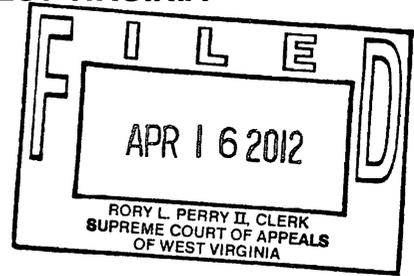


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-0044



**PSYCHOLOGICAL ASSESSMENT &
INTERVENTION SERVICES, INC.,**

Plaintiff Below, Petitioner,

v.)

Appeal from a final order of the Circuit
Court of Kanawha County (10-C-1443)

**WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY, d/b/a
BrickStreet Mutual Insurance Company,**

Defendant Below, Respondent.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- A. The trial court erred by granting full summary judgment and dismissing PAIS' entire case from the docket, when the only issue raised by BrickStreet in its motion for summary judgment was the narrow, uncontested immaterial issue of consent.**

BrickStreet sought summary judgment on the narrow issue of whether it was required to obtain consent from its insured, PAIS, prior to effectuating the settlement of a *pro se* workers' compensation claim brought against PAIS by an injured employee. PAIS did not contest summary judgment on this narrow issue of consent. Moreover, PAIS maintained that consent was not the premise of, or material to, its first-party insurance case against BrickStreet. In its ruling, the circuit court granted full summary judgment to BrickStreet and summarily dismissed PAIS' entire complaint. PAIS submits that the narrow issue of consent was not dispositive to its multi-count complaint against BrickStreet, and that this case should be remanded to the circuit court for further proceedings. (J.A.R. 360-376).

- B. The trial court erred by granting summary judgment based upon the workers' compensation claim release document, where a genuine issue of material fact existed as to the execution of the release and the intent of the parties with respect to the effect of the release.**

In its final ruling, the circuit court disregarded the existence of a genuine issue of material fact as to who was responsible for payment of the injured employee's long-term future medical bills. It was undisputed that every medical provider who examined the injured employee agreed that she needed long-term care and treatment. Moreover, BrickStreet admitted knowing the anticipated cost of the

future medical treatment far exceeded the amount of the workers' compensation settlement it negotiated. The injured employee testified that BrickStreet informed her she could still recover the long-term future medical expenses from PAIS in her deliberate intent suit. BrickStreet was aware that PAIS was not insured for excess exposure of deliberate intent cases. PAIS had no knowledge of these communications between BrickStreet and the injured employee, and PAIS continued to defend the deliberate intent case at its own expense and actually paid a substantial sum of money to the injured employee. PAIS submits that BrickStreet improperly avoided payment of the long-term medical care and treatment, which were clearly covered under PAIS' workers compensation policy, and thereby intentionally shifted liability for payment thereof to PAIS. As a result, PAIS was forced to unnecessarily expense large sums of money and face closure of its business due to the shifted liability by BrickStreet.. **(J.A.R. 360-376).**

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because it presents issues of first impression, fundamental public importance, and a narrow issue of law, this case is appropriate for selection for oral argument under Rev. R.A.P. 18(a). If the Court determines that oral argument is necessary, this case involves issues which could be deemed appropriate for argument under either Rule 19 or Rule 20. Oral arguments of more than fifteen minutes per side should not be necessary.

STATEMENT OF THE CASE & PROCEDURAL HISTORY

ON August 11, 2010, PAIS instituted legal action against BrickStreet in the Circuit Court of Kanawha County, alleging breach of contract, common law bad faith and violation of the West Virginia Unfair Trades Practices Act (UTPA). **(J.A.R. 1-33)**. The suit stemmed from BrickStreet's handling of a workers' compensation claim made against PAIS by one of its former employees. Id. In a nutshell, PAIS alleged that BrickStreet placed its own interests ahead of PAIS' interests when reaching a "settlement agreement" with the former employee, in that the agreement relieved BrickStreet from further liability for payment of benefits for reasonable and necessary medical expenses in the workers' compensation claim, but left PAIS exposed to pay the same in the deliberate intent action also filed by the same injured employee. Id. BrickStreet was represented by legal counsel in the workers' compensation claim, but Ms. Radabaugh was *pro se*. Id. PAIS was not involved in the settlement of the workers' compensation claim. Id.

