IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MICHAEL COVELLI, M.D.,

Plaintiff,

v.

Civil Action No. 18-C-1250
Honorable Tera L. Salango

WEST VIRGINIA MUTUAL INSURANCE COMPANY,

Defendant.

ORDER DENYING WEST VIRGINIA MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

On this 7th day of January 2021 came the parties for a Pretrial Conference during which Defendant West Virginia Mutual Insurance Company's Motion for Summary Judgment was duly noticed. The Court has reviewed the pleadings including Defendant's Motion, Plaintiff's Response in Opposition thereto and Defendant's Reply, along with all of the Exhibits attached thereto. Having reviewed all of the pleadings and having given the matter mature consideration, the Court is of the opinion and does hereby **DENY** Defendant West Virginia Mutual Insurance Company's Motion for Summary Judgment pursuant to WVRCP 56 finding that there are genuine issues of material fact requiring a jury's determination such that this Court cannot determine this case as a matter of law. In addition, due to the ongoing Covid-19 pandemic, the trial of this matter currently set for January 25, 2021 is hereby **CONTINUED** and the parties are to contact the Court on or after March 1, 2021 to obtain a new trial date. Relative to the Motion for Summary Judgment, the Court makes the following findings of fact and conclusions of law;

STANDARD OF REVIEW

1. This Court should only grant summary judgment if the undisputed material facts indicate that the movant is entitled to summary judgment as a matter of law. Rule 56(c) of the

West Virginia Rules of Civil Procedure only permits summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

2. The moving party must satisfy its burden by demonstrating that the record contains no evidence to support an essential element of the Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-24 (1986).

3. Importantly, all facts, and the inferences drawn from those facts, must be viewed in the light most favorable to the party opposing the Motion. *United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962).

4. If all facts, and inferences from those facts, reflect that it is "perfectly clear that there are no issues in the case[,]" only then is summary judgment proper. *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887, 72 S.Ct. 178 (1951).

5. In addition, even where a directed verdict would be proper after hearing the evidence, this Court should not try the case in advance by summary judgment. *Id.*

6. In the context of this summary judgment motion, Plaintiff is in a favorable position and is entitled "to have the credibility of [his] evidence as forecast assumed, [his] version of all that is in dispute accepted, all internal conflicts in it resolved favorably to [him], the most favorable of possible alternative inferences from it drawn in [his] behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered." *Charbonnages de France v. Smith*, 597 F. 2d 406, 414 (1979).

FINDINGS OF FACT

7. Dr. Covelli maintained medical professional liability insurance with Defendant WVMIC for the time periods relevant to the two claims made against him and referred to herein with policy limits of $2 milllion.

8. Dominique Adkins, a former patient of Dr. Covelli, sued him alleging medical malpractice in the performance of a total thyroidectomy.

9. Defendant retained Salem C. Smith as counsel to defend Dr. Covelli against Ms. Adkins' claim.

10. The Defendant appointed a claims consultant, Tammy Welch, to handle Ms. Adkins claim for the insurance company.

11. Ms. Welch's responsibilities included gathering and reporting information regarding the lawsuit from defense counsel, transmitting that information to Defendant's Claim's Committee, and then communicating the Claims Committee's instructions and directions to defense counsel.

12. Defendant's Claims Committee is a nine-person board that makes decisions regarding whether a claim against an insured should be settled or defended at trial.

13. Ms. Adkins' case was mediated on April 21, 2017.

14. Mediation was unsuccessful, ending with a formal demand by Ms. Adkins in the amount of $300,000 and a formal offer from the Defendant on Dr. Covelli's behalf in the amount of $150,000.

15. Mr. Smith, the lead lawyer retained by Defendant to defend Dr. Covelli informed Ms. Welch shortly after mediation that he believed that the case could be settled for $275,000 and he recommended authority of $250,000.00.

16. On May 15, 2017, Dr. Covelli sent Defendant a "*Shamblin*" letter, demanding that Defendant settle Ms. Adkins claim within policy limits.

