IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-409

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WEST VIRGINIA MUTUAL INSURANCE COMPANY,

Petitioner,

v.

STEVEN R. MATULIS, MD,

Respondent.

RESPONDENT'S BRIEF

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INTRODUCTION

The Petitioner, West Virginia Mutual Insurance Company ("the Mutual"), is so apparently blinded by its loathing of the Respondent, Dr. Steven Matulis, that it ignores well-settled insurance law, refuses to consider the standpoint of the insured, and persists—including in this Court—in making demonstrably false statements of fact regarding the factual and procedural history of the case. Apparently, the Mutual hopes that this Court will be so distracted and (falsely) prejudiced that it will set aside the proper legal analysis that is compelled by longstanding precedent.

The rule of law demands more.

Here, the facts are not in dispute. In early 2016, Dr. Matulis was publicly accused of sexual misconduct. Unsurprisingly, those accusations prompted a flurry of civil lawsuits. From the beginning, Dr. Matulis explained that he would perform limited vaginal examinations during a colonoscopy where it was medically appropriate. This position was supported by multiple medical experts, including the independent expert retained by the West Virginia Board of Medicine. And because Dr. Matulis made his viewpoint quite clear, the various plaintiffs in the underlying civil cases asserted not only claims of sexual misconduct *but also* pleaded well-established tort claims including failure to obtain informed consent, failure to adequately document the examination, and medical malpractice. Yet the Mutual refused to defend Dr. Matulis against these claims.

More than two years after these public allegations and lawsuits, and well after the Mutual had already denied him coverage, Dr. Matulis was charged criminally in 2018 at the height of the "Me-Too" movement. Most of the criminal

charges were dismissed by the court. Only three were submitted to the jury. Dr. Matulis went to trial to defend himself. There, he presented a medicine-based defense, resulting in acquittals on *every* charge of sexual assault and *every* charge arising from the performance of a vaginal examination during a colonoscopy. He was only convicted of a single, lesser count of abuse, related to the performance of a breast examination.

This case—an insurance coverage case, which had been stayed—resumed after the conclusion of Dr. Matulis' criminal proceeding. After lengthy and contested proceedings below—and following several unsuccessful interlocutory appeals and/or writ petitions by the Mutual—the Circuit Court concluded that (at a minimum) the Mutual was required to provide Dr. Matulis with a defense to the underlying civil claims. The court, however, reserved judgment on the question of indemnification. At that point, the underlying civil cases proceeded and were ultimately settled. Having substantially prevailed in the coverage action, Dr. Matulis then sought to recover his net economic losses and damages for aggravation and inconvenience arising from the Mutual's legally erroneous coverage position regarding their refusal to defend.

One component of Dr. Matulis' economic loss—the fees that he spent to defend himself in the underlying civil cases—was resolved by the court as a matter of law before trial. The remainder of his *Hayseeds* damages were resolved by a jury after a one-day trial. There was contentious litigation concerning which of Dr. Matulis' out-of-pocket fees would be covered under the applicable policy. Of more

than $1,100,000 in out-of-pocket fees expended by Dr. Matulis, the court ultimately determined that just $367,224.45 were covered by the policy. Of that number, the overwhelming majority ($212,100.80) were not disputed by the Mutual. The remaining out-of-pocket fees awarded by the court were the product of a careful process of analyzing invoices, applying appropriate sublimits, and deciding coverage.

At the conclusion of a one-day trial, the jury awarded Dr. Matulis $200,000 in economic loss damages and $150,000 in aggravation and inconvenience. The jury also determined that Dr. Matulis should be awarded prejudgment interest. After trial, the court calculated the amount of prejudgment interest, conducted a *Pitrolo* hearing in response to Dr. Matulis' motion for attorney's fees, and entered the final judgment.

The Mutual now appeals from the final judgment, seeking appellate review of seven assignments of error, ranging from legal errors on the defense obligation to various and sundry evidentiary matters well-within the discretion of the trial court. *See Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012) ("When a party comes to us with nine grounds for reversing the [trial] court, that usually means there are none."). In its kitchen-sink approach to this appeal, the Mutual heavily relies on provably false assertions of fact, hoping this Court will ignore the well-settled legal principles concerning the Mutual's duty to defend. But despite the Mutual's attempt to prejudice the Court against Dr. Matulis's *legal*

arguments, this is in fact an insurance coverage case that the Circuit Court got right.

For the reasons that follow, this Court should affirm.

STATEMENT OF THE CASE

I. The underlying tort claims.

Beginning in April of 2016, various former patients began issuing notices of claims and filing civil actions against Dr. Matulis and Charleston Gastroenterology Associates, PLLC ("CGA") for incidents alleged to have occurred during the period in which Matulis and CGA were named insureds under a medical professional liability insurance policy issued by the Mutual. App. 420–769. Those former patients advanced a variety of theories of recovery, all arising from Dr. Matulis' admitted practice of performing limited digital vaginal examinations (DVEs) during colonoscopy procedures. Most of the patients alleged that Dr. Matulis performed DVEs for non-medical purposes, and alternatively that the exams were performed without obtaining informed consent, that the exams were not properly documented in their medical records, and that performing supplemental examinations constituted a breach of the appropriate standard of care. App. 978–81.

Dr. Matulis promptly notified the Mutual of each claim and, in correspondence with the Mutual, explained that he would perform a DVE where the exam was medically indicated. App. 0983. Dr. Matulis also supplied the Mutual with written opinions from two separate experts explaining that a DVE would not only be appropriate but could be *required* by the applicable standard of care. App.

985–88, 997. The Mutual nevertheless refused to provide Dr. Matulis with a defense in the majority of the civil cases filed against him.

II. The criminal proceedings.

In 2018, at the height of the national "Me-Too" movement, more than a year after this declaratory judgment action had been filed, and more than two years after the first filed underlying tort actions, Dr. Matulis was indicted on five counts of second-degree sexual assault and two counts of first-degree sexual abuse. *State v. Matulis*, No. 18-1053, 2020 WL 1487810, at *1 (W. Va. Mar. 23, 2020). Due to a complete lack of evidence, two counts were dismissed by the Circuit Court before trial. *Id.* at *1. At the close of the State's case-in-chief, the Circuit Court granted a judgment of acquittal with respect to two additional counts. *Id.* at *2. Three counts were submitted to the jury: two counts of sexual assault arising from DVEs, and one count of sexual abuse (*not* assault) arising from a breast examination. *Id.* The jury found Dr. Matulis not guilty of on all of the sexual assault charges. But it found him guilty of a single count of the lesser charge sexual abuse, which was unrelated to any DVE. *Id.* Critically, Dr. Matulis was acquitted of every charge related to performing DVEs in connection with colonoscopies. The single count of abuse did not arise from his admitted practice of performing DVEs where medically indicated.

