

No. 101414

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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AT CHARLESTON

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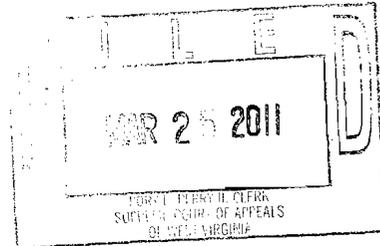
WEST VIRGINIA EMPLOYERS' MUTUAL  
INSURANCE COMPANY d/b/a BRICKSTREET  
MUTUAL INSURANCE COMPANY,

Petitioner and Defendant Below,

v.

SUMMIT POINT RACEWAY ASSOCIATES, INC.,

Respondent and Plaintiff Below.



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*AMICUS CURIAE* BRIEF ON BEHALF OF  
THE WEST VIRGINIA BUSINESS & INDUSTRY COUNCIL

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Brief in Support of Appellant, West Virginia Employers' Mutual Insurance Company  
d/b/a BrickStreet Mutual Insurance Company  
Supporting Reversal of the Decision in  
Civil Action No. 09-C-275 (Judge David H. Sanders)  
In the Circuit Court of Jefferson County, West Virginia

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***AMICUS CURIAE* BRIEF ON BEHALF OF  
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COMES NOW the West Virginia Business & Industry Council (“BIC”), by and through counsel, and pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, hereby submits to this Court its brief *amicus curiae* in the above-referenced matter.

**INTRODUCTION AND INTEREST OF *AMICUS***

BIC is a voluntary association comprised of members and executives of various trade and business organizations and is dedicated to promoting the improvement of business conditions throughout West Virginia.<sup>1</sup> The association places a priority on issues relating to economic

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<sup>1</sup> Pursuant to disclosure requirements of Rule 30(e)(5), please be advised that the undersigned authored this brief in its entirety. As a voluntary association comprised of members and executives of other trade and business organizations, BIC focuses its resources on outreach and education initiatives designed to improve the business climate in West Virginia; as such, the availability of excess funds to support litigation proceedings is limited.

development, job creation, and the continued viability of its member organizations; to that end, BIC is keenly interested in this matter given the significant impact that the Court's ruling could have on the business community. It has often been granted leave by this Court to file briefs *amicus curiae* in similar cases in which its members have an interest.<sup>2</sup>

This case turns on whether a decision of this Court detailing certain obligations of automobile insurers – one that has been superseded by statute and otherwise limited to its own particular corner of insurance regulation – can be used to distort the statutory responsibilities imposed upon Appellant during the transition to a private workers' compensation insurance market. Common sense suggests that it should not. If the circuit court's ruling is permitted to stand, the impact upon the workers' compensation system – and ultimately the business community and West Virginia workers – could be substantial.

Prior to the privatization, the unfunded liability in the state workers' compensation program exceeded three billion dollars (\$3,000,000,000.00). *See* W. Va. Code § 11-13V-2(b)(1). At the same time, West Virginia employers were finding it increasingly difficult to afford the rates being charged by the state Workers' Compensation Commission ("Commission"), with skyrocketing premiums inhibiting their ability to compete in a global economic environment. *See* W. Va. Code §23-2C-1(a)(3). Following privatization and the transition to an open market, the unfunded liability has been slashed, delays in paying benefits to injured workers have been reduced from two months to just fifteen days, and premiums have decreased considerably. *See*

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Because of BIC's interest in the resolution of this proceeding, however, Appellant (a member of BIC) has made a monetary contribution to fund the preparation and submission of this brief.

