IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 21-0169
(Circuit Court of Kanawha County, West Virginia
Civil Action No. 18-C-1250)

State of West Virginia *ex rel.* West Virginia Mutual Insurance Company, Petitioner,

v.

Hon. Tera Salango, Presiding Judge, Circuit Court of Kanawha County, West Virginia; and Michael Covelli, M.D., Respondents.

PETITION FOR A WRIT OF PROHIBITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Constitutional Provisions

Rules

Other Authorities

QUESTIONS PRESENTED

1. Whether the Circuit Court erred as a matter of law in concluding that *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990), permits an insured to maintain a common-law bad faith refusal to settle claim against his professional liability insurer when the insurer settled all claims asserted against the insured prior to the entry of judgment and before the insured's assets were ever actually exposed to collection.

2. Assuming, *arguendo*, that *Shamblin* permits an insured to maintain a common-law bad faith refusal to settle claim in spite of a consummated settlement and in the absence of an excess judgment, whether the Circuit Court erred as a matter of law in refusing to grant summary judgment when the undisputed material facts conclusively proved the reasonableness of the insurer's conduct.

3. Whether the Circuit Court erred as a matter of law in permitting an insured under a professional liability policy of insurance to maintain a claim against his insurer under the West Virginia Unfair Trade Practices Act, W. VA. CODE §§ 33-11-1 to -10, despite this Court's express holding to the contrary in *State ex rel. State Auto Property Insurance Co. v. Stucky*, 239 W. Va. 729, 806 S.E.2d 160 (2017).

STATEMENT OF THE CASE

This lawsuit is nothing more than the attempt of a former insured, Plaintiff/Respondent Michael Covelli, M.D. (**Dr. Covelli**), to transform a typical group medical malpractice insurance policy (**the Policy**) sold to his former employer by Defendant/Petitioner West Virginia Mutual Insurance Company (**the Mutual**) into some boundless guarantee of future economic prosperity and bulwark against bad publicity unrecognized under the laws of the State of West Virginia or any other state. In Count I of the Complaint, Dr. Covelli alleges that the Mutual refused in bad faith to settle two separate malpractice claims made against him by two former patients on his

preferred timetable. (App. 44–45, ¶¶ 24–32.) However, the undisputed reality is that the Mutual exercised its contractual right to proceed to trial in a hotly contested case and complied with existing law, including *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990), by settling both lawsuits within Policy limits and prior to the entry of judgment in either of them.

Similarly, in Count II of the Complaint, Dr. Covelli alleges that the Mutual's handling of those two malpractice claims somehow violated four separate subsections of the West Virginia Unfair Trade Practices Act (**UTPA**), W. VA. CODE § 33-11-4(9)(b)–(d), (f), all of which regulate an insurer's conduct relative to an insured's "claim." (App. 45–47, ¶¶ 33–41.) Yet, neither of the two aforementioned malpractice claims asserted against Dr. Covelli belonged to him who, as an insured under a professional liability policy, had no "claims" of his own to assert. In consequence, Dr. Covelli lacks standing to complain of the Mutual's alleged conduct relative to the malpractice claims brought against him, a proposition that this Court recently made clear in *State ex rel. State Auto Property Insurance Co. v. Stucky*, 239 W. Va. 729, 806 S.E.2d 160 (2017).

Pointing out the above deficiencies, the Mutual moved for summary judgment as to Count I and Count II. There are no facts material to resolving Count I or Count II that are subject to genuine dispute. Nonetheless, the Circuit Court denied the Mutual's motion, inexplicably allowing each claim to proceed to trial. That decision is manifestly erroneous and merits the extraordinary relief sought in this Petition.

Factual Background

Dr. Covelli was an insured under a group medical malpractice insurance policy sold by the Mutual to THS Physician Partners, Inc., his former employer, which had selected, obtained, and paid for the Policy on behalf of its physicians. (App. 238–39; *see also* App. 168–216.) The Policy

afforded the Mutual an absolute right to either defend or settle any claim with or without the insured's consent. (App. 465, 470, 587–88.) Nothing was atypical about that Policy provision, which is included in each and every policy of insurance sold by the Mutual. (App. 475, 484.)

A. The *Adkins* Litigation

On March 31, 2016, which was during the applicable Policy period, Dominique Adkins, a former patient of Dr. Covelli's, instituted a medical malpractice action—styled *Dominique Adkins v. Michael Covelli, M.D.*, Civil Action No. 16-C-309 (**the *Adkins* Litigation**)—against him. (App. 503–06.) In pertinent part, Ms. Adkins alleged that "Dr. Covelli, after identifying both the left and right recurrent laryngeal nerves, injured both nerves" during a thyroidectomy that he performed, which ultimately forced Ms. Adkins to undergo a permanent tracheostomy. (App. 504, ¶¶ 6–7.) After receiving notice of Ms. Adkins' claim, the Mutual retained Salem Smith, Esq. and Shereen Compton, Esq. of Flaherty, Sensabaugh & Bonasso P.L.L.C., to represent and defend Dr. Covelli at no cost to him, as it was obligated to do under the Policy.[1] (App. 495.)

From the inception of the *Adkins* Litigation, Dr. Covelli adamantly and consistently denied departing from the standard of care. (App. 220.) Dr. Covelli told the Mutual as much and expected the Mutual to rely on that representation in evaluating and defending the claim. (App. 220.) At no point in time did Dr. Covelli ever disclose or admit that he had deviated from the standard of care in connection with his treatment of Ms. Adkins. (App. 220.) Rather, and as documented in the Mutual's Claim Evaluation Report, Dr. Covelli insisted that Ms. Adkins' vocal cord paralysis was the result of "a very unusual fibrotic healing response that was delayed and then progressive in nature." (App. 526.) Dr. Covelli specifically relied on the results of a bronchoscopy, which he performed subsequent to the thyroidectomy, to support his conclusion. He testified that Ms.

[1] Ms. Adkins was represented by Richard Lindsay, Sr., Esq. and Richard "Rich" Lindsay, Jr., Esq. of Charleston, West Virginia.

Adkins' vocal cords were movable during the bronchoscopy, something which indicated to him that the cords "were not cut or transected" during the thyroidectomy. (App. 526.) In addition, Dr. Ari Brooks and Dr. Gregory Baker, two expert witnesses retained by the Mutual, supported Dr. Covelli's position. (App. 522.) Each testified that Dr. Covelli "fully met" the standard of care and "did not negligently cause or contribute to any harm" suffered by Ms. Adkins. (App. 522.)

At the time of the *Adkins* Litigation, the Mutual's Claims Committee—which was composed of nine individuals, seven of whom are licensed physicians—was responsible for deciding whether claims against the Mutual's insureds should be defended at trial or settled. (App. 482–83.) On February 16, 2017, the Claims Committee met to evaluate the *Adkins* Litigation. (App. 53.) Significant to the Claims Committee's evaluation was Dr. Covelli's insistence that he had not deviated from the standard of care. (App. 466–67.) Relying on Dr. Covelli's repeated assurances and sworn testimony, it considered the *Adkins* Litigation to be defensible, yet also approved settlement authority in the amount of $150,000. (App. 479, 534.) If the matter did not settle for an amount within that range, the Mutual intended to defend the claim at trial.

On April 21, 2017, the Mutual participated in pretrial mediation. (App. 536.) Ms. Adkins' initial demand was $1,300,000, while the Mutual's initial offer was $25,000. (App. 536.) Through a stair-stepping process, Ms. Adkins lowered her formal demand to $300,000, while the Mutual raised its offer to $150,000—the full extent of the authority authorized by its Claims Committee. (App. 475.) However, no settlement was reached.

On May 15, 2017, and on September 13, 2017, Dr. Covelli sent the Mutual two *Shamblin* letters. (App. 537–41.) In each letter, Dr. Covelli demanded that the *Adkins* Litigation be settled, if possible, within the Policy limit of $2,000,000. Dr. Covelli expressed no concern about a potential finding of liability on his part and, in fact, continued to insist that he had not "deviated

from the standard of care in [his] care and treatment of Ms. Adkins." (App. 538.) The only concern that Dr. Covelli identified in each of the *Shamblin* letters was the existence of a punitive damages claim for which the Policy provided no coverage.

Accepting the representations of its insured as true, the Mutual took the *Adkins* Litigation to trial in late September 2017. (App. 476.) At the close of Ms. Adkins' case-in-chief, Judge Carrie Webster directed a verdict in Dr. Covelli's favor on the punitive damages claim—the only issue of concern expressed on behalf of Dr. Covelli in both *Shamblin* letters. (App. 477–78.) No additional *Shamblin* letters were sent to the Mutual before October 2017 when the jury returned a verdict against Dr. Covelli in the amount of $5,788,977.[2] (App. 543–44.) Of the above figure, the jury awarded Ms. Adkins $5,000,000 for noneconomic losses, $199,521 for medical expenses, $539,456 for loss of income, and $50,000 for loss of household services. (App. 544.)

Shortly after the verdict was returned, and prior to the entry of judgment, the Mutual settled all claims asserted by Ms. Adkins against Dr. Covelli for $950,000, an amount within Dr. Covelli's $2,000,000 Policy limit. (App. 546–52.) Thus, the *Adkins* Litigation was resolved solely through the Mutual's funding and with no personal payment by Dr. Covelli. An Order of Dismissal was entered on November 8, 2017. (App. 554–55.) At no point in time after the trial were any of Dr. Covelli's assets exposed to attachment or collection. (App. 275.) Even Dr. Covelli agreed that the verdict only resulted in hypothetical—not actual—exposure to an excess judgment. (App. 275.) Simply put, the Mutual discharged its common-law duty under *Shamblin* by settling the *Adkins* Litigation before Dr. Covelli was actually exposed to a personal obligation to pay any sum of money through the entry of a judgment.

[2] In retrospect, all parties agree that one issue was central to the jury's verdict. During the trial, Ms. Adkins' counsel accused Dr. Covelli of having falsified the post-surgery bronchoscopy record that reported Ms. Adkins' vocal cords as moving. (App. 229.) That argument, which the jury ultimately accepted, "had a significant influence" on the jury's finding of liability. (App. 230.)