III. The insurance coverage case.

With respect to the underlying tort actions, the patient/plaintiffs were aware of Dr. Matulis' position that a DVE performed during a colonoscopy can be a legitimate medical procedure, serving a legitimate medical purpose. *Matulis,* 2020

WL 1487810, at *3 (explaining expert testimony concerning DVE). Dr. Matulis' defense—which the jury accepted with respect to his practice of performing DVEs—was that "[e]verything that he did was directly related to [the patient's] symptoms, was directly related to [the patient's] treatment, and was directly related to patient care." *Id*. Because they knew Dr. Matulis' perspective on the matter, the patient/plaintiffs in the underlying tort actions advanced the alternative theory that Dr. Matulis performed DVEs without consent and in breach of the applicable standard of care. App. 863–71; 978–81.

In this context, the Circuit Court in May of 2021 determined that the Mutual was required to provide Dr. Matulis and CGA with a *defense* to the underlying tort claims. App. 0001. The Circuit Court made no findings with respect to whether the Mutual would be required to *indemnify* Dr. Matulis in any of the underlying tort actions. *Id.*

Once the Mutual settled the underlying tort actions, it acknowledged that because of the Court's coverage determination, Dr. Matulis "would be entitled to recover any attorneys' fees and expenses incurred in the defense of [the underlying tort actions] as well as fees and expenses allowed under *Hayseeds, Inv. v. State Farm Fire & Cas.*, 352 S.E.2d 73 (W. Va. 1986)." App. 1503. However, Dr. Matulis would only be able to recover attorneys' fees for his *Hayseeds* claims. *Id.*

By contrast, Dr. Matulis would not be entitled to recover attorneys' fees and expenses incurred in the prosecution of any first party bad faith claims against the Mutual. *Id.* (citing *Lemasters v. Nationwide Mut. Ins. Co.*, 751 S.E.2d 735 (W. Va.

2013)). In order "to clearly delineate between those attorneys' fees incurred which are potentially recoverable and those which are not," the Mutual asked the Circuit Court to "enter an Order requiring [Dr. Matulis] to submit his claim for attorneys' fees and expenses for determination by the Court." App. 1503.

Dr. Matulis agreed with the Mutual that it was appropriate to separate the *Hayseeds* claims from the bad faith claims, and proposed bifurcating those two aspects of the coverage litigation. App. 1782–83, 1787. Dr. Matulis also supported bifurcation to prevent the jury in phase one from being unnecessarily exposed to evidence concerning his conviction and the other allegations of sexual misconduct. Dr. Matulis explained, and the Circuit Court ultimately agreed, that such evidence would necessarily be admissible in the bad faith portion of the case but would *not* be admissible in a limited phase one conducted for the purpose of determining contract and *Hayseeds* damages.

At a pretrial conference conducted on October 5, 2022, the Court bifurcated the *Hayseeds* and contract claims from the bad faith (also called *Jenkins*) claims in the case in order to establish a clear delineation between the fees that are potentially recoverable and those which are not. App. 1810.

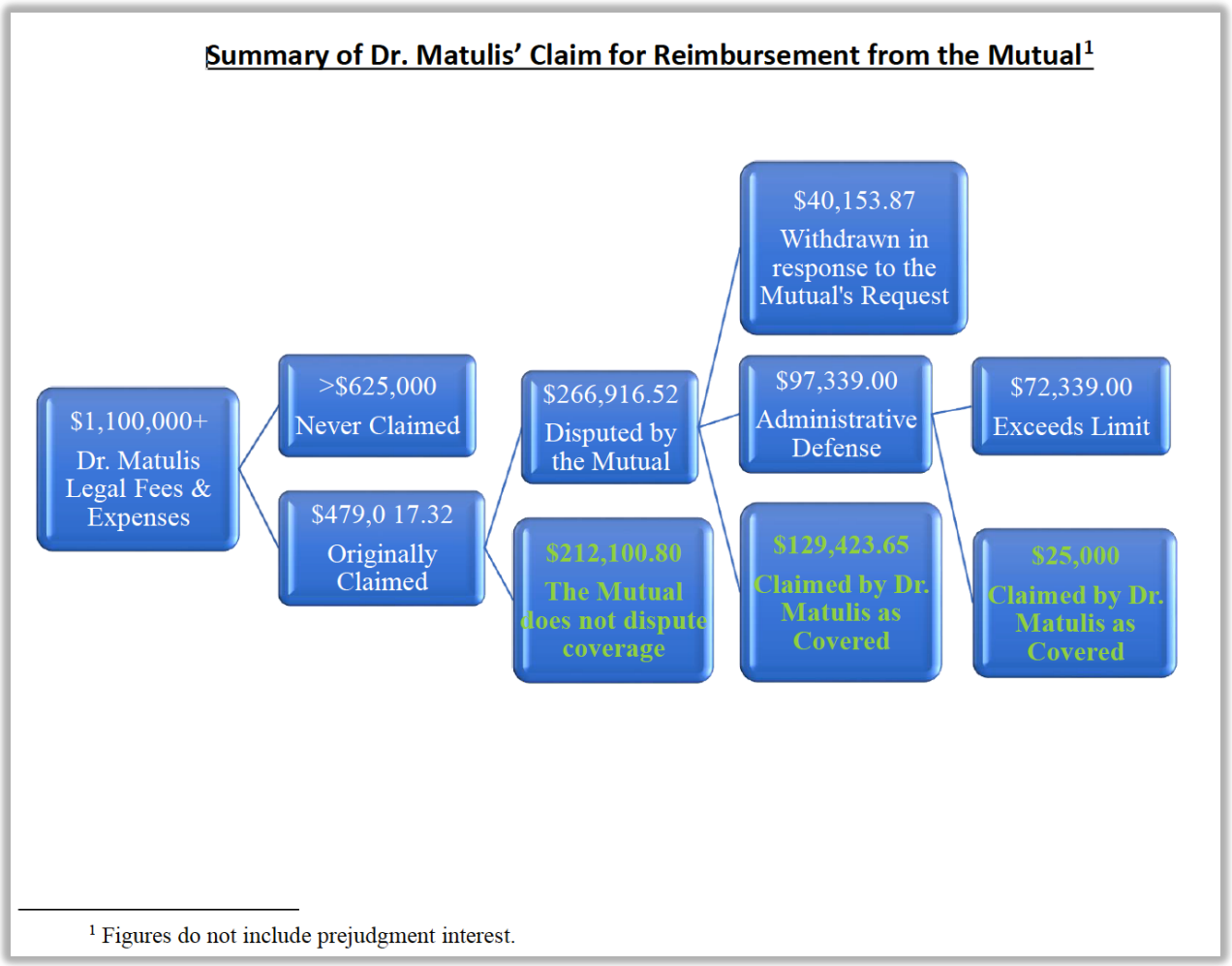
Because Dr. Matulis would be entitled to recover fees incurred in defending himself, and because the parties disagreed as to which fees would be covered under the applicable insurance policy, the parties then submitted cross-motions seeking summary judgment as to which legal fees Dr. Matulis could recover under the

Policy. *See* App. 1955–2062 (the Mutual's Motion); *id*. at 2129–2142 (Dr. Matulis' Cross-Motion).

Over the course of several hearings, it became apparent that where Dr. Matulis actually spent money out-of-pocket to defend himself in the underlying tort actions, the Court would be required as a matter of law to decide which fees were covered by the Policy. At the highest level, Dr. Matulis' out-of-pocket legal fees and expenses were divided into several categories: (1) those incurred for reasons not covered under the policy such as criminal defense, seeking insurance coverage[1], or other miscellaneous reasons; (2) those incurred defending licensing proceedings, which (if recoverable at all) would be subject to a separate $25,000 sublimit; and (3) those incurred in defense of the underlying civil claims, which are recoverable either under the policy, as *Hayseeds* damages, or both.

