NO. 25-ICA-418

ICA EFiled: Dec 23 2025
05:44PM EST
Transaction ID 78069736

IN THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

JOSEPHINE N. DUTTON,

Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANC COMPANY,

Respondent.

PETITIONER'S BRIEF

Counsel for Petitioner:

/s/ *George N. Sidiropolis*
George N. Sidiropolis, Esq. (# 10391)
THE INJURY RISHTS FIRM, PLLC
1140 Main Street, 4th Floor
Wheeling, WV 26003
Phone: (304) 233-7766
george@flaniganlegal.com

/s/ *Jordan M.* Laird
Jordan M. Laird, Esq. (# 12448)
LAIRD LAW, PLLC
2 22nd Street, Suite 202
Wheeling, WV 26003
Phone: (304) 551-2800
jordan@laird-law.com

Counsel for Petitioner
Josephine N. Dutton

Counsel for Respondents:

Jill Cranston Rice, Esq.
Alex M. Greenberg, Esq.
Lauren E. Motes, Esq.
DINSMORE & SHOHL LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501
Phone: (304) 296-1100
Facsimile: (304) 296-6116
jill.rice@dinsmore.com
alex.greenberg@dinsmore.com
lauren.motes@dinsmore.com

Counsel for Respondent
State Farm Mutual
Automobile Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules

Statutes

Treatises

ASSIGNMENTS OF ERROR

I. The Circuit Court erred by concluding that *res judicata* barred Petitioner's insurance bad faith and Unfair Trade Practices Act claims, in disregard of controlling precedent permitting subsequent derivative actions against insurers, including statutory and common law bad faith claims. West Virginia law expressly allows Petitioners to file insurance bad faith claims contemporaneously with the underlying insurance dispute or as separate derivative suits. See *Kettner v. State Farm Mut. Auto. Ins. Co.*, 205 W. Va. 587, 593, 519 S.E.2d 870, 876(1999); *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 157, 451 S.E.2d 721, 723 (1994); *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998); *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23, 25 (2009). The order erroneously conflates the doctrine of *res judicata* as broad claim preclusion, failing to recognize the well-established "same evidence" test, which distinguishes between bodily injury claims and separate bad faith causes of action. See *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W. Va. 476, 481, 557 S.E.2d 883, 888 (2001); *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791 (1994).

II. The order's reliance on settlement as a bar to Petitioner's claims contradicts *Poling v. Motorists Mut. Ins. Co.*, which confirms that settlement of the underlying case does not extinguish a bad faith claim against an insurer so long as the release does not cover the insurer, and the insurer has actual or constructive notice of such claims at settlement. 192 W.Va. 46, 450 S.E.2d 635 (1994). The Circuit Court improperly dismissed Petitioner's statutory Unfair Trade Practices Act claim, and misapplies *Hayseeds, Inc. v. State Farm Fire Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). The Circuit Court improperly dismissed Petitioner's Unfair Trade Practices Act claim misapplying the requirement of substantial prevailing in an underlying claim and failing to recognize the statutorily distinct cause of action. Statutory bad faith claims under the Unfair Trade Practices Act do not require a Petitioner to have prevailed on their underlying insurance claim.

III. The Circuit Court erred in dismissing Petitioner's express breach of contract claim, disregarding specific and detailed factual allegations well-pled in the Complaint and permitted under Rule 8(a) of the West Virginia Rules of Civil Procedure. The Complaint sets forth explicit factual allegations evidencing breach of contract, including failures of prompt investigation, good faith negotiation, and proper claims handling. See *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 433 (1998); *Hayseeds, Inc. v. State Farm Fire Cas. Co.*, 177 W.Va. 323, 352 S.E.2d 73 (1986). The motion to dismiss standard requires courts to accept well-pled facts as true and to assess only the formal sufficiency of the claims, not the underlying merits. See *Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008). Dismissing the express breach of contract claim improperly disregards binding authority and the plain language of the Complaint.

IV. The Circuit Court misapplied West Virginia law in holding that breach of the implied duty of good faith and fair dealing is not recognized as a separate cause of action in the insurance context. Contrary to the Circuit Court's ruling, West Virginia law recognizes that a common law duty of good faith and fair dealing is implied in insurance contracts, and is actionable where the insured substantially prevails. See *Hayseeds, Inc. v. State Farm Fire Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1986); *Marshall v. Saseen*, 192 W. Va. at 100, 475 S.E.2d at 797; Syl. pt. 6, *Smithson v. U.S. Fidelity & Guar. Co.*, 186 W. Va. 195 (1991). The order improperly merges Petitioner's claims, ignoring the distinction between express breach of contract, breach of the implied covenant of good faith and fair dealing, and common law bad faith claims as recognized in West Virginia jurisprudence.

STATEMENT OF THE CASE

This matter came before the Intermediate Court of Appeals of West Virginia on appeal of Josephine N. Dutton, the Petitioner below ("Petitioner" or "Ms. Dutton") from an *Order Granting Motion to Dismiss the Complaint* ("*Order*") entered by the Circuit Court of Ohio County on September 23, 2025. (Appendix Record ("A.R.") 190-205.)

