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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 101414

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY
d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY

Appellant,

v.

SUMMIT POINT RACEWAY ASSOCIATES, INC.

Appellee.

From the Circuit Court of Jefferson County, West Virginia
Civil Action No. 09-C-275

BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF BRIEF OF APPELLANT WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY

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I. INTRODUCTION

The West Virginia Insurance Federation (the "Federation") files this brief as *amicus curiae* in support of the brief filed by Appellant West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet") because this case has significant implications for insurance law in West Virginia, the interpretation of plainly-stated, mandatory provisions in insurance policies, and the ability of insurers to predict their losses if they can be liable for damages exceeding policy limits in breach of contract cases.[1]

For the reasons detailed below, the Federation respectfully urges this Court to reverse the Orders of the Circuit Court of Jefferson County.

II. FACTUAL BACKGROUND

Although the Federation incorporates by reference the factual background as outlined by BrickStreet in its brief, the Federation provides the following inasmuch as it relates to the Federation's interest in the issue before this Court.

In early 2005 the West Virginia Legislature enacted significant reform legislation that privatized West Virginia's workers' compensation system. In that process, the State created BrickStreet as a private insurance company to replace the former state-run Workers' Compensation Commission. The legislation also provided that BrickStreet would be the sole provider of workers' compensation insurance in West Virginia from July 1, 2006, to June 30, 2008, after which the workers' compensation insurance market would open up for other private insurance companies to offer workers' compensation insurance to West Virginia's employers. Docket 55-57, Exhibit A, ¶ 5. As of March 1, 2011, 220 workers' compensation carriers filed

[1] The undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5) of the Revised Rules of Appellate Procedure.

rates and forms for approval with the Offices of the West Virginia Insurance Commissioner ("OIC") to write workers' compensation insurance in West Virginia in the new private system. OIC List, attached as Exhibit A.

Unless these new carriers specifically requested approval to do otherwise, they were required to use forms developed by the National Council on Compensation Insurance, Inc. ("NCCI"), the rating organization designated by the OIC pursuant to W. Va. Code § 23-2C-18a(b) (2010) and W.Va. C.S.R. § 85-8-10.3 (2010). See also W. Va. Code § 33-6-8. BrickStreet used these form policies.

From a case-specific, factual standpoint, Brandon Gregory, an employee of Appellee Summit Point Raceway Associates, Inc. ("Summit Point"), injured his hand while working on a surfacer in the wood flooring shop in February 2007. At that time, Summit Point was insured by BrickStreet, whose insurance policy utilized not only the basic NCCI form policy mandated by OIC, but also a number of endorsements (together, the "Policy"). The basic NCCI policy form was divided into two parts: Part One (Workers Compensation Insurance) and Part Two (Employers Liability Insurance). Specifically, the basic NCCI policy form provided coverage as follows:

PART ONE
WORKERS COMPENSATION INSURANCE

A. How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.

2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

* * *

F. Payments You Must Make

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;

3. you fail to comply with a health or safety law or regulation. . . .

PART TWO
EMPLOYERS LIABILITY INSURANCE

A. How This Insurance Applies

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.

2. The employment must be necessary or incidental to your work in a state or territory listed in Item 3.A. of the Information Page.

3. Bodily injury by accident must occur during the policy period.

4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

(Docket 31-34, Exhibit A, pp. 1 and 2 of 6).

As noted above, the Policy also contained a number of endorsements, only one of which is germane to the issues in this case. That endorsement, clearly and prominently entitled "West Virginia Intentional Injury Exclusion Endorsement" (the "Exclusion"), states, in pertinent part:

F. Payments You Must Make

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct, or arising out of West Virginia Annotated Code §23-4-2.

Exclusion 5 of Section C. Exclusions of Part Two (Employers Liability Insurance) of the policy is replaced by:

C. Exclusions

This insurance does not cover:

5. Bodily injury caused by your intentional, malicious or deliberate act, whether or not the act was intended to cause injury to the employee injured, or whether or not you had actual knowledge that an injury was certain to occur, or any bodily injury for which you are liable arising out of *West Virginia Annotated Code §23-4-2*.

(Docket 31-34, Exhibit A, pp. 1 and 2 of 6, Endorsement No. WC 99 03 06) (emphasis added).

Mr. Gregory filed a workers' compensation claim under Part One of the Policy, which BrickStreet paid in full. He also, however, filed a deliberate intent claim against Summit Point in the Circuit Court of Jefferson County pursuant to West Virginia Code § 23-4-2(d)(2)(ii). Summit Point sought a defense and indemnification from BrickStreet, but BrickStreet denied coverage for the deliberate intent claim based upon the language in the Exclusion.