On or about September 10, 2010, BrickStreet filed a motion to dismiss PAIS' complaint, pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. **(J.A.R. 34-58)**. BrickStreet argued that PAIS did not have standing to sue its own insurer, and further that it did not have any obligation to defend PAIS in the deliberate intent action. Id. PAIS countered by arguing that it did have standing to sue its own insurer—BrickStreet. **(J.A.R. 59-70)**. PAIS further argued that BrickStreet was obligated to pay unlimited reasonable and necessary medical benefits under the

workers' compensation policy, regardless of whether PAIS had purchased an excess exposure policy [covering deliberate intent claims]. Id. After the motion was fully briefed and argued, the circuit court entered an order denying BrickStreet's motion to dismiss. **(J.A.R. 133-134).**

On or about May 2, 2011, BrickStreet moved the circuit court to certify a question to the West Virginia Supreme Court of Appeals. **(J.A.R. 146-175).** Initially, the circuit court entered BrickStreet's proposed order certifying a question to this Court. **(J.A.R. 176-178).** However, PAIS objected to the order certifying the question and requested the circuit court to vacate the order. **(J.A.R. 179-223).** The circuit court agreed with PAIS and vacated the order certifying the question crafted by BrickStreet. **(J.A.R. 229-230).**

During the next three to four months, the parties engaged in written discovery and depositions. BrickStreet deposed Dale Rice (PAIS owner) and Marcia Radabaugh (the former employee who had filed the workers' compensation claim and deliberate intent claims against PAIS), and PAIS deposed Sally Edge (BrickStreet's Business Director) and Leilani VanMeter (BrickStreet's Claims Adjustor who "settled" Ms. Radabaugh's claim). Ms. VanMeter confirmed at her deposition that BrickStreet has changed its policy regarding settling a workers' compensation claim while a deliberate intent claim is pending. **(J.A.R. 295-296).** More specifically, BrickStreet will not settle a workers' compensation claim while a deliberate intent claims is also pending. Id.

On or about October 17, 2011, BrickStreet moved for summary judgment, on the grounds that “[b]ecause [PAIS]’ policy with BrickStreet does not provide [PAIS] with a right to participate in the settlement of claims made on the policy, [PAIS]’ allegations in the Complaint fail as a matter of law.” (J.A.R. 231-274). PAIS countered with the argument that its complaint against BrickStreet was not about PAIS “consenting” to settlement, but instead was about BrickStreet’s failure to honor the terms and provisions of the workers’ compensation policy regarding protecting PAIS from payment of reasonable and necessary medical expenses for an injured employee. (J.A.R. 275-303). After the motion was fully briefed and argued, the circuit court granted BrickStreet’s motion for summary judgment. (J.A.R. 369-376). In essence, the circuit court concluded that BrickStreet had no duty to communicate with PAIS regarding the settlement of the underlying workers compensation claim and that BrickStreet had no duty to get consent from PAIS prior to settling the workers’ compensation claim. Id. The circuit court specifically concluded that there was no evidence in the record to support any finding that BrickStreet had violated the insurance contract, the common law on bad faith or the UTPA. (J.A.R. 375-376).

Prior to its entry, PAIS filed objections and exceptions to the final order prepared by BrickStreet and presented its own proposed order to the circuit court for entry. (J.A.R. 360-368). In its objections and exceptions, PAIS argued that BrickStreet’s proposed order mischaracterized the case and that genuine issues of material fact did exist in the case. Id.

SUMMARY OF ARGUMENT

This case warrants review by this Honorable Court because it raises narrow issues of law of fundamental public importance to employers throughout the State of West Virginia. A decision will provide significant guidance with regards to the rights of employers who have procured workers' compensation insurance but have not procured excess liability insurance coverage, specifically when an employee has brought both a workers' compensation claim and a deliberate intent claim.

