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, M.D.,

Respondent.

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

REPLY BRIEF OF PETITIONER WEST VIRGINIA MUTUAL INSURANCE COMPANY

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I. INTRODUCTION

Matulis' response against the Mutual reveals one thing— he still is unwilling to accept that the facts alleged in the sexual abuse claims against him were expressly excluded under the Mutual's Policy. Matulis' response is far too quick to cast aspersions on the "Me Too" movement and fails to counter the Mutual's arguments, which reflect the overwhelming approach of courts towards efforts to manufacture insurance coverage where none exists. Filled with ad hominem attacks and factual mischaracterizations, Matulis' response is lean on the law and actual record citations. Matulis' response repeatedly chastises the Mutual for addressing the sheer number of errors committed, asserting the Mutual's supposed "kitchen-sink approach" is somehow proof of the propriety of the proceedings below rather than recognizing that the sheer number of errors identified was driven by the circuit court's repeated erroneous rulings. Yet Matulis rarely provides any countervailing logic to confront the single, overarching issue presented in this appeal—his intentional, sexual, and criminal acts were not covered under the Policy. Simply put, Matulis was not entitled to a defense in the underlying sexual abuse cases.

In erroneously holding that Matulis was entitled to a defense from the Mutual, however, the circuit court below ignored the plain language of the Policy's intentional, sexual, and criminal acts exclusions as well as the unambiguous definitions of what constitutes a "medical incident" or "professional services" under the Policy. The circuit court also disregarded well-settled West Virginia law reflecting the majority position that there is no duty to defend or indemnify claims arising from an insured's sexual misconduct. And from this all-encompassing error, a series of others followed—ultimately resulting in more than a $1.4 Million windfall in supposed damages to Matulis (in addition to the Mutual settling the underlying actions against him, despite the coverage issues). As discussed in its opening brief and in further detail below, the circuit court's

decision must be reversed.

II. ARGUMENT

A. The circuit court erred in ruling that the underlying sexual abuse claims against Matulis were covered despite clear Policy language to the contrary.

Although "an insurer must 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," Syl. Pt. 1, in part, *Farmers & Mechanics Mut. Fire Ins. v. Hutzler*, 191 W. Va. 559, 447 S.E.2d 22 (1994),[1] "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). Critically, "a liability insurer need not defend a case against the insured if the alleged conduct is entirely foreign to the risk insured against." *Horace Mann Ins. v. Leeber,* 180 W. Va. 375, 378, 376 S.E.2d 581, 584 (1988). The allegations of sexual abuse contained in the underlying cases are entirely foreign to risks insured under the Mutual's medical malpractice Policy. Therefore, the circuit court erred in holding that the Mutual had a duty to defend Matulis in those cases.

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

In *Horace Mann Insurance v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988), the Supreme Court of Appeals of West Virginia held 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

[1] Contrary to Matulis' assertion, the Supreme Court of Appeals of West Virginia did not criticize the Mutual for any alleged failure to look beyond the four corners of the underlying complaints in *State ex rel. West Virginia Mutual Insurance v. Bailey*, No. 20-0257, 2020 WL 6581850 (W. Va. Nov. 10, 2020), which cited *Hutzler* in a general discussion of the duty to defend and the duty to indemnify. *See id.* at *5. Nor is that decision, which considered the propriety of a writ of prohibition in the context of the circuit court's order consolidating the Mutual's declaratory judgment action with the underlying sexual abuse cases, law of the case where the Court made no determination whatsoever regarding the question of the Mutual's duty to defend Matulis in the underlying actions.

the intent of an insured to cause some injury will be inferred as a matter of law.

Id. at Syl.

Matulis asserts that "[t]his case is a far cry from *Leeber*." Resp't's Resp. at 16. His assertion is unavailing for several reasons. *Leeber* did not accept 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. Further, the Court in *Leeber* rejected what it recognized as a "transparent attempt" to trigger insurance coverage by characterizing allegations of intentional tortious conduct under the guise of negligent activity. *Id.* These are the same arguments Matulis makes in this case.

Smith v. Animal Urgent Care, Inc., 208 W. Va. 664, 542 S.E.2d 827 (2000), 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. *West Virginia Fire & Casualty Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004), reiterated that 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").

