.

--"What is the point? The point is right here. The point is the lawsuit we've been dealing with for the last week, and they're looking for the big payday. And I don't mean to talk about Mr. Lemasters in this in any way." App. R. 2002 (Trial Tr. 525).

After all that, specifically inviting the jury to question the "sincerity" of opposing counsel seems like small potatoes, but that also took place. App. R. 1997 (Trial Tr. 508). The trial court attempted to cure this egregious misconduct by supplemental instructions but there is simply no way to tell what effect these improper statements may have had on the amounts the Lemasters were awarded. App. R. 2012 (Trial Tr. 566); App. R. 22069-2070 (Trial Tr. 599-600). In any case, these statements to the jury, well after *Setser* was decided, represented substantial and highly prejudicial litigation misconduct, further supporting the Lemasters' claim for fees.

All of the above conduct by Nationwide, including the unlawful delay and abuse during the claims process, the illegitimate corporate compensation arrangements, the malicious use of unfair business practices, the frivolous defenses, the discovery abuse and finally, the prejudicial closing argument, were cited by the Lemasters as just cause for the trial court to award the reasonable attorney fees incurred in the prosecution of the case to the Lemasters. The trial court's conclusion, in the face of these record facts and the law set forth below, that it was "without authority" to award fees was error. Appellants submit that the trial court's order denying fees should therefore be REVERSED and the case REMANDED with directions to the trial court to hold a *Pitrolo* hearing on the reasonable fees incurred by the Lemasters in this case and then to award those fees to the Lemasters.

SUMMARY OF THE ARGUMENT

McCormick v. Allstate Insurance Company, 197 W.Va. 415, 475 S.E.2d 507 (1996), specifically allows attorney fees in an insurance bad faith case. As *McCormick* put it:

> The fundamental holding of *Jenkins* recognizes a private, implied cause of action for violations of W. Va. Code § 33-11-4(9) and *permits plaintiff to recover attorney fees* and, under the appropriate circumstances, punitive damages, if it can be shown that there was more than a single isolated violation of W. Va. Code § 33-11-4(9) and that the violations indicate a "general business practice" on the part of the insurer. . .
>
> Since the predicate for seeking relief under *Jenkins* and its progeny does not require that an insured substantially prevail on an underlying action, and since *Jenkins does allow, under certain conditions, a party to seek reasonable attorney fees and punitive damages*, this Court believes that insofar as the trial court's order in the present case precludes the appellant from seeking attorney fees or punitive damages because the appellant failed substantially to prevail below, the trial court's order in the present case was erroneous.

McCormick, 197 W.Va. at 427-28, 475 S.E.2d at 519-20 (emphasis added). *See also*, *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 598, 505 S.E.2d 654, 661 (1998) (*quoting McCormick*). This language in *McCormick* allows an award of reasonable attorney fees to a prevailing party in a UTPA case and is authority for the Appellants' request below.

This Court reversed in *McCormick* because the trial court had found the contrary under circumstances far less compelling than in this case – *i.e.*, in *McCormick*, the claimant had *not* substantially prevailed. The trial court's holding below – that it is "without authority" to award the Lemasters their fees, is erroneous and should be reversed.

But *McCormick* is not the only valid authority under which fees should have been awarded. *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), and *Marshall v. Saseen*, 192 W.Va. 94, 450 S.E.2d 791 (1994), enshrine the principle that an insured is entitled to his or her attorney fees and costs when he or she substantially prevails in a claim. This case represents a wrinkle in the *Hayseeds/Marshall* doctrine because in this case the fees and costs associated with pursuing the underlying claim (about $30,000.00) were held hostage by Nationwide for the *entirety* of the bad faith case – several additional years. In other

words, having forced the Lemasters to file suit and litigate at length to obtain their policy proceeds, Nationwide eventually paid the policy limit, but then refused to pay the *Hayseeds* damages that it clearly owed. Instead, it disputed the claim for those damages in manifest bad faith, to the point where its own attorneys said after years of litigation that the substantially prevailing question wasn't a fight "Nationwide wanted to have." App. R. 699.