As reflected in the Circuit Court's multiple orders, this process was laborious. It required the parties and the Court to arduously review and code thousands of line items in order to identify those categories and then to determine which items were in agreement and which were contested. The best high-level visual summary of the process is reflected in the following chart:

[1] Fees incurred defending the declaratory judgment action were not recoverable under the insurance policy. Rather, they were addressed post-trial under *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986).



App. 2142.

Importantly, throughout this process, the Mutual never disputed that the work was actually performed, or that the fees were charged and paid, or that the contemporaneous time entries accurately reflected the legal work performed on Dr. Matulis' behalf. Rather, the Mutual acknowledged that the only "issue before the Court [was] whether the fees [were] covered under the Policy, not whether they were incurred." App. 0025; *see also* App. 1793 (Counsel for the Mutual explaining that "[t[here is no question that under the law the Court, not the jury, determines the amount of attorney's fees.").

Because the sole issue was coverage, the Circuit Court engaged in a lengthy process of identifying the various categories of fees and narrowing the issues to those that were in dispute. This culminated in a filing, requested by the Circuit Court, which was limited to the $129,423.65 in fees and expenses that remained in dispute as of February 6, 2023 and which set forth the parties' coverage positions with respect to each and every line item. App. 2160-81. Every one of the Mutual's specific objections were discussed by the parties and addressed by the court. App. 2182–2240. In the Circuit Court, as it does here, the Mutual repeatedly argued that Dr. Matulis was seeking to recover fees which had in fact already been withdrawn from the claim. *See* App. 2197-2208. And at the end of that process, after going line by line through the fees that were requested, disputed, and withdrawn, the Circuit Court determined that of the more than $1,100,000 in fees incurred by Dr. Matulis, he was entitled to recover (1) $212,100.80 that was uncontested by the Mutual, plus (2) $129,423.65 that had been the subject of a dispute, plus (3) $25,000 for Administrative Defense fees.[2]

Having resolved the purely legal matters at issue, the court conducted a jury trial for the purpose of determining Dr. Matulis's net economic loss, and aggravation and inconvenience. *See* App. 3008. The presentation of evidence and argument was completed in one day. In terms of net economic loss, Dr. Matulis presented evidence that because of the Mutual's refusal to defend him in the

[2] Although the evidence demonstrated that Dr. Matulis had actually incurred $97,339.00 in Administrative Defense fees, the Circuit Court reduced that amount pursuant to the $25,000 Administrative Defense contained in the Policy.

underlying civil cases, he was required to sell a piece of land on Lake Wylie. App. 2433–34. Dr. Matulis testified that he sold the property for $350,000. He also presented expert testimony from an appraiser who opined that the value of the house as of the trial date was $700,000. The jury partially credited the appraisal evidence and awarded Dr. Matulis $200,00 in net economic loss. App. 3008.

With respect to aggravation and inconvenience, Dr. Matulis put on very little evidence. The sum total of the aggravation and inconvenience evidence was that Dr. Matulis paid his premiums every year and that the Mutual did not defend him when it should have. Dr. Matulis did not assert that the Mutual caused him emotional distress, made him lose sleep, or forced him to seek treatment for anxiety. He offered no evidence that the Mutual's conduct in any way caused or contributed to any other stressors in his life. App. 2434-38.

The limited nature of this evidence was to comply with pretrial rulings made regarding Dr. Matulis' criminal conviction and other alleged sexual misconduct. Before trial, the Circuit Court had determined that if Dr. Matulis attempted to present a broad case for aggravation and inconvenience, then he would be opening the door to allow the Mutual to offer evidence concerning other causes of anxiety, stress, or similar damages. Namely, evidence that there was a pending criminal investigation at the time of the Mutual's denial of coverage. *See* App. 00014; App. 1805-06. The jury awarded Dr. Matulis $150,000 in damages for aggravation and inconvenience. App. 3008.

IV. Post-Trial Proceedings

After the conclusion of trial, Dr. Matulis filed a motion for attorney's fees pursuant to *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191, 342 S.E.2d 156, 157 (1986). App. 3009-116. The court conducted a *Pitrolo* hearing, considered all of the appropriate factors, and awarded Dr. Matulis fees and expenses of $523,138.19. App. 00042-54. This result was based in large part on the fact that the work performed by Dr. Matulis' counsel obtained total relief of nearly $4,000,000, which consisted largely of securing settlements to the alleged victims in excess of $3,000,000. App. 0048. Finally, the court then accepted the parties' stipulation to dismiss the previously bifurcated *Jenkins* claims, subject to reinstatement if the Court's judgment were to be vacated or reversed. App. 0053.

SUMMARY OF ARGUMENT

The court below correctly determined that Dr. Matulis was entitled to a defense in the underlying civil actions. Although the plaintiffs in those cases alleged sexual misconduct, *they also alleged well-established and plausible tort claims that were not dependent in any way on proving any kind of sexual misconduct*. The tort claims were not a mere attempt to trigger coverage but were directly premised upon Dr. Matulis' medical rationale for performing digital vaginal examinations that were supported by multiple medical experts. Under these circumstances, the lower court correctly determined that, at a minimum, Dr. Matulis was entitled to a defense under longstanding precedent of the Supreme Court of Appeals.

The Circuit Court was also the proper entity to decide which out-of-pocket attorney's fees would be covered under the policy. Where the parties agreed that the

sole issue was coverage—a legal determination—it would have been manifest error to require *the jury* to review *thousands* of line items and check a box deciding whether *each* was "covered" or "not covered."

The lower court's substantive coverage decisions were also correct. Even now, the Mutual does not point to any single, specific line item which it would have this Court reverse. Instead, the Mutual continues (as it did below) to make false statements about what the Circuit Court in fact decided, and to malign Dr. Matulis personally in an attempt to undermine the judgment below.

At trial, the Circuit Court's evidentiary rulings were proper and were well-within the Court's broad discretion. Dr. Matulis' direct examination did not open the door to evidence of his criminal conviction or other allegations of sexual misconduct. There was no error in the handling of prejudgment interest, which (like any other claim) can be determined as a matter of law when no factual matter is disputed. And Dr. Matulis' claim for economic loss was amply supported by the evidence at trial to support the jury's decision. And post-trial, the Circuit Court complied both substantively and procedurally with the *Pitrolo* process for awarding attorney's fees in an insurance coverage dispute. Because the Mutual has not identified a single ground to reverse the years of hard-fought litigation below, the judgment of the Circuit Court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Because the Mutual's appeal—despite its kitchen-sink approach to the assignments of error—raises facts and legal arguments adequately presented by the briefs and the record, oral argument is unnecessary. But if this Court concludes

that oral argument may be helpful, Rule 19 argument would be appropriate because this case involves assignments of error in the application of settled law, and where the lower court is entitled to exercise its discretion, and because the Mutual argues that the evidence was not sufficient to support the jury's decision.