Matulis asserts that *Leeber* and other cases cited by the Mutual are distinguishable from the case at bar because some of the underlying cases against him 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." Resp't's Resp. at 16. Relying on the hallmarks of his failed defense to various criminal charges, Matulis spends a great deal of his response addressing the propriety of digital

vaginal examinations he admittedly performed. *See* Resp't's Resp. at 16–17. Yet Matulis ignores the fact that he himself conceded that, "[r]egardless 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." J.A. 968. Here, as in *Leeber*, Matulis' intent to cause injury based upon the sexual misconduct alleged in the underlying complaints should have been inferred as a matter of law. Therefore, the circuit court should have applied the Policy's intentional acts exclusion, barring coverage for "any claim or suit arising out of an intentional tort, dishonest, reckless or malicious act[.]" J.A. 3272.

Matulis' attempts to distinguish *Westfield Ins. v. Matulis*, 421 F. Supp. 3d 331 (S.D. W. Va. 2019), are similarly futile. Matulis contends that the commercial general liability policy at issue in Westfield contained a broad "Professional Services" exclusion and therefore is inapposite to the case at bar. *See* Resp't's Resp. at 19–20. In so arguing, Matulis would have this Court ignore the "Expected or Intended Injury" exclusion at issue in *Westfield* under which the court noted that the public policy of West Virginia "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." 421 F. Supp. 3d 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.* Based on the intentional acts exclusion contained within the Policy and the inferred intentional acts at issue in the underlying complaints, the circuit court erred when

it found there was a duty to defend.

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 factual allegations in the former patients' complaints uniformly assert liability arising out of Matulis' improper sexual acts or sexual activities. Cases interpreting similar sexual acts exclusions and similar facts overwhelmingly support the same result and have barred coverage for the precise conduct at issue here.

Incredibly, Matulis claims that the cases cited in the Mutual's opening brief as representative of the majority position regarding sexual acts exclusions actually *support* his position. This is clearly not so. *Govar v. Chicago Insurance*, 879 F.2d 1581 (8th Cir. 1989), is particularly persuasive. In *Govar*, the insurer defendant defended the plaintiff insured under a reservation of rights against a malpractice claim alleging that the insured had sexual relations with a female patient negligently. *Id.* at 1582.[2] As was the case in several of the underlying cases below, the claimant, upon discovering the sexual acts exclusion in the insured's policy, "amended her original complaint, deleting all references to sex and alleging only that [the insured] failed to exercise the degree of skill and care required by his profession." *Id.*

[2] Critically, the sexual acts exclusion at issue in *Govar* provided that, notwithstanding the applicable exclusion,

> the insured shall be protected under the terms of this policy for any claim upon which suit may be brought against him, for any such alleged act or acts by the Insured unless a judgment or final adjudication adverse to the Insured shall establish that such act or acts occurred as an essential element of the cause of action so adjudicated.

Id. at 1882. No such proviso is contained in the Mutual's Policy. Thus, Matulis' attempt to distinguish *Govar* on the grounds that it extended only to indemnification is inapposite. The duty to indemnify discussed in *Aldrich v. National Chiropractic Mutual Insurance*, No. 96-CV-847S, 1997 WL 662509 (W.D.N.Y. Oct. 14, 1997), was a matter of procedural posture. In *Aldrich*, the plaintiff was the claimant in the underlying action against the insured who subsequently sued his insurance company directly. The *Aldrich* court broadly discussed coverage under the applicable policy's sexual acts exclusion. Thus, Matulis' attempt to discredit this case is likewise unavailing.

In concluding that the policy at issue did not provide coverage, the Eighth Circuit reasoned:

> Govar could have presented her case without reference to sex, but she chose not to do so. After our own review of the record, we agree with the district court that Govar's entire case centered on sex. As the district court stated, the sexual relationship between Govar and Hiett was "so intertwined with Hiett's malpractice as to be inseparable."

Id. at 1582–82.

National Fire Insurance v. Radiology Associates, L.L.P., 439 F. App'x 293 (5th Cir. 2011), is also illustrative. In that case, the Fifth Circuit reversed the lower court's decision that the insurer had a duty to defend its insured against claims that a former employee sexually assaulted a patient. *Id.* In holding that the allegations were not covered under the policy's sexual misconduct exclusion, the Fifth Circuit reasoned as follows:

> Because the court may consider only the facts as set out in the complaint to determine the duty to defend, the question is whether the Pecore complaint potentially states a claim within the scope of coverage triggering American Physicians' duty to defend. The complaint described Riley's conduct as "a sexual assault" and also alleged that the acts of Riley were an intentional tort. This court must focus, though, on the facts asserted, not the legal theories presented. . . . Based on the actual facts in the complaint, Riley's conduct constituted unauthorized sexual conduct. His acts were sexual in nature and not authorized by Pecore's treating physician.