In this situation, it is manifest that the *Hayseeds* fee award must include the efforts to collect the *Hayseeds* damages, or the *Hayseeds* doctrine simply would not function. After all, if the insurance company can hold the insured's *Hayseeds* damages hostage to several years of litigation, the cost of recovering them could be swamped by the fees expended in the effort. As this Court has explained

> [A] policyholder buys an insurance contract for peace of mind and security, not financial gain, and certainly not to be embroiled in litigation. The goal is for all policyholders to get the benefit of their contractual bargain: they should get their policy proceeds promptly without having to pay litigation fees to vindicate their rights.

Miller v. Fluharty, 201 W.Va. 685, 694, 500 S.E.2d 310, 319 (1997) (footnote omitted). "We adopted this rule in recognition of the fact that, when an insured purchases a contract of insurance, he buys insurance-not a lot of vexatious, time-consuming, expensive litigation with his insurer." *Hayseeds,* 177 W.Va. at 329, 352 S.E.2d at 79. But if fees are not awarded in this case, Nationwide would have, in effect, put its insured back over the same barrel it used in the underlying UIM claim, utilizing its superior resources and eternal life to deprive the insured of the benefit of his bargain by dragging out the case for years and imposing the cost of the litigation on the insured.

Another applicable doctrine under which the Lemasters are entitled to their attorney fees is that of *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986). In *Sally-Mike*, this Court held that:

> There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as "costs," without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Syl. pt. 3, *Sally-Mike*, 179 W. Va. 48, 365 S.E.2d 246. In this case, the record is replete with evidence of vexatious, bad faith and oppressive conduct by Nationwide. The record includes: 1) Nationwide's bad faith defense of the *Hayseeds* claim; 2) its discovery misconduct; 3) its abusive closing argument; 4) its actual malice towards the Lemasters as found by the jury; 5) its bad faith breach of contract; and 6) its violation of the UTPA "as a general business practice." Appellants submit that less than all of those circumstances would be sufficient to trigger fee-shifting under *Sally-Mike* and that in light of the overwhelming evidence that Nationwide acted illegitimately, maliciously and in bad faith, both in the underlying claim and in this case as well, the trial court abused its discretion in denying fees under *Sally-Mike*.

Finally, Appellants respectfully submit that this Court should hold that, as a matter of law, a litigant against whom a finding of actual malice is made should be required to pay the prevailing party's attorney fees absent extraordinary circumstances showing why it should not. In *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987), this Court explained that the *Sally-Mike* doctrine allows attorney fees to be collected in a punitive damage case provided that there is sufficient evidence of bad faith, vexatious, wanton or oppressive conduct:

> In the case now before us there was sufficient evidence of wanton, willful or malicious conduct to support the jury's finding of liability for punitive damages. Similarly, there was sufficient evidence of bad faith, vexatious, wanton or oppressive conduct to support an award of reasonable attorney's fees

McClung, 178 W.Va. at 453, 360 S.E.2d at 230. Appellants submit that it would serve the interests of justice and judicial economy to adopt a bright line rule whereby a jury finding of "actual malice" is presumed to be sufficient to warrant fees under the *Sally-Mike* standard, whether the case sounds in insurance bad faith, defamation or another doctrine.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants do not waive oral argument in this matter. Appellants submit that oral argument would aid in the decisional process because this matter raises significant points of law impacting West Virginia citizens' ability to enforce their legal rights. This case is appropriate for Rule 20 Argument and Decision because it involves issues of first impression and of fundamental public importance.

ARGUMENT

I. *McCormick* Allows Fees For A Prevailing Insured In A *Jenkins* Case

The long-standing case of *McCormick v. Allstate* explains that the *Jenkins* cause of action allows for the recovery of fees by a prevailing Plaintiff and carefully distinguished the separate considerations governing a *Hayseeds* claim:

> [A]n action under *Jenkins v. J.C. Penney Casualty Insurance Company*, [167 W.Va. 597, 280 S.E.2d 252 (1981)], and its progeny, is a type of action which is wholly distinct from an underlying contractual action on an insurer's failure to comply with its insurance contract. Such an action is also wholly distinct from a *Hayseeds* action. Further, the conditions and predicate for bringing a *Jenkins*-type case are wholly different from those necessary for bringing an underlying contract action or for bringing a *Hayseeds* action. Whereas under *Hayseeds* it is necessary that a policyholder substantially prevail on an underlying contract action before he may recover enhanced damage, under *Jenkins* there is no requirement that one substantially prevail; it is required that liability and damages be settled previously or in the course of the *Jenkins* litigation. *Jenkins* instead

predicates entitlement to relief solely upon violation of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4(9), where such violation arises from a "general business practice" on the part of the insurer.

