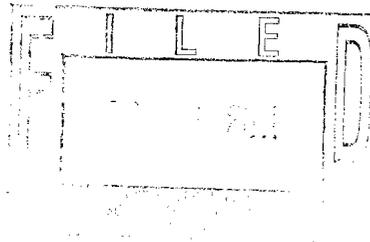


**BRIEF FILED
WITH MOTION**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 101414



WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY D/B/A BRICKSTREET
MUTUAL INSURANCE COMPANY,

Appellant,

v.

(appealed from Civil Action No. 09-C-275,
Circuit Court of Jefferson County)

SUMMIT POINT RACEWAY ASSOCIATES, INC.,

Appellee.

**BRIEF OF TKS CONTRACTING, INC., H. TALBOTT TEBAY
AND H. TALBOTT TEBAY DDS, LTD., AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEE**

Brent K. Kesner (WV State Bar # 2022)
Ernest G. Hentschel, II (WV State Bar # 6006)
Kesner, Kesner & Bramble, PLLC
P. O. Box 2587
Charleston, WV 25329
(304) 345-5200
Counsel for Amicus Curiae

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

TKS Contracting, Inc., H. Talbott Tebay and H. Talbott Tebay DDS, Ltd. (“TKS and Dr. Tebay”), file this brief as *amicus curiae* in opposition to the briefs filed by the Appellant, West Virginia Employers’ Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company (“Brickstreet”) as well as the *amicus curiae*, the West Virginia Insurance Federation and the West Virginia Business & Industry Council. TKS and Dr. Tebay submit this brief because they are in possession of information which is highly relevant to the matters at issue and because this case will have a significant impact upon employers throughout West Virginia who, like them, have purchased employers liability insurance coverage through Brickstreet.¹

Unlike the West Virginia Insurance Federation and the West Virginia Business & Industry Council, both TKS and Dr. Tebay’s dental practice are small businesses that have been the subject of deliberate intent claims brought by their injured employees. Both had purchased what was identified as “Employers Liability Insurance” through Brickstreet, but were later advised that they had no coverage for deliberate intent claims arising under *W. Va. Code § 23-4-2(d)(2)(ii)*. Because the policy language relied upon by Brickstreet to deny their claims (and the claims of the Appellee in this case) is ambiguous and ineffective, TKS and Dr. Tebay are pursuing their own declaratory judgment action in the Circuit Court of Jackson County, identified as *TKS Contracting, Inc., et. al. v. Employers Mut. Insurance Company et. al.*, Civil Action No. 08-C-170.

In conjunction with the Jackson County declaratory action, TKS and Dr. Tebay’s counsel have conducted extensive discovery regarding both the development of the Brickstreet employers’

¹ The undersigned counsel authored this brief in its entirety. No party or 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 W. Va. Rev’d R. App. P. 30.

liability policy which is at issue in this case and the manner in which Brickstreet has implemented employers liability coverage in West Virginia. Because the information they have obtained is highly relevant to the issues being decided in this case and is not available to the Court otherwise, TKS and Dr. Tebay submit this brief as *amicus curiae* pursuant to W. Va. Rev'd R. App. P. 30, in order to assist the Court in fully addressing the coverage issue presented herein.

For the reasons set forth below, TKS and Dr. Tebay respectfully urge the Court to uphold the Orders of the Circuit Court of Jefferson County and reject the arguments of the Appellant.

FACTUAL BACKGROUND

As the Court is aware, this case arose from personal injury claims asserted against the Appellee, Summit Point Raceway Associates (“Summit Point”), by one of its employees. That employee, Brandon Gregory, filed both a workers compensation claim against Summit Point and a deliberate intent claim pursuant to W. Va. Code § 23-4-2(d)(2)(ii). Similar deliberate intent claims were filed against TKS by the estate of one of its employees, who was killed in an on-the-job accident, and against Dr. H. Talbott Tebay by one of his employees, who was injured while working. Accordingly, both TKS and Dr. Tebay are in the same position as Summit Point with respect to their claims against Brickstreet.

