No. 25-ICA-418

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

JOSEPHINE N. DUTTON,

***Plaintiff Below, Petitioner*,**

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

***Defendant Below, Respondent*.**

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 25-C-12

RESPONDENT'S BRIEF

Jill Cranston Rice (W. Va. State Bar No. 7421)
Alex M. Greenberg (W. Va. State Bar No. 12061)
Lauren E. Motes (W. Va. State Bar No. 14053)
215 Don Knotts Blvd., Suite 310
Morgantown, West Virginia 26501
Telephone: (304) 225-1449
Facsimile: (304) 296-6116
jill.rice@dinsmore.com
alex.greenberg@dinsmore.com
lauren.motes@dinsmore.com

COUNSEL FOR RESPONDENT
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. STATEMENT OF THE CASE 1

A. The First Suit – The Marshall County Complaint 1

B. The Second Suit – The Ohio County Bad Faith Complaint 3

II. SUMMARY OF ARGUMENT 4

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

IV. STANDARD OF REVIEW 6

V. ARGUMENT 6

A. The Circuit Court properly applied res judicata to bar the entirety of the Complaint. 7

B. The second assignment of error does not preclude the application of res judicata or justify reversing the Circuit Court's dismissal of Petitioner's statutory bad faith claim. 11

1. *Poling* is not determinative here, and the Circuit Court correctly dismissed the statutory bad faith claim. 11

2. Good faith value disputes do not constitute statutory bad faith. 13

C Dismissal of the breach of contract claim was proper and supported by well-established contract principles. 16

D. Breach of the implied duty of good faith and fair dealing, also known as common law bad faith, is not a standalone claim. 17

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Aetna Casualty & Surety Co. v. Pitrolo, 176 W. Va. 190, 342 S.E2d 156 (1986) 18
Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 498 S.E.2d 41 (1997)........................ 7
Brown v. City of Montgomery, 233 W. Va. 119, 755 S.E.2d 653 (2014). 13
Burcham v. City of Mullens, 139 W. Va. 399, 83 S.E.2d 505 (1954).. 13
Califoux v. W. Va. Dep't of Health & Human Res., 250 W. Va. 617, 906 S.E.2d 270 (2023)....... 7
Clendenin v. Wells Fargo Bank, N.A., No. 2:09-cv-00557, 2009 U.S. Dist. LEXIS 109952, 2009 WL 4263506 (S.D. W. Va. Nov. 24, 2009). 6, 17, 19
Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 239 W. Va. 549, 803 S.E.2d 519 (2017)... 7, 8, 12
Davis v. State Farm Fire & Cas. Co., No. 12-0985, 2013 W.Va. LEXIS 769, 2013 WL 3184734 (June 24, 2013).. 6, 18
Elmore v. State Farm Mut. Auto. Ins. Co., 202 W. Va. 430, 504 S.E.2d 893 (1998).................. 19
Family Med. Imaging, LLC v. W. Va. Healthcare Auth., 218 W. Va. 146, 624 S.E.2d 493 (2005).. 13
Hayseeds Inc. v. State Farm Fire Cas. Co., 177 W. Va. 323, 352 S.E.2d 73 (1986)....... 17, 18, 19
Kentucky Fried Chicken of Morgantown v. Sellaro, 158 W. Va. 708, 214 S.E.2d 823 (1975).. 19
Knisely v. Nat'l Better Living Ass'n, Inc., No. 3:14-cv-15, 2014 U.S. Dist. LEXIS 114964 (N.D. W. Va. Aug. 19, 2014) 16
Kohler v. State Farm Mut. Ins. Co., No. 5:20-CV-51, 2020 U.S. Dist. LEXIS 224605 (N.D. W. Va. Apr. 2, 2020)... 17, 19
Lloyd's, Inc. v. Lloyd, 225 W. Va. 377, 693 S.E.2d 451 (2010)... 9
Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W. Va. 34, 716 S.E.2d 696 (2011)..................... 19, 20
Marshall v. Saseen, 192 W. Va. 94, 450 S.E.2d 791 (1994). 19, 20
Mueller v. Shepherd Univ. Bd. of Governors, No. 11-0567, 2012 W. Va. LEXIS 95 (Nov. 30, 2012). 12
Nance v. Huntington W. Va. Housing Auth., No. 16-0855, 2017 W. Va. LEXIS 345, 2017 WL 2210152 (2017)... 16
Poling v. Motorists Mut. Ins. Co., 192 W. Va. 46, 450 S.E.2d 635 (1994)................. 5, 11, 12, 13
Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766 (1990) 20
Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 557 S.E.2d 883 (2001) 8
Smithton v. United States Fid. & Guar. Co., 186 W. Va. 195, 411 S.E.2d 850 (1991) 19
State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W. Va. 770, 461 S.E.2d 516 (1995).. 6
Wolford v. Mt. Top Hunting Club, Inc., No. 14-0963, 2015 W. Va. LEXIS 1136 (Nov. 20, 2015).. 16
Yoak v. Marshall Univ. Bd. of Governors, 223 W. Va. 55, 672 S.E.2d 191 (2008)..................... 14

Statutes

W. Va. Code § 33-11-4 16
W. Va. Code § 33-11-4a 9, 11, 14

Other Authorities

46 Am. Jur.2d, *Judgments* §454 (2d ed. 2023) 7

Rules

W. Va. R. Civ. P. 12(b)(6) 1, 4, 14, 17
W. Va. R. App. P. 18(a)(1)-(4). 6
W. Va. R. of Prof. Cond 2.1 15
W. Va. R. of Prof. Cond. 1.7 15

Regulations

W. Va. Code R. § 114-14-6.1. 14

I. STATEMENT OF THE CASE

This appeal relates to the Circuit Court's correct application of the doctrine of res judicata and dismissal of Plaintiff's Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Because res judicata is a primary issue in this appeal, a full account of the case's factual and procedural history is central for the Court's analysis.

