IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-409

West Virginia Mutual Insurance Company,

Petitioner,

v.

Steven R. Matulis, M.D.,

Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 17-C-748

BRIEF OF PETITIONER WEST VIRGINIA MUTUAL INSURANCE COMPANY

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2. The circuit court erred by denying Appellant's right to have the jury decide the amount of attorneys' fees awardable under the Policy as breach of contract damages.

3. The circuit court erred by awarding attorneys' fees, as a matter of law, as breach of contract damages for attorneys' services that were not covered under the Policy.

4. The circuit court erred by awarding Respondent attorneys' fees as *Hayseeds* damages for attorneys' services that were not necessary to resolve his coverage claim in violation of *Lemasters v. Nationwide Mutual Insurance*.

5. During the jury trial of the *Hayseeds* claim, the circuit court committed multiple evidentiary errors which substantially and unfairly prejudiced the Mutual.

6. The circuit court erred during the jury trial of the *Hayseeds* claim by allowing recovery of lost opportunity damages rather than net economic loss damages.

7. The circuit court erred by incorrectly removing from the jury's consideration the issue of prejudgment interest in violation of West Virginia Code § 56-6-27.

II. STATEMENT OF THE CASE

Respondent Steven R. Matulis ("Matulis") is a convicted felon, registered sexual offender, and disgraced ex-physician who was accused of sexually assaulting hundreds, if not thousands, of unconscious female patients. When those female patients brought civil claims against him, West Virginia Mutual Insurance Company (the "Mutual") provided Matulis with a defense to the majority of those claims under reservation of rights and denied coverage and a defense as to others.

Then, because the applicable medical malpractice insurance policy, Policy No. PL002028 (the "Policy"), excludes coverage for "any claim or suit arising out of an intentional tort, dishonest, reckless or malicious act," and states that the Mutual "will not defend or pay for . . . liability arising out of sexual acts or sexual activities whether under the guise of professional services or not" and

that the Mutual "will not defend or pay for . . . injury or damage resulting from . . . a willful violation of a statute, ordinance, or regulation imposing criminal penalties," the Mutual filed a declaratory judgment action seeking a decision that it owed Matulis no duty to defend or indemnify him from these claims. Judge Jennifer Bailey of the Circuit Court of Kanawha County, however, ignored that language and ruled that those sexual abuse claims were covered under the Policy, and, thus, the Mutual had a duty to defend Matulis. After that ruling, the Mutual had little choice but to settle the victims' claims against Matulis, and it did so with no payment from Matulis' personal assets.

The circuit court, however, proceeded on Matulis' insurance bad faith claims and ultimately awarded Matulis more than $1.4 Million in supposed damages, uniformly ruling in his favor on every issue while ignoring the facts and well-settled West Virginia law. As discussed below, the circuit court must be reversed.

A. Factual Background.

1. Dr. Matulis' sexual misconduct.

Charleston Area Medical Center ("CAMC") began an investigation into Matulis on February 16, 2016. J.A. 122. On February 18, 2016, CAMC suspended Matulis' clinical privileges based upon the allegations that Matulis engaged in "inappropriate behavior" with female patients. J.A. 2888–89. Ultimately, his privileges were permanently revoked due to his sexual abuse of patients at CAMC.

On March 30, 2016, the Complaint Committee of the West Virginia Board of Medicine ("BOM") considered Matulis' suspension from CAMC and initiated a complaint against him arising from his sexual abuse of patients (No. 16-46-W). J.A. 2650; J.A. 2889. The BOM then received another sexual abuse claim against Matulis (No. 16-54-W) on April 13, 2016. J.A. 2650;

J.A. 2895. In response, Matulis requested that his medical license be converted from active to inactive effective as of May 16, 2016. J.A. 2650; J.A. 2890. The BOM concluded that Matulis engaged in "inappropriate and medically unnecessary physical contact with the bodies of sedated female patients." J.A. 2901. Matulis entered into a consent decree with the BOM dated September 16, 2020, where he permanently surrendered his medical license and agreed to never seek reinstatement due to his sexual misconduct with unconscious female patients. J.A. 2649–63.

Matulis was criminally indicted on June 1, 2018, on seven felony counts stemming from his sexual abuse of unconscious patients. J.A. 2880. Following a five-day trial, a jury found him guilty of sexual abuse in the first degree of T.W. on October 5, 2018. J.A. 2883. Matulis was sentenced to not less than one and up to five years in prison and assessed a $10,000 fine. J.A. 2638. He also was ordered to register as a sex offender and given five years of extended supervision. J.A. 2638. Matulis' conviction and sentence withstood appeal. *See State v. Matulis*, No. 18-1053, 2020 WL 1487810, at *6 (W. Va. Mar. 23, 2020).

2. The underlying claims against Dr. Matulis.

Starting in March 2016, Matulis received notices and lawsuits asserting tort claims arising from his sexual abuse of patients during the performance of colonoscopies and other procedures. J.A. 426. Ultimately, approximately 2,885 claims were made against Matulis culminating in thirteen civil lawsuits, including two separate class actions. *See, e.g.*, J.A. 3300–426. The Mutual defended Matulis under a reservation of rights in four cases, (Jane Doe 1 and Jane Doe 2, A.H. and Adriana Fleming, Y.T., and B.D), which included approximately 2,873 of the claims, and denied coverage in the other claims and lawsuits. *See* J.A. 2548–60; J.A. 2573–85; J.A. 2594–606; J.A. 2607–18. Despite some causes of action crafted in a thinly veiled effort to trigger insurance coverage, the core conduct alleged in each of these lawsuits was the same: Matulis improperly

touched, or the underlying plaintiffs fear he may have improperly touched, the breasts or vaginas of his patients without their consent and without being medically indicated.

For example, T.W. alleged that, "[w]ithout her knowledge or consent, and while [she] was under anesthesia and incapacitated, Defendant Matulis placed his hands inside her hospital gown and fondled and groped her breasts." J.A. 527. K.H. alleged that "Defendant Matulis performed breast examinations as part of the physical examinations upon [her] . . . while the medical conditions for which [she] was to be treated did not require breast examinations." J.A. 541. J.L. alleged that "Defendant Matulis sexually assaulted [her] while she was incapacitated and under anesthesia without her consent. Said acts were not consensual and were against [her] will." J.A. 552. Likewise, Jane Doe 1 and Jane Doe 2 alleged on behalf of themselves and others similarly situated that "Plaintiffs became concerned that they, too, may have been sexually assaulted and/or abused by Dr. Matulis while they were anesthetized. Plaintiffs had not consented to receiving vaginal or breast exams by Dr. Matulis while they were anesthetized." J.A. 659. All of the other Complaints filed against Matulis contain virtually identical allegations of sexual abuse.[1]

B. Procedural Background.

1. The circuit court's erroneous coverage decision.

The Mutual filed a declaratory judgment action on May 30, 2017, seeking a decision that there was no coverage under the Policy for the sexual abuse claims of T.W., K.H., and J.L. J.A.

[1] J.W. alleged that Matulis used a medical device on her in a sexual, non-medical manner. J.A. 562. R.L., T.W. and R.W., and D.C. all alleged that they were subjected to inappropriate and offensive sexual misconduct. J.A.597; J.A. 612; J.A. 628. P.W. alleged that, while she was under anesthesia and incapacitated, Matulis placed his hands upon her and sexually assaulted her. J.A. 640. R.K. alleged that Matulis performed a vaginal examination that was not medically indicated. J.A. 651. B.D. alleged that Matulis sexually assaulted and sexually abused her. J.A. 697. Y.T. alleged that she became concerned that she, too, may have been sexually assaulted by Matulis while she was anesthetized. J.A. 712. In her notice of claim, L.B. asserted that she was sexually assaulted by Matulis during her colonoscopy exam. J.A. 718. A.H. and Adriana Fleming alleged on behalf of themselves and others similarly situated that they, like the other female patients of Matulis, became emotionally upset and worried about what he did to their bodies, what non-consensual touching may have occurring during their examinations and procedures, and what acts and conduct occurred during their procedures while they were sedated and unconscious. J.A. 735.

55–153. As other claims by Matulis' victims mounted, the Mutual filed an Amended Complaint for Declaratory Relief on September 28, 2018, adding the sexual misconduct claims of J.W., L.H., A.H., R.L., T.W., D.C., P.W., and R.K. J.A. 154–419. As still other claims were received from his former patients, the Mutual filed a Second Amended Complaint for Declaratory Relief against Matulis, including claimants T.W., K.H., J.L., J.W., R.L., T.W. and R.W., D.C. and R.C., P.W., R.K., Jane Doe 1 and Jane Doe 2, D.B., Y.T., L.B., and A.H. and Adriana Fleming as defendants. J.A. 420–769. Matulis counterclaimed against the Mutual, asserting claims under *Hayseeds*, for alleged insurance bad faith, and for breach of contract. J.A. 770–90.

On July 8, 2019, the Mutual moved for partial judgment on the pleadings seeking a declaration of no coverage for the sexual abuse claims based upon intentional acts, sexual acts, and criminal acts exclusions and the fact that Matulis' sexual misconduct did not constitute a "medical incident" or "professional services" under the Policy. J.A. 801–46. In response, Matulis filed a Motion for Partial Summary Judgment, arguing that the sexual abuse claims were covered and the Mutual had a duty to defend him in nine of the thirteen actions. J.A. 967–99.[2] The circuit court heard oral argument on these motions on February 17, 2021, and, by Memorandum Opinion and Order on May 4, 2021, the circuit court ruled in favor of Matulis erroneously finding that the Mutual owed Matulis a duty to defend him in all of the claims of sexual abuse. J.A. 1–13. Immediately after the hearing and before the circuit court even entered its written Order, the Mutual retained counsel to defend Matulis in all pending claims, ultimately settling all claims[3] and obtaining full releases. J.A. 3366.