“Part Two” of the Brickstreet policy issued to the Appellee Summit Point in this case, and to both TKS and Dr. Tebay, is expressly described as “Employers Liability Insurance.” It states, in relevant part, as follows:

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.

* * *

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.

B. We Will Pay

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

* * *

2. for care and loss of services;

* * *

D. We Will Defend

We have the right and duty to defend at our expense, any claim, proceeding or suit against you for damages payable by this insurance.

...

See Docket 31-34, copy of Brickstreet policy.

While both TKS and Dr. Tebay purchased this "employers liability insurance," TKS paid an additional premium for coverage limits of \$500,000 while Dr. Tebay acquired only the \$100,000 of employer's liability coverage "automatically" included with his Brickstreet workers' compensation policy. Appendix at 1, **Exhibit A**, Information Pages for TKS and Tebay policies.

Despite the clear language of its policy form, Brickstreet has denied that it has any duty to defend or indemnify Summit Point, TKS, or Dr. Tebay because they did not elect to also purchase what it identifies as "Broad Form/Employers Excess Liability Coverage" when they purchased their

respective policies. While the Brickstreet policy describes the coverage which Summit Point, TKS, and Dr. Tebay did purchase as “employers liability” coverage, Brickstreet purports to exclude every type of claim an employee might bring against the employer in West Virginia under that coverage, unless the employer also purchases what Brickstreet describes as “Broad Form/Employers Excess Liability Coverage.” In that regard, Brickstreet’s “West Virginia Intentional Injury Exclusion Endorsement,” attached to the Policy purportedly excludes:

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 Docket 31-34.

Because such deliberate intent claims are the only type of suit a typical West Virginia employee may bring, the Brickstreet Policy is hopelessly ambiguous. TKS and Dr. Tebay are pursuing Civil Action No. 08-C-170 in the Circuit Court of Jackson County to seek a declaratory judgment with respect to this coverage.

ARGUMENT

I. Brickstreet’s policy language with respect to “employers liability” coverage is ambiguous and defeats the reasonable expectations of its insureds.

Prior to the enactment of the Workers' Compensation laws, the recourse for employees who suffered on-the-job injuries was to bring a lawsuit against the employer for negligence. In such a suit, the employer could raise all of the available common law defenses, including the comparative negligence of the employee. That situation changed after West Virginia enacted Workers' Compensation statutes, such as W. Va. Code § 23-2-6 (2003), which provides that any employer who pays into the Workers' Compensation system is immune from suit “for the injury or death of any

employee.” The trade-off for this immunity, of course, is that the Workers’ Compensation coverage pays for on the job injuries regardless of fault. Under the law, an employer’s immunity applies in all but a few circumstances. The exceptions to immunity are set forth in W. Va. Code § 23-4-2 (2005), which provides, in relevant part:

[T]he intent of the Legislature in providing immunity from common law suit was and is to protect those so immunized from litigation outside the workers' compensation system except as expressly provided in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton, and reckless misconduct[.]

W. Va. Code § 23-4-2(d)(1).

The statute goes on to set forth a specific list of five (5) elements which an employee must prove in order to establish “deliberate intent” on the employer’s part and penetrate the employer’s immunity. They are:

- (A) That a specific unsafe working condition existed in the work place which presented a high degree of risk and a strong probability of serious injury or death;
- (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
- (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted

with a statute, rule, regulation, or standard generally requiring safe work places, equipment or working conditions;

- (D) That notwithstanding the existence of the facts set forth in sub-paragraphs (A) through C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
- (E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not a direct and proximate result of the specific unsafe working condition.

W. Va. Code § 23-4-2(d)(2)(ii).

In light of this statutory framework, the only type of employee personal injury actions to which West Virginia employers are routinely subjected are so-called “deliberate intent” actions brought pursuant to W. Va. Code §23-4-2(d)(2)(ii) and cases such as *Mayles v. Shoneys, Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990).

As noted above, Brickstreet’s “West Virginia Intentional Injury Exclusion Endorsement,” purports to exclude:

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.

