

**IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA**

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

**Plaintiff-petitioner,**

**v.**

**Docket Number: 12-0044**

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

**Defendant-respondent.**

From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 10-C-1443

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**RESPONDENT'S BRIEF OF WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE  
COMPANY, d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY**

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## I. ASSIGNMENTS OF ERROR

*A. Petitioner Psychological Assessment and Intervention Services, Inc. (“PAIS” or “Petitioner”) argues in its Brief that “the trial Court erred by granting full summary judgment and dismissing PAIS’ entire case from the docket, when the only issue raised by the BrickStreet in its Motion for Summary Judgment was the narrow, uncontested issue of consent.”*

Petitioner’s first Assignment of Error is without merit and unsupported by the record. As explained in the Argument Section of this Brief and as is abundantly clear from the Court’s Final Order Granting the Motion for Summary Judgment by BrickStreet Mutual Insurance Company, (“Final Order”), as well as the entire record, the Circuit Court properly considered all evidence and legal authority before granting summary judgment on every aspect of Petitioner’s case for West Virginia Employers’ Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company (“BrickStreet” or “Respondent”).

*B. Petitioner argues in its Brief that “the trial Court erred by granting summary judgment based upon the workers’ compensation 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.”*

Petitioner’s second Assignment of Error is inscrutable and without merit. As explained in the Argument Section of this Brief, PAIS’ position on the “intent of the parties” regarding the execution of Marcia Radabaugh’s (“Radabaugh”) workers’ compensation release has no bearing on any aspect of PAIS’ claims below. PAIS essentially faults the Circuit Court for its failure to re-litigate Radabaugh’s workers’ compensation medical claims, in order to collaterally attack her workers’ compensation settlement agreement. This circular argument by PAIS is rebutted by the fact that PAIS has no right to object to or participate in the settlement of Radabaugh’s workers’ compensation claim and has no standing to bring suit based on the amount of the settlement alone -- a point that PAIS now agrees with and raises as irrelevant in its first assignment of error. This argument is also rebutted by the fact that there is a written

settlement agreement that clearly and unambiguously expresses the intent of the parties to the agreement.

## II. STATEMENT OF THE CASE

Pursuant to West Virginia Rule of Appellate Procedure 10(d), Respondent deems it essential to correct inaccuracies and omissions in the “Statement of the Case” section of the Petitioner’s Brief. Petitioner’s Statement of the Case portrays the case *sub judice* in an overly simplistic fashion, and mischaracterizes the true nature of the Petitioner’s allegations and legal theories below. A complete understanding of PAIS’ novel “bad faith” legal theories below will be critical to this Court’s understanding of the Circuit Court’s reasoning for its summary judgment dismissal and the resolution of the issues presented on appeal. Accordingly, and with this Court’s indulgence, Respondent provides the following clarification, and additional explanation of the facts and legal theories that make up the case below.

PAIS’ case below, styled as a breach of contract and insurance “bad faith” case, attempts to impose common law and statutory bad faith liability on a workers’ compensation carrier, for nothing more than faithfully and dutifully settling a workers’ compensation claim brought against its insured by the insured’s employee when such employee is also making a deliberate intent claim against the employer. PAIS’ theory of liability in the case below arises out of the confluence of West Virginia’s workers’ compensation and deliberate intent law, and utilizes the faulty premise that a complete workers’ compensation settlement can somehow “expose” the employer to “unlimited” additional future medical and wage damages in a deliberate intent action for the same injury.<sup>1</sup> Thus, under PAIS’ theory, no matter how high the workers’ compensation settlement, the workers’ compensation settlement will have left the

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<sup>1</sup> PAIS repeatedly claims in Petitioner’s Brief that future compensable medical and wage benefits under workers’ compensation are “unlimited.”

employer “exposed” to additional future medical and future wage loss damages in a deliberate intent claim, giving rise to a bad faith suit.