<sup>2</sup> *See e.g. Kessel v. Monongalia County General Hosp. Co.*, 220 W.Va. 602, 606, 648 S.E.2d 366, 370 (2007); *In re Flood Litigation*, 216 W.Va. 534, 539, 607 S.E.2d 863, 868 (2004); *State ex rel. Cities of Charleston, Huntington and its Counties of Ohio and Kanawha v. West Virginia Economic Development Authority*, 214 W.Va. 277, 281, 588 S.E.2d 655, 659 (2003); *State ex rel. McKenzie v. Smith*, 212 W.Va. 288, 292, 569 S.E.2d 809, 813 (2002); *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 729, 474 S.E.2d 906, 909 (1996); *West Virginia Trust Fund, Inc. v. Bailey*, 199 W.Va. 463, 467, 485 S.E.2d 407, 411 (1997).

*Positive Business Climate*, Business Climate Brochure (W. Va. Dev. Off., Charleston, W. Va.) Nov. 2010 at 3. BIC's members have a significant interest in protecting this progress and preserving access to competitive workers' compensation rates (along with the attendant economic benefits resulting therefrom).

### **DISCUSSION OF LAW**

To realize these tangible benefits to our State, the Legislature enacted a sweeping and comprehensive series of statutory reforms designed to effectuate the privatization of the state-run workers' compensation system and to open the market to private insurance carriers.

The threshold issue in the instance case involves one aspect of this extensive overhaul: the impact of privatization on the Employer's Excess Liability Fund ("EELF"), a state fund administered by the Commission to provide insurance coverage to employers that might be subjected to liability in "deliberate intent" actions for civil damages in excess of those benefits provided by workers' compensation. *See* W. Va. Code § 23-4C-1, *et seq.* Critically, participation in the EELF was entirely optional: the fund consisted solely of premiums paid into it by employers that voluntarily elected to subscribe to the fund for such coverage. *See* W. Va. Code § 23-4C-2(a). Moreover, unlike the underlying workers' compensation market itself, the provision of "deliberate intent" insurance was not provided exclusively by the State, but rather was available for employers to purchase in the private insurance market.

Thus, prior to the privatization reforms of 2005, West Virginia employers had the option of: (i) subscribing to EELF to insure against damages imposed by a "deliberate intent" civil action; (ii) buying "deliberate intent" coverage in the private market; or (iii) declining to purchase any "deliberate intent" coverage whatsoever (the option apparently exercised by Appellee in this case, both before and after privatization). During the transition phase outlined in

the 2005 reforms, (from January 1, 2006 to June 20, 2008), the “deliberate intent” coverage options available to employers remained **exactly the same**, with the Appellant simply being substituted for the Commission in administering the EELF and offering state-sanctioned “deliberate intent” insurance:

Upon the termination of the commission, *all assets, obligations and liabilities resulting from this article are transferred to the successor of the commission.* Thereafter, the company shall offer insurance to provide for the benefits required by this article until at least the thirtieth day of June, two thousand eight.

W. Va. Code § 23-4C-6 (emphasis added).

The circuit court’s conclusion that the novation of the EELF to the Appellant transformed this voluntary, elective subscription program into a mandatory, offer-and-rejection scheme simply is not supported by the terms of W. Va. Code § 23-4C-6, which succinctly imposed upon Appellant the assets, obligations and liabilities previously held, exercised, and owed by the Commission – no more, no less.

Nevertheless, Appellee seizes upon the second sentence of section 23-4C-6 to assert that this “offer” of insurance was a newly imposed mandatory obligation of the private successor company. Incredibly, Appellee argues the “obligation to offer deliberate intent coverage *did not exist (and could not have existed)* until after the Commission’s termination; therefore it could not have been an obligation of the Commission. It is a new, clear, statutory obligation of Brickstreet.” *Response in Opposition to Petition for Appeal*, p. 11 (emphasis added). Contrary to Appellee’s argument, however, the Legislature created the EELF program nearly thirty years ago, and since that time, state law has charged the Commission with providing insurance coverage for deliberate intent cases. The provisions of section 23-4C-6 simply transferred this

responsibility (and the attendant assets and liabilities) to the soon-to-be-created private successor to the Commission.<sup>3</sup>