The quoted policy provision effectively defeats the purpose of purchasing “employers liability coverage” in West Virginia and runs counter to the reasonable expectations of any objective person who might purchase such coverage. In that regard, the Court defined employers liability coverage and explained its purpose in the case of *Erie Ins. Prop. and Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W.Va. 63, 553 S.E. 2d 257 (2001). The Court noted:

[E]mployers' liability insurance is traditionally written in conjunction with workers' compensation policies and is intended to serve as a "gap-filler," providing protection to the employer in those situations where the employee has a right to bring a tort action despite the provisions of the workers' compensation statute or the employee is not subject to workers' compensation law. Generally, these two kinds of coverage are mutually exclusive. Most employers' liability policies limit coverage to liability for which the insured is held liable as an employer ... *We can therefore conclude that employers' liability insurance applies to actions brought by an employee against an employer, when the employer and the employee are not entitled to the benefits and protections under any workers' compensation law, or when, even though covered by a workers' compensation law, the employee has a right to bring an action for common law damages against the employer.*

Stage Show Pizza, 210 W.Va. at 68, 553 S.E. 2d at 262 (citations omitted, emphasis supplied).

Based upon the Court's explanation, a reasonably prudent person must conclude that an "employers liability policy" would cover precisely the situation presented by the employees of Summit Point, TKS, and Dr. Tebay in their deliberate intent actions. Unfortunately, the Court's analysis of this type of coverage is directly in conflict with Brickstreet's interpretation of what its "employers liability" policy actually covers.

Policy language is ambiguous if it "is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]" Syl. Pt. 1, *Prete v. Merchants Prop. Ins. Co. of Indiana*, 159 W.Va. 508, 223 S.E.2d 441 (1976). A latent ambiguity "arises when the instrument upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain." *Flanagan v. Stalnaker*, 216 W.Va. 436, 440 n. 4, 607 S.E.2d 765, 769 n. 4 (2004) (*per curiam*) (citation omitted). Moreover, "[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syl.

Pt. 5, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), modified on other grounds by *Potesta v. U.S. Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E. 2d 135 (1998).

In this case, Brickstreet's "employers liability" coverage is ambiguous because its policy's promise to provide coverage for "damages because of bodily injury to your employees" contradicts its "West Virginia Intentional Injury Exclusion Endorsement," which excludes coverage for the only type of bodily injury claim an employee may bring against a West Virginia employer who is covered under Workers' Compensation. Therefore, the collateral matter which makes Brickstreet's policy ambiguous is the fact that West Virginia employers are immune from all bodily injury claims except "deliberate intent" claims of the type Brickstreet purports to exclude in the "West Virginia Intentional Injury Exclusion Endorsement." In effect, the exclusion defeats the reasonable expectations of anyone who reads the words "Employers Liability Coverage" and raises the obvious question of exactly what type of claim the Brickstreet policy does cover.

The "West Virginia Intentional Injury Exclusion Endorsement" is also ambiguous because it fails to indicate exactly what types of claims are excluded and only references claims "for which you [the insured] are liable arising out of West Virginia Annotated Code § 23-4-2." In that regard, the text of W. Va. Code § 23-4-2 is not found anywhere in the Brickstreet policy, and there is no explanation of how liability might "arise" out of this statute. Apparently, an insured is expected to simply know that the phrase "arising out of W. Va. Code § 23-4-2" is meant to refer to "deliberate intent" claims brought pursuant to W. Va. Code § 23-4-2(d)(2)(ii). This fact was acknowledged by Brickstreet's employees during discovery in Civil Action No. 08-C-170.² For example, Brickstreet's

²Much of this discovery was conducted on behalf of BC Development, Inc. and Charles Frangella, who have subsequently been dismissed as Plaintiffs from Civil Action No. 08-C-170

director of underwriting, Ken Howard, was deposed on December 30, 2009, and was asked:

Q. If you look at the policy form there, Exhibit 16 at page 16 at the bottom left, you see an endorsement called the "West Virginia Intentional Injury Exclusion Endorsement." Have you seen that endorsement before?