On July 22, 2006, PAIS was insured by a Workers’ Compensation and Employers’ Liability Insurance Policy, issued by BrickStreet (“the Policy”), which covered workers’ compensation claims made pursuant to and under the authority of West Virginia’s workers’ compensation laws. J.A.R. 2-3, Complaint, ¶¶ 3, 4. The Policy issued by BrickStreet expressly reserves the exclusive right to investigate and settle workers’ compensation claims to BrickStreet, and provides no right of participation or control in the settlement of claims to PAIS. J.A.R. 16. PAIS did not purchase from BrickStreet an insurance policy which provided liability coverage for “deliberate intent” liability arising out of West Virginia Code § 23-4-2. J.A.R. 5, Complaint, ¶ 15.

On July 22, 2006, Radabaugh, an employee of Petitioner, sustained a work-related injury. J.A.R. 4, Complaint, ¶ 8. On August 9, 2006, BrickStreet authorized Claim No. 2006048030, covering PAIS for the workers’ compensation claim of Radabaugh. J.A.R. 4, Complaint, ¶ 9. On May 10, 2007, Radabaugh filed a deliberate intent civil action in the Circuit Court of Wood County, West Virginia, against PAIS arising out of the same work-related injury of July 22, 2006. J.A.R. 4, Complaint, ¶10. Because PAIS did not purchase coverage through BrickStreet for civil deliberate intent liability, BrickStreet properly denied PAIS’ request for coverage, defense and indemnification of Radabaugh’s deliberate intent liability suit against PAIS. J.A.R. 5, Complaint, ¶ 12, 15.

On October 21, 2008, Radabaugh and BrickStreet executed the Full and Final Settlement Agreement which settled all aspects of Radabaugh’s workers’ compensation claim

for \$50,000.00. J.A.R. 268 - 272. Pursuant to the Full and Final Settlement Agreement executed by Radabaugh, the parties settled “any and all issues [including future medical benefits] that have existed or do now exist between the parties as a result of claimant’s filing of the claim. . .” J.A.R. 269. BrickStreet did not consult with Petitioner regarding the settlement terms prior to settling Radabaugh’s workers’ compensation claim. J.A.R. 5, Complaint, ¶ 14.

After the settlement of Radabaugh’s workers’ compensation claim, Radabaugh settled her deliberate intent action with her employer PAIS. As consideration for the release from Radabaugh’s civil deliberate intent claim, PAIS agreed to pay \$50,000.00 to Radabaugh, and assigned to Radabaugh its first-party right to bring the underlying bad faith lawsuit against BrickStreet. J.A.R. 6-7, Complaint, ¶ 19. Representing Radabaugh in her deliberate intent case was the Ranson Law Offices, PLLC. The Ranson Law Offices now brings the underlying first party bad faith case, in PAIS’ name, against BrickStreet.

The Complaint below, brought in the name of PAIS, rather than Marcia Radabaugh, to whom the first- party bad faith claim now belongs, was filed on August 11, 2010. Carefully constructing the Complaint so as to preserve the fiction that this matter is being prosecuted by PAIS and not Radabaugh (and to avoid obvious rhetorical inconsistencies), PAIS alleges that BrickStreet “exposed the assets” of PAIS to future compensable medical and wage damages in Radabaugh’s deliberate intent action when it settled Radabaugh’s workers’ compensation claim. The only act or omission within the Complaint allegedly constituting “bad faith” by BrickStreet is the fact that BrickStreet settled Radabaugh’s workers’ compensation claim “without notice” to PAIS and for an insufficient amount. J.A.R. 2-13, Complaint, J.A.R. 59-69, Response to Motion to Dismiss.