While it is true that the occurrence and substance of the jury verdict was publicized on a limited basis in the *Charleston Gazette* and *West Virginia Record*, (App. 560–72), it is also undisputed that the Policy contained no obligation to protect Dr. Covelli from adverse publicity, (App. 262). Tellingly, neither *Shamblin* letter expressed any concern about Dr. Covelli being damaged by adverse publicity—the principal claim advanced in the instant litigation. (App. 537–41.) More to the point, it is indisputable that Dr. Covelli suffered no adverse consequences as a result of the limited and factual post-verdict publicity. Contrary to the allegations of the Complaint,[3] no prospective employer denied him a position as a result of that limited publicity. (App. 280.) Only a handful of persons even mentioned the articles to Dr. Covelli, and none of them were prospective employers. (App. 248.) Of equal significance, Dr. Covelli is earning $104,000 more now than he was earning at the time of trial. (*Compare* App. 227 (salary of $180,000 in September 2017), *with* App. 284 (salary of $284,000 currently).) Dr. Covelli could not identify any direct negative impact from the trial, aside from the assertion of a meritorious malpractice claim, discussed below, that the Mutual settled within a short time after the Complaint was filed. (App. 280.)

B. The *Pomeroy* Litigation

Subsequent to the resolution of the *Adkins* Litigation, on October 13, 2017, a second patient treated by Dr. Covelli, Shelbie Pomeroy, served Dr. Covelli with a Notice of Claim, asserting that Dr. Covelli had deviated from the standard of care in connection with performing her thyroid surgery in 2015. (App. 603–04.) Just as he did relative to the *Adkins* Litigation, Dr. Covelli adamantly denied having deviated from the standard of care. (App. 246.) And as before, the

[3] Paragraph 21 of the Complaint alleged: "As a direct result of Defendant's bad faith conduct, Plaintiff Covelli was unable to obtain privileges at a local hospital, a position for which he had resigned his previous employment to take." (App. 44, ¶ 21.) As discussed, *infra*, that allegation was and is demonstrably false.

Mutual retained Mr. Smith and Ms. Compton to represent and defend Dr. Covelli at the Mutual's expense.[4] (App. 610.)

Less than one month later, Dr. Covelli's personal counsel, Scott Kaminski, Esq., sent a *Shamblin* letter to the Mutual. (App. 612–13.) Mr. Kaminski candidly conceded that Ms. Pomeroy had not even published a settlement demand as of the date of his correspondence. (App. 613.) That notwithstanding, Mr. Kaminski demanded that the Mutual settle Ms. Pomeroy's claim within Policy limits. (App. 612.) The Mutual responded to that letter on December 5, 2017 and advised that it had only received the required Screening Certificate of Merit the day prior and was still in the process of evaluating Ms. Pomeroy's claim. (App. 615; *see also* App. 617–18.)

Still, the Mutual took all conceivable steps to expedite its assessment. One week after receiving the Screening Certificate of Merit, the Mutual located and retained a practicing physician to review the limited records available and provide an initial assessment. (App. 620.) Six days later, Mr. Smith corresponded with the Lindsays to request pre-suit mediation. (App. 622–23.) Mr. Smith even offered to execute a tolling agreement that would have extended the statute of limitations indefinitely in an effort to resolve Ms. Pomeroy's claim prior to the filing of a complaint. (App. 623.) However, the Lindsays refused to enter into a tolling agreement and refused to participate in pre-suit mediation. (App. 622–23.)

Mr. Kaminski sent yet another *Shamblin* letter to the Mutual on January 5, 2018. (App. 625–26.) Again, he candidly conceded that Ms. Pomeroy had not published a settlement demand as of the date of his correspondence. (App. 626.) Yet, Mr. Kaminski reiterated his earlier demand that the Mutual to settle Ms. Pomeroy's claim within Policy limits. (App. 625.) The Mutual received that correspondence on January 8, 2018, (App. 628), which was the same day that Ms.

[4] Lindsay, Sr. and Lindsay, Jr. represented Ms. Pomeroy.

Pomeroy instituted a medical malpractice action—styled *Shelbie Pomeroy v. Michael Covelli, M.D.*, Civil Action No. 18-C-22 (**the *Pomeroy* Litigation**)—against Dr. Covelli, (App. 630–33).[5] The Mutual responded to Mr. Kaminski's letter on January 11, 2018, informing him that the Lindsays had refused to engage in pre-suit mediation and had rejected the Mutual's offer to toll the statute of limitations. (App. 628.) That letter also explained that the Mutual was still in the process of obtaining medical records and damages information from Ms. Pomeroy's counsel. (App. 628.) It is impossible to evaluate a medical malpractice claim without medical records, and even Dr. Covelli conceded that it would be unreasonable to have expected the Mutual to settle Ms. Pomeroy's claim without first having the opportunity to review the pertinent medical records. (App. 275–76.)

From the outset, the Mutual moved with all deliberate speed to resolve the *Pomeroy* Litigation. As of January 16, 2018, the Mutual only had a partial set of Ms. Pomeroy's medical records. (App. 635.) Likewise, Mr. Smith had just completed preparing his initial Attorney Evaluation Report. (App. 635.) Due to the incomplete nature of the records available, the Mutual had not even been able to prepare a Claim Evaluation Report. (App. 635.)

Ms. Pomeroy's claim was originally scheduled to be presented to the Mutual's Claims Committee on February 15, 2018. (App. 637.) However, within twenty-four hours of receiving the first Attorney Evaluation Report on January 16, 2018, Tammy Welch (Claims Consultant) requested that the Claims Committee convene a special telephonic meeting to discuss and authorize settlement authority. (App. 639.) Mr. Smith provided additional medical records to the Mutual on the afternoon of January 22, 2018. (App. 641.) Hours later, the Claims Committee

[5] As discussed, *infra*, Dr. Covelli failed to disclose the existence of the *Pomeroy* Complaint to CAMC's Credentials Committee for thirty-six days, after which the Committee discovered Dr. Covelli's omission on its own.

convened the telephonic meeting and authorized settlement authority in the amount of $500,000. (App. 643.)

The *Pomeroy* Litigation went to Mediation on February 21, 2018. (App. 645.) On that date, the Mutual settled the *Pomeroy* Litigation in exchange for $300,000 and secured a comprehensive release in favor of Dr. Covelli. (App. 648–54.) An Order of Dismissal was entered on March 19, 2018. (App. 656–57.) Again, the *Pomeroy* Litigation was resolved solely through the Mutual's funding and at no point were any of Dr. Covelli's assets exposed to attachment or collection because there had been no trial, no verdict, and no judgment entered.

It is indisputable that Dr. Covelli suffered no adverse consequences as a result of the *Pomeroy* settlement. Dr. Covelli does not allege to have suffered any adverse publicity on that account. (App. 273.) And just as was the case regarding the *Adkins* Litigation, Dr. Covelli is earning $284,000 more now than he was earning at the time that the *Pomeroy* Litigation settled. (*Compare* App. 227 (salary of $0 circa settlement), *with* App. 284 (salary of $284,000 currently).)

To the extent Dr. Covelli has suffered adverse consequences in recent years, such were occasioned by his own negligence (at best) or intentional misconduct (at worst). Shortly before trial in the *Adkins* Litigation, Dr. Covelli had applied for privileges with the Charleston Area Medical Center (**CAMC**). (App. 659–64.) After the *Adkins* verdict, CAMC made him an offer of employment at its Teays Valley Hospital contingent on the issuance of hospital credentials by the CAMC Credentials Committee. (App. 598–600.) Dr. Covelli accepted a conditional offer of employment from CAMC on October 26, 2017—less than two weeks after being personally served with a copy of Ms. Pomeroy's Notice of Claim and about one month after the *Adkins* verdict.

Dr. Covelli voluntarily resigned his employment at Lewis Gale Hospital in Virginia shortly before he met with CAMC's Credentials Committee in December 2017. Yet, he failed to disclose

to the CAMC Credentials Committee the existence of Ms. Pomeroy's claim against him, despite having actual knowledge of Notice of Claim and Screening Certificate of Merit and the Committee rule that required disclosure of pending professional liability claims. (App. 241–42.) Dr. Covelli compounded this intentional non-disclosure in December again in January and February after the *Pomeroy* Complaint was filed on January 8, 2018. Despite being unemployed and not having looked for any other employment position because he had the contingent offer of employment from CAMC, Dr. Covelli testified that he "forgot" to disclose the filing of the *Pomeroy* Complaint to the Credentials Committee in blatant violation of its rules. (App. 252.) Dr. Covelli continued to "forget" to disclose it for the remainder of January and the first two weeks of February 2018. (App. 252.) When the Credentials Committee discovered on its own that Dr. Covelli had failed to disclose the existence of the *Pomeroy* Complaint for more than a month after the filing, it acted swiftly. Dr. T. Pinckney McIlwain (CAMC's Chief Medical Officer) telephoned Dr. Covelli on February 13, 2018 and informed him that the Credentials Committee had ceased processing his application as a result. (App. 668.) Based on these circumstances, Dr. Covelli understood that CAMC intended to deny his application as a result of his non-disclosure. (App. 243.) He consulted with Mr. Kaminski and withdrew his application the next day to avoid adverse reporting consequences with the National Practitioner Data Bank should his application be denied. (App. 243, 254, 257.) On March 12, 2018, Mr. Kaminski, on behalf of Dr. Covelli, submitted a letter to the CAMC Credentials Committee to memorialize the deal that allowed him to avoid an adverse National Practitioner Data Bank report. (App. 670–71.)

Thereafter, Dr. Covelli accepted employment as Medical Director for Aetna Insurance in Charleston, (App. 279), and about a year later accepted a surgical position at the Veteran's Hospital in Clarksburg, (App. 233). He remains employed with the VA as of the filing of this Petition.