Id. at 296 (citation omitted). Indeed, the Fifth Circuit further cautioned that "a court should not imagine factual scenarios which might trigger coverage." *Id.* (cleaned up).

Similarly, in *Greenberg v. National Chiropractic Mutual Insurance*, No. 96 CIV 0052 JSM, 1996 WL 374145 (S.D.N.Y. July 3, 1996), the court found that, "despite [the claimant's] use of the words negligence and carelessness, the only reasonable conclusion to be drawn from the facts alleged in the [underlying] complaint . . . is that [the claimant] is seeking to recover from injuries caused by assault, battery and sexual assault, all of which are intentional torts." *Id.* at *3. Thus, the court concluded that "[t]here are no other facts alleged in the Prado Complaint to support a claim for negligence." *Id.* Matulis clings to this language to contrast *Greenberg* from the case at

bar. He does so without context. Specifically, the *Greenberg* court went on to state that the court adhered to its view even after considering an affidavit from the insured that he had examined the claimant's groin "because she indicated that she suffered from pelvic and groin pain in addition to neck and back pain." *Id.* The court recognized that the insured's affidavit did not indicate that any contact had been inadvertent, and, therefore, did "nothing" to modify the underlying complaint's "allegation of an intentional sexual assault which is not within the coverage of the Policy." *Id.*

As was the case in *Govar*, the underlying cases "centered on" Matulis' sexual abuse, which permeated every facet of the underlying complaints so as to be inseparable from any manufactured reference to negligence. Likewise, *National Fire Insurance* and *Greenberg* caution against prioritizing legal theories over the facts when determining coverage. Both cases rejected the notion that the insurer had a duty to defend against alleged injuries arising from sexual acts, even where such conduct could be costumed in terms of negligence. *Greenberg* steadfastly held to that reasoning even where the insured attempted to characterize his conduct as a medically indicated professional service.

Like the insured in *Greenberg*, Matulis attempts to shroud his sexual abuse "under the guise of professional services," contending that he performed digital vaginal exams "when appropriate." *See* Resp't's Resp. at 20–21. Like the courts in *Govar*, *National Fire Insurance*, and *Greenberg*, the circuit court below should have given weight to the overwhelming and inseparable allegations of sexual abuse and applied the Policy's unambiguous sexual acts exclusion. Instead, it improperly conjured "factual scenarios which might trigger coverage." *National Fire Insurance*, 439 F. App'x at 296. 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.

Matulis contends that he "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." Resp't's Resp. at 22. Yet that is precisely what happened below when the Mutual settled the underlying actions against him—in spite of the fact that 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. Here, Matulis was criminally convicted for sexually abusing T.W. *See State v. Matulis*, No. 18-1053, 2020 WL 1487810, at *6 (W. Va. Mar. 23, 2020).[3] This conviction should have been dispositive of Matulis' assertion that T.W.'s claim, and subsequent claims brought by the other former patients that echoed her allegations of sexual assault and molestation, were covered. *See, e.g.*, J.A. 526; J.A. 542; J.A. 546; J.A. 597; J.A. 612; J.A. 628; J.A. 638; J.A. 712. 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, including the claim by T.W.

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

In a nearly forty-page response, Matulis devotes only half a paragraph as to why his sexual abuse constitutes a "professional service" under the Policy, which is rooted in his own insistence that, under certain circumstances, limited vaginal examinations may be appropriate. *See* Resp't's Resp. at 22. Not only is this assertion here unsupported by any record citation, but it also conveniently ignores the facts and allegations of the underlying sexual abuse claims where, among other things, Matulis broadly was accused of sexual assault, including using a medical device on