Accordingly, the circuit court erred by reading the second sentence of section 23-4C-6 in isolation from the rest of that provision (as well as the remaining provisions of article 4C, and the entire workers' compensation chapter). "[T]he intention or purpose of the legislature, or the meaning of the statute, is to be determined, not from any single part, portion, or section . . . , but from a general consideration or view of the act as a whole, or in its entirety." *Parkins v. Londeree*, 146 W.Va. 1051, 1059-1060, 124 S.E.2d 471, 476 (1962). Further, the meaning and intent of a statutory provision is to be gleaned by reading all of its parts together. *State ex rel. Hughes v. Board of Ed. of Kanawha County*, 154 W.Va. 107, 132, 174 S.E.2d 711, 726 (1970) (overruled on other grounds by *Janasiewicz v. Board of Educ. of Kanawha County*, 171 W.Va. 423, 424, 299 S.E.2d 34, 35 (1982)). A closer review of this statutory section, particularly when read in conjunction with the other provisions of article 4C and the entirety of the privatization reforms, evinces the Legislature's intent to **maintain the status quo** during the transition period from a state-administered system to an open market.<sup>4</sup>

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<sup>3</sup> In this regard, it is important to remain mindful that other private insurance companies were offering "deliberate intent" insurance throughout this timeframe. Yet, the circuit court's interpretation of W. Va. Code § 23-4C-6 would impose additional obligations on Appellant alone, ignoring the other private insurance companies that were offering deliberate intent coverage during the relevant time period.

<sup>4</sup> See e.g., W. Va. Code § 23-2C-3, which in listing the purposes of the statutorily-created private insurance company, includes the following obligation:

(B) Provide . . . employer excess liability coverage as provided in this chapter[.]

*Id.* This language correlates with the terms utilized in those provisions establishing the EELF and providing for its novation to Appellant, namely to provide, or make available to those who voluntarily subscribe, coverage to employers that may be subjected to liability damages above any workers' compensation amounts received or receivable.

To facilitate this transition, the Legislature required those deliberate intent policies issued previously by the Commission-operated EELF to novate to Appellant, while simultaneously providing that participation in the EELF would continue to be available to West Virginia employers during this transition period. W. Va. Code § 23-4C-6. Thus, if an employer voluntarily subscribed to EELF prior to January 1, 2006, then Appellant provided identical coverage for deliberate intent actions to that employer. Conversely, if an employer declined EELF coverage, then coverage for deliberate intent claims was specifically excluded from that employer's policy with Appellant. The record in the instant case shows that Appellee did not voluntarily subscribe to the EELF to insure against deliberate intent claims prior to the creation of the private mutual company that succeeded the Commission. Because Appellee had no coverage prior to privatization, then it follows necessarily that no coverage could transfer from the Commission to the Appellant after privatization. The obligations owed to Appellee were confined to those obligations and liabilities previously held, exercised, and owed by the Commission – no more, no less.

In light of the foregoing, it is not surprising that Appellee largely glosses over a detailed examination of this statutory language, preferring instead to presuppose that a new obligation to “offer” the optional deliberate intent coverage was mandated by statute. By making this presupposition, Appellee may then distract the Court's focus to the thrust of its misguided argument, which is that this purportedly new mandate triggered corresponding obligations to extend such “offers” in accordance with certain legal requirements; if not, then such optional coverage would be included in the insurance policy by operation of law. *See Response*, pp. 9-10.

In support of this argument, Appellee relies exclusively on this Court's 1987 decision in *Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987), which held that: (i)

where an offer of optional coverage is required by statute, the insurer has the burden of proving that an effective offer was made, and that any rejection of that offer by the insured was knowing and informed, *id.*, Syllabus Point 1; and, (ii) when an insurer is required by statute to offer optional coverage, it is included in the policy by operation of law when the insurer fails to prove an effective offer and a knowing and intelligent rejection by the insured. *Id.*, Syllabus Point 2. *Bias* also required an insurance company's offer to be made in a "commercially reasonable manner" and provide the insured with adequate information to make an intelligent decision. *Id.*, 365 S.E.2d at 791.