Procedural Background

On October 1, 2018, Dr. Covelli filed the instant lawsuit against the Mutual. The Complaint alleged two claims against the Mutual arising out of the above events. In Count I of the Complaint, Dr. Covelli alleged that the Mutual refused in bad faith to settle the *Adkins* Litigation and *Pomeroy* Litigation on his preferred timetable. (App. 44–45, ¶¶ 24–32.) Similarly, in Count II of the Complaint, Dr. Covelli mechanistically reproduced four subsections of the UTPA and alleged, in a conclusory fashion, that the Mutual somehow violated each provision in its handling of the *Adkins* Litigation and *Pomeroy* Litigation.[6] (App. 45–47, ¶¶ 33–41.)

On November 2, 2018, the Mutual moved to dismiss each claim for failing to state a claim, pursuant to Rule 12(b)(6), W. VA. R. CIV. P. (App. 48–53.) The Circuit Court heard argument on the Mutual's motion to dismiss on December 11, 2018. On February 14, 2019, the Circuit Court denied the Mutual's motion in its entirety, yet failed to include any discussion relative to Count II in its Order. (App. 33–38.) Thereafter, the parties proceeded with discovery; roughly a dozen depositions were taken, and the Mutual produced its entire claims file, which consisted of hundreds of pages, as redacted to protect the quasi-attorney client privileged documents. No challenge to the privilege assertion was made by Dr. Covelli.

The Circuit Court entered the operative Scheduling Order on January 22, 2020. (App. 31–32.) It set November 30, 2020 as the deadline by which to file dispositive motions. (App. 31, ¶ 2.) On November 2, 2020, the Mutual timely filed its motion for summary judgment and supporting memorandum in which the Mutual advanced the same arguments made in this Petition.[7]

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[6] The Complaint also included a potential underwriting claim, including an allegation that the Mutual cancelled the Policy under which Dr. Covelli was a named insured. (App. 44, ¶ 22.) But discovery yielded no proof capable of supporting such a claim or allegation, and so Dr. Covelli voluntarily dismissed the same. (App. 27–28.)

[7] In an effort to protect the confidentiality of certain settlement agreements and other materials discussed and incorporated into the Mutual's memorandum, on October 28, 2020, the Mutual moved the Circuit Court to seal all summary judgment submissions. (App. 157–59.) Later that afternoon, the Circuit Court granted that motion and entered a confirming order. (App. 29–30.) All of the filings, referenced below, were filed with the Clerk under seal.

(App. 163–65, 683–713.) The Circuit Court entered an Order on November 30, 2020 setting briefing deadlines relative to the Mutual's motion and scheduling oral argument on the same for January 7, 2021. (App. 23–24.) In accordance with that briefing schedule, Dr. Covelli filed his response in opposition on December 11, 2020. (App. 714–34.) On December 22, 2020, the Mutual filed its supporting reply. (App. 763–78.) The Circuit Court heard argument on the Mutual's motion on January 7, 2021, announced its decision to deny the motion without explanation, and directed Dr. Covelli's counsel to prepare and submit a proposed order. Dr. Covelli tendered a proposed order to the Circuit Court on January 13, 2021. (App. 781–802.) That same afternoon, the Mutual filed objections, pointing out a number of erroneous findings of fact and conclusions of law. (App. 803–10.) Nonetheless, on January 25, 2021, the Circuit Court adopted Dr. Covelli's proposed order *verbatim* without addressing any of the deficiencies noted in the Mutual's objection. (App. 1–22.) This Petition followed.[8]

SUMMARY OF ARGUMENT

In refusing to enter summary judgment in the Mutual's favor on Dr. Covelli's bad faith refusal to settle claim, the Circuit Court clearly and fundamentally erred as a matter of law. The effect of the decision below is to hold professional liability insurers liable in tort solely for exercising, in good faith, their contractual right to direct and control litigation involving their insureds. To reach its decision, the Circuit Court not only disregarded the plain and unambiguous terms of the applicable Policy, but also tortured the precedent of this Court to impose entirely novel and extra-contractual obligations—such as to protect insureds from "adverse publicity"—upon

[8] Under the operative scheduling order, the trial of this action was originally scheduled to begin on December 7, 2020. (App. 31, ¶ 1.) However, on November 30, 2020, the Circuit Court granted a continuance, which Dr. Covelli requested, and scheduled the trial to commence on January 25, 2021. (App. 23.) Due to the COVID-19 pandemic, as well as other circumstances affecting the undersigned's availability, the Circuit Court subsequently vacated the January 25, 2021 trial date. (App. 1.) In that same order, counsel were directed to contact the Circuit Court on or after March 1, 2021 to obtain a new trial date. (App. 1.)

professional liability insurers doing business throughout West Virginia. If not immediately corrected by this Court, professional liability insurers will be exposed to a new species of tort liability never before recognized under the laws of West Virginia—or that of any other jurisdiction. Relief in prohibition is necessary not only to correct the Circuit Court's persistent disregard for the substantive law of West Virginia, but also to resolve the new and important problems its decision has created for the insurance industry as a whole.

For an insured to state a bad faith refusal to settle claim, it is axiomatic that there must be "a failure on the part of [the] insurer to settle within policy limits." Syl. Pt. 2, *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990). In other words, no bad faith claim will lie against an insurer which settles the claims made against its insured. Here, it was and is undisputed that the Mutual settled both of the claims made against Dr. Covelli within the limits of the applicable Policy. That undisputed fact notwithstanding, the Circuit Court concluded, erroneously, that Dr. Covelli had stated "a viable *Shamblin* claim" and permitted that claim to proceed to trial.

The Circuit Court compounded its error by failing to treat this Court's decision in *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765 (2007), as dispositive. In *Strahin*, this Court held that to be actionable under *Shamblin*, an insurer's failure to settle must be not only negligent, but also must have "***actually exposed***" the insured to "***personal liability*** in excess of the policy limits." Syl. Pt. 9, *id.* (emphasis added). *Strahin* made clear that an insured's personal liability for an excess judgment is a *sine qua non* of a *Shamblin* claim. Here, again, it was and is undisputed that none of Dr. Covelli's assets were ever exposed to collection. The reason why is simple: The Mutual settled the *Adkins* Litigation and *Pomeroy* Litigation prior to the entry of judgment against Dr. Covelli in either case. Yet, the Circuit Court disregarded *Strahin* based on irrelevant factual

differences and permitted Dr. Covelli's claim to move forward in spite of two consummated settlements and in the absence of any excess judgment. In so holding, the Circuit Court clearly and unmistakably erred.

Even if *Shamblin* permitted Dr. Covelli to maintain a bad faith claim against the Mutual—despite the Mutual having settled each claim asserted, and before the rendition of any judgment against him—the Circuit Court clearly erred in refusing to award summary judgment to the Mutual on this record. The question dispositive of a *Shamblin* claim is "whether the reasonably prudent insurer would have refused to settle within policy limits under the facts and circumstances, bearing in mind always its duty of good faith and fair dealing with the insured." Syl. Pt. 4, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766. Here, the Mutual's investigation, evaluation, and resolution of each claim was reasonable as a matter of law. When deciding to defend, rather than to outright settle, the *Adkins* Litigation, the Mutual relied on the judgment of the seven physicians on its Claims Committee, as well as the sworn testimony of Dr. Covelli and two independent expert witnesses, who collectively opined that Dr. Covelli had not deviated from the applicable standard of care. As a matter of law, an insurer, such as the Mutual, does not act in bad faith by accepting the sworn representations of its insured, especially when other medical professionals supported and agreed with his assessment. Likewise, the Mutual acted reasonably in promptly evaluating and settling the *Pomeroy* Litigation. As a matter of law, an insurer, such as the Mutual, does not act in bad faith by settling a medical malpractice claim made against its insured within four months of first receiving notice of the claim and within thirty days of obtaining the medical records necessary to evaluate the merits of the same.

In addition, the Circuit Court's conclusion that Dr. Covelli had standing—as an insured under a liability policy of insurance—to pursue statutory claims under the West Virginia Unfair

Trade Practices Act (**UTPA**), W. VA. CODE §§ 33-11-1 to -10, is clearly and unmistakably erroneous as a matter of law. Each of the four provisions that collectively form the basis of Count II regulate an insurer's conduct with respect to "claims." *See* W. VA. CODE § 33-11-4(9)(b)–(d), (f). In *State ex rel. State Auto Property Insurance Co. v. Stucky*, 239 W. Va. 729, 806 S.E.2d 160 (2017), this Court interpreted the statutory term "claim" as used with "regard to a liability insurance policy" to mean "an effort by a third party to recover money from the insured." In other words, this Court held that an insured protected by a liability policy has no "claim" within the meaning of the UTPA and, therefore, has "no standing" to complain about how his insurer resolves the claims of third-parties against him.

The holding of *Stucky* foreclosed Count II of the Complaint as a matter of law. Yet, the Circuit Court flagrantly disregarded *Stucky*'s holding on the ground that the Justices of this Court who constituted the majority did not reduce that holding to a new syllabus point. Of course, the simple absence of a new syllabus point does not diminish the "significant, instructive, [and] precedential weight" of *Stucky* as a published and signed opinion. Syl. Pt. 2, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014). The Circuit Court then held, without explanation, that there "was a serious question as to the *Stucky*'s decision precedential value."[9]

Relief in prohibition is warranted for the exact same reason that the writ issued in *Stucky*. In departing from the course charted by this Court, the Circuit Court manifested a persistent disregard for the substantive law of West Virginia, including this Court's constitutionally assigned role "to say what the law is." *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 616, 730 S.E.2d 368, 399 (2012) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). By rewriting the

[9] As discussed *infra*, Justice Menis Ketchum's majority opinion in *Stucky* was joined in full by Chief Justice Allen Loughry and Justice Elizabeth Walker, making that decision "binding authority upon any court" in the State of West Virginia. W. VA. CONST. art. VIII, § 4.

definition of the statutory term "claim," the decision below exposes liability insurers transacting business in West Virginia to statutory liability not contemplated by the plain language of the UTPA, invading the Legislature's constitutional prerogative to "consider facts, establish policy, and embody that policy in legislation." Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009). The systemic consequences of the Circuit Court's errors are so extraordinary that relief in prohibition must be granted to correct them.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary, and this Court's decisional process would be significantly aided by permitting the same. Full oral argument, pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, is appropriate because this Petition involves questions of statutory interpretation, presents issues of critical importance to the insurance industry, and arguably raises issues of first impression, as indicated in the Questions Presented above. Therefore, the Mutual respectfully requests that this Petition be set for Rule 20 oral argument.