[3] Specifically, Matulis was convicted of a felony for "sexual abuse in the first degree, regarding his touching of T.W.'s breast." *Id.* Matulis asserts that the Mutual falsely claims that he was convicted of sexual assault in its opening brief. *See* Resp't's Resp. at 21 n.5. Not only is "sexual assault" broadly defined as "[o]ffensive sexual contact with another person," *see Assault, Black's Law Dictionary* (11th ed. 2019), T.W.'s original complaint also referred to "sexual assault." *See* J.A. 524–37. The Mutual's brief repeatedly cites the opinion that upheld Matulis' conviction, *State v. Matulis*, No. 18-1053, 2020 WL 1487810 (W. Va. Mar. 23, 2020), as well as record evidence pertaining to his conviction. *See* Pet'r's Br. at 3, 18, 23. Matulis' histrionics are merely an attempt to confuse and detract from the coverage issues properly before this Court.

a female patient in a sexual, non-medical manner, J.A. 562, and performing a vaginal examination on a female patient that was not medically indicated, J.A. 651.

Matulis' feeble attempt, *see* Resp't's Resp. at 22, to distinguish this matter from *Physicians Insurance & Professional Adjustment Services, Inc. v. Pistone,* 726 A.2d 339 (Pa. 1999), where the physician had been accused of fondling a patient's breasts is incredulous almost to the point of outrageousness. 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. 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. Indeed, that is precisely why Matulis was criminally convicted for sexual abuse in the first degree. *See State v. Matulis*, No. 18-1053, 2020 WL 1487810, at *6 (W. Va. Mar. 23, 2020).

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." Because the damages alleged in the underlying claims 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 simply not covered under the insuring agreement of the Policy. The plain language of the Policy clearly indicates that these claims do not require a duty to defend, even before analyzing whether exceptions apply. There is no reason for West Virginia to depart from the majority of other jurisdictions on this issue. 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.

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

The rest of the Mutual's assignments of errors necessarily flow from the circuit court's erroneous decision on the duty to defend, which is the overarching issue in this appeal. If this Court agrees there was no duty to defend, the remaining errors from the trial are mooted. Contrary to Matulis' repeated assertion, *see* Resp't's Resp. at 3, 38, the six remaining grounds for relief the Mutual raised in its opening brief do absolutely nothing to rehabilitate the circuit court's drastic departure from the majority of other jurisdictions. Thus, his reliance on *Fifth Third Mortgage Co. v. Chicago Title Insurance*, 692 F.3d 507, 509 (6th Cir. 2012), in this regard is meritless.

Nonetheless, Matulis collapses two distinct concepts in his response: (1) whether the underlying sexual abuse claims were covered under the Policy; and (2) if so, the amount of damages resulting from the Mutual's refusal to provide Matulis a defense. The circuit court decided the first issue in its Memorandum Opinion and Order on May 4, 2021, where it held that the Mutual owed Matulis a defense in the underlying actions. J.A., 1–13. Although its decision was legally erroneous, as discussed above, it was procedurally proper for the circuit court to determine the coverage issue as a matter of law under Syl. Pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002).

The second issue, by contrast, was a question of damages—not coverage. Thus, Matulis' reliance on *Berkeley County Public Service District v. Vitro Corp.*, 152 W. Va. 252, 162 S.E.2d 189 (1968), is misplaced. Stated differently, the issue was not technically whether the disputed attorneys' fees were covered under the Policy but rather whether the disputed attorneys' fees were recoverable because they were caused by the Mutual's supposed breach of contract. That determination was plagued by a number of genuine issues of material fact centering on whether the attorneys' fees incurred represented defense costs resulting from a medical incident.

The Mutual argued that the attorneys' fees incurred for: (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 were not recoverable. J.A. 2183–94. Matulis disagreed, arguing that the disputed fees all went to the "Common Defense" of the underlying sexual abuse claims. J.A. 2160–80. Rather than submit the dispute over whether the disputed costs were caused by the Mutual's alleged breach of the Policy to jury, the circuit court substituted its own fact-finding analysis in violation of West Virginia Rule of Civil Procedure 56. 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.

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

1. Administrative defense fees.

A telling theme throughout his response, Matulis does not address the Mutual's argument that the $25,000.00 in attorneys' fees awarded to Matulis for administrative defense violated clear, unambiguous Policy language. Specifically, the CAMC and BOM proceedings were not eligible for coverage under the Policy because the Policy 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. Matulis does not even attempt to refute this language, which should have proved fatal to his claim for such fees.