This appeal stems from Petitioner's uninsured motorist claim ("UM claim") arising from a November 1, 2019 automobile collision. App. R. at 23-25, ¶¶ 65-73. Petitioner Josephine Dutton ("Petitioner") immediately hired an attorney to assist with her UM claim, and her attorney reached out to State Farm Mutual Automobile Insurance Company ("State Farm") less than two weeks after the collision, on November 13, 2019. *See* App. R. at 25, ¶ 72. State Farm immediately accepted Petitioner's claim; it never denied coverage. *Id.* at ¶ 73. On or around May 15, 2020, Petitioner's attorney provided State Farm with various medical records and bills related to Petitioner's treatment. *Id.* at ¶ 74. The medical summary provided at that time, and referenced in the Complaint, set forth less than $5,000.00 in medical bills. In response to the medical information and bills provided, State Farm offered Petitioner $6,706 for her UM claim on May 29, 2020, and later that day, increased the offer to $7,500. *See, e.g.*, App. R. at 81. The dispute over the value of Petitioner's claim forms the basis of Petitioner's Complaint in this case. Importantly, it also formed the basis of Petitioner's prior lawsuit against State Farm.

A. The First Suit – The Marshall County Complaint

On November 1, 2021, Petitioner filed her first lawsuit relating to this loss. App. R. at 25, ¶ 76; *see also Dutton v. State Farm Mutual Automobile Insurance Co. et al.*, Civil Action No. 21-C-94, in the Circuit Court of Marshall County, West Virginia. App. R. at 83, 90. As stated by Petitioner, the Marshall County Complaint was filed because Petitioner alleged that "State Farm refused to provide reasonable compensation to Ms. Dutton as [a] result of the crash and forced plaintiff to file suit in order to vindicate her rights under the policy." App. R. at 25, ¶ 75. The Marshall County Complaint sought "compensatory and punitive damages" from State Farm as a result of Petitioner's injuries from the collision. App. R. at 87. State Farm Mutual Automobile Insurance Company—the Defendant in that case and the Defendant/Respondent in this case—was a named defendant in the action, and the prayer for relief demanded judgment against "Defendants State Farm and Chelsea Keyser," the at-fault uninsured driver.[1] App. R. at 87.

During the course of the Marshall County litigation, counsel for Petitioner and State Farm[2] exchanged several letters, a few of which are quoted by Petitioner's counsel in the subsequent Complaint underlying this appeal. *See, e.g.*, App R. at 25-30, ¶¶ 77, 79. A few details, however, are omitted from the instant Complaint, including that Petitioner's counsel told the Marshall County Court during a status conference on April 5, 2024, that he intended to amend the first Marshall County Complaint to include bad faith allegations against State Farm. Ultimately, Petitioner failed to amend the Marshall County Complaint, and the parties agreed to resolve Petitioner's UM claim for policy limits of $25,000. *See* App. R. at 44, ¶ 108; *see also* App. R. at 95.

The Dismissal Order from the Marshall County action specifically stated that "all of the claims, demands and causes of action alleged and referred to in the Complaint filed in [the Marshall County] action have been settled." App. R. at 95. The parties moved the Circuit Court of Marshall County to dismiss the action with prejudice, and Petitioner's case against State Farm—a named defendant—was dismissed, with prejudice, on December 4, 2024. App. R. at 95.

---

[1] State Farm was not merely a notice defendant pursuant to the provisions of West Virginia Code § 33-6-31(d). Rather, State Farm was a named defendant. State Farm proceeded to participate in the litigation as such.

[2] State Farm was represented by different counsel in the Marshall County action.

B. The Second Suit – The Ohio County Bad Faith Complaint

The following month, in January 2025, Petitioner filed the Complaint at issue in this appeal in the Circuit Court of Ohio County. The Complaint re-stated the same conduct of the at-fault driver (App. R. at 23-25, ¶¶ 66-71) and added paragraphs of general, overarching assertions and allegations about State Farm's decades-old policies and programs, purported industry standards, and professed claim handling obligations (App. R. at 7-23, ¶¶ 10-63.). It also provided a one-sided recitation of the legal tactics used during the prior Marshall County litigation. *See* App. R. at 36-44, ¶ 92-93, 96-101, 103, 105-107.[3]

Despite these lengthy and unnecessary paragraphs, there is no dispute that Petitioner's UM claim was fully paid with the total amount of policy limits that were available to her. *See* App. R. at 44, ¶ 108. The Ohio County Complaint merely marked Petitioner's attempt to get a second bite at the apple and recover additional amounts from State Farm on top of the policy limits that were already paid to her.

The Complaint on appeal asserted three claims against State Farm: Count I for "Common Law Claim Misconduct" or common law bad faith, Count II for violations of the "Unfair Claims Settlement Practice Act" or Unfair Trade Practices Act ("UTPA"), also known as statutory bad faith, and Count III for Breach of Contract. *See* App. R. at 46-62, ¶¶ 119-138; 139-161; and 162-173. State Farm moved to dismiss the Complaint pursuant to Rules 8(c) and 12(b)(6) of the West Virginia Rules of Civil Procedure because Petitioner's claims are barred by the doctrine of res judicata and, alternatively, the Complaint failed to properly plead common law bad faith, statutory bad faith, and breach of contract. App. R. at 66-96.