ARGUMENT

The Circuit Court clearly exceeded its legitimate powers and fundamentally erred as a matter of law in refusing to enter summary judgment in the Mutual's favor. The errors of law committed are so obvious, and the consequences of them of such importance, that extraordinary relief is required to correct them.

This Court has original jurisdiction in prohibition proceedings pursuant to article VIII, section 3 of the Constitution of the State of West Virginia. "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. VA. CODE § 53-1-1. The standard applicable to a request for such extraordinary relief is well established and is satisfied here.

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 1, *State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hummel*, ___ W. Va. ____, 850 S.E.2d 680 (2020) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)).

In this case, the Circuit Court unquestionably exceeded its legitimate powers in permitting each of Dr. Covelli's claims to go forward to trial. The decision by the Circuit Court below manifests a "persistent disregard for" the "substantive law" of West Virginia, including this Court's decisions in *Strahin* and *Stucky*. *Id.* Relief in prohibition is necessary not only to correct the Circuit Court's clear errors of law, but also to resolve the "new and important problems" its decision has created for the insurance industry as a whole. *Id.* Unless corrected immediately, "both parties [will] be compelled to go through an expensive, complex trial and appeal from a final judgment" that this Court will certainly reverse. *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 658, 510 S.E.2d 486, 492 (1998). For the reasons discussed more fully below, relief in prohibition is appropriate.

I. The Circuit Court Clearly Erred in Permitting Plaintiff's Bad Faith Refusal to Settle Claim (Count I) Proceed to Trial.

Whether the Circuit Court's order is clearly erroneous as a matter of law is the most significant and substantial factor in determining whether a discretionary writ of prohibition should

issue. Syl. Pt. 1, *Hummel*, ___ W. Va. ____, 850 S.E.2d 680. Here, that factor decidedly weighs in favor of granting extraordinary relief. The Circuit Court committed a clear-cut error of law by permitting Count I of the Complaint, which alleges a bad faith refusal to settle claim under *Shamblin*, to proceed to trial.

The rationale for the Circuit Court's holding is difficult to glean from the text of its Order which denied the motion for summary judgment. Relative to the *Pomeroy* Litigation, the Circuit Court failed to undertake even the most cursory analysis. Not a single conclusion of law so much as mentions the claim of Shelbie Pomeroy. (App. 6–14, ¶¶ 38–83.) Relative to the *Adkins* Litigation, the Circuit Court's decision seemingly rests upon its unsupported and conclusory statement that the Mutual "failed to consider all relevant factors," such as the potential for adverse publicity, "in evaluating [Dominque Adkins'] claim against Dr. Covelli," notwithstanding that the Circuit Court identified no basis in law that made adverse publicity a relevant consideration. (App. 14, ¶ 81.) In fact, there are no appellate decisions in American jurisprudence that require an insurer to take into account "adverse publicity to the insured" when making the decision of whether to proceed to trial. The Circuit Court then concluded—without explanation and unsupported by any relevant findings of fact or predicate conclusion of law—that Dr. Covelli had established "a prima facie bad faith cause of action" against the Mutual. (App. 14, ¶ 81.)

In reaching that conclusion, the Circuit Court impermissibly expanded upon this Court's decision in *Shamblin*, thereby imposing new obligations upon professional liability insurers, including a heretofore unrecognized obligation to protect insureds from "adverse publicity." Of course, no decision from this Court or any other court has recognized the existence of such a duty in the first instance—a point that the Circuit Court failed to address, much less analyze. Likewise, the Circuit Court blatantly ignored and disregarded the plain language of the Policy that vested the

Mutual with the exclusive discretion to defend or settle the two claims made against Dr. Covelli. (App. 191, 194.) The decision by the Circuit Court below manifests a "persistent disregard for" the "substantive law" of West Virginia, including this Court's decision in *Strahin*, and imposes unwarranted extra-contractual obligations upon the insurance industry as a whole. Syl. Pt. 1, *Hummel*, ___ W. Va. ____, 850 S.E.2d 680. The consequences that flow from the Circuit Court's torturous expansion of *Shamblin* "raise[] new and important problems" for professional liability insurers in the form of exposure to a new species of tort liability never before recognized under the laws of West Virginia or any other jurisdiction. *Id.* Unless corrected immediately, "both parties [will] be compelled to go through an expensive, complex trial and appeal from a final judgment" that this Court will certainly reverse. *Hrko*, 203 W. Va. at 658, 510 S.E.2d at 492. In light of the Circuit Court's repeated and persistent errors of law, discussed above and below, and the impact of them upon the insurance industry, relief in prohibition is appropriate and must be granted.

A. The Cause of Action Recognized in *Shamblin* Only Arises Where an Insurer Fails to Effectuate a Settlement of the Claims Made Against Its Insured.

In order for an insured to state a cause of action against his insurer pursuant to *Shamblin*, it is axiomatic that there must be "a failure on the part of [the] insurer to settle within policy limits." Syl. Pt. 2, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766. In this case, it was and is undisputed that the Mutual settled both of the claims made against Dr. Covelli within the limits of the applicable Policy. (App. 546–52, 648–54.) That undisputed fact notwithstanding, the Circuit Court concluded, incorrectly, that Dr. Covelli somehow still had "a viable *Shamblin* claim" against the Mutual. (App. 8, ¶ 53.) That conclusion is clearly erroneous as a matter of law and must be corrected through relief in prohibition.

In *Shamblin*, this Court first recognized the right of an insured to sue his insurer for negligently failing "to settle third party liability claims against [the insured] within policy limits." 183 W. Va. at 594, 396 S.E.2d at 775. While the procedural background of *Shamblin* is somewhat complex, the operative and material facts are simple enough. The plaintiff in *Shamblin* was an insured under a commercial automobile liability policy issued by the insurer. *Id.* at 588, 396 S.E.2d at 769. During the applicable policy period, one of the insured's employees was involved in an automobile accident with the claimant. *Id.* The claimant sued the insured for negligence. *Id.* Shortly before trial, the claimant offered to settle her claims against the insured in exchange for policy limits, but no settlement was reached. *Id.* at 589, 396 S.E.2d at 770. The jury subsequently returned a verdict, which was substantially in excess of the applicable policy limit, in favor of the claimant, and a confirming judgment order was entered. *Id.* at 590, 396 S.E.2d at 771.

Left with a judgment order that imposed substantial personal liability upon him, the insured sued the insurer to recover the amount of the excess judgment. *Id.* at 588, 396 S.E.2d at 769. He alleged that the insurer "refused to settle within the policy limits" and claimed "that the company acted negligently and in bad faith." *Id.* at 590, 396 S.E.2d at 771. That dispute proceeded to trial, and the jury found in the insured's favor. *Id.* The insurer appealed, arguing that the trial court had erred in "adopting negligence as the sole standard to determine whether a liability insurer had complied with its duty to its insured regarding the settlement of third-party claims." *Id.* at 592, 396 S.E.2d at 773. The insured responded "that a strict liability standard should apply." *Id.*

This Court charted a middle course, adopting a "hybrid negligence-strict liability" standard of proof, and affirmed the judgment of the lower court. *Id.* at 595–97, 396 S.E.2d at 776–78. In a new syllabus point, this Court articulated the standard applicable "in determining whether [an]

insurer is liable to its insured for any judgment obtained against him in excess of policy limits." *Id.* at 596, 396 S.E.2d at 777.

> 2. ***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.

Syl. Pt. 2, *id.* (emphasis added). Turning to the record before it, this Court found no genuine dispute that the claimant had offered to settle for "a reasonable" sum, and that the insurer had refused that offer despite facts that "uncontrovertedly [*sic*] showed liability on the part of" its insured. *Id.* at 596, 396 S.E.2d at 777. It concluded that the "insurer's failure under these circumstances to settle for policy limits . . . clearly indicate[d] a lack of an aggressive, good faith effort to settle and protect its insured." *Id.* In rejecting "the settlement offers" of the claimant, this Court reasoned, the insurer "subjected itself to liability for the excess damages incurred by its insured" as a result of the judgment entered against him. *Id.* Accordingly, this Court affirmed the award in the insured's favor.

By implication, *Shamblin* teaches that no bad faith refusal to settle claim will lie against an insurer where there has been no "failure on the part of an insurer to settle within policy limits." Syl. Pt. 2, *id.* The Circuit Court's refusal to acknowledge that proposition goes to the heart of its error. Since the inception of this litigation, it was and remains undisputed that the Mutual settled both of the claims made against Dr. Covelli within the limits of the applicable Policy. (App. 546–52, 648–54.) It spent $257,770 to investigate, evaluate, and defend the *Adkins* Litigation, plus an additional $950,000 to secure a comprehensive release in favor of Dr. Covelli. (App. 680.) Just months later, the Mutual expended $16,024 more to investigate, evaluate, and negotiate a settlement of the *Pomeroy* Litigation, in addition to $300,000 to secure a comprehensive release for Dr. Covelli's benefit. (App. 682.) All told, the Mutual outlaid roughly $1,523,794 to protect

the interests of its insured, while Dr. Covelli spent nothing—just as *Shamblin* requires. In permitting Count I to go forward despite the undisputed fact that the Mutual settled all claims against its insured, the Circuit Court clearly and reversibly erred.