[2] Without explanation, Matulis did not challenge that there was no coverage in four cases. J.A. 967. However, those claims were included within the Mutual's Motion for Partial Judgment on the Pleadings, which was denied by the circuit court, so the Mutual considered them to have been within the circuit court's order to provide a defense.
[3] The Mutual is not seeking any decision from this Court that would impact the settlements with Matulis' victims.

2. The circuit court's mishandling of Matulis' attorneys' fees claims under the Policy and under *Hayseeds*.

After the coverage issue was decided, the circuit court entered a scheduling order on March 23, 2022, on Matulis' claims for breach of contract, common law and statutory bad faith, and claims under *Hayseeds*. J.A. 3368. In his pre-trial memorandum dated October 3, 2022, Matulis asserted that his statutory bad faith claims should be bifurcated from his breach of contract and *Hayseeds* claims. J.A. 1780–85. At the pretrial conference on October 5, 2022, over the Mutual's objection, the circuit court ruled in favor of Matulis, deciding to bifurcate the trial as his counsel suggested. J.A. 1809–12. The Phase 1 trial was to be limited to contract and *Hayseeds* damages, and the Phase 2 trial was to be devoted to Matulis' statutory bad faith claims and claim for punitive damages. J.A. 1810.

On the morning the Phase 1 trial was to begin, which originally was set for October 17, 2022, the circuit court took up preliminary matters and ruled from the bench—in favor of Matulis––that disputes concerning the attorneys' fees sought by Matulis as compensatory damages under his breach of contract claim would be removed from the jury's consideration and necessitated further briefing. J.A. 1927–37. Despite the Mutual being ready for trial and intending to offer evidence to the jury to challenge the amount of damages recoverable, the circuit court continued the Phase 1 trial to February 6, 2023. J.A.1942–48. At the second pretrial conference held on January 18, 2023, the parties advised the circuit court that it would be proper to establish a schedule for briefing and argument on cross-motions for summary judgment regarding what attorneys' fees Matulis could or could not recover, as a matter of law, for breach of contract or whether such issues presented a genuine issue of material fact for decision by a jury. J.A. 2108–09.

At the pretrial conference on February 6, 2023, the circuit court heard argument on the parties' cross-motions for partial summary judgment regarding attorneys' fees for breach of

contract. J.A. 2182–240. The Mutual argued that Matulis' demand for attorneys' fees related to his administrative defense, criminal defense, coverage issues, and asset protection were not covered under the Policy as a matter of law. Alternatively, the Mutual argued that, given the conflicting evidence as to coverage of the attorneys' fees at issue, such evidence was for the jury to properly weigh and decide. J.A. 2183–96. The circuit court rejected the Mutual's position and granted in part Matulis' motion for partial summary judgment with respect to $212,100.80 in attorneys' fees and $25,000 in administrative defense fees, leaving $129,423.65 in disputed attorneys' fees and costs to be decided. J.A. 2225–31.

3. The circuit court's errors during and after the jury trial.

At the final pretrial conference on May 3, 2023, the circuit court reiterated its prior rulings with respect to the motions for summary judgment, as well as its intention to grant Matulis' motion *in limine* excluding all evidence of his sexual misconduct. J.A. 2244–58. Those rulings in Matulis' favor were memorialized in written orders dated May 11, 2023. J.A. 14–17; J.A. 18–20.

On the morning of May 15, 2023, the circuit court announced its intention to again rule in Matulis' favor, granting the remainder of his motion for partial summary judgment regarding the $129,423.65 in disputed attorneys' fees and costs for his breach of contract claim, finding that the work performed for other matters, including Matulis' criminal defense, asset protection, and a coverage dispute with an unrelated insurer, was intertwined with work performed for the underlying civil suits brought by Matulis' victims. J.A. 2298. Again, siding with Matulis over the Mutual's objection, the circuit court decided that the jury would determine whether to grant Matulis prejudgment interest, but, if granted, the circuit court would calculate the amount. J.A. 2308–09. The case then proceeded to trial to determine the remaining amounts of damages under *Hayseeds* and to determine whether Matulis was entitled to prejudgment interest. J.A. 2315.

During his case-in-chief, Matulis testified that the Mutual failed to provide him a defense for certain claims, although he had paid premium payments, and that he was forced to incur out-of-pocket expenses for attorneys' fees to defend him in the underlying civil suits and forced to sell lakefront property in North Carolina to pay for those expenses. J.A. 2388–89. Pursuant to the circuit court's ruling on the motion *in limine* excluding all evidence of sexual misconduct, the Mutual was not permitted to offer evidence of the basis of the claims made against Matulis, to advise the jury that Matulis had been defended under reservation of rights, to inquire about other sources of aggravation and inconvenience in Matulis' life at the time, including the criminal investigation, indictment, and conviction, as well as the surrender of his medical license, among other things. J.A. 2292. In this same vein, the Mutual was not permitted to introduce voluminous evidence, including documents related to proceedings before the BOM, documents relating to his suspension from CAMC, attorney fee invoices, attorney fee summaries Matulis prepared, and documents relating to his criminal conviction. J.A. 2312–13; J.A. 2548–3000. The Mutual also was not permitted to inquire about the payment of attorneys' fees for unrelated matters at or near the time of the sale of the lakefront property. J.A. 2435–41; J.A. 2445–47.

Matulis also presented the expert testimony of a real estate appraiser, Dean Dawson, regarding the present-day fair market value of the lakefront property Matulis sold on October 30, 2017. J.A. 2453. The Mutual's counsel objected to Mr. Dawson's testimony regarding the then-current fair market value of the property, as his opinions never were supplemented at any point following his deposition on October 11, 2022, and such opinions were not relevant. J.A. 2461–63.

Following the close of Matulis' case-in-chief, the Mutual moved for judgment as a matter of law pursuant to Rule of Civil Procedure 50(a), which was denied. J.A. 2470–77. The Mutual subsequently presented the testimony of Tamara Huffman, who was the Mutual's Executive Vice

President & Chief Operating Officer at the time it made its coverage decisions in the underlying civil cases. J.A. 2480. During cross-examination, and over the objection of the Mutual's counsel, Matulis' counsel asked Ms. Huffman about MagMutual Insurance Company's ("MagMutual") November 2020 acquisition of the Mutual, as well as MagMutual's net worth, notwithstanding the fact that Matulis was not seeking punitive damages during the Phase 1 trial and notwithstanding the fact that the acquisition took place after the Mutual's coverage decisions. J.A. 2487–94. After Ms. Huffman's testimony, the Mutual renewed its Rule 50 motion, which again was denied. J.A. 2500–01.

On May 16, 2023, the jury returned a verdict in the amount of $200,000 for net economic loss and $150,000 for aggravation and inconvenience. J.A. 3008. The jury also elected to award Matulis prejudgment interest, but, in accordance with the circuit court's prior ruling, it did not indicate an amount. J.A. 3008.

The circuit court entered a Partial Judgment Order on June 5, 2023, reflecting the verdict for the Phase 1 trial. J.A. 21. After trial, the parties submitted orders under West Virginia Trial Court Rule 24.01 regarding the circuit court's ruling on Matulis' cross-motion for partial summary judgment. J.A. 3425. A written Memorandum Opinion and Order on those issues, which included the disputed $25,000.00 in administrative defense fees and the disputed $129,423.65 in attorneys' fees and costs for breach of contract, was dated August 14, 2023. J.A. 23–31. By the same order, the circuit court also awarded prejudgment interest in the amount of $226,223.35. J.A. 30.

On June 21, 2023, the Mutual filed its renewed motion for judgment as a matter of law or, in the alternative, for a new trial in accordance with West Virginia Rules of Civil Procedure 50 and 59. J.A. 3203–21. Those motions were denied by order dated August 17, 2023. J.A. 32–41.

Matulis filed his motion for attorneys' fees under *Hayseeds* on June 14, 2022. J.A. 3009–

116. By order dated August 31, 2023, the circuit court again ruled in Matulis' favor, granting him the full $523,138.19 requested, and actually adding a 20% upward adjustment on the base hourly fees in the amount of $78,581.40. J.A. 42–54. In the same order, the circuit court dismissed Matulis' remaining claims by the parties' agreement and entered final judgment. J.A. 54.

III. SUMMARY OF ARGUMENT

The circuit court erroneously found that the underlying sexual abuse claims against Matulis were covered under the Policy, despite numerous exclusions and well-established precedent to the contrary. First, West Virginia law states that there is no duty to defend claims arising out of an insured's sexual misconduct when the insurance policy contains an intentional injury exclusion like the Policy does here, and the Supreme Court of Appeals has rejected attempts to artificially manufacture insurance coverage by means of artful pleading. Second, there is no duty to defend claims arising out of an insured's sexual misconduct when the insurance policy contains a sexual acts exclusion like the Policy at issue. Third, there is no duty to defend claims arising out of an insured's sexual misconduct when the insurance policy contains a criminal acts exclusion like the Policy. Finally, most courts have held that sexual misconduct is not a "medical incident" or "professional services" under a medical professional liability insurance policy like the one at issue here.

