IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

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2. Whether the Circuit Court correctly denied summary judgment concluding that *Shamblin v. Nationwide Mutual Insurance Co.*, 396 S.E.2d 766 (W.Va. 1990) permits a direct action by an insured against his insurer where the insured demanded that the case be settled within his policy limits, the insurer had an opportunity to do so but failed resulting in a verdict of over $5 million in excess of his policy limits.

3. Whether the Circuit Court correctly denied summary judgment concluding that genuine issues of material fact existed as to whether Petitioner violated its common-law duty of good faith and fair dealing with its insured.

4. Whether the Circuit Court correctly denied summary judgment allowing Respondent to proceed with his claim against his insurer under the West Virginia Unfair Trade Practices Act (UTPA), W.Va. Code §33-11-1 to 10.

II. STATEMENT OF THE CASE

This Writ of Prohibition is an attempt at an improper interlocutory appeal to which Petitioner has no legal right and brazenly fails to address its claim of original jurisdiction before this Court in its brief. Petitioner, a medical malpractice insurance company, promised that it would protect

the reputation of Respondent, its insured and proud member of the United States Naval Reserves. It failed to do that ignoring his wishes that an underlying claim by a former patient, Dominique Adkins, be settled in advance of trial. Petitioner substituted its own judgment for that of its insured and his counsel appointed by the Petitioner. The Adkins case could have been settled before trial for $275,000.00. Petitioner only offered $150,000.00 and never negotiated any further. The Adkins case proceeded to trial and resulted in a verdict of over $5 million drawing attention from the local media. Respondent's policy limits were only $2 million.

The adverse publicity resulted in a second claim against Respondent by a former patient, Shelbie Pomeroy. As a result, a public lawsuit was filed by Pomeroy and moreover, Respondent was forced to withdraw his application for privileges at Charleston Area Medical Center (CAMC) resulting in great economic harm to Respondent.

The Adkins case was not hotly contested, but rather the result expected by Adkins' attorney, Dr. Richard Lindsay. The Circuit Court correctly denied Petitioner's Motion for Summary Judgment finding genuine issues of material fact exist precluding the Court from granting summary judgment. It is from this Order that Petitioner seeks original jurisdiction of this Court in lieu of proceeding to a public trial as required which

trial will expose to its insureds its unfair, arrogant and selfish claims management practices.

III. STATEMENT OF FACTS

Petitioner ignored that there are two sides to every case in its handling of the Adkins claim. Salem C. Smith, counsel appointed by Petitioner to represent Respondent, recommended to Petitioner settlement authority on the Adkins case of $250,000.00 after Adkins' counsel informed Smith at mediation that the case could be settled for $275,000.00. (App. 3, 750). Smith recommended that the case be settled "…in light of the potential verdict amount over policy limits…" (App. 530). Petitioner refused to listen to Smith, offered no more authority and forced the case to trial which resulted in a verdict of $5,788,977.00. (App. 4, 543-544). The verdict was published in the West Virginia Gazette and the West Virginia Record. (App. 4, 560-564). As a result of the publication of that verdict, a second claimant, Shelbie Pomeroy contacted counsel[1] to pursue a claim against Respondent. (App. 4).

Petitioner advertised to the world on its website that it delivers "Advocacy - Protecting physicians, their livelihoods and their reputations." (App. 9, 736). Petitioner, however, held the sole power to settle or force to trial the Adkins

[1] Pomeroy retained Dr. Richard Lindsay and Richard Lindsay, the same attorneys who had successfully tried the Adkins case.

claim, which decision failed to protect Respondent's livelihood or reputation. (App. 9). Petitioner's claim committee met in secret keeping no notes or recordings of its proceedings and deliberations in consideration of the Adkins claim. (App. 9, 761). Petitioner invoked quasi attorney-client privilege to redact the contents of Smith's 29-page case evaluation report. It cannot rely upon Smith's report therefore as to what information it considered in evaluating the Adkins claim. (App. 9).