Petitioner filed her *Notice of Appeal* on October 23, 2025 seeking reversal of the lower courts' orders and remand of this action. (A.R. 206-14)

Petitioner filed her *Complaint* ("*Compl.*") on January 16, 2025 naming Respondent State Farm Mutual Automobile Insurance Company ("State Farm") as the Respondent. (A.R. 1-61.) This action arises from the handling of an uninsured motorist insurance claim following a November 1, 2019, automobile collision. (A.R. 24-5.) The Complaint asserted claims for common law bad faith (Hayseed damages), violations of the Unfair Claims Settlement Practices Act, and breach of contract, all arising from Respondent's claims handling conduct and alleged failure to promptly and fully pay policy benefits. (A.R. 45-62.) Petitioner sought compensatory damages, statutory damages, and all available common law remedies against the insurer for its improper claims practices. (A.R. 62-3.)

The Circuit Court granted Respondent's motion to dismiss, ruling, in part, that Petitioner's claims were barred by *res judicata* due to prior litigation between the same parties based upon the same set of facts, which resolved with full payment of policy limits and resulted in dismissal with prejudice. (A.R. 200.) The Circuit Court ruled, in the alternative, that Petitioner's pleading failed to state any viable claim for relief, including for breach of contract, statutory bad faith, or common law bad faith. (A.R. 200-03.) The final order dismissed the action in its entirety, with prejudice, and ordered the case stricken from the docket. (A.R. 203.)

At the time of the crash on November 1, 2019, Petitioner was insured under Policy number 136130548 issued by Respondent and was a first-party insured. (A.R. 6.) Petitioner was entitled to underinsured motorist coverage under the policy and her claim for coverage was the subject of a prior lawsuit. (A.R. 6.))

Respondent, through its claims adjusters, had a duty to know, and comply with, applicable law and regulations that impact claim handling and treat policyholders in a manner consistent with requirements of the law. (A.R. 17.) Moreover, an implied covenant of good faith and fair dealing exists with respect to the insurance contact. (A.R.

17-9.) Respondent had a duty to investigate liability and damages. (A.R. 20.) Respondent had a duty to determine all damages the insured is legally entitled to collect from the at fault driver; and pay those damages. (A.R. 33.)

On November 1, 2019, Petitioner was operating her motor vehicle on Benwood Hill Road near the Marshall Street Exit, when the tortfeasor, Chelsea Keyser ("Keyser"), lost control of her vehicle and crashed into the plaintiff. (A.R. 23.) Keyser crashed into the plaintiff head-on, causing total loss to the vehicles and injuries and damages to the Petitioner and her minor child. (A.R. 24.) Keyser was negligent and reckless toward Petitioner in the operation of her motor vehicle. (A.R. 24.)

On November 13, 2019, Petitioner's counsel directed correspondence to Respondent notifying Respondent of Petitioner's representation. (A.R. 25.) On May 15, 2020 Petitioner provided Respondent with relevant medical records and bills, including a summary, for her treatment with WVU Medicine, Radiology Associates, and Rite Aid Pharmacy. (A.R. 25.)

Respondent refused to provide reasonable compensation to Ms. Dutton for her injuries and damages resulting from the crash and forced Petitioner to file suit in order to vindicate her rights under the policy. (A.R. 25.) Petitioner's Complaint was filed in Marshall County, West Virginia Circuit Court as Civil Action No. 21-C-94. (A.R. 25.) The Complaint alleged negligence against the tortfeasor and sought compensation from State Farm under the Uninsured Motorist Coverage of the applicable policy. (A.R. 25;83-88.) Petitioner requested the available policy limits of Twenty-Five Thousand Dollars ($25,000). (A.R. 25.) Respondent was advised that Petitioner presented numerous symptoms associated with her traumatic brain injury including headaches, nausea, vertigo and visual disturbances. (A.R. 27.) Petitioner also continued to suffer headaches and problems associated with her traumatic brain injury. (A.R. 27.)

Additional communications occurred regarding settlement, resulting in an October 17, 2022 statement on by Respondent's counsel to Petitioner's counsel that "Your letters appear to be nothing more than self-serving pontification to advance an agenda as opposed to meaningful efforts to move this matter forward to resolution." (A.R. 29-31.)

On October 20, 2022, Respondent by counsel offered "the full extent of my authority of $19,237.00 for Ms. Dutton," which acknowledges that State Farm has been withholding money from its policyholder and adjusting this claim as if it were a third party claim. (A.R. 33.) Thereafter, on February 5, 2023 Petitioner wrote to State Farm and requested that State Farm reconsider its position regarding this matter. (A.R. 34-36.) State Farm again refused to tender the available limits of UM coverage.