Based on the premise that BrickStreet's settlement with Radabaugh exposed PAIS' assets to deliberate intent damages, the Complaint below brings claims for Breach of Contract (Count I), Common Law Bad Faith (Count II), and Unfair Trade and Claim Practices (Count III). J.A.R. 2-13. Each Count in the Complaint is based on the notion that future medical and wage loss damages in a deliberate intent lawsuit should be covered by a policy of workers' compensation insurance, and therefore, a workers' compensation insurer must provide some coverage for deliberate intent claims, regardless of whether the insured purchased deliberate intent liability insurance. J.A.R. 2-13. In Count I, Breach of Contract, PAIS alleges that BrickStreet breached a duty to PAIS by "denying coverage to PAIS and declining to defend PAIS against those aspects of Ms. Radabaugh's [deliberate intent] lawsuit which were covered by the [workers' compensation] Policy issued to PAIS." J.A.R. 7, Complaint, § 23 (emphasis supplied). Under Count II, Common Law Bad Faith, PAIS alleges that BrickStreet had a duty to "make coverage determinations concerning the policy and Ms. Radabaugh's claims and suits in good faith, including the determination that PAIS was covered and BrickStreet would assume the costs of defense and settlement related to said covered damages," and further that BrickStreet "negligently, recklessly, willfully, maliciously, intentionally, in bad faith and in an untimely manner den[ie]d coverage to PAIS under the policy with respect to Ms. Radabaugh's future wage loss and future medical expenses and by failing to assume the costs of defense with regards thereto." J.A.R. 8-9, Complaint, ¶¶ 27, 28 (emphasis supplied). Finally, in Count III, Unfair Trade and Claims Practices, PAIS alleges that "BrickStreet breached its duty to refrain from unfair trade practices by overlapping employers' excess liability insurance with its workers' compensation insurance and thereby preventing, obstructing, deceiving, or confusing PAIS or

other insurance purchasers from understanding the nature of the coverage and any supposedly applicable exclusions.” J.A.R. 11, Complaint, ¶ 35.

Thus, the legal premise of the Complaint below is that all workers’ compensation carriers in West Virginia are under an implied-in-law duty to cover aspects of a deliberate intent lawsuit such as future medical and wage claims, regardless of whether the employer/worker’s compensation insured purchased deliberate intent coverage or not. Under PAIS’ theory, a good faith settlement of the workers’ compensation claim gives rise to bad faith liability, where a deliberate intent claim for future damages is also pending. If PAIS’ theory is correct, there would be no reason for West Virginia employers to purchase insurance coverage for deliberate intent claims.

BrickStreet promptly moved the Circuit Court for dismissal of PAIS’ claims based on (1) the fact that PAIS had assigned its right to sue BrickStreet to Marcia Radabaugh and no longer had standing to bring these claims, and (2) PAIS’ claims as outlined in the Complaint fail as a matter of law because the Policy of PAIS did not provide deliberate intent coverage and BrickStreet’s settlement of Radabaugh’s workers’ compensation claim did not and could not “expose assets” of PAIS. J.A.R. 34-58. PAIS responded to BrickStreet’s Motion to Dismiss and argued that “BrickStreet secretly settled a workers compensation claim pending against its insured, PAIS,” and that “it was the conduct of BrickStreet in secretly settling the workers compensation claim with PAIS’s employee, which led to the unnecessary exposure of PAIS’s assets.” J.A.R. 59-70. At oral argument, counsel for PAIS argued that BrickStreet “can’t settle the medicals and leave their client [PAIS] owing the medicals.” J.A.R. 113. Counsel for PAIS further distilled PAIS’ case: “That’s in effect what BrickStreet did. They settled, without any notice to PAIS, the workers’ compensation claim, to get themselves off the hook, and left

PAIS holding the bag... As long as they hadn't settled that claim, Ms. Radabaugh couldn't claim a penny of the Million dollars in this case, because that's a dollar-for-dollar offset... It's only once they've settled --" The Circuit Court responded to PAIS' arguments against dismissal by stating that "[t]his whole thing seems like a big, huge stretch to me, to be honest." J.A.R. 120. The Court also proposed that the parties "short circuit a lot of this to determine if there is a cause of action that exists, maybe with a certified question to the Supreme Court," and asked the parties to "see if you can get a certified question ready." J.A.R. 126.<sup>2</sup> The Court ultimately found that "I think there may well be some discovery that is necessary before I can reach an ultimate conclusion one way or the other at summary judgment." J.A.R. 131.