Moreover, the factual record reflects that Petitioner failed to acknowledge the risk of any trial. Petitioner's claims handler, Tammy Welch acknowledged in her deposition that a doctor may not be believed by a jury. (App. 10, 741). Welch admitted that a trial contained a risk of an excess verdict, consequences to the doctor such as reporting and publicity and that when evaluating the case, a claim for punitive damages existed against Respondent. (App. 10, 741).

Counsel for Adkins, Dr. Richard Lindsay, testified that he, and likely Petitioner, knew there was substantial risk that Respondent would not be believed by the jury. (App. 11, 749). He has great confidence in his case for Adkins and all of the evidence which gave him that high level of confidence was available or known to Petitioner in the form of medical records,

expert opinions and deposition testimony. (App. 11-12, 745-747).

Despite Petitioner's continued reliance on Respondent's denial of a deviation from the standard of care in the Adkins claim (Petition at p. 3), Petitioner was well-aware that Adkins' attorneys had retained experts prepared to testify otherwise. Further, Petitioner knew that Adkins' experts would opine at trial that Respondent's deviation from the standard of care caused damages to Adkins. (App. 520-521).

It was further evident that Petitioner ignored Adkins claim for impaired ability to enjoy sexual relations due to Respondent's negligence. This claim was known to Petitioner prior to trial. (App. 12-13, 752-753).

Most significantly, Tamara Huffman, Petitioner's Executive Vice President and COO and member of the Claims Committee testified that Petitioner gave **NO** consideration to the potential for an adverse verdict against its insured in the Adkins case. (App. 13-14). No testimony in this case more clearly shows the arrogance of Petitioner in failing to afford the interests of it's insured at least as great a respect as their own economic interests in the claim. (App. 21, 757).

Further, Dr. Austin Wallace is the Chairman of the Board, President and CEO of Petitioner and sits on the Claims Committee. (App. 18, 760). He admitted that the Claims

Committee meetings are not recorded and there are no notes taken or preserved of those committee meetings. (App. 18, 761). Respondent's expert, J. Rudy Martin, Esq., an expert witness relative to claims handling, opined that Petitioner's failure to keep records of its investigations are a violation of the UTPA. (App. 17, 578-579). Respondent failed to preserve any rationale as to why it evaluated the Adkins claim at $150,000.00 and never waivered from this evaluation as the trial unfolded. (App. 18).

Martin further opined that Petitioner's claims handling process violated its first-party duty of good faith and fair dealing to Respondent as well as the UTPA. (App. 4, 581-582). Respondent further retained Dr. Clifford Hawley, Professor Emeritus of Economics at West Virginia University to opinions concerning Respondent's economic loss caused by Petitioner's claims handling conduct. (App. 5).

The Circuit Court found that Respondent

> "…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 (sic) totaling $1,250,000.00 reported to the National Practitioner's Data Bank." (App. 5).

Prior to the Adkins trial, Respondent had applied for privileges at CAMC and received an offer of employment on or

about October 26, 2017. (App. 5, 598-600). He withdrew his application for privileges following the filing of the Pomeroy Complaint. (App. 5). While Petitioner argues that Respondent caused suffered no damages by failing to disclose to CAMC the Pomeroy claim, Petitioner ignores the simple fact that had it properly settled the Adkins claim, there would have been no Pomeroy claim for Respondent to report to CAMC and he would have received his privileges having already been offered employment. (App. 5). Petitioner's self-serving pat on the back that it "…moved with all deliberate speed to resolve the Pomeroy Litigation" is spurious. (Petition at p. 8). Simply, Petitioner's bad faith conduct relative to the Adkins claim directly resulted in the Pomeroy claim which directly resulted in Respondent losing his contract of employment with CAMC suffering economic damages. Petitioner again fails to understand and accept the impact of its bad faith when it contends that Dr. Covelli suffered no adverse consequence from the Pomeroy settlement. (Petition at p. 9). The Circuit Court properly denied summary judgment finding a genuine issue of material fact for a jury to determine. (App. 23).