Contrary to Matulis' suggestion, Resp't's Resp. at 26, the Mutual hardly conceded that any

administrative defense coverage extended to the BOM or CAMC proceedings. Specifically, Matulis ignores the fact that the Mutual noted that the Broad Form Administrative Defense Endorsement expressly states that "[p]ersonal injury arising out of sexual misconduct is not covered." *See* Pet'r's Br. at 29 n.12; J.A. 3284 (Section IX.D.2.l.(7)).

The endorsement further 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. Although Matulis' response characterizes his alleged belief that the Mutual had actual notice of the pending administrative proceeding as an "*unchallenged* factual finding," Resp't's Resp. at 26, Matulis does not address his prior concession that he believed any fees related to the defense of the administrative matters were not covered, *see* J.A. 1617–18. Matulis also overlooks, and certainly does not attempt to refute, the fact that Matulis himself *never* alerted the Mutual to CAMC's investigation or suspension. Thus, Matulis' reliance on *Colonial Insurance v. Barrett*, 208 W. Va. 706, 542 S.E.2d 869 (2000), is misplaced where the notice requirement at issue was not satisfied by Matulis' counsel until March 20, 2017, nearly a full year after the first investigation was instituted and Matulis' coverage was terminated.

2. Other miscellaneous fees.

Regarding the remaining disputed $129,423.65 in attorneys' fees Matulis claimed as breach of contract damages, Matulis derides the Mutual for failing to provide specific line items it believes should not have been awarded as breach of contract damages and why. *See* Resp't's Resp. at 27. As set forth in its opening brief, the answer is simple: The Mutual disputed the entire $129,423.65 in attorneys' fees awarded by the circuit court as breach of contract damages because 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.

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. Indeed, a significant amount of the disputed fees clearly are a thinly-veiled attempt to recoup additional costs for administrative defense beyond the Policy limit, even though such fees should not have been awarded in the first instance. For example, one of the disputed entries was for fees incurred to "[r]eview WV Board of Medicine complaint." J.A. 2166. Significant other expenses, *see* J.A. 2167–71, were incurred for multiple attorneys to travel to Utah to meet with Donald Seibert, an expert who had been retained to "review and comment on the issues raised by the West Virginia Board of Medicine." J.A. 985. Other entries include fees incurred for Matulis' dispute with Westfield (a completely unrelated insurer), J.A. 2175–76, a focus group for his criminal trial, J.A. 2176–78, issues around his indictment, J.A. 2176–78, and review and analysis of bankruptcy law, J.A. 2170, among other things.

Despite the unambiguous requirement that the defense costs result from a medical incident, J.A. 3250, the circuit court wholly accepted Matulis' explanation that such fees were covered under a "Common Defense" theory, going so far as to blame the Mutual for any perceived overlap. *See* J.A. 26–27. Simply put, none of the disputed $129,423.65 in attorneys' fees was 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.

D. 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*.

It is well-settled: "West Virginia law allows fee-shifting only for work 'necessary to obtain

payment of the insurance proceeds'" under a policy. *Moses Enters. v. Lexington Ins.*, 66 F.4th 523, 527 (4th Cir. 2023) (quoting *Jordan v. Nat'l Grange Mut. Ins.*, 183 W.Va. 9, 14, 393 S.E.2d 647, 652 (1990)). *Accord* Syl. Pt. 4, *Jones v. Sanger*, 217 W. Va. 564, 618 S.E.2d 573 (2005); Syl. Pt. 4, *Richardson v. Ky. Nat'l Ins.*, 216 W.Va. 464, 607 S.E.2d 793 (2004); Syl. Pt. 2, *Miller v. Fluharty*, 201 W.Va. 685, 500 S.E.2d 310 (1997); Syl. Pt. 3, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996); Syl. Pt. 2, *Hadorn v. Shea*, 193 W.Va. 350, 456 S.E.2d 194 (1995).

Manifestly, attorneys' fees incurred to pursue *Hayseeds* damages are not related, let alone "necessary to obtain" payment of insurance proceeds under a policy. *See* Syl. Pt. 1, *Jordan*, 183 W.Va. at 9, 393 S.E.2d at 647; *see also 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).