Following the erroneous coverage decision, the circuit court further erred by removing the decision as to the amount of attorneys' fees due under the Policy from the jury. The circuit court compounded this error by improperly awarding Matulis $366,524.45 in attorneys' fees as breach of contract damages for services that were not covered under the Policy as a matter of law. This award improperly included $25,000.00 in attorneys' fees for services related to Matulis' untimely administrative defense claim and $129,423.65 in attorneys' fees for services related to: (1) Matulis'

criminal prosecution for sexually abusing his patients; (2) his disputes with the Mutual over coverage; (3) disputes with an entirely unrelated insurer regarding coverage; and (4) various matters related to his finances and asset protection.

Further, the circuit court improperly awarded Matulis $523,138.19 in attorneys' fees as *Hayseeds* damages. In violation of West Virginia law, the circuit court awarded Matulis fees for services that were not necessary to resolve his coverage claim, including: (1) defense of the underlying sexual abuse claims; (2) prosecution of his bad faith claims; (3) efforts to hide his assets from the reach of his sexual abuse victims; and (4) fees incurred in his dispute with an unrelated insurer, among others. The circuit court even awarded Matulis fees incurred during trial, which related only to recovery of *Hayseeds* damages. Moreover, $78,581.40 of this award represented the circuit court's 20% *upward* adjustment to the inflated $392,907.00 base fees proposed by Matulis' counsel.

At trial, the circuit court also made numerous erroneous evidentiary rulings. The circuit court erred in excluding several wholesale categories of evidence critical to the Mutual's ability to defend itself at trial, including any description at all of the claims made against Matulis and all evidence of Matulis' sexual abuse, which also encompassed other sources of emotional distress during the relevant timeframe. The circuit court further erred in admitting evidence that the Mutual had been acquired by MagMutual—as well as MagMutual's net worth.

The circuit court continued its errors by allowing Matulis to improperly recover $200,000.00 under *Hayseeds* for supposed economic loss when the only evidence he submitted at trial included the then-current fair market value of lakefront property he purportedly sold to pay attorneys' fees, thus constituting the amount of appreciation supposedly lost. In the process, the circuit court ignored the fact that damages for net economic losses under *Hayseeds* are not intended

to compensate insureds for hypothetical appreciation of assets.

The circuit court also erroneously decided how to award and calculate prejudgment interest in the amount of $226,223.35. To the extent prejudgment interest was properly recoverable, the jury should have calculated prejudgment interest under West Virginia Code § 56-6-27, which requires the jury to determine the amount of interest to be awarded under contract actions.

The Mutual seeks reversal of the circuit court's orders of May 4, 2021, May 11, 2023 (two orders), June 5, 2023, August 14, 2023, August 17, 2023, and August 31, 2023, in their entirety and entry of judgment in the Mutual's favor, as there is no coverage for the sexual abuse claims under the Policy at issue. A reversal of the erroneous coverage decision would result in a finding that Matulis was not insured under the Policy for the claims asserted against him, thus mandating dismissal of all other asserted claims and mooting the remaining errors.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary and appropriate pursuant to West Virginia Rule of Appellate Procedure 18. This appeal is suitable for Rule 20 argument because the circuit court's decision greatly expands the scope of insurance coverage under a medical malpractice policy to cover sexual abuse claims in contravention of West Virginia law, therefore causing uncertainty and confusion within the medical malpractice insurance industry.

V. ARGUMENT

A. Standards of Review.

1. Insurance coverage.

The circuit court's decision regarding the Mutual's duty to defend under the Policy is reviewed *de novo* on appeal. *See* Syl. Pt. 2, *Riffe v. Home Finders Assocs., Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999) ("The interpretation of an insurance contract . . . is a legal determination

that . . . shall be reviewed *de novo* on appeal."); Syl. Pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002) ("Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law."). The Supreme Court of Appeals regularly has applied the *de novo* standard of review when reviewing declaratory judgment actions regarding insurance coverage. *See Blankenship v. City of Charleston*, 223 W. Va. 822, 824–25, 679 S.E.2d 654, 656–57 (2009) ("[B]ecause the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo*.").

2. Summary judgment.

The circuit court's summary judgment decisions are likewise reviewed *de novo* on appeal. *See* Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins.*, 213 W. Va. 80, 576 S.E.2d 807 (2002) (denial review *de novo*); Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (entry reviewed *de novo*). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins.*, 148 W. Va. 160, 133 S.E.2d 770 (1963); *see also* W. Va. R. Civ. Pro. 56.

3. Evidentiary issues.

The circuit court's evidentiary rulings are reviewed for abuse of discretion on appeal. "Rulings on motions *in limine* lie within the trial court's discretion." *State v. Dillon*, 191 W. Va. 648, 662, 447 S.E.2d 583, 597 (1994). Likewise, "[t]he West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court." *Reynolds v. City Hosp., Inc.*, 207 W. Va. 101, 108–09, 529 S.E.2d 341, 348–9 (2000). The appellate court inquires "as to whether the trial court acted in a way that was so arbitrary and

irrational that it can be said to have abused its discretion." *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994).

4. Post-trial motions.

The circuit court's decision regarding the Mutual's renewed motion for judgment as a matter of law is reviewed *de novo* on appeal. Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009). When this Court "reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial . . . its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below." *Id.* at Syl. Pt. 2. Therefore, "when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party." *Id.*

The circuit court's decision regarding the Mutual's motion for a new trial is reviewed on appeal for abuse of discretion. *See* Syl. Pt. 3, in part, *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 454 S.E.2d 413 (1994) ("A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion."). Appellate courts apply a "two-pronged deferential standard of review" when reviewing challenges to findings and rulings made by a circuit court. *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). This Court must "review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard," and "review the circuit court's underlying factual findings under a clearly erroneous standard." *Id.*

B. <u>The circuit court erred in ruling that the underlying sexual abuse claims against Matulis were covered despite clear Policy language to the contrary.</u>

West Virginia law is clear that "an insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers." *State Auto. Mut. Ins. v. Alpha Eng'g Servs., Inc*., 208 W. Va. 713, 716,

542 S.E.2d 876, 879 (2000). *See also Butts v. Royal Vendors, Inc*., 202 W. Va. 448, 453, 504 S.E.2d 911, 916 (1998) (undertaking an "examination of the allegations of the complaint" to determine the duty to defend under an insurance contract); Syl. Pt. 3, *Bruceton Bank v. U.S. Fid. Guar. Ins.*, 199 W. Va. 548, 486 S.E.2d 19 (1997) (noting that the duty to defend turns on "whether the allegations in the complaint . . . are reasonably susceptible [to] an interpretation that the claim may be covered by the terms of the insurance policies"). In reaching its decision that the Mutual had a duty to defend Matulis under the Policy, the circuit court ignored this well-settled law as well as several unambiguous exclusions and other definitions contained in the Policy.

1. The intentional acts exclusion barred any duty to defend Matulis.

The Policy language excludes coverage for "any claim or suit arising out of an intentional tort, dishonest, reckless or malicious act[.]" J.A. 3272. West Virginia law expressly holds that there is no duty to defend or indemnify claims arising out of an insured's sexual misconduct when the insurance policy contains an intentional injury exclusion such as this. *Horace Mann Ins. v. Leeber*, 180 W. Va. 375, 377–76, 376 S.E.2d 581, 583–84 (1988). Following the majority of courts, the Supreme Court of Appeals of West Virginia made clear that a sexual misconduct claim involves an intentional act in which the intent to injure will be inferred as a matter of law. *Id.* at 377, 376 S.E.2d at 583. Importantly, Matulis conceded that each of the claimants' underlying complaints allege intentional torts tied to factual allegations of sexual misconduct. J.A. 968 ("Regardless of the causes of action, each claim stems from the same alleged course of conduct: Matulis performed digital vaginal and/or breast exams on patients in the course of their medical treatment [and] [t]he patients allege that these exams were performed for sexual gratification.").

Under strikingly similar circumstances, the Court in *Leeber* found that the subject insurance policy's intentional-act exclusion barred coverage. *See* 180 W. Va. at 377–76, 376

S.E.2d at 583–84. Leeber, a teacher who pled guilty to two counts of sexual abuse in the third degree, alleged that, under his homeowners' insurance policy, his insurer had a duty to defend him and to pay for damages arising from a civil suit brought by the parents of a victim of his sexual abuse. The Supreme Court of Appeals, like most other courts, disagreed, holding as follows:

> There is neither a duty to defend an insured in an action for, nor a duty to pay for, damages allegedly caused by the sexual misconduct of an insured, when the liability insurance policy contains a so-called "intentional injury" exclusion. In such a case the intent of an insured to cause some injury will be inferred as a matter of law.

Id. at Syl.

The Court reasoned that its holding was consistent with West Virginia's public policy against permitting insurance coverage for purposeful or intentional torts. *Id.* at 380, 376 S.E.2d at 586. The Court further reasoned, along with the majority rule, that its holding rejecting insurance coverage under such circumstances also was consistent with the doctrine of reasonable expectations under West Virginia law because an insured does not reasonably expect the insurer to defend an action against the insured for damages alleged to have been caused by the sexual misconduct of the insured. *Id.* at 380–81, 376 S.E.2d at 586–87.

Leeber also rejected the insured's argument that the underlying complaint against him alleged both intentional, physical conduct as well as negligent conduct, thereby triggering the duty to defend where some claims arguably were covered under his policy. *Id.* at 381, 376 S.E.2d at 587. Instead, the Court rejected such attempts by means of artful pleading by creative lawyers to manufacture insurance coverage where there is none, explaining:

> The allegations of negligence in the complaint are a transparent attempt to trigger insurance coverage by characterizing allegations of intentional tortious conduct under the guise of negligent activity. Our review of the complaint reveals that the plaintiff in the underlying action seeks recovery for the alleged intentional acts committed by the insured. Thus, there was no duty upon the homeowner's insurer to defend.