The fundamental holding of Jenkins recognizes a private, implied cause of action for violations of W. Va. Code § 33-11-4(9) and ***permits plaintiff to recover attorney fees*** *and, under the appropriate circumstances, punitive damages, if it can be shown that there was more than a single isolated violation of W. Va. Code § 33-11-4(9) and that the violations indicate a "general business practice" on the part of the insurer. . .*

Since the predicate for seeking relief under Jenkins and its progeny does not require that an insured substantially prevail on an underlying action, and since ***Jenkins does allow, under certain conditions, a party to seek reasonable attorney fees and punitive damages,*** this Court believes that insofar as the trial court's order in the present case precludes the appellant from seeking attorney fees or punitive damages because the appellant failed substantially to prevail below, the trial court's order in the present case was erroneous.

McCormick, 197 W.Va. at 427-28, 475 S.E.2d at 519-20 (emphasis added). *See also*, *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 598, 505 S.E.2d 654, 661 (1998) (*quoting McCormick*).

Moreover, *Jenkins* itself did not purport to specify all the damages a prevailing plaintiff might be entitled to, but rather specifically clarified that its listing was not exhaustive and not duplicative of the damages available in the underlying claim. *See Jenkins*, 167 W.Va. at 609, 280 S.E.2d at 259, n. 12. In *McCormick,* this Court directed that, if the plaintiff was successful on remand in proving his *Jenkins* claim, a determination as to whether he "should be awarded attorney fees for vindicating his *Jenkins*-type claim and, if so, in what amount" was required. *McCormick*, 197 W.Va. at 428, 475 S.E.2d at 520. By using the phrase "for vindicating his *Jenkins*-type claim", this Court distinguished the attorney fees incurred in bringing the underlying action from those incurred in bringing a successful *Jenkins*-type/UTPA claim and indicated that the attorney fees incurred in the second action are recoverable. The Lemasters

vindicated their *Jenkins*-type/UTPA claim and, as a result, the jury awarded both compensatory and punitive damages. The Lemasters now ask this Court to complete their recovery of damages permitted under *McCormick*, by requiring that the Circuit Judge determine a reasonable fee for vindicating the *Jenkins* cause of action in this case.

II. Where An Insurance Carrier Refuses To Pay *Hayseeds* Damages, It Is Responsible For The Fees Incurred Pursing Them Until It Pays.

Under the facts of this case, the Lemasters are also entitled to fees for this case under the *Hayseeds* doctrine. This is because Nationwide refused to pay the Lemasters their *Hayseeds* damages for the entire duration of the bad faith case – well over three years after the underlying claim settled. When the insurer holds the *Hayseeds* damages hostage to lengthy court proceedings, the logic of the *Hayseeds* doctrine demands that the insurer bear the risk, should it lose, of paying the fees incurred. Otherwise, the *Hayseeds* doctrine could be entirely defeated by insurers who could simply force insureds to spend more in attorney fees than their *Hayseeds* claims are worth.

The Lemasters submit that a frivolous, bad faith, defense of the *Hayseeds* claim, as occurred in this case would be sufficient to warrant fees, but is not necessary that the defense be frivolous. As long as the carrier refuses to pay the damages owed, the insured is out the fees to chase after them and should be compensated by the carrier. "[W]e consider it of little importance whether an insurer contests an insured's claim in good or bad faith. In either case, the insured is out his consequential damages and attorney's fees." *Hayseeds* at 177 W.Va. at 329, 352 S.E.2d at 79. However, it is significant that the defense of the *Hayseeds* claim in this case was frivolous and in bad faith. In its Answer to the Lemasters' Amended Complaint, Nationwide denied that the Lemasters had substantially prevailed in their claim for underinsured motorist benefits despite having tendered its $50,000.00 policy limit to the Lemasters after three

years of litigation. Answer, ¶¶ 21, 35-36; App. R. 353-354. Nationwide litigated this issue throughout the pretrial discovery process and, despite admitting at the March 26, 2010, Final Pretrial Hearing that substantially prevailing was "not a dispute we want to fight",[4] Nationwide contested the substantially prevailing issue until the trial court entered its May 25, 2010 Journal Entry and Judgment Order. App. R. 1340. Nationwide's counsel's admission at the Final Pretrial Hearing, taken together with the absence of any logical basis to dispute the substantially prevailing question, was a clear indication that Nationwide was asserting a factually and legally unsupported, frivolous and meritless defense to the Lemasters' substantially prevailing claims.