---

[3] For example, this Complaint claims State Farm's prior counsel's option of utilizing an independent medical examination as permitted by West Virginia Rule of Civil Procedure 35 was "abuse." App. R. at 42, ¶ 104. However, Petitioner's counsel actually set up an initial IME in early 2024 to which Petitioner did not attend. App. R. at 39-40, ¶ 100. This demonstrates the misrepresentations present in the Complaint.

The parties fully briefed the motion, and the Circuit Court granted the motion on both grounds, dismissing the case in its entirety on September 23, 2025. App. R. at 190-205.

II. SUMMARY OF ARGUMENT

The Circuit Court correctly determined Petitioner's Complaint was barred by the doctrine of res judicata. The Circuit Court analyzed the Marshall County Complaint and the Ohio County Complaint and concluded they were sufficiently similar under the same evidence test to justify dismissing the case in its entirety, with prejudice. The Circuit Court also evaluated the Ohio County Complaint under alternative grounds for dismissal under Rule 12(b)(6) and determined the Complaint falls short of alleging legally cognizable claims.

Petitioner's Brief disputes both grounds for dismissal. Assignment of Error No. 1 and the first part of Assignment of Error No. 2 appear to dispute the Circuit Court's dismissal based on res judicata, and the remainder of the Assignments of Error relate to dismissal under Rule 12(b)(6). Therefore, if this Court upholds the Circuit Court's dismissal based on res judicata, the Court need only address Assignment of Error No. 1 and the relevant portion of Assignment of Error No. 2 because the remainder become moot. Nonetheless, this Respondent's Brief addresses each of Petitioner's Assignments of Error.

Assignment of Error No. 1: The crux of the parties' dispute over the first assignment of error is the Circuit Court's application of the same evidence test as it relates to the third element of the doctrine of res judicata. Despite assertions by Petitioner to the contrary, the Circuit Court did, in fact, apply the same evidence test—not the same transaction test.[4] Nowhere in this section of Petitioner's Brief does Petitioner discuss, evaluate, or apply the actual facts of her case to the

[4] Petitioner states the Circuit Court ignored the same evidence test and applied a same transaction test in evaluating the application of res judicata. Pet. Br. at 7. This is incorrect. The Circuit Court acknowledged the controlling nature of the same evidence test and applied it to support the application of res judicata. App. R. at 171, ¶¶ 14-19.

same evidence test. Tellingly, the facts supporting both the Marshall County suit and the Ohio County suit largely consist of Petitioner's injuries and damages and are the same in both complaints. As a result, the Circuit Court correctly determined the Complaint is barred by the doctrine of res judicata.

Assignment of Error No. 2:[5] Petitioner argues *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 450 S.E.2d 635 (1994) is determinative, but it is not. Although Petitioner argues *Poling* precludes the application of res judicata in any insurance bad faith case, this is not supported by *Poling* or the body of res judicata law in this state. Indeed, Petitioner seeks to extend *Poling*, but that would be improper. The Circuit Court adequately considered *Poling* and Petitioner's arguments and correctly dismissed the case.

Further, Petitioner's Second Assignment of Error switches from appearing to argue *Poling* precludes the first basis of dismissal, res judicata, to then arguing the alternative basis for dismissing the statutory bad faith claim was improper. It was not; the Court reviewed the allegations in the Complaint and determined the conclusory allegations that State Farm violated the Unfair Trade Practices Act were unsupported by sufficient facts, particularly in light of the fact that State Farm tendered policy limits. Again, the Circuit Court correctly dismissed Count II on the alternative basis that the Petitioner failed to adequately state a claim for statutory bad faith.

Assignment of Error No. 3: The law is clear. The elements of a breach of contract claim include a breach of the term of the contract, but petitioner fails to allege any breach of the terms of the insurance policy. State Farm paid Petitioner full policy limits, thereby meeting its obligations under the policy. Once the terms of the contract of insurance are met, there can be no

---

[5] Because the Circuit Court dismissed the action on two distinct and alternative grounds, the second part of Assignment of Error No. 2 and Assignments of Error Nos. 3-4 should only be considered by this Court ***if*** this Court determines the Circuit Court erroneously applied the doctrine of res judicata to bar the underlying action.

breach of contract claim. *See Davis v. State Farm Fire & Cas. Co.*, No. 12-0985, 2013 W.Va. LEXIS 769, 2013 WL 3184734, at *16-17 (June 24, 2013).

Assignment of Error No. 4: Even in the insurance context, breach of the implied duty of good faith and fair dealing is not a standalone claim under West Virginia law. *Clendenin v. Wells Fargo Bank, N.A.*, No. 2:09-cv-00557, 2009 U.S. Dist. LEXIS 109952, 2009 WL 4263506, at *5 (S.D. W. Va. Nov. 24, 2009). At some point, a breach of the insurance policy must precede a claim for breach of the implied duty of good faith and fair dealing. The Circuit Court correctly determined because Petitioner's breach of contract claim failed, Petitioner's breach of the implied duty of good faith and fair dealing claim, or common law bad faith claim, also fails.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument will not aid this Court's decision in this matter. The dispositive issues have been authoritatively decided by the trial court, and the facts and legal arguments are adequately presented in the briefs and record on appeal. *See* W. Va. R. App. P. 18(a)(1)-(4).

IV. STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

V. ARGUMENT

Petitioner treats the Circuit Court's opinion as flexible, mischaracterizing the legal standards applied and the basis for the Order. Indeed, Petitioner spends little time discussing, quoting, or analyzing the Circuit Court's Order and instead improperly draws summary conclusions based on general law without application to specific facts. Conversely, Respondent's Brief does not avoid the facts but addresses them head on.