Id. (cleaned up).

Following *Leeber*, the Supreme Court of Appeals in *Smith v. Animal Urgent Care, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (2000), similarly found no duty to defend or indemnify simply because sexual misconduct claims were creatively couched in a negligence theory of liability. *Id.* at 669, 542 S.E.2d at 832. Likewise, in *West Virginia Fire & Casualty Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004), the Supreme Court of Appeals reiterated that the inclusion of negligence-type allegations in a complaint that is, at its essence, a sexual misconduct claim will not prevent the operation of an intentional acts exclusion. *Id.* at 54, 602 S.E.2d at 497 (stating that "although the word 'negligent' is used in their allegations . . . intentional conduct is actually described" and noting that the conduct was "characterized as willful, wanton, reckless, outrageous, intentional, and malicious"). *See also Ball v. Baker*, No. 5:10-CV-00955, 2012 WL 6151736, at *5 (S.D. W. Va. Dec. 11, 2012) (agreeing with *Leeber* that the negligence theory in the underlying complaint was merely a "transparent attempt to trigger insurance coverage by characterizing allegations of intentional tortious conduct under the guise of 'negligent' activity" as the nature of the claim was grounded in intentional conduct, not negligence); *Am. States Ins. v. Fishes Hot Dog Huntington, Inc*., No. 3:98-cv-0165, 1999 WL 33510174, at *3 (S.D. W. Va. Jan. 22, 1999) (mere use of the term "negligent" in complaint does not trigger insurer's duty to defend).

Here, the Policy contains an intentional acts exclusion, providing that the Mutual has no duty to defend or pay for "any claim or suit arising out of an intentional tort, dishonest, reckless or malicious act." J.A. 3272. As in *Leeber*, *Smith*, and *Stanley*, it is immaterial that the claimants alleged negligence claims because their underlying complaints all center upon factual allegations of deliberate sexual misconduct, which by operation of law are presumed to be intentional acts. *See* Syl., *Leeber*, 180 W. Va. 375, 376 S.E.2d 851. The circuit court here however ignored the

intentional acts exclusion and instead focused on the negligence theories of liability in the claimants' notices and complaints, which were alleged in the alternative to the claimants' intentional tort claims. The circuit court failed to appreciate that the negligence theories of liability were alleged in the alternative in a creative attempt to create coverage where there was none.

Indeed, it was not until after learning of the relevant coverage exclusions that many of the claimants filed amended pleadings to add legal theories such as medical negligence, medical malpractice, and informed-consent causes of action to the sexual misconduct theories. *See, e.g.*, J.A. 420–769. For example, T.W., the patient Matulis ultimately was criminally convicted of assaulting, was the first patient to file a complaint against him on April 21, 2016. J.A. 524–37. The original complaint alleged that T.W. was a "victim of sexual assault" and asserted a claim for battery. J.A. 526. The Mutual denied coverage for the complaint by letter dated April 7, 2016. J.A. 2968–75. T.W.'s lawyer then filed an amended complaint on October 28, 2016.[4] J.A. 533–37. The amended complaint no longer asserted specific causes of action, no longer referenced "sexual assault," and no longer referred to T.W. as a "victim of sexual assault." *See id.* Similarly, after coverage for their class action complaint was denied, A.H. and Adriana Fleming filed an amended complaint adding claims for invasion of privacy and professional impairment. J.A. 723–69.

Each of the underlying claims alleged intentional sexual misconduct. J.A. 529; J.A. 535; J.A. 541; J.A. 548; J.A. 562; J.A. 593; J.A. 608; J.A. 624; J.A. 639; J.A. 652; J.A. 662; J.A. 695; J.A. 712; J.A. 718; J.A. 729. Almost all of the underlying claims characterized Matulis' conduct as willful, wanton, or reckless. J.A. 535; J.A. 552; J.A. 571; J.A. 599; J.A. 614; J.A. 642; J.A. 652; J.A. 684; J.A. 706; J.A. 762. Regardless of the negligence-based legal theories of liability drafted

[4] Prior to this date, it appears that Matulis' counsel colluded with T.W.'s counsel to amend the complaint in an effort to trigger coverage. *See* J.A. 2692 (billing entry dated September 1, 2016, referencing "getting [T.W.'s counsel] to amend complaint").

by the claimants' lawyers after learning of the Policy exclusions, the core conduct alleged in every one of the underlying claims was that Matulis improperly touched the former patients' sexual organs without consent for sexual gratification (that is, intentionally). The eleventh-hour inclusion of negligence-based theories against Matulis cannot defeat the application of the intentional acts exclusion, as the Supreme Court of Appeals makes clear in *Leeber* and its progeny.

In attempting to rationalize its decision to ignore the intentional acts exclusion, the circuit court relied heavily on Matulis' perspective in determining whether the underlying complaints alleged intentional misconduct. *See* J.A. 5; J.A. 8–9. However, the circuit court failed to appreciate that the "standpoint of the insured" test set forth in *Columbia Casualty Co. v. Westfield Insurance*, 217 W. Va. 250, 617 S.E.2d 797 (2005), applies only to the determination of whether an incident was an "occurrence" under the applicable policy—not whether a particular exclusion applied.[5] *See also Nat'l Fire Ins. of Hartford v. Radiology Assocs.*, 439 F. App'x 293, 297 (5th Cir. 2011) (rejecting argument that "standpoint of the insured" extended to the application of exclusions where the case law was clear that the use of the insured's perspective was limited to defining occurrences).

The circuit court also adopted Matulis' attempt to distinguish *Leeber* on the grounds that the negligence claim in that case was not an independent cause of action and because the aggressor in *Leeber* was a teacher with no medical pretext for the sexual touching.[6] *See* J.A. 7–8. However, West Virginia federal courts have soundly rejected this exact challenge to *Leeber* in this situation and relied on *Leeber* to hold that coverage cannot be created where there is none simply by couching the claimants' legal theory in negligence, when the complaint is "at its essence" a sexual

[5] In *Smith*, the "standpoint of the insured" language was included verbatim in the applicable policy's intentional acts exclusion, not a broader test as to whether the exclusion applied. *See* 208 W. Va. at 666, 542 S.E.2d at 829.
[6] The medical pretext does not save Matulis, as the Policy excludes from coverage "liability arising out of sexual acts or sexual activities *whether under the guise of professional services or not*." J.A. 3271 (emphasis added).

misconduct claim. *See Westfield Ins. v. Matulis*, 421 F. Supp. 3d 331 (S.D. W. Va. 2019).

Westfield is a case of particular importance to this matter, as it dealt with another attempt by Matulis to obtain insurance coverage under a Commercial General Liability policy for the very same sexual abuse claims at hand. In *Westfield*, another insurer of Matulis brought a declaratory judgment action to determine whether its policy provided coverage for Matulis' alleged sexual assault of his patients. *Id.* at 335. Identical to the instant case, some of the claimants in *Westfield* asserted claims against CGA for negligently supervising Matulis. *Id.* at 346. Westfield, just like the Mutual here, argued that the claimants' negligence theories could not "create coverage under the policy where it would not otherwise exist by virtue of an intentional act exclusion." *Id.* at 347. Westfield urged that despite "the inclusion of negligence-type allegations" the complaint "is at its essence a sexual harassment claim[.]" *Id.* The *Westfield* court agreed with the insurer, noting the expressly-recognized public policy of West Virginia which "require[s] courts to apply intentional and criminal act exclusions to torts based on intentional acts even when the claims are couched in terms of negligence." *Id.* at 348. To find otherwise would foster an untenable environment where insureds are less motivated to prevent sexual misconduct due to the availability of insurance coverage. In light of this clear public policy, the *Westfield* court ruled that the claims against CGA "sounding in the negligent supervision or retention of Matulis arose from Matulis' own intentional acts" and therefore "[t]hese claims are not covered under the Policy based on the 'Expected or Intended Injury' exclusion." *Id.*

Westfield is particularly persuasive in this appeal. *Westfield* involved the very same sexual abuse claims and lawsuits at issue in this matter. It involved the same arguments by Matulis in an effort to obtain coverage for these same sexual abuse claims. And the federal district court, through Judge Copenhaver, correctly rejected the creative efforts to manufacture insurance coverage

despite an intentional acts exclusion in Westfield's policy. Simply put, the circuit court's decision in the case at hand cannot be reconciled with Judge Copenhaver's well-reasoned decision.

Another federal district court, applying West Virginia law, rejected the insured's argument that he was entitled to a duty to defend where the plaintiff-claimant pled a negligence theory of liability. *Erie Ins. Prop. & Cas. Co. v. Dolly*, No. 3:20-CV-77, 2020 WL 7344709, at *5 (N.D. W. Va. Dec. 14, 2020). In *Erie*, the insured argued that because the underlying complaint sought damages for his negligent infliction of emotional distress, the insurer had a duty to defend him in the underlying lawsuit. *Id.* Flatly rejecting this argument, the *Erie* court observed that "the West Virginia Supreme Court has upheld that alleging negligent conduct in a complaint that is essentially a sexual misconduct claim does not bar the application of the intentional acts exclusion." *Id.* The *Erie* court therefore found that the plaintiff's standalone negligent infliction of emotional distress claim did "not alter the fact that the underlying complaint is, at essence, a claim for sexual assault. Accordingly, the intentional acts exclusion applies, and the [insurer] does not owe a duty to defend[.]" *Id.* at *6.