IV. SUMMARY OF ARGUMENT

Respondent contends that the Circuit Court properly denied Petitioner's Motion for Summary Judgment. Moreover, Petitioner has failed to assert the basis for its right to original

jurisdiction in this Court, which jurisdiction is improper under the procedural posture of this case.

Setting aside for the moment that this Court lacks original jurisdiction over this matter, the Circuit Court properly denied summary judgment holding that *Shamblin v. Nationwide Mutual Insurance Co.,* 396 S.E.2d 766 (W.Va. 1990) shifts the burden to the insurer to prove by clear and convincing evidence that it accorded the interests and rights of the insured at least as great a respect as its own.

The key language relied upon by the Circuit Court from the *Shamblin* decision is that a cause of action arises if the insured is 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). The *Stahin v. Sullivan,* 647 S.E.2d 765 (W.Va. 2007) case is distinguishable as it involved a covenant not to execute on an excess verdict between Plaintiff and insured. No such covenant existed here and so, at the time the Adkins excess verdict was rendered, Respondent was actually exposed to personal liability in excess of his policy limits and it is legally irrelevant to Respondent's bad faith claim that Petitioner later settled the Adkins claim within his policy limits.

The Circuit Court correctly found that issues of material fact exist as to Petitioner's violations of the UTPA.

Respondent's expert Martin and the Circuit Court relied on W.Va. C.S.R. §114-14-3 which requires an insurer to maintain a file with "…all notes and work papers pertaining to a claim in such detail that pertinent events and the dates of such events can be reconstructed." Wallace admitted that Petitioner failed to do that here and that such failure was a pattern and practice of Petitioner.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Procedurally, Respondent believes this Court respectfully lacks jurisdiction over this improperly filed Petition as one of original jurisdiction pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure and it should be dismissed without argument as Petitioner has failed to assert the basis for its claimed right of original jurisdiction. However, in the event this Court accepts jurisdiction, then Respondent believes that the decisional process would be aided by oral argument. Respondent suggests that this petition involves assignments of error in the application of well settled law and, therefore, the matter would be appropriate for memorandum decision and argument under Rule 19 of the *West Virginia Rules of Appellate Procedure*.

VI. ARGUMENT

This is an insurance bad faith case arising out of Petitioner's handling of two claims against its insured,

Respondent Dr. Michael Covelli. Respondent filed his Complaint against Petitioner in the Circuit Court of Kanawha County. After discovery, Petitioner moved for Summary Judgment and Respondent responded in opposition. The Circuit Court of Kanawha County denied Petitioner's Motion by Order entered January 25, 2021. (App. 1-22).

It is from this Order that Petitioner improperly seeks a Writ of Prohibition.

A. Standard for Original Jurisdiction by Writ of Prohition

Original jurisdiction is conferred upon this Court by Rule 16 of the West Virginia Rules of Appellate Procedure. Here, Petitioner seeks a Writ of Prohibition, which by rule is an extraordinary writ that is not a matter of right but rather, of discretion sparingly exercised. W.Va.R.App.P. 16(a). Petitioner makes not a single citation in its Petition to the West Virginia Rules of Appellate Procedure, assuming arrogantly that it has a right to this Writ of Prohibition rather than be subject to the discretion of this Court.

The only reference to any standard for a Petition for Writ of Prohibition referenced by Petitioner is the five-factor test adopted by this Court at Syl. Pt. 1, *State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hummel,* 850 S.E.2d 680 (W.Va. 2020)(quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger,* 483 S.E.2d 12 (W.Va. 1996). Petitioner performs no analysis of

this five-factor test as it may apply to this matter, but rather concludes summarily that the Circuit Court manifested a "persistent disregard for" the "substantive law" of West Virginia. Nothing could be further from reality.

The five-factor test is as follows:

(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.

First, while Petitioner complaints that the Circuit Court entered Respondent's proposed order *verbatim* (Petition at p. 12), it fails to note that Petitioner inspected and signed that proposed order. (App. 22).

