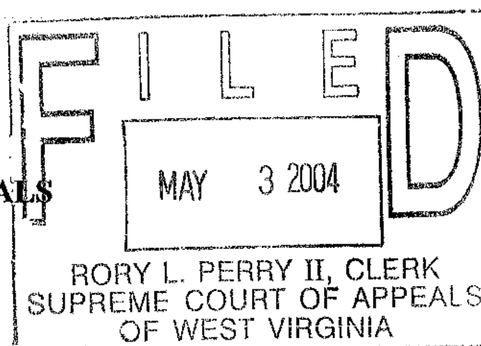
NO. 31708

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

At Charleston



APRIL LYNN HUDSON PERDUE,

Plaintiff Below
Appellant,

v.

DOUGLAS L. JONES, individually;
WENDLING JAMES FOOD SERVICE COMPANY;
and DIXIE PROVISIONER, INC.,
a West Virginia corporation; and
STATE FARM INSURANCE COMPANIES,
a foreign insurance corporation,

Defendants Below,
Appellees.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 01-C-3188

WEST VIRGINIA INSURANCE
FEDERATION'S BRIEF OF *AMICUS CURIAE*

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 2

III. ARGUMENT 3

A. The Trial Court properly applied the standard for recovery of lost value established in *Ellis v. King* 3

B. The Court should preserve the standard for recovery of lost value established in *Ellis v. King* 5

IV. CONCLUSION 6

TABLE OF AUTHORITIES

Page

Ellis v. King, 184 W.Va. 227, 400 S.E.2d 235 (1990) .... *passim*

I. INTRODUCTION

The West Virginia Insurance Federation (the "Federation") is an association of property and casualty insurance companies that provide insurance to the citizens of West Virginia. One of the primary functions of the Federation is to provide its members with information regarding the law and public policy affecting policies written in West Virginia. The Federation also advises its members regarding insurance claim handling laws and regulations. The Federation has served as a spokesperson for its members regarding legal or public policy matters affecting the insurance industry in West Virginia. The Federation, like consumers, has a strong interest in promoting a healthy and competitive insurance market in this State to ensure that insurance is both available and affordable.

The instant appeal is taken from a decision of the Circuit Court of Kanawha County, the Honorable Louis H. Bloom presiding, in a case arising out of an automobile accident on November 2, 1999, involving the plaintiff, April Lynn Hudson Perdue ("Perdue"), and defendant Douglas L. Jones ("Jones"). The Petition for Appeal and Brief of Petitioner raise several issues, including evidentiary issues regarding their proffered expert witnesses and the exclusion of evidence. The Federation seeks only to address that portion of Perdue's brief in which she challenges the trial court's application of this Court's decision in *Ellis v. King,* 184 W.Va. 227, 400 S.E.2d 235 (1990). As discussed below, the Federation believes that Judge Bloom's ruling correctly applied *Ellis* and that continued faithfulness to the *Ellis* holding is important to the Federation's members and their customers.

II. FACTUAL BACKGROUND

Following the accident in question, Perdue made a claim with defendant State Farm Mutual Automobile Insurance Company ("State Farm"), who insured Jones and his employers, Wendling James Food Services Company and Dixie Provisioner, Inc.. According to the briefs submitted, State Farm provided Perdue with a rental car three days after the accident and paid $6,265.00 for repairs to her car. Two years after the accident – and after putting 50,000 additional miles on the car after the repairs were made, Perdue filed a lawsuit, seeking, *inter alia,* $8,700.00 in "inherent diminished value" to her vehicle.

At trial, Perdue proffered Larry Batton ("Batton") as an expert witness who testified to the "inherently diminished value" of Perdue's car as result of the accident. Following Batton's direct testimony and in response to the defendants' renewed motion *in limine* to exclude this claim, Judge Bloom put the following question to Perdue's counsel: "I didn't hear [Mr. Batton] identify any structural damage after the repairs. Am I wrong on that?" The reply from Perdue's counsel: "You are not wrong on that, your Honor." Trial transcript at 153. Following this Court's holding in *Ellis,* Judge Bloom granted the motion to exclude Perdue's claim for "inherent diminished value."