III. The Vexatious, Oppressive And Malicious Behavior Demonstrated In This Case Required An Award Of Fees Under *Sally-Mike*

Even if this Court found that the *Hayseeds* doctrine does not inherently include the fees imposed by the insurer while disputing the substantially prevailing question, other applicable doctrines would have called for fees because of Nationwide's vexatious behavior in illegitimately disputing that the Lemasters substantially prevailed. The Lemasters made a policy limits demand, and over three years later, Nationwide paid the policy limits, after repeatedly low-balling and delaying the claim. There was no colorable argument that the Lemasters had not substantially prevailed.

West Virginia has long recognized a trial court's "authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory

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[4] At the March 26, 2010, Final Pretrial Hearing the following exchange occurred:

> The Court: . . . . is there a dispute that they substantially prevailed?
> Mr. Parker: Your Honor - -
> The Court: They did pretty damn good.
> Mr. Parker: - - you know, let's put it this way. It's not a dispute we want to fight, okay?

App. R. 699.

authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. pt. 3, in part, *Sally-Mike*; *see also*, *Nelson v. Public Employees Retirement Bd.*, 171 W.Va. 445, 451, 300 S.E.2d 86, 92 (1983) ("A well-established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."). An award of attorney fees and costs is warranted when a party asserts a meritless defense. As stated in the syllabus of *Daily Gazette Company, Inc. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985):

> A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law.

Id.

Under West Virginia law, "'Bad faith' may be found in conduct leading to the litigation or in conduct in connection with the litigation." *Sally-Mike*, 179 W.Va. at 51, 365 S.E.2d at 249 (citing *Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702, 713 (1973)); *see also*, *Bowling v. Anstead Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 474, 425 W.Va. 144, 150 (1992) (quoting *Sally-Mike*). Conduct falling within the "bad faith" justification for an award of attorney fees includes the litigation of "non-disputes". *Sally-Mike*, 179 W.Va. at 51, n. 7, 365 S.E.2d at 249, n. 7. Here, Nationwide litigated the "non-dispute" of whether the Lemasters had substantially prevailed from the time Nationwide filed its Answer until the trial court entered its May 25, 2010, Journal Entry and Judgment Order. This vexatious and unreasonable stance warranted the imposition of fees by the trial court.

There are valid reasons for an award of attorney fees for the bad faith maintenance of a defense, such as that asserted by Nationwide in this instant litigation. As explained in *Canady*:

> Although there is an undeniable interest in the maintenance of unrestricted access to the judicial system, unfounded claims or defenses asserted for vexatious, wanton, or oppressive purposes place an unconscionable burden upon precious judicial resources already stretched to their limits in an increasingly litigious society. In reality, to the extent that these claims or defenses increase delay or divert attention from valid claims or defenses asserted in good faith, they serve to deny the very access to the judicial system they would claim as justification for their immunity from sanction

Canady, 175 W.Va. at 252, 332 S.E.2d at 265; *see also Sally-Mike*, 179 W.Va. at 52, 365 S.E.2d at 250 (quoting *Canady*). Assessment of fees due to bad faith conduct "is consistent with the primary justification for the rule against the shifting of attorney fees, specifically, that the losing litigant should not be discouraged from fairly prosecuting or defending a claim." *Sally-Mike*, 179 W.Va. at 52, 365 S.E.2d at 250. The emphasis is on fairness. If there is a valid basis for a claim or defense, a finding of bad faith and award of attorney fees is not warranted. However, when a defense is meritless or asserted only to harass or for vexatious or oppressive reasons, attorney fees and costs should be assessed to protect the integrity of the judicial system. As the frivolousness of a "defense increases, the likelihood that it is being advanced for improper purposes increases." *Canady*, 175 W.Va. at 253, 332 S.E.2d at 266. Similarly, persistence in pursuing a defense once it has been admitted to be meritless justifies a fee award. *See Horkulic v. Galloway*, 222 W.Va. 450, 464, 665 S.E.2d 284, 298 (2008) (Obduracy, or stubbornly persisting in wrongdoing, may justify the imposition of attorney fees against a losing party.).