ARGUMENT

I. The Circuit Court properly concluded that Dr. Matulis was entitled to a defense in the underlying civil actions.

To begin with, the Mutual does not dispute that it issued the subject policy, or that Dr. Matulis was a named insured, or that all premiums were timely paid. The Mutual is not challenging its obligation to *indemnify* Dr. Matulis with respect to the underlying tort actions: it has already settled those actions and is not seeking to unwind or undermine those settlements. Rather, with respect to insurance coverage, the principal issue in this appeal is whether the Mutual was required to provide Dr. Matulis with a *defense* to the underlying tort actions. The answer is unambiguously yes.

This conclusion is compelled by the straightforward application of settled insurance law that is well-known to this Court regarding the duty to defend. "An insurance company's duty to defend an insured is broader than the duty to indemnify under a liability insurance policy." *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 651, 609 S.E.2d 895, 912 (2004). If "the allegations in the complaint . . . are reasonably susceptible of an interpretation that the claim may be covered," then the insurer must provide a defense. *Id.* "Any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured

where there is any question about an insurer's obligations." Syl. Pt. 5, *Tackett v. American Motorists Ins. Co.*, 213 W.Va. 524, 584 S.E.2d 158 (2003).

If any part of the claims against an insured fall within the scope of coverage, "the insurer must defend all of the claims, although it might eventually be required to pay only some of the claims." *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988). The insurer's duty to defend is tested by "whether the allegations in the complaint against the insured are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.* In other words, "there is no requirement that the facts alleged in the complaint against the insured specifically and unequivocally delineate a claim which, if proved, would be within the insurance coverage. *Id.* And finally, "[i]n determining whether under a liability insurance policy an occurrence was or was not an 'accident'—or was or was not deliberate, intentional, expected, desired, or foreseen—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue." Syl., *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 250, 617 S.E.2d 797, 797 (2005).

Repeating arguments it pressed below, the Mutual forcefully argues that the decision in *Leeber* absolves it of *any* duty to defend. On that score, the Mutual fails to recognize the important limitations of the *Leeber* case. Seeking to avoid an intentional acts exclusion, the plaintiffs in *Leeber* had alleged "vaguely identified negligent conduct, a sort of 'negligent' seduction . . . so as to cause emotional harm."

Leeber, 180 W. Va. at 381, 376 S.E.2d at 587. Under the facts of that case, the Supreme Court of Appeals properly recognized those allegations as "a transparent attempt to trigger insurance coverage by characterizing allegations of intentional tortious conduct under the guise of 'negligent' activity." *Id.* Because the complaint in *Leeber* was "not reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy," the court correctly concluded that there was no coverage. *Id.*

This case is a far cry from *Leeber*. The insured in *Leeber* was an adult public school teacher accused of having sexual contact with a minor student. Based on those allegations, any "negligence" theory was so implausible on its face that was swiftly discarded. By contrast, the patients who filed claims against Dr. Matulis alleged that he performed examinations without obtaining their informed consent, failed to adequately document his examinations in their medical records, and performed examinations in breach of the applicable standard of care. *See* App. 863–71; 978–81. Each of these theories constitute recognized tort claims that, if proven, would have fallen squarely within the scope of coverage.

What's more, Dr. Matulis has consistently acknowledged performing DVEs on patients where the procedure was medically indicated. During the proceedings below, Dr. Matulis provided documentation indicating that he disclosed to the Mutual, no later than March of 2017, his practice of performing DVEs when the exam was medically indicated. Dr. Matulis enclosed the opinions of two separate physicians who agreed that a limited DVE is both appropriate and sometimes

required by the standard of care. Dr. Matulis presented this defense—a textbook defense to medical malpractice accusations—at his criminal trial and *was acquitted of every charge that arose from the performance of DVE*. The defense was bolstered by medical expert testimony, including by the expert retained by the West Virginia Board of Medicine.

The Mutual contended below that this information should have no bearing on its coverage inquiry. In doing so, the Mutual has brazenly rejected its obligation—and, critically, "the law of the case" as already established by the Supreme Court of Appeals[3]—to "'look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide.'" *State ex rel. W. Virginia Mut. Ins. Co. v. Bailey*, No. 20-0257, 2020 WL 6581850, at *5 (W. Va. Nov. 10, 2020) (quoting Syl., *Farmers & Mechanics Mut. Fire Ins. Co. of W. Va. v. Hutzler*, 191 W. Va. 559, 447 S.E.2d 22 (1994)). Indeed, the Supreme Court of Appeals has already criticized the Mutual—in an ill-conceived writ proceeding filed by the Mutual (and rejected) in this very case—for "limiting its coverage determination to the four corners of the complaint and failing to assess the avenues for recover in view of the factual allegations, which avenues may give rise to coverage." *Id.* (cleaned up).

The Mutual cites several additional cases for the premise that it has no duty to defend in a case where the pleadings allege sexual misconduct. Like *Leeber*, these

[3] Syl. Pt 3, *In re Name Change of Jenna A.J.*, 234 W. Va. 271, 765 S.E.2d 160, 161 (2014).

cases involved an obviously sham attempt to trigger coverage. They did not involve cases in which the underlying plaintiffs had alleged recognized tort claims, independent of any allegation of sexual misconduct that, if proven, would clearly give rise to liability which is covered under the Mutual's policy. That is the critical error in the Mutual's argument.

The Mutual goes on to discuss "T.W., the patient Matulis was criminally convicted of assaulting." Pet'r. Br. at 18. In fact, after presenting a medicine-based defense, Dr. Matulis was *acquitted* of the charge that he sexually assaulted T.W. The Mutual's marked dislike of its insured here has so colored its view of the case that it still persists—nearly six years later—in making patently false representations to the Court about even the procedural history of Dr. Matulis's criminal proceedings. As is apparent throughout its appellate brief, the Mutual hopes that this Court will be persuaded by the prejudicial (and even false) portrayal of irrelevant facts rather than longstanding insurance law.

Dr. Matulis' acquittal of the T.W. assault charge—and the Mutual's relentless disregard of the truth—tellingly illustrates the real issue driving this litigation. The Mutual decided years ago, before he was ever charged with any crime, that Dr. Matulis was a Bad Man accused of Bad Things—and so, therefore, it could safely abandon its coverage obligations. The Mutual decided that it would disregard the medical facts, because it was certain that he would be convicted of assaulting his patients and would go away quietly. He was not—and has not.

When Dr. Matulis was acquitted of every single count involving DVE, based on the defense theory of which the Mutual had been on notice for years (including receiving supporting medical opinions), the Mutual found itself in a difficult situation. For years, the Mutual had ignored the actual substance of the allegations leveled against Dr. Matulis. For years, the Mutual had disregarded the medical rationale for performing a DVE where it was justified by the circumstances.