The Circuit Court granted Plaintiff's Motion for Partial Summary Judgment by finding that the plainly-worded language under Part Two and the Exclusion was ambiguous, and "deliberate intent coverage therefore [was] extended to Summit Point as a matter of law." See Order dated May 4, 2010 ("Order"), p. 13. In a separate order that preserved BrickStreet's objections, the Circuit Court also ordered BrickStreet to pay the full judgment of $1,201,080.30, with interest, for "the amount expended by Summit Point in settlement of the Brandon Gregory

deliberate intent lawsuit." See Judgment Order dated June 29, 2010 ("Judgment Order"), p. 2. It is both the Order and the Judgment Order, and the implications of those orders, that concern members of the West Virginia Insurance Federation.

III. STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members write more than 80% of the workers' compensation policies insuring West Virginia employees in our State. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has a strong interest in promoting a healthy and competitive insurance market in this State to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief pursuant to Rule 30 of the Revised Rules of Appellate Procedure in support of BrickStreet's brief because the Circuit Court erred in ignoring the clear and unambiguous language of the Exclusion, which specifically excluded coverage for deliberate intent claims by citing to the correct statutory citation under which "deliberate intent" claims arise. In addition, the Circuit Court erred when it found the language in Part Two, which the OIC *required* BrickStreet to use, ambiguous. Insurers must be able to rely on the validity and soundness of the forms and policies not only approved by the State agency that regulates them, but which, as here, the regulator *mandates* that they use. Finally, the Circuit Court erred by determining that BrickStreet could be liable in a breach of contract claim for indemnity amounts that exceed its policy limits. Insurers must be able to predict their losses when they write policies; thus, they impose policy limits and charge a premium according to the risk associated with that particular policy. If an insurer can be found liable for damages in a breach of contact claim that includes an indemnity payment far in excess of the policy limit for indemnity

payments, then the ability of insurers to predict their losses and establish appropriate premiums will be severely hampered.

Accordingly, the Federation respectfully urges this Court to consider the untenable position in which the Circuit Court has placed insurers following its decision in this case. It warrants reversal.

IV. ARGUMENT

A. The BrickStreet Policy Is Not Ambiguous.

In what has become an all-too-common occurrence, Summit Point manufactured an alleged "ambiguity" in the Policy so that it could argue that it "reasonably expected" coverage for a deliberate intent claim under that Policy. Perhaps more egregiously, the Circuit Court adopted this argument. In doing so, however, the Circuit Court made a false assumption about one part of the Policy, and it completely ignored the Exclusion. As such, this Court should reject the artificial and constrained effort to inject "ambiguity" into the clear language of the Policy.

1. The Policy clearly and unmistakably excludes claims for deliberate intent.

The Circuit Court found an alleged ambiguity in the Policy because (1) Part Two (Employers Liability Insurance) of the Policy "seems" to "correspond" to "excess liability coverage" that BrickStreet was required to offer, and (2) there is "no exclusion for 'deliberate intent' or 'broad form' coverage in Part Two, and no reference to the deliberate intent statute." Order at 12. To reach this conclusion, however, the Circuit Court necessarily ignored the clear and unambiguous language of the West Virginia Intentional Injury Exclusion Endorsement (the "Exclusion"), which was both identified on the List of Forms and Endorsements That Apply to Your Policy in the Policy and which was included in the Policy itself.

Obviously, Summit Point wanted the Circuit Court to ignore the Exclusion because, if considered, it completely defeats any reasonable argument that the language of the Policy is somehow ambiguous. Indeed, the Exclusion contains two (2) parts, both of which clearly and unmistakably exclude coverage for deliberate intent claims. As noted above, the first part of the Exclusion, for insertion into Part One of the Policy, states:

> F. Payments You Must Make
>
> You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:
>
> 1. of your serious and willful misconduct, or arising out of West Virginia Annotated Code §23-4-2.

See Exclusion. The second part of the Exclusion, for insertion into Part Two of the Policy, states:

> C. Exclusions
>
> This insurance does not cover:
>
> . . .
>
> 5. Bodily injury caused by your intentional, malicious, or deliberate act, whether or not the act was intended to cause injury to the employee injured, or whether or not you had actual knowledge that an injury was certain to occur, or *any bodily injury for which you are liable arising out of West Virginia Annotated Code § 23-4-2.*

See Exclusion (emphasis added).