A. Yes.

Q. Are you familiar with it?

A. Yes.

Q. It cites or makes reference to West Virginia Annotated Code 23-4-2.

A. Correct.

Q. From your familiarity with the policy, does the policy anywhere indicate what that Code Section addresses?

A. In the policy itself?

Q. Yes.

A. No. It refers to the Code.

Q. Okay. Is there anywhere in the policy that an insured would be able to determine what liability arises out of 23-4-2?

A. Not in the policy.

Q. Is there any way an insured would know what 23-4-2 addresses in any way by language or provisions of the policy?

A. No.

Appendix at 21, **Exhibit B**, excerpts, Ken Howard Depo. (December 30, 2009), at 52-53.

The difficulty this situation presents for insureds reading a Brickstreet policy is best illustrated by the testimony of two other Brickstreet employees who were deposed in Civil Action

after a resolution was reached between the parties.

No. 08-C-170. On December 29, 2009, Brickstreet employee Tracie Saunders, an underwriting technician, was questioned about the exclusion and testified as follows:

Q. Now, this endorsement indicates that the policy - - "The insurance does not cover" - and it uses various words - and then it says "for which you are liable arising out of West Virginia Annotated Code Section 23-4-2." Do you see that? It's under C-5 at the last line of that. Do you see that?

A. Yes.

Q. Do you know what West Virginia Annotate-- Annotated Code 23-4-2 is?

A. No, I don't.

Q. And you've worked in the insurance business since, what, sometime in the 90s.

A. Yes, sir.

Q. That's right? Do you have any reason to believe that the typical insured knows what West Virginia Annotated Code 23-4-2 is?

A. Probably not.

Appendix at 75, **Exhibit C**, excerpts, Tracie Saunders Depo. (December 29, 2009), at 171-72.

In the same fashion, David Townsend, a supervisor at Brickstreet, was asked:

Q. Are you familiar with West Virginia Code Section 23-4-2?

A. No, sir. I don't recall the specific cite.

Q. Do you know what that Code Section is?

A. No, sir.

Q. And if someone were to tell that you have coverage for 23-4-2 or you don't have coverage from 23-4-2, would you know what you had or didn't have?

A. No, sir.

Q. You'd have to go find some other information to figure that out, wouldn't you?

A. Yes, sir.

Appendix at 114, **Exhibit D**, excerpts, David Townsend Depo. (December 30, 2009), at 66.

Because the exclusion for deliberate intent claims found in Brickstreet's "West Virginia Intentional Injury Exclusion Endorsement" simply makes reference to an obscure West Virginia Code citation and is beyond the understanding of even Brickstreet's own employees, it is clearly ambiguous. Where the language of an insurance contract is found to be ambiguous, the Court employs a doctrine of "reasonable expectations," *Smith v. Sears, Roebuck & Co.*, 191 W.Va. 563, 565, 447 S.E.2d 255, 257 (1994), which is

... that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Id., 191 W.Va. at 565, 447 S.E.2d at 257.

Since "deliberate intent" claims are the only type of bodily injury claim an employee may assert in West Virginia against his or her covered employer, the reasonable expectation of any employer purchasing such coverage would be that deliberate intent claims would be covered. The only policy language which might lead an employer to believe otherwise is an exclusion which even Brickstreet's own employees do not understand. Likewise, West Virginia courts avoid construing policies in such a way as to render the coverage illusory. For example, in *Wehner v. Weinstein*, 216 W.Va. 309, 607 S.E.2d 415 (2004), the Court expressly approved a lower Court's finding that

the language of the policy could not possibly have been intended to be that limited in its scope. Such an interpretation would render the coverage of the policy illusory in that it would really provide no coverage at all because, as far as the court can determine from the

record, there are no businesses conducted on the fraternity property by anyone.

Wehner, 216 W.Va. at 316, 607 S.E.2d at 422.

In this case, Brickstreet wants the Court to find that its employers liability policy does not actually cover the only type of employee claims which could arise in West Virginia, a finding that would render the coverage illusory.