West Virginia's recognition of the inherent power of a court to impose an attorney fee award for the losing party's bad faith assertion of a meritless or improper defense is consistent with long-established federal law. Federal courts have inherent power to invoke the "bad faith" exception to the American Rule of each party bearing its own litigation costs and to assess

attorney fees against a losing party "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'". *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 765 (10th Cir.1997) (*quoting F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974). In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46, 111 S.Ct. 2123, 2132-33, 115 L.Ed.2d 27 (1991) (citations omitted), the United States Supreme Court recognized a court's inherent power to "assess attorney's fees when a party has acted in bad faith, vexatiously wantonly, or for oppressive reasons." *See also, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (same); *Lamb Eng'g & Const. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1435 (8th Cir.1997) ("A court's inherent power to award attorney fees pursuant to the bad faith exception 'depends not on which party wins the lawsuit, but on how the parties conduct themselves *during the litigation.*'")(*quoting Chambers*, 501 U.S. at 45-46, 111 S.Ct. at 2133) (emphasis in original); *Pritt v. Suzuki Motor Co., Ltd.*, 204 W.Va. 388, 393-94, 513 S.E.2d 161, 166-67 (1998) (discussing holding in *Chambers*). "The term 'vexatious' means that the losing party's actions were frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Local 285 v. Nonotuck Resource Assocs.*, 64 F.3d 735, 737 (1st Cir. 1995) (internal quotations and citations omitted).

Conduct during the course of litigation that is abusive of the judicial process or defending an action through the assertion of a meritless defense are both circumstances constituting bad faith conduct warranting an award of attorney fees. *Towerridge*, 111 F.3d at 768. "Bad faith in the conduct of the litigation, resulting in a fee award as a sanction for abuse of the judicial process, is the most familiar type of bad faith under which fees are awarded. Courts have also consistently recognized attorney fees as awardable where a meritless claim or defense

is maintained in bad faith." *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1230 (6th Cir. 1984) (footnotes omitted). Where a "defense is brought or maintained for oppressive reasons", imposition of attorneys' fees and costs may be appropriate. *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1014 (11th Cir.1985) (*citing Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); *Hall v. Cole,* 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973). "In order to award bad faith fees, the district court must find that the losing party's claim was (1) meritless; and (2) brought for improper purposes such as harassment or delay." *Kerin v. U.S. Postal Service*, 218 F.3d 185, 190 (2nd Cir. 2000) (footnote omitted). Subjective bad faith is not required. *Local 285*, 64 F.3d at 738.

The ability to recover attorney fees for bad faith conduct in West Virginia is not as limited as it is under federal law. In West Virginia, an award of attorneys' fees for bad faith conduct may be based both on conduct in connection with the primary, substantive claim, here Nationwide's bad faith conduct in violation of West Virginia statutory and common law, and also upon Nationwide's bad faith conduct during the instant litigation when it knowing pursued a defense to the Lemasters substantially prevailing claims. *Sally-Mike*, 179 W.Va. at 51, 365 S.E.2d at 249; *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 226 W. Va. 103, 111, 697 S.E.2d 139, 147 (2010).

Nationwide's course of conduct throughout its handling of the Lemasters' underinsured motorist claims and during the instant litigation adds up to a pattern of litigation misconduct exemplified by assertion of frivolous defenses and arguments, creation of meritless disputes and a finding of actual malice by the jury.

(a) Meritless defense of substantially prevailing claims - Nationwide's bad faith persistence in asserting a vexatious, frivolous and meritless defense against the Lemasters' substantially prevailing claims justifies an award of attorney fees, costs and litigation expenses incurred in the pursuit of the Lemasters' common-law bad faith and statutory UTPA claims. Nationwide's counsel admitted that Nationwide had nothing to say for itself on the *Hayseeds* question. App. R. 699. Yet Nationwide forced the Lemasters to litigate this issue for over *three years*, including through the jury's verdict and the trial court's entry of its Journal Entry and Judgment Order on May 25, 2010.

(b) Discovery Sanctions - Nationwide's bad faith, vexatious, harassing and oppressive conduct was not limited to its litigation of the substantially prevailing question, but extended to the discovery process. Nationwide had to be sanctioned during the discovery process for the assertion of a frivolous objection to the production of documents relevant to the Lemasters' UTPA claims. *See* App. R. 421-423.