After limited discovery was had on PAIS' claims, the Motion for Summary Judgment by BrickStreet Mutual Insurance Company ("BrickStreet's Motion") was filed. BrickStreet's Motion sought summary judgment dismissal on all counts in Petitioner's Complaint. In its Final Order, the Court properly concluded that "[b]ecause PAIS did not purchase insurance coverage for deliberate intent liability from BrickStreet, BrickStreet had no duty to defend or indemnify PAIS in the deliberate intent lawsuit brought by Ms. Radabaugh in the Circuit Court of Wood County, West Virginia." J.A.R. 374, Final Order, Conclusion of Law ¶ 3. The Court also noted that damages available to a plaintiff in a deliberate intent civil claim are for "any excess of damages over the amount received or receivable in a claim for benefits under this chapter, whether filed or not." J.A.R. 374. Final Order, Conclusion of Law ¶ 4. Therefore, the Circuit Court concluded that "the settlement of Ms. Radabaugh's workers' compensation claim cannot and did not 'expose the assets' of PAIS to claims in Radabaugh's

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<sup>2</sup> The parties ultimately agreed on a certified question as reflected in Defendant's Proposed Order Certifying Question to the West Virginia Supreme Court of Appeals. J.A.R. 176-178. As explained by Petitioner, PAIS rejected the proposed question after it was answered in a manner that it did not like.

deliberate intent civil action.” J.A.R. 375, Final Order, Conclusions of Law 4. The Circuit Court also properly concluded that “[i]n accepting and settling the workers’ compensation claim brought by Ms. Radabaugh, 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.” J.A.R. 375, Final Order, Conclusions of Law, ¶5. Conclusion of Law 6 stated that “PAIS has failed to show any basis for recovery under West Virginia’s common law bad faith jurisprudence” and granted Brickstreet’s Motion as to the common law bad faith claim.<sup>3</sup> J.A.R. 375. Conclusion of Law 7 stated that “PAIS has failed to provide evidence that BrickStreet’s dealing with PAIS constituted a single violation of West Virginia Code § 33-11-1 *et.seq.*, let alone a business practice” and granted Brickstreet’s Motion as to the claim for violations of the Unfair Trade Practices Act.<sup>4</sup> J.A.R. 375-376.

### III. SUMMARY OF ARGUMENT

A. PAIS’ argument that the Circuit Court granted summary judgment for BrickStreet based on the “narrow issue of consent” is demonstrably false. This assignment of error is baseless and easily refuted by examination of the record below.

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<sup>3</sup>“ 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.”

<sup>4</sup> 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 Trade Practices Act, is GRANTED.

B. PAIS' argument that the Circuit Court granted summary judgment for BrickStreet based on the workers' compensation settlement release document, but failed to consider a genuine issue of material fact about the execution of the release and the intent of the parties of the release, is wholly without merit and has no bearing on PAIS' claims in the matter below. PAIS is attempting to change the very nature of this case, into a claim by Radabaugh that her workers' compensation settlement was inadequate. That issue was not presented in PAIS' claims below, is irrelevant to a discussion of PAIS' claims, and was not raised by PAIS as defense to summary judgment.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This matter presents no issues of first impression, is based upon well established rules of contractual interpretation, established regulations, and therefore no oral argument is necessary. This case is appropriate for a Memorandum Decision under Rule 21 of the Appellate Rules of Procedure. However, should this Court desire oral argument, twenty minutes per side should be sufficient.

#### **V. ARGUMENT**

*A. Petitioner PAIS' First Assignment of Error Which Asserts that Brickstreet's Motion was Singularly Focused on Consent Has No Basis in the Record.*

The Circuit Court duly considered all relevant and necessary facts and legal authority in granting summary judgment for BrickStreet. In its Brief, PAIS alleges that the "circuit court erred by expanding BrickStreet's motion for summary judgment on consent to a motion for summary judgment on all issues set forth in PAIS' complaint." Petitioner also alleges that BrickStreet's Motion did not assert a lack of evidence on Petitioner's claims. Petitioner also

alleges that BrickStreet bears some liability under *Shamblin v. Nationwide Mut. Ins. Co.*, Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990). Each assertion of Petitioner is easily refuted by a review of the record.