II. Discovery in Civil Action No. 08-C-170 in the Circuit Court of Jackson County has established that the basic “employers liability” coverage offered by Brickstreet is illusory

Because the Brickstreet “Employers Liability Insurance” appears to exclude the only type of claim which an employee in West Virginia could bring against his or her employer, TKS and Dr. Tebay’s counsel served discovery upon Brickstreet in Civil Action No. 08-C-170, seeking to determine what types of claims the policy did cover and how much Brickstreet had paid to resolve such claims. For example, Interrogatory No. 7 of the Plaintiffs’ Second Set of Interrogatories asked:

Indicate the total amount Brickstreet has paid in order to resolve bodily injury claims arising under “Employers Liability Coverage” of the type purchased by the Plaintiff in this action, as opposed to “Broad Form/Employers Excess Liability Coverage,” since the inception of Brickstreet.

On November 20, 2009, Brickstreet served the following response:

Objection. Brickstreet objects to this Interrogatory on the grounds that it seeks information that is irrelevant or not likely to lead to the discovery of relevant or admissible information. The Interrogatory seeks information that is not limited to policies in West Virginia or the subject matter of this civil action. See State Farm Mut. Auto. Ins. Co. v. Stephens, 425 S.E.2d 577, 584, n. 12 (W. Va. 1992); Gable v. Kroger Co., 410 S.E.2d. 701 Syl. Pt.3 (W. Va. 1991). See also State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003). The Interrogatory also assumes facts that are not accurate as Plaintiff did not purchase Employers Liability Coverage given that it was provided free of charge. ***Without waiving any objections, Brickstreet***

has not resolved bodily injury claims under Part Two - Employers Liability coverage.

Appendix, **Exhibit E**, excerpts, Brickstreet *Supplemental Answers To Plaintiffs' Second Set Of Interrogatories And Request For Production Of Documents To Defendant West Virginia Employers Mutual Insurance Company* served November 20, 2009 (Civil Action No. 08-C-170) (emphasis added).

In effect, Brickstreet has admitted that it has never paid even one penny to resolve a claim under the non-broad form "Part Two - Employers Liability Insurance" coverage. *Id.* This admission is even more remarkable when considered in light of the fact that employers such as TKS have been asked to pay an extra premium to purchase additional employers liability coverage of the same type.

On December 30, 2009, Brickstreet's Senior Vice President, General Counsel and Corporate Secretary, Thomas Obrokta, was questioned regarding the fact that Brickstreet has never paid even one dollar to resolve a claim under the "Part Two - Employers Liability Insurance" coverage, and testified as follows:

- Q. You know that there was a specific question presented: "How much has Brickstreet paid for settlement or indemnification toward any settlement or judgment of any claim against an insured of Brickstreet from its inception to the time of that interrogatory question under employers liability coverage, nonbroad form, such as sold to BC Development here," and it would not surprise you then - and I'm sure you saw and probably gave the information - that the answer to that was, rounded up to the whole dollar, nearest dollar to it, zero. Correct?
- A. I don't need to round to get to zero, so I'm not sure why you're phrasing the question in that way.
- Q. Is it zero - -
- A. I have - -
- Q. - or is it some different number?
- A. I'm fully aware that we've never had a claim submitted to us that fits

your description, therefore, we've never accepted coverage of one, and therefore it makes sense to me we haven't paid one.

Appendix at 157, **Exhibit F**, excerpts, Thomas Obrokta Depo. (December 30, 2009), at 134-35.

Later, Mr. Obrokta was asked about the fact that Brickstreet had collected premiums for such coverage for years even though it had never paid any claims under the coverage:

Q. Okay. And you sell them the additional - - if they chose that they want it, you'll sell them additional employers liability coverage, nonbroad form, and charge them a premium for that additional coverage; is that right?

A. Yeah, we have different - - that's correct, different - - above \$100,000, there is a premium at that point..

Q. And in fact, in - - in this case, I've been provided with discovery 75 pages of entities that purchased additional nonbroad form employers liability coverage. You've seen that. It's Exhibit B to Brickstreet's answers to the second set of interrogatories, and these are supplemental answers. You've seen that.