A. The Circuit Court properly applied res judicata to bar the entirety of the Complaint.

As Petitioner agrees, the purpose of res judicata is to "preclude[] piecemeal litigation by splitting a single cause of action or re-litigation of the same cause of action on a different legal theory or for different relief." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 559, 803 S.E.2d 519, 529 (2017). Res judicata "prohibits **not only** the re-litigation of claims that were actually asserted in the prior action, **but also** precludes '**every other matter which the parties might have litigated as incident thereto**[.]'" *Dan Ryan Builders, Inc.* at 560 (quoting *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (1997) (other citations omitted)) (emphasis added).

Indeed, res judicata "pertains more broadly to 'claim' preclusion and bars re-litigation of claims that were either actually litigated **or *could have been* litigated in other proceedings**." *Califoux v. W. Va. Dep't of Health & Human Res.*, 250 W. Va. 617, 628, 906 S.E.2d 270, 281 (2023) ("[R]es judicata or claim preclusion bars the litigation of not only issues that were actually litigated, but **also issues that could have been litigated, might have been litigated, or should have been litigated in the original suit or former proceedings**. In this respect, res judicata, or claim preclusion, is a broader remedy than collateral estoppel which applies only to issues that were actually litigated.") (citing 46 Am. Jur.2d, *Judgments* §454 (2d ed. 2023) and citing other cases) (emphasis added).

Petitioner's Brief advocates for permission to relitigate the same facts based on a different legal theory, or claim, and different relief. This position is not supported by the body of res judicata case law in West Virginia. The Supreme Court of Appeals of West Virginia has established three elements that, if satisfied, will bar a lawsuit on the basis of res judicata:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve

> either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it would have been resolved, had it been presented, in the prior action.

Dan Ryan Builders, Inc., at Syl. Pt. 2.

Petitioner does not dispute that the first and second elements of this test are satisfied. With respect to the third element, the Supreme Court of Appeals of West Virginia has adopted the "same-evidence" approach in evaluating the third factor:

> For purposes of res judicata, "a cause of action" is the **fact or facts** which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. . . . The test to determine if the issue or cause of action involved in the two suits is identical is to inquire **whether the same evidence would support both actions or issues**. . . . If the two cases require **substantially** different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata.

Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 480, 557 S.E.2d 883, 888 (2001) (emphasis added).[6] Notably, the test is whether the two cases require ***substantially different evidence***. This is much different than only applying res judicata when the ***exact same*** evidence can support both suits.

The same evidence test, naturally, is a fact intensive inquiry. Yet, Petitioner's Brief cites no facts in support of its first assignment of error. Petitioner essentially advocates for the application of a "same claim" test; Petitioner argues because breach of contract, common law bad faith, and statutory bad faith are all separate claims, they necessarily all require different evidence.[7]

---

[6] This case is factually distinct from *Slider*. Here, State Farm was a named defendant in the Marshall County Complaint; whereas it appears the *Slider* UM and UIM insurers were only notice defendants. Further, State Farm was the only insurer defendant involved in the Marshall County Complaint. In *Slider*, there were tortfeasors, insurers, underinsureds, and uninsureds involved. Additionally and significantly, Petitioner's counsel here threatened to amend the Marshall County Complaint to include bad faith allegations. By making such threats, Petitioner was well aware the bad faith causes of action should have been brought in Petitioner's first lawsuit or not at all.

[7] Petitioner, in a conclusory fashion, asserts, "[t]he causes of action herein require substantially different evidence than Petitioner's claim for uninsured motorist benefits." Pet. Br. at 10.

This is not the approach West Virginia courts follow. Ultimately, State Farm does not disagree with Petitioner that breach of contract, common law bad faith, and statutory bad faith are all separate claims. State Farm, however, does disagree with Petitioner about the application of the same evidence test to these specific claims in this specific case based on the specific facts at issue. Here, Petitioner is required to present the same evidence in support of the bad faith action as was discovered and at issue in the first Marshall County case. This is because both cases presented a good faith value dispute.[8]

More specifically, the Marshall County Complaint and the current Complaint arise from the exact same set of facts—the November 1, 2019 collision. The Ohio County Complaint even duplicates its recitation of the same facts of loss and conduct of the at-fault driver that were cited in the Marshall County Complaint. *See* App. R. at 23-25, ¶¶ 65-71; App. R. 84, ¶¶ 7-14. Both complaints also allege State Farm owed Petitioner money as a result of the collision. *See* App. R. at 87; *see also, e.g.*, App. R. at 24-25, ¶ 71. Both lawsuits involve the same parties: Petitioner and State Farm.[9] Both lawsuits involve the same legal theory: that State Farm undervalued Petitioner's UM claim. *See* App. R. at 22, ¶¶ 75; *see also* App. R. at 49, ¶ 135. Because the suits involve the same legal theories, the same facts are required to be proven to establish liability. The Marshall County Complaint cites Petitioner's bills for her hospital and medical care (*E.g.*, App. R. at 86, ¶ 16)—these were required to prove the damages portion of Petitioner's negligence claim; the Ohio

---

[8] "A good faith disagreement over the value of an action or claim or the liability of any party to any action or claim is not an unfair claims settlement practice." W. Va. Code § 33-11-4a(g); *see also infra* Section II.B.

[9] The initial case, filed in Marshall County, sought damages against State Farm Mutual Automobile Insurance Company—the same defendant as in this case—and the prayer for relief demanded judgment against "Defendants State Farm and Chelsea Keyser," the at-fault uninsured driver. The inclusion of Chelsea Keyser is inconsequential to the res judicata analysis. *See generally Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 385, 693 S.E.2d 451, 459 (2010) (determining additional parties in a subsequent action did not preclude the application of res judicata).