**1. BrickStreet's Motion asserted a lack of evidence on each of Petitioner's claims and was a broad based summary judgment motion on all claims.**

PAIS' claim that the Circuit Court decided summary judgment based on "the narrow issue of consent" is baseless and demonstrably false. Citing *Loudin, et ux. v. Nat'l Liability & Fire Ins. Co.*, 2011 WL 4536682 (Slip Op., No. 35763, Sept. 22, 2011), Petitioner alleges that the Circuit Court granted summary judgment *sua sponte*, and that the "the only issue raised by Brickstreet in its Motion for Summary Judgment was the narrow, uncontested immaterial issue of consent."<sup>5</sup> Petition for Appeal, P. 12. Petitioner's assignment of error is a "strawman argument" that mischaracterizes BrickStreet's Motion and overlooks the fundamental logic and unmistakable legal conclusions in BrickStreet's Motion for Summary Judgment and Reply. BrickStreet's Motion contains a section entitled "Plaintiff's Counts in the Complaint Must All Be Dismissed" with subsections urging summary judgment on each of the three counts in PAIS' Complaint. J.A.R. 239 - 244. Petitioner also alleges that BrickStreet never

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<sup>5</sup> It is interesting that the Petitioner now claims that BrickStreet's ability to settle was never contested when Petitioner repeatedly referred to the workers' compensation settlement as a "secret settlement" and complained about the lack of notice to Petitioner. It is also worthy of note that at the November 20, 2010 hearing on BrickStreet's Motion to Dismiss, PAIS' counsel made the following statement:

MR. RANSON: It's very simple, your Honor. It's just a first party bad faith -- it's a simple question in the case for the Court to decide at some point in time: Can BrickStreet settle, when they know their insured has no insurance to cover the *Mandolidis*; can you settle the medical for fifty Thousand dollars and say to their insured, You pay the rest? They either can or they can't.

If they can do that, then there is no case here, Judge. If they can't do it, then that's what the bad faith is. J.A.R. 120-121.

asserted that there was a lack of evidence supporting Petitioner's claims. A mere cursory review of BrickStreet's Motion is sufficient to reject this discrete point and the entire first assignment of error.

PAIS argues that "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." In doing so, PAIS ignores several parts of BrickStreet's Motion. BrickStreet's Motion contains three separate subsections that address the problems and lack of evidence supporting Petitioner's breach of contract claim, common law bad faith claim, and Unfair Trade Practices claim, respectively. J.A.R. at 239 - 243.

In BrickStreet's Motion, it states that "BrickStreet fully protected PAIS' interests by settling Marcia Radabaugh's workers' compensation claim against it. There remains simply no contractual duty owing to PAIS that BrickStreet has not fully and completely fulfilled." J.A.R. 241. BrickStreet's Motion states "(t)here is no evidence in this case that BrickStreet made incorrect coverage determinations, or made coverage determinations in bad faith." J.A.R. 242. BrickStreet's Motion also states "Plaintiff cannot show even a single violation of any element of West Virginia Code § 33-11-4 (9) by BrickStreet to PAIS, let alone a general business practice. There is simply no evidence that BrickStreet violated any element of West Virginia Code § 33-11-1 *et seq.* in its handling of PAIS' employee's Workers' Compensation claim." J.A.R. 243. Clearly, BrickStreet's Motion asserted a lack of evidence regarding each and every count in PAIS' Complaint. PAIS' unfounded argument in its first assignment of error also ignores the elementary but compelling summary of argument contained in BrickStreet's Conclusion section to its Motion for Summary Judgment:

In this case, BrickStreet promptly covered PAIS' employee's Workers' Compensation claim against PAIS and dutifully settled

that claim, securing a full release liability for PAIS. This was in full and complete satisfaction of every duty BrickStreet owed PAIS under the Workers' Compensation Insurance Policy and West Virginia law. BrickStreet owes no duty to PAIS to (1) defend and cover a deliberate intent claim brought by PAIS' employee, or (2) to allow PAIS to participate in the Workers' Compensation settlement process with that employee. These facts are dispositive of every aspect of this case. Accordingly, the Court should grant the Motion for Summary Judgment by Defendant BrickStreet Mutual Insurance Company.

J.A.R. at 244.