A. I saw that some time ago, yes.

Q. So -

A. But I do not believe that that document is a list of 75 pages of separate entities. I believe - and I can be proven wrong if you will show it to me - but I believe that policy - - that document covers numerous policy periods, so the same insured may show up on there numerous times.

Q. Okay. Well, but there's 75 pages of instances where an insured purchased additional nonbroad form employers liability coverage.

A. If that's - - it's been a while since I've seen that, but I - - I gave you that - - a list to that regard - - to that point, that's correct.

Q. And it's that coverage under which you say Brickstreet has never received a claim.

A. That is correct.

Q. And therefore has never paid to settle or defend or indemnify any such claim.

A. That's correct.

Id. at 139-40.

While collecting premiums for coverage and never having to pay to defend or settle claims is obviously lucrative, the fact that Brickstreet has not even seen a claim which it believes was covered over the course of several years is a clear indication that the coverage at issue, as applied by Brickstreet, is illusory. While Brickstreet may seek to demonstrate that its coverage is not illusory by asserting that other types of claims are covered, it is unable to point to a single coverage scenario which could actually arise when a West Virginia employer purchases the coverage at issue.

For example, if suit is brought by an injured employee of an employer who is not subject to the Workers Compensation Act and, therefore, not required to carry workers compensation coverage, that claim could conceivably be covered under the language of the "West Virginia Intentional Injury Exclusion Endorsement." However, the Brickstreet coverage at issue would not be triggered because Brickstreet's employers liability policy was sold as part of a mandatory package of coverages provided to West Virginia employers who purchased Workers' Compensation coverage. Those employers who were exempt from the mandatory requirement to purchase Workers' Compensation under W. Va. Code § 23-2-1 (2005), and those who choose to self-insure under W. Va. Code § 23-2-9 (2007), would not be purchasing the Brickstreet employer's liability policy at issue in the first place and, therefore, would never have such coverage.

Nor could the Brickstreet policy cover so-called "third party over" suits in which an employee is injured while operating a machine that malfunctions because it has not been properly maintained. In such suits, the injured worker collects statutory workers' compensation benefits, but

may also sue the machine's manufacturer. The manufacturer then, in turn, sues the employer for contributory negligence for its failure to properly maintain the machine. In the case of *Sydenstricker v. Unipunch Products Inc.*, 169 W.Va. 440, 288 S. E. 2d 511 (1982), the Court addressed such a claim and explained why it could not really arise under West Virginia law. The Court noted that the employer's Workers' Compensation immunity applies to bar such claims, stating:

The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law. The ground is a simple one: the employer is not jointly liable to the employee in tort; therefore he cannot be a joint tortfeasor.

Sydenstricker, 169 W.Va. at 449, 288 S. E. 2d at 517 (citations omitted).

Once again, there is simply no possibility of coverage under the Brickstreet "West Virginia Intentional Injury Exclusion Endorsement."

Brickstreet's Policy also could not cover so-called "dual capacity" suits, in which an employee is injured by a product the employer manufactures, because the Workers' Compensation statute, W. Va. Code § 23-2-6, expressly provides for an employer's immunity for the injury or death of an employee "however occurring." Moreover, the "dual capacity" doctrine has been repeatedly rejected in West Virginia. See, e.g., *Deller v. Naymick*, 176 W.Va. 108, 342 S.E. 2d 73 (1986); *Smith v. Monsanto*, 822 F. Supp. 327 (S.D.W. Va. 1992). In *Deller*, the Court noted that

a few courts have stretched the doctrine so far as to destroy employer immunity whenever there was, not a separate legal person, but merely a separate relationship or theory of liability. When one considers how many such added relations an employer might have in the course of a day's work - as landowner, land occupier, products manufacturer, installer, modifier, vendor, bailor, repairman, vehicle owner, shipowner, doctor, hospital, health services provider, self-insurer, safety inspector - it is plain enough that this trend could go a long way toward demolishing the exclusive remedy principle. ...