On August 11, 2010, PAIS sued its own insurer, Brickstreet, alleging various first-party theories of liability, including breach of contract and bad faith claims arising from BrickStreet's failure to protect and serve the interests of its insured, PAIS. **(J.A.R. 1-33)**. The actions arose from BrickStreet's mishandling of the settlement of a workers' compensation claim made by a former employee, Marcia Radabaugh, who had also filed a deliberate intent type action against PAIS. BrickStreet had actual knowledge of the deliberate intent action and the identity of Ms. Radabaugh's counsel therein. **(J.A.R. 40)**. In fact, BrickStreet declined to defend or indemnify PAIS with regards to the deliberate intent action--citing PAIS's failure to procure excess exposure coverage. Id.

BrickStreet was represented by legal counsel in the workers' compensation case and the deliberate intent case. Ms. Radabaugh was not represented by counsel in the workers' compensation case, but she was represented by counsel in the deliberate

intent case. Once BrickStreet refused to defend the deliberate intent action, PAIS secured private counsel to defend its interests therein.

It is undisputed that PAIS' employee, Ms. Radabaugh, was working within the scope and course of her employment on July 22, 2006, when she was injured by a client of PAIS. It is undisputed that PAIS had in full force and effect a workers' compensation policy with unlimited benefits for reasonable and necessary medical care and treatment for injured employees. The overwhelming evidence in the case is that Ms. Radabaugh needed long-term medical treatment, which included *inter alia* very expensive rhizotomy procedures designed to numb the nerve endings in her neck and to alleviate the excruciating neck pain she was experiencing. In fact, every physician who actually examined Ms. Radabaugh and evaluated her neck injury agreed she needed the long-term medical treatment, which included the rhizotomies. The only "physician" who did not concur that Ms. Radabaugh needed the long-term medical care and treatment was BrickStreet's medical review physician, who only examined Ms. Radabaugh's medical records. BrickStreet's medical review physician never examined Ms. Radabaugh. On the other hand, BrickStreet paid physicians who actually examined Ms. Radabaugh, and they all concluded that she did need the long-term medical care and treatment which included the expensive rhizotomies. **(J.A.R. 290, 292, 298).**

In the fall of 2008, Ms. Radabugh was experiencing great pain and she was in desperate need of a rhizotomy treatment. **(J.A.R. 297-301).** Despite having actually knowledge that physicians had opined Ms. Radabaugh needed long-term medical

treatment, including the rhizotomies, BrickStreet refused to pay for the treatment. **(J.A.R. 288-301)**. (Ms. Radabaugh's reasonable and necessary future medical care and treatment is projected to cost in excess of \$1.0 million). Shortly thereafter, BrickStreet informed Ms. Radabaugh that they were pay her a lump sum of \$50,000.00, but that she had to “settle” her workers’ compensation claim for that amount. Id. According to Ms. Radabaugh, BrickStreet [misrepresented] to her that BrickStreet had paid out all it could under the workers’ compensation policy purchased by PAIS and that there was no more money available to her. Id. BrickStreet refused to pay for the much needed rhizotomy as ongoing treatment, but did agree to pay her the settlement amount, so she could seek treatment on her own. Id. At the time of the agreement, both Ms. Radabaugh and BrickStreet had actual knowledge that Ms. Radabaugh needed long-term medical care and treatment the cost of which would far exceed the amount of the settlement. Id. Accordingly, Ms. Radabaugh, who was *pro se*, inquired about who would pay for her long-term medical care and treatment. Id. BrickStreet informed her that she was at her limit with her workers’ compensation claim and that she could get the additional monies for her medical care and treatment from her employer, PAIS. Id.

BrickStreet admits that the workers’ compensation insurance policy issued to PAIS had no limit as to the amount of medical benefits that could be paid to Ms. Radabaugh for future medical treatment. **(J.A.R. 289)**. Thus, the evidence reveals that BrickStreet misrepresented to Ms. Radabaugh that she had reached her limit and that

there was no more coverage, in order to relieve BrickStreet of any additional liability. However, the evidence reveals that Ms. Radabaugh was redirected to PAIS.