Perdue now contends that Judge Bloom "misread and thus misapplied" the holding in *Ellis* by "reading it require that there be remaining structural damage *after* the vehicle's repair and/or that the damage affect the use of the vehicle before diminution can be awarded." Appellant's Brief at 7-8. The Federation disagrees. For the reasons stated below, Judge Bloom properly applied *Ellis* to the agreed facts before him.

III. ARGUMENT

A. The Trial Court properly applied the standard for recovery of lost value established in *Ellis v. King.*

The *Ellis* decision is neither factually nor legally complex. In that case, the plaintiff's brand new Volvo was involved in an accident within three days of its purchase. The car was repaired, after which it had no mechanical problems. 184 W.Va. at 228, 400 S.E.2d at 236. The plaintiffs filed suit over a year later, however, claiming, among other things,

> that their car, although "repaired," was not worth the same as it was before the accident. They point[ed] out that an estimate of the value of the car after the accident showed the value to be diminished by $4,986.

Id. In short, although the Ellises' car had been repaired to its pre-accident condition, they sought to recover an additional amount sum of nearly $5,000 because the car allegedly was simply worth that much less solely because it had been in an accident.

As stated in the syllabus, the Court in *Ellis* held:

> If the owner of a vehicle which is damaged and subsequently repaired can show a diminution in value **based upon structural damage after repair,** then recovery is permitted for that diminution in addition to the cost of repair, but the total shall not exceed the market value of the vehicle before it was damaged.

Id., Syl. pt. 2 (emphasis added). Justice Brotherton also explained this holding in detail, cautioning the trial courts that "[n]ot all damage to a vehicle would allow the plaintiffs to recover for the dimunition in value." *Id.* at 238, 400 S.E.2d at 230. To recover for loss in value, the plaintiff must show (a) "that the value was diminished following repair" and (b) that the "damage be structural, something that is integral to the structure of the vehicle." *Id.* The opinion continues to provide an example of the application of the Court's holding:

> [I]f an automobile is sideswiped and, as a result, the right front panel of the car must be replaced, diminution in value would not be permitted. However, if the frame of a car is damaged and would affect the future use of the vehicle even after repair, then diminution in value is recoverable. Finally, we note that only a vehicle with significant value prior to the accident is subject to recovery. Frankly, a vehicle that is so old or in such poor condition as to have minimal value will not be subject to recovery for loss or diminution in value.

Id. at 238-39, 400 S.E.2d at 230-31. Finally, the Court expressly noted that the immediate diminution in value that occurs when any new car is driven off the lot could not be recovered under any circumstances. *Id.* at 238 n.7, 400 S.E.2d at 230 n.7.

Perdue attempts to pry a hole in Justice Brotherton's tightly worded opinion by suggesting the concept of damage existing following repairs is an oxymoron and by arguing that Judge Bloom "failed to distinguish 'condition' from 'value.'" Appellant's Brief at 8.[1] It is difficult to imagine how the Court in *Ellis* could have been clearer: damages are based on the vehicle's "condition" and not its "value." "Repairs" are completed when the repairman stops working on the vehicle. At that time the car either (a) has remaining structural damage "that is integral to the structure of the vehicle" and "affects its future use" or (b) it does not. In the latter instance, the plaintiff cannot recover for a loss in "value" that is not tied – and substantially tied -- to the car's condition.

As noted, the record suggests that Perdue's counsel informed Judge Bloom that Mr. Batton did not identify any structural damage to Perdue's car after the repairs were made. If this is the case,[2] then Judge Bloom properly applied the law as stated in *Ellis*.

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[1] Appellant cites the Court to *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001), for this proposition. The Georgia court, however, proceeded from the proposition that a completely repaired vehicle has inevitable and unavoidable dimunition in value unrelated to its condition. *Id.* at 502, 556 S.E.2d at 119. This view is utterly irreconcilable with this Court's holding in *Ellis*.

[2] Appellant's brief asserts that Judge Bloom improperly excluded evidence of substantial structural damage to Perdue's car after the repairs were made. The Federation is not in a position to comment on that aspect of this appeal.