17. Defendant refused to authorize any further settlement authority for Ms. Adkins' claim and in September 2017, a jury returned a verdict in favor of Ms. Adkins and against Dr. Covelli finding that he was negligent and awarding Ms. Adkins damages in the amount of $5,788,977.00.

18. News stories regarding the verdict, including the amount, were published in the West Virginia Gazette and West Virginia Record.

19. Several weeks after the verdict, Defendant settled Ms. Adkins' claim in the amount of $950,000.00.

20. As a result of the publicity generated by Ms. Adkins' trial verdict, a second claimant, Shelbie Pomeroy, contacted Ms. Adkins' counsel about pursuing a similar claim.

21. Defendant received Ms. Pomeroy's notice of claim on October 13, 2017.

22. Dr. Covelli's counsel served Defendant with a "*Shamblin*" letter regarding Ms. Pomeroy's claim on November 14, 2017 and January 5, 2018.

23. A civil complaint alleging medical malpractice was filed on Ms. Pomeroy's behalf and against Dr. Covelli on January 8, 2018.

24. Defendant settled Ms. Pomeroy's claim on February 21, 2018 in the amount of $300,000.

25. Dr. Covelli has retained and disclosed J. Rudy Martin, Esq. as an expert witness to offer testimony in support of his claims of first-party bad faith and violation of the West Virginia Unfair Trade Practices Act.

26. In furtherance of his damages claim, Dr. Covelli retained the service of Dr. Clifford B. Hawley, a Professor Emeritus of Economics at West Virginia University, to provide testimony concerning Dr. Covelli's economic damages resulting from Defendant's conduct.

27. Dr. Hawley has submitted a report, which has been provided to Defendant, in which he opines a range for Dr. Covelli's damages ranging from $1,205,058 to $1,467,650.

28. Dr. Covelli has provided evidence that he has sustained some amount of damages resulting from Defendant's conduct; its failure to settle the Adkins claim which resulted in a large public verdict reported in the newspaper triggering a second claim by Pomeroy resulting in two settlement totaling $1,250,000.00 reported to the National Practitioner's Data Bank.

29. Dr. Covelli, prior to the Adkins trial, had applied for privileges at Charleston Area Medical Center ("CAMC").

30. In 2018, he withdrew his application following the filing of the Pomeroy claim.

31. Defendant argues that Dr. Covelli caused his own damages in this regard by failing to report the Pomeroy claim to CAMC (Dr. Covelli contends he simply forgot to report it).

32. What Defendant ignores is had it settled the Adkins claim prior to the public verdict with a confidential settlement agreement as Defendant does with all claims it settles on behalf of its insureds, there would have been no Pomeroy claim for Dr. Covelli to report to CAMC.

33. In addition, Dr. Covelli has claimed additional damages in this matter for annoyance and inconvenience, emotional distress and punitive damages.

CONCLUSIONS OF LAW

34. Defendant seeks summary judgment on both counts alleged in Dr. Covelli's complaint.

35. With regard to the allegation of common law bad faith in Count I, Defendant essentially argues that it did not breach any duty it owed to Dr. Covelli.

36. With regard to Count II, Defendant argues that Dr. Covelli lacks standing to assert a claim under the West Virginia Unfair Trade Practices Act.

37. Finally, with regard to both counts, Defendant argues that Dr. Covelli has not suffered any damages.

A. A Material Question of Fact Exists as to Whether Defendant Breached the Duty of Good Faith and Fair Dealing it Owed to Dr. Covelli.

38. In the context of this motion for summary judgment, Defendant primarily argues, as it did in its motion to dismiss that Dr. Covelli has no viable cause of action under *Shamblin v. Nationwide Mutual Insurance Co.*, 396 S.E.2d 766 (W.Va. 1990) because Dr. Covelli was not actually exposed to personal risk in excess of the policy limits (here, $2 million).

39. As authority for its argument, Defendant relies on the West Virginia Supreme Court of Appeals decision in *Strahin v. Sullivan,* 647 S.E.2d 765 (W. Va. 2007).

40. As this Court recognized in denying Defendant's motion to dismiss, *Strahin* does not carry the day for Defendant.

41. By way of background, *Shamblin* established protection for insureds against the misconduct of insurers in the context of claim negotiation and settlement.