Petitioner was not deposed until May 5, 2023. (A.R. 36.) Ms. Dutton's deposition testimony confirmed the significance of her post-traumatic injuries, damages and losses, including substantiating her claims for duties under duress and loss of enjoyment of life. (A.R. 37.) Without any basis in fact, at the deposition of Josephine Dutton, State Farm asked Ms. Dutton whether she "looked anything up, like you, what happens – you , what are symptoms related to head injuries" in an effort to imply that she was manufacturing symptoms of a traumatic brain injury. (A.R. 36-39.) State Farm asking its policyholder "do you do, like internet research on issues that you're having, like Dr. Google?" is similarly distasteful. *Id.* Respondent ignored Ms. Dutton's sworn deposition testimony and placed no additional value on her claim. (A.R. 37.)

After the deposition, Respondent indicated that it had not decided whether to obtain an independent neuropsychological examination and requested additional records regarding Petitioner. (A.R. 37.) On May 23, 2023, Petitioner requested that State Farm provide an evidentiary basis for it claim that the Petitioner was manufacturing her injury claim. (A.R. 37-38.) Respondent did not produce any evidence.

In an effort to further substantiate the Petitioner's injury, counsel for the Petitioner scheduled Petitioner for a neuropsychological examination with Dr. Timothy S. Saar, PhD., but inexplicably Respondent objected to the Petitioner's counsel providing independent evidence from a neuropsychological examination. (A.R. 38-40.) Petitioner wrote to State Farm on multiple occasions documenting State Farm's history of fraud and misconduct in relation to Rule 35 examinations and requested that it reconsider its position regarding Dr. Saar's medical examination. (A.R. 39-43.)

In that regard, Respondent indicated that it was unwilling to consider the expert opinion of the neuropsychologist retained by the Petitioner causing the Petitioner to cancel the examination. (A.R. 43.) Subsequently, Respondent, on February 14, 2024, advised Petitioner's counsel that Respondent unilaterally noticed its own Rule 35 examination of plaintiff with Dr. Glen Getz neuropsychologist. (A.R. 43.) The examination was scheduled for eight hours beginning at 8:00 a.m. in Pittsburgh, Pennsylvania. (A.R. 44.)

Finally, on February 22, 2024, Respondent agreed to tender its available policy limits. (A.R. 44.) The initial offer from Respondent was $7,500.00 (Seven Thousand Five Hundred Dollars), which was made on May 29, 2020. (A.R. 81.)

In Count I of the Complaint, Petitioner seeks *Hayseeds* damages. (A.R. 43-50.) Count II sets forth a claim for violation of the UTPA. (A.R. 50-59.) Count III alleges a claim for breach of contract. (A.R. 60-62.) Paragraph 171 of the Complaint specifically identifies the Respondent's breaches of the contract. (A.R. 57-58.) The damages suffered by Petitioner as a result of Respondent's wrongful conduct are set forth in the remaining paragraphs of the Complaint. (A.R. 62-63.)

Respondent filed *Defendant State Farm Mutual Automobile Insurance Company's Motion to Dismiss the Complaint* on March 3, 2025. (A.R. 66-95.) On March 14, 2025, Respondent filed *Defendant State Farm Mutual Automobile Insurance Company's Supplement to Motion to Dismiss the Complaint*. (A.R. 97-110.) Petitioner filed her *Response in Opposition to Defendant State Farm Mutual Automobile Insurance Company's Motion to Dismiss*. (A.R. 112-48.) Respondent filed *Defendant State Farm Mutual Automobile Insurance Company's Reply in Support of its Motion to Dismiss the Complaint*. (A.R. 149-160.)

Petitioner contends that the dismissal of Petitioner's *Complaint* was in error and seeks reversal and remand.

SUMMARY OF ARGUMENT

The Circuit Court erred in concluding that proof of the nature and extent of Petitioner's injuries resulting from a motor vehicle accident was the same evidence required to establish the elements of a cause of action for breach of contract; bad faith; and a patterned violation of the UTPA rising to the level of a general business practice. Thus, the Circuit Court ignored the causes of action alleged in Petitioner's Complaint and applied a transactional approach, which has been disavowed by the West Virginia Supreme Court of Appeals. The Circuit Court erroneously applied the doctrine of *res judicata* on the basis that all of Petitioner's causes of action arose out of the same transaction, the motor vehicle accident and Petitioner's claim for underinsured motorist benefits from Respondent.

The West Virginia Supreme Court of Appeals has reaffirmed the distinct nature of each of Petitioner's alleged causes of action in numerous cases. A claim for uninsured motorist benefits requires proof of liability of the tortfeasor and the nature and extent of damages. A breach of contract action requires evidence of a defendant's failure to perform its obligations under a contract. A *Hayseeds* claim requires a showing that the Petitioner substantially prevailed which a claim under the UTPA does not require such a showing. The UTPA requires a showing of violations of the UTPA which rise to the level of a general business practice on the part of the insurer. None of the causes of action in the present case require only a showing of negligent operation of a motor vehicle proximately causing damages. Therefore, each of the claims in the present action require substantially different evidence than was required in the uninsured motorist litigation and the instant lawsuit is not barred by the doctrine of *res judicata*.