County Complaint relies on the same damages evidence and medical bills to support Petitioner's theory that State Farm undervalued her claim (App. R. at 25, ¶ 74-75). Without this same evidence, the Ohio County Complaint fails.

Naturally, both lawsuits then rely on the same alleged evidence: that Petitioner had a valid UM claim arising out of the November 1, 2019 collision, and State Farm offered an initial amount that was lower than the settlement of policy limits ultimately accepted by Petitioner. The only additional evidence Petitioner now relies on is evidence developed *after* the prior lawsuit was filed on November 1, 2021. Specifically, in the present case, the only new evidence cited is correspondence between the parties' counsel created after the filing of the first Marshall County Complaint. Of course, this is insufficient to overcome res judicata because the correspondence still reflects Petitioner's effort to recover damages arising from the November 2019 collision – the same evidence Plaintiff relies on to support her claims in this case. *See, e.g.*, App. R. at 25-30, ¶¶ 77-82.

The application of res judicata is particularly appropriate here because Petitioner has acknowledged her goal in bringing both suits is the same: to recover damages against State Farm arising out of Petitioner's UM claim. *See* App. R. at 25, ¶ 75; *id.* at 45, ¶ 114. Indeed, the Ohio County Complaint explicitly stated the Marshall County Complaint was filed **because "State Farm refused to provide reasonable compensation to Ms. Dutton** as [a] result of the crash and forced plaintiff to file suit in order to vindicate her rights under the policy." App. R. at 25, ¶ 75 (emphasis added). This is precisely the same reason Petitioner has filed the second lawsuit. The Ohio County Complaint alleged, *inter alia*, "**State Farm wrongfully and repeatedly denied and/or delayed the plaintiff's requests for claim payment as compensation** for her serious injuries, damages and losses." App. R at 45, ¶ 114 (emphasis added).

To be clear, the Circuit Court **did <u>not</u>** determine res judicata always applies to bar a subsequent bad faith suit against an insurer when a prior suit was brought against a tortfeasor—and State Farm is not advocating that position here nor was State Farm advocating that before the Circuit Court. Rather, the Circuit Court found "the application of res judicata appropriate in this **narrow and specific instance** where State Farm was more than a mere notice defendant in the prior action." App. R. at 174, ¶ 22 (emphasis added). This is important because the prior lawsuit at issue was not merely one in which State Farm was a notice defendant, [10] and the crux of both cases is a value dispute.

Accordingly, this Court should affirm the Circuit Court's dismissal of this second lawsuit on the basis the Circuit Court properly applied the doctrine of res judicata to the specific facts presented by this case. As a result, the remainder of the assignments of error, which relate to the Circuit Court's separate and alternative basis for dismissal, are moot.

B. The second assignment of error does not preclude the application of res judicata or justify reversing the Circuit Court's dismissal of Petitioner's statutory bad faith claim.

Though it is unclear, Petitioner's second assignment of error appears to raise two distinct issues. The first issue is whether the *Poling* case precludes the application of res judicata. It does not. The second issue encompassed within this assignment of error is the Circuit Court's alternative dismissal of Petitioner's statutory bad faith claim. The Complaint falls short of providing factual support for its statutory bad faith claim, particularly considering W. Va. Code § 33-11-4a(g).

1. *Poling* is not determinative here, and the Circuit Court correctly dismissed the statutory bad faith claim.

[10] Petitioner's Brief does not dispute State Farm was more than a notice defendant in the prior litigation. The Marshall County Complaint sought "compensatory and punitive damages" against the tortfeasor and State Farm as a result of Petitioner's injuries from the collision. App. R. at 87.

Poling does not preclude the application of res judicata to this particular case. The first element of the res judicata analysis is whether there has been a final adjudication on the merits in the prior action. *Dan Ryan Builders, Inc.*, at Syl. Pt. 2. For purposes of the **first element**, dismissal based on a settlement between the parties is a final decision on the merits. *See Mueller v. Shepherd Univ. Bd. of Governors*, No. 11-0567, 2012 W. Va. LEXIS 956, at *1-2, 7 (Nov. 30, 2012). Here, there was a settlement and a final decision on the merits. *See* App. R. at 95. This is the context in which the Circuit Court considered the settlement of the Marshall County action. The Circuit Court did **not** find the settlement relating to the Marshall County suit, on its own, prohibited the Ohio County suit—which is what the insurer in *Poling* argued. Rather, the Court applied res judicata, which included considering the final adjudication of the prior proceeding.

Further, *Poling* does not apply to make the Circuit Court's application of res judicata improper; *Poling* is distinguishable for two additional reasons. First, and most importantly, the *Poling* Court did not evaluate the elements of res judicata, perhaps because it does not appear it was raised by the insurer in *Poling*. Second, *Poling* involved a prior lawsuit against the insured only and not the insurer. In this case, Petitioner previously litigated and filed the lawsuit against State Farm and has filed the instant lawsuit against State Farm again, as outlined above. As such, unlike *Poling*, the current case presents the re-litigation of the same case between the same parties and res judicata applies. Therefore, the *Poling* decision does not control the application of res judicata here.

Additionally, the bad faith landscape in West Virginia has changed since *Poling* was decided in 1994. Specifically, the injured party in *Poling* was a third party to the insurance contract, and third-party bad faith actions were abolished in West Virginia in 2005. Here, Petitioner was a first-party insured of State Farm; further, it was reasonable for State Farm to believe the entire matter was resolved because State Farm paid Petitioner the full amount of UM benefits available under the policy.[11] Ultimately, Petitioner dismissed the initial lawsuit, with prejudice, against State Farm—even if State Farm was not expressly released in the settlement agreement. *Poling* does not give Petitioner permission to ignore the doctrine of res judicata and the Circuit Court's application of the same.