B. *Strahin* Confirmed That an Excess Judgment Against the Insured Is Required to State a *Shamblin* Claim.

The Circuit Court compounded its error by failing to treat this Court's decision in *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765 (2007), as dispositive. In *Strahin*, this Court emphasized what it had already stated in *Shamblin*. In a new syllabus point, this Court held that to be actionable under *Shamblin*, an insurer's failure to settle must be not only negligent, but also must have "***actually exposed***" the insured to "***personal liability*** in excess of the policy limits." Syl. Pt. 9, *id.* (emphasis added). It is axiomatic that only the entry of a judgment in excess of policy limits could satisfy that necessary condition—a point discussed, *infra*, in more detail. Yet, whether bearing on the element of breach or damages, *Strahin* made clear that an insured's personal liability for an excess judgment is a *sine qua non* of a *Shamblin* claim. *See, e.g., Wilson v. Liberty Ins. Underwriters, Inc.*, Civil Action No. 2:07-0478, 2008 WL 538883, at *4 (S.D. W. Va. Feb. 25, 2008) (Copenhaver, J.) (granting insurer's motion to dismiss a *Shamblin* claim because the complaint alleged no "facts indicating, as required by *Strahin*, that plaintiffs suffered personal liability for an excess verdict"). In the instant litigation, it was and remains undisputed that the Mutual settled each claim prior to the entry of judgment in either case and for amounts within the Policy limit. (App. 546–52, 648–54.) The Circuit Court's failure to recognize the dispositive nature of that undisputed fact led it to erroneously deny the Mutual's motion and merits correction through extraordinary relief.

Strahin controls the disposition of this case. In *Strahin*, the plaintiff sued a homeowner to recover for injuries sustained on the homeowner's property. 220 W. Va. at 332–33, 647 S.E.2d at

768–69. At the time that the plaintiff was injured, the homeowner was insured by a policy of insurance issued by an insurer. *Id.* at 333, 647 S.E.2d at 769. On two separate occasions, the plaintiff made formal demands to the insurer for policy limits in exchange for a release of the insured homeowner, but the insurer rejected both demands. *Id.* Thereafter, the plaintiff and homeowner entered into a settlement agreement. *Id.* Under the terms of the settlement agreement, the plaintiff agreed "to not execute upon any of the personal assets" of the homeowner if the plaintiff obtained a judgment against him. *Id.* In exchange, the homeowner assigned to the plaintiff whatever claims that he might have against his insurer. *Id.* When the case proceeded to trial, the jury returned a verdict against the homeowner that exceeded his policy limits, and the trial court entered a conforming judgment order. *Id.* The plaintiff, as the assignee of the homeowner's rights, then amended his complaint to bring a bad faith failure to settle claim against the insurer. *Id.* at 333–34, 647 S.E.2d at 769–70. The circuit court granted summary judgment in favor of the insurer, finding that the homeowner was never exposed to liability on account of the settlement agreement and covenant not to execute. *Id.* at 334, 647 S.E.2d at 770.

This Court affirmed. To recover "under *Shamblin*," this Court held, "there must not only be a negligent refusal to accept a settlement offer by the insurer, but also subsequent harm to the insured." *Id.* at 335, 647 S.E.2d at 771. "In other words, the insured's personal assets must be at risk." *Id.* No such risk existed in *Strahin* because the plaintiff and the homeowner had entered into a binding settlement agreement that prohibited execution upon the homeowner's assets. *Id.* "As a result," this Court found that the homeowner "was not 'injured' when the jury returned a verdict against him in excess of his homeowners' policy limits. . . . Consequently, an essential element of the *Shamblin* claim, i.e., damage to the insured, does not exist in this case." *Id.*

The same result inures here. For Dr. Covelli to have been "actually exposed to personal liability," the entry of a judgment—not merely the return of a verdict, as happened in the *Adkins* Litigation, or the filing of a complaint, as occurred in the *Pomeroy* Litigation—was required. Just as was the case in *Strahin*, Dr. Covelli suffered no damage because the Mutual settled the *Adkins* Litigation and *Pomeroy* Litigation prior to the entry of any judgment in excess of Policy limits. (App. 554, 656.) Not only was no judgment ever entered against Dr. Covelli, but none of his personal assets were ever "at risk" or "actually exposed." Even Dr. Covelli agreed that, at most, his exposure relative to each claim was hypothetical. (App. 275.) Viewing the record in the light most favorable to Dr. Covelli, it was and remains undisputed that he was never "actually exposed to personal liability in excess" of the Policy limits. In the absence of an excess judgment, *Strahin* foreclosed Dr. Covelli's bad faith refusal to settle claim as a matter of law. *See, e.g.*, *Wilson*, 2008 WL 538883, at *4.

Neither of the Circuit Court's two interrelated attempts to distinguish *Strahin* alter that conclusion. The Circuit Court first read *Strahin* as turning on whether the insured was exposed to personal liability at the time when an excess verdict was rendered—not if, or when, a conforming judgment was entered. (App. 8, ¶¶ 49–50.) In the same vein, the Circuit Court then proceeded to disregard the holding of *Strahin* based on an irrelevant factual distinction. It reasoned that, unlike the insured homeowner in that case, no "covenant or other agreement existed to protect Dr. Covelli from personal liability at the time the excess verdict against him was rendered" in the *Adkins* Litigation. (App. 7–8, ¶¶ 44–53.) However, neither ground is persuasive.

It is true that Syllabus Point 9 of *Strahin* made reference to the time of rendition of a verdict:

> 9. In order for an insured or an assignee of an insured to recover the amount of a verdict in excess of the applicable insurance policy limits from an insurer pursuant to this Court's decision in *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990), the insured must be actually

> exposed to personal liability in excess of the policy limits at the time the excess verdict is rendered.

Syl. Pt. 9, *Strahin*, 220 W. Va. 329, 647 S.E.2d 765. That notwithstanding, the rationale and reasoning of *Strahin* simply do not support the Circuit Court's interpretation and must be corrected.

In *Strahin*, this Court held that "to recover under *Shamblin*, there must not only be a negligent refusal to accept a settlement offer by the insurer, but also ***subsequent harm to the insured***." *Id.* at 335, 647 S.E.2d at 771 (emphasis added). This Court described the nature of the harm required when it stated that "***the insured's personal assets must be at risk***." *Id.* (emphasis added). For Dr. Covelli to have been "actually exposed to personal liability," the entry of a judgment—not the merely the return of a verdict or filing of a complaint—was required.

The reason why is simple. A verdict—unlike a judgment—does not create an obligation to pay. For that reason, the existence (or nonexistence) of a pre-*verdict* "covenant or other agreement" not to execute is irrelevant as a matter of law. The distinction between verdicts and judgments is well recognized. *See* 46 AM. JUR. 2d *Judgments* § 5, Westlaw (database updated Feb. 2021) ("[A] judgment entered on a jury verdict is a legal concept separate and distinct from the verdict."). "A judgment is a judicial act of the court which fixes clearly the rights and liabilities of the respective parties to the litigation and determines the controversy at hand." *Id.* § 1 (footnotes omitted); *see also Judgment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining judgment as a "court's finial determination of the rights and obligations of the parties in a case"). A verdict, in contrast, is merely a "jury's finding or decision on the factual issues of a case." *Verdict*, BLACK'S LAW DICTIONARY (10th ed. 2014). Therefore, while a verdict is a "building block[] for a judgment," 46 AM. JUR. 2d *Judgments* § 5, it is the judgment entered on the verdict that "represents a judicial declaration that a judgment debtor is personally indebted to a judgment creditor for a sum of money," *id.* § 10. Indeed, it is often the case that the amount of the actual judgment will

differ from that awarded by the jury. *See, e.g.*, *Doe v. Pak*, 237 W. Va. 1, 6, 784 S.E.2d 328, 333 (2016) (holding that "payment of prejudgment interest shall be on the special damages portions of *judgments* or *decrees* for the payment of money, *not on verdicts.*"); *State ex rel. Motorists Mut. Ins. Co. v. Broadwater*, 192 W. Va. 608, 612 n.9, 453 S.E.2d 591, 595 n.9 (1994) ("Since the trial court retains the ultimate authority in entering a judgment, the actual judgment entered will not necessarily coincide with a jury verdict form. As this case demonstrates, the existence of a settlement agreement, which the jury is unaware of, may affect the amount of damages awarded in a judgment order.").

Other jurisdictions recognize the importance of this distinction in the context of bad faith refusal to settle claims such as that asserted in Count I. The Court of Appeals of Maryland, for example, has declined to recognize a cause of action against an insured based on "a failure to settle initially which is followed by a settlement by the insurer and full release of the insured." *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 659 (Md. 1994). Likewise, the Supreme Court of Wyoming has refused to recognize "a cause of action for bad faith for failure of the insurer to initially settle a claim which is followed by a judgment or settlement within policy limits." *Jarvis v. Farmers Ins. Exch.*, 948 P.2d 898, 901–02 (Wyo. 1997).

The law of West Virginia is no different. Despite using the term "verdict" in Syllabus Point 9, *Strahin* clearly concerned itself with the effect of a "judgment."

> If the ***judgment*** cannot be enforced against the insured, no such injury exists. . . . Since the Covenant at issue here was executed before the jury rendered its verdict, the ***resulting judgment*** was not enforceable against Mr. Sullivan. Therefore, since Mr. Strahin 'stands in Mr. Sullivan's shoes' as his assignee, he simply cannot satisfy the essential legal elements of a *Shamblin* claim.

Strahin, 220 W. Va. at 336–37, 647 S.E.2d at 772–73 (emphasis added). The clear implication of *Strahin*'s holding is that the "***the insured's personal assets must be at risk***." *Id.* at 335, 647 S.E.2d at 771 (emphasis added). As discussed, *supra*, only the entry of a judgment could accomplish that

task. Because it is undisputed that no judgment was ever entered against Dr. Covelli, Count I fails as a matter of law, and the Circuit Court clearly erred in concluding otherwise.

This Court's decision in *State ex rel. State Auto Property Insurance Co. v. Stucky*, 239 W. Va. 729, 806 S.E.2d 160 (2017), not only illustrates the Circuit Court's error, but also indicates that extraordinary relief is the appropriate remedy. Both *Stucky* and this litigation involved common-law bad faith claims and UTPA claims. In each, the lower courts erroneously refused to grant the insurers' motions for summary judgment. The clear-cut nature of the errors in *Stucky* led this Court to grant relief in prohibition. Because this case stands on all fours with *Stucky*, that same result should inure here.