Prohibition is improper here as Petitioner seeks an interlocutory appeal. This Court should exercise sparingly its

power of original jurisdiction as a trial is the proper next step for this litigation. If Petitioner prevails at trial, then this Court will not have needed to invoke its power of original jurisdiction as the matter will have been resolved favorably for Petitioner. If Petitioner is not successful at trial, then it has its remedy of appeal. Obviously, Petitioner seeks this Writ to avoid a public trial where its claim handling procedures will be exposed to all of its past, current and prospective insureds. Petitioner is desperate to avoid precisely that and to be permitted to handle claims in its Star Chamber. Petitioner cites no authority granting it a right of direct appeal of the Circuit Court's denial of its Motion for Summary Judgment. Thus, Petitioner fails to meet the first factor for this Court to exercise original jurisdiction.

Petitioner fails to even argue that it meets the second factor, that it will be damaged or prejudiced in a way that is not correctable on appeal. As set forth above, it Petitioner loses at trial, it may then seek an appeal to correct any errors by the Circuit Court.

Petitioner spends what argument it makes for original jurisdiction asserting the Circuit Court's Order is clearly erroneous. Yet, Petitioner fails to state why the Circuit Court's Order is clearly erroneous. Petitioner does not argue that this Court should exercise original jurisdiction,

Petitioner brazenly presumes it. As will be shown herein, the Circuit Court's Order was not clearly erroneous but rather based on well-settled West Virginia law.

Petitioner concludes without any citation to record or authority that the Order reflects a persistent disregard for the substantive law of West Virginia. Petitioner cites no other instance in which the lower Court disregarded any law. Upon review, the undersigned has been unable to find any case in which the Honorable Tera L. Salango had a decision reviewed on a Writ of Prohibition. Thus, Petitioner cannot demonstrate that the lower court shows a "persistent disregard" for the substantive law of West Virginia. Petitioner fails to meet the fourth factor.

Petitioner also fails to meet the fifth factor. The primary cases relied on herein are *Shamblin v. Nationwide Mutual Insurance Co.*, 396 S.E.2d 766 (W.Va. 1990) and *Stahin v. Sullivan*, 647 S.E.2d 765 (W.Va. 2007). They are from 1990 and 2007 respectively. The notion that an insurer owes its insured a first-party duty of good faith and fair dealing and a duty to accord the interests and rights of the insured at least as great a respect as its own is not new law or a first impression to anyone with the possible exception of the Petitioner.

Simply because Petitioner disagrees with the denial of its Motion for Summary Judgment does to confer original jurisdiction

upon this Court. Granting this Writ will only invite similar Writs by every party that is denied summary judgment at the Circuit Court level. Effectively, it would have the effect of permitting an interlocutory appeal every time summary judgment is denied. Surely that is not what is contemplated by W.Va.R.App.P. 16. Quite the contrary; as the rule states, it is an extraordinary remedy. Losing summary judgment is not extraordinary.

This Court recently visited the issue of whether the denial of summary judgment constitutes extraordinary relief sufficient for original jurisdiction of this Court. The answer was a resounding "NO." In *State ex rel. Vanderra Resources, LLC v. Hummel,* 829 S.E.2d 35 (W.Va. 2019), this Court denied Vanderra's request for a Writ of Prohibition finding that the Circuit Court's denial of summary judgment did not exceed its legitimate powers. Like this case, the Circuit Court in *Vanderra* found that genuine issues of material fact existed and denies summary judgment. Like *Vanderra,* this matter does not involve any issues of qualified immunity and therefore, is interlocutory and not immediately appealable. As this Court clearly stated in Syl. Pt. 8 of *Aetna Casualty and Surety Company v. Federal Insurance Company of New York,* 133 S.E.2d 770 (W.Va. 1963) and reiterated again in *Vanderra,* "[a]n order denying a motion for summary judgment is merely interlocutory, leaves the case

pending for trial, and is not appealable except in special instances in which an interlocutory order is appealable." Petitioner cites no exception to this bright line rule, rather it implies that it does not like the decision of the Circuit Court, fears a public trial of its claims-handling procedures and seeks relief from this Court to which it plainly is not entitled. This improper Petition should be denied without delay so that this matter may proceed to trial.