B. The Court should preserve the standard for recovery of lost value established in *Ellis v. King*.

The Court's ruling in *Ellis* has been the law of this State since 1990, and the Legislature has not seen fit to change it. Nor should the Legislature or this Court forsake it now. The concept of "inherent diminished value" in the absence of existing structural damage would defy rational and reliable measurement, and the concept rests on the subjective assessment of a vehicle's worth when, by definition, it has no structural damage.

The facts in *Ellis* and the case at bar also demonstrate why a contrary rule would be unworkable. Perdue put 50,000 miles on her car after it was repaired before filing her lawsuit. The plaintiffs in Ellis drove their car for at least fifteen months after it was repaired before suing for its lost "value." Common sense teaches that 50,000 miles of driving also has a deleterious effect on any vehicle's "inherent value." If Perdue were allowed to recover for the "inherently diminished value" of her car at the time of her accident, the trier of fact would be faced with the unmanageable task of determining how much of this hypothetical loss in "value" also was lost by Perdue's driving the car 50,000 miles during the intervening two years.

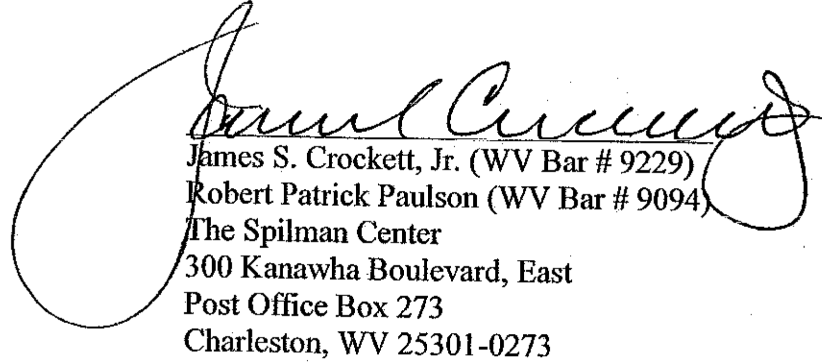
Finally, if recoverable damages to a vehicle were expanded to include an additional award for "value" quite apart from the vehicle's condition, the inevitable result will be increased demands, increased settlements, increased verdicts and, of necessity, increased premiums passed on to West Virginian insureds. The Federation submits that it is poor public policy to put such pressure on the already high automobile liability rates demanded by the West Virginia market simply to support such ethereal claims for damages.

IV. CONCLUSION

For the foregoing reasons, the Federation urges the Court to reaffirm its holding in *Ellis* by upholding Judge Bloom's application of that case's holding.

WEST VIRGINIA INSURANCE FEDERATION

By: SPILMAN THOMAS & BATTLE, PLLC



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CERTIFICATE OF SERVICE

I, James S. Crockett, Jr., counsel for the West Virginia Insurance Federation, do hereby certify that on May 3, 2004, a true and exact copy of the **WEST VIRGINIA INSURANCE FEDERATION'S BRIEF OF *AMICUS CURIAE*** was served upon the parties involved herein by depositing true copies of same in the United States mail, postage prepaid and sealed in envelopes addressed as follows:

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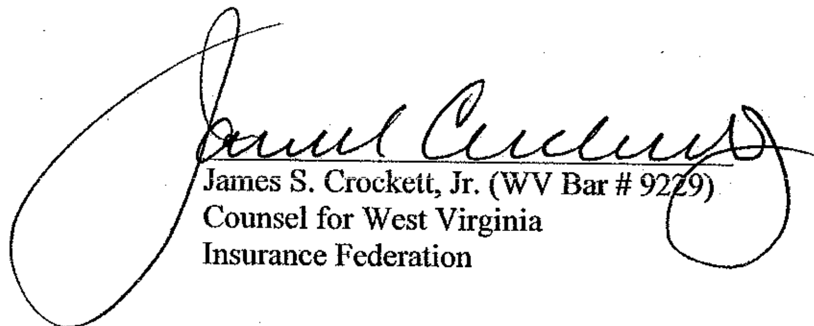

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