2. Good faith value disputes do not constitute statutory bad faith.

This Court should only reach the second portion of the second assignment of error if it concludes res judicata does not bar the Complaint. In evaluating this second part, it is important to look to the Circuit Court's Order. The Order dismissed all claims, in the alternative, for failure to state a claim under Rule 12(b)(6). App. R. at 200-203. The Court acknowledged the statutory bad faith claim was a separate claim from the breach of contract and common law bad faith claims. App. R. at 202-203, ¶ 32-33.[12] This cause of action relies entirely on allegations that State Farm failed to reasonably investigate Petitioner's claim, failed to negotiate in good faith, and purportedly refused to acknowledge State Farm was liable for the full value of Petitioner's claim for benefits. App. R. at 51-53, ¶¶ 146, 148.[13] As the Circuit Court confirmed, however, Petitioner's claim fails

[11] In *Poling*, the injured party specifically refused to provide a release to the insurer, thereby putting the insurer on notice that the injured party may file a bad faith action against the insurer. That is not the case here: State Farm did not request that Petitioner execute a release, and State Farm was aware Petitioner intended to amend her first complaint to include UTPA allegations, but the parties reached resolution of the prior action and it was dismissed with prejudice.

[12] To the extent the Circuit Court included introductory language that predicates the dismissal of the statutory bad faith claim on the dismissal of the breach of contract claim, such introductory language would be a harmless error. The Court's decision outlined in Paragraphs 32 and 33 of its Order separately considered the statutory bad faith claim apart from the breach of contract claim. *See Family Med. Imaging, LLC v. W. Va. Healthcare Auth.*, 218 W. Va. 146, 624 S.E.2d 493, n.15 (2005) (citing *Burcham v. City of Mullens*, 139 W. Va. 399, 416, 83 S.E.2d 505, 515 (1954) ("This Court will not . . . on appeal reverse the judgment or decree of a trial court for error which is merely harmless.")).

[13] Although a plaintiff's factual allegations must be accepted as true on a motion to dismiss, the court need not accept a plaintiff's "legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations." *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014).

because the Complaint also acknowledged State Farm "agreed to tender its available policy limits" to Petitioner after State Farm's counsel investigated the merits of her UM claim, and the parties ultimately dismissed the Marshall County lawsuit, with prejudice. App. R. at 44, ¶ 108. After all, the purpose of a motion to dismiss under Rule 12(b)(6) is to "test the formal sufficiency of the complaint" and "weed out unfounded suits." *Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008).

As the Circuit Court acknowledged, State Farm is entitled to investigate the merits of Petitioner's claim[14] and, after doing so, State Farm tendered the total amount of policy limits available to her, which resulted in a settlement and Petitioner dismissing her claim against State Farm, with prejudice, in the Marshall County action. Petitioner's attempts to re-litigate the same issues here have no merit. Count II was properly dismissed.

Taking the Complaint as a whole, the crux of Petitioner's Complaint against State Farm is a good faith value dispute. *See* App. R. at 4-64. Good faith value disputes do not sufficiently present a claim for statutory bad faith. In 2005, the Legislature substantially restructured third-party "bad faith" litigation by channeling such complaints to the Insurance Commissioner and eliminating private causes of action by third-party claimants. *See* W. Va. Code § 33-11-4a. The restructured legislation specifically states, "**[a] good faith disagreement over the value of an action or claim or the liability of any party to any action or claim is not an unfair claims settlement practice.**" W. Va. Code § 33-11-4a(g) (emphasis added). The legislature recognized Courts are ill-suited to police negotiation ranges in individual cases; the Legislature intentionally

[14] Not only is State Farm entitled to investigate the merits of Petitioner's claim, but regulations promulgated by the West Virginia Offices of the Insurance Commissioner require an insurer to "promptly conduct and diligently pursue a thorough, fair and objective investigation." W. Va. Code R. § 114-14-6.1.

removed that task from private litigation to avoid inconsistent, case-by-case valuation policing. Dismissal of Count II enforces that boundary.

Petitioner's Brief takes issue with State Farm initially offering an amount lower than policy limits to resolve Petitioner's UM claim. Pet. Br. at 5 ("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 the claim as if it were a third party claim.").[15] Taking this argument to its logical conclusion, Petitioner advocates that any time a first-party insured makes any claim for policy limits, that claim must immediately be paid by the insurance carrier. This turns every disputed claim into litigation, which is unreasonable and not supported by West Virginia law.

Further, and in this instance, Petitioner is disputing an insurer's handling of a claim while it was in active litigation. Petitioner's Brief specifically cites State Farm's defense counsel's choice to schedule an independent medical examination and his specific questions asked of Petitioner in her deposition. Pet. Br. at 5-6. West Virginia law regulates the conduct of insurers but, ethically, a lawyer must exercise independent judgment. *See* W. Va. R. of Prof. Cond. 1.7, Cmt. 1 ("[I]ndependent judgment [is an] essential element in the lawyer's relationship to a client."); *see also* W. Va. R. of Prof. Cond 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."). It is inappropriate for Petitioner to attempt to support her statutory bad faith claim on appeal by citing the independent actions of State Farm's defense counsel in the underlying suit.

This Court should not permit claims for statutory bad faith such as Petitioner's to continue forward; the Circuit Court correctly dismissed Count II of the Complaint.

