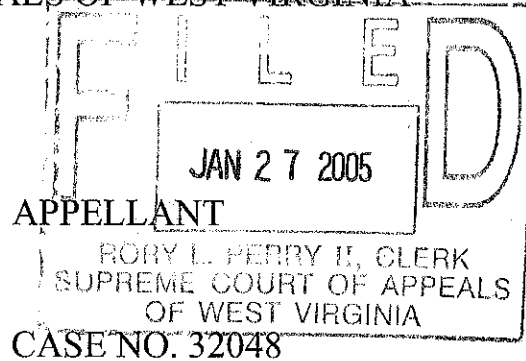


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM E. JONES,  
plaintiff below,

v.

STEVEN L. SANGER, and  
STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY  
defendants below,



APPELLEE

**APPELLANT'S BRIEF**

WILLIAM JONES

BY COUNSEL

Ralph C. Young  
HAMILTON BURGESS YOUNG POLLARD  
HEWITT & SALVATORE, pllc  
Counsel for Appellant  
P. O. Box 959  
Fayetteville, WV 25840

## **The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal**

This is an appeal of a first party underinsured motorist claim from the Circuit Court of Fayette County, Vickers, J., of an Order entered March 5, 2004, denying Plaintiff's Motion for an Award of Attorney Fees and denying Plaintiff's Motion for Leave to Amend the Complaint. (Order, Exhibit 1)

### **STATEMENT OF FACTS**

#### **A. Procedural Facts**

William Jones was injured in an automobile accident on January 21, 1992. Mr. Jones was a backseat passenger in a car and driven by his father and also occupied by his mother. The vehicle was hit head-on by an underinsured driver on the wrong side of the road injuring Mr. Jones and his father and killing his mother. Mr. Jones' injury case was originally tried in Fayette County and a verdict entered for the defense. This Court found multiple errors and awarded Plaintiff a new trial. *Jones v. Sanger, et al.*, 204 W. Va. 333, 512 S.E.2d 590 (1998).<sup>1</sup>

The case subsequently settled and Plaintiff moved for an award of his attorney fees as he had substantially prevailed and further moved to amend his complaint against his

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<sup>1</sup>This Court held that Mr. Jones' insurer, State Farm, was a proper party Defendant; that Mr. Jones could bring a claim for negligent infliction of emotional distress as he was trapped in the wrecked vehicle next to the corpse of his mother; that the trial court improperly limited cross examination of a defense witness that had also asserted and settled his negligence claim against the underinsured driver; and, that the trial court had improperly excluded photos of the speed and curve warning road signs and photos of the tires on the at fault vehicle.

insurance carrier, State Farm, to allege a cause of action sounding in bad faith/unfair claims settlement practices.

A hearing was held on Plaintiff's Motions on September 29, 2003. At the hearing, counsel for both parties, argued their respective positions with respect to the issue of whether Plaintiff substantially prevailed. On the record, counsel for State Farm indicated that State Farm had no objection to Plaintiff's Motion to Amend his complaint. Thereupon, the Court orally granted Plaintiff's Motion for Leave to Amend his complaint.

The Order herein was entered more than five months later on March 5, 2004. The Order denied Plaintiff's Motion for Attorney Fees and denied Plaintiff's Motion to Amend his complaint holding that the amendment was moot as the Court found that the Plaintiff did not substantially prevail in the action. Although the Order contained the caption, "Findings of Fact," it made no Findings of Fact other than that the Plaintiff had settled his underinsured claim for \$76,500.00. The Plaintiff's moved the Court to reconsider its decision asking the Court to make findings of fact, and pointing out that the order made no findings of fact to support its conclusion that Plaintiff did not substantially prevail and also pointed out that the Court had previously granted Plaintiff's Motion to Amend. The Court *sua sponte* canceled the hearing set by counsel for the Plaintiff without explanation and the motion could not be rescheduled before the time for this appeal would have expired.

## **B. Facts to Relating to Whether Plaintiff Substantially Prevailed**

The "at-fault" driver carried \$50,000 single limit liability policy. Settlement was reached with the liability carrier and the limits of the policy were apportioned \$12,500.00 to Mr. Jones, \$12,500.00 to Mr. Jones' father, \$12,500.00 for the wrongful death of Mr. Jones' mother and \$12,500.00 to a guest passenger in the at fault driver's vehicle. State Farm consented to this settlement and waived subrogation against the "at-fault" driver.