In *Stucky*, a couple hired a contractor to build a home. *Id.* at 731, 806 S.E.2d at 162. During the course of constructing the home, the plaintiffs' adjacent property and a sewer line owned by the City of Charleston were damaged. *Id.* at 731, 736 n.6, 806 S.E.2d at 162, 167 n.6. The contractor, which was a named insured under a commercial general liability policy of insurance, promptly notified its insurer of the damage, and the insurer advised that it would handle the claims. *Id.* at 731, 806 S.E.2d at 162. However, the insurer then insisted on conducting "a series of inspections and investigations" that, according to the contractor, delayed "resolving the City of Charleston's claim"; delayed "a potential settlement of the plaintiffs' lawsuit"; increased "the amount of the plaintiffs' property damage"; and ultimately resulted in the plaintiffs suing the couple and contractor to recover for the damage. *Id.* at 731, 736 n.6, 806 S.E.2d at 162, 167 n.6. In response, the contractor filed a third-party complaint against its insurer, alleging that the insurer's "delay in resolving the property damage claim of the plaintiffs," its "delay in resolving the City of Charleston's claim for the relocation of a sewer line," and its "failure to protect" the

contractor "from litigation" generally constituted common-law bad faith and violated subsection (9)(b) and subsection (9)(f) of section 4 the UTPA. *Id.*

Subsequent to the filing of the third-party complaint, the insurer settled all of the plaintiffs' and the City's claims against the contractor and secured comprehensive releases in the contractor's favor. *Id.* at 732, 736 n.6, 806 S.E.2d at 163, 167 n.6. The insurer then moved for summary judgment on the contractor's third-party complaint. *Id.* at 733, 806 S.E.2d at 164. In support of its motion, the insurer asserted "that there was no question of fact that it had provided [the contractor] with a defense in the plaintiffs' lawsuit and that a settlement and release of plaintiffs' damage claim was secured at no cost to [the contractor] and without the entry of an adverse judgment." *Id.* The circuit court disagreed and denied the motion "on the basis of unresolved questions of fact" relative to whether the insurer "failed to use good faith in settling a claim by someone the insured allegedly harmed or injured." *Id.* Though not expressly noted in this Court's opinion, the circuit court below also concluded, as a matter of law, that the existence of "an excess judgment" was not a "requirement under West Virginia law" to maintain a "first-party bad faith action." *Evans v. CMD Plus, Inc.*, Civil Action No. 11-C-606, 2017 WL 2466221, at *4 (W. Va. Cir. Ct. Mar. 2, 2017), *writ granted sub nom. Stucky*, 239 W. Va. 729, 806 S.E.2d 160. The insurer then sought a writ of prohibition, contending that the contractor's third-party complaint should be dismissed as a matter of law. *Stucky*, 239 W. Va. at 733, 806 S.E.2d at 164.

With respect to the common-law bad faith claim, this Court agreed, vacated the decision of the circuit court, and granted the writ. *Id.* at 736, 806 S.E.2d at 167. In so doing, a majority of the Justices of this Court implicitly, if not outright, rejected the notion that an insured may maintain a first-party bad faith claim against a liability insurer in the absence of an excess judgment. This Court's analysis of the plaintiffs' bad faith claim is equally applicable to the bad faith claim that

Dr. Covelli has advanced here. Regarding the insurer's handling of the plaintiffs' claim, this Court reasoned:

> In this proceeding, we are asked to determine whether [the contractor's] first-party bad faith claim should be permitted to go forward. The record, however, establishes that ***[the contractor] was fully defended by its insurer*** . . . throughout the lawsuit filed by the plaintiffs. ***[The insurer] also reached and paid a settlement of $325,000 to the plaintiffs, an amount well within the $1,000,000 policy limit. The defense and indemnification were provided at no cost to [the contractor], and no judgment was entered against [the contractor] by the circuit court.*** On this record, ***we cannot see any evidence that [the insurer] failed to exercise good faith*** in meeting its obligations under the commercial general liability insurance policy.

Id. at 734, 806 S.E.2d at 165 (emphasis added). Relative to the insurer's handling of the City's claim, this Court similarly concluded:

> In addition to the handling of the plaintiffs' claim, [the contractor's] third-party complaint also alleged bad faith regarding [the insurer's] purported delay in resolving the City of Charleston's claim for the relocation of a sewer line necessitated by the slippage. The record demonstrates, however, that ***[the insurer] defended [the contractor] against the City's claim, provided coverage for the relocation of the sewer line and secured a release on behalf of [the contractor] of all liability for damage. The settlement of the claim was without cost to [the contractor] and no judgment was entered.*** We therefore find no merit in [the contractor's] third-party complaint regarding the claim of the City of Charleston.

Id. at 736 n.6, 806 S.E.2d at 167 n.6. This Court found each conclusion so obvious and inescapable that it issued a writ of prohibition dismissing the contractor's bad faith claim as a matter of law. *Id.* at 736, 806 S.E.2d at 167.

There is little to no daylight between the operative facts of *Stucky* and those underlying the claims asserted here. Like the insurer in *Stucky*, the Mutual "fully defended" Dr. Covelli throughout the *Adkins* Litigation and *Pomeroy* Litigation. The Mutual also "reached and paid a settlement" of sums within the limits of the applicable Policy. (*Compare* App. 169, *with* App. 546–52, *and* App. 648–54.) As with the insured in *Stucky*, the defense and indemnification were provided at no cost to Dr. Covelli, (*see* App. 680, 682), and no judgment was entered against him on either claim, (*see* App. 554, 656). Just as this Court saw no "evidence that [the insurer] failed

to exercise good faith" in *Stucky*, so too should the Court conclude here. *Stucky*, 239 W. Va. at 734, 806 S.E.2d at 165. In permitting Count I to go forward despite the undisputed evidence just recited, the Circuit Court clearly and reversibly erred.

C. To the Extent That a *Shamblin* Claim May Be Asserted In Spite of a Consummated Settlement and in the Absence of an Excess Judgment, the Mutual's Resolution of Each Claim Was Reasonable as a Matter of Law.

Even assuming *arguendo* that Count I of the Complaint stated a cognizable claim—the existence of a settlement and absence of an excess judgment notwithstanding—the Circuit Court clearly erred in refusing to award summary judgment when the undisputed material facts conclusively proved the reasonableness of the Mutual's conduct as a matter of law. Under *Shamblin*, the question dispositive of Count I is "whether the reasonably prudent insurer would have refused to settle within policy limits under the facts and circumstances, bearing in mind always its duty of good faith and fair dealing with the insured." Syl. Pt. 4, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766. To answer that question, this Court has instructed circuit courts to examine:

> **[1]** whether there was appropriate investigation and evaluation of the claim based upon objective and cogent evidence; **[2]** whether the insurer had a reasonable basis to conclude that there was a genuine and substantial issue as to liability of its insured; and **[3]** whether there was potential for substantial recovery of an excess verdict against its insured. Not one of these factors may be considered to the exclusion of the others.

Id. Tellingly, the Circuit Court below not only failed to cite that syllabus point of *Shamblin*, but also refused to even consider those factors in context with the evidence adduced and arguments made by the Mutual. (App. 6–14, ¶¶ 38–83.) Had the Circuit Court done so, it would have discovered that each factor decisively weighed in the Mutual's favor.

With respect to the *Adkins* Litigation, the Mutual clearly evaluated the "claim based upon objective and cogent evidence" and had a "reasonable basis to conclude that there was a genuine and substantial issue" as to Dr. Covelli's liability based on the opinions of the seven medical

professionals on the Mutual's Claims Committee, Dr. Covelli, and his two experts. Syl. Pt. 4, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766. It is undisputed that Dr. Covelli consistently denied deviating from the standard of care. He made that point unmistakably clear during his deposition:

> Q. Doctor, did you meet with standard of care during the entirety of your physician patient relationship with Dominque Adkins?
> A. Yes.
> Q. No doubt about that in your mind?
> A. No.

(App. 220.) What is more, Dr. Covelli fully expected the Mutual to rely on that representation when evaluating the merits of Ms. Adkins' claim:

> Q. Did you expect The Mutual to reply upon your representations that you met the standard of care?
> A. Yes.

(App. 220.) If that were not enough, two expert witnesses (Ari Brooks, M.D., and Gregory Baker, M.D.) also supported Dr. Covelli's position; each testified that he "fully met" the applicable standard of care and "did not negligently cause or contribute to any harm" suffered by Ms. Adkins. (App. 522.) As a matter of law and common sense, an insurer, such as the Mutual, does not act in bad faith by accepting the representations of its insured when evaluating potential liability, especially so when numerous other medical professionals supported and agreed with his assessment.

The reasonableness of the Mutual's decision is further demonstrated by the dismissal, on the merits, of the Board of Medicine Complaint that was filed against Dr. Covelli by Ms. Adkins. The Mutual, as a courtesy in the absence of a contractual obligation to do so, retained Mr. Smith to defend Dr. Covelli before the Board of Medicine free of charge. (App. 478.) The Board of Medicine dismissed the Complaint against Dr. Covelli on the merits, finding no probable cause existed to support the allegations of medical malpractice made against him. (App. 673–75.) Significantly, the Board exonerated Dr. Covelli of any professional misconduct based on the same

defense by the same lawyer with the same witnesses who testified on his behalf during the trial. (App. 263.)