It this action against BrickStreet, PAIS contends that BrickStreet placed its own interests ahead of PAIS in order to “effectuate a settlement” of the workers' compensation claim and relieve BrickStreet of any further liability. However, when doing so, BrickStreet knew the deliberate intent claim was still pending and that PAIS would then be exposed to payment of substantial expenses for long-term medical care and treatment. PAIS further contends that BrickStreet’s actions were fraudulent and solely for the purpose of inducing Ms. Radabaugh to sign the “settlement agreement” to relieve BrickStreet from further liability. The settlement agreement did not impede Ms. Radabaugh’s legal ability to collect monies from PAIS for the long-term medical care and treatment.

PAIS did not consent to the “settlement agreement” between BrickStreet and Ms. Radabaugh, and PAIS does not contend that its consent was required. However, PAIS does contend that BrickStreet was legally, contractually and statutorily bound to protect PAIS from payment of any reasonable and necessary medical treatment associated with the work-related injury. However, instead of doing so, BrickStreet placed its own interests above those of PAIS. Notably, the record in this case reveals that BrickStreet has now changed its policy and BrickStreet will not settle a workers' compensation case when a deliberate intent case is pending.

Finally, PAIS submits that BrickStreet breached its duty to PAIS under the workers' compensation policy to protection PAIS and to indemnify PAIS for payment of reasonable and necessary medical benefits to an injured employee. As a direct and proximate result of BrickStreet's breach of its legal and contractual duties to its insured, PAIS was unexpectedly faced with closing its businesses in order to pay the additional long-term medical care and treatment needed by Ms. Radabaugh.

In order to save its business, PAIS paid Ms. Radabaugh \$50,000.00 for her future medical care and treatment and gave her an assignment of its first-party rights against BrickStreet for refusing to afford the undisputed coverage under the workers' compensation policy. PAIS also incurred attorneys' fees and expenses and experienced emotional distress, aggravation, inconvenience and annoyance with the prospect of losing its businesses even though it had procured insurance from BrickStreet.

Hereinbelow, BrickStreet moved the circuit court for summary judgment on the sole issue of whether BrickStreet was required to obtain the consent of PAIS prior to reaching a settlement agreement in the underlying workers' compensation case. PAIS did not dispute the issue and PAIS did not contend BrickStreet *was* required to obtain PAIS' consent prior to settlement of the workers compensation claim. However, PAIS contends that consent is not a material issue with regards to BrickStreet's failure to protect PAIS interests under the workers' compensation policy. More specifically, PAIS contends that BrickStreet owed duties to PAIS with regards to fully and completely

indemnifying PAIS for reasonable and necessary medical expenses of Ms. Radabaugh. Accordingly, as a direct and proximate result of BrickStreet's actions or inactions, PAIS remained exposed to payment of Ms. Radabaugh's medical expenses and faced closure of its businesses. The circuit court erred by expanding the BrickStreet's motion for summary judgment on consent to a motion for summary judgment on all issues set forth in PAIS' complaint.

STANDARD OF REVIEW

This appeal arises from an order of the circuit court that granted summary judgment in favor of BrickStreet. "A circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). Accord Syl. pt. 2, Jackson v. Putnam Cnty. Bd. of Educ., 221 W.Va. 170, 653 S.E.2d 632 (2007); Syl. pt. 1, Mueller v. Am. Elec. Power Energy Servs., Inc., 214 W.Va. 390, 589 S.E.2d 532 (2003). In other words, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, Painter, 192 W.Va. 189, 451 S.E.2d 755. "As a general rule, a trial court may not grant summary judgment *sua sponte* on grounds not requested by the moving party. An exception to this general rule exists when a trial

court provides the adverse party reasonable notice and an opportunity to address the grounds for which the court is *sua sponte* considering granting summary judgment.” Syllabus Point 4, Loudin, et ux. V. Nat’l Liability & Fire Ins. Co. 2011 WL 4536682 (Slip Op., No. 35763, Sept. 22, 2011).