(c) Witness Admissions - Further, the impropriety of Nationwide's defenses to the Lemasters' UTPA claims became apparent at trial when its primary adjuster on the Lemasters' underinsured motorist claim, Tina Pritts, admitted that the delay in resolving the Lemasters' underinsured motorist claims occasioned by Nationwide's persistence in its position relating to the Adverse Medical Examination was unreasonable[5] and that the information Nationwide sought

[5] Tina Pritts testified:

relating to why Mr. Lemasters was off work after January 12, 2005, was not necessary to pay the claim.[6] Nationwide witnesses Peter Kensicki, Sharen Robinson and Gabriella Martin all agreed at trial with Ms. Pritts' admissions regarding the relevancy of the information sought by Nationwide after January 12, 2005. App. R. 1741; 1947 (Trial Tr. 308-311); 1965-1966 (Trial Tr. 384-386). Thus, not only was Nationwide's defense of the Lemasters' substantially prevailing claim conducted in bad faith, it appears that Nationwide's entire defense of the Lemasters' remaining claims was also undertaken vexatiously and

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Q: It's not reasonable, is it Ms. Pritts, to tie up this claim for two years arguing over which doctor to see because its 10 miles further to Morgantown, is it?
A: It was our choice as to what doctor we could ask for an independent medical examination.
Q: It's not reasonable, is it, to tie the claim up for two and a half years when you have a West Virginia doctor lined up starting in August of 2005, is it Ms. Pritts? It's not reasonable?
A: No.

App. R. 1864 (Trial Tr. 127) (objection omitted).

[6] Tina Pritts testified:

Q: Can we agree on this: Since this is true that the damages and the time off work as of January 12, 2005 would have been enough to justify paying both policies, whether or not Mr. Lemasters was off work in 2007 because of this wreck is immaterial, isn't it?
A: Right.
Q: Whether he was off work in 2006 because of this wreck is immaterial?
A: Right.
Q: And if he was off work the rest of 2005, that's immaterial also, isn't it?
A: Right.
Q: And any additional medical bills that he would have sustained in '05, '06 and '07, those would be immaterial? They would just be on top of what would be enough to pay the claim, right?
A: Right.

App. R. 1863 (Trial Tr. 123-124).

in bad faith in an attempt to harass and oppress the Lemasters until they abandoned their claims.

(d) Improper Closing Arguments - Having realized that there was no legitimate dispute as to liability for any claim based upon Ms. Pritts' admissions, Nationwide attempted to divert the jury's attention from the liability issues through a vicious, bad faith, unprofessional and vexatious attack on the Lemasters' counsel during closing arguments.[7] The clear impropriety of

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[7] Nationwide argued, in essence, that the Lemasters' counsel set up Nationwide by withholding information arguing:

> It only makes sense for one purpose and one purpose only. The goal is not to get that $50,000 paid as fast as possible. It's not Mr. Bordas' goal to get that $50,000 paid as fast as possible.
>
> The goal is to have that dispute actually turn into a dispute and have it drag out for awhile so that we come to court this past week. So they get to ask not just for 50 from Brooks and 50 from their own policy, but way more money.
>
> That's why we've been here for the last week. Brought to you by the law firm of Bordas & Bordas.
>
> What you've just experienced for the past week, I'm not here trying to tell you that it's right or wrong or good or bad, I'm here to tell you it is the suing insurance company's [sic] business plan of Jamie Bordas. . . .
>
> It is the Jamie Bordas suing insurance company's [sic] business plan. That's why it makes sense. . . .
>
> When the opportunity to just go obtain what Nationwide said it needed and give it to Nationwide was on their doorstep at every moment. When I say theirs, I'm talking about Bordas & Bordas. It was on their doorstep every moment.
>
> It's not like they were hurting for being told what Nationwide needed. The obstinance had a purpose. . . .
>
> This is not a real controversy. It is one that was created by Mr. Bordas for the goal of bringing us here for the past week so that there can be another lawsuit that he and his firm take a contingency fee in.

> Nationwide's tactics during closing arguments resulted in multiple "curative" instructions[8] to the jury and can only be deemed to be vexatious, bad faith behavior. There can be little doubt the jury was prejudiced by such an unfair attack on the Lemasters' counsel.