The record is replete with examples where the circuit court's purported "well-reasoned judgment," *see* Resp't's Resp. at 30, resulted in an award of attorneys' fees in contravention of this applicable law. Contrary to Matulis' assertion, Resp't's Resp. at 29, the Mutual provided a list of several specific—though admittedly not exhaustive—disputed line item entries to Matulis' *Hayseeds* attorneys' fee claim below. *See* J.A. 3124–96. The fees disputed by the Mutual covered: (1) fees incurred in the defense of the underlying claims, *see, e.g.*, J.A. 3152, 3155 (multiple highlighted entries pertaining to underlying class action); (2) fees incurred to prosecute his claim for damages under *Hayseeds*, *see, e.g.*, J.A. 3158–62, 3187 (multiple highlighted entries pertaining to *Hayseeds* damages for alleged net economic loss and trial); (3) fees related to other matters, *see* J.A. 3192 (multiple highlighted entries related to declaratory judgment action against Westfield); and (4) fees incurred in anticipation of this appeal, *see* J.A. 3183, 3187 (multiple highlighted

entries related to appellate issues and process). Such fees inherently flunk the "necessary to obtain payment" test for an award of attorneys' fees under *Hayseeds*.

And 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*. Contrary to his assertion, *see* Resp't's Resp. at 30, the circuit court's conclusory analysis that "[t]he work of each attorney appears to have been reasonably necessary," J.A. 45, does not relieve Matulis of his burden. The test is not whether such fees were "reasonably necessary" to obtain some unspecified relief as the circuit court accepted. Rather, the test set forth repeatedly by the Supreme Court of Appeals of West Virginia is whether such fees were "necessary to obtain payment of the insurance proceeds." *See* Syl. Pt. 1, *Jordan*, 183 W.Va. at 9, 393 S.E.2d at 647. No such analysis occurred below. 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, and 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.

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

Although the circuit court has broad discretion regarding evidentiary rulings, such discretion is not beyond reproach. This court must inquire "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). Nowhere is the arbitrariness and irrationality of the circuit court's campaign to hamstring the Mutual's ability to defend itself during trial more evident than in the juxtaposition of what the Mutual was precluded from asking in

comparison to what Matulis was permitted to examine.

On the one hand, Matulis contends that, because he was not seeking punitive damages during the Phase 1 trial, the Court properly excluded all evidence of his sexual abuse under West Virginia Rule of Evidence 403. And yet the specter of Matulis' sexual abuse permeated every piece of evidence the Mutual otherwise could have used to disprove Matulis' allegations of annoyance and inconvenience as well as his purported net economic damages. Instead, Matulis was permitted to lambast the Mutual for not providing him a defense in the underlying cases, but the Mutual was not allowed to mention the nature of the claims in those cases, the basis for its coverage decision making, the fact that the Mutual did provide Matulis a defense in many of those cases, nor the fact that the Mutual ultimately settled the underlying sexual abuse claims. Under Rule 403, the circuit court was permitted to exclude relevant evidence only if its probative value was "substantially outweighed" by a danger of unfair prejudice or confusion of the issues. Here, the probative value of the veritable mountain of evidence the Mutual was prevented from introducing was not outweighed by theoretical risks of unfair prejudice or confusion. The circuit court therefore abused its discretion.

On the other hand, despite the fact that Matulis was not seeking punitive damages during the Phase 1 trial, his counsel devoted almost the entirety of the cross-examination of Tamara Huffman on the net worth of MagMutual, the Mutual's parent company as of November 2020. J.A. 2487–99. Based on the circuit court's severe limitation on the evidence the Mutual could present in its defense, its origin and history were essentially the only topics on which it could testify. Contrary to Matulis' assertion, *see* Resp't's Resp. at 33–34, the Mutual's direct examination of Ms. Huffman did not give his counsel carte blanche to inquire about MagMutual's present finances. *See Wheeler v. Murphy*, 192 W. Va. 325, 333, 452 S.E.2d 416, 424 (1994)

(holding 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"). Considering MagMutual's November 2020 acquisition of the Mutual occurred well after the Mutual's coverage decisions, such information bore no probative value under Rule 403 to the issues before the jury. Accordingly, it should have been precluded, and the circuit court abused its discretion in allowing such evidence to be admitted.