ARGUMENT

- A. The trial court erred by granting full summary judgment and dismissing PAIS’ entire case from the docket, when the only issue raised by BrickStreet in its motion for summary judgment was the narrow, uncontested immaterial issue of consent.**

“As a general rule, a trial court may not grant summary judgment *sua sponte* on grounds not requested by the moving party.” Syl. Pt. 4, in part, Loudin, et ux. V. Nat’l Liability & Fire Ins. Co. 2011 WL 4536682 (Slip Op., No. 35763, Sept. 22, 2011). The grounds and argument advanced by BrickStreet in support of its motion for summary judgment before the circuit court were very specific. Precisely, BrickStreet’s motion was hinged entirely on its contention that “[PAIS’ workers’ compensation insurance] policy with BrickStreet does not provide [PAIS] with a right to participate in the settlement of claims made on the policy, [PAIS’] allegations in the Complaint fail as a matter of law.” It was based upon this sole argument that BrickStreet sought and obtained summary judgment as to all counts set forth by PAIS’ in its complaint must fail.

Essentially, BrickStreet’s argument is that PAIS had neither a contractual right, nor a legal right to participate in the settlement of a workers’ compensation claim.

However, PAIS does not contend it has any contractual or legal right to participate in the settlement of a workers' compensation claim. In other words, this issue was not disputed by PAIS before the circuit court, and PAIS contends that the "consent" or "participation" issue was a red herring and is not dispositive of its complaint against BrickStreet. PAIS made this very same argument to the circuit court, essentially conceding that consent and participation were not required. Nonetheless, the circuit court granted full summary judgment to BrickStreet on all counts of PAIS' complaint.

In its order granting summary judgment to BrickStreet, the circuit court reiterated the singular premise upon which the motion for summary judgment was brought as follows: "BrickStreet filed its Motion for Summary Judgment and Memorandum in Support ("BrickStreet's Motion"), arguing that Plaintiff's allegations of wrongful conduct by BrickStreet are based solely on BrickStreet's alleged failure to permit PAIS to participate in and object to the settlement of Ms. Radabaugh's workers' compensation claim." (J.A.R. 370). The circuit court's order went on to note that PAIS' first-party case was premised on a theory that BrickStreet accorded its own interests and rights over that of its insured, citing Shamblin v. Nationwide Mutual Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990). Id.

Notwithstanding the circuit court's realization that BrickStreet's motion for summary judgment was hinged on a single theory, a theory which PAIS both rejected and countered, the circuit court summarily dismissed PAIS' entire complaint. Specifically, the circuit court rendered the broad-sweeping conclusions on all three

counts of PAIS' complaint against BrickStreet. As to the breach of contract count, the circuit court concluded:

5. In accepting and settling the workers' compensation claim brought by Ms. Radabugh, BrickStreet satisfied all duties owed to PAIS, arising under West Virginia law and the Policy issued to PAIS. PAIS has failed to provide any evidence that BrickStreet breached any duty owed to it under the policy. Consequently, BrickStreet's Motion, as to the breach of contract claim, is **GRANTED**.

As to the common law bad faith count, the circuit court concluded:

6. Notwithstanding PAIS' generalized claims that BrickStreet accorded its own interests and rights over and above that of PAIS, PAIS has failed to provide evidence of any act or omission on the part of BrickStreet which may constitute a breach or violation of a common law tort duty owed to PAIS. Specifically, PAIS has failed to show any basis for recovery under West Virginia's common law bad faith jurisprudence, as expressed in Miller v. Fluharty, 201 W.Va. 685, 500 S.E.2d 310 (1997) and Hayseeds, Inc. v. State Farm Fire & Cas., 177 W.Va. 323, 352 S.E.2d 73 (1986), because PAIS has not and cannot "substantially prevail in enforcing the insurance contract." Syl. Pt. 4, Miller v. Fluharty, 201 W.Va. 685, 500 S.E.2d 310 (1997). Consequently, BrickStreet's Motion, as to the common law bad faith claim, is **GRANTED**.