Nor did the Mutual fail to consider "whether there was potential for substantial recovery of an excess verdict against its insured." Syl. Pt. 4, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766. During mediation and before trial, Ms. Adkins' final settlement demand was $300,000, having dropped from $1,300,000 in response to an offer of $150,000. (App. 475, 536.) That amount paled in comparison to the $2,000,000 of coverage afforded to Dr. Covelli under the Policy. (App. 169.) What is more, the West Virginia Medical Professional Liability Act (**MPLA**) limited the amount of compensatory damages recoverable for noneconomic losses to no more than $500,000. W. VA. CODE § 55-7B-8(b). Even in a hypothetical "worst-case" scenario, that still left $1,500,000 of coverage to satisfy any amount awarded for economic losses.[10] That coverage amount was unquestionably sufficient as compared to Ms. Adkins' settlement demand of $300,000. (App. 475.) Hindsight confirms the reasonableness of that conclusion insofar as the jury only awarded $788,977 for economic losses—a little more than half of total coverage available. (App. 544.) In short, the undisputed evidence of record established that the Mutual appropriately investigated and evaluated the *Adkins* Litigation "based upon objective and cogent evidence"; that the Mutual "had a reasonable basis to conclude that there was a genuine and substantial issue as to [the] liability of its insured"; and that the Mutual adequately considered the "potential for substantial recovery of an excess verdict against its insured." Syl. Pt. 4, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766.

The same holds true with respect to the *Pomeroy* Litigation. Not a single Finding of Fact

[10] It is true that Ms. Adkins also sought an award of punitive damages against Dr. Covelli. Yet, it is equally true that punitive damages are awarded in only 1% of medical malpractice cases nationwide. BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, NCJ 233094, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, at 4 (2011), *available at* https://www.bjs.gov/content/pub/pdf/pdasc05.pdf. It is therefore unsurprising that Judge Carrie Webster directed a verdict in Dr. Covelli's favor on the punitive damages claim. (App. 477–48.)

or Conclusion of Law by the Circuit Court explained how the Mutual supposedly shirked its obligations under *Shamblin* relative to Ms. Pomeroy's claim. (App. 6–14, ¶¶ 38–83.) But according to the Complaint, the Mutual breached an obligation of some nebulous nature owed to Dr. Covelli by failing to settle that claim "prior to the filing of any public lawsuit against him." (App. 43, ¶ 15.) Of course, the record tells a much different story.

In the words of *Shamblin*, medical records comprise much of the "objective and cogent evidence" upon which an "appropriate investigation and evaluation" of a medical malpractice claim is based. Syl. Pt. 4, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766. Even Dr. Covelli agreed that it would be unreasonable to expect an insurer to settle a medical malpractice claim without first having the opportunity to review the pertinent medical records. (App. 275–76.) Here, the Mutual did not receive the medical records necessary to evaluate Ms. Pomeroy's claim until January 22, 2018. (App. 641.) Its Claims Committee immediately authorized $500,000 of authority to expeditiously resolve the claim. (App. 643.) Just thirty days later, the Mutual mediated and settled Ms. Pomeroy's claim and secured a comprehensive release in Dr. Covelli's favor. (App. 648–54.) In other words, the Mutual mediated and settled Ms. Pomeroy's claim within ***four months*** of first receiving the Notice of Claim, (*compare* App. 602–05, *with* App. 648–54); within ***two months*** of first receiving the Screening Certificate of Merit, (*compare* App. 617–18, *with* App. 648–54); and within ***thirty days*** of first obtaining the required records, (*compare* App. 641, *with* App. 648–54). As a matter of law, an insurer, such as the Mutual, does not act in bad faith by settling a medical malpractice claim made against its insured within thirty days of obtaining the medical records necessary to evaluate the merits of the claim. The Circuit Court clearly erred as a matter of law in adopting, *sub silentio*, the opposite conclusion, especially so in the absence of even a cursory analysis which explains its decision.

Relative to the *Adkins* Litigation and *Pomeroy* Litigation, the Mutual adduced sufficient undisputed evidence demonstrating that it proceeded "on reasonable and substantial grounds" and that it "accorded the interests and rights of the insured at least a great a respect as its own." Syl. Pt. 3, *Shamblin*, 183 W. Va. 585, 396 S.E.2d 766. Because the Mutual discharged its obligation under Rule 56(c) of the West Virginia Rules of Civil Procedure, the Circuit Court had no discretion to withhold summary judgment in its favor and unilaterally expand the *Shamblin* doctrine to fit the bogus claims advanced by Dr. Covelli. As the late Justice Franklin Cleckley wrote on behalf of this Court, summary judgment "is not a remedy to be exercised at the circuit court's option; it ***must*** be granted when there is no genuine disputed issue of a material fact." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996) (emphasis added) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59 n.7, 459 S.E.2d 329, 335–36 n.7 (1995)); *accord, e.g.*, *Jackson v. Putnam Cty. Bd. of Educ.*, 221 W. Va. 170, 177–78, 653 S.E.2d 632, 639–40 (2007) (per curiam) ("Summary judgment is mandated in our courts where, after appropriate discovery, there is no legitimate dispute regarding a genuine issue of material fact impacting liability apparent from the record before the circuit court."). Such was and is the case here. The Circuit Court's opposite conclusion is clearly erroneous as a matter of law and must be corrected through relief in prohibition.

II. The Circuit Court Flagrantly Disregarded This Court's Binding Interpretation of the West Virginia Unfair Trade Practices Act and Clearly Erred in Permitting Plaintiff's Corresponding Claim (Count II) to Proceed to Trial.

The Circuit Court clearly erred as a matter of law in concluding that Dr. Covelli enjoyed standing to sue the Mutual under the UTPA. (App. 14–19, ¶¶ 84–123.) Recognizing that this Court's decision in *Stucky* was dispositive of that issue, the Circuit Court first disparaged and then

disregarded it. (App. 14–17, ¶¶ 84–101.) The Circuit Court's outright refusal to follow this Court's decision in *Stucky* manifests precisely the type of "persistent disregard for" the "substantive law" of West Virginia that justifies extraordinary relief. Syl. Pt. 1, *Hummel*, ___ W. Va. ____, 850 S.E.2d 680. By rewriting the definition of the statutory term "claim," the decision below exposes liability insurers transacting business in West Virginia to statutory liability not contemplated by the plain language of the UTPA, thereby invading the Legislature's constitutional prerogative to "consider facts, establish policy, and embody that policy in legislation." Syl. Pt. 2, *Huffman*, 223 W. Va. 724, 679 S.E.2d 323. Unless corrected now, "both parties [will] be compelled to go through an expensive, complex trial and appeal from a final judgment" that this Court will certainly reverse. *Hrko*, 203 W. Va. at 658, 510 S.E.2d at 492. The systemic consequences of the Circuit Court's errors are so extraordinary that relief in prohibition must be granted to correct them.

In Count II of the Complaint, Dr. Covelli mechanistically alleged that the Mutual somehow violated four separate subsections of the UTPA relative to its resolution of the *Adkins* Litigation and *Pomeroy* Litigation. (App. 46, ¶¶ 34–37.) Each of the four relied-upon provisions regulates an insurer's conduct with respect to "claims."[11] *See* W. VA. CODE § 33-11-4(9)(b)–(d), (f). Yet, as an insured protected by a liability policy of insurance, Dr. Covelli had no "claim" within the

[11] In detail, subsection (9)(b) prohibits an insurer from "[f]ailing to acknowledge and act reasonably promptly upon communications with respect to **claims** arising under insurance policies . . . with such frequency as to indicate a general business practice." W. VA. CODE § 33-11-4(9)(b) (emphasis added). Subsection (9)(c), in turn, prohibits an insurer from "[f]ailing to adopt and implement reasonable standards for the prompt investigation of **claims** arising under insurance policies . . . with such frequency as to indicate a general business practice." *Id.* § 33-11-4(9)(c) (emphasis added). Subsection (9)(d) prohibits an insurer from "[r]efusing to pay **claims** without conducting a reasonable investigation based upon all available information . . . with such frequency as to indicate a general business practice." *Id.* § 33-11-4(9)(d) (emphasis added). Lastly, subsection (9)(f) prohibits an insurer from "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of **claims** in which liability has become reasonably clear . . . with such frequency as to indicate a general business practice." *Id.* § 33-11-4(9)(f) (emphasis added).

meaning of the UTPA and, in consequence, has no standing to complain about how the Mutual resolved the two claims made against him.

This Court's decision in *Stucky* is dispositive of that issue. The factual and procedural background of *Stucky* was discussed earlier in this Petition and will not be repeated in detail here. Just like the instant litigation, *Stucky* involved an insured's claim that its insurer violated subsection (9)(b) and subsection (9)(f) of section 4 the UTPA in connection with resolving liability claims made against the insured. 239 W. Va. at 731, 806 S.E.2d at 162. The insurer moved for summary judgment, which the circuit court denied, and thereafter sought a writ of prohibition from this Court. *Id.* at 733, 806 S.E.2d at 164.

This Court granted the writ not only with respect to the bad faith claim discussed earlier, but also with respect to the UTPA claim discussed here. *Id.* at 736, 806 S.E.2d at 167. The question dispositive of the petition was one of statutory interpretation, specifically of the term "claims," which is the operative language used in subsection (9)(b) and subsection (9)(f) of section 4 of the UTPA. *Id.* at 734–36, 806 S.E.2d at 165–67. This Court explained that in the "context of a liability policy," subsections (9)(b) and (9)(f) were "designed to protect plaintiffs who seek liability-related damages from an insured"—***not*** "to protect the insured." *Id.* at 735, 806 S.E.2d at 166. "With regard to a liability insurance policy," this Court held that "the term 'claim' is used 'in its common (and common sense) usage: an effort by a third party to recover money from the insured.'" *Id.* (quoting *Evanston Ins. Co. v. Sec. Assur. Co.*, 715 F. Supp. 1405, 1412 (N.D. Ill. 1989)). This Court then applied that definition and concluded that the contractor (as opposed to the plaintiffs) had no "claim," within the meaning of the UTPA, against the insurer and, therefore, had no standing to prosecute its third-party complaint:

> With respect to the [insurance] policy issued to [the contractor], the "claim" at issue in subsections (9)(b) and (9)(f) is the demand upon [the contractor] by the plaintiffs

> for compensation for damages resulting from [the contractor's] alleged negligent act or omission. To the extent [the insurer] failed to "act reasonably promptly upon communications with respect to claims," or failed to "effectuate prompt, fair and equitable settlements of claims," in this action, the UTPA protects only the efforts by the plaintiffs to recover legally cognizable damages from [the contractor] by way of [the insurer's] liability policy. **As the insured protected by the commercial general liability policy, [the contractor] itself can make no demand that can be defended, settled or paid by [the insurer]**. Therefore, [the contractor] has no standing to assert a claim under subsection (9)(b) or subsection (9)(f) of W. Va. Code, 33-11-4 [2002].