> [I]t is beyond cavil that the original Shamblin doctrine was created to protect policyholders who purchase insurance to safeguard their hard-won personal estates and then find these estates needlessly at risk because of the intransigence of an insurance carrier.

Charles v. State Farm Mutual Automobile Ins. Co., 452 S.E.2d 384, 389 (W.Va. 1994).

42. The contours and guardrails of a *Shamblin* cause of action have been well established since 1990.

> 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, *Shamblin v. Nationwide Mutual Insurance Co.*

> 43. It will be the **insurer's burden to prove by clear and convincing** evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was **based on reasonable and substantial grounds,** and that **it accorded the interests and rights of the insured at least as great a respect as its own.**

Syl. Pt. 3, *Shamblin v. Nationwide Mutual Insurance Co.* (emphasis added).

44. In *Strahin*, the West Virginia Supreme Court addressed the specific situation in which the Defendant-Insured had entered into an Assignment and Covenant Not to Execute ("Covenant") with the underlying Plaintiff. *Strahin*, 647 S.E.2d at 769.

45. Under the terms of the Covenant, the third-party claimant agreed not to pursue an excess verdict against the insured.

46. In consideration for the agreement not to execute, the inured assigned all of its rights relating to any bad faith claim it may have had or attain in the future against the insurer.

47. The Supreme Court noted, as a result of the Covenant, at the time an excess verdict was rendered against the insured, the insured was protected from liability for the excess verdict.

48. Accordingly, the trial court granted summary judgment in favor of the insured on the plaintiff's *Shamblin* claim.

49. The supreme court affirmed the trial court's decision in the following syllabus point:

> 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.**

Id. at syl. pt. 9 (emphasis added.)

50. *Strahin* is clearly and easily distinguishable because no such covenant or other agreement existed to protect Dr. Covelli from personal liability at the **time** the excess verdict against him was rendered.

51. The jury rendered its verdict in favor of Ms. Adkins on September 29, 2017.

52. The amount awarded in the verdict was in excess of Dr. Covelli's liability limits.

53. Viewing the lay and expert evidence of record in this case in a light most favorable to Dr. Covelli, as this Court must do, Dr. Covelli has a viable *Shamblin* claim against Defendant as alleged in Count I of the complaint, and that claim is not precluded by the decision in *Strahin*.

54. Moreover, this Defendant relies on the contract of insurance between it and Dr. Covelli as the sole basis for the duties it was required to meet.

55. Defendant ignores it common law covenant of good faith and **fair** dealing as well as its own advertising.

56. Here, Defendant advertised to the world on its website that it delivers "**Advocacy** – Protecting physicians, their livelihoods and **their reputations**."

57. Here, Defendant's decision (and it was their sole decision as their contract does not require their insured physician's advice or consent to settle) to not settle the Adkins claim and proceed to trial did not protect Dr. Covelli's livelihood or reputation.

58. The defense in summary is that Dr. Covelli maintained that he met the standard of care in his treatment of Ms. Adkins, the Defendant had experts to support that and so despite Dr. Covelli's desire to settle the claim against him, Defendant was going to defend the claim through trial.

59. That posture, which ignores reality, is not supportable because Defendant's claim committee meets in secret, has the power to determine whether to settle a claim and if so, for how much and maintains no records of the substance of what was considered when it met to discuss the Adkins claim against Dr. Covelli.

60. Defendant has invoked the quasi attorney-client privilege relative to advice and reporting it received from Salem C. Smith, counsel Defendant retained to defend Dr. Covelli in the Adkins claim, and accordingly has redacted the entirety of Mr. Smith's case evaluation report.

61. Defendant cannot now rely in its defense on what Mr. Smith might have advised them having withheld it from discovery.

62. Moreover, Defendant's claim representative, Tammy Welch, acknowledged that it is not unusual for Defendant's insured doctors to claim they have met the standard of care but yet desire to settle a claim made against them.