Mr. Jones was 40 years old at the time of the collision. Mr. Jones had suffered from cerebral palsy since birth and had sensation in his legs but no independent movement. He lived with his parents and "walked" with the use of arm crutches by swinging his legs and hips which were atrophied in a semi-flexed position at the knee. The collision shattered both of his knee caps and "flexed" his previously locked knee joints. Mr. Jones was bedfast for several months post collision. After his recovery, Mr. Jones resumed "walking" with his crutches but "stood" several inches shorter as his knees were now locked or atrophied in a more flexed position than pre-injury. Mr. Jones' medical bills and attendant care expenses were \$4,415.80.<sup>2</sup>

State Farm initially offered Mr. Jones \$12,500.00 not only to settle the underinsured injury claim but also to release any claims for bad faith/unfair claims settlement practices. Counsel for Mr. Jones wrote counsel for State Farm on December 19, 1994 stating: "I would like to clarify at this juncture whether the \$12,500.00 offer of State Farm was only

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<sup>2</sup>Mr. Jones declined to have his shattered knee caps repaired surgically as his knees and kneecaps were nonfunctional.

to compensate Mr. William Jones for his personal injury, or if that offer also included a release of State Farm for any unfair claims settlement practices or bad faith.” (Letter, December 19, 1994, Exhibit 2) Counsel for State Farm replied by letter: “Our settlement offer of \$12,500.00 is an offer to settle any and all claims Mr. William Jones may have arising out of the automobile accident which forms the subject matter of this civil action. Our offer is an offer to settle all claims that Mr. Jones may have including any claims for unfair claims settlement practices or bad faith.” (Letter, December 27, 1994, Exhibit 3)

Counsel for Mr. Jones wrote counsel for State Farm requesting that “State Farm advise me of State Farms’ present offer to settle only the personal injury claim of Mr. William Jones arising out of the applicable State Farm policies providing underinsured motorist coverage.” (Emphasis in original.) (December 29, 1994, Exhibit 4) Counsel for Mr. Jones’ letter also pointed out that State Farm’s position likely violated state insurance law and regulations.<sup>3</sup> Counsel for State Farm replied by letter stating that State Farm had revised its position and was now prepared to offer \$12,500.00 to settle only the personal injury claim of Mr. Jones without a release of any extra contractual claims. (Letter, January 5, 1995, Exhibit 5).

Therefore, three years post accident, State Farm made its first offer to Mr. Jones to settle only his personal injury claim. Ten years post accident, State Farm doubled its offer

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<sup>3</sup>W. Va. Insurance Regulations (Unfair Trade Practices) §114-14-6.8 Separation of Claims. – In any case where there is no dispute as to one (1) or more elements of a claim, payment for such elements shall be made notwithstanding the existence of dispute as other elements of the claim where such payment can be made without prejudice to either party.

to \$25,000.00 to settle the personal injury claim and paid those monies to Mr. Jones without prejudice to his right to pursue his civil action to recover additional uninsured monies.<sup>4</sup>

In June 2003, State Farm agreed to pay \$51,500.00 in addition to the \$25,000.00 paid earlier to settle his underinsured personal injury claim (total underinsured payments to Mr. Jones of \$76,500.00).

Prior to the final settlement in June 2003, a mediation was held pursuant to the Trial Court Rules. During the mediation, Plaintiff demanded \$150,000.00 additional under his underinsured policy and State Farm offered \$64,000.00. Plaintiff communicated acceptance of that offer through the mediator and inquired as to whether State Farm wished to continue to mediate with respect to extra contractual claims which Mr. Jones intended to assert. According to the mediator, both Plaintiff's demand of \$150,000.00 and State Farm's offer of \$64,000.00 were clearly communicated as "new money".<sup>5</sup> State Farm upon hearing Plaintiff's request to continue to negotiate with respect to extra contractual

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<sup>4</sup>The amount of \$25,000.00 was forwarded to counsel for Mr. Jones on February 19, 2002. These monies were paid pursuant to a policy of State Farm to pay to first party insureds asserting underinsured motorist claims the amount of State Farm's last or final offer. Counsel of Plaintiff learned of this policy from another claim and insisted that State Farm follow its own policy with respect to the outstanding claim of Mr. Jones. State Farm concedes that it had offered \$60,000.00 in an earlier mediation but asserts that \$25,000.00 reflected State Farm valuation of the claim.