B. The Circuit Court correctly denied summary judgment pursuant to *Shamblin v. Nationwide Mutual Insurance Co.*, 396 S.E.2d 766 (W.Va. 1990).

Petitioner primarily argues, as it did in its motions to dismiss and for summary judgment, 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). 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).

Strahin does not carry the day for Petitioner.

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). 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.* (emphasis added).

> 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).

Here, because of Petitioner's conduct in failing to record its Claims Committee meetings and invoking the quasi attorney-client privilege relative to Smith's case evaluation, there is

no way that anyone can determine that Petitioner based its claims handling decision on reasonable and substantial grounds and that it accorded the interests of Respondent at least as great a respect as its own.

In *Strahin*, this 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. Under the terms of the Covenant, the third-party claimant agreed not to pursue an excess verdict against the insured. 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. This 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. Accordingly, the trial court granted summary judgment in favor of the insured on the plaintiff's *Shamblin* claim. 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.)

Strahin is clearly and easily distinguishable because it is undisputed that no such 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 trial. *Shamblin* makes clear that the critical time period at which the law judges the insurer's actions is not at the time a Judgment Order is entered as Petitioner suggests, but rather at the **time the excess verdict is rendered.** Here, two points are undisputed: 1) that the verdict was in excess of Respondent's policy limits and 2) that there was no covenant not to execute at the time the excess verdict was rendered.

While Petitioner cites other jurisdictions which support its position, equally there are other jurisdictions that support Respondent's position that an action in bad faith lies where there is an excess verdict but the claim is subsequently settled within policy limits. California allowed a claim for equitable subrogation for an excess insurer where the underlying insurer failed to settle a claim within the insured's policy limits.

In *Ace Am. Ins. Co. v. Firemans's Fund Ins. Co.,* 206 Cal. Rptr. 3d 176 (Cal. App. 2016), the underlying insurer had opportunities to settle the claim within its policy limits but

failed to do so. Trial resulted in an excess verdict. Fortunately, the insured had excess coverage through Ace American Insurance Company (Ace). Ace was required to satisfy the excess claim but it made a claim for equitable subrogation against Firmena's Fund Insurance Company, (Fireman's Fund), the underlying insurer, as well as a claim for violation of its covenant of good faith and fair dealing. The equitable subrogation claim and breach of covenant of good faith and fair dealing sounded in bad faith, alleging that Fireman's Fund had a reasonable opportunity to settle the claim within its policy limits and there was a substantial likelihood of an excess verdict.

The underlying claim was settled for an amount in excess of Fireman's Fund's policy limits. Like here, there was no judgment. In fact, there was not even a verdict. Nevertheless, the California court recognized that Ace had what amounted to a bad faith claim against Fireman's Fund for its failure to settle the underlying claim within its policy limits. Thus, the notion that a judgment is a necessary prerequisite for a bad faith claim is not absolute.

C. The Circuit Court correctly denied summary judgment concluding that genuine issues of material fact existed as to whether Petitioner violated its common-law duty of good faith and fair dealing with its insured.

Shamblin and its progeny created for insurers a common-law duty of good faith and fair dealing. That duty is defined by *Shamblin* as requiring an insurer to accord 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.* Furthermore, this duty exists in addition to and in spite of an insurer's contractual obligations to its insured. An insurer cannot just say "we did what the contract required," so you can't sue us. An insurer's duty is higher than just the contract.

The jury rendered its verdict in favor of Ms. Adkins on September 29, 2017. The amount awarded in the verdict was in excess of Dr. Covelli's liability limits (by about 2.5 times the policy limits). Viewing the lay and expert evidence of record in this case in a light most favorable to Dr. Covelli, as the Circuit Court was required to do, it found that Respondent has a viable *Shamblin* claim against Petitioner as alleged in Count I of the complaint, and that claim is not precluded by the decision in *Strahin*.