63. This scenario acknowledges risks in the trial process despite expert opinions supporting the insured physician.

64. For instance, the risk that the doctor may not be believed by the jury as acknowledged by Ms. Welch:

Q. Sure, because there are – first of all, there are risks that the doctor may not be believed –

A. Uh-huh.

***

Q. There's risk for excess verdicts?

A. Yes.

Q. There are other consequences potentially to the doctor, such as reporting, bad publicity, thing of that nature?

A. Yes, I guess that would be correct, yes.

Q. And at least in this case and at least when Dr. Covelli first met with you, there was still an existing claim for punitive damages?

A. Yes.

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Q. As we discussed, the claim for punitive damages wasn't dismissed until midway through the trial or thereabouts?

A. Thereabouts, correct.

65. Ms. Welch acknowledged a risk that the doctor may not be believed by the jury as well as other factors relevant to the litigation process beyond merely the doctor's contention that he met the standard of care in the treatment of the patient.

66. Defendant failed to acknowledge this risk in its evaluation of the Adkins claim at only $150,000.00.

67. Defendant knew prior to trial that there was substantial risk Dr. Covelli would not be believed.

68. Ms. Adkins was represented at trial by Dr. Richard Lindsay, an experienced medical malpractice attorney who also happens to be a doctor.

69. Dr. Lindsay testified that he had great confidence in the merits of Adkins' case.

70. Moreover, he testified that all of the evidence upon which he gained his confidence was evidence available or known to Defendant here.

Q. ...Were any of the facts that led you to that confidence level facts that you knew that the defendant or his team or The Mutual were not aware of?...

A. Yeah, I mean, the facts of the case, I'm assuming they were – The Mutual was aware of.

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Q. Sure. They had – The Mutual had access to the same medical records that you had, correct?

A. Yes.

Q. Had access to the same expert opinions that you had? Those were all disclosed, correct?

A. Yeah, I'm sure they did.

Q. And would have had access to the same deposition testimony up to the point of mediation and thereafter at trial, correct?

A. Yes.

Q. And then in terms of – as you referenced Dr. Covelli's background, are you aware of any of that that was not a matter of public record of one sort or another?

A. Well, I mean, I think from what I can tell from the depositions, not only public record but they're aware of the settlements and that type of thing. So that they would know what they paid out before...

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Q. But his past medical claims prior to leading up to the Adkins trial would have been information that The Mutual would have had at least as much access to, if not more?

A. Yeah, I mean, I would think so. And I think, like – again, if I was investigating a present case, not only would I have access to the prior settlements and claims, I would like to see what his testimony was. How does it stack up? Does he change his testimony from one deposition to the next? What's the reason in the other cases?

So, beyond the actual paperwork of a settlement, I would want to know what – his track record regarding testimony and reasons for the injuries.

Q. And has it been your experience as a practicing attorney that prior deposition testimony is obtainable?

A. For the most part, yes. I mean, not just like 20 years ago, but it's – for the most part, it is obtainable, especially by the insurance company, because they would have the right to – especially if it's the same insurance company, I would think – would have the right to get the deposition on behalf of Dr. Covelli or have Dr. Covelli get the deposition to turn over.

71. It is evident that Defendant ignored Adkins' claim that Dr. Covelli's negligence impaired her ability to enjoy sexual relations.

72. Adkins' attorney, the experienced Dr. Richard Lindsay testified that Adkins' Complaint contained a claim for loss of enjoyment of life, and despite not being married, her right to enjoy sex outside of marriage was part of her claim and "...no less important to them than people in marriage."

73. What is significant here is that this aspect of Ms. Adkins claim was known to Defendant in advance of mediation.

74. Dr. Lindsay went on to testify that nothing new developed at trial to lessen his confidence level.

75. Accordingly, Defendant here cannot assert that the trial verdict in excess of $5 million was the result of any surprise fact or testimony or any other development that occurred during the trial of the Adkins matter.

76. Defendant extended no further settlement offers to Adkins during the pendency of the trial, despite Dr. Lindsay's willingness to continue negotiations and listen to any offer.

77. Dr. Lindsay testified that it is not just the medicine that must be evaluated, but that the sympathy of a witness and the credibility of a defendant are important.