Deller, 176 W.Va. at 113, 342 S.E. 2d at 78 (citations omitted).

Since any employer who purchased the Brickstreet Workers' Compensation/employers liability package would have immunity from suit under W. Va. Code § 23-2-6, this scenario is yet another example of a claim that could never arise.

After going through a number of these scenarios in his deposition, Mr. Obrokta was only able to suggest that the Brickstreet policy might provide coverage if the Supreme Court of Appeals of West Virginia changed its mind about whether to allow some of these potential causes of action:

A. I understand that lawsuits are brought regardless of whether the Supreme Court says it's a viable cause of action or not, and I understand the Supreme Court changes its opinion from time to time. So I do not believe - - I cannot sit here and tell you I don't think those cases are filed, and I cannot sit here and tell you I don't think they would - - they won't be filed. What I can tell you is: If they are filed, we would defend them.

Q. So do you think it's a good consumer product for insureds to buy in West Virginia, that they're essentially purchasing employers liability coverage that's nonbroad form to protect themselves against the risk that the Supreme Court changes its mind? Is that what we're talking about then?

A. I don't believe that applies to all the examples I just provided to you.

Q. Well, the only one that it doesn't apply to at this point really is the one with the employee's daughter who's not an employee then, and that wouldn't be employer's liability. But do you have other examples?

A. I'm not sure if you were just asking me to - - a series of questions or you were just providing testimony in a deposition. I don't know what you just said to me.

Q. I was commenting on what you just indicated, and my question is: Do you have any other examples?

A. Those are the ones that come to mind right now.

Q. And as to these examples, again, Brickstreet's not encountered a single one of them in the period of time that Brickstreet's been in existence; is that a fair

statement?

A. None have been submitted to Brickstreet for coverage.

Appendix at 161, **Exhibit F**, Obrokta Depo. at 150-52.

By definition, insurance coverage which only covers claims which do not exist and for which no payments are ever made by the insurance company is illusory. If it were not, Brickstreet would be able to identify some type of claim which would be covered, and it would presumably have paid at least a few claims over the course of its existence.

III. A finding that Brickstreet’s “West Virginia Intentional Injury Exclusion Endorsement” is ambiguous will not place other insurers in a “Catch 22” situation with respect to the use of a form required by the West Virginia Insurance Commissioner’s Office on the ground that endorsement was created by Brickstreet for use in West Virginia.

The West Virginia Insurance Federation devotes a substantial portion of the argument in its *Amicus* brief to the suggestion that other insurers will be placed in a “Catch 22” situation if the Court finds the Brickstreet policy language ambiguous, because the portion of the Brickstreet policy which contains “Part Two - Employers Liability Insurance” is a National Council On Compensation Insurance (NCCI) form which is used in over thirty (30) states and which the West Virginia Insurance Commissioner’s Office requires Brickstreet to use. However, this argument ignores the fact that the ambiguity in this case is not created by the “Part Two - Employers Liability Insurance” form itself. Instead, as discussed above, the ambiguity is created by the “West Virginia Intentional Injury Exclusion Endorsement” which Brickstreet created specifically for its use in West Virginia, for the purpose of excluding deliberate intent claims. In fact, Thomas Obrokta acknowledged that the deliberate intent endorsement was not part of the required NCCI form:

Q. Okay. Is it Brickstreet’s position that Brickstreet was required to utilize, without modification, NCC I forms when it incepted its business?

A. Brickstreet is of the position that the base policy, the six pages that it was essentially required to use, and that we had the flexibility to submit for approval our own additional policy documents such as this endorsement.

Q. Was there any - according to Brickstreet - any limitation by the State imposed upon Brickstreet with respect to the modifications that it could make to the NCCI form?

A. Any limitations?

Q. Right. In other words, "You can't change that provision, you can't change this provision."

A. Well, we were not permitted to change the six pages. There were no - that I recall, no limitations on what we could change through endorsement.

Appendix at 181, **Exhibit F**, Obrokta Depo. at 232-33.