It is axiomatic under West Virginia law that language in an insurance policy should be given its plain, ordinary meaning, and "where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. Aluise v. Nationwide Mutual Fire Insurance

Co., 625 S.E.2d 260, 267 (W. Va. 2006) (citing Keefer v. Prudential Insurance Co., 172 S.E.2d 714, 716 (W. Va. 1970)). Here, by contrast, the Circuit Court not only completely ignored the "plain, ordinary meaning" of the language in the Exclusion, but it completely ignored the Exclusion altogether!

The Circuit Court's conclusion that Part Two (Employers Liability Insurance) of the Policy "seems" to "correspond" to "excess liability coverage" that includes coverage for deliberate intent claims is clearly in error. Notably, that conclusion depends not on the actual (and unambiguous) language used in Part Two of the Policy, but on the complete and unfounded supposition of what the language is supposed to say. By assuming that the language in Part Two is supposed to provide coverage for deliberate intent claims, and then criticizing the actual language used as "ambiguous" because it does not contain the phrases "deliberate intent" or "deliberate intent statute" is an exercise in absurdity. In fact, this rationale falls apart because the assumption that Part Two is supposed to cover claims for deliberate intent is, in a word, false. The West Virginia Office of the Insurance Commissioner ("OIC") has opined that "deliberate intent coverage and the separate 'Part Two' EL coverage . . . are not the same." See Memo, WV Offices of the Insurance Commissioner, May 27, 2008 ("OIC Memo"), p. 2 (emphasis in original). In fact, the OIC Memo reiterates this point: "Clearly, . . . 'Part Two' coverage does not include the very specific cause of action in West Virginia for deliberate intent." OIC Memo at 2.

The Circuit Court also found ambiguity in the Policy because there is "no exclusion for 'deliberate intent' or 'broad form' coverage in Part Two, and no reference to the deliberate intent statute." Order at 12. As noted above, however, this conclusion completely ignores not only the language of the Exclusion, but also the very existence of the Exclusion itself. In addition, the Exclusion itself cannot possibly be any more specific about exactly what type of claim is

excluded from coverage under Part Two. Here, it is uncontested that Brandon Gregory filed a civil action against Summit Point alleging that Summit Point (and certain supervisors) "injured him with deliberate intent pursuant to West Virginia's 'deliberate intent' statute, W.Va. Code §23-4-2(d)(2)(ii)." Order at 2. Of course, a so-called "deliberate intent" claim, which is also sometimes referred to as a "Mandolidis" claim, is simply a term that has developed through case law to describe a cause of action under W. Va. Code § 23-4-2. If an insurance policy excludes from coverage a claim "arising out of West Virginia Annotated Code § 23-4-2" – which is the exact language used in the Exclusion – and that policy language is found to be "ambiguous" because it fails to use the phrases "deliberate intent" or "deliberate intent statute," then no policy language can be anything other than ambiguous. Put another way, if policy language that clearly excludes coverage for a claim "arising out of West Virginia Annotated Code §23-4-2" is ambiguous as to whether a claim arising under W. Va. Code §23-4-2 is covered by the policy, then no policy language could possibly exclude coverage for such a claim in a clear and unambiguous way. Such a proposition is preposterous.

Finally, Summit Point argues that an ambiguity exists in the Policy because there is a "reasonable disagreement about the scope of Part Two of [the] Policy and the specific nature of BrickStreet's purported exclusion . . . ." Response to Petition at 20. In essence, Summit Point argues that because it is unclear whether Part Two provided coverage in West Virginia for a "deliberate intent" claim, the Exclusion's reference to § 23-4-2 – which is the only statute under which a "deliberate intent" claim can be asserted in West Virginia – renders the entire policy ambiguous. Nonsense. First, as a general matter, exclusions in an insurance policy create a specific exclusion to coverage for a claim, which claim would, absent the exclusion, be covered. That a "deliberate intent" claim would be covered under Part Two, therefore, is immaterial