Petitioner's Brief repeatedly states that evidence existed in the record to support its claims of breach of contract, common law bad faith and violation of the West Virginia Unfair Trade Practices Act. However, Petitioner's Brief fails to state what evidence the Court overlooked that presents an issue of material fact, and why that evidence is important to the claims in the Complaint. Repeatedly stating the broad general assertion that BrickStreet "exposed the assets" of PAIS in settling the workers' compensation claim is not evidence supporting any claim in PAIS' Complaint. In its Motion to Dismiss, Motion for Summary Judgment, and throughout the entire litigation, BrickStreet impressed on the Circuit Court that PAIS' underlying allegation that the workers' compensation settlement "exposed the assets" of PAIS to deliberate intent damages, is premised on the legal fallacy that the workers' compensation settlement could have, or should have, covered some of PAIS' deliberate intent liability. J.A.R 76 - 77; J.A.R. 235, FN 5. As this Honorable Court is well aware, no deliberate intent liability can be resolved by settling a workers' compensation claim.

The fundamental legal problem with PAIS' theories below is this: central to PAIS' claim is its principal contention that its employee Marcia Radabaugh's contested and unproven future medical needs were "compensable" by workers' compensation and should have been covered in the settlement agreement between BrickStreet and Radabaugh. That contention

was in dispute between BrickStreet and Radabaugh, and was resolved by the Full and Final Settlement Agreement of Radabaugh's workers' compensation claim. Nonetheless, even if Radabaugh's alleged future medical needs were compensable under workers' compensation, then the same damages must necessarily be considered "receivable" under West Virginia Code § 23-4-2(c).<sup>6</sup> Thus, if, as PAIS claims, the future medical treatment were "receivable," then those medical damages were not available in the deliberate intent action against PAIS. Accordingly, PAIS could not have been "exposed" to this future medical liability. PAIS has not, and cannot, rebut the argument that its fundamental premise is based on a this legal "catch-22." Any exposure that Petitioner had in the deliberate intent claim, above the receivable benefits in the workers' compensation claim, existed because Petitioner chose not to purchase insurance coverage for deliberate intent claims. The Circuit Court correctly recognized this critical issue in its Final Order, Conclusions of Law ¶ 4. J.A.R. 374 -375.

## **2. Petitioner's reliance on *Shamblin v. Nationwide* is misplaced.**

Petitioner's Brief attempts to rely on *Shamblin v. Nationwide Mut. Ins. Co.*, Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990). As this Honorable Court is well aware, the *Shamblin* case involved an automobile liability insurer's failure to resolve the claim of a third party when it had the opportunity to settle the case within the policy limits. The *Shamblin* case created a new cause of action against an insurance company where the insurer failed to settle within policy limits despite having the ability to do so before an excess verdict is rendered by a jury. The *Shamblin* case created a new Syllabus Point:

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

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<sup>6</sup> West Virginia's deliberate intent statute, West Virginia Code § 23-4-2, expressly states that damages available under that statutory cause of action are for "any excess of damages over the amount received or receivable in a claim for benefits under this chapter." W. Va. Code § 23-4-2(c).

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.

*Id.* at Syl. Pt. 3. *Shamblin*, and the new syllabus point it created, have no application to the facts of this matter. In this case, BrickStreet settled the worker's compensation claim made against PAIS. There was no failure to settle. Consequently, *Shamblin* is not applicable to PAIS' claims below.

The record clearly demonstrates that the Circuit Court properly considered all of BrickStreet's arguments and incorporated them into its Final Order. The Petition for Appeal fails to specify what evidence would create any genuine issue of material fact because the Petitioner cannot point to any discrete act of BrickStreet which constitutes a breach of any provision of the contract of workers' compensation insurance between the parties. Furthermore, the Petitioner cannot point to evidence that BrickStreet made incorrect coverage determinations, that BrickStreet committed common law bad faith or that Brickstreet violated the Unfair Trade Practices Act. Instead, PAIS repeats the simplistic and generic argument that BrickStreet "put its interests ahead of its insured's" and "exposed the assets" of PAIS without presenting any material facts to overcome the straightforward legal arguments of BrickStreet. BrickStreet presented the Circuit Court with all relevant factual and legal authority necessary to make its decision. The Circuit Court's Final Order was based on the evidence and argument put forward by the parties, analyzed every claim made by PAIS and properly dismissed every claim made by PAIS. Accordingly, PAIS' first assignment of error is without merit.