Moreover, this Petitioner relies on the contract of insurance between it and Dr. Covelli as the sole basis for the

duties it was required to meet. Petitioner ignores it common law covenant of good faith and fair dealing as well as its own advertising. Here, Defendant advertises to the world on its website that it delivers "**Advocacy** – Protecting physicians, their livelihoods and **their reputations**." (App. 736). Here, Petitioner'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. They failed in their promise to Dr. Covelli and must he held to account for that as a jury sees fit.

The defense in summary is that Dr. Covelli maintained that he met the standard of care in his treatment of Ms. Adkins, the Petitioner had experts to support that and so despite Dr. Covelli's desire to settle the claim against him, Petitioner was going to defend the claim through trial. That posture, which ignores reality, is not supportable because Petitioner'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. Petitioner has invoked the quasi attorney-client privilege relative to advice and reporting it received from Salem Smith, counsel Petitioner

retained to defend Dr. Covelli in the Adkins claim, and accordingly has redacted the entirety of Smith's case evaluation report. Petitioner cannot now rely in its defense on what Smith might have advised them having withheld it from discovery.

Moreover, Petitioner's claim representative, Tammy Welch, acknowledged that it is not unusual for Petitioner's insured doctors to claim they have met the standard of care but yet desire to settle a claim made against them. (App. 740-741). This scenario acknowledges risks in the trial process despite expert opinions supporting the insured physician. For instance, the risk that the doctor may not be believed by the jury as acknowledged by 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.

***

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

A. Thereabouts, correct.

(App. 741).

Interestingly, Welch acknowledged a risk that the doctor may not be believed by the jury. Evidently, Petitioner failed to acknowledge this risk in its evaluation of the Adkins claim at only $150,000.00. But the Petitioner knew prior to trial that there was substantial risk Dr. Covelli would not be believed.

Adkins was represented at trial by Dr. Richard Lindsay, an experienced medical malpractice attorney who also happens to be a doctor. Dr. Lindsay testified that he had great confidence in the merits of Adkins' case. Moreover, he testified that all of the evidence upon which he gained his confidence was evidence available or known to Petitioner 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.

***

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. (App. 745-746).

It is evident that Petitioner ignored Adkins' claim that Dr. Covelli's negligence impaired her ability to enjoy sexual relations. 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." (See Ex. 3, Lindsay Depo. at P. 84). What is significant here is that this aspect of Ms. Adkins claim was known to Petitioner in advance of mediation. (App. 752).

Dr. Lindsay went on to testify that nothing new developed at trial to lessen his confidence level. (App. 747). Accordingly, Petitioner 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. Petitioner 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. (App. 748). 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. (App. 749).

Tamara Huffman is Executive Vice President and COO for Petitioner. As such, she serves as a member of the claims committee that considered the Adkins claim against Dr. Covelli. Her sworn testimony displays the lack of consideration of the consequences of an adverse verdict upon Dr. Covelli, and thus Petitioner'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.

(App. 757).

Huffman's testimony displays the arrogance and hubris of Petitioner. It cared not what happened to Dr. Covelli and clearly ignored the very same evidence upon which Dr. Lindsay drew his high level of confidence in the result ultimately obtained.

The lay and expert evidence of record establishes a prima facie bad faith cause of action against Petitioner because it failed to consider all relevant factors in evaluating the Adkins claim against Dr. Covelli. At the trial of this matter, the burden of proof will shift to Petitioner 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. These are all issues to be

decided by a jury at trial as the Circuit Court correctly decided. Therefore, this Writ of Prohibition must be denied.

D. The Circuit Court correctly denied summary judgment allowing Respondent to proceed with his claim against his insurer under the West Virginia Unfair Trade Practices Act (UTPA), W.Va. Code §33-11-1 to 10.