78. Tamara Huffman is Executive Vice President and COO for Defendant.

79. As such, she serves as a member of the claims committee that considered the Adkins claim against Dr. Covelli.

80. Her sworn testimony displays the lack of consideration of the consequences of an adverse verdict upon Dr. Covelli, and thus Defendant's violation of its covenant of good faith and fair dealing to give at least equal consideration to Dr. Covelli's interests as its own:

Q. What consideration, if any, was given to Dr. Covelli by The Mutual for the potential impact of an adverse verdict?

A. We never thought there was going to be an adverse verdict.

Q. I understand.

A. Dr. Covelli never thought, as far as we know, that there was going to be an adverse verdict, so there really was no condiseration. We thought it was a very defensible case. That was our information. That's what we based our decisions on. We expected a defense verdict.

81. The lay and expert evidence of record establishes a prima facie bad faith cause of action against Defendant because it failed to consider all relevant factors in evaluating the Adkins claim against Dr. Covelli.

82. At trial of this matter, the burden of proof will shift to Defendant to prove by clear and convincing evidence that it attempted in good faith to settle the case and that it accorded the interests of its insured at least as great a respect as its own.

83. These will all be issues to be decided by the jury at trial.

B. Dr. Covelli Has Standing to Allege a Claim Against Defendant Under the West Virginia Unfair Trade Practices Act.

84. Defendant's argument that Dr. Covelli lacks standing to allege a claim under the Unfair Trad Practices Act ("UTPA") primarily relies on the West Virginia Supreme Court of Appeals decision in *State ex. Rel. State Auto Prop. Ins. Co. v. Stucky*, 806 S.E.2d 160 (W. Va. 2017).

85. *Stucky* arose out the construction of a new home that caused damage to another home located downhill that was damaged.

86. The downhill homeowners sued the new-home owners and the builder, CMD.

87. CMD was insured by State Auto and CMD alleged in its UTPA claim that State Auto conducted a series of inspections and investigations that delayed settlement of the plaintiff's claims and increased the amount of plaintiff's property damage.

88. The trial court denied State Auto's motion to dismiss and motion for summary judgment.

89. State Auto sought a Writ of Prohibition from the Supreme Court for its denial of summary judgment motion.

90. The Supreme Court granted the writ and dismissed CMD's claims against is insurer. *Id.*, 806 S.E.2d at 167.

91. CMD asserted in its complaint that State Auto had violated subsections (9)(b), (9)(f), and (9)(g) of the UTPA.

92. In the discussion relied upon by Defendant in the present case, the Supreme Court found that CMD, the insured, lacked standing to assert claims that State Auto violated subsections (9)(b) and (9)(f) of the UTPA. *Id.*, 806 S.E.2d at 166-7.

93. Subsection (b) of the UTPA prohibits "[f]ailing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies." W. Va. Code § 33-11-4(9)(b).

94. Subsection (f) prohibits "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." W. Va. Code § 33-11-4(9)(f).

95. The court reasoned that any cause of action arising from subsections (9)(b) and (9)(f) protects only the third-party claimant seeking damages from the insured. *Id.*, 806 S.E.2d at 166-7.

96. The court also concluded that the facts of the case did not support a claim under subsection (9)(g) of the UTPA, which prohibits "[c]ompelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts

ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered[.] *Stucky*, 806 S.E.2d at 167; W. Va. Code § 33-11-4(9)(g).

97. There is a serious question as to the *Stucky* decision's precedential value.

98. More notably, as pointed out by Justice Workman in her dissent, the case has no syllabus point, but it "has implicitly altered the law without even enunciating a new syllabus point." *Id.*, 806 S.E.2d at 167 (Workman, J., dissenting).

99. "Signed opinions containing original syllabus points have the highest precedential value because the Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court." Syl. pt. 1, *State v. McKinley*, 764 S.E.2d 303 (W. Va. 2014).

100. "Signed opinions that do not contain original syllabus points also carry significant, instructive, precedential weight because such opinions apply settled principles of law in different factual and procedural scenarios than those addressed in original syllabus point cases." *Id.*, at syl. pt. 2.