The Mutual's penchant for falsehoods, and its loathing of Dr. Matulis, continues unabated in its discussion of *Westfield v. Matulis*, 421 F. Supp. 3d 331 (S.D.W. Va. 2019). The Mutual characterizes *Westfield* as "another attempt by Dr. Matulis to obtain insurance coverage under a Commercial General Liability policy for the very same sexual abuse claims at hand." Pet's Br. at 20. In truth, because *Westfield* involved a *CGL policy* that was clearly inapplicable, "neither Dr. Matulis nor Charleston Gastroenterology . . . appeared in th[at] action to oppose Westfield's position." *Westfield*, 421 F. Supp. 3d at 338. Because none of the insureds appears or opposed Westfield's position, Judge Copenhaver entered default judgments against them in the *Westfield* case. *Id.*

Dr. Matulis did not appear in or contest the *Westfield* action precisely because it involved a CGL policy that clearly excluded the underlying tort actions. Like any good CGL policy, the Westfield policy contained a robust "Professional Services" exclusion. Westfield's Professional Services exclusion "even extend[ed] to claims of negligence." *Id.* at 346. Quoting the Supreme Court of Appeals, Judge Copenhaver explained that "language that excludes coverage for 'professional

liability' is specifically designed to shift the risk of liability in connection with the performance of professional services . . ." *Id*. And why would a CGL carrier to shift the risk for claims arising from the performance of professional services? Because "[p]rofessionals wishing to insure themselves against the risk of liability in connection with the rendering of their professional services may opt to purchase separate insurance coverage, known as an errors and omissions policy." *Id.* (cleaned up). To the extent that Judge Copenhaver discussed *Leeber* and its related cases, that analysis was not necessary to the Court's holding that "the triggering incidents that caused harm to the claimants occurred during medical procedures," and that "[t]hose procedures are professional services" which are "excluded from coverage under [Professional Services Exclusion of] the Policy." *Id.* at 350.

At various points in its brief—and for the first time on appeal—the Mutual argues that Dr. Matulis attempted to manipulate the complaints in the underlying cases so as to trigger coverage.[4] Here again, the Mutual is so eager to cast aspersions that it overlooks the actual facts. The first civil action filed was *T.W. v. Matulis*, No. 16-C-749. Early on in that first-filed case Dr. Matulis not only admitted performing DVEs, he explained *why* he performed a DVE in T.W.'s case. App. 1671 ("During the course of the colonoscopy procedure, Dr. Matulis was concerned about the possibility of a submucosal mass and/or retroverted cervix.

[4] In the case below, the Mutual never advanced the argument that Dr. Matulis attempted to manipulate the pleadings to trigger coverage. That argument is therefore waived. *See Zaleski v. West Virginia Mut. Ins. Co.*, 224 W.Va. 544, 550, 687 S.E.2d 123, 129 (2009) ("Because this argument is now being raised for the first time on appeal, we must necessarily find that the argument . . . has been waived.").

Therefore, as part of the evaluation, he performed a limited digital vaginal examination to assess the potential presence of a submucosal mass."). Rather than a vast conspiracy, the plaintiffs in the underlying civil claims adapted their theories of recovery when they learned that there was a medical justification for Dr. Matulis' practice of performing a DVE when appropriate.

Finally, neither the sexual acts nor the criminal acts exclusions preclude coverage. In its discussion of these policy provisions, the Mutual relies primarily on a multipage string cite.[5] On a close review, most of these cases actually support Dr. Matulis' position that where there is a plausible allegation of a negligence based tort, a medical professional liability insurer is at least required to provide its insured with a defense. *See, e.g., Nat'l Fire Ins. Co. of Hartford v. Radiology Assocs., L.L.P.,* 439 F. App'x 293, 296 (5th Cir. 2011) (the complaint "makes no allegation that Riely may have negligently believed his actions were authorized"); *Physicians Nat. Risk Retention Grp., Inc. v. Price*, 968 F.2d 1224 (10th Cir. 1992) ("there were no allegations in the complaint . . . which, assuming they were proved at trial, would give rise to coverage for professional services"); *Govar v. Chicago Ins. Co.*, 879 F.2d 1581, 1582 (8th Cir. 1989) (insurer *was* required to defend, but not to indemnify); *Aldrich v. Nat'l Chiropractic Mut. Ins. Co.*, 1997 WL 662509, at *5

[5] The Mutual also maliciously repeats the false claim that Dr. Matulis was "criminally convicted for the sexual assault of T.W." Pet'rs Br. at 23. Again, this is demonstrably false. Dr. Matulis was *acquitted* of the charge that he assaulted T.W. by performing a DVE. He was convicted of the far lesser offense of abuse, which was completely unrelated to his performance of a DVE during her colonoscopy. The Mutual's persistent misrepresentation on this score shows, once again, that it is hoping this Court will be so colored by the (false) record, that it ignores the law. It should not.

(W.D.N.Y. Oct. 14, 1997) (addressing indemnity and not defense); *Greenberg v. Nat'l Chiropratic Mut. Ins. Co.*, 1996 WL 374145, at *3 (S.D.N.Y. July 3, 1996) ("the only reasonable conclusion to be drawn from the facts alleged . . . is that [Plaintiff] is seeking to recover from injuries cause by assault, battery, and sexual assault . . . . There are no other facts alleged . . . to support a claim for negligence."). Even *New Mexico Physicians Mut. Liab. Co. v. LaMure*, 860 P.2d 734, 740 (N.M. 1993), which broadly enforced a criminal acts exclusion, was limited to the question of indemnification.

To be clear, Dr. Matulis does not claim—and has never claimed—that the Mutual was or should be required to indemnify him for any conduct that constitutes a criminal act. The Court must look past the Mutual's recurrent red herrings.

In arguing that the underlying civil actions did not arise from any medical incident or from the provision of medical services, the Mutual asserts 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." Pet'r Br. at 25 (citing *Physicians Ins. Co. v. Pistone*, 555 Pa. 616, 726 A.2d 339 (Pa. 1999)). That was of course true in *Pistone*, a case in which the insured physician exposed himself, fondled a patient, and masturbated during an examination. *See id.* But it is emphatically not true in this case. Here, Dr. Matulis has repeatedly and emphatically described the medical circumstances in which a limited vaginal examination may not only be appropriate but could be *required* by the applicable standard of medical care.

Affirming the Mutual's duty to defend is entirely consistent with caselaw from the Supreme Court of Appeals and, despite the Mutual's insistence, would not be a departure from the norm. It would *not* require a ruling that the Mutual or any other insurer must indemnify insureds who are found by a jury to have engaged in intentional sexual misconduct. Nor would it require a ruling that any insurer must *defend* a case involving sexual misconduct that merely dress-up intentional torts under the guise of negligence. In short: this case is bound by its particular facts and circumstances. Affirming the Mutual's duty to defend therefore requires nothing more than the application of well-settled and binding precedent, which inexorably leads to the conclusion that where a claim plausibly alleges established tort theories, independent of any alleged intentional sexual misconduct, an insurer like the Mutual must provide its insured with a defense, even if it may ultimately not be required to provide indemnity.

II. The Circuit Court—and not the jury—was the proper party to decide whether Dr. Matulis's legal fees were covered by the Mutual's insurance policy.