Here, just as in *Westfield* and *Erie*, regardless of the causes of action alleged, each of the claimant's legal theories stem from the same alleged course of conduct: Matulis' intentional sexual acts. The claimants' pleading of negligence here, as in *Westfield* and *Erie*, cannot "create coverage under the policy where it would not otherwise exist by virtue of an intentional act exclusion." *Westfield*, 421 F. Supp. 3d at 347. Indeed, the intent to merely manipulate the pleadings to invoke insurance coverage is even more obvious in the instant matter than in *Westfield* because the timing of the claimants' amended complaints suspiciously follows notice of the Policy exclusions and denial of claims. J.A. 533; J.A. 656; J.A. 722. The explanation is simple: these claims, as in *Westfield*, despite "the inclusion of negligence-type allegations," are at their essence claims of

intentional sexual misconduct and were pled in the alternative merely to invoke coverage where it did not otherwise exist. 421 F. Supp. 3d at 347. At their core, the claimants' allegations against Matulis plainly involve a bevy of allegations of intentional sexual misconduct—triggering the Policy exclusion. The fact that certain legal theories in their complaints are alternatively couched in terms of negligence simply fails to create coverage where there is none. The circuit court erred in holding otherwise.

2. The sexual acts exclusion barred any duty to defend Matulis.

The Policy provides that the Mutual "will not defend or pay for . . . liability arising out of sexual acts or sexual activities whether under the guise of professional services or not, on the part of any insured[.]" J.A. 3271. The sexual acts exclusion in the Policy bars coverage for the precise conduct at issue here. The factual allegations in the former patients' complaints uniformly assert liability arising out of Matulis' improper sexual acts or sexual activities.

As discussed above, West Virginia cases discuss non-coverage of sexual abuse claims as intentional acts generally. *See, e.g.*, *Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (allegations of sexual abuse committed by the insureds' son were not covered by homeowner's insurance policy); *Smith*, 208 W. Va. 664, 542 S.E.2d 827 (policy exclusions barred coverage for employee's sexual harassment); *Leeber*, 180 W. Va. 375, 376 S.E.2d 581. Although West Virginia courts have not addressed a sexual acts exclusion directly on point, other state and federal courts have done so in circumstances strikingly similar to this case.[7]

[7] *See, e.g.*, *Nat'l Fire Ins. of Hartford*, 439 F. App'x 293 (no duty to defend insured against claims that former employee sexually assaulted patient where policy contained sexual misconduct exclusion); *Physicians Nat'l Risk Retention Grp., Inc. v. Price*, 968 F.2d 1224 (10th Cir. 1992) (sexual misconduct exclusion barred coverage for post-operative gynecological examination); *Govar v. Chicago Ins.*, 879 F.2d 1581 (8th Cir. 1989) (enforcing sex acts exclusion when a patient's malpractice claim alleged that the insured had sexual relations with her negligently); *Aldrich v. Nat'l Chiropractic Mut. Ins.*, No. 96-CV-847S, 1997 WL 662509 (W.D.N.Y. Oct. 14, 1997) (insurer was not obligated to indemnify patient where the applicable policy expressly excluded "sexual assault or impropriety" from the definition of "bodily injury"); *Greenberg v. Nat'l Chiropractic Mut. Ins.*, No. 96 CIV 0052 JSM, 1996 WL

These cases from other jurisdictions are persuasive because they concern sexual misconduct claims against physicians and other health care providers under medical professional liability policies containing sexual acts exclusions similar to the exclusion in the Mutual's Policy. In fact, the exclusion in the Policy at issue is even broader than some of the exclusions in the persuasive cases because it applies to "liability arising out of sexual acts or sexual activities" and not just sexual assault or harassment. J.A. 3271. Even more compelling, the exclusion applies to sexual acts or activities "whether under the guise of professional services or not." J.A. 3271. In light of the unequivocal allegations of sexual acts in the claimants' underlying complaints, the circuit court erred when it found there was a duty to defend.

3. The criminal acts exclusion barred any duty to defend Matulis.

The Policy provides that the Mutual "will not defend or pay for . . . injury or damage resulting from . . . a willful violation of a statute, ordinance, or regulation imposing criminal penalties." J.A. 3271. Like the applicable sexual acts exclusion, although West Virginia courts have not addressed a criminal acts exclusion directly on point, other state and federal courts have done so.[8] Here, Matulis was criminally convicted for the sexual assault of T.W. *See State v. Matulis*, No. 18-1053, 2020 WL 1487810, at *6 (W. Va. Mar. 23, 2020). Unquestionably, this

374145 (S.D.N.Y. July 3, 1996) (insurer had no duty to defend underlying action from female patient where policy excluded injuries resulting from "sexual impropriety"); *Rivera v. Nev. Med. Liab. Ins.*, 814 P.2d 71 (Nev. 1991) (concluding that sexual-acts exclusion precluded coverage for the insured's sexual assault of a patient); *Physicians' Reciprocal Ins. v. Giugliano*, 37 A.D.3d 442 (N.Y. Sup. Ct. 2007) (finding policy excluded coverage for claims resulting from sexual intimacy, sexual molestation, sexual exploitation, or sexual assault); *Woodbridge Ins. v. Vice*, No. 13-97-32, 1997 WL 746386 (Ohio Ct. App. Dec. 3, 1997) (no duty to defend where policy contained exclusion for sexual misconduct).

[8] *See, e.g.*, *Aldrich*, 1997 WL 662509 (insurer was not obligated to indemnify patient where applicable policy did not apply to injury resulting from "an act in violation of any United States or state statute governing the commission of a crime"); *N.M. Physicians Mut. Liab. Co. v. LaMure*, 860 P.2d 734 (N.M. 1993) (excluding physician's sexual assault from coverage under policy's exclusion for liability arising from criminal acts); *Med. Mut. Liab. Ins. Soc'y v. Azzato*, 618 A.2d 274, 280 (Md. Ct. Spec. App. 1993) (enforcing criminal acts exclusion and denying indemnification to a physician who was liable for supplying and encouraging a patient's illegal drug abuse); *Rivera*, 814 P.2d at 74 (enforcing the criminal acts exclusion where gynecologist raped patient during an examination and rejecting the contention that malpractice insurance policies should be construed to protect the injured party).

judicial determination that Matulis violated a West Virginia statute is dispositive of Matulis' claim that T.W.'s claim was covered. Moreover, the subsequent claims brought by the other former patients in the wake of T.W.'s civil action likewise alleged unlawful sexual assault in allegations that echoed T.W.'s Complaint. K.H., J.L., P.W., and Y.T. alleged that Matulis' actions constituted "sexual assault." J.A. 526; J.A. 542; J.A. 546; J.A. 638; J.A. 712. R.L., T.W., and D.C. alleged that Matulis sexually molested them. J.A. 597; J.A. 612; J.A. 628. All of the complaints and amended complaints allege facts that constitute a crime under West Virginia law. *See, e.g.*, J.A. 420–769. The circuit court erred in deciding the Mutual had a duty to defend them.

4. The sexual abuse was not a medical incident or professional services.

Although the intentional acts, sexual acts, and criminal acts exclusions patently bar coverage, there is also no coverage because the claims do not fall within the Insuring Agreement of the Policy. As outlined above, the Policy provides that the Mutual "will pay those sums that the insured becomes legally obligated to pay as damages because of a claim that is a result of a medical incident." J.A. 3270. The Policy defines a medical incident as "any act, series of acts, failure to act, or series of failures to act arising out of the rendering of, or failure to render professional services, to any one person by an insured." J.A. 3275. Professional services, in turn, are defined as "the providing of medical services, including medical treatment, which the insured is licensed to perform." J.A. 3276. Thus, for the underlying claims to fall within the Insuring Agreement of the Policy, the damages would have to be the result of an act or failure to act in rendering medical services or treatment which Matulis is licensed to perform.

It is readily apparent, however, that the alleged damages in the underlying claims arise out of Matulis improperly touching his patients instead of providing medical services or treatment. Because the damages alleged are the result of sexual misconduct and do not arise out of the

rendering of, or failure to render, medical services or treatment Matulis was licensed to perform, the underlying claims are not covered under the insuring agreement of the Policy.

Although West Virginia courts have not yet addressed this precise issue, the "overwhelming majority" of jurisdictions have held that sexual misconduct is not a "medical incident" or "professional services" within the meaning of a medical professional liability insurance policy. As the Pennsylvania Supreme Court observed in *Physicians Insurance & Professional Adjustment Services, Inc. v. Pistone*, 726 A.2d 339 (Pa. 1999), the majority of jurisdictions have concluded that professional liability policies do not provide coverage for health care practitioners who sexually assault their patients. [9]

In *Pistone*, the insurer filed a declaratory judgment action seeking a determination that it was not required to defend or indemnify a physician or his employer in an action asserting that the physician was negligent in exposing his patient to his sexual misconduct, that the employer was negligent in hiring him, and that the hospital was negligent in granting him staff privileges. *Id.* In granting the insurer's motion for summary judgment, the trial court concluded that none of the physician's acts as alleged in the underlying complaint could reasonably be deemed to be of a professional nature or done in the course of delivering health care services to the patient. *Id.* In reaching its holding, the court relied on the analysis set forth in *Marx v. Hartford Accident & Indemnity Co.*, 157 N.W.2d 870 (Neb. 1968), which considered whether the conduct alleged