101. Justice Workman's blistering dissent, in which Justice Davis joined, further criticized the majority decision with the following language:

> As the circuit court astutely observed, "the duty to defend and indemnify are not met merely by providing the insured with an attorney and ultimately obtaining a release of the insured." On this matter's first appearance in this Court, a majority recognized that CMD is claiming bad faith in the settlement process,"for failing to use good faith in settling a claim." Stucky I, 2016 WL 3410352 at *3. The majority in the present case draws the line injudiciously by essentially agreeing with State Auto's assertion that provision of a defense and indemnification are sufficient, regardless of the manner in which such things are accomplished. However, paying in the end may not always be sufficient; an insurer must also

> adhere to its duty of good faith and fair dealing throughout the process.

Stucky, 806 S.E.2d at 170.

102. More importantly, the *Stucky* decision does not address all of the UTPA violations alleged by Dr. Covelli.

103. In addition to subsections (9)(b) and (9)(f), Dr. Covelli has alleged and developed evidence in support of claims that Defendant violated subsections (9)(c) and (9)(d) of the UTPA.

104. Contrary to Defendant's argument, *Stucky* does not explicitly hold that an insured has no standing to assert claims under these subsections.

105. Subsection (9)(c) prohibits "[f]ailing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies." W. Va. Code § 33-11-4(9)(c).

106. Subsection 9(d) prohibits "[r]efusing to pay claims without conducting a reasonable investigation based upon all available information." W. Va. Code § 33-11-4(9)(d).

107. As Defendant correctly acknowledges, Dr. Covelli's insurance expert, J. Rudy Martin, Esq. has also identified that Dr. Covelli has a claim for violation of the UTPA regulations based on Defendant's failure to properly document its claim file.

108. Defendant mocks Mr. Martin for not knowing what is in the redacted portion of the claim file but, at no point does Defendant suggest that the redacted portions defeat Mr. Martin's conclusion that Defendant did not properly document its claim file.

109. One can infer that if the redacted portions supported Defendant's arguments, they would have waived their claim of quasi attorney-client privilege and removed the redactions.

110. But to be sure and fair and just, Defendant cannot rely in its defense upon that which it has withheld claiming privilege.

111. Due process dictates otherwise.

112. Dr. Austin Wallace is Chairman of the Board, President and CEO of Defendant.

113. As such, he also sits on the claims committee.

114. He confirmed Defendant's failure to adhere to the UTPA's requirements of properly documenting its claims handling process.

Q. Okay. Very good. And am I correct in understanding that these meetings of the claims committee are not recorded?

A. Correct.

Q. They're not either by audio, video or any other means?

A. Yes.

Q. Okay. And are notes taken and preserved of the committee meetings?

A. No.

115. Simply put, Defendant failed to preserve any rationale as to its determination to only offer $150,000.00 to settle the Adkins claim and never reconsider its position.

116. Dr. Wallace's testimony is evidence of violations of the UTPA insomuch as the claims handling process simply isn't documented.

117. While not specifically cited in Mr. Martin's deposition, the regulation to which he was referring states as follows:

> The insurer's claim files shall be subject to examination by the Commissioner or by his or her duly appointed designees. Such files shall contain all notes and work papers pertaining to the claim in such detail that pertinent events and the dates of such events can be reconstructed. All communications and transactions emanating from or received by the insurer shall be dated by the insurer. A notation of the substance and date of all oral communications shall be contained in the claim file. Insurers shall either make a notation in the file or retain a copy of all forms mailed to claimants.

W. Va. C.S.R. §114-14-3.

118. Defendant argues that Mr. Martin's opinion that Defendant violated a UTPA regulation is meaningless.

119. Digging deep into dicta, Defendant relies on a footnote in an overturned case for the proposition that "a violation of an insurance regulation **standing alone** does not give rise to a cause of action under" the UTPA. *Russell v. Amerisure Ins. Co.*, 433 S.E.2d 532, at n. 4 (W. Va. 1993)(emphasis added), *overruled on other grounds by State ex. Rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 155 (W. Va. 1994).