The Circuit Court also erred in finding that Petitioner's Complaint failed to state claims upon which relief can be granted. Petitioner's breach of contract claim alleges the existence of a contract and identifies Respondent's breach of that contract and resulting damages. Petitioner's claims under *Hayseeds* and the UTPA are not rendered moot by State Farm ultimately paying the UM policy limits. The UTPA seeks to remedy abuses in the claims handling process regardless of whether a settlement occurred. Finally, the Circuit Court erred in determining that Petitioner does not state a claim for *Hayseeds* damages as an independent claim does not exist. This conclusion is wholly unsupported by the facts and circumstances of the instant case and long-standing West Virginia precedent.

The errors by the Circuit Court resulted in the erroneous dismissal of Petitioner's action. The numerous errors committed by the lower court require that the decision of the Circuit Court be reversed and this case remanded for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this Appeal involve assignments of error addressing the distinct nature of actions seeking to recover underinsured motorist benefits under an insurance policy; breach of contract; common law bad faith; and statutory bad faith under the Unfair Trade Practices Act ("UTPA"). The Circuit Court erroneously applied the doctrine of res judicata and dismissed Petitioner's claims for breach of contract, bad faith, and violations of the UTPA. The basis for the dismissal was Petitioner's prior action, which sought compensatory damages for injuries she sustained in a motor vehicle accident precluded her from bringing the underlying action to recover distinctly different damages based upon distinctly different causes of action. Moreover, the Circuit Court erroneously applied the standards applicable when considering a motion to dismiss for failure to state a claim upon which relief can be granted. The case *sub judice* presents issues that require clarification under West Virginia Law. Therefore, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*."[1]

ARGUMENT

I. The Circuit Court erred by concluding that *res judicata* barred Petitioner's insurance bad faith and Unfair Trade Practices Act claims, in disregard of controlling precedent permitting subsequent derivative actions against insurers, including statutory and common law bad faith claims. West Virginia law expressly allows Petitioners to file insurance bad faith claims contemporaneously with the underlying insurance dispute or as separate derivative suits. See *Kettner v. State Farm Mut. Auto. Ins. Co.*, 205 W. Va. 587, 593, 519 S.E.2d 870, 876(1999); *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 157, 451 S.E.2d 721, 723 (1994); *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998); *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23, 25 (2009). The order erroneously conflates the doctrine of res judicata as broad claim preclusion, failing to recognize the well-established "same evidence" test, which distinguishes between bodily injury claims and separate bad faith causes of action. See *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W. Va. 476, 481, 557 S.E.2d 883, 888 (2001); *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791 (1994).

The error of the Circuit Court in dismissing Petitioner's claim on the basis of *res judicata* can be found in this one sentence: "Importantly, the dispute over the value of Plaintiff's claim forms the basis of Plaintiff's present Complaint; it also formed the basis of Plaintiffs prior lawsuit against State Farm." (A.R. 191.) This statement by the Circuit Court establishes that the Court misperceives the nature of the causes of action pleaded by Petitioner.

The prior Complaint addressed a motor vehicle crash and damages from the crash. The dispute over the value of Petitioner's claim is not the evidence at issue in the case and would be inadmissible. W.Va. R. Evid. 408.

The present action concerns Respondent's wrongful actions with respect to Petitioner's claim for uninsured motorist coverage under the policy including common law bad faith, statutory bad faith, and breach of contract. While the valuation of the claim is one of the factual bases underlying these claims, the causes of action in the present

[1] Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 773, 461 S.E.2d 516 (1995).

case are separate and distinct from the issue of the amount of compensation Petitioner was legally entitled to recover under the policy.

"When considering *res judicata* or claim preclusion, West Virginia applies a narrow 'same evidence' test which examines whether 'the same evidence would support both actions or issues.'"[2] The Circuit Court apparently applied the broader "same transaction" test utilized by Federal courts.[3] The latter test requires a determination of whether "the new litigation arises out of the same transaction or series of transactions as the claim resolved by the prior judgment.'"[4]

Petitioner seeks recovery for the causes of action of common law bad faith, statutory bad faith, and breach of contract. "For purposes of *res judicata*, a cause of action' is the fact or facts which establish [sic] or give rise to a right of action, the existence of which affords a party a right to judicial relief."[5] The inquiry is "whether the same evidence would support both actions or issues" or whether substantially different evidence is required. [6] ""*Res judicata* precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief."[7]

The causes of action herein require substantially different evidence than Petitioner's claim for uninsured motorist benefits. In the prior action, Petitioner's recovery was dependent upon establishing the negligence of the other driver and the nature and extent of her injuries from the collision. This evidence alone would not support any of the causes of action plead in the present case.