Nationwide's did not engage in mere isolated misconduct, limited to the *Hayseeds* issue, as the above recitation clearly shows. On the contrary, it also abused the discovery process during the case. App. R. 421-423. It abused the trial process by making a patently illegitimate, unfair and insulting closing argument. App. R. 2000-2002, (Trial Tr. 520-522, 526). It repeatedly denied basic facts in pleadings and briefs only to have its own witnesses come to trial and admit them. App. R. 1741; 1863-1864 (Trial Tr. 123-124, 127); 1947 (Trial Tr. 308-311); 1966-1967 (Trial Tr. 384-386). Furthermore, and as detailed below, Nationwide acted with actual malice towards the Lemasters and intentionally violated the law of West Virginia in delaying this straightforward UIM claim for years. These circumstances, taken together, fully justified an award of attorney fees under *Sally-Mike*.

App. R. 2000-2002, (Trial Tr. 520-522, 526).

[8] During closing arguments, the Court instructed the jury that during Nationwide's:

> closing arguments, there was reference to the, and I'll quote it, the Jamie Bordas suing insurance company's [sic] business plan, end quote. At this time, the Court is making a decision to strike reference from your mind, to the extent that is possible, do you understand? In that the argument, that argument and that phrase exceeded the particular bounds of this court in this case.

App. R. 2012 (Trial Tr. 566). The Court also reinstructed the jury on the impropriety of Nationwide's argument prior to the jury's commencing deliberations on April 14, 2010. App. R. 2069-2070 (Trial Tr. 599-600). Prior to the attack upon the Lemasters' counsel, Nationwide had already been admonished before the jury for an improper reference to Hurricane Katrina during closing arguments. App. R. 1999, Trial Tr. 513).

IV. A Party Found To Have Acted With Actual Malice Should Bear The Opposing Party's Fees Absent Extraordinary Circumstances.

This Court has repeatedly held that to obtain punitive damages in an insurance bad faith case, a high bar of "actual malice" must be cleared by the plaintiff. Syl. pt. 2, *McCormick v. Allstate Ins. Co.* 202 W.Va. 535, 505 S.E.2d 454 (1998). One would hope such cases would be rare, but some number of them will occur, and will present the issues described in Part III, supra. The Lemasters submit that this Court should hold that, in any case where a litigant is found to have acted with actual malice whether it sounds in insurance bad faith, defamation or any other tort, the prevailing party should be allowed his or her reasonable attorney fees.

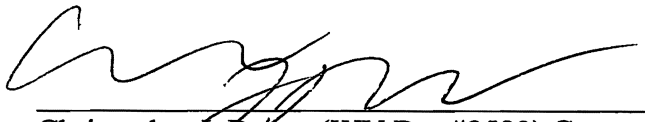
As justification for this proposed doctrine is the simple fact that actual malice has no place in West Virginia and no citizen of our state should be subjected to it. Accordingly, any actor who exhibits actual malice should be required, as a matter of course, to bear the entire cost of the ensuing litigation.

CONCLUSION

The trial court erred in finding it was without authority to award Appellants their attorney fees and costs incurred in prosecuting their bad faith claims. This Court's decision in *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996), not only permits, but requires, an award of attorney fees in this situation. Moreover, the principles of *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), would be thwarted if insureds are force to incur additional attorney fees and costs to recover their *Hayseeds* damages to which they are legally entitled for having substantially prevailed in obtaining their rightful policy benefits. West Virginia law recognizes that equity permits an award of attorney fees "when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

The principles of *Sally-Mike*, viewed in light of Nationwide's conduct throughout this litigation and coupled with the jury's finding that Nationwide acted with "actual malice" in the handling of the underlying claim, demonstrate that the trial court erred in failing to award the Lemasters the attorney fees costs they incurred in successfully prosecuting their bad faith claims. Appellants submit that the trial court's order denying fees should therefore be REVERSED and the case REMANDED with directions to the trial court to hold a *Pitrolo* hearing on the reasonable fees incurred by the Lemasters in this case and then to award those fees to the Lemasters.

Very Respectfully submitted,
Wayne and Joan Lemasters, Appellants,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-0774

WAYNE LEMASTERS AND MARY JOAN LEMASTERS

Appellants

v.

NATIONWIDE MUTUAL INSURANCE COMPANY

Appellee.

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CERTIFICATE OF SERVICE

Service of the foregoing APPELLANTS' BRIEF and APPENDIX was had upon the parties herein by forwarding a true and correct copy of the same by Federal Express, Overnight Mail, this 29th day of August, 2012 as follows:

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