because, even if it was covered, the Exclusion clearly and unambiguously excluded coverage for that claim. Second, Part Two does specifically exclude coverage for "bodily injury intentionally caused or aggravated by you[.]" See Policy at 3, C.5. Since this Court, however, has determined that a "deliberate intent" cause of action under the five-part test in § 23-4-2(d)(2)(ii) does not necessarily involve an "intent" by an employer to cause an injury, the Policy clarifies in the Exclusion that any claim under §23-4-2 is excluded from coverage, regardless of what it is called and regardless of how it is described by this Court, by BrickStreet's counsel, by Summit Point's counsel, or by anyone else. Finally, the Exclusion is necessary to clarify the language in Section C.5 of the Policy because of the unique nature of the cause of action under W. Va. Code § 23-4-2 and the cases from this Court that have interpreted that cause of action. In a nutshell, no other state has a statute that reads like § 23-4-2 or has a five-part test to prove "deliberate intent" like West Virginia. To ensure that the unique nature of this claim is clearly and unambiguously accounted for, the Exclusion – which is specifically titled "West Virginia Intentional Injury Exclusion Endorsement" – was prepared. This Exclusion refers to the exact West Virginia statute that specifically covers any type of "deliberate intent" claim that could be made by an employee. That Part Two may provide coverage that is specifically excluded by the Exclusion, therefore, cannot possibly result in an "ambiguity." To follow Summit Point's logic would necessarily invalidate any exclusion contained in an endorsement to an insurance policy regardless of how specific and clear the language used in the endorsement. Such would introduce a seismic change in the application and interpretation of insurance endorsements. Thankfully, however, such is not the law, and this Court should reject Summit Point's contention.

The Circuit Court's conclusion that the Policy was "ambiguous" as to whether coverage existed for deliberate intent claims was clearly erroneous, therefore, and this Court should read and apply the plain, clear and unambiguous language of the Policy – including the Exclusion – in finding that no such coverage was provided.

2. A judicial finding of "ambiguity" in a form that an insurer is required to use by the Office of the Insurance Commissioner results in a Catch-22 for an insurer.

Under W. Va. Code § 33-6-8, all insurance policy forms must be approved by the OIC, including the forms for commercial lines property and casualty risks. The form that comprises the basic policy in this case, which includes Part Two but does not include any of the endorsements, not only had to be approved by the OIC, but the OIC required that BrickStreet use that basic form. As noted in the Petition for Appeal, the basic policy form was promulgated by NCCI and is used in over thirty (30) states, including West Virginia. Petition at 6. In fact, the OIC has required, pursuant to its authority under 85 CSR 6.10.3, that insurers use the NCCI form. What is more, the OIC required the use of this form with the knowledge that Part Two did not provide coverage for deliberate intent claims. See OIC Memo at 2. See also W. Va. Code § 33-6-30(c) (2002) ("Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter.").

Given that the OIC required BrickStreet to use the form that contains Part Two, the Circuit Court's conclusion that Part Two is ambiguous puts insurers in an untenable, unreasonable, and ultimately unfair Catch-22 situation. An insurer can either use the basic policy form mandated by the OIC or risk using unauthorized forms, thereby exposing itself to the

full array of penalties available to the OIC, including losing the ability to conduct insurance business in West Virginia. On the other hand, if an insurer uses the basic policy form mandated by the OIC, it may expose itself to a judicial finding of "ambiguity" that would expose the insurer to damages far beyond the policy limits in the supposedly ambiguous policy. This is a false choice. See In the Matter of Government Employees Ins. Co. v. Young, 39 A.D.3d 751, 835 N.Y.S.2d 283, 2007 N.Y. App. Div. LEXIS 4745 (N.Y. App. Div. Apr. 17, 2007) ("Contrary to appellants' contention, the [supplemental uninsured/underinsured motorist benefits, or "SUM"] endorsement of the Geico policy which incorporated the precise requirements for SUM coverage mandated by 11 NYCRR 60-2.3(f), including, but not limited to, the offset provision, . . . was not ambiguous and misleading."); In the Matter of State Farm Mut. Auto. Ins. Co. v. Bigler, 18 A.D.3d 878, 796 N.Y.S.2d 368, 2005 N.Y. App. Div. LEXIS 5831 (N.Y. App. Div. May 31, 2005) ("[T]he inclusion on the declarations page of the policy of language which alerted the appellant to the existence of the offset and directed him to the specific endorsement where it could be found served to ameliorate any concerns that the stated limit of underinsured motorists coverage was misleading, ambiguous, or deceptive. . . . *Indeed, the language employed was virtually identical to that required by Insurance Department regulations*) (emphasis added).".

Fortunately, this Court can, and should, reject this conundrum. As detailed above, the language used in the Policy, including in Part Two and the Exclusion, is clear and unambiguous. To allow the Circuit Court's artificial and constrained logic in finding an ambiguity to stand would send the message to insurers that doing exactly what the OIC requires may still open them to liability far beyond what the insurers contemplated in setting rates for policies. This is bad policy and bad business, and it is based on the bad and erroneous decision of the Circuit Court, all of which this Court should reject.