West Virginia Courts have consistently confirmed the distinctness of each of the

---

[2] *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 558 n.26, 803 S.E.2d 519, 528 (2017)(quoting, Syllabus Point 4, *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476, 557 S.E.2d 883 (2001).
[33] *Id.*
[4] *Id.*(quoting, *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999
[5] *White v. SWCC*, 164 W. Va. 284, 290, 262 S.E.2d 752, 756 (1980)(citations omitted); See also, *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 560, n. 37(quoting, *White*).
[6] *Id.*(citations omitted).
[7] *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 559(quoting, *Gonzales v. California Dep't of Corr.*, 739 F.3d 1226, 1232 (9th Cir. 2014) (quoting *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 123 Cal. Rptr. 2d 432, 51 P.3d 297, 302 (Cal. 2002).

causes of action at issue. The West Virginia Supreme Court recognized that "In *McCormick*, we expressly distinguished a *Hayseeds*-type claim from a suit brought under the implied right of action created by W. Va. Code § 33-11-4(9), which this Court had previously recognized in *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981)."[8] The Court further explained:

> Whereas under *Hayseeds* it is necessary that a policyholder substantially prevail on an underlying contract action before he may recover enhanced damages, under *Jenkins* there is no requirement that one substantially prevail; it is required that liability and damages be settled previously or in the course of the *Jenkins* litigation. *Jenkins* instead predicates entitlement to relief solely upon violation of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4(9), where such violation arises from a 'general business practice on the part of the insurer.[9]

The distinction made in *McCormick* demonstrates that the required facts are substantially different in proving a *Hayseeds* claim and a *Jenkins* claim. More importantly, Petitioner is not required to prove that she "substantially prevailed" or a violation of the UTPA to recover uninsured motorist benefits.

Furthermore, prior to the decision in *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 157, 451 S.E.2d 721, 723 (1994), a number of West Virginia Supreme Court opinions implied that an action against an insurer for bad-faith and unfair settlement practices may not be joined in the same complaint as the underlying personal injury suit against the insured. [10] *Madden* made it clear that an action against an insurer for bad-faith and unfair settlement practices *may* be joined in the same complaint as the underlying personal injury suit against the insured. The word "may" is permissive language[11] and should not be confused with the term "shall" which is

---

[8] *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W. Va. 476, 483, 557 S.E.2d 883, 890 (2001).
[9] *Id.* (quoting Syl. Pt. 9, *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996.)
[10] See e.g., *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), *Davis v. Robertson*, 175 W.Va. 364, 332 S.E.2d 819 (1985), *Robinson v. Continental Cas. Co.*, 185 W.Va. 244, 406 S.E.2d 470 (1991), or *Russell v. Amerisure Ins. Co.*, 189 W.Va. 594, 433 S.E.2d 532 (1993).
[11] See e.g., *Butler v. Tucker*, 187 W. Va. 145, 149 n. 4, 416 S.E.2d 262, 266 n. 4 1992)("We have customarily held that the word 'may' is permissive and not mandatory. *See, e.g., Weimer–Godwin v. Board of Educ.,* 179 W.Va. 423, 369 S.E.2d 726 (1988); *Mellon–Stuart Co. v. Hall,* 178 W.Va. 291, 359 S.E.2d 124 (1987); *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher,* 174 W.Va. 618, 328 S.E.2d 492 (1985); *Hodge v. Ginsberg,* 172 W.Va. 17, 303 S.E.2d 245 (1983).").

mandatory language.

Additionally supporting the lack of preclusive effect is the separate statute of limitations that apply to the causes of action. Claims involving unfair settlement practices that arise under the Unfair Trade Practices Act, West Virginia Code § 33-11-1 to -10, are governed by the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c).[12] Similarly, the one year statute of limitations contained in W.Va. Code § 55–2–12(c) applies to a common law bad faith claims.[13] The Circuit Court clearly fails to recognize that these two causes of action are independent causes of action from an uninsured motorist claim.

Not only are the causes of action separate and substantially different evidence required to prove them, the underlying justification of *res judicata* that the defendant not be vexed by multiple lawsuits, is not served by its application as joining all the claims will most likely result in bifurcation of the uninsured motorist claim and the bad faith and breach of contact claims.[14]

Finally, Respondent and the Circuit Court attempt to distinguish the holding in *Slider* by relying on the fact that the insurer was only a "notice defendant" pursuant to W. Va. Code § 33-6-31(d). (A.R. 197;204.) In *Slider*, judgment in favor of underinsured motorist carriers on insured's claim for attorney fees and costs and damages for annoyance and inconvenience after prevailing in tort suit was not *res judicata* bar to suit against carriers to recover for bad faith failure to pay, unfair claims settlement practices, and intentional infliction of emotional distress. The evidence required to prevail on the bad faith and intentional tort claims differed substantially from that which was necessary

---

[12] Syllabus Point 1, *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 165, 506 S.E.2d 608, 608 (1998).

[13] *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23, 25 (2009).

[14] *Klettner v. State Farm Mut. Auto. Ins. Co.*, 205 W. Va. 587, 593, 519 S.E.2d 870, 876 (1999)("[O]ur decision in *Madden* to *permit* a statutory bad faith action to be joined in the same proceeding as the underlying tort action made clear that, *when* such claims were joined, bifurcation of the two actions is required to prevent the jury from being wrongfully influenced by the availability of insurance coverage. 192 W.Va. at 160-61, 451 S.E.2d at 726-27"); See also, Syl. Pt. 2, in part, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 28, 506 S.E.2d 64, 65 (1998)(" In a first-party bad faith action against an insurer, bifurcation and stay of the bad faith claim from the underlying action are not mandatory.").

to prevail under the previous claim.