---

[15] Before the conclusion of the prior action, State Farm offered—and Petitioner accepted—full policy limits in the amount of $25,000. App. R. at 44, ¶ 108.

C Dismissal of the breach of contract claim was proper and supported by well-established contract principles.

Petitioner, through the third assignment of error, claims she sufficiently alleged a claim for breach of contract and asserts the Circuit Court should not have dismissed this claim. Pet. Br. at 15-16. Petitioner's argument is simple but misplaced. Petitioner supports her breach of contract claim by pointing to various standards established by the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4. *See* Pet. Br. at 15 (listing, for example, State Farm's alleged "failure to conduct a prompt and reasonable investigation" to revive the breach of contract claim).

Petitioner is using the grounds for her statutory bad faith claim to attempt to support her breach of contract claim. However, the law in West Virginia is clear. To properly state a claim for breach of contract, Petitioner was required to allege State Farm breached a term of her Policy. *See Knisely v. Nat'l Better Living Ass'n, Inc.*, No. 3:14-cv-15, 2014 U.S. Dist. LEXIS 114964, at *15 (N.D. W. Va. Aug. 19, 2014) (citing a compilation of cases and dismissing the breach of contract claim where the plaintiff had "not sufficiently alleged which policy provisions were breached and the nature of the claim"); *see also Wolford v. Mt. Top Hunting Club, Inc.*, No. 14-0963, 2015 W. Va. LEXIS 1136, at *8 (Nov. 20, 2015) ("Upon review of the complaint, it is clear that petitioners do not allege that their expulsion from the Club was the result of a violation of any of the Club's by-laws, rules and regulations. As such, there can be no breach of contract.").

"In West Virginia, the elements of breach of contract are (1) a contract exists between the parties; (2) **a defendant failed to comply with a term of the contract**; and (3) damage arose from the breach." *Nance v. Huntington W. Va. Housing Auth.*, No. 16-0855, 2017 W. Va. LEXIS 345, 2017 WL 2210152, at *13 (2017) (emphasis added) (other citation omitted) (affirming dismissal of plaintiff's breach of contract claim). Here, the Complaint failed to allege the second element—that State Farm failed to comply with a term of the insurance policy. Further, this second element cannot reasonably be implied from the entirety of the Complaint. There are no allegations in the Complaint, or supporting facts or citations in Petitioner's Brief, that identify any term of the contract State Farm has purportedly breached. To the contrary, the Complaint specifically acknowledged State Farm paid Petitioner's claim in the amount of the full policy limits available. App. R. at 44, ¶ 108. This is fatal to Petitioner's breach of contract claim.[16]

This Court should affirm the Circuit Court's dismissal of Count III of the Complaint, Petitioner's breach of contract claim, pursuant to West Virginia Rule of Civil Procedure 12(b)(6).

D. Breach of the implied duty of good faith and fair dealing, also known as common law bad faith, is not a standalone claim.

The fourth assignment of error asserts a breach of the implied duty of good faith and fair dealing is a standalone claim, but Petitioner cites no case in direct support of this proposition. Breach of good faith and fair dealing is not a standalone claim under West Virginia law. *Clendenin v. Wells Fargo Bank, N.A.*, No. 2:09-cv-00557, 2009 U.S. Dist. LEXIS 109952, 2009 WL 4263506, at *5 (S.D. W. Va. Nov. 24, 2009) (confirming a claim for breach of the common law duty of good faith must be brought with an express breach of contract claim; thus, "this claim will live or die by the [express breach of contract] claim in [the same complaint]."); *see also Kohler v. State Farm Mut. Ins. Co.*, No. 5:20-CV-51, 2020 U.S. Dist. LEXIS 224605, at *1 (N.D. W. Va. Apr. 2, 2020) (dismissing claim for "common law bad faith").

Petitioner relies on *Hayseeds Inc. v. State Farm Fire Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1986) to support her argument that extracontractual damages can be pursued so long as the insured "substantially prevailed." Pet. Br. at 17. Petitioner's argument misunderstands *Hayseeds*.

[16] And, as addressed below, alleging a separate claim for breach of the implied duty of good faith and fair dealing cannot sustain a breach of contract claim because the claims are distinct, and a breach of contract claim must be independently plead and supported to survive a 12(b)(6) motion.

The *Hayseeds* decision **relies on** the contractual relationship between an insurer and the insured: "As Justice Miller noted in *Aetna*, *supra*, 'whether an insurer's refusal to defend was in good or bad faith is largely irrelevant **once it has been established that the insurer breached its contract with its insured**.'" *Hayseeds*, 177 W. Va. at 329 (emphasis added); *see also id.* at 331 (acknowledging the action was one for breach of contract). The *Hayseeds* Court reiterated the Court's prior holding in *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E2d 156 (1986), which provides the background for the *Hayseeds* decision: "[w]here an insurer has violated its **contractual obligation** to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action." *Hayseeds*, 177 W. Va. at 329 (quoting *Aetna*, 176 W. Va. at 194) (emphasis added). Indeed, the principal issue in *Hayseeds* was the insurer's denial of coverage and failure to pay altogether; this is not the case here. *Hayseeds*, 177 W. Va. at 192. Thus, *Hayseeds* actually supports and emphasizes the law in West Virginia that an insured must first establish a breach of contract before the insured can pursue a claim for breach of the implied duty of good faith and fair dealing, also known as common law bad faith.