Id. at 735–36, 806 S.E.2d at 166–67 (emphasis added) (last alteration in original). This Court found that conclusion so obvious and inescapable that it issued a writ of prohibition dismissing the contractor's third-party complaint as a matter of law. *Id.* at 736, 806 S.E.2d at 167.

This Court's holding in *Stucky* is dispositive of Dr. Covelli's UTPA claim. Distilled to its essence, *Stucky* stands for the proposition that an insured protected by a liability policy of insurance has no "claim" within the meaning of the UTPA and, therefore, has "no standing" to complain about how his insurer resolves claims made by third-parties against him. *Id.* at 734–36, 806 S.E.2d at 165–67. That holding disposes of Count II here. With respect to the *Adkins* Litigation and *Pomeroy* Litigation, the "claims" handled by the Mutual were those of Ms. Adkins and Ms. Pomeroy—not Dr. Covelli. Dr. Covelli was merely an insured under a medical professional liability insurance policy. In that context, he had no "claim," within the meaning of the UTPA, against the Mutual. Under the reasoning of *Stucky*, it follows that like the contractor in that case, Dr. Covelli has no standing to assert a cause of action against the Mutual here.[12]

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[12] Even assuming, *arguendo*, that Dr. Covelli had standing to assert a claim against the Mutual under the UTPA, Count II fails on the merits. "In order to establish a statutory cause of action [under the UTPA], a claimant must demonstrate that the insurer (1) violated the UTPA in the handling of the claimant's claim and (2) that the insurer committed violations of the UTPA with such frequency as to indicate a general business practice." *Holloman v. Nationwide Mut. Ins. Co.*, 217 W. Va. 269, 276, 617 S.E.2d 816, 823 (2005) (citing *Jenkins v. J. C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 610, 280 S.E.2d 252, 260 (1981), *overruled on other grounds by State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994); *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996)). Here, the record contains no proof that the Mutual violated the UTPA with respect to resolving either the *Adkins* Litigation or the *Pomeroy* Litigation. Liability was never "reasonably clear" regarding the *Adkins* Litigation. *See* Syl. Pt. 2, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004). That

Confronted with this Court's decision in *Stucky*, the Circuit Court simply disregarded it. (App. 14–17, ¶¶ 84–101.) It concluded, without explanation or analysis, that there was "a serious question as to the *Stucky* decision's precedential value." (App. 16, ¶ 97.) The Circuit Court framed its conclusion as turning on the absence of a new syllabus point, but the reality is that the Circuit Court merely disagreed with this Court's decision and preferred to rely on the dissent of Justices Davis and Workman. (*Compare* App. 16, ¶¶ 98–100, *with* App. 16–17, ¶ 101.) In so doing, the Circuit Court clearly erred as a matter of law.

The Circuit Court failed to appreciate that the simple absence of a new syllabus point does not diminish the "significant, instructive, [and] precedential weight" of *Stucky* as a published and signed opinion of this Court. Syl. Pt. 2, *McKinley*, 234 W. Va. 143, 764 S.E.2d 303. It is indisputable that two duly elected Justices of the West Virginia Supreme Court of Appeals joined Justice Menis Ketchum's majority opinion in *Stucky*. *See Stucky*, 239 W. Va. at 736, 806 S.E.2d at 168 (Workman, J., joined by Davis, J., dissenting) ("I respectfully dissent **to the majority opinion** . . . ." (emphasis added)). Because a "majority of the justices of the court" joined Justice Ketchum's majority opinion in *Stucky*, it is "binding authority upon any court" in the State of West Virginia. W. VA. CONST. art. VIII, § 4. The Circuit Court below is no exception.

In addition, the hierarchy of precedent established in *McKinley* only becomes relevant if *Stucky*'s holding happened to conflict with a prior or subsequent decision of this Court. In that situation, it would be necessary to determine which part of which opinion controlled. *See, e.g.*, *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 42–43, 829 S.E.2d 35, 42–43 (2019) (affording controlling weight to syllabus point that conflicted with dicta from subsequent case).

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much is demonstrated by the testimony of Dr. Covelli, Dr. Luke Martin (Assistant Surgeon during the Adkins procedure), Dr. Ari Brooks, and Dr. Gregory Baker, and the dismissal on the merits of the Board of Medicine Complaint. (*See* App. 220, 522, 673–75.) Likewise, for the reasons discussed earlier, the Mutual did not fail to promptly investigate and evaluate the merits of the *Pomeroy* Litigation either.

Here, of course, there was no such conflict and, so, no need for the Circuit Court to have resorted to *McKinley* in the first instance. That conclusion is especially true insofar as *Stucky* turned on a question of statutory interpretation which, as this Court has instructed, merits significant deference. *See, e.g., Jenkins v. City of Elkins*, 230 W. Va. 335, 341, 738 S.E.2d 1, 7 (2012) ("[A]dherence to prior decisions of this Court, and the consistency among the rulings of this Court that necessarily results therefrom, is particularly warranted when those prior decisions involve a matter of statutory construction.").

Recognizing that its effort to discount or disparage *Stucky*'s precedential force was unavailing, the Circuit Court also relied on an irrelevant factual distinction as support for its decision to depart from this Court's precedent. (App. 17–19, ¶¶ 102–23.) The Circuit Court first noted, correctly, that only subsection (9)(b) and subsection (9)(f) were directly at issue in *Stucky*, but then extrapolated, incorrectly, that *Stucky*'s holding did not prohibit Dr. Covelli from maintaining a cause of action premised on subsection (9)(c) or subsection (9)(d). (App. 17, ¶¶ 102–06.) The Circuit Court made no effort to explain why *Stucky*'s holding should be cabined to subsections (9)(b) and (9)(f) alone.

The reason for the absence of such an explanation is obvious. As discussed, *supra*, this Court's decision in *Stucky* turned on its interpretation of the statutory term "claim," which the Court held to mean "an effort ***by a third party*** to recover money ***from the insured***." *Stucky*, 239 W. Va. at 735, 806 S.E.2d at 166 (emphasis added) (quoting *Evanston Ins. Co.*, 715 F. Supp. at 1412). Just like subsections (9)(b) and (9)(f), which this Court directly addressed in *Stucky*, subsections (9)(c) and (9)(d) both speak in terms of "claims." Subsection (9)(c) pertains to "reasonable standards for the prompt investigation of ***claims***," W. VA. CODE § 33-11-4(9)(c) (emphasis added), while subsection (9)(d) pertains to a refusal "to pay ***claims*** without conducting

a reasonable investigation," *id.* § 33-11-4(9)(d) (emphasis added). Under the reasoning of *Stucky*, it follows, *a fortiori*, that Dr. Covelli similarly lacks standing to pursue a cause of action premised on alleged violations of subsections (9)(c) and (9)(d) as well. The Circuit Court clearly erred as a matter of law and of common sense in disregarding *Stucky* on the basis of a naked distinction without a substantive difference.[13] Relief in prohibition is warranted for the exact same reason that the writ issued in *Stucky*.

CONCLUSION

The Circuit Court clearly erred as a matter of law in permitting Count I and Count II of the Complaint to proceed to trial. In consequence, the Mutual will be forced to incur the substantial expense associated with trial and an inevitable appeal absent extraordinary relief from this Court. The matters presented in this Petition, if permitted to stand, raise important problems and issues for the professional liability insurance industry going forward. Therefore, the Mutual respectfully asks this Court to grant its Petition and issue a writ directing the Circuit Court to dismiss the Complaint as a matter of law.

[13] The Circuit Court also concluded, erroneously, that West Virginia law recognizes a cause of action premised on alleged violations of insurance regulations. (App. 18–19, ¶¶ 107–21.) Yet, even if Dr. Covelli had standing to sue for alleged regulatory violations, it has long been settled that "a violation of an insurance regulation standing alone does not give rise to a cause of action under" the UTPA. *White v. Am. Gen. Life Ins. Co.*, 651 F. Supp. 2d 530, 548 (S.D. W. Va. 2009) (citation omitted). On that point, the regulations themselves are clear: None of them "creates or recognizes, either explicitly or impliedly, any new or different cause of action not otherwise recognized by law." W. VA. CODE ST. REG. § 114-14-1.1(e) (effective Apr. 24, 2006).

VERIFICATION

I, Michael J Farrell, after being first duly sworn, depose and say that the facts contained in the foregoing ***Petition for a Writ of Prohibition*** are true, except insofar as they are therein stated to be upon information and belief, and, as to those matters, I believe them to be true.

Executed on this 3rd day of March, 2021, at Cabell County County, West Virginia

[Signature]

Beverly G. Morrison

NOTARY PUBLIC

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____
(Circuit Court of Kanawha County, West Virginia
Civil Action No. 18-C-1250)

State of West Virginia *ex rel.* West Virginia Mutual Insurance Company, Petitioner,

v.

Hon. Tera Salango, Presiding Judge, Circuit Court of Kanawha County, West Virginia; and Michael Covelli, M.D., Respondents.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Petitioner West Virginia Mutual Insurance Company, do hereby certify that the foregoing **Petition for a Writ of Prohibition**, **Appendix Volume I**, **Appendix Volume II**, and **Appendix Volume III** were served on March 3, 2021 via hand delivery upon the following:

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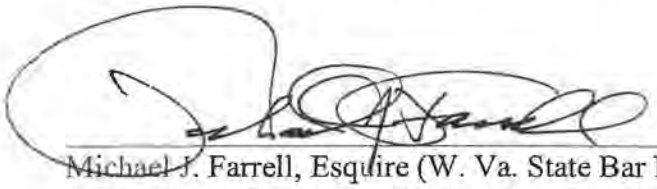

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