While the insurers in *Slider* were notice defendants, they had "the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name." W. Va. Code § 33-6-31(d). Thus, the insurers were able to be permissively joined as named defendants in the action to protect their rights. Therefore, any reliance on the difference in the status of the insurers is inconsequential.

Res judicata is clearly inapplicable to the present action, which presents distinct and separate causes of action from the previous action seeking underinsured motorist benefits. Therefore, Petitioner respectfully requests that this Court vacate the dismissal and remand this action for further proceedings.

II. The order's reliance on settlement as a bar to Petitioner's claims contradicts *Poling v. Motorists Mut. Ins. Co.*, which confirms that settlement of the underlying case does not extinguish a bad faith claim against an insurer so long as the release does not cover the insurer, and the insurer has actual or constructive notice of such claims at settlement. 192 W.Va. 46, 450 S.E.2d 635 (1994). The Circuit Court improperly dismissed Petitioner's statutory Unfair Trade Practices Act claim, and misapplies *Hayseeds, Inc. v. State Farm Fire Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). The Circuit Court improperly dismissed Petitioner's Unfair Trade Practices Act claim misapplying the requirement of substantial prevailing in an underlying claim and failing to recognize the statutorily distinct cause of action. Statutory bad faith claims under the Unfair Trade Practices Act do not require a Petitioner to have prevailed on their underlying insurance claim.

The Circuit Court erred in concluding that the UTPA claim should be dismissed as the policy limits were paid. (A.R. 202-03.) The West Virginia Supreme Court of Appeals held:

> "A cause of action for insurance bad faith may arise even if there has been a settlement and release of the underlying case against the tortfeasor so long as the release does not cover the insurer and the insurer is, or should be, aware of the possibility of a bad faith action at the time it agrees to the settlement."[15]

In the instant case, there was no release signed by the Petitioner because the Respondent knew that the Petitioner would not accept signing a release as a condition of a settlement.

[15] Syl. Pt. 2, *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 47, 450 S.E.2d 635, 636 (1994)

(A.R. 185). Performing its contractual duty under the policy of insurance does not get the defendant a pat on the back, a gold star or any additional consideration.[16] To the contrary – it is the insurance company's duty to meet its contractual obligations. An insurance company is not entitled to additional consideration in the form of waiver of derivative claims for honoring the terms of an insurance contract.

Furthermore, in distinguishing between *Hayseeds* and the UTPA, the West Virginia Supreme Court of Appeals specifically held:

> [U]nder *Jenkins* there is no requirement that one substantially prevail; it is required that liability and damages be settled previously or in the course of the *Jenkins* litigation. *Jenkins* instead predicates entitlement to relief solely upon violation of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4(9), where such violation arises from a 'general business practice' on the part of the insurer.[17]

The Circuit Court ignored well settled law and misapprehends the nature of a claim under the UTPA. (A.R. 51-52). The statutory framework provides recovery for violations regardless of whether the claim made to the insurer was settled. If the UTPA only applied when no settlement or jury verdict occurred, it would be meaningless. The focus is on the insurer's handling of the claim, not whether the insured, sometimes years later, is compensated for the loss. Therefore, Petitioner respectfully requests that the dismissal of the UTPA claim be reversed and the case be remanded.

---

[16] In *Hatfield v. Liberty Mutual Insurance Company*, 98 F. App'x 789, 794 (10th Cir. 2004), the Tenth Circuit held that it was bad faith for an insurer to withhold payment until a release was signed where the insurer did not dispute that an amount was due under the policy. The Court explained that, "[a] reasonable jury could decide that [the insurance company's] withholding of payment was little more than an effort to take advantage of an insured in need of proceeds rightfully due him, and that there was no 'legitimate dispute,' ... to justify the failure to pay $25,000." *Hatfield*, 98 F. App'x at 794 (quoting *Davis v. Mid-Century Ins. Co.*, 311 F.3d 1250, 1252 (10th Cir. 2002)); see also, *Carpenter v. American Family Mutual Ins. Co.*, No. 13-cv-1986-JLK, 2015 WL 8529775, at **1, 2 (D.Colo. Dec. 11, 2015).

[17] Syl. Pt. 9, in part, *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

III. The Circuit Court erred in dismissing Petitioner's express breach of contract claim, disregarding specific and detailed factual allegations well-pled in the Complaint and permitted under Rule 8(a) of the West Virginia Rules of Civil Procedure. The Complaint sets forth explicit factual allegations evidencing breach of contract, including failures of prompt investigation, good faith negotiation, and proper claims handling. See *4*Reliance is placed on "liberal discovery rules and summary judgment motions" to dispose of claims without merit.[18] "'The overarching purpose of discovery is to clarify and narrow the issues in litigations, so as to efficiently resolve disputes. This purpose makes litigation less of a game of "blindman's bluff" and more of a contest that seeks a fair and adequate resolution of a dispute.'"[19] Furthermore, courts may permit amendment of a complaint to correct any perceived deficiencies.