As to the UTPA count, the circuit court concluded:

7. Similarly, PAIS has failed to provide evidence that BrickStreet's dealing with PAIS constituted a single violation of any provision of West Virginia Code 33-11-1 et. seq, let alone a business practice, as required by the statute. Consequently, BrickStreet's Motion, as to the claim of violations of the Unfair Trades Practices Act, is **GRANTED**.

The circuit court therefore ordered that "all claims in the above-styled civil action be DISMISSED, with prejudice" (J.A.R. 375-376).

Notwithstanding the fact that evidence did exist in the record to support PAIS' contention that BrickStreet violated its contractual obligations, common law bad faith and the UTPA, the motion for summary judgment brought by BrickStreet was premised solely on the issue of whether PAIS had the right to participate in the settlement. In other words, BrickStreet's motion for summary judgment did not assert that the record was void of any evidence that BrickStreet violated its contractual obligations, common law bad faith and the UTPA, as BrickStreet's argument was limited to the issue of participation.

Using BrickStreet's rationale, an insured who has no right to participate in the settlement of a workers' compensation claim thereby loses any possible first-party claim the insured may have against the insurer for inadequately protecting the rights and interests of the insured with respect to the settlement agreement. BrickStreet's theory is a virtual stiff-arm to the entire body of law supporting first-party bad faith actions where an insurer places its rights and interests ahead of that of its insured. Certainly, BrickStreet is not immune from first-party insurance liability.

West Virginia law is well-settled that an insurer has a clear duty to attempt in good faith to negotiate a settlement with an injured third party and to accord interests and rights of the insured at least as great a respect as its own. In fact, an insurer's failure to do so is *prima facie* first-party bad faith. In Syllabus Point 2 of Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990), this Court held:

Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured's best interest and such failure to so settle prima facie constitutes bad faith toward its insured.

In the case *sub judice*, the parties agree there was no limit on the amount of medical benefits which could be paid to injured former employee of PAIS'. Nonetheless, BrickStreet elected to essentially threaten to withhold any additional payment of medical benefits to the former employee, unless she would accept the lump sum payment of \$50,000.00. In doing so, BrickStreet had actual knowledge that its insured, PAIS, was defending a deliberate intent claim brought the same employee and that PAIS was exposed to pay additional sums for medical benefits in that proceeding. Instead of fully protecting PAIS and taking responsibility for all reasonable and necessary medical bills of the former employee, BrickStreet chose to relieve itself of any further liability and leave its insured, PAIS, to fend for itself. The actions of BrickStreet in this regard are the very essence of first party bad faith, as enunciated in Shamblin, *supra*.

Notwithstanding the evidence in the case, the circuit court disposed of the entire case when the motion for summary judgment was clearly on the sole issue of participation. "As a general rule, a trial court may not grant summary judgment *sua sponte* on grounds not requested by the moving party. An exception to this general rule exists when a trial court provides the adverse party reasonable notice and an opportunity to address the grounds for which the court is *sua sponte* considering

granting summary judgment.” Syl. Pt. 4, Loudin, et ux. V. Nat’l Liability & Fire Ins. Co. 2011 WL 4536682 (Slip Op., No. 35763, Sept. 22, 2011). In the case sub judice, neither the circuit court nor BrickStreet gave PAIS notice that the motion for summary judgment was based on any ground other than the participation issue, and no notice was afforded to PAIS that the circuit court intended to view the participation issue as wholly dispositive of the entire complaint.

In its complaint, PAIS alleged three counts against BrickStreet. The first count is breach of contract. (J.A.R. 7-8). In order prevail on a breach of contract claim, PAIS must demonstrate a *prima facie* case of the existence of a contract and a breach of the terms thereof and damage as a proximate result. Participation in reaching a settlement agreement is not an element of a breach of contract action.