Petitioner's argument that Dr. Covelli lacks standing to allege a claim under the Unfair Trade Practices Act ("UTPA") primarily relies on this Court's decision in *State ex. Rel. State Auto Prop. Ins. Co. v. Stucky*, 806 S.E.2d 160 (W. Va. 2017). *Stucky* arose out the construction of a new home that caused damage to another home located downhill that was damaged. The downhill homeowners sued the new-home owners and the builder, CMD. 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. The trial court denied State Auto's motion to dismiss and motion for summary judgment. State Auto sought a Writ of Prohibition from the Supreme Court for its denial of summary judgment motion. The Supreme Court granted the writ and dismissed CMD's claims against is insurer. *Id.*, 806 S.E.2d at 167.

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

discussion relied upon by Petitioner 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. 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). 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). 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. 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).

Respondent respectfully challenges the prudence of using the *Stucky* decision to summarily reject his claim under the UTPA

for several reasons. 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). "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). "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.

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.

More importantly, the *Stucky* decision does not address all of the UTPA violations alleged by Dr. Covelli. In addition to subsections (9)(b) and (9)(f), Dr. Covelli has alleged and developed evidence in support of claims that Petitioner violated subsections (9)(c) and (9)(d) of the UTPA. Contrary to Petitioner's argument, *Stucky* does not explicitly hold that an insured has no standing to assert claims under these subsections. This Court should deny Petitioner's argument that it does.

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). 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).

As Petitioner 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 Petitioner's failure to properly document its claim

file. In resisting this argument, Petitioner's argument is confusing and confounding. Petitioner mocks Mr. Martin for not knowing what is in the redacted portion of the claim file but, at no point does Petitioner suggest that the redacted portions defeat Mr. Martin's conclusion that Petitioner did not properly document its claim file. It is ridiculous for Petitioner to imply that the redacted portions defeat an argument that it properly documented its claim file, while refusing to reveal what is behind the redactions. Like Oz, Petitioner hides its failures and imperfections behind a curtain simultaneously projecting an imagine of itself as great and powerful. One can infer that if the redacted portions supported Petitioner's arguments, they would have waived their claim of quasi attorney-client privilege and removed the redactions. But to be sure and fair and just, Petitioner cannot rely in its defense upon that which it has withheld claiming privilege. Due process dictates otherwise.

Dr. Austin Wallace is Chairman of the Board, President and CEO of Defendant. As such, he also sits on the claims committee. 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.

(App. 761).

Simply put, Petitioner failed to preserve any rationale as to its determination to only offer $150,000.00 to settle the Adkins claim and never reconsidered its position. For anyone to come to trial and testify otherwise would be incredible given the number of claims and passage of time, and inadmissible as not disclosed in discovery. But moreover, Dr. Wallace's testimony, regardless of any other outcome, proves violations of the UTPA insomuch as the claims handling process simply isn't documented.

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.

Petitioner argues that Mr. Martin's opinion that Petitioner violated a UTPA regulation is meaningless. Digging deep into dicta, Petitioner 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 721 (W. Va. 1994). However, Respondent's alleged violation of the UTPA rules does not stand alone. 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 Petitioner violated its covenant of good faith and fair dealing.

As explained above, Petitioner'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. The evidence is sufficient, Dr. Covelli has

standing and the Circuit Court correctly denied summary judgment.

VII. CONCLUSION

Petitioner respectfully requests that this Court issue a decision (1) reversing the Circuit Court's order granting summary judgement to Appellee, (2) reversing the Circuit Court's order denying Appellant's motion for leave to file amended complaint; and (3) remanding this matter the Circuit Court of Fayette County for further proceedings.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.

CERTIFICATE OF SERVICE

I, Scott H. Kaminski, counsel for Michael Covelli, M.D., certify that I served a true and correct copy of the foregoing ***"Response to Petition for Writ of Prohibition"*** by U.S. Mail, postage prepaid on this 14th day of April, 2021:

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