Despite the directives from the West Virginia Supreme Court of Appeals explaining and reaffirming the liberal pleading standards and available alternatives to the dismissal for failure to state a claim, the reasoning and decision of the Circuit Court in the case *sub judice* is directly contradictory to these pronouncements and to the legal standard applicable to a Rule 12(b)(6) motion.

Petitioner has sufficiently alleged a claim for breach of contract. Count III of the *Complaint* sets forth the claim for breach of contract, incorporating by reference all one-hundred 160 (160) prior factual allegations. (A.R. 60.) While alleging a breach of the implied duty of good faith and fair dealing, Petitioner also alleges that "State Farm has breached the State Farm Policy as follows:

a. failure to conduct a prompt and reasonable investigation;
b. attempting to coerce the plaintiff into accepting an unjust settlement;
c. attempting to take advantage of an insured who was suffering from as traumatic brain injury;
d. unreasonably refusing to acknowledge that State Farm was liable for the full value of Plaintiff's claim for benefits;
e. failing to negotiate in good faith;
f. unreasonably refusing to acknowledge pertinent communications;
g. not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
h. failure to adopt and implement reasonable standards for the prompt

[18] *Id.* (citations omitted).
[19] *State ex rel. Pritt v. Vickers*, 214 W.Va. 221, 226, 588 S.E.2d 210 (2003) (citation omitted).

investigation of claims arising under insurance policies;

i. failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
j. refusing to pay claims without conducting a reasonable investigation based upon all available information;
k. failing to promptly provide a reasonable explanation of the basis in the State Farm Policy in relation to the facts or applicable law for the offer of a compromise settlement;
l. failure to conduct a meaningful investigation of the facts and circumstances of the claim prior to denying coverage;
m. failing to promptly adjust and pay the covered damages and losses sustained by Plaintiff, which damages and losses were covered by the State Farm Policy;
n. failing to deal with plaintiffs in a good faith manner; and/or,
o. other acts and omissions by State Farm.

(A.R. 60-61.)

The Complaint, taken as a whole, states a claim for breach of contract.[20]

The Circuit Court also takes issues with the lack of specific citations to policy provisions. However, "[a]s suggested in, 4A M.J., Contracts § 84 (Matthew Bender & Co. 2007), while a breach of contract may best be alleged in the express words of the contract, the use of such words is not necessary."[21] In essence, the Circuit Court reasons that an implied duty of good faith and fair dealing is not a standalone claim and Petitioner failed to plead a breach of contract claim. (A.R. 200.) The latter conclusion was reached despite the various allegations in the Complaint regarding the existence of the policy and Paragraph 171 of the Complaint. (A.R. 6;9;60;68.) The latter conclusion is also erroneous and requires reversal of the dismissal of the breach of contract claim.

[20] Evidence that an insurance company "failed to promptly remit payment of the claim in violation of the policy language can constitute an express breach of the insurance policy." *Blevins v. Nationwide Gen. Ins. Co.*, No. 2:17-CV-03692, 2017 WL 6626330, at *5 (S.D.W. Va. Dec. 28, 2017)(citing, *Nowlan v. JP Morgan Chase Bank*, N.A., No. 2:11-cv-00404, 2012 WL 1029315, at * 4 (S.D. W. Va. Mar. 26, 2012) (finding that although plaintiff did not assert a breach of contract claim, plaintiff's allegations that defendant failed to properly apply plaintiff's loan payments may constitute an express breach of the deed of trust); see also *Miller v. Fluharty*, 500 S.E.2d 310, 320 (W. Va. 1997) ("Other jurisdictions have ... also concluded that the failure by an insurance carrier to investigate a claim adequately, or to investigate a claim properly within a reasonable time, constitutes a breach of the insurance contract.")).

[21] *Highmark W. Va., Inc. v. Jamie*, 221 W. Va. 487, 492-93, 655 S.E.2d 509, 514-15 (2007)

IV. The Circuit Court misapplied West Virginia law in holding that breach of the implied duty of good faith and fair dealing is not recognized as a separate cause of action in the insurance context. Contrary to the Circuit Court's ruling, West Virginia law recognizes that a common law duty of good faith and fair dealing is implied in insurance contracts, and is actionable where the insured substantially prevails. See *Hayseeds, Inc. v. State Farm Fire Cas. Co*., 177 W. Va. 323, 352 S.E.2d 73 (1986); *Marshall v. Saseen*, 192 W. Va. at 100, 475 S.E.2d at 797; Syl. pt. 6, *Smithson v. U.S. Fidelity & Guar*. Co., 186 W. Va. 195 (1991). The order improperly merges Petitioner's claims, ignoring the distinction between express breach of contract, breach of the implied covenant of good faith and fair dealing, and common law bad faith claims as recognized in West Virginia jurisprudence.