The second count of PAIS’ complaint is common law bad faith. (J.A.R. 8-9). The phrase 'bad faith' was developed to describe the common law action against an insurer. A common law bad faith cause of action was first recognized in Hayseeds, Inc. v. State Farm Fire & Casualty, 177 W.Va. 323, 352 S.E.2d 73 (1986), wherein this Court held that there was a common law duty of good faith and fair dealing running from an insurer to its insured. A bad faith claim sounds in tort. In order prevail on a common law bad faith claim, PAIS must demonstrate a *prima facie* case of a duty, breach, and damage as a proximate result. Participation in reaching a settlement agreement is not an element of a first-party bad faith action.

The third count of PAIS complaint is violation of the UTPA. (J.A.R. 9-11). The phrase 'unfair settlement practices' was developed to describe the statutory action against an insurer. The UTPA creates a positive duty independent of any insurance contract, and a cause of action may be maintained based on the violation of the statutory duty. Taylor v. Nationwide Mut. Ins. Co., 214 W.Va. 324, 589 S.E.2d 55 (2003). In The bad faith statute, W.Va.Code § 33-11-4(9) [1985], provides in relevant part that “[n]o person shall commit or perform with such frequency as to indicate a general business practice any of the following:” In order prevail on a UTPA, PAIS must demonstrate a *prima facie* case of violation of one or more provisions of the UTPA with such frequency so as to constitute a general business practice. Participation in reaching a settlement agreement is not an element of a UTPA action.

Without question, if the merits of PAIS’ claims of breach of contract, common law bad faith and violation of UTPA had been presented to the circuit court on a motion for summary judgment, the court has the authority to decide as a matter of law whether a BrickStreet’s conduct may reasonably be construed to have demonstrated the elements of any or all of these claims. However, PAIS contends that the circuit court should not have and could not have properly decided whether summary judgment was appropriate on the three counts of their complaint because BrickStreet never sought summary judgment on those claim. Instead, BrickStreet sought summary judgment on the sole issue of participation—an issue which PAIS did not dispute.

The circuit court's error occurred when issue of participation was transformed, without warning, into a broad-sweeping summary dismissal of all counts and the entire complaint. Perhaps, the circuit court concluded that BrickStreet was actually seeking summary judgment on all counts of the complaint based solely upon the participation issue. However, the circuit court's summary dismissal of all claims was not based on the participation issue. Instead, the circuit court reached conclusions of law, without any corresponding factual basis, there was no evidence in the record to support any of the three counts set forth in PAIS' complaint.

The circuit court's summary judgment order did not discuss any particular evidence surrounding the three counts set forth in PAIS' complaint, other than the participation issue. Notwithstanding the fact that there is evidence in the record to support all three counts of PAIS' complaint, BrickStreet did not rest its motion for summary judgment on a claim of lack of evidence. Consequently, PAIS did not offer evidence in opposition to an argument which was not advanced by BrickStreet. In other words, the circuit court *sua sponte* invoked an alternative ground for granting summary judgment on all three counts of PAIS' complaint by issuing a broad-sweeping order summarily dismissing the same. It was improper for the circuit court to summarily dismiss the entire complaint, without warning to PAIS, when the only issue brought for summary judgment was that of participation.

B. The trial court erred by granting summary judgment based upon the workers' compensation claim release document, where a genuine issue of material fact existed as to the execution of the release and the intent of the parties with respect to the effect of the release.

"Although [the] standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl. pt. 3, Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).

It is undisputed that PAIS' workers' compensation insurance policy afforded unlimited coverage for reasonable and necessary medical benefits to injured employees. (J.A.R. 289). It is also undisputed that every medical provider requested to examine the thirty-five (35) year old injured employee agreed that she needed rhizotomies every six months to two years, and that the anticipated average cost of each procedure was \$5,000.00. (J.A.R. 290). BrickStreet admitted that cost of the future medical treatment, if paid, would far exceed the amount of the \$50,000.00 workers' compensation settlement it negotiated, and that an attempt to settle such a claim for only \$50,000.00 would not be "ethical." (J.A.R. 290-292).