In the proceedings below, the Court and the parties engaged in multiple rounds of briefing and argument to identify the attorney's fees for which coverage was contested. App. 2142. The chart at Appendix 2142 reflects the distillation of thousands of line entries from legal invoices reviewed by both parties and the Court. Of more than $1,100,000 in total fees, Dr. Matulis immediately and unliterally identified $625,000 which were not eligible for reimbursement. He made a claim for reimbursement of $479,017.32, of which the Mutual agreed that $212,100.80 would

be subject to reimbursement. The Mutual then provided its reasons for contesting coverage, prompting Dr. Matulis to voluntarily withdraw $40,153.87. That left only $129,423.65 for which coverage was in dispute, plus $97,339.00 in Administrative Defense fees[6] which, if covered, would be capped by the $25,000 sublimit applicable to the administrative proceeding.

Crucially, the Mutual did not dispute that Dr. Matulis actually incurred any of the disputed fees. Rather, the Mutual conceded that the only "issue before the Court [was] whether the fees [were] covered under the Policy, not whether they were incurred." App. 0025. In light of the Mutual's concession, the Court conducted a detailed review of the contested items and made a coverage determination. That approach was unquestionably correct. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 704, 568 S.E.2d 10, 11 (2002) ("Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.").

The Mutual's contrary argument—that a legal coverage determination should be made by a jury—defies not only precedent but also common sense. The Mutual's approach was to "have a witness who will explain . . . [h]ere is the policy . . . [h]ere is why these claims are not covered under the policy. Here is why they are dealt with through a broad form endorsement. Here is why the broad form endorsement or the administrative endorsement doesn't cover these claims." App. 1914. Had the court adopted the Mutual's approach, it would have resulted in a clearly reversible error. Syl. Pt. 8, *Berkeley Cnty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va.

[6] Administrative Defense fees are those which related to the defense of a disciplinary proceeding initiated by the West Virginia Board of Medicine.

252, 253, 162 S.E.2d 189, 192 (1968) ("It is error to allow witnesses to give their interpretation or construction of a contract as this is a matter of law for the court to decide."). If a jury were required to determine which legal fees were covered under the policy, they would have been required to proceed line-by-line through hundreds of pages of invoices and, for each line, to check a box deciding that each line item was either "Covered" or "Not Covered." That absurd procedure is contrary to *Smallwood* and *Berkeley County*—and to common sense. This Court can swiftly reject the Mutual's arguments on this score.

III. The Circuit Court correctly identified which fees were covered under the Policy.

Based upon the Court's coverage ruling, the Mutual admitted that Dr. Matulis was entitled to be reimbursed for $212,100.80 in legal fees incurred by him in defending the underlying cases in which the Mutual had improperly refused to provide him with a defense. It disputed, however, that Dr. Matulis was entitled to reimbursement for fees incurred defending himself in Board of Medicine proceedings, and it contested $129,423.65 in fees which—it asserted—were completely unrelated to the defense of the underlying civil claims. The Circuit Court carefully considered and properly rejected both arguments.

A. The Circuit Court correctly determined that the Mutual had timely, actual notice of the administrative proceedings and that, regardless, the Mutual failed to present any evidence of prejudice.

In its opening brief, the Mutual concedes that two separate Board of Medicine actions were initiated against Dr. Matulis *before* the date on which the Mutual

terminated coverage under the policy. More precisely, Board of Medicine action No. 16-46-W was premised upon an April 13, 2016 Complaint, and No. 16-54-W was initiated "sometime between March 23, 2016 and May 16, 2016." Pet'r Br. at 29. In other words, *both* Board of Medicine complaints were initiated before the date on which the Mutual terminated Dr. Matulis' coverage. In terms of policy language, the Mutual also concedes that Administrative Defense coverage is extended to a "claim or investigation . . . alleging sexual misconduct or harassment by You in the course of providing professional services to such patient." App. 3283.

Here, the Mutual argues that "Dr. Matulis' counsel" failed to notify it of the administrative proceedings within thirty days. Pet's Br. at 29. Crucially, the Mutual does not challenge the Circuit Court's holding that "[b]ased on the evidence in the record, it appears that Dr. Matulis reasonably believed that the Mutual had actual notice of the pending administrative proceeding." App. 00020. Based upon that *unchallenged* factual finding, controlling precedent prohibits the Mutual from denying coverage based on a notice requirement where it in fact received timely, actual notice:

> A provision in an insurance contract requiring a policyholder to give the insurance company notice of a claim may be satisfied when notice of a potential claim is provided to a claims representative for the insurance company *regardless of whether it was the policyholder who provided the notice*.

Syl. Pt. 1, *Colonial Ins. Co. v. Barrett*, 208 W. Va. 706, 707, 542 S.E.2d 869, 870 (2000) (emphasis added).

The Mutual similarly does not challenge the Circuit Court's finding that "even if Dr. 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." App. 00020. See Syl. Pt. 2, *Colonial Ins.*, 208 W. Va. 706, 542 S.E.2d 869 ("If the delay appears reasonable in light of the insureds explanation, the burden shifts to the insurance company to show that the delay in notification prejudiced their investigation and defense of the claim."). Simply put, the Mutual has not challenged the essential portion of the Circuit Court's holding, which was predicated on well-settled law requiring an insurer to demonstrate actual prejudice in order to deny coverage based on an alleged untimely notification of a claim. That is reason enough to reject this additional claim of error.

B. The Circuit Court correctly concluded that the $129,423.65 in disputed fees were covered under the policy.

In challenging "other miscellaneous fees," the Mutual launches a smattering of citations at this Court without any explanation as to which specific line items ought not be covered, or why. Most troubling is that the Mutual is either raising new issues which it failed to assert below, or misstating what transpired in the Circuit Court. On February 6, 2023, the Circuit Court conducted a hearing regarding the issue of attorney's fees. At that hearing, the Mutual made an argument virtually identical to that which appears on pages 30 through 33 of its opening brief in this Court regarding miscellaneous fees. App. 2182-2240. The problem, however—both then and now—is that the Mutual was arguing against coverage for fees that Dr. Matulis had *already withdrawn*. *Id.* at 2198.

At the request of the Circuit Court, Dr. Matulis prepared and filed an additional, supplemental filing which detailed—to the penny—the $129,423.65 in

fees and expenses which for which coverage remained in dispute. App. 2160–81. After reviewing that submission, which reflected the considerable effort undertaken by Dr. Matulis and by the Mutual to identify and exclude enormous categories of legal work, the Circuit Court observed that

> the disputed entries reflect analysis of the CAMC investigative file, preparation for fact witness interviews, retention of expert witnesses, developing defense themes through the use of focus groups, and other work which would undoubtedly have benefitted Dr. Matulis in defending the underlying civil actions, even if that work also benefitted him with respect to his licensing and criminal proceedings. *The Court also notes that the Mutual had the ability to prevent this overlap.* While prosecuting this declaratory judgment action, the Mutual provided Dr. Matulis with a defense — subject to a reservation of rights — in some but not all of the underlying civil cases. Had the Mutual extended that defense to the remainder of the cases, there would be no dispute about whether historical fees were incurred for the benefit of the underlying civil actions or for some other purpose not covered by the applicable policy. Having declined to provide Dr. Matulis with a defense, the Mutual cannot now impose, unilaterally, its own billing standards retroactively on the counsel retained by Dr. Matulis.

App. 00027 (emphasis added).