The Court erred in failing to properly apply the law in *Hayseeds* and its progeny and dismissing Petitioner's Complaint. "West Virginia recognizes the right of an insured first-party to bring a bad faith cause of action against his/her insurer under the common law and the West Virginia Unfair Trade Practices Act."[22] The *Hayseeds* Court held that an insured is entitled to reasonable attorney fees, net economic loss, and damages for aggravation and inconvenience when an insurer's delay payment of the insured's claim and the insured substantially prevails in an action against the insurer. The *Marshall* case expressly extended *Hayseeds* to uninsured and underinsured motorist coverage.[23]

In the *Smithton* case, the insured and insurer utilized an extrajudicial appraisal process regarding their dispute of the value of the property that was damaged.[24] "Subsequently, on June 14, 1988, Mr. Smithson sued USF&G, alleging that the insurer acted in bad faith by failing to settle his claim promptly."[25] The insured received a directed verdict on liability "because he had substantially prevailed in the underlying appraisal proceeding."[26]

The Court ultimately concluded that "that a first-party suit based on *Hayseeds* will

---

[22] *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 38, 716 S.E.2d 696, 700 (2011)(CITATIONS OMITTED).

[23] *Syl. Pt. 6Marshall v. Saseen*, 192 W. Va. 94, 96, 450 S.E.2d 791, 793 (1994)("When a policyholder of uninsured or underinsured motorist coverage issued pursuant to W. Va. Code, 33-6-31(b) substantially prevails in a suit involving such coverage under W. Va. Code, 33-6-31(d), the insurer issuing such policy is liable for the amount recovered up to the policy limits, the policyholder's reasonable attorney fees, and damages proven for aggravation and inconvenience.")

[24] *Smithson v. United States Fid. & Guar. Co.*, 186 W. Va. 195, 198, 411 S.E.2d 850, 853 (1991).

[25] *Id.* at 198, 853.

[26] *Id.* at 198-99, 853-854.

not be barred by the settlement of the loss in an appraisal proceeding under the fire insurance policy if the insured substantially prevailed in the appraisal proceeding over the amount of the loss."[27]

Therefore, contrary to the Circuit Court's conclusion, the implied common law duty of good faith and fair dealing exists in insurance contracts and is actionable as a separate claim. Therefore, Petitioner respectfully requests that this Court reverse the dismissal on this basis and remand the case for further proceedings.

CONCLUSION

Wherefore, based upon the foregoing, Petitioner Josephine N. Dutton respectfully requests the *Order Granting the Motion to Dismiss* be reversed in its entirety and the case remanded for further proceedings.

JOSEPHINE N. DUTTON

BY COUNSEL

/s/ George N. Sidiropolis
George N. Sidiropolis, Esq. (# 10391)
THE INJURY RISHTS FIRM, PLLC
1140 Main Street, 4th Floor
Wheeling, WV 26003
Phone: (304) 233-7766
george@flaniganlegal.com

/s/ *Jordan M.* Laird
Jordan M. Laird, Esq. (# 12448)
LAIRD LAW, PLLC
2 22nd Street, Suite 202
Wheeling, WV 26003
Phone: (304) 551-2800
jordan@laird-law.com

Counsel for Josephine N. Dutton

[27] *Id.* at 203, 858; See also, *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 38, 716 S.E.2d 696, 700 (2011)(quoting, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 369, 508 S.E.2d 75, 86 (1998))(further citations omitted)(" '[A] first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim . . . filed by the insured.'")

NO. 25-ICA-418

IN THE WEST VIRGINIA
INTERMEDIATE
COURT OF APPEALS

JOSEPHINE N. DUTTON,

Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANC COMPANY,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 2025, a true and correct copy of the foregoing Appellant's Brief and Appendix was served upon all counsel of record by electronic service through File & Serve Express, which provides electronic notice and access to the filed documents to registered participants.

Service was made upon the following:

Jill Cranston Rice, Esq.
Alex M. Greenberg, Esq.
Lauren E. Motes, Esq.
DINSMORE & SHOHL LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501
Phone: (304) 296-1100
Facsimile: (304) 296-6116
jill.rice@dinsmore.com
alex.greenberg@dinsmore.com
lauren.motes@dinsmore.com

Counsel for Respondent
State Farm Mutual Automobile Company

I further certify that File & Serve Express is the court-approved electronic filing and service system and that service through this system constitutes valid service under the Rules of Appellate Procedure of West Virginia.

Respectfully submitted,
Counsel for Petitioner:

/s/ *George N. Sidiropolis*
George N. Sidiropolis, Esq. (# 10391)
THE INJURY RISHTS FIRM, PLLC
1140 Main Street, 4th Floor
Wheeling, WV 26003
Phone: (304) 233-7766
george@flaniganlegal.com

/s/ *Jordan M.* Laird
Jordan M. Laird, Esq. (# 12448)
LAIRD LAW, PLLC
2 22nd Street, Suite 202
Wheeling, WV 26003
Phone: (304) 551-2800
jordan@laird-law.com

Counsel for Petitioner
Josephine N. Dutton