F. 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.

Under *Hayseeds*, a policy holder who substantially prevails is entitled to "damages for net economic loss caused by the delay in settlement. Syl. Pt. 1, in part, *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). The Mutual argued that Matulis set forth no evidence that he suffered any net economic losses during the 2017 sale of his vacant lot on Lake Wylie, not to mention evidence that any economic losses were caused by a delay in settlement. Once again, however, Matulis wholly fails to address the Mutual's argument on this issue.

Matulis contends that there was ample evidence that the lakefront property he sold in 2017 had appreciated as of May 2023. *See* Resp't's Resp. at 35. Whether the property appreciated in value after Matulis sold it is beside the point. As *Nationwide Mutual Fire Insurance v. Faircloth*, No. 3:12-CV-4, 2013 WL 4647690 (N.D. W. Va. Aug. 29, 2013), cited in the Mutual's opening brief, makes clear—damages for net economic losses under *Hayseeds* are not intended to compensate insureds for appreciation of assets. In *Faircloth*, 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.*

Matulis does not even attempt to counter *Faircloth*. Nor can Matulis twist the testimony from his appraiser, Dean Dawson, who conceded 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. In other words, Mr. Dawson admitted that he did not know whether Matulis experienced a net economic loss when he sold the property in 2017, because Mr. Dawson was not asked to compare the price at which Matulis purchased the property to its fair market value at the time of sale. J.A. 2467. As such, there was no evidence of net economic loss.[4] It was error for the circuit court not to grant the Mutual judgment as a matter of law on this issue.

G. 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.

Contrary to Matulis' assertion, *see* Resp't's Resp. at 36, the Mutual made no mistake and did not conflate the separate aspects of the attorneys' fee awards below. In *Graham v. National Union Fire Insurance*, 556 Fed. App'x 193 (4th Cir. 2014), the Fourth Circuit relied on *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997), to conclude that prejudgment interest was not proper on attorneys' fee awards—period—"even those sustained as direct damages." 556 Fed. App'x 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.* In *Graham*, the prejudgment interest at issue was for attorneys' fees incurred as *direct* damages resulting from the defendant's refusal to defend the plaintiff in an underlying lawsuit pursuant to the terms of a liability insurance policy. So too here.

It bears repeating: given that the circuit court did not memorialize its ruling on the

[4] Even if Matulis had set forth evidence of a net economic loss, the Mutual was precluded from questioning whether the sale of the Lake Wylie property was in any way *caused* by a delay in settlement because the circuit court prevented the Mutual from asking Matulis about payments he made for attorneys' fees following his sale. J.A. 2443–45.

$129,423.65 in disputed attorneys' fees and costs until August 14, 2023, the damage award was not liquidated. As reasoned in *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. Matulis does not even attempt to counter *Graham*, nor does he address the prejudgment interest awarded on his lost opportunity damages. Once again, Matulis' failure to counter the arguments and legal authority cited in the Mutual's brief is telling.

In any event, Matulis' assertion that the Mutual did not genuinely dispute or disagree with Matulis' suggested method of calculation, Resp't's Resp. at 38, is specious. Instead, the Mutual took the position that, 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." "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.*

The Mutual was not permitted to present this concept to the jury. The fact that it was precluded from doing so does not mean that the Mutual acceded to Matulis' method of calculation. On the contrary, the Mutual argued that the circuit court's calculation of prejudgment interest under Section 56-6-27 only would have been appropriate had the trial below been a bench trial. *See Velasquez v. Roohollahi*, No. 13-

1245, 2014 WL 5546140, at *3–4 (W. Va. Nov. 3, 2014). It was not. Thus, the circuit court's calculation as to the amount of prejudgment interest was in error.[5]

III. CONCLUSION

For these reasons and as discussed in the Mutual's opening brief, 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, the 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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[5] Matulis' suggestion that the Mutual's position means that a court could never award summary judgment on a breach of contract claim is likewise unavailing. Courts can and routinely do award prejudgment interest for breaches of contract determined by way of summary judgment under Section 56-6-27. *See Ferguson Enters., LLC v. Wolfe Constr. Co.*, No. 2:20-CV-00439, 2021 WL 2877604, at *3 (S.D. W. Va. July 8, 2021). A court substituting its judgment for that of the jury is another matter entirely.

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 "***REPLY BRIEF OF PETITIONER WEST VIRGINIA MUTUAL INSURANCE COMPANY***" has been served via the Court's File & Serve Xpress system on March 20, 2024, which will notify all counsel of record.

/s/ Robert L. Massie