Mr. Obrokta then acknowledged that he, with the assistance of others at Brickstreet, actually wrote the language of the "West Virginia Intentional Injury Exclusion Endorsement" at issue here. *Id.* at 238-39. Thus, other insurers such as the members of the Federation will only face a "Catch 22" situation if they chose to modify the required NCCI forms by drafting an ambiguous endorsement which purports to exclude all of the coverage provided by the language of the required policy form by merely making reference to West Virginia Code Section 23-4-2.²

CONCLUSION

The policy language at issue in this case is ambiguous and provides no basis for Brickstreet to deny coverage for the claims asserted against the Appellee. Moreover, the coverage itself is illusory, inasmuch as Brickstreet has neither defended nor paid a single claim under the coverage

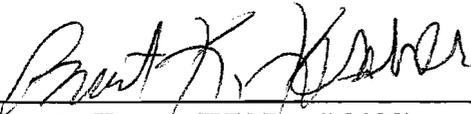
² The Court recognized at Footnote 10 of *Stage Show Pizza*, 210 W.Va. 63, 553 S.E.2d 257 (W.Va. 2001), that it is possible to exclude coverage for deliberate intent claims, but the language of Brickstreet's endorsement fails to do so in a clear and unambiguous way.

which the Appellee purchased. Accordingly, TKS and Dr. Tebay respectfully urge the Court to uphold the Orders of the Circuit Court of Jefferson County and reject the arguments of the Appellant.

Respectfully submitted,

TKS CONTRACTING, INC., H. TALBOTTTEBAY
AND H. TALBOTT TEBAY DDS, LTD.

By counsel



Brent K. Kesner (WV Bar # 2022)
Ernest G. Hentschel, II (WV Bar #6006)
KESNER, KESNER & BRAMBLE, PLLC
112 Capitol Street
Post Office Box 2587
Charleston, West Virginia 25329
(304) 345-5200
Counsel for Appellees

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 101414

WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY D/B/A BRICKSTREET
MUTUAL INSURANCE COMPANY,

Petitioner and Defendant Below,

v.

(appealed from Civil Action No. 09-C-275,
Circuit Court of Jefferson County)

SUMMIT POINT RACEWAY ASSOCIATES, INC.,

Respondent and Plaintiff Below.

CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for TKS Contracting, Inc., H. Talbott Tebay, and H. Talbott Tebay, DDS, Ltd., certify that the **BRIEF OF TKS CONTRACTING, INC., H. TALBOTT TEBAY AND H. TALBOTT TEBAY DDS, LTD., AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE** were served on the following counsel of record by depositing a true copy thereof in the regular course of the United States mail this **25th** day of April, 2011:

Don C. A. Parker, Esq.
Angela D. Herdman, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 24321-0273

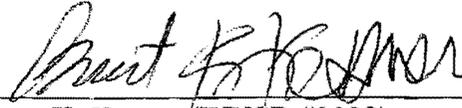
Peter L. Chakmakian, Esq.
Peter L. Chakmakian, LC
108 North George Street
P.O. Box 547
Charles Town, WV 25414

Jill Cranston Bentz, Esq.
Mychal Sommer Schulz, Esq.
Jacob A. Manning, Esq.
Dinsmore & Shohl, LLP
P.O. Box 11887
Charleston, WV 25339

Carte P. Goodwin, Esq.
Benjamin B. Ware, Esq.
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301

Wm. Richard McCune, Jr., Esq.
Alex A. Tsiatsos, Esq.
Wm. Richard McCune, Jr., PLLC
115 West King Street
Martinsburg, WV 25401

Jeffrey M. Wakefield, Esq.
Erica M. Baumgras, Esq.
Flaherty, Sensabaugh & Bonasso, PLLC
P. O. Box 3843
Charleston, WV 25301



Brent K. Kesner (WVSB #2022)
Ernest G. Hentschel (WVSB #6006)
Kesner, Kesner & Bramble, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Phone: (304) 345-5200
Fax: (304) 345-5265