<sup>5</sup>The mediator, Mr. Vince King, filed a written report of mediation with the Trial Court which stated, "...Although the opening demand was designated as "new money" (i.e., in addition to partial underinsured benefits previously advanced), and the Defendant's specifically assured me that the counter was also "new money", once the same was accepted with respect to the pending motion, then it came to light that the defense had intended to negotiate with respect to total policy proceeds (i.e., less a set off for the partial underinsured benefits previously advanced) and the perceived settlement of the personal injury claim broke down." (Exhibit 6)

claims reneged and indicated that the \$64,000.00 offer actually meant \$64,000.00 less the \$25,000.00 already paid for an offer of \$39,000.00.<sup>6</sup> Plaintiff sought to compel enforcement of the \$64,000.00 settlement offer which was accepted by Mr. Jones but the trial court declined, holding that there was no meeting of the minds.

As a result of the motor vehicle accident, two separate civil actions were prosecuted. One on behalf of Mr. Jones' father in his own right and as the administrator of the estate of Mr. Jones' deceased mother. This action was instituted separately by Mr. Jones for his own personal injuries. Various "global" offers and counter offers were made to settle all of the Jones' family's claims. Eventually, a separate offer was made to settle the wrongful death claim which was accepted and a separate offer was made to settle Mr. Jones' father's underinsured claim which was accepted. A specific demand for damages on Mr. Jones' claim was never made and all negotiations and settlements of the other two claims were made after all lawsuits were filed. Mr. Jones' complaint filed July 12, 1994, contained an *ad damnum* clause of \$250,000.00.

Although State Farm maintains that Mr. Jones made demands of \$400,000.00 to settle post-suit, there is no evidence of such demands in the record as none exists. State Farm arrived at those figures by utilizing pre-suit settlement discussions concerning all three claims of the Jones' family and subtracting the amounts actually paid to settle the

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<sup>6</sup>Counsel for State Farm indicated that she was not familiar with the term "new money."

wrongful death claim of Mr. Jones' mother and his father's personal injury claim. (See, excerpt, Defendant State Farm's Response to Plaintiff's Motion to Reconsider, Exhibit 7)

Although the trial court orally granted Plaintiff's Motion to Amend his complaint to assert extra contractual claims against State Farm without objection by State Farm at the hearing of September 23, 2003 (see, Transcript page 3, Exhibit 8), the Court after concluding that Plaintiff did not substantially prevail found that Plaintiff's Motion to Amend was moot in its written order. The Court apparently believed that a finding that Plaintiff that did not substantially prevail barred all extra contractual claims.

## ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the Plaintiff did not “substantially prevail” such as to entitle Plaintiff to recover his attorney fees in the prosecution of the underinsured motorist claim.

2. The trial court erred by denying Plaintiff’s Motion to Amend his complaint to allege extra contractual damage claims against State Farm, by finding such claims moot, after initially granting the Plaintiff’s Motion to Amend without objection by State Farm.

## AUTHORITIES RELIED UPON

*Jones v. Sanger, et al.*, 204 W. Va. 333, 512 S.E.2d 590 (1998)

*Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974)

*Kalwar v. Liberty Mutual Insurance Company*, 203, W. Va. 2, 506 S.E.2d 39 (1998)

*Light v. Allstate*, 203 W. Va. 27, 506 S.E.2d 64 (1998)

*Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997)

*Paxton v. Municipal Mutual Insurance Company*, 202 W. Va. 224 503 S.E.2d (1998)

*Slider v. State Farm Mutual Automobile Insurance Company*, 210 W. Va. 476, 573 S.E.2d 883 (2001)

*State ex rel Board of Education v. Spillers*, 164 W. Va. 453, 259 S.E.2d 417 (1979)

*State ex rel State Farm Fire & Casualty Company v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1984)

*State ex rel Strickland v. Daniels*, 173 W. Va. 576, 310 S.E.2d 627 (1984)

## DISCUSSION OF THE LAW

### **Mr. Jones is Entitled to Recover His Attorney Fees From His Underinsured Carrier as He Substantially Prevailed.**

This Court revised and clarified its previous holdings with respect to determining when a Plaintiff substantially prevails in first-party insurance litigation in *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). “Whether a policyholder 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*, 201 W. Va. at 696, 500 S.E.2d at 321. “An insurance carrier has a duty, once a first-party policyholder has submitted proof of a 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 to the policyholder 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 v. Fluharty*, *Supra* (Syl. pt. 3).