[9] *See also, e.g.*, *Price*, 968 F.2d at 1224; *Med. Protective Co. v. Turner*, No. 3:15-CV-0366-L, 2015 WL 3631701 (N.D. Tex. June 10, 2015); *B.A. v. Bohlmann*, No. 09-CV-346-BBC, 2010 WL 597455 (W.D. Wis. Feb. 16, 2010); *Snyder v. Major*, 789 F. Supp. 646 (S.D.N.Y. 1992); *St. Paul Ins. v. Cromeans*, 771 F. Supp. 349, 353 (N.D. Ala. 1991); *Sanzi v. Shetty*, 864 A.2d 614 (R.I. 2005); *LaMure*, 860 P.2d at 738; *Steven G. v. Herget*, 505 N.W.2d 422 (Wis. 1993); *Niedzielski v. St. Paul Fire & Marine Ins.*, 589 A.2d 130, 131–32 (N.H. 1991); *Roe v. Fed. Ins.*, 587 N.E.2d 214 (Mass. 1992); *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 407 S.E.2d 655, 657 (S.C. 1991); *Smith v. St. Paul Fire & Marine Ins.*, 353 N.W.2d 130, 132 (Minn. 1984); *Hirst v. St. Paul Fire & Marine Ins.*, 683 P.2d 440 (Idaho 1984); *St. Paul Fire & Marine Ins. v. Alderman*, 455 S.E.2d 852 (Ga. Ct. App. 1995); *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636, 639 (Fla. Ct. App. 1994); *Standard Fire Ins. v. Blakeslee*, 771 P.2d 1172 (Wash. Ct. App. 1989); *St. Paul Fire & Marine Ins. v. Quintana*, 419 N.W.2d 60 (Mich. Ct. App. 1988); *Wash. Ins. Guar. Ass'n v. Hicks*, 744 P.2d 625 (Wash. Ct. App. 1987).

involves specialized knowledge, labor, or skill which is predominantly mental or intellectual. *Pistone*, 726 A.2d at 341 (citations omitted). The court also noted that, in *Roe v. Federal Insurance*, 587 N.E.2d 214 (Mass. 1992), the Supreme Court of Massachusetts elaborated on the application of the *Marx* standard to the health care profession, clarifying that professional services do not include all forms of a medical professional's conduct and that "there must be a medical . . . act or service that causes the harm, not an act or service that requires no professional skill." *Pistone*, 726 A.2d at 341–42. Consistent with the definition of "professional acts or services" set forth in *Marx*, the majority of jurisdictions have concluded that professional liability policies do not provide coverage for health care practitioners who sexually assault their patients. *Id.* at 342.

There is no reason for West Virginia to depart from the majority on this issue. Applying the majority rule to the underlying claims in the present case, there is no question that the Mutual did not have a duty to defend. Sexual misconduct claims do not fall within the Insuring Agreement of the Policy because they are not the result of a "medical incident," and they do not arise out of the rendering of or the failure to render "professional services." Therefore, the circuit court erred when it found there was a duty to defend, and this Court should vacate and reverse the circuit court's Memorandum Opinion and Order dated May 4, 2021.

C. The circuit court erred by denying the Mutual's right to have the jury decide the amount of attorneys' fees awardable under the Policy as breach of contract damages.

Following its erroneous decision in Matulis' favor that the sexual abuse claims were covered under the policy, the circuit court further erred in denying the Mutual's right to have a jury determine what benefits were due under the Policy. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. &*

Sur. Co. v. Fed. Ins., 148 W. Va. 160, 133 S.E.2d 770 (1963); *see also* W. Va. R. Civ. Pro. 56. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 6, *Aetna Cas. & Sur. Co.*, 148 W. Va. 160, 133 S.E.2d 770. That is not what happened.

On January 18, 2023, the parties advised the circuit court that it would be proper to establish a schedule for briefing and argument on cross-motions for summary judgment regarding what attorneys' fees Matulis could recover, as a matter of law, for breach of contract or whether such issues presented a genuine issue of material fact and if those fee claims should be submitted to the jury. J.A. 2108–09. The circuit court established a briefing schedule and heard argument on the parties' cross-motions at the pretrial conference on February 6, 2023. J.A. 2183.

During argument, the Mutual disputed that Matulis was entitled to $129,423.65 in attorneys' fees Matulis claimed as breach of contract damages because such services related to: (1) Matulis' criminal prosecution for sexually abusing his patients; (2) his disputes with the Mutual over coverage; (3) disputes with an entirely unrelated insurer regarding coverage; and (4) various matters related to financial asset protection and potential bankruptcy. J.A. 2183–94. Alternatively, the Mutual argued that, given the conflicting evidence as to coverage of the attorneys' fees at issue, such evidence was for the jury to properly weigh and decide. J.A. 2195–96.

On the morning of May 15, 2023, before the jury convened, the circuit court announced its intention to grant the remainder of Matulis' motion for partial summary judgment regarding the $129,423.65 in disputed attorneys' fees and costs for his breach of contract claim, finding that the work performed for other matters, including, *inter alia*, Matulis' criminal defense, asset protection, and a coverage dispute with an unrelated insurer, was intertwined with work performed for the

underlying civil suits brought by Matulis' victims. J.A. 2298.[10]

It was inappropriate for the circuit court to grant Matulis' motion for partial summary judgment for attorneys' fees in light of the genuine issues surrounding whether the fees incurred were covered under the Policy. Syl. Pt. 3, *Aetna Cas. & Sur. Co.*, 148 W. Va. 160, 133 S.E.2d 770. Instead, the circuit court substituted its own fact-finding analysis to arrive at a result-driven decision that ultimately robbed the Mutual of its right to have a jury determine what benefits were due under the Policy, prevented the entire story from being presented to a jury, and barred any mention of Matulis' sexual abuse. For this reason alone, this Court should vacate and reverse the circuit court's Memorandum Opinion and Order dated August 14, 2023, to the extent the circuit court erroneously decided attorneys' fees as a breach of contract damages by summary judgment.

D. The circuit court erred by awarding attorneys' fees as breach of contract damages for attorneys' services that were not covered under the Policy.

Ultimately, the circuit court awarded Matulis $366,524.45 in attorneys' fees as breach of contract damages for services that were not covered under the Policy. The Mutual had no choice but to concede $212,100.80 in attorneys' fees that appeared to be recoverable under the circuit court's erroneous ruling that the Mutual owed Matulis a defense. However, the Mutual disputed $25,000.00 in attorneys' fees incurred for services related to Matulis' untimely claim regarding the investigation and suspension by CAMC and the complaints initiated by the BOM. The Mutual further disputed $129,423.65 in attorneys' fees for services related to: (1) Matulis' criminal prosecution for sexually abusing his patients; (2) his disputes with the Mutual over coverage; (3)

[10] In its Memorandum Opinion and Order dated August 14, 2023, wherein the circuit court memorialized its decision, it noted that, "[b]ecause there is no dispute as to whether the fees were incurred, and because the only question is whether the fees would be covered under the applicable policy, it is appropriate for the Court to resolve this dispute as a matter of law." J.A. 25. The circuit court accepted Matulis' assertion that he had withdrawn all fees unrelated to the defense of the underlying actions and, after its own review, agreed that, to the extent fees incurred "benefitted one or more unrelated matters, they were also necessary for the defense of the underlying civil claims." J.A. 26. The circuit court went so far as to blame the Mutual for not preventing any overlap. J.A. 26–27.

disputes with an entirely unrelated insurer regarding coverage; and (4) various matters related to financial asset protection and potential bankruptcy. Nonetheless, the circuit court determined that these disputed amounts were recoverable.

1. Administrative defense fees.

Regarding the $25,000.00 in attorneys' fees awarded to Matulis for administrative defense, the circuit court blithely accepted that Matulis "reasonably believed that the Mutual had actual notice of the pending administrative proceeding. And even if Matulis failed to notify the Mutual in a timely manner, the Administrative Defense coverage is a reimbursement coverage and the Mutual has not demonstrated sufficient prejudice." J.A. 20. In so holding, the circuit court, once again, ignored the relevant Policy language.[11]

The CAMC and BOM proceedings were not eligible for coverage under the Policy because it only contemplates "protection against **professional liability claim(s)** which may be brought against [Matulis] by a patient in [his] practice as a physician or surgeon." J.A. 3255. Neither CAMC nor the BOM was a patient in Matulis' practice, nor did either assert a professional liability claim against him. Thus, those fees are not covered under the Policy.

Nor do Matulis' untimely claims meet the terms of the Broad Form Administrative Defense Endorsement, which provided that Matulis was required to notify the Mutual "within thirty (30) days from the date of an **Administrative Defense Proceeding** being **instituted** in order to receive coverage . . . ." J.A. 3281.[12] Matulis' counsel first alerted the Mutual to the BOM complaints on March 20, 2017, nearly a full year after the first investigation was instituted. Specifically, the BOM

[11] Matulis even conceded in his deposition that he believed any fees related to the defense of the administrative matters were not covered. J.A. 1617–18.

[12] Although this endorsement includes "[a] claim or investigation instituted by a patient of Yours, alleging sexual misconduct or harassment by You in the course of providing professional services to such patient," *see* J.A. 3283 (Section IX.D.2.j), as part of the definition of administrative defense proceedings, the endorsement goes on to state that "[p]ersonal injury arising out of sexual misconduct is not covered," *see* J.A. 3284 (Section IX.D.2.l.(7)).

investigation includes two complaints, No. 16-46-W and No. 16- 54-W. J.A. 2887. With respect to Complaint No. 16-54-W, Paragraph 85 of the Complaint states that the BOM received a professional misconduct complaint against Matulis, from Patient 2 on April 13, 2016. J.A. 2895. The BOM does not indicate when Complaint No. 16-46-W was initiated, however, it appears to have been sometime between March 23, 2016, and May 16, 2016. J.A. 2889. Based upon the allegations, it is evident that Complaint Nos. 16-46-W and 16-54-W both were instituted more than thirty days before March 20, 2017, when the Mutual first received notice of the complaints from Matulis' counsel. Matulis never alerted the Mutual to CAMC's investigation or suspension.