In this case, PAIS presented sufficient evidence upon which a jury could conclude that BrickStreet placed its own rights and interests ahead of those of PAIS, for the purpose of capping its own exposure for payment of future medical benefits. However, when doing so, BrickStreet had actual knowledge that the injured employee

had a parallel deliberate intent suit pending against PAIS. Moreover, the testimony of the injured employee reveals that she was instructed by BrickStreet that she could recover payment for the long-term future medical expenses in her parallel deliberate intent suit against PAIS. (J.A.R. 301).

In its actual ruling, the circuit court did not discuss the disputed evidence relating to who was responsible for payment of the injured employee's long-term future medical bills following BrickStreet's purported "settlement" agreement. Instead, the circuit court appears to have found that the *pro se* injured employee released PAIS from liability as to all future medical benefits. Notwithstanding the fact that the release agreement was neither offered nor considered in the context of the deliberate intent suit, it is clear that BrickStreet did not consult with or notify the injured employee's legal counsel in the deliberate intent suit that it was procuring a release which BrickStreet expected to bar her from collecting future medical benefits in the parallel proceeding. Likewise, BrickStreet did not consult with PAIS or its counsel regarding the matter, and PAIS eventually paid the injured employee additional monies. In any event, the record reveals that there is a genuine issue of material fact as to the intent of the parties with respect to the terms of the release agreement.

The circuit counsel was required to both recognize the existence of the disputed evidence surrounding the "release" and to view it in the light most favorable to the non-movant, PAIS. "The circuit court's function at the summary judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there

is a genuine issue for trial." Williams v. Precision Coil, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (quoting, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)). "Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. Williams v. Precision Coil, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (quoting, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 553 (1986); Masinter v. WEBCO Co., 164 W.Va. 241, 262 S.E.2d 433 (1980); Andrick v. Town of Buckhannon, 187 W.Va. 706, 708, 421 S.E.2d 247, 249 (1992)).

In the case *sub judice*, the circuit court did not discuss or evaluate the relevant evidence surrounding the settlement agreement to determine whether there is a genuine issue of material fact for trial as to the intent of the parties. Instead, the circuit court simply made minimum findings of fact, which were not determinative of the issues set forth in the three counts of PAIS' complaint against BrickStreet, and summarily dismissed the entire complaint. Accordingly, the circuit court did not make the necessary findings of fact as required by this Court in Syl. pt. 3, Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).

CONCLUSION

The circuit court erred by granting summary judgment to BrickStreet with a broad-sweeping order that dismissed PAIS' entire complaint. The record is clear that the issue upon which BrickStreet sought summary judgment was whether PAIS had the

right to participate in the settlement of a workers' compensation claim. This issue was not even disputed by PAIS. A trial court may not grant summary judgment *sua sponte* on grounds not requested by the moving party. An exception to this general rule exists when a trial court provides the adverse party reasonable notice and an opportunity to address the grounds for which the court is *sua sponte* considering granting summary judgment. In this case, there was no notice given to PAIS that the circuit was contemplating summary dismissal of PAIS' entire complaint. Moreover, the circuit court apparently ignored the evidence demonstrating that BrickStreet afforded its own rights and interests ahead of that of its insured, PAIS.

The circuit court erred by reaching conclusions of law on PAIS' three-count complaint without any correspondence factual findings to support such conclusions. Moreover, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, Painter, 192 W.Va. 189, 451 S.E.2d 755. As to the three-count complaint of PAIS, there are certainly genuine issues of material fact and those issues should be resolved by a jury.

RELIEF SOUGHT

Accordingly, your petitioner respectfully requests this Honorable Court to **REVERSE** the circuit court's order granting summary judgment in favor of BrickStreet, and to **REMAND** this matter to the circuit court for further proceedings, and for such other relief as the Court deems just and proper.


Signed: _____
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Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2012, a true and accurate copy of the foregoing *Petitioner's Brief* was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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