In its opening brief, the Mutual does not identify a single, specific line item for which the Circuit Court's analysis was incorrect. Nor can the Mutual seriously challenge the conclusion that the Mutual is really only claiming that if it had retained lawyers to defend Dr. Matulis, those lawyers would have been subject to the Mutual's billing guidelines and standards. *But the Mutual refused to defend Dr. Matulis, and so he was forced to defend himself.* And where it had the opportunity to supply a defense, the Mutual cannot fault Dr. Matulis or his lawyers for the manner in which they chose to prepare his defense. The Circuit Court's judgment was

correct, and the Mutual has not presented any legal basis upon which that judgment should be disturbed.

IV. The Circuit Court properly awarded fees pursuant to *Hayseeds*.

Because Dr. Matulis substantially prevailed, he filed a post-trial motion to recover the attorney's fees that he incurred for vindicating his claim to collect benefits due to him under the Mutual's policy. *See Moses Enterprises, LLC v. Lexington Ins. Co.*, 66 F.4th 523, 527 (4th Cir. 2023). After the trial in this matter, there was "no dispute [Dr. Matulis] may recover some amount of attorney's fees." *Id.* As in *Moses*, the only question was "[h]ow much and for what?" *Id.*

Here, Mutual contends that, like in *Moses*, the Circuit Court failed to distinguish fees that were incurred for the sole purpose of pursuing a UTPA or common law bad faith claim. *See Lemasters v. Nationwide Mut. Ins. Co.*, 232 W. Va. 215, 751 S.E.2d 735, 742–43 (2013) (insured may not recover fees incurred in prosecution of a bad faith claim).

Astonishingly, however, the Mutual's argument fails to account for two crucial facts. First, *at the Mutual's suggestion*, the Circuit Court bifurcated the UTPA and common law bad faith claims from the contract claims, for the purpose of avoiding any confusion as to fee-shifting. App. 2127. And second, Dr. Matulis separately tracked and separately submitted all time entries associated with the *Hayseeds* award. *See* App. 3009–3095. In its opening brief, the Mutual does not appear to be challenging even a single line item that was submitted in connection with Dr. Matulis' *Hayseeds* motion.

As a fallback, the Mutual asserts that Dr. Matulis' motion for attorney fees was "ambiguous" and that Matulis "failed to satisfy his burden to show that the requested fees were necessary." Pet's. Br. at 33. Swiftly rejecting this argument, the court properly explained:

> Based upon a review of the submissions and the Court's familiarity with this lengthy case, it is apparent that the lawyers representing Dr. Matulis diligently pursued insurance coverage for Dr. Matulis for many years and that they did so under a contingent fee agreement pursuant to which no payment would be received if the effort was unsuccessful. The work of each attorney appears to have been reasonably necessary. The Court gives significant credit to the affidavit submitted by attorney Isaac Forman – the primary attorney on this case – which credibly explains that the hours expended in this complicated case were reasonable and were necessary in order to secure relief for Dr. Matulis.

App. 00044–45.

Nothing contained in the Mutual's opening brief in any way undermines the Circuit Court's well-reasoned judgment on this issue, or its application of the *Pitrolo* factors to arrive at a base fee and an appropriate adjustment. The Circuit Court's judgment with respect to attorneys' fees should be affirmed.

V. The Circuit Court's evidentiary rulings were correct.

The Mutual also contests various evidentiary rulings by the Circuit Court, none of which have merit upon appellate review. The Mutual falls far short of making the case that any of the challenged decisions constituted an abuse of discretion. *See* Syl. Pt. 5, *Smith v. Clark*, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019) ("The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure 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. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.") (cleaned up).

A. The Circuit Court did not abuse its discretion by excluding evidence concerning sexual misconduct.

Once the Court determined that the Mutual had breached its policy by failing to provide Dr. Matulis with a defense, only damages remained to be tried. Those damages were limited to actual economic damages and aggravation and inconvenience. Based upon the limited nature of the issues to be tried, Dr. Matulis moved to exclude evidence of actual or alleged sexual misconduct on the grounds that such evidence was irrelevant to his contract damages and that, even if relevant, its probative value was substantially outweighed by the risk of unfair prejudice, confusion of the issues, and misleading the jury.

Indeed, the only (obvious) purpose for presenting sexual misconduct evidence with respect to his contract and *Hayseeds* claims would be to convince the jury that Dr. Matulis was convicted of a crime and so, therefore, he should not be awarded his actual contract damages, or to confuse the jury and mislead them about the nature of the issues to be tried in the contract and *Hayseeds* trial. In other words, Dr. Matulis sought to exclude evidence concerning prior sexual misconduct under Rules 403 and 404 of the West Virginia Rules of Evidence. The Mutual argued that sexual misconduct was admissible for a variety of purposes, such as disproving actual

malice with respect to punitive damages, disproving annoyance and inconvenience, and mitigating emotional distress damages.

But Dr. Matulis did not seek punitive damages, and the trial in this matter was limited solely to actual contract damages and damages for annoyance and inconvenience. With respect to annoyance and inconvenience, Dr. Matulis' evidence was limited. No aspect of his testimony ever even suggested that the Mutual's coverage decision—which occurred years before he was ever charged with any crime—caused or contributed to his criminal proceedings or licensing matters. Prior to trial, Dr. Matulis readily acknowledged that if he presented such evidence, then he may be opening the door at trial to other potential causes of annoyance and inconvenience, including potentially the subsequent criminal proceedings.

In that posture, the Circuit Court granted Dr. Matulis's motion, but properly left open the possibility that such evidence could be admitted in the event that Dr. Matulis opened the door by way of his own testimony or other evidence. App. 00014-16. At trial, the sole evidence concerning aggravation and inconvenience came in the form of five questions, which occupies barely one full page of trial transcript. *See* App. 2434, line 14 – 2435, line 16. Because of the court's pretrial ruling, the evidence regarding aggravation and inconvenience was incredibly limited and specifically designed to avoid opening the door to evidence of sexual misconduct. Indeed, counsel for the Mutual immediately objected and the parties engaged in a lengthy bench conference on the subject. App. 2435–2439. The evidence was

presented consistent with the court's pretrial ruling, which was correct on its own terms, and certainly fell within the Circuit Court's ample discretion.

B. The Circuit Court did not abuse its discretion by preventing the Mutual from cross-examining Dr. Matulis about issues beyond the scope of his direct examination.

In its zeal to disparage Dr. Matulis before the jury, the Mutual sought to cross-examine him about his criminal proceedings, indictment, conviction, surrender of his medical license, and the substance of the underlying civil actions.

The problem with these lines of inquiry? Dr. Matulis never raised those issues in his direct, and they had no bearing whatsoever on his credibility. *See State v. Richey*, 171 W. Va. 342, 345, 298 S.E.2d 879, 882 (1982) ("[T]he scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination[.]"). By limiting cross-examination to the scope of Dr. Matulis' direct testimony, the Circuit Court properly applied the rules of evidence and appropriately managed the trial of this case well within its broad discretion. It was hardly an abuse of discretion, and the Mutual's overreaching only confirms their kitchen-sink approach to this appeal.