B. Insurers In West Virginia Should Not Automatically Be Liable Beyond Their Policy Limits When Coverage is Disputed.

Even assuming the Policy was ambiguous and provided coverage for Mr. Gregory's deliberate intent claim, the Circuit Court's determination of damages was inappropriate. This Court has long-held that insurance policies are contracts, yet when the Circuit Court decided the damages in this case, it completely ignored basic contract principles in a way that seriously undermines the manner in which insurers write those policies.

It is beyond dispute that insurance policies are contracts and are interpreted according to the principles of contract law in West Virginia. The parties to this appeal argued the damages issue in the context of contract principles, and the Circuit Court's Order discussed damages using contract principles. Order at 14. As a result, the Order's finding that BrickStreet breached its insurance contract with Summit Point necessarily carried certain consequences on the issue of damages that are uncontested. First, BrickStreet is obviously liable up to the full amount of its limits of liability under Part Two of the Policy, which is $100,000. Second, BrickStreet is liable under the Policy for all costs of defense, including attorney's fees, incurred by Summit Point in defending itself in both the deliberate intent case and in the declaratory judgment action. As such, there is no dispute that BrickStreet is liable to Summit Point for the agreed-upon attorney fees, the $100,000 policy limits under Part Two, and interest on those amounts.

The Circuit Court went much further than that, however, and for reasons that are simply not reflected in its Order, held that BrickStreet was liable for the *entire* amount of the settlement that Summit Point reached with the Gregorys – $600,000 – and not just the $100,000 policy limit available under the Policy to contribute to that settlement. See Order at 17 (BrickStreet "ordered to pay to Summit Point the amount expended in settling the Gregory claim . . . .") and BrickStreet's Petition for Appeal at 2 ("During the pendency of Mr. Gregory's lawsuit against

Summit Point, Mr. Gregory and Summit Point entered into a settlement agreement in the amount of $600,000.")

Generally, in a breach of contract case, "[c]ompensatory damages recoverable by an injured party incurred through the breach of a contractual obligation are those as may fairly and reasonably be considered as arising naturally – that is, according to the usual course of thing – from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach." Kentucky Fried Chicken v. Sellaro, Syl. Pt. 2, 158 W. Va. 708, 214 S.E.2d 823 (1975). Here, the damages "arising naturally" from BrickStreet's alleged breach of the insurance contract are what Summit would have received under the insurance contract; i.e., the policy limits of $100,000 under Part Two, the cost of defense in the Gregory claim, the cost to Summit Point in bringing a declaratory judgment action, and interest.

West Virginia law is reasonably well-developed as to when an insurer owes an amount in excess of the policy limit. In Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766 (1990), for example, this Court determined that the insurer is liable to its insured for personal liability in excess of policy limits wherever the insurer fails to settle within policy limits when the opportunity to settle exists and such settlement within policy limits would release the insured from any and all personal liability. Applying that analysis to the present case, BrickStreet would be liable to Summit Point for the amount of the underlying settlement in excess of the $100,000 policy limit *if* the opportunity had existed for the Gregorys' claims to settle within that limit, yet despite that opportunity, BrickStreet failed to provide coverage to Summit Point and pay that amount. Here, there was absolutely no evidence before the Circuit

Court that Summit Point could have settled the Gregory case for an amount within $100,000 policy limit had BrickStreet not denied coverage.

Similarly, in Hayseeds, Inc. v. State Farm Fire & Casualty, 177 W. Va. 323, 331, 352 S.E.2d 73 (1986), this Court held that when a policyholder substantially prevails in a property damage suit against an insurer, the policyholder is entitled to damages for net economic loss caused by the delay in settlement, as well as an award for aggravation and inconvenience. Thus, in order to recover those damages in excess of the policy limit, the insured must prove the damages were caused by the insurer's delay in the settlement or, in this instance, its failure to defend and settle the claim. Again, there was no evidence before the Circuit Court that the amount of the settlement *in excess of the policy limit* was the result of BrickStreet denying coverage to Summit Point.