Moreover, Matulis was not an Insured under the Policy at the time the claim was made, which is a requirement for coverage under the Policy. J.A. 3266 ("This **policy** applies only to **claim(s)** that arise out of a **medical incident** which occurs on or after the **retroactive date** stated in the **policy declarations** and **schedule of insureds**, and that are first made against an **insured** and reported to the **Company** by the insured during the **policy period**."). Matulis could submit claims for medical incidents which occurred from the retroactive date of July 1, 1994, through the date his coverage was terminated on May 16, 2016, when he ceased being insured under the Policy. J.A. 3274–76. When Matulis' counsel provided notice of the administrative complaints on March 20, 2017, he did not qualify for any coverage because he was no longer an insured.

2. Other miscellaneous fees.

Regarding the remaining disputed $129,423.65 in attorneys' fees Matulis claimed as breach of contract damages, even if the Mutual did properly owe Matulis a defense in the underlying actions, examination of these entries reveals how incredulous the circuit court's conclusion is in light of the facts where such services undisputedly related to: (1) Matulis' criminal prosecution for sexually abusing his patients; (2) disputes with the Mutual over coverage; (3) disputes with an

entirely unrelated insurer regarding coverage; and (4) various matters related to financial asset protection and potential bankruptcy. J.A. 2675–77; J.A. 2688; J.A. 2692–93; J.A. 2696; J.A. 2706–07; J.A. 2715–17; J.A. 2721–24; J.A. 2728–29; J.A. 2745; J.A. 2749; J.A. 2751; J.A. 2753–54; J.A. 2758; J.A. 2762; J.A. 2766; J.A. 2770; J.A. 2773; J.A. 2777; J.A. 2781; J.A. 2786; J.A. 2791–92; J.A. 2797–98; J.A. 2801–02; J.A. 2806.

Matulis was not only faced with hundreds of civil sexual abuse claims, he also was indicted for some of those crimes. J.A. 2880. Despite the clear language of the Policy, Matulis claimed that attorneys' fees he incurred in the defense of his crime were covered.[13] As discussed above, any damages related to Matulis' criminal defense patently would have been excluded under the Policy's sexual acts and criminal acts exclusions. J.A. 3271. Matulis also included claims for attorneys' fees incurred in his efforts to obtain coverage under the Policy, including fees related to his lawsuit against the Mutual concerning coverage. Neither of these categories of fees is covered under the Policy's Broad Form Administrative Defense Endorsement, which states that the Mutual will not pay for legal expenses: "[i]ncurred in disputes with respect to this insurance" or "[i]ncurred in defense of criminal prosecution." J.A. 3281–87.

Despite the unambiguous requirement that the defense costs result from a medical incident, J.A. 3250, Matulis also submitted claims for fees for a variety of matters unrelated to the defense in the underlying tort suits. Such matters included, but certainly were not limited to, fees incurred for Matulis' dispute with Westfield (a completely unrelated insurer), J.A. 2715; J.A. 2722; J.A. 2758; J.A. 2762; J.A. 2766; J.A. 2770, attempts to protect his assets, J.A. 2786; J.A. 2791, transfer and handling of retirement accounts and funds, J.A. 2786–87; J.A. 2791, and review and analysis of bankruptcy law, J.A. 2716; J.A. 2723–24; J.A. 2728–29; J.A. 2786; J.A. 2791, among other

[13] As with administrative defense costs, Matulis previously conceded in his deposition that he believed any fees solely related to the criminal matter were not covered. J.A. 1617–18.

things. Those fees, however, were not covered under the Policy, as they were not in furtherance of the defense of the underlying tort claims. It was error for the circuit court to find so.

For these reasons, this Court should vacate and reverse the circuit court's Memorandum Opinion and Order dated May 11, 2023, and Memorandum Opinion and Order dated August 14, 2023, to the extent the circuit court erroneously decided attorneys' fees as a matter of law.

E. The circuit court erred by awarding attorneys' fees as *Hayseeds* damages for attorneys' services that were not necessary to resolve Matulis' coverage claim in violation of *Lemasters*.

West Virginia law is resoundingly clear: The fees Matulis may recover under *Hayseeds* extend only to those reasonable fees incurred for vindicating his claim to collect benefits under the Policy, not fees incurred to prosecute his bad faith action or other, unrelated claims. *See Moses Enters., LLC v. Lexington Ins.*, 66 F.4th 523, 528–29 (4th Cir. 2023); *Lemasters v. Nationwide Mut. Ins.*, 232 W. Va. 215, 222–23, 751 S.E.2d 735, 742–43 (2013) (recognizing that an insured is not entitled to recover attorneys' fees incurred in prosecution of an insurance bad faith action, either under a UTPA claim or a common law bad faith claim). Moreover, the Fourth Circuit has recognized that "[j]ust because two things happen at the same time . . . does not mean one is 'necessary' to the other." *Moses*, 66 F.4th at 529 (citation omitted).

In *Moses*, the Fourth Circuit, applying West Virginia law, vacated and remanded the district court's award of attorneys' fees to the plaintiff under *Hayseeds* where the district court failed to consider whether the requested fees were necessary to vindicate the "wholly distinct" breach of contract claim. *Id.* In so holding, the court recognized: "On remand, the district court must—aided by appropriate submissions by the parties—at least attempt to determine which portions of the requested fees were "'necessary to obtain payment of the insurance proceeds' and then award fees based on that work only." *Id.*

Matulis only could recover fees incurred to recover benefits under the Policy. He could not recover: (1) fees incurred in the defense of the underlying claims; (2) fees incurred to prosecute his claim for damages under *Hayseeds*; (3) fees incurred to prosecute his bad faith claims; or (4) fees related to other matters. Matulis failed to satisfy his burden to demonstrate that the requested fees related solely to vindicate his breach of contract claim rather than his bad faith claims. In order to award him any fees under *Hayseeds*, the circuit court was required to review each and every entry to determine whether the requested fees relate to Matulis' recovery under the Policy or whether they relate to his bad faith claim, as the court required in *Moses*. The circuit court's review of Matulis' requested fees in this case is perhaps even more crucial than it was in *Moses* because Matulis, once again, improperly sought to recover fees entirely unrelated to vindicating his claim for benefits under the Policy, including but not limited to fees for unrelated coverage issues, fees for analyzing asset protection, and fees generated for pursuing *Hayseeds* damages for net economic loss damages and aggravation and annoyance through extensive expert and trial preparation. J.A. 2664–48; J.A. 2849–79.

Where the request for fees is ambiguous as to whether they were necessary to vindicate Matulis' claim for insurance benefits under his Policy with the Mutual, such ambiguity must be construed against Matulis as falling short of his burden of proof under *Hayseeds*. Given the distinct nature between breach of contract and bad faith claims, such services cannot be considered *necessary* for a proper award under *Hayseeds*. For these reasons, the circuit court erred in granting Matulis' motion to the extent he has failed to satisfy his burden to show that the requested fees were necessary to vindicate his insurance coverage claim.

Finally, absolutely nothing under West Virginia law supported an upward adjustment of attorneys' fees based upon the complexity of the issues or the results obtained, let alone an upward

adjustment to the magnitude of 20%. As a threshold matter, it was beyond the pale for Matulis to suggest and the circuit court to agree that he be awarded an arbitrarily inflated amount of attorneys' fees in this case based on the settlements awarded to the victims of *his* sexual abuse—settlements secured by the victims' attorneys and negotiated by defense attorneys the Mutual ultimately provided for him following the circuit court's coverage decision. Shockingly, this resulted in Matulis actually being rewarded for sexually abusing patients.

Likewise, Matulis' suggestion and the circuit court's acceptance that a presumptively reasonable fee award in this case could be $1,000,000, as one-third of the face amount of the Policy, also demonstrates a fundamental misunderstanding of *Hayseeds*, considering the $366,524 in unreimbursed defense fees awarded by the circuit court—the only amount of coverage secured under the Policy for Matulis in this case—was nowhere near the Policy limits. Indeed, even under the factors set forth in *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), the base hourly fees requested in this case—$392,907—represent an upward adjustment of a reasonable contingent fee based upon the amount of coverage Matulis' attorneys secured for him in this case, considering the base fees are more than the breach of contract recovery. For these reasons, this Court should vacate and reverse the circuit court's Order Awarding Attorneys' Fees under *Hayseeds*, Dismissing Remaining Claims and Final Judgment Order dated August 31, 2023.

F. During the jury trial, the circuit court committed multiple evidentiary errors which substantially and unfairly prejudiced the Mutual.

1. The circuit court excluded all evidence of Matulis' sexual abuse.

Matulis' sexual abuse of his patients was an overarching fact that permeates every single facet of this case and every lawsuit filed against Matulis; therefore, its probative value with respect to Matulis' alleged damages outweighed any possibility of undue prejudice under West Virginia Rule of Evidence 403. The Mutual should have been allowed to introduce the voluminous

documentary evidence it proffered, including documents related to proceedings before the BOM, documents relating to Matulis' suspension from CAMC, attorney fee invoices, attorney fee summaries, and documents relating to his criminal conviction. J.A. 2548–3000. In essence, the Mutual was faulted for not providing Matulis a defense—and ultimately was found liable for $350,000 in aggravation and inconvenience and net economic loss damages—but the Mutual was not allowed to mention the nature of the claims, the basis for its decision making, nor the fact that the Mutual did provide Matulis a defense in many of the claims. Further, the Mutual was prevented from offering evidence that it settled the underlying sexual abuse claims. In precluding this evidence, the circuit court mislead the jury into thinking that the only fees incurred included those for which the circuit court previously determined the Mutual was liable—not fees for Matulis' criminal defense or asset protection. Without question, the circuit court abused its discretion in excluding such evidence, essentially preventing the Mutual from effectively defending itself at trial.