C. The Circuit Court did not abuse its discretion by permitting appropriate cross-examination of Ms. Huffman.

In its defense case, the Mutual offered the testimony of Tamara Huffman. App. 2480-87. Huffman testified as to the history and origins of the West Virginia Mutual Insurance Company. *Id.* She testified about the historical crisis in medical malpractice premiums and that the "big insurance companies" pulled out of West Virginia. *Id.* at 2482. Huffman explained that Governor Bob Wise called a special

session of the legislature in 2001 to address the crisis to ensure the viability of "small, rural hospitals in the state." *Id.* Huffman went on to explain the nature of Mutual insurance companies, that is, companies owned by small groups of local physicians. *Id.* at 2483. Huffman explained that a Mutual is "not a big corporation" and explained her personal participation in the legislative process. *Id.* In order to emphasize the point, the Mutual's counsel clarified that they were talking about "a West Virginia company started by West Virginia doctors to keep West Virginia doctors in West Virginia." *Id.* at 2484. Huffman explained how essential the Mutual was in that task, and that an insurance company with that structure was essential to retain physicians and that the insurance crisis "was a threat to the healthcare delivery system in West Virginia and our citizenry." *Id.*

This testimony had nothing whatsoever to do with any claim at issue in the case. Rather, it was plainly and strategically crafted by the Mutual so as to leave the jury with the false impression that the Mutual is a small, locally owned insurance business without which medical care in our state would be in peril. *In fact, the Mutual is owned by MagMutual, which is headquartered in Atlanta and is the largest mutual insurance company in the United States.* App. 2487–2494. Cross-examination on that subject, which the Mutual now claims was error, plainly fell well-within the scope of Huffman's direct examination and was perfectly appropriate. Indeed, zealous advocacy required nothing less. Once again, the Mutual's dubious arguments otherwise should be rejected.

VI. Dr. Matulis' economic loss claim was supported by sufficient evidence.

The Mutual also launches a challenge to the sufficiency of the evidence to support the jury's decision as to Dr. Matulis's economic loss, but this argument too falls well-short of the mark. *See* Syl. Pt. 1, *Smith v. Clark*, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019) ("In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.") (cleaned up); *see also* Syl. P. 9, *Neely v. Belk Inc.*, 222 W. Va. 560, 668 S.E.2d 189 (2008) ("When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the evidence or without sufficient evidence to support it.").

Below, the jury heard Dr. Matulis testify that he was forced to sell a piece of land on Lake Wylie to fund his defense due to the Mutual's refusal to provide him a defense. Dr. Matulis testified that he sold the lakefront lot in an arms' length transaction to an unaffiliated purchaser for $350,000. App. 2444, 1585. The jury also heard from expert appraiser Dean Dawson, who explained that the value of the land, if Matulis had not been forced to sell, was $700,000. App. 2464. The forced sale of the Lake Wylie residence was the sum total of Dr. Matulis' economic loss

damages, for which the jury awarded Dr. Matulis $200,000. App. 3008. The appreciation was not hypothetical. It was supported by the testimony of an expert appraiser, whose opinion the jury appropriately, though partially, credited. The Mutual's assignment of error here is also meritless.

VII. Because there was no dispute as to the method, the Circuit Court correctly calculated prejudgment interest.

In its final salvo, the Mutual challenges the manner in which prejudgment interest was decided. Again, its arguments lack merit. Here—and perhaps accidentally—the Mutual conflates two separate aspects of the proceedings below. *Hayseeds* fees are those awarded to an insured who substantially prevails against an insurer in obtaining coverage under an insurance policy. It is true that prejudgment interest is not available for attorney's fees that are awarded post-trial pursuant to *Hayseeds*. *See Miller v. Fluharty*, 201 W. Va. 685, 700, 500 S.E.2d 310, 325 (1997). The flaw in the Mutual's argument is that the Circuit Court did not award *even a single penny* of prejudgment interest on its *Hayseeds* fee award. *See* App. 00042-54. Quite so.

By contrast, the lower court correctly awarded prejudgment interest on the attorney's fees that Dr. Matulis expended out of his own pocket in order to defend himself *in the underlying civil cases*. *See* App. 00027-30. The court began by recognizing the parties' competing positions, and observed that "the Mutual did not, at [the pretrial conference] or any time prior to, disagree with [Matulis'] method of calculation, other than it believe the jury should be tasked with making this calculation themselves . . ." App. 00028. Accordingly, "because there was no genuine

dispute regarding the method," the court determined that the jury would decide *whether* to award prejudgment interest and, if prejudgment interest were awarded, the amount would be determined *by the court*. *Id.* That was entirely appropriate. On its verdict form, the jury awarded Dr. Matulis prejudgment interest. App. 3008. Consistent with that verdict, the court applied the undisputed methodology and calculated a prejudgment interest award of $226,223.35.

But regardless of how Dr. Matulis' out-of-pocket expenses are characterized, that result is correct. As an initial matter, it is not clear that fees incurred in the defense of the underlying civil actions are purely contractual. If such out-of-pocket expenses were purely contractual, it would have been entirely unnecessary for the Supreme Court of Appeals to create a distinct syllabus point on the subject: "Where an insured is required to retain counsel to defend himself in litigation because his insurer has refused without valid justification to defend him, in violation of its insurance policy, the insured is entitled to recover from the insurer the expenses of litigation, including costs and reasonable attorney's fees." Syl. Pt. 1, *Aetna Cas. & Sur. Co. v. Pitrolo,* 176 W. Va. 190, 191, 342 S.E.2d 156, 157 (1986). Again, the logic of the Mutual's argument would make this Supreme Court of Appeals' rule surplusage.

If this category of damages is considered an "economic loss" under *Hayseeds*, then it is not contractual in nature and, for the reasons explained by the lower court, prejudgment interest must be applied as a matter of law pursuant to W. Va. Code § 56-6-31. *See* App. 00029. By contrast, as the court below also observed, if the

out-of-pocket attorney's fees are contractual in nature, then the court was correct to calculate the figure where the calculation was not in dispute.

The Mutual's contrary position would mean that summary judgment (or judgment as a matter of law) could never be awarded in a contract case involving prejudgment interest, because even if every other aspect of the case had been resolved, a jury would still be required to resolve the question of prejudgment interest. That argument is not supported by law (or common sense). By contrast, where there was no genuine dispute as to any material fact regarding prejudgment interest, the Circuit Court's approach to the issue was appropriate. It was hardly reversible error.

CONCLUSION

After years of litigation fighting his insurance company to provide him a defense—and after defending against several unsuccessful interlocutory appeals/writs by the Mutual's lawyers—Dr. Matulis prevailed in holding the Mutual to account for its persistent and legally erroneous refusal to defend him. Now, they throw the kitchen-sink at this Court, all-the-while coloring Dr. Matulis as a Bad Man, hoping that this Court will ignore binding insurance law. But, "[w]hen a party comes to [the appellate court] with nine grounds for reversing the district court, that usually means there are none." *Fifth Third Mortgage v. Chicago Title Ins.*, 692 F.3d 507, 509 (6th Cir. 2012).

The same goes here. The Circuit Court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2024, **Respondent's Brief** was filed and served via File&ServeXpress on all counsel of record.

/s/ J. Zak Ritchie