### *The Totality of the Circumstances*

Twelve and one half years after William Jones was injured in a head on motor vehicle collision, he settled his underinsured claim with his insurance carrier, State Farm. Before suit was filed, Mr. Jones did not make a separate demand as negotiations focused on settling all of the Jones' families' claims. (Mr. Jones' injury claim, his father's injury claim and the wrongful death claim for his mother.) After suit was filed, State Farm made its first offer to settle Mr. Jones' claims for \$12,500.00. Counsel for Mr. Jones on December 19, 1994, sought to clarify whether the offer of the \$12,500.00 was to settle just the injury claim or all of Mr. Jones' claims. (Exhibit 2) State Farm then unequivocally established that the \$12,500.00 offer was to settle not only the personal injury claim but any extra contractual claims Mr. Jones may have. (Exhibit 3) It was only after counsel for Mr. Jones pointed out to State Farm that it was likely an unfair claims settlement practice to "bundle" the settlement of the injury claim with a release of any extra contractual claims that State farm capitulated and on January 5, 1995 (almost 3 years post injury) and offered \$12,500.00 to settle only Mr. Jones' personal injury claim without a release of the extra contractual claims.

Eight years later, after a successful appeal by Mr. Jones to this Court, State Farm doubled that offer to \$25,000.00 and paid those monies to Mr. Jones in March 2002 without prejudice of his right to pursue his underinsured claims through litigation.<sup>7</sup>

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<sup>7</sup>State Farm had actually offered \$60,000.00 in an earlier mediation but insisted it only valued the claim at \$25,000.00. See Defendant State Farm's Response to Plaintiff's Motion for Reconsider.

Therefore, it was more than ten years after Mr. Jones was injured that he received the first nickle of his underinsured policy benefits.

Then, adding insult to injury, State Farm clearly reneged after Mr. Jones accepted State Farm's next offer to settle his underinsured claim for \$64,000.00 "new money" made in June 2003 (in addition to the \$25,000.00 partial underinsured benefit paid previously for a total settlement of \$89,000.00). State Farm's paltry explanation was that it's attorney didn't understand the term "new money" even though they assured the mediator that the \$64,000.00 offer was "new money." It is perplexing why the Trial Court didn't enforce the settlement but no more perplexing then the than the multiple earlier ruling of the trial court which were reversed in the previous appeal or the Court's adverse ruling on Plaintiff's Motion to Amend to which State Farm didn't object. (*infra*).

After the Trial Court declined to enforce the settlement, Mr. Jones agreed to settle his underinsured claim of \$51,500.00 "new money" in addition to the \$25,000.00 previously paid for a total underinsured settlement of \$76,500.00. Mr. Jones received the balance of the underinsured settlement monies in July 2003, twelve and a half years after an underinsured motorist lost control of his car, crossed the centerline and hit his parent's car head on in their own lane of traffic.

Although State Farm conceded the liability of the underinsured driver and settled Mr. Jones' father claim and his mother's wrongful death claim from the same vehicle, State Farm contested liability of the underinsured driver in Mr. Jones' case for twelve years.

But, the trial court held that Mr. Jones did not substantially prevail in this matter because his complaint contained an *ad damnum* clause of \$250,000.00.

Plaintiff does not dispute that he did not make a separate demand to settle his claim prior to suit. After suit was filed in Mr. Jones case as well as the separate action brought by his father various "global" offers to settle all claims were made. Each time, State Farm was asked to make a specific offer for each claim, and when State Farm made a specific offer for Bill Jones' father's case and his mother's wrongful death case, those cases eventually settled. At that point (December 1994), counsel for Mr. Jones confirmed that there was an outstanding offer of \$12,500.00 but inquired as to what State Farm wanted in return for such offer. (Exhibit 2) It wasn't until January 1995 that the offer of \$12,500.00 was made to settle only the injury claim. (Exhibit 4) Then, State Farm waited until March 2002 to double that offer and July 2003 to pay more than six times its original offer to settle the claim. (\$76,500.00)

A determination of whether Plaintiff substantially prevailed on a first party action is not a mechanical formula. On one hand, Plaintiff's complaint contained an *ad damnum* clause of \$250,000.00 and during a mediation seven years after the accident, Plaintiff demanded \$150,000.00. On the other hand, it took the Mr. Jones, a first-party insured, more than twelve years to wheedle \$76,500.00 from his own insurance carrier.

Plaintiff's Motion for an Award of Attorney Fee requested an evidentiary hearing on the issue of the amount of attorney fee, due to the protracted nature of the litigation.