2. The circuit court erroneously excluded evidence of other emotional distress.

In this same vein, the Mutual also should have been able to ask questions about other sources of aggravation and inconvenience in Matulis' life at the time the Mutual denied him a defense in certain underlying suits, including the criminal investigation, indictment, and conviction, the surrender of his medical license, and the underlying claims and complaints, among other things. J.A. 1803–09; J.A.1907–35; J.A. 2435–52. Compensation for aggravation, annoyance, and inconvenience includes the aggravation and inconvenience shown in the claims process until the benefits under the policy are offered or paid. Syl. Pt. 4, *McCormick v. Allstate Ins.*, 197 W. Va. 415, 475 S.E.2d 507 (1996). Here, Matulis admitted that his attorneys primarily dealt with the coverage issue, and he trusted them to make decisions. J.A. 1575–78. Considering

the myriad other circumstances in his life during this time period—none of which the jury was permitted to hear—the Mutual was precluded from testing whether it was the sole cause of such damages, if any. Thus, the circuit court abused its discretion in excluding such evidence.

3. The circuit court admitted evidence that the Mutual had been acquired by MagMutual and MagMutual's worth.

Matulis was clear—he was not seeking punitive damages during the Phase 1 trial. J.A. 1578–82. That was one of his arguments in support of bifurcation. J.A. 1804. In spite of those representations and in spite of the fact that MagMutual's November 2020 acquisition of the Mutual occurred well after the Mutual's coverage decisions, Matulis' counsel focused almost the entirety of the cross-examination of Tamara Huffman on MagMutual's net worth. J.A. 2487–99. In *Wheeler v. Murphy*, 192 W. Va. 325, 452 S.E.2d 416 (1994), the Supreme Court of Appeals held that evidence of defendant's wealth or lack thereof is generally inadmissible because such evidence "is irrelevant to the ultimate determination of whether the defendant was actually at fault . . . ." *Id.* at 333, 452 S.E.2d at 424. Here, evidence of MagMutual's wealth or profits bore absolutely no relation to the issues involved in the case and did not tend to establish a proposition that was legitimately before the jury during the trial. Furthermore, even if such evidence were relevant, its probative value was substantially outweighed by a danger of unfair prejudice. *See* W. Va. R. Evid. 403. Accordingly, it should have been precluded, and the circuit court abused its discretion in allowing such evidence to be admitted.

G. The circuit court erred during the jury trial of the *Hayseeds* claim by allowing recovery of lost opportunity damages rather than net economic loss damages.

Matulis set forth no evidence at trial that the Mutual proximately caused any damages for net economic loss available under *Hayseeds* caused by the delay in settlement. Specifically, Matulis set forth no evidence that he suffered any net economic losses during the 2017 sale of his

vacant lot on Lake Wylie. Rather, Matulis' appraisal expert, Dean Dawson, testified that he was not asked to render an opinion of the property's fair market value when Matulis sold it; he only conducted a fair market value analysis as of May 2023. J.A. 2464; J.A. 2467.

Net economic damages are the loss of money which Matulis sustained as a direct and proximate result of the Mutual's failure to pay Matulis the appropriate insurance proceeds when they were due. Such damages must be proven with reasonable certainty, not mere speculation or estimates. *See Smithson v. U.S. Fid. & Guar. Co.*, 186 W. Va. 195, 206, 411 S.E.2d 850, 861 (1991). Damages for net economic losses under *Hayseeds* are not intended to compensate insureds for hypothetical appreciation of assets. In *Nationwide Mutual Fire Insurance v. Faircloth*, No. 3:12-CV-4, 2013 WL 4647690 (N.D. W. Va. Aug. 29, 2013), the plaintiffs alleged that they were forced to withdraw considerable sums from their retirement accounts in order to defend themselves in a coverage lawsuit. *Id.* at *7. The court awarded them $6,100.00 in net economic losses caused by the delay in settlement, which represented the penalty fees plaintiffs incurred from early withdrawals—not the gains plaintiffs presumably would have enjoyed had they otherwise left their retirement accounts untouched. *Id.* Because Matulis set forth no evidence of the fair market value of his Lake Wylie property at the time of the 2017 sale, he failed to establish a *prima facie* right to recover damages for alleged net economic losses. It was error for the circuit court not to grant the Mutual judgment as a matter of law on this issue.[14]

H. The circuit court erred by incorrectly removing from the jury's consideration the issue of prejudgment interest in violation of West Virginia Code § 56-6-27.

As a matter of law, given the circuit court's rulings on Matulis' motion for partial summary

[14] The circuit court also erred in precluding the Mutual from asking Matulis about payments he made for attorneys' fees following his sale of the Lake Wylie Property because he testified that he sold the property to pay fees. J.A. 2443–45. Because the Mutual could not inquire about payments for attorneys' fees following the sale of his property, the Mutual erroneously was not permitted to challenge the amount of the alleged fees incurred or alleged loss suffered.

judgment immediately before trial, Matulis was not entitled to prejudgment interest on any element of his claims. In *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997), the Supreme Court of Appeals explained that attorneys' fees under *Hayseeds*, which are decided by the circuit court, are not entitled to prejudgment interest, reasoning: "Only after the circuit court approves the policyholder's attorney's fee does the amount become liquidated and established. Hence, prejudgment interest is not available, because the amount of the attorney's fee is not ascertainable until the circuit court issues its ruling." *Id.* at 700, 500 S.E.2d at 325. Relying on *Miller*, the Fourth Circuit in *Graham v. National Union Fire Insurance*, 556 Fed. App'x 193 (4th Cir. 2014), concluded that prejudgment interest was not proper on attorneys' fee awards, "even those sustained as direct damages." *Id.* at 198. In reaching its conclusion, the court reasoned that such expenses are not similar out-of-pocket expenditures and are unliquidated until the court awards them. *Id.*

Given that the circuit court did not memorialize its ruling on the $129,423.65 in disputed attorneys' fees and costs until August 14, 2023, the damage award was not liquidated. Under *Miller* and *Graham*, prejudgment interest would be inappropriate. Nor could damages for lost opportunity damages, as awarded here, qualify for prejudgment interest because such damages are not "special damages," which "include lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court." W. Va. Code § 56-6-31.

In its Memorandum Opinion and Order, the circuit court correctly recognized that the parties agreed that whether prejudgment interest should be awarded was a matter for the jury. J.A. 27. For the circuit court to suggest, however, that the Mutual did not genuinely dispute or disagree with Matulis' suggested method of calculation, J.A. 28, displays the circuit court's complete misunderstanding of the applicable statute.

To the extent prejudgment interest was properly recoverable, this action should have been

governed by West Virginia Code § 56-6-27, which provides that, "[t]he jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off." *See also* Syl. Pt. 1, *Miller v. WesBanco Bank, Inc.*, 245 W. Va. 363, 859 S.E.2d 306, 311 (2021) ("West Virginia Code §56-6-27 (eff. 1923) provides the exclusive means by which to obtain prejudgment interest in any action founded on contract."). *Only* when the case is a bench trial may the court, as the factfinder, award prejudgment interest. *See Velasquez v. Roohollahi*, No. 13-1245, 2014 WL 5546140, at *3–4 (W. Va. Nov. 3, 2014).[15] Because this action is indeed founded on a contract—the Policy—the jury should have calculated prejudgment interest at trial, not just determined whether prejudgment interest should have been awarded. Accordingly, this Court should vacate and reverse the circuit court's Memorandum Opinion and Order dated August 14, 2023, to the extent the circuit court erroneously decided the amount of prejudgment interest by summary judgment.

VI. CONCLUSION

The medical professional liability insurance policy at issue simply does not provide insurance for sexual abuse claims as is expressly—and repeatedly—set forth in the Policy. Instead, the circuit court ignored that clear language and improperly found coverage for Matulis' criminal conduct. For these reasons, the Mutual asks this Court to vacate and reverse the circuit court's Memorandum Opinion and Order dated May 4, 2021, grant the Mutual's Motion for Partial Judgment on the Pleadings, and deny Matulis' Motion for Partial Summary Judgment. This would rectify the cascade of other errors that flowed from the circuit court's erroneous decision on the duty to defend, rendering them moot. Alternatively, and for the reasons discussed herein, the

[15] "West Virginia Code § 56-6-27 does not prescribe how prejudgment interest should be calculated." *Com. Builders, Inc. v. McKinney Romeo Props., LLC*, No. 1:20CV62, 2022 WL 16706973, at *14 (N.D. W. Va. May 18, 2022). In such cases, West Virginia district courts have determined that, "in order to make the injured parties whole, the prejudgment interest should reflect the injured party's borrowing costs." *Id.* However, the Mutual was not permitted to present this concept to the jury.

Mutual asks this Court to vacate and reverse the circuit court's orders dated May 11, 2023 (two orders), June 5, 2023, August 14, 2023, August 17, 2023, and August 31, 2023, and remand for further proceedings.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-409

West Virginia Mutual Insurance Company,

Petitioner,

v.

Steven R. Matulis, M.D.,

Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 17-C-748

CERTIFICATE OF SERVICE

I, Robert L. Massie, herby certify that the forgoing "***BRIEF OF PETITIONER WEST VIRGINIA MUTUAL INSURANCE COMPANY***" has been served via the Court's File & Serve Xpress system on January 2, 2024, which will notify all counsel of record.

/s/ Robert L. Massie