120. However, Defendant's alleged violation of the UTPA rules does not stand alone.

121. It is accompanied by the alleged violations of the UTPA in Count II and the bad faith claim in Count I, and further bolstered by Dr. Covelli's claim that Defendant violated its covenant of good faith and fair dealing.

122. As explained above, Defendant's legal arguments against Dr. Covelli's UTPA claims are unpersuasive leaving only questions of whether the evidence of record is sufficient to defeat summary judgment at this stage and entitle Dr. Covelli to proceed to trial.

123. The evidence is sufficient and summary judgment is denied.

C. Dr. Covelli Suffered Provable Damages as a Result of Defendant's Conduct as Alleged in Both Counts of the Complaint.

124. Defendants argument that Dr. Covelli cannot establish that he has suffered any damage is without merit.

125. Dr. Covelli has testified that he experienced the emotional distress of facing the embarrassment and humiliation of the public knowledge through the newspaper article announcing to the world (and still available on the internet) that verdict was returned against him in excess of $5 million.

126. Dr. Covelli has testified that he suffered the emotional distress of potential exposure to an excess verdict from the time the verdict in Ms. Adkins case was rendered until Defendant, at long last, settled the claim on his behalf.

127. Dr. Covelli has also testified that suffered the consequential emotional distress of the Pomeroy claim which never would have been made but for the publicity of the Adkins verdict.

128. Furthermore, West Virginia's recognition of a compensatory award for damage to reputation is ancient in its origin and remains relevant today. *See Kendall v. Dunn*, 76 S.E. 454 (W. Va. 2012); *Michaelson v. Turk*, 90 S.E. 395 (W. Va. 1916); *Jones v. Credit Bureau of Huntington, Inc.*, 399 S.E.2d 694 (W. Va. 1990); *Estep v. Brewer*, 453 S.E.2d 345 (W. Va. 1994).

129. Damages for injury to reputation are in the nature of general damages and the amount to be awarded are within the sole province of the jury. *Estep*, 453 S.E.2d at 346, n. 4.

130. More substantially, Dr. Covelli retained the services of Dr. Clifford B. Hawley, a Professor Emeritus of Economics at West Virginia University, to provide testimony concerning Dr. Covelli's economic damages resulting from Defendant's misconduct.

131. Dr. Hawley has submitted a report, which has been provided to Defendant, in which he opines a range for Dr. Covelli's economic damages ranging from $1,205,058 to $1,467,650.

132. Defendant asserts that Dr. Covelli caused his own damages having failed to report the Pomeroy claim to CAMC where he had then pending an application for privileges.

133. Defendant's argument fails to acknowledge that, whether Dr. Covelli innocently forgot to report the Pomeroy claim to CAMC or he intentionally failed to do so as Defendant

suggests, there would have been no Pomeroy claim for Dr. Covelli to report to anyone had Defendant not violated its duty of good faith and fair dealing to Dr. Covelli and closed the gap between its offer of $150,000.00 and Adkins demand of $275,000.00 to confidentially settle that claim prior to trial.

134. Defendant can challenge the opinions of Dr. Hawley and the basis thereof but Defendant cannot assert that Dr. Covelli has suffered no damages at all from its conduct sufficient to merit summary judgment.

135. This is not a case of "no harm, no foul" as Defendant suggest simply because it settled both claims without personal payment from Dr. Covelli.

136. The potential consequences of Defendant's actions and failure to **accord the interests and rights of its insured at least as great a respect as its own** reach far beyond the $1,250,000.00 it cost itself to settle those claims when it could have settled Adkins for $275,000.00 and never had to deal with Pomeroy.

137. Defendant failed to accord the interests of Dr. Covelli's livelihood, reputation and emotions at least as great a respect as their own economic interest in the two claims.

138. Summary judgment must be denied

139. Accordingly, for the reasons set forth herein, the Defendant's Motion for Summary Judgement is denied.

140. The Court notes the exception and objections to all parties to any adverse rulings.

141. The Clerk is directed to forward a true copy of this Order to all counsel of record.

ENTER: January 25, 2021

Honorable Tera L. Salango

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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