This reliance is misguided, however, insofar as the *Bias* decision has been superseded by statute and is limited to the context of uninsured and underinsured motorists insurance coverage. Indeed, neither the trial court nor Appellee point to a single instance in which the now-superseded requirements of *Bias* have been extended outside the confines of UM and UIM disputes. The absence of such authority to support this argument is understandable, given this Court's implicit recognition that the scope of the *Bias* decision is limited to automobile insurance. See *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896, 902 n.11 (2005) (emphasis added) (citing *Bias* for the proposition that "insurers are statutorily required to offer certain coverage benefits *in the context of automobile insurance.*"); see also *Foutty v. Porterfield*, 192 W. Va. 105, 450 S.E.2d 802, 804 n.5 (1994) ("We note that W. Va. Code, 33-6-31d (1993), appears to have altered the *Bias* case by setting out in detail how the offer of uninsured and underinsured motorist coverage should be made.").

Moreover, the *Bias* obligations that Appellee would now expand beyond the contours of automobile disputes have been further limited even within those narrow confines. See *Burrows v. Nationwide Mut. Ins. Co.*, 215 W.Va. 668, 600 S.E.2d 565, 570 - 571 (2004) ("As to whether

the statute imposes a duty to offer underinsurance upon insurers other than as expressly delineated, the Legislature clearly anticipated this issue and responded statutorily by providing: ‘No insurer is required to make such form available or notify any person of the availability of such optional coverages authorized by this section except as required by this section.’”). As this Court observed in *Burrows*, the Legislature expressly identified four specific events that would trigger an insurance company’s obligation to make an offer of optional insurance: (1) requiring insurers to send the insurance form to all existing insureds upon the enactment of the section; (2) upon the initial application for liability coverage; (3) upon any request of the named insured; and (4) upon a request for different coverage limits. *Id.* Similarly, the manner in which such an offer could be extended is expressly articulated by statute. *See* W. Va. Code § 33-6-31d(a) (requiring offer to be made on form prepared and made available by the Insurance Commissioner; requiring contents of form to be prescribed by the Commissioner; and establishing delivery requirements for form and deadlines for acceptance). Simply put, in superseding *Bias* and legislatively imposing new, mandatory obligations on insurers, the Legislature did so **explicitly**, providing detailed descriptions of the obligations, those circumstances that triggered those obligations, and the means by which insurers could comply with the law.

Conversely, the language in section W. Va. Code § 23-4C-6 providing for the novation of the EELF to Appellant contains no such list of “triggering events” or any detailed procedural guidelines for making the requisite offer. If the Legislature had intended to impose a “new, clear, statutory obligation” on Appellant, it would have followed the example established by W. Va. Code § 33-6-31d and expressly described: (i) the circumstances that would trigger this “new” obligation to offer optional coverage; and (ii) the manner in which such an offer must be communicated. The contrast is striking, yet understandable, for the provisions of section

23-4C-6, as read within the context of the remaining provisions governing the EELF and the entirety of the 2005 workers' compensation reforms, were designed simply to transfer the existing obligations for administering the EELF moneys and providing deliberate intent coverage from the State to Appellant. Appellee's effort to inject obsolete caselaw into this Court's consideration of the privatization reforms would frustrate legislative intent and threaten the newfound stability of West Virginia's workers' compensation market. This effort should be rejected.

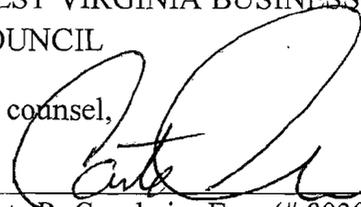
### CONCLUSION

The West Virginia Business & Industry Council, as *amicus curiae*, respectfully requests this Honorable Court carefully consider the points raised herein, and correct the errors of the Circuit Court of Jefferson County.

Respectfully submitted,

WEST VIRGINIA BUSINESS & INDUSTRY  
COUNCIL

By counsel,



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