(Plaintiff's Motion for Attorney Fees, Exhibit 9) It is clear that the trial court attempted some sort of mechanical analysis upon the status of negotiations before and after the lawsuit was filed. In doing so however, the trial court had to reach the anomalous conclusion that "the Plaintiff immediately prior to the institution of the lawsuit made a claim for \$250,000.00 as evidenced by his Complaint of July 12, 1994." It seems at best, that \$250,000.00 was Plaintiff's *ad damnum* clause **at the time** the Complaint was filed and not his position **before** the Complaint was filed, but, nonetheless, it seems inequitable under the present circumstances to hold Plaintiff to an *ad damnum* clause when this Court doesn't hold any Plaintiff to an *ad damnum* clause for any other reason. See, *State ex rel Board of Education vs. Spillers, Supra*. (Allowing an *ad damnum* clause to be amended post verdict to conform with the verdict.) See also, *State ex rel Strickland v. Daniels*, 173 W. Va. 576, 310 S.E.2d 627, this Court held, "We agree with the general proposition that the value of a law suit is not determine definitively by the *ad damnum* clause." 173 W. Va. at 571, 318 S.E.2d at 631. An *ad damnum* clause in a personal injury complaint has become an anachronism and of little value other than fodder for newspapers articles about multi-million dollars claims asserted in lawsuits. Therefore, it seems rather harsh to seize upon the *ad damnum* clause to determine the respective positions of the parties at a given point in time.

Although the trial court made no findings of fact to such effect, within the body of its order, the Court states, "The plaintiff initially made a demand of \$400,000.00." There

is no evidence before the Court of such a demand by the Plaintiff. In fact, such a figure was arrived at by counsel for State Farm based upon his "recollection" asserted in a brief by extrapolating out the amount actually paid to settle the wrongful death claim of Bill Jones' mother and the injury claim of Bill Jones' father from negotiations attempting to settle all three claims.<sup>8</sup> (Exhibit 7) No specific demand was ever made by Plaintiff other than demand that State Farm make Mr. Jones an offer solely to settle his personal injury claim unfettered by any conditions which would release extra contractual claims against his own insurance carrier.<sup>9</sup>

Given the totality of the circumstances, it appears that Mr. Jones did prevail as State Farm initially offered something less than \$12,500.00 because the first \$12,500.00 offer included a release of other claims. 12 1/2 years later, Mr. Jones' underinsured claim was settled for a total of \$76,500.00. Using the *Miller v. Fluharty* totality of the circumstances analysis, this court affirmed a finding that the first party insured substantially prevailed in *Paxton v. Municipal Mutual Insurance Company*, 202 W. Va. 224 503 S.E.2d (1998) when

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<sup>8</sup>"...[b]ased upon information and belief, the only demand which had been forthcoming prior to the initial offer of \$12,500.00 was the global demand of \$850,000.00 to settle all claims which were asserted by [Mr. Jones, Mr. Jones' father and his mother's wrongful death claim]. ...Therefore, the demand was calculated upon the following basis: \$850,000.00 (policy limits) MINUS \$325,000.00 (Edith Jones' settlement) MINUS \$125,000.00 (Woodrow Jones' settlement) = \$400,000.00." (Excerpt, State Farm's Brief in Response to Plaintiff's Motion to Reconsider, Exhibit 7)

<sup>9</sup>Plaintiff filed a "Motion to Reconsider" after the entry of the Order pointing out to the Court that it failed to make Findings of Fact in support of its conclusions. (Exhibit 10) The trial court canceled that hearing without explanation and could not reschedule the hearing prior to the expiration of time for appeal.

the insured settled for \$38,825 after the carrier offered \$17,157.32 less than three months after the loss and two months after the insured's retained counsel.<sup>10</sup>

The *Miller v. Fluharty* analysis was also applied in *Kalwar v. Liberty Mutual Insurance Company*, 203, W. Va. 2, 506 S.E.2d 39 (1998) wherein this Court noted:

When the insured in this case, plaintiff Kalwar, purchased his underinsured motorist policy from Liberty Mutual, he could not have expected to have also purchased a declaratory judgment lawsuit that would drag on for over 7 years. We therefore affirm the trial court's award of attorney's fees and costs to the plaintiff. *Kalwar*, 203 W. Va. at 7.

Similarly, Mr. Jones 12 1/2 years of litigation may set a new benchmark for the term "protracted."

Given the totality of these circumstances, Mr. Jones substantially prevailed and should have recovered his attorney fees incurred in prosecuting his first party underinsured action.