B. *PAIS' Second Assignment of Error Is Based on an Extraneous and Inconsequential Matter and Has No Basis in the Record*

In its second assignment of error, PAIS makes an enigmatic argument about the Circuit Court's reliance on Radabaugh's workers' compensation settlement agreement, while simultaneously alleging that the Court ignored an alleged genuine issue of material fact regarding either the "intent of the parties with respect to the effect of the release," or "who was responsible for payment of the injured employee's long-term future medical bills." PAIS also asserts that the Circuit Court did not make the necessary findings of fact under *Fayette County Nat'l Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997), "to permit meaningful review."

In *Fayette Co. Nat'l Bank v. Lilly*, this Court found that "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." *Id.* at Syl. Pt. 3. The Court explained that

an order granting summary judgment cannot merely recite and rest exclusively upon a conclusion that, "No genuine issue of material fact is in dispute and therefore summary judgment is granted." For meaningful appellate review, more must be included in an order granting summary judgment. This Court's function, as a reviewing court is to determine whether the stated reasons for the granting of summary judgment by the lower court are supported by the record.

*Id.* at 236, 353 (quoting *Gentry v. Magnum*, 195 W. Va. 512, 521, 466 S.E.2d 171, 180 (1995)).

The summary judgment findings by the trial court in *Lilly* simply recited the familiar summary judgment standard and granted judgment without any meaningful analysis to illuminate the trial court's rationale. PAIS' Brief fails to specifically indicate what the Circuit Court's Final Order omitted or how that omission was critical to a proper analysis of the summary judgment issue. However, there is simply no basis for PAIS' argument that the Circuit Court's Final Order is insufficient to permit meaningful appellate review. Clearly, the Circuit Court of Kanawha

County's Final Order in this matter goes far beyond the conclusory order complained of in *Lilly*. The Final Order of the Circuit Court contains all necessary findings of fact and applies the appropriate legal principles to those facts in a methodical and reasoned manner.

In this assignment of error, PAIS appears to argue that the Circuit Court should have conducted further examination of Radabaugh's Full and Final Settlement Agreement regarding her workers' compensation claim in order to determine whether BrickStreet and Radabaugh failed to consider the impact of the settlement on the deliberate intent action, or who would pay for the contested future medical treatment if Radabaugh chose to receive that treatment. PAIS even goes so far as to suggest in its Brief that BrickStreet's adjuster admitted that the settlement of Radabaugh's workers' compensation claim was "unethical." However, this is refuted by reference to the deposition transcript of Leilani VanMeter wherein she stated "the medical in the file indicated that she (Radabaugh) had a sprain/strain type injury which doesn't require the elaborate treatment that she was receiving. So, you know, based on that information is why I didn't reserve for the rest of her life." J.A.R. 291. Clearly, there was no admission of an unethical settlement on Ms. VanMeter's part. Even so, this approach by PAIS appears calculated to lead the Circuit Court to consider voiding the settlement agreement between Radabaugh and BrickStreet, an approach that was not advocated by the Plaintiff below and has no legal basis.

Even if PAIS had requested this relief, PAIS has no right to void the settlement agreement between Radabaugh and BrickStreet. The Policy clearly states that BrickStreet has the right to settle claims made on the Policy by employees of the insured:

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

J.A.R. at 250.

Further, the West Virginia Code of State Regulations clearly states that

An insured employer is permitted to participate in the settlement of a claim only to the extent that the employer is permitted to do so under the terms of the applicable Workers' Compensation insurance policy.