Petitioner also argues her "claims under *Hayseeds* and the UTPA are not rendered moot by State Farm ultimately paying the UM policy limits." Pet. Br. at 7. West Virginia law is well-grounded in long-standing contract principles. Taking this step by step, once the terms of the insurance contract are met, there can be no breach of contract claim. *See Davis v. State Farm Fire & Cas. Co.*, No. 12-0985, 2013 W. Va. LEXIS 769, 2013 WL 3184734, *16-17 (June 24, 2013) (finding no breach of contract where terms of Policy required insurer to adjust and pay petitioners the cost to repair or replace damaged property and insurer had adjusted the claim and offered to replace ring and repair setting). Once a breach of contract claim is dismissed, any claim for breach of the implied duty of good faith and fair dealing[17] must also be dismissed. *Clendenin v. Wells Fargo Bank, N.A.*, No. 2:09-cv-00557, 2009 U.S. Dist. LEXIS 109952, 2009 WL 4263506, at *5 (S.D. W.Va. Nov. 24, 2009) (confirming a breach of good faith and fair dealing is not a standalone claim under West Virginia law).

Petitioner also cites *Smithton v. United States Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991) in support of her last Assignment of Error. Whether breach of the implied duty of good faith and fair dealing is a standalone claim was **not** an issue in the *Smithton* appeal. *Smithton*, 186 W. Va. 195 (outlining several assignments of error including whether the trial court failed to disqualify an attorney, an arbitration provision prohibits subsequent litigation, the insurance agent was an agent of the insurer, testimony was improperly admitted at trial, certain jury instructions should have been given, and the verdict lacked evidentiary support). Because the issue presented here was not presented in *Smithton*, it is unclear whether a breach of the policy was alleged in the *Smithton* complaint or whether the insurer contested the issue. As a result, Petitioner cannot rely on *Smithton*. *See id.* at Syl. Pt. 10 ("Compensatory damages recoverable by an injured party incurred through the **breach of a contractual obligation** must be proved with reasonable certainty." (quoting Syl. Pt. 3, *Kentucky Fried Chicken of Morgantown v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975) (emphasis added))). None of the cases cited by Petitioner directly state, rule, or determine that the implied duty of good faith and fair dealing is a standalone claim.[18]

---

[17] Courts have treated claims for common law bad faith and breach of the implied duty of good faith and fair dealing as the same claim. *See Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 440, 504 S.E.2d 893, 903 (1998), superseded on other grounds (answering the certified question of whether there exists a third-party claim for "common law breach of the implied covenant of good faith and fair dealing (common law bad faith)" in the negative); *see also Kohler v. State Farm Mut. Ins. Co.*, No. 5:20-CV-51, 2020 U.S. Dist. LEXIS 224605, at *1 (N.D. W. Va. Apr. 2, 2020).

[18] In addition to the *Hayseeds* and *Smithton* cases, Petitioner also cites *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 716 S.E.2d 696 (2011) and *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791 (1994).

As such, the Circuit Court did not improperly conflate Petitioner's claims for breach of contract and common law bad faith; rather, the Circuit Court determined because Petitioner's breach of contract claim was dismissed, the common law bad faith claim must also be dismissed because it is not a standalone claim. The Circuit Court's decision should be upheld.

VI. CONCLUSION

The Circuit Court correctly applied West Virginia law and procedure in granting Respondent *State Farm Mutual Insurance Company's Motion to Dismiss the Complaint*. The Circuit Court appropriately dismissed the Complaint pursuant to the doctrine of res judicata and, alternatively, West Virginia Rule of Civil Procedure 12(b)(6). Therefore, based on the foregoing, and for any other reason apparent to this Court, Respondent State Farm Mutual Automobile Insurance Company respectfully requests this Court affirm the Circuit Court's *Order Granting Motion to Dismiss the Complaint*.

Respectfully Submitted,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

BY DINSMORE & SHOHL LLP

/s/ Jill Cranston Rice
Jill Cranston Rice (W. Va. State Bar No. 7421)

These cases do not include any determination by the Court that a breach of the implied duty of good faith and fair dealing is a standalone claim. Indeed, in *Loudin*, the insurer failed to pay certain coverage benefits and plaintiff alleged a claim for breach of contract in addition to a breach of the implied duty of good faith and fair dealing. *Loudin*, 228 W. Va. at 698. Similarly, in *Marshall*, the primary issues were whether the UM insurer was immune from an excess judgment against a tortfeasor and whether *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990) should be extended to first party claims. *Marshall*, 192 W. Va. at 99. Further, *Marshall* involved the insurer's refusal to pay policy limits; such is not the case here.

Alex M. Greenberg (W. Va. State Bar No. 12061)
Lauren E. Motes (W. Va. State Bar No. 14053)
215 Don Knotts Blvd., Suite 310
Morgantown, West Virginia 26501
Telephone: (304) 225-1449
Facsimile: (304) 296-6116
jill.rice@dinsmore.com
alex.greenberg@dinsmore.com
lauren.motes@dinsmore.com

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

JOSEPHINE N. DUTTON,

***Plaintiff Below, Petitioner*,**

v. **No. 25-ICA-418**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

***Defendant Below, Respondent*.**

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that the foregoing **RESPONDENT'S BRIEF** was served via the Court's e-filing system on the 22nd day of January, 2026 upon the following counsel of record:

George N. Sidiropolis
The Injury Rights Firm, PLLC
1140 Main Street, 4th Floor
Wheeling, WV 26003
george@flaniganlegal.com
Co-Counsel for Petitioner

Jordan M. Laird
Laird Law, PLLC
2 22nd Street, Suite 202
Wheeling, WV 26003
jordan@laird-law.com
Co-Counsel for Petitioner

/s/ Jill Cranston Rice
Jill Cranston Rice (W. Va. State Bar No. 7421)