**Mr. Jones' Motion to Amend to Assert Extra Contractual Claims Against State Farm Should Have Been Granted as it was Originally Granted Without Objection by State Farm and the Extra Contractual Claims were not Mooted by the Trial Court's Findings that Plaintiff Did Not Substantially Prevail.**

It seems that Mr. Jones couldn't ever win a motion in this case even an unopposed motion. In fact, counsel for State Farm responded in open court to Plaintiff's Motion to Amend:

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<sup>10</sup>The Court also increased the trial court's award of the attorney fee by more than \$10,000.00 as it was "clear that without counsel's intervention MMI would not have increased its payment from \$17,157.32 to the policy limit of \$38,825.00."

Your Honor, with regard to the Motion to Amend, we certainly don't believe that there is any meritorious bad faith action here, but I'd assume that that's a matter really to be determined down the road.

So, as far as Mr. Young amending his complaint to bring a bad faith action, I suppose, under the rules of liberality for amending the complaint, we really don't have much of a position to object. We certainly will vigorously defend any bad faith claim, we do not believe that claim has any merit. But, as I say, I guess that's a matter to be determined down the road.

So, we didn't file anything in opposition because, under Rule 15, I believe it is, for amendments of complaints, those are to be liberally construed and granted. So I suppose it is a matter of Mr. Young filing his complaint and then we will defend it in the manner we believe necessary.

The Court: **All right. Plaintiff has the Court's approval to amend the Complaint.** It will be addressed after it is amended and counsel knows what it is. ...

(Transcript, page 3, Exhibit 8) (Emphasis added).

The trial court's subsequent denial of Plaintiff's previously granted Motion to Amend in the order entered five months later provides:

The Plaintiff further moves to amend his complaint to: (1) assert claims for consequential damages, such as annoyance, aggravation and inconvenience; (2) assert unfair claims settlement practices; and (3) assert claims for breach of the duty of good faith and fair dealing. The court having previously found that the plaintiff did not substantially prevail in this matter finds that the above claims are moot.

The finding by the trial court that the Plaintiff had not substantially prevailed, even if upheld, does not moot all potential first-party claims of the Plaintiff. This Court so held in *Slider v. State Farm Mutual Automobile Insurance Company*, 210 W. Va. 476, 573 S.E.2d 883:

Where an insured has previously brought a claim for consequential damages under *Marshal v. Sasseen*, 192, W. Va. 94, 450 S.E.2d 791 (1994), and a final judgment has been entered with respect to such claim, the insured is not thereby precluded under principles of *res judicata* or claim preclusion from bringing a subsequent action asserting causes of action, predicated upon a Defendant's insured's alleged bad faith or other intentional misconduct in the course of settling the insured's policy claim. *Slider v. State Farm Mutual Automobile Insurance Company, Syl. Pt. 5*

The trial court in *Sliders* did exactly what the trial court did in the instant case, it denied Plaintiff's request for attorney fees as well as costs, expenses, and damages for annoyance, inconvenience. Under *Sliders*, a separate action, can be filed and the trial court's decision is not be *res judicata* to such claim. It follows, then, that the same action can be asserted by way of amendment in this pending action particularly when the Defendant State Farm does not object.

This Court has expressly permitted a third party claim for bad faith to be combined with the underlying tort action In *State ex rel State Farm Fire & Casualty Company v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1984) and required only that the bad faith action be bifurcated from the underlying tort. *Light v. Allstate*, 203 W. Va. 27, 506 S.E.2d 64 (1998) affirmed this same position as to first party bad faith/unfair claims practice cases except held that bifurcation wasn't mandatory.

It was therefore error for the trial court to *sua sponte* reverse its only ruling that Plaintiff could amend his complaint to allege extra contractual claims against State Farm.

**RELIEF PRAYED FOR**

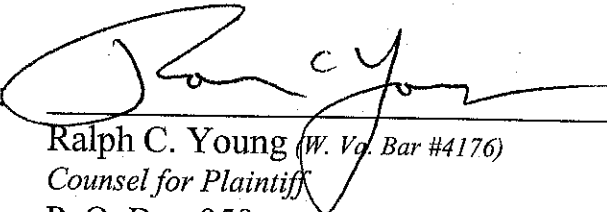
1. That this Court conclude that Mr. Jones substantially prevailed in this matter and remand this case to the Circuit Court of Fayette County for a determination of a reasonable attorney fees;
2. That this matter be remanded to the Circuit Court of Fayette County with instructions to allow Plaintiff to amend his complaint;

**WILLIAM E. JONES**

BY COUNSEL

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By



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