W. Va. C.S.R. § 85-12-4.

If Radabaugh herself felt that the settlement of her workers' compensation claim was inadequate, or improperly failed to address the impact on her deliberate intent claims against her employer PAIS, Radabaugh would not have agreed to it, or would have challenged the settlement herself at a later date. The settlement agreement between Radabaugh and BrickStreet expressly states that Radabaugh "may revoke this Settlement Agreement within five (5) business days." J.A.R. 271. W.Va. CSR § 85-12-13 also provides claimants with five business days to revoke a settlement agreement. Radabaugh never revoked the Full and Final Settlement Agreement. Further, the procedure for review of a settlement that an unrepresented claimant believes to be unconscionable is set forth in W. Va. C.S.R. § 85-12-14.4(a), and provides the claimant 180 days to request review of the settlement agreement. The regulation clearly states that "the one hundred-eighty (180) day time limitation is jurisdictional, and a claimant may under no circumstances have a settlement reviewed beyond the time limitation." *Id.* Radabaugh never attempted to have her Full and Final Settlement Agreement reviewed under W. Va. C.S.R. § 85-12-14.4(a).

Clearly, PAIS has no standing to collaterally attack the Full and Final Settlement Agreement or its provisions, to which it was not a party, and to void that agreement against the interests of the actual parties to the agreement. It is otherwise unclear what PAIS would have had the Circuit Court consider regarding the settlement agreement between PAIS and

Radabaugh. Finally, PAIS argues that the Circuit Court should have recognized a genuine issue of material fact regarding the intent of the parties with respect to the Full and Final Settlement Agreement. The Full and Final Settlement Agreement clearly expresses the intent of the parties and states that Radabaugh settled “any and all issues [including future medical benefits] that have existed or do now exist between the parties as a result of claimant’s filing of the claim. . .” J.A.R. 269. There is no ambiguity regarding the intent of the parties to the Full and Final Settlement Agreement. In short, PAIS’ second assignment of error completely misses the mark and is wholly without merit.

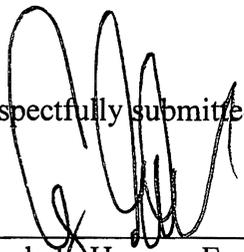
#### IV. CONCLUSION

The West Virginia judicial system provides redress when insurance companies fail to settle claims promptly and reasonably. Through tortured logic and a misunderstanding of the relationship between workers’ compensation recovery and deliberate intent damages, PAIS brings this breach of contract, common law “bad faith” and Unfair Trade Practices Act case based on its workers’ compensation carrier’s settlement of its employee’s claim “too quickly” or for “too little.” This lawsuit against BrickStreet is a thinly-veiled attempt by Radabaugh and her lawyers (who obtained this claim through assignment) to distort the policies behind the workers’ compensation and deliberate intent systems, and devise a “loophole,” whereby West Virginia insurers are exposed to liability for nothing more than faithfully and promptly resolving workers’ compensation claims.

Petitioner PAIS’ Brief fails to assert any facts which support its claims and fail to address the legal arguments supporting the Circuit Court’s proper summary judgment dismissal

of its claims. Consequently, PAIS' assignments of error have absolutely no merit. If the Court reverses Circuit Court's well-reasoned decision, allowing this case to proceed under with these ill-conceived legal theories, it will have a chilling effect on the settlement of workers' compensation claims, and will create significant problems with the workers' compensation system. Accordingly, BrickStreet respectfully asks that this Honorable Court deny Petitioner's requested relief, and affirm the summary judgment dismissal of the Circuit Court of Kanawha County in the case below.

Respectfully submitted,



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**IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA**

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

**Plaintiff-petitioner,**

**v.**

**Docket Number: 12-0044**

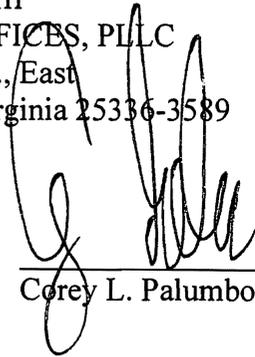
**WEST VIRGINIA EMPLOYERS' MUTUAL  
INSURANCE COMPANY, d/b/a BrickStreet  
Mutual Insurance Company,**

**Defendant-respondent.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has served the attached *Respondent's Brief of West Virginia Employers' Mutual Insurance Company, d/b/a BrickStreet Mutual Insurance Complaint* upon counsel of record via United States Mail, postage prepaid and addressed as follows, on this 31st day of May, 2012:

J. Michael Ranson  
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