The Circuit Court, therefore, committed clear error by concluding that the *entire* settlement paid by Summit Point constituted damages caused by BrickStreet's alleged breach of the Policy, for which BrickStreet is liable. This Court has made clear, both in insurance cases and in run-of-the-mill contract cases, that damages are those amounts expended *as a result of the party's breach.* Here, the alleged breach was BrickStreet's failure to defend Summit Point and its failure to indemnify Summit Point up the limits of the Policy. It is crystal clear that, under West Virginia law, BrickStreet can only be liable for that portion of Summit Point's damages actually *caused* by BrickStreet's breach of its duty to defend and duty to indemnify under the Policy, i.e., legal costs and the policy limits – not the total amount that Summit Point agreed to pay the Gregorys to resolve the deliberate intent claim. See Strahin v. Sullivan, 220 W. Va. 329, 647 S.E.2d 765 (2007) (Court found that in asserting a bad faith claim, the insured (or in the case

of Strahin, the judgment creditor) must demonstrate that there were damages actually caused by the insurer's bad faith).

Importantly, neither the Order nor the Judgment Order entered by the Circuit Court ever analyzed the actual damages caused by BrickStreet's alleged breach of the insurance contract. Instead, the Circuit Court made the conclusory finding that BrickStreet should pay the entirety of what Summit Point agreed to pay the Gregorys, even though that amount – $600,000 – was well over the Policy limits and, therefore, had absolutely nothing to do BrickStreet's alleged breach. Put simply, BrickStreet's alleged breach denied Summit Point the $100,000 under the Policy that could have been contributed to the settlement and caused Summit Point to incur defense costs. The alleged breach did *not* cause $600,000 in damages to the Gregorys, and the alleged breach did *not* cause Summit Point to settle the Gregorys' claim for $600,000. Instead, BrickStreet's breach caused Summit Point to (1) incur legal fees and expenses, both in defending against the Gregory claim and in brining the declaratory judgment action – for which BrickStreet is undeniably liable – and (2) pay $100,000 more to its settlement with the Gregorys than it would have had to otherwise pay had the Policy been in effect.

To find that BrickStreet's breach of the Policy caused Summit Point to incur the full $600,000 settlement as damages, the Circuit Court would have to reach one of a few conclusions -- none of which are plausible. For example, the Circuit Court may have concluded that, even though Summit Point had counsel throughout the litigation with the Gregorys, had BrickStreet provided counsel, the result would have somehow been different and resulted, presumably, in a settlement at or under the policy limits. Notably, Summit Point does not allege that it negotiated a poor settlement because it was unrepresented. Rather, an attorney represented Summit Point throughout the Gregory litigation, and there is simply no allegation that BrickStreet would have

provided counsel who would have negotiated any settlement better than the one agreed to by Summit Point.

Or, the Circuit Court may have concluded that the Gregorys would have settled for $500,000 less than they actually received had BrickStreet been involved. Presumably, however, Mr. Gregory's injuries and Mrs. Gregory's loss of consortium claim justified the settlement of $600,000; otherwise, Summit Point and its counsel would not have settled for that amount. BrickStreet's involvement would have changed only two things: (1) Summit Point would not have incurred defense costs, including attorney fees, and (2) Summit Point would have spent $100,000 less than it did the settle with the Gregorys. There is no reason (or evidence) to believe that BrickStreet's involvement would have changed the amount of the settlement at all.

As noted above, the Order entered by the Circuit Court did not contain any analysis of what damages were actually caused by BrickStreet's alleged breach of the Policy. Instead, the Order simply penalized BrickStreet for its denial of coverage. That position is unsupported by any case law in West Virginia and, as importantly, defies common sense.

For these reasons, the Federation encourages the Court to adopt the majority opinion that, in breach of insurance contract situations, damages available are the policy limits, plus costs and attorney's fees, and incidental damages as are caused by the insurer's breach. As such, the Federation asks the Court to reverse the Circuit Court's decision and find that BrickStreet's liability for breach of the Policy is limited to its policy limits of $100,000, plus costs and attorney's fees, or remand to the Circuit Court with instructions regarding calculation of those damages.

V. CONCLUSION

For the reasons set forth above, the Federation requests that this Court reverse the Orders entered by the Circuit Court of Jefferson County.

WEST VIRGINIA INSURANCE FEDERATION

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NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY
d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY

Appellant,

v.

SUMMIT POINT RACEWAY ASSOCIATES, INC.

Appellee.

From the Circuit Court of Jefferson County, West Virginia
Civil Action No. 09-C-275

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **Brief of the West Virginia Insurance Federation as *Amicus Curiae* in Support of Brief of Appellant West Virginia Employers' Mutual Insurance Company d/b/a Brickstreet Mutual Insurance Company** upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

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EXHIBITS

ON

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